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Report of the Select Committee Appointed to Inquire into the Administration of Justice

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APPENDIX No. 2

Report and Proceedings of the Select Committee Appointed to Inquire into the Administration of Justice in the Province

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Session of 1941

Report of the Select Committee Appointed to Inquire into the Administration of Justice

To the Honourable the Legislative Assembly of the Province of Ontario:

GENTLEMEN:

The Committee of the Ontario Legislature appointed to inquire into the administration of justice in the Province begs to submit the following report:

The Committee was appointed by Order of the Ontario Legislature on Wednesday, February 21st, 1940, to inquire into:

> The administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts, with a view to—
>
> (i) improving the constitution, organization and the system of maintenance of the said courts,
>
> (ii) simplifying, facilitating, expediting and otherwise improving practice and procedure in the said courts, and
>
> (iii) effecting economy to the people, the municipalities and to the Province generally,
>
> and to report upon what amendments are necessary or desirable to the existing law.

The Committee comprised—

The Honourable G. D. Conant, K.C., M.P.P., Attorney-General of Ontario, Chairman,

The Honourable Paul Leduc, K.C., M.P.P., Minister of Mines,

Messrs. Ian T. Strachan, K.C., M.P.P.,

Richard D. Arnott, K.C., M.P.P.,

Leslie M. Frost, K.C., M.P.P.

During the final sittings of the Committee the Honourable Mr. Leduc ceased to be a member by reason of his appointment as Registrar of the Supreme Court of Canada which prevented him from continuing as a member of the Ontario Legislature. While pleased to learn of the appointment of Mr. Leduc to the important post which he now ably occupies, the remaining members of the

Committee regret that his valued counsel was not available in their final deliberations.

The Committee met on March 6th at the Parliament Buildings in Toronto at which time Mr. C. R. Magone, K.C., Senior Solicitor of the Attorney-General's Department, was appointed Committee Counsel and Mr. E. H. Silk, K.C., Legislative Counsel, was appointed assistant counsel. Subsequently Mr. Silk was appointed as counsel succeeding Mr. Magone, and Mr. Robert Hicks was appointed secretary of the Committee.

Arrangements were made for the publication in the Ontario Weekly Notes of the report made by Mr. F. H. Barlow, K.C., Master of the Supreme Court of Ontario, on the administration of justice, and, in the same issue of the Ontario Weekly Notes, members of the legal profession and others were invited to present submissions to the Committee. Notice of the appointment and of the dates of sittings of the Committee were also sent to the judges, officials of the courts, legal and other organizations and other persons closely connected with the administration of justice as well as to boards of trade and chambers of commerce, insurance companies, loan companies and labour organizations. A list of persons to whom notices of the appointment and sittings of the Committee were sent appears as schedule "A" to this report. In addition the Chairman on several occasions expressed publicly the willingness of the Committee to receive submissions.

The Committee held public sittings at the Parliament Buildings on April 2nd, 3rd, 4th, 5th, 9th, 10th, 11th and 12th; on September 23rd, 24th, 25th and 30th, and on October 1st, 1940. A list of the persons who appeared before the Committee and an indication of the organizations represented by some of the persons so appearing, appears as Schedule "B".

The Committee was impressed by the co-operative spirit of the members of the Bench and Bar and other persons who appeared before it. In many instances the views expressed were not those of any individual but were made on behalf of an association or organization which had interested itself in the Committee's undertaking. Other bodies were of assistance to the Committee by filing written submissions. Government officials of the other provinces of Canada kindly furnished information to Committee counsel which was of great value.

It is significant that on comparatively few of the subjects under consideration were the views of persons making representations unanimous or substantially the same. Even among the barristers who appeared, many of whom were Benchers of the Law Society, a substantial divergence of opinion was apparent on many matters.

While most of the recommendations made in the report may be effected by provincial legislation, some will undoubtedly require to be implemented by Dominion legislation. In particular the Criminal Code will require amendment if effect is to be given to certain of the recommendations of the Committee. The Committee respectfully recommends that the necessary action in this regard be taken.

For convenience the matters considered will be here dealt with in alphabetical order.

ACTIONS AGAINST THE GOVERNMENT AND GOVERNMENT BOARDS AND COMMISSIONS

The rule of law which prevents the Crown from being sued in tort is one of the incidents of the principle represented by the maxim "The King can do no wrong". This well-known maxim had its origin at a time when the functions of governments did not include the many branches of administration and the innumerable undertakings which form a necessary part of administrative government to-day. The very conciseness of the maxim renders its application so general that, as the work of governments increased through the centuries, the ramifications of its application could not be foreseen and have not in all respects been desirable.

It is well recognized that governments, if entirely unprotected against legal actions, would be targets for avalanches of frivolous or vexatious litigation. Ample protection against unwarranted actions is, however, provided by requiring a fiat of the Crown as a condition precedent to the commencement of an action against the Crown or its agencies. This is generally the practice in those types of cases where actions may now be brought against the Crown. The Committee has studied the practice followed in Ontario in considering applications for fiats and is satisfied that fiats are not refused in proper cases.

It is a modern practice of governments to create boards and commissions which are charged with carrying on certain functions of government. Owing to the tendency of governments to extend their undertakings, some of these boards are authorized to conduct businesses which, while not usually in the past considered to be ordinary functions of a government, are rendered necessary by particular circumstances, and it is not the intention of this Committee to criticize any government for such practice. Some of the businesses which are carried on to-day by government boards and agencies include the operation of railways and other transportation facilities, the sale of liquor and the sale of electrical power and other commodities. Although many of these businesses are not operated in competition with private enterprises, the government, as represented by its boards and commissions, is carrying on business just as much as though the business were being conducted by a private individual, and the incidents of business which give rise to causes of action are present to the same extent.

There are of course exceptions to the general principles of law relating to actions against the Crown and against government boards and commissions. There is, for example, a provision in The Highway Improvement Act which permits actions to be brought for default in maintaining a highway in proper repair. The Hydro-Electric Negligence Act provides that actions may be brought against The Hydro-Electric Power Commission for damages arising in connection with the operation of any electric railway operated by the Commission. Provision is made in The Exchequer Court Act for the bringing of actions in tort against the Crown in the right of the Dominion in certain circumstances, and the Canadian National Railway Act permits actions to be brought without a fiat against the Canadian National Railway. For the purposes of this report it is unnecessary to refer further to the various exceptions to the general rule which exist to-day.

THE COMMITTEE THEREFORE RECOMMENDS:

1. That provision be made to permit a subject to recover against the Crown in tort by way of petition of right provided that the fiat of the Lieutenant-Governor in Council is first obtained; and

2. That the Hydro-Electric Power Commission of Ontario, the Liquor Control Board of Ontario and the Temiskaming and Northern Ontario Railway Commission, which are in fact carrying on businesses, be placed in the same position as private individuals with respect to the right and liability to sue and be sued in the courts so that actions may be brought against them without the consent of the Attorney-General, but that the present rights of expropriation and other extraordinary rights enjoyed by them be not thereby interfered with.

APPEALS FROM BOARDS AND COMMISSIONS HAVING QUASI-JUDICIAL POWERS

The duties and functions of several boards and commissions, as well as the procedure followed by each of them, were studied by the Committee. It has not been suggested that those matters now dealt with by boards and commissions which were not previously determined by the courts should be the subject of appeals to the courts. Therefore it is not necessary under this heading to consider further the position of the Liquor Control Board. Nor do the activities and practice of the Industry and Labour Board, the Milk Control Board or the Farm Products Control Board come within the scope of this Committee's enquiry.

The expression of the view by the Committee that a study of the functioning of the Industry and Labour Board, the Milk Control Board and the Farm Products Control Board does not come within the scope of the Committee's enquiry, as these Boards do not deal with matters which formerly came before the courts, must not be taken as an indication that the Committee favours entrusting to such Boards the wide powers which they now possess or that the Committee either approves or disapproves of the manner in which the powers are being exercised. No evidence was heard in that regard. It may be that a study of the manner in which such Boards are exercising the powers vested in them by a body appointed for that purpose is warranted.

ONTARIO MUNICIPAL BOARD

The Ontario Municipal Board exercises powers under several statutes and while the procedure varies greatly under the various statutes, it would seem that although the decision of the Board is final upon questions of fact in all cases, there is invariably an appeal from the Board on questions of law. As the Board appears to be ideally equipped to study and make decisions on questions of fact, the Committee does not favour any change in the right of appeal from the Board.

The Board will be further referred to under the heading APPEALS UNDER THE ASSESSMENT ACT.

Workmen's Compensation Board

The Committee heard comparatively little evidence concerning a right of appeal from the Workmen's Compensation Board and no representations were made to the Committee on the subject by any labour organization. References were made to it by a few witnesses who dealt with the subject more from an academic standpoint than from the standpoint of the actual operation of the Act. In all cases opposition to appeals on questions of fact was expressed. On the other hand some witnesses, notably the representative of the Ontario section of the Canadian Bar Association, advocated appeals on questions of law and principle. In view of the comparatively small amount of evidence heard the Committee is of the opinion that it should not make any recommendation on this point.

The Committee feels, however, that attention should be drawn to the social purpose of workmen's compensation and to the findings of previous commissions which have gone into the subject very much more extensively than the Committee has had the opportunity of doing. Almost since the establishment of the Workmen's Compensation Board some twenty-five years ago, suggestions have been made from time to time recommending appeals of various kinds from the Board. The following should indicate to those in favour of appeals in various forms that the present system and its workings should be the subject of very careful inquiry and consideration before any mode of appeal is introduced.

In considering any proposal for an appeal from the Board it is important to keep clearly in mind the purpose of the Board and not to lose sight of the fact that it is not a tribunal making rulings on questions between an injured workman and his employer. As Viscount Haldane has expressed it in Workmen's Compensation Board vs. Canadian Pacific Railway (1919), 48 D.L.R. 218, at p. 219:

> "The right of the workman does not . . . depend on negligence on the part of the employer, as in ordinary employers' liability . . . but arises from an insurance by the Board against fortuitous injury."

In Blatchford vs. Staddon, [1927] A.C. 486, Lord Blanesburgh describes workmen's compensation as "a compulsory system of mutual insurance throughout an industry at risk under it."

Idington, J., expressed himself in Dominion Canners vs. Costanza, [1923] S.C.R. 46, in the following language, at page 51:

> "The aim of the whole Act is to eliminate the litigious struggle and strife and judicial peculiarities in mode of thought and applying the law."

In the same case Duff, J. (now Sir Lyman Duff, Chief Justice of Canada) stated at page 54:

> "The autonomy of the Board is, I think, one of the central features of the system set up by The Workmen's Compensation Act. One at least of the more obvious advantages of this very practical method of dealing with the subject of compensation for industrial accidents is that the waste of energy and expense of legal proceedings and a canon of interpretation, governed in its application by refinement upon refinement, leading to uncertainty and perplexity in the application of the Act, are avoided."

THE MEREDITH COMMISSION. Whether or not there should be an appeal of any kind from the Board was a matter of careful and exhaustive study in 1913 by Sir William Meredith, a former Chief Justice of Ontario, whose investigation at that time covered the whole of Canada as well as the United States and Europe. Sir William considered it most undesirable that there should be an appeal from the Board. We quote from his report dated October 31st, 1913:

> "I think it would be a blot on the Act to have a right of appeal unless it can be shown there is danger in making the Board final."
>
> "One of the justifications for this law is to get rid of the nuisance of litigation, and I think even if injustice is done in a few cases it is better to have it done and have swift justice meted out to the great body of the men."
>
> "In my opinion it is most undesirable that there should be the appeal for which the draft Bill provides. A compensation law should, in my opinion, render it impossible for a wealthy employer to harass an employee by compelling him to litigate his claim in a court of law after he has established it to the satisfaction of a Board such as that which is to be constituted, and which will be probably quite as competent to reach a proper conclusion as to the matters involved, whether of fact or law, as a court of law."

THE MIDDLETON COMMISSION. Subsequent attempts to incorporate a right of appeal into the Act, some of which reached the stage of being reduced to the form of a Bill to amend the Act, were abandoned because of opposition from both workmen and employers.

In 1931 the Honourable Mr. Justice Middleton was appointed a Commissioner to inquire into and report upon proposed amendments to The Workmen's Compensation Act and in his report, dated February 11th, 1932, he states, at pages 11 and 12:

> "There is almost unanimous agreement on the part of all concerned that the introduction of any right of appeal would be disastrous. I am satisfied that the workmen should be the last to complain of the existing conditions. . . ."
>
> "I do not recommend any change looking to either an appellate tribunal or to any of the various schemes for Boards of Review."

For the reasons previously given and in view of the small amount of evidence heard, the Committee feels that it is not in a position to make any recommendation with regard to appeals from the Workmen's Compensation Board.

ONTARIO SECURITIES COMMISSION

While the functions of the Ontario Securities Commission under the provisions of The Securities Act extend beyond the power to license persons engaged in the marketing of securities, the discretionary power which the Commission is most frequently called upon to exercise relates to the issue, suspension and cancellation of licenses of brokers and securities salesmen. Since the Commission was established in 1931 this power has been vested in a single commissioner.

In considering the position of the Ontario Securities Commission, the procedure in the office of the Superintendent of Insurance has afforded the Committee a helpful and suggestive analogy. The Superintendent of Insurance is vested with the power to issue licenses to insurance companies and insurance agents. In this case also the decision is that of a single official. The power of the Superintendent to issue and revoke licenses is contained in section 281 of The Insurance Act and the principles to be followed in issuing and revoking licenses are contained respectively in subsections 3 and 8 of Section 281. Under the same section an advisory board is established, consisting of a representative of the insurers, a representative of the agents and a representative of the Superintendent. This board advises the Superintendent regarding the issuance and cancellation of agents' licenses when requested by the Superintendent. As might be expected decisions of the Superintendent made on the advice of a board on which both branches of the insurance business are represented have proven acceptable to those engaged in the business.

The Committee favours the establishment of a similar Board of Review to function under The Securities Act. It is important that the different branches of the brokerage business be represented on the Board and it seems equally important that the Chairman of the Board should not be engaged in or connected with the brokerage business. In view of the frequent urgency of preventing the continuation of fraud, the Committee is of the opinion that the Commission should have the power to make an order suspending or cancelling a broker's or salesman's license to be effective as soon as it is made, subject to review of the Commission's order by the Board of Review within a specified period. It is desirable to have the members of the Board of Review appointed by the Attorney-General and not by the Commission.

THE COMMITTEE THEREFORE RECOMMENDS:

1. That a Board of Review under The Securities Act of three members comprising,—

(*a*) a judge of a county or district court, as chairman;

(*b*) a licensed broker not being a member of a stock exchange; and

(*c*) the president of the Toronto Stock Exchange or some member of the Toronto Stock Exchange nominated by the President and approved by the Attorney-General,

be established, the judge and licensed broker to be appointed from time to time by the Attorney-General;

2. That, upon the application of a broker or salesman made within a specified period, the Board of Review have the power to affirm, rescind or vary any ruling or order of the Commission refusing to grant or suspending or cancelling a broker's or salesman's license after hearing such evidence as may be submitted; and

3. That where the Securities Commission refuses to grant, or suspends or cancels a broker's or salesman's license, the Commission be required

immediately to notify such broker or salesman, advising him that if he desires to have the matter reviewed by the Board he should so advise the Commission within a specified time; but that any such order or ruling of the Commission shall remain in full force and effect unless and until it is modified or rescinded by the Board of Review.

APPEALS FROM ORDERS ON MOTIONS TO QUASH INDICTMENTS

It appears to the committee that it would be advantageous to permit an immediate appeal from an order dismissing a motion to quash an indictment. If such an appeal were permitted it would undoubtedly prevent the loss of time and money in cases where, after the trial has taken place, the indictment is subsequently found to be defective by the Court of Appeal. However, it is important that any such right of appeal should not be permitted to be used as a means of delaying prosecutions, and the committee is of the opinion that the right to appeal to the Court of Appeal from an order dismissing a motion to quash an indictment should be dependent upon leave being first obtained from the trial Judge. The Committee is also of the opinion that an appeal by the Crown should lie to the Court of Appeal from an order quashing an indictment.

The Committee Therefore Recommends:

That an appeal should lie to the Court of Appeal from an order dismissing a motion to quash an indictment, before proceeding with the trial, upon leave being obtained from the Judge hearing the motion and that an appeal by the Crown should lie to the Court of Appeal from an order quashing an indictment.

APPEALS FROM SURROGATE COURTS

Appeal Tribunals

By section 29 of The Surrogate Courts Act, the matter of appeals from the judgments and orders of the Surrogate Court is dealt with as follows:

(1) Any party may appeal to the Court of Appeal from an order, determination or judgment of a surrogate court, in any matter or cause when the value of the property affected by such order, determination or judgment exceeds $200.

(2) A motion for a new trial after a trial by a jury shall be deemed an appeal.

(3) An appeal shall also lie to a judge of the Supreme Court from any order, decision or determination of the judge of a surrogate court, on the taking of accounts or upon an adjudication or to a claim or demand or as to the title to any property if the amount involved exceeds $200 in like manner as from the report of a Master under a reference directed by the Supreme Court.

The effect of the above quoted section is that an appeal lies to a single judge of the Supreme Court of Ontario from any order made by a surrogate court judge

on the passing of accounts or upon an adjudication as to a claim against an estate if the amount involved exceeds $200. A further right of appeal in such cases lies from the order of the single judge of the Supreme Court of Ontario to the Court of Appeal. On the other hand, as to such questions as the determination of the validity of a will and as to all matters which do not come within the language of subsection 3 of section 29, an appeal lies directly from the judgment of the surrogate court to the Court of Appeal when the value of the property affected by the judgment exceeds $200.

The Committee is of the opinion that the system of appeals provided for by section 29 of The Surrogate Courts Act is working satisfactorily and should not be interfered with.

Practice on Appeals

In the case of appeals coming within section 29 (3) of The Surrogate Courts Act, which are taken to a single judge of the Supreme Court in the first instance, the provisions of section 29 (3) must be read in conjunction with Rules 506 and 507 of the Consolidated Rules of Practice, 1928, which are as follows:

> 506. Every report or certificate of a Master shall be filed and shall be deemed to be confirmed at the expiration of fourteen days from the date of service of notice of filing the same, unless notice of appeal is served within that time.
>
> 507. An appeal from the report or certificate of a Master or Referee shall be to the Court upon seven clear days notice, and shall be returnable within one month from the date of service of notice of filing of the report or certificate.

A practical difficulty arises in connection with the application of the language of Rules 506 and 507 to section 29 (3) of the Act, because the practice of service of a notice of filing of a report or certificate is not used in the surrogate court. This matter should be clarified and the time for appeal provided for in section 29 (3) should be made specific.

The Committee Therefore Recommends:

1. That the present system of appeals from judgments and orders of surrogate courts be continued; and

2. That the time for service of a notice of appeal from an order, decision or determination of a judge of a surrogate court under section 29 (3) of The Surrogate Courts Act be limited to 14 days from the date of the service of a copy of such order, decision or determination upon such persons as the judge of the surrogate court may direct, by prepaid registered mail or in such other manner as the judge may determine, and that such appeal be upon seven clear days notice and be returnable within one month from the date of the service of a copy of such order, decision or determination.

APPEALS IN SUMMARY CONVICTION MATTERS

Except in the case of offences under The Liquor Control Act, appeals from summary convictions by magistrates under provincial statutes, as well as under

the Criminal Code, are by way of a trial *de novo* before a county court judge. On the other hand, both in civil and criminal matters, appeals to the Court of Appeal of Ontario are upon the record whether the appeal be from a decision of a judge of the Supreme Court or a judge of a county or district court or a magistrate. Because the practice of appeals on the record has proven satisfactory for many years, and because an appeal on the record usually occupies less of the appellate court's time and is less expensive than an appeal by way of trial *de novo*, appeals upon the record would appear to be preferable, all other things being equal. The practice of calling new and additional witnesses upon a trial *de novo* may also be considered to be an objectionable feature of that form of appeal for undoubtedly in some cases it reduces the hearing in the magistrate's court to something akin to an examination for discovery. An appeal by way of trial *de novo* has the further disadvantage of encouraging carelessness at the original trial because of the knowledge of the parties that the appeal will be by way of a new trial in the court appealed to.

While the Committee feels for these reasons that appeals by way of trials *de novo* should be abolished in summary conviction matters and that all appeals should be upon the record where a court reporter is present, nevertheless, as adequate and competent reporting is not always available, the Committee feels that it can make no such recommendation until this condition as to reporting is rectified.

However, if appeals by way of trials *de novo* are to remain, the Committee is of the opinion that on an appeal by way of trial *de novo* only those witnesses who gave evidence in the magistrate's court should be heard on the trial *de novo* unless the judge presiding at the trial *de novo* gives leave to call a new witness or witnesses on the following grounds:

(*a*) That at the time of the hearing in the magistrate's court the new witness was ill or out of Ontario or for any other sufficient reason was unable to attend the hearing in the magistrate's court, or

(*b*) That by the exercise of reasonable diligence the new witness whose evidence is offered could not be produced at the time of the hearing in the magistrate's court.

THE COMMITTEE THEREFORE RECOMMENDS:

1. That when adequate and competent reporters in the magistrates' courts become uniformly available in the Province appeals by way of trial *de novo* should be abolished and appeals should be on the record; and

2. That until such time as adequate and competent reporters are uniformly available throughout the Province in the magistrates' courts appeals by way of trials *de novo* be retained, but that only those witnesses who gave evidence in the magistrate's court should be heard on the trial *de novo* unless the Judge presiding at the trial *de novo* gives leave to call a new witness on the following grounds:

(*a*) That at the time of the hearing in the magistrate's court the new witness was ill or out of Ontario or for any other sufficient reason was unable to attend the hearing in the magistrate's court; or

(*b*) That by the exercise of reasonable diligence the new witness whose evidence is offered could not be produced at the time of the hearing in the magistrate's court.

APPEALS UNDER THE ASSESSMENT ACT

Although several submissions were made relating to practices prevailing in connection with the making and altering of assessments as to real property, the Committee limits its recommendations to the practice governing appeals under The Assessment Act, being of opinion that the practice on assessment appeals is a matter properly coming within the scope of this investigation, while other matters relating to assessment which were the subject of submissions are not.

Under The Assessment Act an appeal lies from an order of the court of revision to a county or district judge. Subsection 1 of section 84 of The Assessment Act provides for a further limited right of appeal thus:

(1) Where a person is assessed to an amount aggregating in a municipality in territory without county organization $10,000 or upwards and in any other municipality $40,000 or upwards, an appeal shall lie from the decision of the judge to the Ontario Municipal Board, and any person who had appealed or was entitled to appeal from the court of revision to the judge or the municipal corporation, shall be entitled to make the appeal to the Board.

It is difficult to understand why an appeal to the Ontario Municipal Board should be permitted as to property in unorganized territory if the assessment is only $10,000, whereas no appeal lies as to property in territory having county organization unless the assessment aggregates $40,000. Both amounts were no doubt arbitrarily set in the first instance, and, while the Committee considers $10,000 to be a fair and reasonable amount in a municipality in territory without county organization, the figure of $40,000 is in the view of the Committee unreasonably high as to property in territory having county organization, considering the amount of taxes involved annually on an assessment falling far short of that amount.

Another feature involved in appeals to the Ontario Municipal Board under the present practice is that there is an original hearing before the court of revision and two hearings *de novo*, one before the county judge and another before the Ontario Municipal Board. If the parties desire to appeal directly to the Municipal Board from the court of revision there is no real advantage in requiring a hearing with the expense incidental thereto before the county judge. However, where parties desire to go before the county judge for reasons of convenience or otherwise, they should not be barred from doing so.

The Committee studied the right to and the form of appeal to the Court of Appeal and the powers of that court. Representations were made to the Committee that in addition to the right of appeal as to questions of law now existing an appeal should also lie to the Court of Appeal from orders of the Ontario Municipal Board on all questions of valuation within the jurisdiction of that court as to the amount involved. In the opinion of the Committee the Ontario Municipal Board is well able and has ample opportunity to study matters of

valuation and to arrive at proper conclusions thereon, and the view of the Committee is that the right of appeal to the Court of Appeal should remain as under the present law.

THE COMMITTEE THEREFORE RECOMMENDS:

1. That in addition to or in lieu of the appeal from a court of revision to a county or district judge provided by section 76 of The Assessment Act, where a person is assessed to an amount aggregating in a municipality in territory without county organization $10,000 or upwards and in any other municipality $20,000 or upwards, an appeal shall lie from the court of revision to the Ontario Municipal Board at the instance and option of any of the persons mentioned in subsection 1 of section 76 of The Assessment Act against a decision of the court of revision or against any omission, neglect or refusal of the said court to hear or decide an appeal taken to it; and

2. That where a person is assessed to an amount aggregating in a municipality in territory without county organization $10,000 or upwards and in any other municipality $20,000 or upwards, and an appeal is taken to the county or district judge under section 76 of The Assessment Act, an appeal shall continue to lie from the decision of the judge to the Ontario Municipal Board.

ASSESSORS AND EXPERTS

The practice in the Admiralty Courts both in England and Canada of appointing nautical assessors is calculated to reduce the length of trials by eliminating the calling of expert witnesses. Where nautical assessors are appointed by order of the Admiralty Court neither of the parties is entitled to call experts or present the evidence of experts. In considering the advisability of permitting the appointment of assessors to the exclusion of expert witnesses in all civil cases, the Committee is not unaware of the fact that in New Brunswick this practice has recently been adopted in the civil courts and has been used for a short period in England in courts other than Admiralty Courts.

The appointment of nautical assessors appears to the Committee to be something which peculiarly lends itself to Admiralty Court problems where the questions involved invariably relate to the navigation of vessels. The nautical assessors appointed to assist the Admiralty Court in England, according to the information of the Committee, must be elder brethren of the ancient maritime society known as "The Corporation of the Trinity House of Deptford Strond" and there would be infinitely less opportunity for a divergence of views on the part of different nautical assessors in Admiralty cases than there would be between the opinions of experts in civil courts where matters of medical science, engineering and other sciences are frequently involved. In most cases involving expert testimony in the Ontario courts there would be considerable difficulty in having the parties agree upon a satisfactory independent expert because usually there are different schools of thought among the experts who would be qualified. There is in the present law nothing to prevent the parties from agreeing upon a single expert, but this is not often done. The Committee does not favour any proposal which would permit the court arbitrarily to appoint an expert

who had not been approved by all the parties since it has been so often demonstrated that men prominent in the same branch of science entertain views on a single point which are diametrically opposed.

Further, while constitutional difficulties are not insurmountable, it is not only important that the judge make his own decisions, but it is also desirable to have him sitting alone on the Bench making his decisions on the facts which he obtains from witnesses both lay and expert with the assistance of counsel representing all parties affected. While in the great majority of cases our judges would undoubtedly form their own decisions, the Committee does not favour any step which might tend to result in experts making decisions for judges.

THE COMMITTEE THEREFORE RECOMMENDS:

That a practice similar to that in the Admiralty Court relating to assessors be not adopted in any of the other courts of Ontario.

BAILIFFS

SUPERVISION

There are two types of bailiffs in the Province. First, there are bailiffs who are appointed by the Lieutenant-Governor under The Division Courts Act and, secondly, there are those who act under various Provincial statutes or as agents of landlords and conditional vendors of chattels.

Division court bailiffs are under the supervision of the Inspector of Legal Offices of Ontario, and are dealt with in this report under the heading DIVISION COURTS. There is, however, no supervision over bailiffs acting under The Landlord and Tenant Act and the various other Provincial statutes. Although municipalities may by by-law require bailiffs to be licensed and some municipalities have passed such by-laws, the licensing by municipalities does not involve any control over or assurance of the qualifications of bailiffs so licensed.

Many of the duties performed by bailiffs are of a technical nature requiring some knowledge of procedure and of the provisions of the statute under which the bailiff is acting. Some supervision of persons acting as bailiffs is, in the opinion of the Committee, most desirable in the public interest.

COSTS OF DISTRESS ACT

In many respects the services performed by bailiffs for which the fees are prescribed under The Costs of Distress Act are similar to the services performed by division court bailiffs under The Division Courts Act. The tariffs applicable to bailiffs under The Division Courts Act are more complete and appear to be reasonable. For the purpose of uniformity the Committee favours a revision of the tariffs under The Costs of Distress Act to render them the same, so far as possible, as those under The Division Courts Act.

LANDLORD AND TENANT

A practice has grown up in the levying of distresses for arrears of rent whereby the bailiff, after distraining the goods and chattels, takes a bond from the tenant which purports to permit the bailiff to withdraw from close possession of the

goods and chattels, at the same time retaining all rights existing under the distress warrant against the goods and chattels wherever they may be moved with full authority to retake possession at any time. Such a practice has the advantage of eliminating the necessity of removing chattels from the premises or of placing a man in possession, and consequently effectively reduces the expense of the proceedings for all parties concerned. It appears, however, to be a procedure which has developed without statutory authority. As it has become almost a standard practice with very desirable features it should be made regular and legal.

THE COMMITTEE THEREFORE RECOMMENDS:

1. That any person acting as a bailiff, except under The Division Courts Act be required to comply with the following provisions,—

(*a*) He shall not act as bailiff until the judge of the county or district court of the county or district in which he carries on business has certified to the clerk of such court that, after due examination, he has found such person to be qualified to act as a bailiff.

(*b*) The clerk of such court shall file such certificate of the judge and shall thereupon issue a certificate of qualification to such person.

(*c*) No renewal of any such certificate issued by the clerk shall be required, but every such certificate shall be subject to cancellation at any time at the direction of any county or district court judge;

2. That the tariffs under The Costs of Distress Act be revised so as to make applicable thereto the same fees, so far as possible, as under The Division Courts Act and that such tariffs of fees be prescribed by the Lieutenant-Governor in Council as is the case under most other statutes; and

3. That The Landlord and Tenant Act be amended to permit a bailiff who has distrained for arrears of rent to take a bond so that he may withdraw from close possession without relinquishing any rights.

CENTRAL PLACE OF EXECUTION

At various times in the past representations have been made recommending the establishment of a central place for the executing of all sentences of death imposed in the Province.

The advantages to be gained by the adoption of a central place of execution are negligible. The cost of a scaffold, in those counties and districts where no permanent scaffold exists, ranges from $30 to $100. On the basis of the number of executions carried out in Ontario in the past few years the saving on this account would not exceed $300 or $400 a year at most, and this would be offset by the cost of moving prisoners. No other financial saving would be effected. It would be inadvisable to have an official executioner otherwise employed in any prison or other institution containing a central place of execution because such a situation would be detrimental to the morale of the prisoners. The naming of a central place for the carrying out of death sentences would not

therefore enable the authorities to use an official executioner at other work and thus render his employment permanent and make him available for carrying out all executions, as has been suggested. Nor is it advisable to name any one community as a place in which all executions in the Province should be carried out and thus to saddle that community with all the emotional incidents thereof.

On the other hand there may be advantages in holding an execution in the county or district where the crime was committed. In a province the size of Ontario it is desirable that the relatives of the person to be executed should not be required to travel long distances to reach the place where their unfortunate relative is held prior to the execution. There must be considered also the danger of escape from custody in moving prisoners to a central place of execution.

THE COMMITTEE THEREFORE RECOMMENDS:

That no action be taken with regard to the establishment of a central place for executing sentences of death.

CLERKS OF THE PEACE

Duties are imposed upon the clerk of the peace by several statutes. He performs functions under the Criminal Code and the Naturalization Act (Canada) as well as under some fourteen provincial statutes. Throughout the Province, except in the County of York, the clerk of the peace is also the Crown attorney for the county or district. This means that, with the exception of the County of York, the one official must perform the functions of Crown counsel and court clerk in the county court judges' criminal court and in the court of general sessions of the peace. Such a practice is not conducive to the dignity of the court or the respect to which the office of Crown attorney is entitled.

There appears to be no reason why the county court clerk should not be required to act as clerk of these two courts. However, as it is important to retain the system of filings and preliminary procedure which now obtains in these courts, the clerk of the county or district court should perform only such duties of the clerk of the peace as are actually performed in the court room.

THE COMMITTEE THEREFORE RECOMMENDS:

That (except in the County of York) the clerk of the county or district court be required to perform those duties which the clerk of the peace is now required to perform in the court room, in his capacity as clerk of the peace, during the sittings of the court of general sessions of the peace and the county or district court judges' criminal court.

CONSOLIDATION OF COURTS

Consolidation of certain of the inferior courts of the Province has been suggested. The proposal would include the county and district courts, the surrogate courts, the courts of general sessions of the peace and the county and district court judges' criminal courts. Advantages would include a reduction in the number of courts in the Province and convenience to the public by reducing

the number of court offices. However, as there has been what might be termed a *de facto* consolidation in many counties and districts these advantages have already been partially attained. Although the number of types of books of account would be reduced, the actual saving in books of record, books of account and other items of expense would be small.

While consolidation is desirable, the advantages to be gained do not warrant such a scheme being put into effect at this time, having regard to the great many amendments to statutes and rules of court which would be involved.

THE COMMITTEE THEREFORE RECOMMENDS:

That consolidation of inferior courts be not proceeded with at this time but that hereafter in amending the statutes and rules of court regard should be had to the possibility of consolidation at some future time.

COUNTY COURT DISTRICTS

Prior to 1919 in Ontario the expenses involved in the interchange of county judges had to be approved by the Attorney-General. This is still the practice in the other provinces. However, under an Ontario enactment of 1919 county and district court districts were erected and an unrestricted interchange of judges within the respective districts was provided for in all classes of work under both Provincial and Dominion statutes.

The Committee has thoroughly considered the situation and finds that while there are many advantages in the system of judicial districts as set up in this Province in 1919, there have been extensions in the matter of exchanges which were apparently not contemplated at the time the legislation was introduced, and which the Committee does not regard as desirable. In this connection the Committee refers to the following types of matters as to which the interchange of judges in the districts has become common practice and which the Committee does not regard as desirable or necessary—revision of voters' lists, appeals under The Assessment Act, and division court sittings.

The Dominion Department of Justice has ruled that in the future the Dominion will not pay the expenses involved in the interchange of judges for division courts exclusively. Therefore the Province would have to pay such expenses and the Committee approves the action of the Attorney-General in advising the Dominion Department of Justice that it is not the intention of the Province to pay such expenses. No doubt the Dominion Department of Justice will advise the county and district judges that expenses involved in interchange for division courts only will not be paid.

THE COMMITTEE THEREFORE RECOMMENDS:

That the provisions of The County Judges Act relating to county court districts be limited in their application to county courts, both jury and non-jury, courts of general sessions of the peace and county court judges' criminal courts.

COUNTY COURT PRACTICE

General

Although the jurisdiction of the county courts is subject to very definite limitations, their practice is governed by the same rules as those of the Supreme Court. This means that the machinery of examinations for discovery, interlocutory motions and other proceedings necessary to enable the facts to be brought out and understood in involved cases in the Supreme Court is available in county court actions. This situation not only permits proceedings in county court actions to become unduly complicated and tends to delay trial but also substantially increases the costs of the litigants. Mr. Justice Middleton, whose knowledge and experience in matters of practice are well known, strongly advocated to the Committee that a simplified procedure adapted to the type of cases tried in county and district courts be made applicable to those courts. The Committee concurs in the recommendation of the learned Justice of Appeal. The working out of a simpler procedure with the many problems involved is, however, a work requiring much time and opportunity for study which are not available to this Committee.

Signing of Orders

The practice of having county court judges sign orders which they make while the clerk may sign judgments of the county court is general throughout the counties and districts of Ontario. If a county court clerk is competent to sign a judgment of the court he should be competent to sign an order of a judge of the same court. The present practice seems to have grown up because of the fact that while the county court clerk has in his office an accurate record of judgments there is no provision which ensures that he will have any record of an order made by a judge. The judge of the court is in most cases regularly engaged in court, either in his own county or in another county of the county court district. To require the signature of the judge upon all county court orders is a matter of inconvenience to litigants with no compensating advantage.

Appeals from Interlocutory Orders

It has been suggested that an appeal should be permitted from an interlocutory order in a proceeding in the county court. The Committee is of opinion that there is a real need for simplification of procedure in the county court and that to permit an appeal from an interlocutory order would be undesirable since it would render procedure in the court more involved.

The Committee Therefore Recommends:

1. That consideration be given to simplifying the practice and procedure in the county and district courts by the body which is responsible for the making of rules of practice for those courts;

2. That provision be made that where a judge of a county or district court makes an order he shall make an endorsement thereof upon the notice of motion and that the clerk of the court shall sign the formal order; and

3. That no appeal be permitted from an interlocutory order in proceedings in a county or district court.

COURT CRIERS

Although the office of court crier is very old it has ceased to serve any real purpose. The duties which are performed by the court crier might very well be performed by the clerk of the court, the sheriff or a sheriff's officer or by one of the constables. In any event there is no necessity for having a separate official present in court for that purpose. In most of the courts of England the office of court crier was abolished many years ago and his work is now performed by other officials.

The Committee Therefore Recommends:

That the office of court crier be abolished by providing that upon the retirement from office for any reason of any person now holding the office of court crier no appointment shall be made in his place. For this purpose amendments should be made to the section of The Sheriffs Act which provides for the appointment of court criers, as well as to one of the schedules to The Administration of Justice Expenses Act. The statute should also prescribe which officer shall perform the functions of the court crier.

DESIGNATION OF SPECIAL JUDGES TO SPECIAL CASES

It has been suggested that in the Supreme Court special judges should be designated to hear commercial causes, as has been the practice in England for many years, and that a similar practice be adopted with regard to matrimonial causes. While such a practice might be advantageous in some jurisdictions, it is not adaptable to this Province, in the opinion of the Committee, because of the geography and population of Ontario, and considering the number of cases which are usually heard at each sitting of the Court. As one witness stated, "It is not yet practical in this country," and certainly it would cause an unnecessary and undesirable amount of travel on the part of the judges in many instances, having regard to the number of cases and the distances involved. Furthermore, there does not appear to be any real need for the adoption of such a system.

The Committee Therefore Recommends:

That, apart from the present practice of assigning one judge to bankruptcy matters, the practice of designating special judges to deal with commercial causes, matrimonial causes or other special types of causes be not adopted.

DIVISION COURTS

Generally

During the proceedings before the Committee it became apparent that the division court system is open to two main objections, namely, the amount of the costs and the difficulty of recovery after judgment. The Act has also been criticized as being unreasonably long and complicated. When it is considered that the Act, exclusive of forms, occupies less than 70 pages and contains, in addition to matters relating to practice and procedure both before and after judgment, all provisions relating to the establishment of the courts, the inspec-

tion of the courts and provisions relating to judges, clerks and bailiffs, as well as sections prescribing the jurisdiction of the courts, special provisions applicable to partnership, evidence, appeals, absconding debtors, claims of landlords and other matters, the length of the Act does not appear unreasonable, nor can the procedural provisions, with certain exceptions, be termed unduly complicated. While the statement has been made that The Division Courts Act should be shortened and simplified, this is not an easy matter in view of the great number of aspects of division court constitution, practice and procedure, which must necessarily be dealt with in The Division Courts Act and the regulations made under it.

Service of Process

The practice of having all summonses served by a court official is peculiar to the division courts. In the higher courts service may be effected by any person whether or not he is an official of the Court.

Service by post is dealt with more fully in another part of this report and in a general way the observations therein contained are applicable to division court matters. One of the principal items of expense in connection with the prosecution of division court claims is the bailiff's fees for serving process. Service by registered mail has proven satisfactory in England, although the safeguard applicable in that jurisdiction, and discussed in another part of this report, must be borne in mind. Service by registered post has proven satisfactory in many of the States of the Union and service by ordinary post is working well in at least one jurisdiction. Because of the apparent success with which service by post has met in other jurisdictions and because of the public demand for a reduction in division court costs the Committee is disposed to recommend the adoption of service by such means in the division court. The Committee is, however, inclined to the view that service by mail in the division courts should be effected by a preferred type of mail so as to ensure, as far as possible, the receipt of the summons or other document by the addressee. The Committee is also of opinion that services by post in division court matters should be attended to by the clerk of the court. This will permit the clerk to keep a record of proofs of service as received by him and will enable him to arrange his court lists accordingly. Ample safeguarding facilities may be created by empowering a trial judge to require personal service where he considers such action warranted. In view of the practice in the higher courts, the Committee sees no reason why personal service should not, at the option of a party to an action, be effected by party or his agent, provided there is proper proof of service.

Court Costs

Objections to the present system of court costs in the division courts are twofold. In addition to the complaint that the costs are excessive, objection has also been taken to the fact that a litigant is never sure at the outset of a case either how much the costs will amount to before judgment or how much they will be by the time judgment has been enforced. Because of the uncertainty and difficulty of enforcing judgment, the Committee is satisfied that it is impossible to devise any system of costs which would take care of proceedings after judgment with any certainty as to the amount of costs involved. However, it is not only desirable but practicable to devise what might be termed a block system of costs to include all proceedings up to and including judgment. In

determining the amounts of costs which should be paid under such a system it would no doubt be necessary to have regard to average amounts involved in prosecuting a suit to judgment or arriving at a settlement before judgment under the present plan, making appropriate divisions according to the amounts claimed in each suit. If such a calculation is to be the basis for arriving at the amounts of fees payable under a block system, no rebates or other allowances could properly be made where the case is settled before judgment. If rebates and other similar allowances were barred the rates could be kept to a minimum. If service is to be effected by prepaid registered mail and the mailing is to be done by the court clerk, postage should also be included in the block tariff. If, however, service by the bailiff as under the present system is to be continued, it would not be feasible to include costs of service in the block tariff for this amount varies greatly in the rural and urban districts. In the northern parts of Ontario particularly, where long distances are involved, the costs of service are much greater than in the more densely populated sections of the Province.

Jurisdiction after Judgment

Where judgment has been recovered in a division court it is often necessary to realize upon it in some other part of the same county. The practice of issuing a transcript to a court of another division is one of the matters which increases costs in division court proceedings. As has so often been observed, with modern means of transportation and communication distances have greatly diminished and consequently it is a matter of no great inconvenience to a bailiff of a division court to travel to another part of the same county. The Committee sees no advantage in continuing the present practice which necessitates the issue of transcript from one division court to another division court in the same county or district.

Extra County Jurisdiction

Because of the arbitrary nature of boundaries of county and provisional judicial districts it is often more convenient for a person residing in one county or district to attend a division court located in the next county or district than to attend a division court located in the county or district in which he resides. The Division Courts Act, however, does not make provision for giving jurisdiction to a division court in more than one county or district. There are many cases in the Province where such a provision would work to the advantage and convenience of many people.

If this recommendation and the next preceding recommendation are embodied in legislation, consideration should be given to the jurisdiction after judgment of a court whose district includes parts of two counties.

Appeals

In cases involving over $100 an appeal from a division court may be taken to the Court of Appeal where three judges sit on the appeal. Substantially the same rules apply to division court appeals as are applicable to appeals from the county court and the Supreme Court where much larger amounts are involved. An appellant is required to furnish three copies of the transcript of evidence and three copies of an appeal book containing the notice of appeal, the pleadings, the formal judgment, reasons for judgment, if any, and exhibits. These matters

render the cost of a division court appeal substantial. The situation might be remedied to some extent by providing for an appeal to a single judge of the Supreme Court. Judges and lawyers appearing before the Committee whose opinions were sought regarding such a change in procedure were practically unanimous in approving of an appeal from the division court to a single judge of the Supreme Court. Owing to the congestion of the lists in weekly court and chambers it is not desirable to require any further matters to be adjudicated in those courts, nor does the Committee consider that it is necessary or desirable to alter the tribunal to which an appeal from a division court is taken. Therefore the Committee is of the opinion that appeals from the division courts should be heard and disposed of by a single judge of the Court of Appeal.

Juries

The Division Courts Act provides for a trial by jury in all actions where the amount sought to be recovered exceeds $50. In order to provide a fund to cover the cost of jury trials another section of the Act requires that there shall be paid to the clerk, on every action originally entered in his court, in addition to all costs or jury fees payable,—

(*a*) where the claim exceeds $20 but does not exceed $60—three cents;

(*b*) where the claim exceeds $60, but does not exceed $100—six cents; and

(*c*) where the claim exceeds $100—twenty-five cents.

Judge Morson, who for more than forty years presided over division courts in the County of York, estimates that he tried 320,000 cases in the division courts during that time out of which not more than 25 were tried by juries. Mr. McDonagh, who is clerk of the First Division Court of the County of York, which is one of the busiest courts in the Province, estimates that during the last six years approximately 42,000 actions have been entered and that there have not been more than 12 jury trials. These figures indicate that the number of jury trials in division courts does not warrant provision for trial by jury being retained in the Act, and that substantial sums of money must have accumulated in many of the counties in what is known as the division court jury fund. The Act requires the clerk to pay over to the county treasurer all moneys received by him as jury fees. Jury fees are not payable in provisional judicial districts.

Report upon Trial List

Many of the division courts are in outlying parts of the Province and owing to the lack of facilities for communication it is sometimes difficult for a judge to ascertain whether there are any cases to be tried on the date set for a sittings of the court. Where there are no cases for trial it is important that the expenses of the administration of justice should not be unnecessarily increased by having the judge travel to the court.

Garnishee and Attachment

For many years proceedings by way of garnishee in the division court have been a source of complaint. Not only does the proceeding increase the expense of

division court procedure but it is a matter of inconvenience to the creditor, the debtor and the debtor's employer for under the established practice a garnishee order may be made only against moneys that are due and payable to the debtor. Accordingly if wages are to be garnished from time to time a new order must be taken out and served each time wages become due. This brief description of the present practice will serve to indicate both the inconvenience and expense which are involved. In the Provinces of Quebec and Manitoba statutes have been passed with a view to assisting debtors who are indebted to more than one person and providing machinery for discharging the debts over periods of time. In Quebec the legislation is known as the Lacombe Law. It is contained in articles 698a and 698h of the Civil Code of Quebec which were passed in 1939 to replace article 1143. The law may be invoked by a debtor having several creditors provided that at least one judgment has been signed against him. He must file a declaration with the court clerk stating his salary, the debt upon which he is paying, his employer's name and other particulars. He is required to pay into court that part of his wages which is not exempt from seizure, within three days of each pay day.

The Lacombe Law is administered by the clerks of the Circuit Court in Montreal and the Magistrates' Courts in the other parts of the province. While these are the small debts courts of the province, the Lacombe Law applies equally to claims of all amounts and to a judgment of any court in the province. Where a debtor brings himself under the Lacombe Law by filing a declaration and then fulfills the requirement of the law by making regular payments into court on the seizable portion of his wages, no proceedings by way of garnishee or attachment may be taken against his wages.

The Manitoba legislation is known as The Orderly Payment of Debts Act, and was first passed in 1932. Having outlined the Lacombe Law, the Manitoba legislation may be conveniently described by indicating the chief respects in which it differs from the Lacombe Law:

(1) While the Lacombe Law applies only to wages, The Orderly Payment of Debts Act applies to all moneys owing to the debtor;

(2) Whereas under the Lacombe Law in Quebec the amount of wages exempt from execution is fixed by statute, under The Orderly Payment of Debts Act the amounts payable into court by the debtor are either agreed upon by the debtor and the creditors, or failing that, are fixed by the court;

(3) Under the Lacombe Law the employer is not brought into the picture at all, the moneys being paid into court by the debtor. This is not necessarily so under The Orderly Payment of Debts Act for under that Act the clerk may at any time require of and take from the debtor an assignment of any moneys due, owing or payable, or to become due, owing or payable to the debtor and unless otherwise agreed upon, he shall forthwith notify the person owing or about to owe the moneys of the assignment; and

(4) The Lacombe Law applies to all claims regardless of the amounts involved while The Orderly Payment of Debts Act does not apply to a claim for which an action may not be maintained in a county court and does not apply to a judgment in an amount exceeding that for which action may be brought in the county court (approximately $800) unless the creditor consents.

It should be observed that both the Quebec and Manitoba Acts have the common and desirable feature that the invoking of the provisions of the Act is entirely at the option of the debtor.

It was brought to the attention of the Committee that a practice in some respects similar to the practice under the Lacombe Law and The Orderly Payment of Debts Act has grown up in some parts of Ontario. Some seventeen collection agencies in the Province are now carrying on a practice that is commonly known as "pooled accounts". Under this system the debtor pays a portion of his wages to the collection agency and the collection agency distributes the amounts paid in among the creditors of the debtor. The charge, known as an "agency charge", for handling the debtor's accounts in this way, varies from 7% to 20% among the various agencies. However, where a collection agency has been authorized by a creditor to collect a debt from a debtor who has pooled his accounts with the agency, it charges that creditor its regular collection fee which varies throughout the Province from 15% to 37%. According to information furnished to the Committee, under this system a collection agency in some cases retains as much as 47% of moneys collected by it from a debtor and which would otherwise be payable to a creditor.

Before establishing any new procedure in the courts similar in nature to the Lacombe Law or The Orderly Payment of Debts Act, the cost of administration is an item which must be carefully considered. The Attorney-General for Quebec was kind enough to arrange for the attendance of Mr. P. A. Juneau, K.C., a Special Law Officer of his Department, to attend before the Committee and clarify many points relating to the administration and operation of the Lacombe Law. Mr. Juneau explained to the Committee that the fee for filing a declaration under the Lacombe Law is very small, being from 50 cents to $1.00. There is also a fee of a similar amount payable by a creditor filing a claim. The court, however, retains 2% of all moneys paid in when distribution is made. It is estimated that in the district of Montreal it costs the province $15,000 annually to maintain the system. A simplification of administrative features would substantially reduce the cost of maintaining the system and a sufficient percentage retained by the court would meet the expense involved. Mr. Juneau stated, "Instead of charging for any declaration and charging for filing any claim, I would suggest that when the debtor has deposited $50, before the distribution of his $50, we would charge $2.50, 5%, and in the end $1.25 would be charged to him and the other $1.25 would be charged to the creditor." In Manitoba the fee system appears to be the practice. The Committee is of opinion that to make such a system self-sustaining and in fairness to those affected by it, the retention by the clerk of a percentage of the amounts paid into court is preferable to the fee system. The Committee also expresses the view, having in mind the benefit accruing to creditors by the facilitation of collections effected by this system, that it is not unreasonable to require the creditor to pay one-half of the prescribed fee. In view of Mr. Juneau's suggestion, the Committee favours a charge of 5% upon the establishment of the system and if experience shows that such a charge is inadequate to cover expenses or exceeds that which is actually required the charge may be increased or reduced. The charge made should be no greater than is required to maintain the system.

In considering the scope of such a law it is felt that it would best serve its purpose by being limited to judgments of division courts or claims within the

jurisdiction of a division court. To make it applicable to claims for much larger amounts and then to make distribution on a *pro rata* basis would deprive a creditor having a small claim from any substantial benefit from the amounts collected. The Committee would also limit the law to wages. Such a law is particularly applicable to wages as it provides for the payment of debts on a deferred basis. This provision would mean that individual creditors could take such proceedings as they might deem desirable against other funds of the debtor regardless of the amount of their claims. The Committee would place the administration of the law in the hands of the division court clerks.

The Division Courts Act permits garnishment of a debt "owing or accruing" to a debtor. Whatever may have been the intention of the Legislature, decisions of the courts have rendered the word "accruing", as it is used in this provision, meaningless. The net result of the present practice is to embarrass and inconvenience the creditor in the collection of his debt by requiring him to act after a debt has become due and before it has been paid over, which requirement, particularly in the case of wages, is often difficult of accomplishment. The Committee favours the extension of the section so as to permit garnishment where a debt, though not yet due and payable, may properly be described as accruing due.

Rules, Forms and Tariffs

In another part of this report where rule-making authorities are dealt with, the recommendation that a special rule-making body should have authority to make all rules relating to court procedure is subject to a specific exception with regard to rules in division courts. The reason for the exception is that the practice and procedure in the division courts differ from that in the other courts in many respects, the procedure being as informal as is practicable. Since the abolition of the Board of County Judges the Lieutenant-Governor in Council has had the authority to make rules governing any matter relating to practice and procedure of the division courts, or other similar matters, and to prescribe fees payable to the clerk and bailiff. Any forms which are prescribed in The Division Courts Act are contained in a schedule to the Act. This practice which in modern legislation is the exception rather than the rule tends to extend the length of the Act. Further, it is often found that forms require to be altered to meet particular situations which were not anticipated when the forms were prepared. For these reasons it is advisable that the power of the Lieutenant-Governor in Council to prescribe rules and fees be extended to include the prescribing of forms.

Third Party Procedure

Section 89 of The Division Courts Act permits any person who ought to have been joined in an action or whose presence is necessary to enable the judge effectually and completely to adjudicate upon the questions involved in the action to be added as plaintiff, defendant or garnishee. There is one situation which is not covered, however, and that is the adding of a third party. Not uncommonly in division court practice it is desirable to have some person added as a third party, a practice recognized in both the county courts and in the Supreme Court, in order that all issues may be settled in the one action. As there is no provision for this procedure in The Division Courts Act or rules it is necessary to bring a separate action against the third party. Arrangements are often made to have both actions tried together. As the "third party" and the plaintiff are not parties to the same action the situation is unsatisfactory.

Interpleader

A practice has developed where a judgment summons or interpleader is issued, to enter it in the books as a separate action. There appears to be no authority for the practice nor is there, in the opinion of the Committee, any good and sufficient reason why this should be the case. Under the practice as it exists a second and separate deposit of costs must be made and as the various items which have been charged for in the original action are again charged against the second deposit, the costs become exhorbitant.

Executions

The Division Courts Act places restrictions upon execution against land on a division court judgment. It provides that "where an execution against goods is returned *nulla bona*, and the sum remaining unsatisfied on the judgment amounts to the sum of $40 or upwards, the judgment creditor shall be entitled to an execution against the land of the judgment debtor." The Committee would not interfere with the minimum amount of $40 fixed by the statute. In many cases, however, the judgment creditor or the clerk of the court knows that the issuing of execution against the goods of a debtor is an abortive gesture. In such cases the requirement that execution must be first issued against goods serves no other purpose than to add costs to those already incurred. Whether the creditor should be entitled as of right to issue execution against lands where the amount involved exceeds $40 or whether he should be required to file an affidavit deposing that the debtor has no goods which are subject to execution has been given some consideration by the Committee. It is only reasonable that judgment creditors in the division courts should have the same remedies for realizing upon their judgments as is the case in other courts, and particularly so because of the substantial increase in the jurisdiction of division courts a few years ago. In addition while a creditor may be reasonably certain that the debtor is not possessed of any seizable goods he may not be in possession of such facts as would permit him to take an affidavit to that effect. The Committee does not feel that it is necessary or desirable to require a creditor to take such an affidavit before being entitled to issue execution against lands.

Appointment of Clerks and Bailiffs

Under the heading Bailiffs the Committee recommends that every bailiff other than one engaged exclusively in division court work, be required to obtain a certificate from the local county or district court clerk that the judge of the court has approved of his qualifications to act as a bailiff. Under existing law the certificate of a judge that any person, other than a barrister or solicitor, desirous of being appointed a notary public is qualified for the position, is necessary before such person can be so appointed.

Because of the large number of division courts in the Province the appointment of division court clerks and bailiffs who are competent to perform the work of their respective offices has long been a problem. In the interests and for the convenience of the public it is important that where a vacancy occurs in the office of clerk or bailiff an appointment be made without undue delay. Having regard to distances involved and the pressure of other work it is not always possible for the proper officers of the Attorney-General's Department to

study the situation and make full inquiry as to the ability of the applicants. As the local judge is ideally situated and equipped to examine and report upon persons who are considered for appointment as clerk or bailiff, the Committee favours having such a judge examine and report whether a person is qualified for the office of clerk or bailiff before he is appointed. This practice would be substantially the same as the present law and practice with regard to notaries public.

THE COMMITTEE THEREFORE RECOMMENDS:

SERVICE OF PROCESS

1. That,

(*a*) service of process in division courts be effected by prepaid registered mail with a return receipt card (subject to provisions of clauses (*c*) and (*e*) hereof);

(*b*) the mailing of process should be done by the division court clerk;

(*c*) if the court is not satisfied that service by mail has been effected in any particular case, the court may require that personal service be effected;

(*d*) where personal service is ordered by the court the party on whose behalf the service is to be made may effect service himself or by his representative, in which case the cost of service shall be in the discretion of the court;

(*e*) in lieu of the form of service indicated in clause (*a*) above, a party may, if he so desires, effect personal service either himself or by his representative, but at his own expense; and

(*f*) where a party elects to make personal service himself or by his representative, or where personal service is required by the court, in cases where the amount does not involve more than $30 the provisions of section 79 of The Division Court Act shall continue to apply.

COURT COSTS

2. That a block system of costs in division courts covering all proceedings up to judgment be established and that the costs of service by prepaid registered mail with a return receipt card be included in the amount required under the block system.

JURISDICTION AFTER JUDGMENT

3. That after a claim has been reduced to judgment the division court in which judgment has been obtained shall have jurisdiction throughout the county or district and that division court bailiffs shall have authority to act in respect of any judgment throughout the county or district in which their court is located, provided that where a bailiff goes outside his own division he shall not be permitted to recover mileage for any travelling outside his division.

Extra County Jurisdiction

4. That The Division Courts Act be amended to allow the Lieutenant-Governor in Council to give a division court located in one county or district jurisdiction in part of an adjoining county or district.

Appeals

5. That provision be made for the taking of appeals from division courts to a single judge of the Court of Appeal.

Juries

6. That juries in division courts and jury fees be abolished.

Report upon Trial List

7. That where there are no cases to be tried at any sittings of a division court the clerk of the court be required so to advise the judge, and if the clerk has not mailed a notification to the judge which would in the ordinary course of mail reach its destination at least twenty-four hours before the time for the sittings of the court in the case of a county, and at least forty-eight hours before the time for the sittings of the court in the case of a district, the clerk be required so to notify the judge by telephone or telegraph at least twenty-four hours in the case of a county and at least forty-eight hours in the case of a district, prior to the time set for the sittings of the court.

Garnishee and Attachment

8.—(*a*) That a law similar to The Orderly Payment of Debts Act of Manitoba be adopted in Ontario subject to the following:

(i) That the operation of the law be limited as in the Lacombe Law in Quebec to wages of the debtor;

(ii) That all judgments of division courts or claims which are within the jurisdiction of a division court may be brought under such law where it is invoked by the debtor;

(iii) That no fees be charged for the filing of a declaration by a debtor bringing himself under the law, and that 5% be deducted upon distribution of moneys, such percentage to be subject to increase or decrease in the light of experience so that the charge may be made commensurate with the costs of administration of the law, and that one-half of the amount charged be payable by the debtor and one-half by the creditor; and

(iv) That the law be administered by the division court clerks who shall be required to keep a record of all the debtors in their respective divisions who have brought themselves within the provisions of the Act; and

(*b*) That the garnishment provisions of The Division Courts Act be made applicable to debts which although not yet due and payable, may be described as "accruing due."

Rules, Forms and Tariffs

9. That the provisions authorizing the Lieutenant-Governor in Council to make rules and prescribe fees be extended to authorize the Lieutenant-Governor to prescribe forms.

Third Party Procedure

10. That provision be made for the joining of third parties in division court actions.

Interpleader

11. That proceedings by way of judgment summons and interpleader, or other matters arising out of a division court action be dealt with by the clerk of the court as part of the same action.

Executions

12. That where the sum remaining unsatisfied under a division court judgment amounts to $40 or more execution may be issued against the lands of the judgment debtor without execution against goods returned *nulla bona* being first required.

Appointment of Clerks and Bailiffs

13. That no person be appointed a division court clerk or bailiff unless the judge of the county or district court of the county or district where the division court is located has certified that he has examined such person and finds him to be qualified to perform the duties of a division court clerk or bailiff, as the case may be.

ENLARGEMENT OF POWERS OF COURT OF APPEAL

The power of the Court of Appeal with regard to an appeal from a judgment based upon the verdict of a jury is concisely stated in Volume 3 of the Canadian Encyclopedic Digest (Ontario) at page 151:

"The duty of a court hearing an appeal from the decision of a judge without a jury is to make up its own mind, not disregarding the judgment appealed from, and giving special weight to that judgment in cases where the credibility of the witnesses comes into question, but with full liberty to draw its own inference from the facts proved or admitted and to decide accordingly, but where the jury finds the facts, it is the province of the court to determine whether there is any evidence proper for submission to the jury, and if it be determined that there is such evidence, a verdict based upon it is not to be disturbed unless the court should think it such that reasonable men could not have found as the jury did, or, in other words,

before a Court of Appeal is justified in granting a new trial on the ground that the verdict of a jury is against the weight of evidence, the court must be satisfied that the evidence so strongly preponderates in favour of one party as to lead to the conclusion that the jury in finding for the other party, have either wilfully disregarded the evidence or failed to understand and appreciate it."

While the volume from which the above extract is taken was published in 1927, the most recent case, Day vs. Toronto Transportation Commission, [1940] S.C.R. 433, indicates that the above is an accurate statement of the law applicable to-day where an appeal is taken from the finding of a jury. An extract from Lord Dunedin's judgment in Wilson vs. Kinnear, [1925] 2 D.L.R. 641, at page 646 is also helpful in indicating the principles upon which the Court of Appeal must proceed. His Lordship says:

"Had the verdict been the verdict of a jury their Lordships think that it could not have been set aside. But the judgment of a judge is in a different position. A Court of Appeal has not to consider whether there is any evidence on which the verdict could be reasonably based; it has to consider whether it, on the evidence, would have come to the same conclusion, and that is what the Appeal Court did."

While there are no doubt reasons why the Court of Appeal should be more restricted in interfering with a finding of fact by a jury than with a finding of fact of a judge sitting alone, the restriction under the present law appears to warrant some relaxation. The present rule renders it impossible for the Court of Appeal to interfere where the jury has acted unreasonably unless the finding amounts to something which might be termed grossly unreasonable. While taking the view that the Court of Appeal should be allowed more latitude than the present rule permits, the Committee fully realizes that any widening of the powers of the Court of Appeal must be effected with limitations. Great care must, therefore, be taken in drafting any amendment so that the Court of Appeal may not interfere with the finding of fact by a jury unless the jury is clearly wrong.

Many of the witnesses who appeared before the Committee, including judges of both the trial division and the Court of Appeal, as well as counsel having experience in the Court of Appeal, agreed that it would be well to extend the powers of the Court of Appeal but that any extension of the powers must be definitely and carefully limited. No one was able to suggest a formula which would satisfactorily take care of this situation. Undoubtedly if the provisions of The Judicature Act under which the Court of Appeal derives its power are to be amended so as to extend the powers of the Court of Appeal, the exact wording must be the subject of careful study.

THE COMMITTEE THEREFORE RECOMMENDS:

1. That the power of the Court of Appeal in appeals from judgments based upon the findings of a jury be extended, but that any such extension be definitely limited; and

2. That the matter of exact wording to be employed in effecting such extension of power be referred to the Law Revision Committee, if and when such committee is constituted.

THE EVIDENCE ACT

The law of evidence in Ontario relating to civil matters is, in the opinion of the Committee, a branch of the law which warrants careful study with a view to effecting a thorough revision in the light of present-day conditions and recent English legislation. The English Evidence Act of 1938 is, in some respects, a departure from well established rules of evidence prevailing in the common law countries and merits consideration and study in this jurisdiction. The considerations which prompted the preparation and introduction of that legislation are indicated by the Right Honourable Lord Maugham in an address which he prepared to deliver at the meeting of the Canadian Bar Association at the City of Quebec in August, 1939, at which time he was Lord High Chancellor of England. (See (1939), 17 Canadian Bar Review 469.)

The detailed and lengthy study of the whole field of evidence which would be involved in a revision of The Evidence Act (Ontario) could not be undertaken by this Committee. The Committee is of opinion that such a study might appropriately be committed to the Law Revision Committee, the establishment of which is recommended in another part of this report.

THE COMMITTEE THEREFORE RECOMMENDS:

That the laws of evidence be carefully studied with a view to revising The Evidence Act in the light of present-day conditions and of recent changes in the law of evidence in England and that such a study be made by the Law Revision Committee referred to in another part of this report if and when such Committee is established.

EXPENSES OF TRIAL WHERE THE VENUE IS CHANGED

While the Rules of Practice require certain types of cases to be tried in a particular county or district, such provisions apply to a small proportion of civil trials, the general practice being that the place of trial is chosen by the plaintiff and a change of venue is ordered only where justified by reason of "preponderance of convenience", having regard to the place of residence of the witnesses and other relevant factors. It is thus impracticable to provide for the reimbursement of one county by another with respect to the expenses of the trial whether the theory of reimbursement is placed on the basis of the place of residence of the parties, the place where the cause of action arose, or otherwise. In many cases at least one of the parties resides in a different county or district from that of the other party or parties, and in other cases the cause of action may have arisen partly in one county or district and partly in another county or district, the result being that it is practically impossible to lay down any rule which would be workable and which would apply satisfactorily to a reasonably large proportion of cases going to trial. The principle contained in section 18 of The Administration of Justice Expenses Act which applies to indictable offences is not adaptable to civil cases by reason of the different principles which apply in fixing the place of trial.

It is doubtful whether any county has suffered any real injustice by the present rules of practice because with the large number of cases which are tried

throughout the Province annually a natural balancing process operates to take care of the situation.

There is, however, an exception to the general rule applicable to the determination of the place of trial in civil actions indicated above, and that is the practice which permits a judge to change the venue from one county to another when he is satisfied that a fair trial cannot be had at the place where the venue was originally laid. In these cases a new venue is chosen either arbitrarily or upon principles which do not otherwise apply, so that the county or district in which the venue has originally been laid is relieved of the expense of the trial for reasons which do not ordinarily play a part in determining the place of trial.

THE COMMITTEE THEREFORE RECOMMENDS:

1. That where a change of venue is ordered in a civil action on the ground that a fair trial cannot be had in the county of original venue, the county of original venue be required to reimburse the county in which the trial is held and that such requirement be made appropriately applicable to provisional judicial districts; and

2. That the Rules of Practice should be correspondingly amended so as to require every order changing the venue to indicate the reason for the change.

JUDICIAL DISTRICTS FOR CRIMINAL ASSIZES

The proposal that the counties be grouped into judicial districts for the holding of criminal assizes has on more than one occasion been advocated and is usually justified by the statement that "we are not living in the horse and buggy days".

In view of the fact that criminal matters and civil matters are both tried at the same assizes, the juries for both types of cases being selected from the same jury panels, it is by no means clear that any advantage would result from the establishment of judicial districts for criminal assizes if no change were made with regard to the holding of sittings of the Supreme Court for the trial of civil cases. In any event the adoption of the system of judicial districts would compel parties, witnesses and counsel to travel greater distances. Some of the jurors would also have to travel longer distances if the jury panels were to contain residents of the county in which the proceedings originated. It is doubtful whether any saving of expense either to the parties involved or to the general public would result but, in any event, any saving so effected would probably be out of proportion to the inconvenience resulting. The Committee accordingly disapproves of the establishment of judicial districts for criminal assizes.

THE COMMITTEE THEREFORE RECOMMENDS:

That no action be taken with regard to the establishment of judicial districts for criminal assizes.

JURIES

Grand Juries

The advisability of abolishing or retaining grand juries has been a matter of controversy in Ontario for a great many years. The question has been discussed in many organizations and in the Legislature itself, a Bill for abolition having been introduced in the year 1933. There is undoubtedly a considerable difference of opinion both among members of the legal profession and others. The members of the Committee themselves hold different views as is indicated below where the further views of the Chairman are set out.

Few institutions in the British Empire are as old as the grand jury system. An excellent and brief outline of the development of the grand jury appears in the report of Mr. F. H. Barlow, K.C., Master of the Supreme Court of Ontario, to the Attorney-General, dated the 7th of July, 1939, and published in a special issue of the Ontario Weekly Notes dated March 8th, 1940. The Committee, therefore, does not deal with the historical background of grand juries being of opinion that Mr. Barlow's report covers the ground quite sufficiently and is readily available to interested parties.

The Committee probably heard more evidence and received more submissions on this than on any other subject and is of the opinion that before stating its recommendations the convenience of the Legislature and the public interest may best be served by setting out in brief outline the various reasons which were advanced for and against abolition. However, it may be stated at this stage that few witnesses who appeared before the Committee advocated outright abolition; in fact the overwhelming opinion expressed in written and verbal representations to the Committee was against outright abolition.

For Abolition—

Grand Juries in Other Jurisdictions. Grand juries have been abolished entirely or in part in many jurisdictions in the British Empire as appears from the following:

England—Abolished from 1917 to 1922; abolished again in 1933 with some minor exceptions.

Scotland—Grand juries never existed.

Ireland—Grand juries do not exist.

South Africa—Abolished in 1885.

Australia—From best sources available it appears that grand juries have not been used in Australia for nearly one hundred years.

Canada—

Alberta—Grand juries never existed.

Saskatchewan—Grand juries never existed.

Manitoba—Abolished in 1923.

British Columbia—Abolished in 1932.

Quebec—Abolished in 1933.

The abolition of grand juries in England was preceded in 1913 by an investigation and report by commissioners under the chairmanship of Viscount St. Aldwyn, and again in 1933 by the Business of Courts Committee under the chairmanship of Right Honourable the Master of the Rolls, Lord Hanworth of Hanworth. The findings of these bodies which resulted in the abolition of grand juries in England in 1917 and in 1933, are of interest and importance in considering the matter as it affects the Province of Ontario. The Committee, however, does not think it is necessary to quote from these reports since they are available to those having occasion to refer to them. Furthermore, the Committee, with the exception of the chairman, has felt that the reasons which brought about the abolition of grand juries in England would not be entirely relevant to the situation in this province, the problem being whether grand juries should be continued here under prevailing conditions.

For Abolition—

Saving of Expense. In his report above referred to, Mr. Barlow states, "It has been estimated that the cost of grand juries in the Province of Ontario exceeds $50,000 annually." This, however, was only the roughest kind of estimate. The Committee is of the opinion that it is practically impossible to arrive at any accurate figure as to the cost of grand juries, or conversely as to the amount which would be saved by their abolition. The impossibility of arriving at any accurate figure is due to the fact that the existence of grand juries creates many duties and situations involving expense, e.g., the work of the local boards of selectors, the work of the county or district selectors, the serving of summonses, the time of the court and court officials engaged while grand juries function, the time of petit juries delayed while grand juries function, the time of counsel and witnesses consumed while grand juries function, the witness fees and mileage paid to witnesses appearing before grand juries, the time of Crown counsel before grand juries and, of course, the fees and mileage paid to grand jurors themselves.

On the other hand, a grand jury, when it finds a "no bill", saves the community and the accused the expense of a trial and this phase of the matter must be considered in arriving at any estimate as to the net cost of grand juries. Mr. J. W. McFadden, K.C., Crown Attorney for the County of York, stated that there was always plenty of work which could be proceeded with in the Toronto courts while the grand jury was functioning. Furthermore, Mr. McFadden stated that in his opinion grand juries had saved money in Toronto since many "no bills" had been found. The saving suggested by Mr. McFadden in the case of Toronto, and which perhaps would apply in the other larger urban centres, is mentioned by the Committee to indicate the difficulty in arriving at any definite figure as to the saving which might be expected over the entire province. The overall expense throughout the province may be exceedingly small.

In the City of Toronto, according to figures submitted by Mr. McFadden, for the period from October, 1935, to January, 1940, 142 criminal cases were investigated by grand juries in Assize Courts. There were "no bills" in 34 cases, or in about 24 per cent of those submitted. In January, 1941, of 20 cases examined by Assize Court grand juries "no bills" were found in 6. In cases where "no bills" are found the public and the accused are saved the costs of trial which include attendance of counsel, witnesses and petit jurymen and all the other items going to make up the costs of trial. One grand jury may examine many

cases and save costs of trial in those in which they find "no bills". The figures for the year 1940 with reference to the work of grand juries throughout the province, as ascertained from a questionnaire sent out to all Crown Attorneys, are as follows:

	Courts of General Sessions of the Peace 1940			Supreme Court of Ontario 1940		
	Total Bills Presented	True Bills	No Bills	Total Bills Presented	True Bills	No Bills
Toronto, Hamilton, Windsor, Ottawa and London.....	78	70	8	70	65	5
Other County and District Towns...	59	48	11	62	53	9
Totals.....	137	118	19	132	118	14

For Abolition—

Magistrates' Preliminary Investigation. In all cases submitted to a grand jury, with the exception of indictments preferred by the Attorney-General or by a person with the consent of the court, there must be a preliminary investigation before a magistrate who, from the evidence adduced, determines whether there is sufficient evidence to put the accused on his trial. If the magistrate finds there is insufficient evidence to warrant putting the accused on his trial, he must dismiss the case on the preliminary investigation.

At one time a considerable percentage of the magistrates conducting such preliminary investigations were laymen. This practice, however, has been changed so that now only barristers are appointed to the Magistrates' Bench. With this change, ensuring the consideration of the evidence in preliminary investigations by men trained in the law, there may be a greater safeguard than was previously the case when lay magistrates considered and adjudicated on the evidence. The figures submitted under the sub-heading Saving of Expenses indicate that there is still much to be desired. The matter is further discussed in succeeding paragraphs.

For Abolition—

Fallibility of Grand Juries. In some jurisdictions in the province it is seldom that grand juries return "no bills". In other jurisdictions a considerable number of cases committed for trial by magistrates are returned by the grand juries as "no bills". This may suggest that in jurisdictions where a large number of bills are returned "no bills", there is only a perfunctory consideration of the evidence by the magistrates on the preliminary investigation. It may be that the certainty of a grand jury intervening before trial leads to carelessness on the part of the magistrates. If, however, the courts in such jurisdictions are so

crowded with work that the magistrates are unable to give proper consideration to such matters, then some change should be made in these particular jurisdictions.

The Committee has been informed of cases in which grand juries have found "no bill" and upon an indictment being subsequently preferred by the Attorney-General a second grand jury has returned a "true bill" and a trial jury has found the accused person guilty. Such cases do not indicate that grand juries are by any means infallible in finding "no bills". It is, of course, impossible to say whether in the cases where a magistrate has committed for trial and the grand jury has subsequently found a "no bill" the magistrate or the grand jury was mistaken. These situations, however, do clearly indicate that in the administration of criminal justice the greatest care must be exercised. Cases submitted to the Committee where "no bills" were found by grand juries after committals had been made by magistrates may indicate that preliminary hearings before magistrates do not altogether supersede grand juries as safeguards. It is impossible for the Committee to form any definite opinion as to who are more generally correct in their conclusions—magistrates in committing, or grand juries in finding "no bills".

In the result the Committee, with the exception of the Chairman, can not conclude that the safeguard afforded by an enquiry by the grand jury should be abolished in all cases. Particularly in cases of murder where the death sentence is mandatory and, when carried out, is irrevocable, the Committee hesitates to recommend the abolition of anything which affords a protection to the accused; in such cases every safeguard should be observed even to the extent of duplication.

For Abolition—

Secret Sittings of Grand Juries. Some criticism has been voiced against the grand jury system on the ground that the hearings are in camera. It has been suggested that grand juries sitting in secret may only reflect the opinion of Crown counsel who usually produce the evidence to the grand jury. There is thus, such critics aver, no real safeguard for the interests of the public, and it is desirable that the administration of justice should be open to all in all its important phases. Because of the absence of any cross-examination there may be some basis for the first objection. As to the second criticism, however, it is difficult to believe that Crown counsel and thirteen representative citizens would knowingly and dishonestly lend themselves to the side-tracking of an issue when they knew there should be a further trial by a petit jury.

Against Abolition—

An Ancient Institution. The historical aspects of the grand jury system have been referred to at the beginning of this section of the report. While there is always sentiment for retaining old customs and old institutions, your Committee, nevertheless, feels that this should not be permitted to stand in the way of bringing our administration of justice up to date to meet present-day conditions. If there are better ways and methods of administering justice, your Committee feels that such ways and methods should be adopted. Because an institution is ancient it is not necessarily fundamental.

Against Abolition—

Administration of Justice Requires Public Co-operation and Confidence. Grand juries provide an important field for public service. Grand

jury service imposes a responsibility for the administration of justice on the individual citizen and creates an opportunity for him to obtain a clear understanding of the care with which the rights of the state and the individual are protected. This knowledge creates a respect for the law and a responsibility for its maintenance. A great many people undoubtedly feel, and many give expression to the view, that the grand jury system should be retained because of its educational value. The holders of this view assert that the people should feel that the administration of justice is something which they control, that it does not consist of mysteries known only to lawyers and judges. The grand jury takes in a cross-section of the whole community in which it presides. It has a view of the moral conditions in that community. It has the opportunity to see how the law is administered and frequently it finds defects in the law and makes recommendations. It is a representative section of the community concentrated upon the moral conditions of that community with a view to improving them if it can. The grand jury imparts to its members a sense of respect for the law and its fairness which is carried back into the community from which it comes. It is an education to those who sit on the jury and it is a method whereby the public can be kept familiar with our laws and criminal administration and, consequently, it inspires public confidence in the administration of justice.

This is particularly important during war time when the public, in the interest of the welfare of the state as a whole, must submit to various forms of regulations; the public should feel that it is taking an important part in the administration of justice by reviewing the evidence before a subject's life or liberty is placed in jeopardy. The Committee, with the exception of the Chairman, is of the opinion that this argument in favour of the retention of the grand jury system is impressive.

This phase of the question also applies to the inspection of public buildings. Although there was much justifiable criticism levelled at the grand jury system because of the unnecessary duplication and repetition of inspections by grand juries, the Committee is of the opinion that occasional inspections of public buildings by grand juries have an undoubted value and that such inspections have a beneficial effect on the officials in charge of such buildings which could not be attained by inspections by departmental officials.

Against Abolition—

Takes Away a Fundamental Right. The grand jury is essentially a safeguard so that an accused person cannot be put on trial before a petit jury unless there is sufficient evidence to warrant putting him on his trial. The functions and adequacy of magistrates and of grand juries as safeguards have been discussed in a previous paragraph.

Against Abolition—

Safeguard Against Indictments by the Attorney-General or Any Person by Order of Court under Section 873, Criminal Code. Under the Criminal Code the Attorney General may prefer a bill of indictment for any offence and any person may prefer a bill of indictment by order of the court. In both cases the indictment must go before a grand jury and a true bill must be found before the person indicted is placed on his trial. It has been pointed out to the Committee that if grand juries were abolished, a person could be indicted

by the Attorney-General or by any person on the order of the court and placed on his trial without the intervention of a magistrate or grand jury or any other safeguard against capricious or unwarranted prosecution. It is conceivable that an accused person might be put on trial for his life without any impartial judicial body or officer having determined whether there was sufficient evidence to put him on his trial. The Committee agrees that this is a fundamental difficulty and one that must be met if grand juries are to be abolished. While, fortunately, the Province of Ontario has always had Attorneys-General who would be unlikely to abuse the power vested in them, the Committee feels that a long view must be taken and that a safeguard must be interposed which would prevent any possible abuse of the power.

The Committee has decided and recommends that where an indictment is laid by an Attorney-General or by anybody on the order of the court a reviewing jury should function in the same manner as a grand jury as more particularly hereinafter set out.

Conclusion

After carefully considering the representations and submissions made to the Committee and the arguments for and against abolition which have been briefly referred to, the Committee has come to the conclusion and recommends that there should be a partial abolition of grand juries in the province, subject to the views of the Chairman hereinafter expressed.

The Committee, with the exception of the Chairman, is of the opinion that there is a considerable difference between cases tried in the courts of general sessions of the peace of the counties and districts and those tried in the Supreme Court. In cases triable in the courts of general sessions of the peace the accused person has three options. He may be tried in a summary manner before a magistrate, he may elect speedy trial before the county judge without a jury, or he may elect trial by a jury. In other words, at the present time as to such offences the accused may elect a mode of trial which does not involve an enquiry by a grand jury. Hence, the abolition of grand juries in such cases does not involve as complete an interference with the rights of accused persons as would the abolition of grand juries in Supreme Court. In every case, however, there has been a preliminary examination by a magistrate and the accused has full knowledge of the charge and the nature of the evidence which will be adduced against him and the points which he will have to meet at his trial.

On the other hand, in cases triable in the Supreme Court the accused generally has no option to be tried in the several ways above indicated. Cases triable in the Supreme Court include such offences as murder, treason and rape in which the penalty is or may be death, and manslaughter where the penalty may be life imprisonment, and other serious offences.

The Committee, therefore would recommend the abolition of grand juries in the courts of general sessions of the peace but would retain grand juries in the Supreme Court, subject, however, to the views of the Chairman who, while agreeing with this conclusion of the majority of the Committee as to the abolition of grand juries in the courts of general sessions of the peace, would go farther and would abolish grand juries in all courts as hereinafter set out.

The Committee is of the opinion, however, that as previously indicated, safeguards should be set up where an indictment is preferred by the Attorney-General or by any person on the order of the court and recommends that this situation be met in the courts of general sessions of the peace by swearing in a reviewing jury of nine men from the petit jury panel which would function in the same manner as grand juries to find a "true bill" or "no bill" on such indictments. This practice is not without precedent because at the present time a jury may be sworn in from the petit jury panel to try the preliminary issue whether an accused person is fit to stand his trial.

In similar manner, if, under the laws amended pursuant to the recommendation of this Committee, an inspection of public buildings is deemed necessary by the presiding judge during the sittings of any court of general sessions of the peace, an inspecting jury could be sworn in from the petit jury panel for the purpose.

The question of the number necessary to constitute a grand jury has also engaged the attention of the Committee and representations have been made to the Committee on this point. The Committee does not feel that there is any particular merit in or necessity for the present number of thirteen to constitute a grand jury and is of the opinion that a grand jury of nine would provide ample safeguards for the purposes for which the grand jury is constituted and would effect some economy.

Further views of the Chairman

The Committee was constituted to enquire into the administration of justice with a view to,—" . . . . simplifying, facilitating, expediting and otherwise improving practice and procedure in the . . . . courts and effecting economy to the people, the municipalities and to the province generally." In my opinion, there is no aspect of the administration of justice in which these purposes could be more effectively accomplished than by the abolition of grand juries. The retention of grand juries is the very antithesis of the purposes of the Committee because there is nothing which more effectively complicates the practice and retards proceedings in the courts, involving expense which might very well be avoided.

While I am in agreement with the views of the majority of the Committee as far as they go, and I am entirely in favour of the abolition of grand juries in the courts of general sessions of the peace, I would unhesitatingly, and particularly in these war times, go further and abolish grand juries in all the courts.

There appear to be two main objections to total abolition—that grand juries are necessary as a safeguard for accused persons and that grand juries serve to familiarize the members of the jury with the administration of justice.

While every reasonable safeguard is necessary to prevent innocent persons being subjected to the jeopardy, inconvenience, expense and embarrassment of a trial, I do not feel that under our present system grand juries are at all necessary for this purpose. The report of The Business of Courts Committee in England under Lord Hanworth, March, 1933 (at page 70), states, "We . . . have not failed to appreciate that an accused person might rightly value the

rejection of a bill of indictment against him without having to stand a trial. Yet we have to balance these advantages against the cost both in time and money and the burden of service involved by their retention." That, I think, is the real question to be determined, i.e., whether the advantages are commensurate with "the cost both in time and money and the burden of service involved by their (grand juries) retention."

As to safeguards, the situation in Ontario is vastly changed from what it was some years ago. At the present time only barristers are appointed magistrates whereas prior to 1934 many laymen were appointed and the majority of magistrates were laymen. In 1933, of the 148 magistrates in Ontario 115 were laymen and only 33 were barristers. At present, of 72 magistrates in the province 48 are barristers and only 24 are laymen. This ratio of barristers to laymen will undoubtedly increase with the maintenance of the present policy of appointing only barristers as magistrates. We now, therefore, have the situation that in most of our magistrates' courts the evidence is heard and the law is applied by magistrates trained in the law and their decisions whether to commit for trial or otherwise, are a much greater safeguard than was previously the case when such a large proportion of laymen performed the same function. Furthermore, I am confident after several years experience as Crown attorney and more recently as Attorney-General, that the abolition of grand juries will engender more careful consideration by magistrates before committing than is now the case. It is only natural that when magistrates know there is no further intervening tribunal before accused persons must stand trial they will be very circumspect about committing for trial. On the contrary, and from the same experience, I am of the opinion that under the present system there is sometimes, and not unnaturally, a disposition on the part of magistrates to commit for trial, realizing that a grand jury will intervene to determine whether there will be a trial or not. As a matter of fact, it not infrequently happens now that cases are committed for trial by consent of counsel for the accused. All of this would be eliminated, and I am confident that there would be far greater care on the part of magistrates before committing for trial if grand juries were abolished.

The views of British jurists are also worthy of consideration. On this aspect of safeguards Lord Marshall of Chipstead had this to say (House of Lords Debates 1933, Page 1058),—"It has been argued that the safety of the subject is protected by the grand jury. . . . Inasmuch as representatives of the British press attend all our courts of summary jurisdiction they are the best protection for the British public." The Lord Chancellor, Viscount Sankey, in the same debate expressed himself similarly in these words,—"I quite agree with my noble friend Lord Marshall, that one of the greatest safeguards to prevent injustice being done nowadays is a vigilant press. . . . Experienced . . . magistrates . . . and a vigilant press have rendered the necessity for a grand jury quite out of date." I am in entire agreement with these statements and regard them as constituting very substantial if not, indeed, conclusive answers to those who argue that grand juries are still necessary as safeguards.

The figures as to the number of "no bills" found by grand juries in Ontario are offered by some as proof or, at any rate, as an argument for the retention of grand juries. If it could be assumed that grand juries are infallible I would agree that these figures are impressive. But again from my experience as Crown attorney and as Attorney-General, I am by no means convinced that grand

juries are infallible. As a matter of fact, I recall several cases, and no doubt many others have occurred, where grand juries found "no bills," indictments were afterwards preferred, subsequent grand juries found "true bills," and the accused were convicted at their trial. While, undoubtedly, safeguards for accused persons are necessary, the interests of the state are also of consequence. It is not, therefore, unreasonable or illogical to observe that of the number of "no bills" found by grand juries, some proportion may have been incorrectly so found and the state may have suffered thereby. In other words, it is by no means certain that grand juries are always right in their conclusions when they find "no bills" so that they may be safeguards to accused persons at the expense of that which is in the best interests of the State.

As to the argument that the grand jury system serves to familiarize grand juries with our system of the administration of justice, I refer to the remarks of Lord Darling (House of Lords Debates 1933, Page 1056) where he said,—"It is, I think, hardly worth while putting so many people to trouble and expense, as the Lord Chancellor has indicated, simply in order that some of the grand jurors may receive what is similar to a University education." In the remarks of Lord Marshall of Chipstead and of the Lord Chancellor, Viscount Sankey, which I have previously quoted, reference is made to the press and to a 'vigilant" press in relation to the administration of justice. I think that the splendid service rendered by the press nowadays, with their extensive reports of proceedings in our courts supplies whatever might be lost by the abolition of grand juries in the direction of familiarizing grand jurors with the administration of justice. Means of communication and for the dissemination of information have improved so enormously in the last few years that almost every detail—in fact sometimes too many details—of all important court proceedings are reported in the press. The radio also adds to the distribution of information along similar lines. I am, therefore, unable to see that this advantage, if it can be considered an advantage, is at all commensurate with or even an important factor against, "the cost both in time and money and the burden of service involved by their (grand juries) retention," to repeat the words used in the report of the Business of Courts Committee previously quoted.

I am unable to understand why it is necessary for us to retain grand juries in this province when they have been abolished in most other jurisdictions of the British Empire. Ontario is, in fact, the only remaining jurisdiction of considerable size and population which retains the grand jury system. I cannot believe that conditions here are so radically different from what they are in other British jurisdictions as to make it necessary for us to retain grand juries when they have been abolished in so many other jurisdictions. I am quite sure that the remaining safeguards in Ontario would be just as ample as they are in the other jurisdictions. I am equally certain that the desirability of familiarizing grand juries with the administration of justice is no greater here than in the other jurisdictions.

While, as stated in the report of the majority of the Committee, the opinions expressed and representations made to the Committee did not favour the abolition of grand juries, I am not particularly impressed with or influenced by this fact. It is, I think, regrettable that so many persons in Ontario who participate in or are associated with the administration of justice, either fail to appreciate the desirability of improving conditions or are so concerned with tradition that they are unable to reconcile tradition with the desirability of "simplifying, facilitating,

expediting and otherwise improving practice and procedure in the Courts and effecting economy to the people, the municipalities and to the province generally". In this repect we have lagged far behind most jurisdictions in the British Empire, and notably England herself. Enormous strides have been made in this direction in England within the last quarter century and I am unable to understand why we of this province cannot make equal progress, particularly since our jurisprudence, our practice and our entire system of the administration of justice is based on that of England.

Grand juries were abolished in England, probably as a war measure, during the period 1917 to 1922. It is most significant that with that experience, and after an interval of over ten years, by an Act of the British Parliament grand juries were again abolished in 1933 with some minor exceptions as to counties and offences and they remain abolished at the present time. I would, therefore, and as a war measure in the present very serious emergency, abolish all grand juries in this province for the duration of the war and for one year thereafter. I do not feel they are necessary for the reasons I have endeavoured to state. But I do feel that before the conclusion of the present struggle we will need the services of every able bodied man and woman to assist in our war effort, directly or indirectly. I think that it is an anomaly to continue, for the duration of the war at any rate, our grand jury system involving the attendance at court of a judge, grand jurors, witnesses, officials and all the array of persons which grand juries involve.

THE COMMITTEE THEREFORE RECOMMENDS, subject to the further views of the Chairman as expressed above,—

1. That grand juries be abolished in the courts of general sessions of the peace;

2. That the present system of grand juries be continued in the Supreme Court of Ontario;

3. That provision be made for the swearing in of reviewing juries from the petit jury panel when an indictment is preferred by the Attorney-General or by any person by the order of the court, before any court of general sessions of the peace;

4. That the number of grand jurors be reduced to nine and the number required to find a true bill be reduced to five; and

5. That the presiding judge, at any sittings of the court of general sessions of the peace, shall be empowered to swear in a jury of nine from the petit jury panel for the purpose of making an inspection of public buildings, if in the opinion of such judge an inspection is desirable and may be properly made under the laws as amended in accordance with the Committee's recommendations under the heading INSPECTING JURIES.

INSPECTING JURIES

For a great many years it has been the practice of the courts to permit the grand jury to make an inspection of the public buildings of the county. No statutory authority for such inspections existed in Ontario prior to 1936. Because

of the frequency of visits of grand juries to certain public institutions, particularly in the city of Toronto where seven grand juries are called each year, legislation was passed in 1936 for the purpose of limiting the number of inspections made by grand juries. The words which operate to effect such restriction and which are contained in subsection 1 of section 44 of The Jurors Act are ". . . where such an inspection has been conducted within the county or district within six months prior to the date of the commencement of such sittings, no inspection shall be made without the specific consent of the judge." The evidence before the Committee is that the legislation has not been as effective in restricting the number of inspection trips as it might be, by reason of the fact that some of the judges, acting under the final words of the provision, specifically consent to inspections being made by grand juries notwithstanding that inspection has been made by another grand jury within the preceding six months. In fact the city hall and the gaol at Toronto have been inspected by grand juries on thirteen occasions since October, 1936. The Committee is of opinion that a provision limiting the number of inspections by grand juries should not be subject to any exception by reason of a judge directing or consenting to the making of additional inspections.

THE COMMITTEE THEREFORE RECOMMENDS:

That section 44 of The Jurors Act be amended by striking out the words "without the specific consent of the judge" at the end thereof.

IMPROVING QUALIFICATIONS OF JURORS

Many submissions have been made to the Committee that it is desirable to improve juries by raising the qualifications of the persons whose names appear on the jury panels. It is the opinion of the Committee that if the present law were carefully carried out by the county selectors, local selectors and others who are charged with duties under it, there would be less cause for complaint as to the persons comprising jury panels.

With regard to the suggestion that assessors in compiling their lists should be required to indicate the educational attainments of persons eligible for jury duty, it was generally agreed by those expressing views to the Committee that, while in some cases educational attainments may be of assistance in determining whether or not a man will make a good juror, many persons eminently qualified to serve on juries have had little schooling. The suggestion that assessors indicate generally the education, experience and physical fitness of persons eligible for jury duty was also considered to be an unsatisfactory answer to the problem. In the larger cities assessors frequently do not see many of the persons who are eligible for jury service and the Committee has concluded that any information which the assessors might be required to furnish, in addition to that now given by them, would be of no material assistance.

The proposal that a board be set up in each of the larger urban centres, by increasing the size of the board of local selectors or otherwise, which would investigate all persons whose names are proposed to be placed upon the jury list must be dismissed as impracticable in view of the great amount of work involved in making a personal investigation of many hundreds and, in some cases, thousands of persons.

The Committee is impressed by the choice and clarity of the language by which the manner of selecting jurors is prescribed in The Jurors Act. Subsection 2 of section 16 requires the local selectors to "select such persons as in their opinion, or in the opinion of a majority of them, are, from the integrity of their characters, the soundness of their judgment and the extent of their information, the most discreet and competent for the performance of the duties of jurors." Subsection 1 of section 21 requires that the local selectors shall "distribute the names of the persons so selected into four divisions; the first consisting of persons to serve as grand jurors in the Supreme Court; the second of persons to serve as grand jurors in the inferior courts; the third of persons to serve as petit jurors in the Supreme Court; and the fourth of persons to serve as petit jurors in the inferior courts, and shall make such distribution according to the best of their judgment with a view to the relative competency of the persons to discharge the duties required of them respectively." The directions contained in these provisions if properly followed, would result in suitable persons being chosen for jury duty. In order to ensure that these directions are properly complied with, the Committee favours a provision that every selector be required to take an oath that he has conscientiously carried out the provisions of The Jurors Act relating to the selection of jurors before being entitled to receive any allowance in respect of his services.

Criticism has been directed at the number and nature of the classes of persons who are exempted from jury duty by section 3 of The Jurors Act. A study of the exemptions indicates that the classes of persons exempted are so numerous and some classes so large, that the general qualification of jurors on the lists is probably impaired. For convenience the exemptions are here set out:

> 3.—(1) The following persons shall be exempt from being returned and from serving as grand or petit jurors, and their names shall not be entered on the rolls prepared and reported by the selectors of jurors as hereafter mentioned:—
>
> (*a*) Every person sixty-five years of age or upwards;
>
> (*b*) Every member of the Privy Council of Canada and of the Executive Council of Ontario;
>
> (*c*) Every member of the Senate and of the House of Commons of Canada and of the Assembly;
>
> (*d*) The secretaries of the Governor-General and of the Lieutenant-Governor;
>
> (*e*) Every officer and other person in the service of the Governor-General or of the Lieutenant-Governor;
>
> (*f*) Every officer, clerk and servant of the Senate and of the House of Commons of Canada, of the Assembly, and of the Public Departments of Canada and of Ontario;
>
> (*g*) Every officer and servant of the Dominion and Provincial Governments;

(*h*) Every judge;

(*i*) Every police magistrate;

(*j*) Every sheriff, coroner, gaoler and keeper of a house of correction or lock-up house;

(*k*) Every sheriff's officer and constable;

(*l*) Every minister, priest or ecclesiastic under any form or profession of religious faith or worship;

(*m*) Every barrister and every solicitor of the Supreme Court actually practising, and every student-at-law;

(*n*) Every officer of any court of justice;

(*o*) Every physician, surgeon, dental surgeon, pharmaceutical chemist and veterinary surgeon qualified to practice, and in actual practice;

(*p*) Every member of His Majesty's Army, Navy or Air Force on full pay;

(*q*) The officers, non-commissioned officers and men of every militia corps, and a certificate under the hand of the officer commanding any such corps shall be sufficient evidence of the service in his corps of any officer, non-commissioned officer or man for the then current year, and of his exemption;

(r) Every pilot and seaman engaged in the pursuit of his calling;

(*s*) Every head of a municipal council;

(*t*) Every municipal treasurer, clerk, collector, assessment commissioner, assessor and officer;

(*u*) Every professor, master, teacher, officer and servant of any university, college, institute of learning or school;

(*v*) Every editor, reporter and printer of any public newspaper or journal;

(*w*) Every person employed in the management, working of a railway or street railway and every person permanently employed by any public commission carrying on the business of developing, transmitting or distributing electrical power or energy;

(*x*) Every telegraph and telephone operator;

(*y*) Every miller;

(*z*) Every fireman belonging to any fire department or company, who

has procured the certificate authorized by section 1 of The Firemen's Exemption Act, during the period of his enrolment and continuance in actual duty as such fireman; and every fireman who is entitled to and who has received the certificate authorized by section 4 of the said Act; but no fireman shall be exempt from serving as a juror unless the captain or other officer of the fire department or company, at least five days before the time appointed for the selection of jurors, notifies to the clerk of the municipality the names of the firemen belonging to his department or company, and residing within the municipality, who are exempt and claims exemption for them.

The Committee favours the repeal of clauses (*e*), (*f*) and (*g*) being of the opinion that there is no special reason for exempting civil servants from jury duty. The Committee would insert the words "police officer" and "police constable" in clause (*j*), because the nature of the duties performed by police officers and police constables renders it essential that they always be available for the performance of their duties. The Committee would restrict clause (*o*) so that it would apply only to physicians and surgeons in actual practice. The Committee favours the repeal of clause (*q*) as members of the Army, Navy and Air Force on full pay are exempted by the previous clause. The Committee also favours the repeal of clauses (*t*), (*u*), (*v*) and (*y*) on the ground that no real need for exempting the persons therein listed exists to-day. The Committee suggests that clause (*w*) should be repealed and the following substituted therefor:

(*w*) every person employed in the actual working of a railway or street railway or public commission carrying on the business of developing, transmitting or distributing electrical power or energy.

The purpose of this provision is to exempt persons carrying on essential services, and the Committee is of opinion that the revised wording would except from exemption those persons whose attendance at work is not absolutely essential.

The Committee's purpose in recommending a revision in the present exemptions is to achieve as far as possible an improvement in the qualifications of jurors. It is not to be presumed that the persons who are removed from the provisions of the exemption clauses have no special reasons to claim exemption. Rather it is an indication that any such reasons are outweighed by the need for jurors with the best possible qualifications.

Jury service should be regarded not only as the right, but the responsibility and duty of every citizen. Exemption from military service is not permitted upon the ground of inconvenience to the individual. Jury service is essential to our system of administering justice, and in the interests of the jury system and the administration of justice it is of paramount importance that individuals summoned as jurors should assume their obligation to society.

The Committee would not exclude in an arbitrary way any exemptions other than those provided by section 3 of The Jurors Act, but would recommend the adoption of means to prevent any person not coming within the exemption clauses from being excused from jury duty except after careful investigation of all the facts by a judge.

It has been represented to the Committee that it is not uncommon for persons to be excused from jury duty after being summoned by reason of their having important business engagements which conflict with their attendance in court and it is suggested that such a practice is becoming altogether too prevalent in certain parts of the Province. In order to dispel any suggestion that persons may be improperly excused from jury duty, the Committee would require all such applications to be made to a judge, and as Supreme Court judges attending the Assizes are in the county town for a very short time and have neither time nor opportunity to deal adequately with such matters, the Committee would give county and district court judges jurisdiction in such matters. In order that the sheriff may have ample notice of any alterations in the jury list by way of exemptions, all applications for exemption should be made not less than five days before the date fixed for the attendance of a jury and applications should be made to the judge through the sheriff who would be responsible for the attendance before the judge of any person desiring to be exempted.

THE COMMITTEE THEREFORE RECOMMENDS:

1. That every person charged with the duty of selecting persons for jury service be required to take an oath that he has conscientiously carried out the provisions of The Jurors Act with regard to the selection of jurors devolving upon him as a county or local selector, or as the case may be, before being entitled to receive the fees provided by the Act;

2. That the following persons now exempt be made liable for jury duty by making the necessary amendments to The Jurors Act:

(*a*) Every officer and other person in the service of the Governor-General or of the Lieutenant-Governor;

(*b*) Every officer, clerk and servant of the Senate and of the House of Commons of Canada, of the Assembly, and of the Public Departments of Canada and of Ontario;

(*c*) Every officer and servant of the Dominion and Provincial Governments;

(*d*) Every dental surgeon, pharmaceutical chemist and veterinary surgeon;

(*e*) The officers, non-commissioned officers and men of every militia corps;

(*f*) Every municipal treasurer, clerk, collector, assessment commissioner, assessor and officer;

(*g*) Every professor, master, teacher, officer and servant of any university, college, institute of learning or school;

(*h*) Every editor, reporter and printer of any public newspaper or journal; and

(*i*) Every miller;

3. That the exemptions applicable to persons employed in the management and working of railways, street railways and power commissions be restricted to persons employed in the actual working of such railways and commissions;

4. That police officers and police constables be exempted from jury duty; and

5. That any person summoned for jury duty be excused only by a judge upon showing reasons therefor beyond his control or reasons other than mere inconvenience; and that all applications be made to the county or district court judge through the sheriff at least five days before the day named for attendance.

Increased Fee in Jury Actions

With respect to the view which has been expressed that the jury fee now payable upon entering a civil action for trial should be increased to a more substantial amount, as is the case in the Provinces of Quebec and Manitoba, the Committee observes that while it is desirable to reduce the expenses of litigation which are paid out of taxation, it is equally important to ensure that no obstacle is placed in the way of any person who desires to have his rights determined by a jury.

The Committee Therefore Recommends:

That the fee payable upon entering an action for trial by jury be not more than a nominal amount.

Jury Trials Involving Corporations

In most of the provinces of Canada it has been recognized, either by legislation or by judicial decisions, that actions against municipal corporations are to be distinguished from actions against persons or other corporations in so far as the right to a trial by jury is concerned. The practice of requiring actions against municipal corporations, where the issue is based on the non-repair of a highway or sidewalk, to be tried without a jury is fairly general. None of the provinces, however, appears to have any special legislation relating to trials involving other types of corporations. The Committee is therefore not inclined to make any recommendation respecting the practice at trials where a corporation other than a municipal corporation is involved.

Section 53 of The Judicature Act reads:

53. Actions against a municipal corporation or board of police trustees for damages in respect of injuries sustained by reason of the default of the corporation in keeping in repair a highway or bridge, shall be tried by a judge without the intervention of a jury, and the trial shall take place in the county which constitutes the municipality or in which the municipality or police village is situate.

It may be observed that there are two principal limitations contained in

the section. First, it is limited to actions against municipal corporations or boards of police trustees and, secondly, it is further limited to actions for damages in respect of injuries sustained by reason of the default of the corporation in keeping in repair a highway or bridge.

There seems to be little doubt that the reason for the second limitation is that when the section was enacted a substantial majority of the actions brought against municipalities at that time were in respect of the non-repair of highways and bridges. To-day other actions based on negligence are frequently brought against municipal corporations by reason of the extended nature of municipal undertakings. As a convenience and service to the public, municipal corporations are called upon to and do operate utilities of various kinds including electrical supply systems, transportation systems and waterworks systems.

The narrowness of the first of the limitations in the above quoted section is probably explained by the fact that the section was passed before it became the general practice of municipal corporations to create public utility commissions and charge them with certain duties and functions otherwise carried out by the municipal council. Where, however, a separate board or other body is created for the purpose of exercising and performing powers and duties which would otherwise be exercised and performed by the council it appears that the same rights and privileges relating to trials of actions should be extended to that board or other body. The reasonableness of this is appreciated when it is pointed out that the section would apply to an action for the non-repair of a highway within a cemetery owned and operated by the municipality, whereas in a municipality where the council has delegated its power with respect to the cemetery to a cemetery board, the section would not apply.

On the other hand a board or commission which has been created by a municipal council to carry on certain of the undertakings of the municipality, may, with regard to some of its undertakings, be in actual competition with other persons or corporations. In such cases it may be argued that the creation of a board or commission by a municipal council does not justify the application of any special law to the board unless that law also applies to the competitor. In view of the possibility of such competition, the Committee is not inclined to recommend that actions against boards and commissions created by municipal councils be tried without a jury in all cases but feels strongly that such a principle warrants further consideration.

It may be pointed out that the exclusion of jury trials in actions against certain corporations is not without precedent. By section 28 of The Sandwich, Windsor and Amherstburg Railway Act, 1930, it is provided that "every action brought for damages by reason of negligence in the operation of the railway . . . shall be brought and tried as if it were an action against a municipal corporation for damages in respect to injuries sustained by reason of the default of a corporation in keeping in repair a highway."

THE COMMITTEE THEREFORE RECOMMENDS:

1. That section 53 of The Judicature Act requiring certain types of actions against municipal corporations and boards of police trustees to be tried without a jury be extended to apply to all actions for damages in

respect of injuries sustained by reason of the default or negligence of municipal corporations and boards of police trustees; and

2. That consideration be given to the extension of the principle of requiring trial of actions without a jury to all actions against bodies corporate created or established by municipal corporations pursuant to statutory authority in respect of injuries sustained by reason of the default or negligence of any such body.

Reduction in Number of Jurors

In certain of the Western Provinces petit juries have been reduced to six jurors in some cases and eight in others. In England a special war-time measure provides for seven-man juries. Why the numbers six, seven or eight were chosen in the various jurisdictions indicated is difficult to understand and it would seem that the numbers in each case must have been chosen arbitrarily. It would be reasonable to conclude that the principle purpose for the reduction in numbers in each case was to effect a saving of expense, although no doubt in England the engagement of a large part of the man power and woman power in war services and war industries was an important factor. It is unlikely that a reduction in the number of jurors in criminal trials would meet with favour by either the judges, the profession or the public generally. The dissatisfaction resulting would probably not be commensurate with the monetary saving involved.

The Committee Therefore Recommends:

That the number of jurors constituting a jury in the Supreme Court, the courts of general sessions of the peace and the county and district courts be not reduced.

Right to Jury Trial

It has been suggested that the rules governing the trial of civil actions with the intervention of a jury should be altered so as to provide that every action shall be tried by a judge sitting without a jury unless the party desiring a jury satisfies the court that the questions in issue are more fit for trial by a jury than by a judge. This would, in effect, remove the *prima facie* right to a jury which exists in the case of most common law actions and would place the burden of establishing the right to a jury upon the litigant who asks for it.

In the view of the Committee the present practice is preferable. While a *prima facie* right to a trial by jury exists in most common law cases every opportunity is afforded to eliminate the jury in those cases where its use would not be suitable. The law relating to the right to a jury has become well established under the present practice whereas under the proposal indicated it would be virtually impossible to draft legislation which would effectively prevent rulings as to the right to a jury from varying with the viewpoints of the various judges. If the judges were to follow the present law in determining whether the questions in issue were more fit for trial by a jury than by a judge, there would be little advantage in making any amendment. If they were not to follow the present law their rulings would vary greatly according to the personal views of each judge.

The Committee would also reject the proposal because the right to a trial by jury should not depend solely upon the discretion of a judicial or other officer and the *prima facie* right to a jury which now exists, with certain well established exceptions, should be preserved.

THE COMMITTEE THEREFORE RECOMMENDS:

That the right to a trial by jury which exists under the present law and practice should not be altered.

SPECIAL JURIES

Figures furnished to the Committee indicate that the average number of special juries which are required by litigants in Ontario does not exceed two or three each year. So far as the Committee was able to ascertain a special jury has never been used in a county court trial and has been asked for on only one occasion in connection with criminal proceedings.

While the legislation permitting a special jury to be required by a litigant has been criticized as a law for the rich, the fact that the party requiring a special jury must pay the cost of it in the first instance meets that objection to a large extent. Experienced counsel expressed the view that the trial of certain types of cases by a special jury is desirable and that the retention of the right to such a trial is important. No one strongly advocated the abolition of special juries. The present machinery for calling a special jury is working very satisfactorily. The panels used are those which are prepared for grand jury purposes so that no great difficulty or inconvenience is occasioned to anyone when a special jury is required. The Committee sees no advantage in discontinuing special juries in the Supreme Court of Ontario.

It is to be observed that where a special jury is required, it shall consist of persons whose names appear on the roll of grand jurors for the Supreme Court or on the roll of grand jurors for the inferior courts for the year in which the notice to the sheriff is given. Both rolls are used. If grand juries are abolished in the court of general sessions of the peace, the selection would be limited to the roll of grand jurors for the Supreme Court. While the roll of grand jurors for the Supreme Court in Toronto usually contains more than 200 names, which is ample for the selection of a special jury, the number is considerably less in many of the other counties and districts. This, however, does not constitute a problem for the sections of The Jurors Act respecting special juries provide for the taking of names from the roll of grand jurors for another year to make up a total of 40 names.

The situation would not be greatly altered by eliminating grand juries in the general sessions. As indicated above so far as the Committee is aware, a special jury has never been required in a trial in a county or district court. That is, however, not surprising having regard to the amounts involved in most county and district court actions and to the cost of a special jury. If, therefore, the abolition of grand juries in the courts of general sessions of the peace renders the elimination of special juries in county and district courts necessary or desirable, no serious objection can be taken. Moreover, apart altogether from the question of abolition of grand juries, the Committee is of the opinion

that the right to a special jury in county court actions is unimportant and that in the interests of simplification of procedure in the county courts, the right to trial by special jury in the county courts should be abolished.

THE COMMITTEE THEREFORE RECOMMENDS:

1. That present provisions as to special juries in Supreme Court trials be not altered; and

2. That the right to trial by special jury in the county and district courts be abolished.

WOMEN JURORS

Women were made subject to the same liability as men for jury service in England by the Sex Disqualification (Removal) Act, 1919, which appears to have been the last measure necessary in that jurisdiction to render women equal to men in all aspects of the law.

In this province, in view of the passing of The Married Women's Property Act, the granting of the franchise to women, and the general tendency in all legislation to place women on the same footing as men, it is difficult to understand why women have not been made eligible to serve upon juries. Since women are recognized as being able to hold property, transact business, engage in professions and callings, and generally conduct themselves in the professional, commercial and industrial life of the province in the same manner as men, it would be unreasonable to argue that they lack the qualifications essential to a good juryman. In short, as women are regarded by most laws of the province relating to civil rights and the holding of property as citizens, they should have all the rights and duties of citizens. There is just as much reason why they should be required to attend courts and act as jurors on the trials of civil and criminal matters as men, and similarly there is just as much reason why they should claim and be granted the right to perform this service, which is an essential part of the administration of justice, as men.

According to the information of the Committee the system of mixed juries has been found to be very satisfactory both in England and in the States of the United States of America where it exists. Of course, consideration would have to be given to certain special provisions if women are to be permitted to sit upon juries. In England it is not necessary that the number of men and women called on a petit jury be equal. The names of the men and women on the panel are placed in one box and drawn indiscriminately until the jury is made up. However, the sheriff must select such a number of women as will bear the same proportion to the number of men on the panel as the total number of women bears to the total number of men listed on the jurors' book. A husband and wife must not be summoned to serve on the same occasion. A judge may, on the application of the parties, or any of them, or at his own instance, order that the jury shall be composed of men only or of women only. He may also on the application of a woman, grant exemption by reason of the nature of the evidence to be given or of the issues to be tried. Where a woman satisfies a summoning officer by medical certificate or otherwise that owing to a special condition of health she is or will be unfit to serve as a juror, the officer may grant her exemption. Some special exemptions applicable only to women would no doubt be

required. Members of certain religious orders living in convents are exempt under the English Act.

If women are to serve upon juries in Ontario, to be practical the enactment providing therefor must apply equally to juries in criminal and civil matters. Juries in both types of trials are chosen from the same panels and to permit women on juries in civil trials but not in criminal trials would unreasonably complicate statutory procedure relating to the selection of jurors and result in other ramifications which are not desirable.

There are three difficulties which should be overcome before the inclusion of women on juries is permitted in Ontario. The first is the provision of the Criminal Code which requires a jury in the trial of a capital offence to be kept together. (Section 945, subss. 3, 4, Criminal Code.) The second is a matter of interpretation. Whether the word "person" as used in the Criminal Code with reference to jurors includes women is a matter which should be clarified before any criminal trial in which women compose a part of the jury, is held. The third difficulty is one of accommodation. Many, if not all, of the court houses of the province would require alteration so as to accommodate mixed juries properly.

If the provision is made by legislation for mixed juries at a session of the Legislature held in the late winter or early spring of any year, the earliest time at which juries trying cases could include women would be almost two years later. This delay is occasioned by reason of the fact that regard for the new law would be required on the part of assessors as well as selectors. Sufficient time must also be allowed to permit necessary alterations in the court houses of the province to be made. For these reasons and because of the amendments to the Code which would be necessary, provision should be made in the provincial legislation for its coming into force by proclamation of the Lieutenant-Governor.

In conclusion the Committee feels that mixed juries are desirable because they will complete the full status of citizenship for women, will assist in alleviating the shortage of men resulting from the engagement of many men in war services and war industries, and will encourage discipline in the jury room and thus be conducive to more efficiency and expedition in the deliberation of juries.

THE COMMITTEE THEREFORE RECOMMENDS:

1. That a system of mixed juries be adopted in Ontario so that women may be qualified to serve on juries the same as men; and

2. That in the legislation establishing such a system provisions similar to those in the English statute be included to ensure that the proportion of women on any jury would not be either unreasonably large or unreasonably small; to provide for exempting and excusing women from jury service in certain circumstances; and to prevent a husband and wife being included on the same jury.

LAW REVISION COMMITTEE

On January 10th, 1934, the Lord Chancellor of England appointed a committee "to consider how far, having regard to the statute law and to judicial

decisions, such legal maxims and doctrines as the Lord Chancellor may from time to time refer to the committee require revision in modern conditions."

Since its creation the committee has reported upon some eight matters referred to it by the Lord Chancellor but to indicate the type of legal problems referred to the committee it will be sufficient to quote the first four references which were made at the time of its appointment. They are as follows:

(1) The doctrine of no contribution between tort-feasors. (Merryweather v. Nixan, with special reference to the remarks of Herschell L.C. in Palmer v. Wick and Pulteneytown Steam Shipping Company Limited [1894] A.C. 318.)

(2) The legal maxim *actio personalis moritur cum persona*, and the rule that "in a civil court the death of a human being could not be complained of as an injury." (Baker v. Bolton (1808), 1 Campbell 493, and The Amerika [1914] P. 167, [1917] A.C. 38.)

(3) The liability of the husband for the torts of the wife. (Edwards v. Porter [1925] A.C. 1.)

(4) The state of the law relating to the right to recover interest in civil proceedings. (See in particular Roscoe's Nisi Prius, 19th Ed., Vol. 1, 508-12.)

It will be observed that in addition to indicating the matter upon which a report is requested, cases and texts which may be of assistance to the committee are also referred to. Other matters referred to the committee, as well as the reports of the committee, are available in the committee's reports which are published in pamphlet form by His Majesty's Stationery Office.

There appears to be no statutory authority for the creation of the committee in England. The members, who are appointed by the Lord Chancellor, number some fourteen or fifteen, and include members of the Bench and Bar and solicitors. No remuneration is paid to the members nor are they furnished with any elaborate staff. There is a secretary who is engaged in private practice. He is nominally unpaid but receives an *ex gratia* allowance from time to time averaging from £50 to £75 a year. He has a female assistant secretary who is employed in the Lord Chancellor's office but it is estimated that the total work of the committee does not occupy more than a thirtieth of her time. The committee has no other assistants.

The practice followed by the committee is that a subcommittee is appointed to consider each matter referred to it, and prepare a draft report thereon. The draft report is then considered by the full committee at which time a fairly lengthy discussion usually takes place. The committee sometimes requests experts in a particular sphere of law to prepare memoranda for its assistance, although this is not the general practice. After the report is drafted in final form and adopted by the full committee it is submitted to the Lord Chancellor and, if he thinks fit, he asks the Parliamentary draftsman's office to draft the necessary Bill which is submitted to the committee for its comments. The usefulness of the committee is indicated by the fact that several of its recommendations, after having been reduced to bill form, have become law.

In the State of New York a Law Revision Commission was established in 1934 by legislative enactment. It consists of seven members, two of whom are *ex officio* members, being the chairmen of the Committees on Judiciary in both houses of the State Legislature. The Commission is given a free hand to study and report upon such matters of a legal nature as it deems advisable. Reports of both the Lord Chancellor's Committee and the Law Revision Commission of New York State have been of interest and assistance in most jurisdictions where the common law system prevails.

Without reflection upon the New York State Commission and with the greatest respect for its accomplishments, this Committee favours the system under which the Lord Chancellor's Committee operates. This Committee is of opinion that the work undertaken by a Law Revision Committee should be subject to definite limitations. The system in England is to have the committee deal only with matters referred to it by the Lord Chancellor. While there is in Ontario no position corresponding to that of the Lord Chancellor, the Attorney-General, who is the Chief Law Officer of the Province and the head of the Law Department of the Government, is very properly the official who should, in a general way, supervise the work of a law revision committee and refer matters to the committee for study and report. The Committee, however, would not limit references to the law revision committee to "legal maxims and doctrines", being of the opinion that there are matters of "lawyers' law" arising out of the Statute law which might not be accurately described as either "legal maxims" or "doctrines", but which may appropriately be referred to such a committee.

If the practice of limiting the work of the committee, as suggested in the preceding paragraph is followed, the Committee is of opinion that the law revision committee would have ample assistance if one of the law officers of the Crown were appointed secretary of the law revision committee, in addition to his other duties. He would be expected to prepare a short brief of the existing law relating to the subject matter of each reference.

In determining who shall comprise the committee, while it is essential that all its members be selected from among the most able members of the Bench and Bar and the practising solicitors of the province, it would be unwise to overlook the fact that if power is given to appoint the members of the committee the person empowered to make the appointments would, of a certainty, be prevailed upon to appoint persons who might not be well qualified to act upon it. Such a situation should be avoided and accordingly the Committee considers it desirable to have as many of the appointments as possible of an *ex officio* nature. In providing for the appointments being made in this manner there should be no difficulty in ensuring that the committee comprises persons well qualified to serve upon it. This Committee has given much thought to the composition of a Law Revision Committee and suggests some of the persons whom it considers might well be appointed to serve upon such a committee.

The advisability of taking steps to promote law reform is capably discussed by Mr. C. A. Wright, K.C., S.J.D., Lecturer at the Osgoode Hall Law School, and Editor of The Canadian Bar Review, in an article entitled "Legal Reform and The Profession" (1937), 15 C.B.R. 633-641.

THE COMMITTEE THEREFORE RECOMMENDS:

1. That a Law Revision Committee be appointed by the Attorney-General to study and report upon such matters of law as may be referred to it from time to time by the Attorney-General;

2. That the Attorney-General appoint a chairman of the committee from among its members;

3. That one of the law officers of the Crown be appointed by the Attorney-General to act as permanent secretary of the committee; and

4. That the committee be composed as follows:

(*a*) Two judges of the Court of Appeal for Ontario designated by the Chief Justice of Ontario or in default thereof by the Attorney-General;

(*b*) Two judges of the High Court of Justice for Ontario, designated by the Chief Justice of the High Court or in default thereof by the Attorney-General;

(*c*) A county court judge, designated by the Attorney-General;

(*d*) A district court judge, designated by the Attorney-General;

(*e*) The Attorney-General, or a law officer of the Crown designated by him;

(*f*) The Chairman of the Legal Bills Committee of the Legislative Assembly;

(*g*) The Treasurer of the Law Society or a Bencher designated by him;

(*h*) The Master of the Supreme Court of Ontario;

(*i*) The Vice-President of the Ontario Branch of the Canadian Bar Association, or one of the Ontario members of the Council of the Association designated by him, or in default thereof by the Attorney-General;

(*j*) The Dean of the Osgoode Hall Law School or a full-time member of the teaching staff of the Law School, designated by him, or in default thereof by the Attorney-General;

(*k*) The Head of the Department of Law of the University of Toronto, or a full-time member of the teaching staff of that Department, designated by him, or in default thereof by the Attorney-General;

(*l*) The Editor of the "Ontario Law Reports"; and

(*m*) The President of the Lawyers' Club of Toronto, or a member of the Club designated by him.

MAGISTRATES

The importance of ensuring that judges shall enjoy security of tenure of office so that they may discharge their judicial functions without any fear of interference or appearance of interference has long been recognized in Canada.

As to the judges of the superior courts, section 99 of The British North America Act provides for their removal only by the Governor-General on address of the Senate and House of Commons. The Judges Act, Canada, provides for a cessation of the payment of salary to judges of the Supreme Court of Canada, the Exchequer Court of Canada and any superior court in Canada and certain other judges upon the report of the Minister of Justice that a judge has become by reason of age or infirmity incapacitated or disabled from the due execution of his office.

As to county and district court judges, the Judges Act, Canada, provides for their removal "for misbehaviour or for incapacity or inability to perform their duties properly on account of old age, ill health or any other cause" as found by a judge or judges appointed to make inquiry under commission of the Governor-General in Council.

At the present time in this Province magistrates do not enjoy the same security of tenure of office that judges enjoy, and it is the opinion of the Committee that magistrates and judges should be placed upon substantially the same basis in this regard. In recent years the duties of magistrates have become more onerous than they formerly were and magistrates to-day exercise exceedingly important functions frequently requiring consideration of complicated law and circumstances. The magistrates try many indictable offences and prosecutions for breach of the Defence of Canada Regulations involving the liberty of the subject are determined by them. It is, therefore, the decided opinion of the Committee that the security of magistrates in the tenure of their offices should be ensured so as to exclude effectively any suggestion or appearance of interference. By way of precedent, in 1938 it was enacted by the Nova Scotia Legislature that "every police magistrate shall hold office for one year after his appointment during pleasure and thenceforth during good behaviour, but every deputy police magistrate shall hold office during pleasure." In the same Act it was provided that "no person shall be appointed a police magistrate who is not a barrister of the Supreme Court of Nova Scotia of at least three years' standing."

The Committee is of the opinion that all sitting magistrates who are appointed in the future should be barristers.

In view of the provisions relating to superannuation contained in The Public Service Act, the Committee is of the opinion that henceforth no one should be appointed a magistrate who has passed fifty-five years of age. Moreover, as recommended under the heading SUPERANNUATION, the Committee is of the opinion that the Public Service Superannuation Board should take steps to bring under the superannuation provisions of The Public Service Act, on a contributory basis, all magistrates who are not disqualified by reason of age.

The Committee is also of the opinion that magistrates should not hold office

after attaining the age of seventy-five years. In this regard the Committee feels that the provisions of the Judges Act, Canada, as to the retirement of county court judges when they have attained the age of seventy-five years afford a desirable analogy.

THE COMMITTEE THEREFORE RECOMMENDS:

1. That every magistrate hold office during pleasure for the first two years after his appointment and that thereafter he be removable only for misbehaviour or for incapacity or inability to perform his duties properly on account of ill health or any other cause as found by a judge of the Supreme Court of Ontario appointed by the Lieutenant-Governor in Council to make inquiry regarding such misbehaviour, incapacity or inability;

2. That in the future no person other than a barrister duly qualified as such according to the law of Ontario be appointed as a sitting magistrate;

3. That in the future no person be appointed as a magistrate who has passed the age of fifty-five years;

4. That every magistrate retire from office when he has attained the age of seventy-five years; and

5. That the Public Service Superannuation Board take steps to bring under the superannuation provisions of The Public Service Act on a contributory basis all magistrates who are not disqualified by reason of age.

THE PARTNERSHIP REGISTRATION ACT

An infant may carry on business either in his own name or as a member of a partnership and the provisions of The Partnership Registration Act apply to infants as well as to other persons. Complaints were made to the Committee that the Act is being used for improper purposes. A creditor who has sued a partnership frequently finds when his case comes to trial that, although he had dealt with older persons, the partnership is in fact registered in the name of an infant or infants. It is not suggested that infants should be prevented from carrying on business but the situation complained of would, to a large extent, be remedied by requiring the declaration filed under The Partnership Registration Act to state the ages of the partners.

THE COMMITTEE THEREFORE RECOMMENDS:

1. That the declaration filed under The Partnership Registration Act be required to state the age of any person named therein who is under twenty-one years of age and that all other persons named therein are over twenty-one years of age; and

2. That penalties be provided for persons furnishing any false information in any declaration filed under The Partnership Registration Act.

POOR PRISONERS DEFENCE

The provision of defence counsel for impecunious persons charged with criminal offences has never been a serious problem in Ontario. No case has been brought to the attention of the Committee where a person charged with a serious offence has been unable to obtain the services of competent counsel to defend him. The courts always protect the interests of accused persons in this regard. Furthermore, there are usually several experienced counsel available to conduct the defence of such persons. So far as appeals to the Court of Appeal are concerned a list of counsel who are willing to conduct appeals in criminal matters without compensation, when so directed by the Chief Justice, is on file at Osgoode Hall. It must be borne in mind also that any system of supplying counsel for poor prisoners would be open to abuse by persons who would otherwise find means of retaining counsel on their own account.

The Committee Therefore Recommends:

That in view of the willingness of the legal profession to defend impecunious prisoners and argue appeals on their behalf, and the possibility of and opportunities for abuse, a system of poor prisoners defence which would be provided by the Government at the expense of the taxpayers of the Province, should not be undertaken.

PRACTICE IN THE SHERIFF'S OFFICE

Encumbrances Against Goods

It has been recommended that writs of execution against goods which are now required to be filed in the sheriff's office should for purposes of convenience be filed in the county court clerk's office and that notices of intention to give security under section 88 of the Bank Act (Canada) which are now filed with the Assistant Receiver-General should also be required to be filed with the county court clerk. So far as notices under the Bank Act are concerned, the Province has no authority to legislate and whether the liens should be centrally registered at the office of the Receiver-General in each province, or registered at offices throughout the Province, is a matter of policy for the Parliament of Canada. In addition, as the present practice accomplishes a centralization of registration, any alteration in the practice might be considered a disadvantage.

While it may be argued that it would be a convenience to file writs of execution against goods in the county court clerk's office because other encumbrances against goods are filed there, it may similarly be argued that it is a convenience to have executions against goods filed in the sheriff's office because that is where executions against lands are filed. However, in many counties and districts of the Province a *de facto* amalgamation of the county court clerk's office and the sheriff's office has been effected, while in most, if not all, of the other counties and districts the offices of the sheriff and the county court clerk are in the same building.

The Committee Therefore Recommends:

That the present practice as to the registration of writs of execution against goods be not altered.

Creditors' Relief Act

It has been suggested that a sheriff should be required to give notice of moneys which he has on hand for distribution by publication in a newspaper. The Committee is of the view that a creditor who is sufficiently interested to reduce his claim to a judgment, has ample opportunity under the present practice to give notice of his judgment to the sheriff so that he will share in any moneys coming into the sheriff's hands and which are available for distribution.

The view has been expressed that the clerk of a division court who has money to distribute should be required to give notice to the sheriff so that the provisions of The Creditors' Relief Act would apply thereto. The division court is manifestly the court for the recovery of small debts, although in certain types of cases, which are the exception rather than the rule, the jurisdiction of the court extends to amounts which according to some views might not be classified as small debts. Further, in the division courts a person entering suit is required to make a deposit which is usually sufficient to carry his case through to judgment. The average amount involved and the average amount recovered in division courts are not to be compared with the average amount sued for and the average amount recovered in the higher courts. Where a judgment debtor is not able to pay the amount of a division court judgment it is usually very difficult to locate any fund available for the payment of the judgment and as a rule any such fund when located is not large. As divisions under The Creditors' Relief Act are made on a *pro rata* basis, if The Creditors' Relief Act were to apply to division court judgments a judgment creditor in the division court, having spent substantial time and money locating a fund out of which payment of his judgment might be made, would often find that he had located the fund for the benefit of creditors of the debtor having judgments in the higher courts, with very little benefit to himself.

The Committee Therefore Recommends:

1. That the present practice with regard to the distribution of money in the hands of the sheriff be not altered; and

2. That the provisions of The Creditors' Relief Act should not be made applicable to division court matters.

Exemptions under Execution Act

The chattels which are exempt from seizure under any writ of *fieri facias* issued out of any court are listed in section 2 of The Execution Act. The section is a very old one and while it served its purpose for many years its provisions are now far from satisfactory. It was enacted at a time when conditions of life were quite different from to-day and accordingly some of its language is ill-fitted to present-day conditions.

It is important that a provision of this kind should apply equally to all persons regardless of vocation or calling. While this is carried out to a degree in the section there are instances where some of its provisions would apply only to persons engaged in certain businesses the result being that by the combined effect of all clauses in the section certain persons are entitled to greater exemptions than others. This should be corrected.

THE COMMITTEE THEREFORE RECOMMENDS:

That the exemptions of chattels from seizure under The Execution Act be revised with a view to adapting them to modern conditions.

SALE OF LAND UNDER WRIT OF EXECUTION

A sheriff is not permitted to make a sale of land under a writ of execution within twelve months from the date on which the writ is delivered to him. Although a proposal was made to the Committee to reduce the period of twelve months the Committee is of opinion that no real need exists for any change and that the present period is a reasonable one.

THE COMMITTEE THEREFORE RECOMMENDS:

That the practice governing the sale of land under a writ of execution be not altered.

SEIZURE AND SALE OF COMPANY SHARES

In a report made to the Attorney-General by Mr. F. H. Barlow, K.C., some months ago a change in the practice relating to seizure and sale of company shares was recommended. While the recommendation has a good deal of merit so far as the sheriff's office and the legal profession are concerned, it has been found that, having regard to prevailing commercial practices, the proposal would not be feasible, and Mr. Barlow, who appeared before the Committee, has advised the Committee that since presenting his report he has changed his opinion with regard to the matter.

THE COMMITTEE THEREFORE RECOMMENDS:

That the practice regulating the seizure and sale of company shares be not altered.

SEIZURE OF BOOK DEBTS AND CHOSES IN ACTION

The provisions of The Execution Act enacted in 1929 which enable a sheriff to seize book debts and other choses in action do not indicate the manner in which the seizure may be made. While the provisions are workable in their present form, it is highly desirable that they should be amended and clarified so as to indicate the manner of making the seizure.

THE COMMITTEE THEREFORE RECOMMENDS:

That The Execution Act be amended to prescribe an effective and simple method of making seizures of book debts and other choses in action.

PRE-TRIAL PROCEDURE IN CIVIL MATTERS

The term "pre-trial procedure" refers to a practice now existing in some of the United States of America. While there are several reports on the system as it exists in various jurisdictions a very comprehensive report covering its

operation in several jurisdictions is contained in the Reports of the Section of Judicial Administration of the American Bar Association, 1938, which are published in pamphlet form.

It appears to be generally agreed that the purposes of the pre-trial meeting are three-fold,—(1) to narrow the issues; (2) to shorten and expedite trials, and (3) to avoid trials in cases which should not go to trial. According to the information which the Committee has, the system has been tried out in some seven or more jurisdictions and has been reported upon favourably in all but two such jurisdictions. It has been abolished in Los Angeles after a trial of some two and one-half years; in San Francisco, where it was established upon a voluntary basis, it has ceased to be used. It would appear that while perhaps feasible in all courts, with the possible exception of single judge courts, it is of most assistance in larger cities where the court lists have become very much congested. Pre-trial procedure was first used in 1929 by the surrogate court of Wayne County, Michigan, in which is located the City of Detroit. At that time the Common Law calender was 45 months behind and the Chancery calendar 24 months behind. The system has largely corrected this situation. The second jurisdiction to adopt pre-trial procedure was the City of Boston where in 1935 it was made applicable to cases on the jury list. There also the court lists were badly congested.

From the information which the Committee has before it, it appears that in the majority of jurisdictions where the system has been adopted the condition of the court lists has been such that a case upon reaching the trial list would not be tried for several months, if not years, and there appears to be no doubt that pre-trial procedure is of great assistance in remedying such conditions.

The adaptability of pre-trial procedure to cases in the Supreme Court of Ontario, with the exception of the courts held in the City of Toronto, is doubtful. It is generally agreed that pre-trial hearings must be held before a judge with power to dismiss or give judgment by default upon non-appearance of counsel; otherwise counsel would be able to take an arbitrary and independent attitude resulting in an impasse at the pre-trial hearing. Most authorities also agree that it is inadvisable to have the pre-trial judge preside at the trial. Settlements are often discussed at the pre-trial hearings and, however fair a judge may be, many counsel would feel prejudiced at the trial if it were to be held before the same judge with whom they had frankly discussed settlement at a pre-trial hearing. Because of the long distances involved, the amount of work which each of the judges of the trial division is now required to perform, and the fact that the judges of the trial division all reside in Toronto, it will be seen that as to cases arising outside of Toronto the system does not readily adapt itself to this province. In passing it may also be observed that the power to dismiss or give judgment at a pre-trial hearing, which power appears necessary to the success of the system, is something which may well be considered as altogether undesirable, for it would place in the hands of the judges power or the opportunity to force settlements before trial.

Whether or not pre-trial procedure would be workable in Toronto, it is the view of your Committee that there is no real need for it. The trial lists in the Toronto courts to-day are such that any person desiring to have his case heard expeditiously may have it brought on for trial without any unreasonable delay.

While the Committee does not doubt that there is merit in the system known as "pre-trial procedure", it is of opinion that the system is not adaptable to many of the courts of the province and is also satisfied that trials in the courts of Ontario are expeditiously disposed of without undue delay.

Reference was made by one of the witnesses appearing before the Committee to the English procedure known as "summons for directions" which is, in some respects, a variation of pre-trial procedure. According to the information of the Committee, experience has shown that such a procedure has a definite tendency to become perfunctory in nature, the result being that almost invariably upon the return of the summons an order for "the usual directions" is made. In the result and from the information at hand the Committee does not believe that such a procedure would have any real advantage over the procedure now followed in Ontario.

THE COMMITTEE THEREFORE RECOMMENDS:

That pre-trial procedure be not adopted in Ontario at this time.

RULES AND REGULATIONS GENERALLY

Under the heading RULES COMMITTEE the provisions in the statutes authorizing the making of rules of court are referred to. The statutes contain many other enactments providing for the making of rules and regulations. For example, the governing bodies of several professions and callings which are regulated by statute are authorized to make rules or regulations. Wide powers are given to the Benchers of the Law Society under The Law Society Act, The Barristers Act and The Solicitors Act. The judges may also make certain rules and regulations under The Solicitors Act. Under The Medical Act the Council of the College of Physicians and Surgeons of Ontario may make orders, regulations and by-laws as therein prescribed. The Board of Directors of the Royal College of Dental Surgeons of Ontario is required to make such by-laws as are deemed necessary for the purposes indicated in the Act. Rule making authority is vested in similar boards under The Pharmacy Act, The Drugless Practitioners Act, The Land Surveyors Act, The Architects Act, The Chartered Shorthand Reporters Act, The Chartered Accountants Act, The Certified Public Accountants Act, The Professional Engineers Act, The Veterinary Science Practice Act, The Embalmers and Funeral Directors Act and The Optometry Act, all of which Acts relate to professions and callings. It will be observed that in many of these enactments the rules, regulations or by-laws, as the case may be, require neither the approval of the Lieutenant-Governor in Council nor publication in the *Ontario Gazette*. Many other statutes authorize the making of regulations by the Lieutenant-Governor in Council, boards, commissions, Ministers of departments, and other authorities. While it is perhaps true that in most cases regulations must either be made or approved by the Lieutenant-Governor in Council, this requirement does not exist in every case.

As to the advantage of requiring all regulations to be passed or approved by the Lieutenant-Governor in Council, the Committee points out that such a practice is desirable because where regulations are made or approved by the Lieutenant-Governor in Council they are on file in the office of the Clerk of the

Executive Council and are available to any person having occasion to refer to them. Where, however, regulations are not required to be made or approved by the Lieutenant-Governor in Council there is no assurance that either the original regulations or copies will be available for inspection by the public generally or by any person interested. Rules, regulations and other forms of delegated legislation when made in accordance with the authorizing statute form a part of the law of the province to the same extent as the statutes passed by the Legislature. The practice of delegating legislative authority is increasing in all jurisdictions. It is generally recognized that this tendency is due to the increasingly complicated nature of industrial, commercial and other phases of civil life and of civil government. Hence, it is of paramount importance that all rules and regulations made under statutory authority be readily available for inspection by the public.

In order to create a central registration office for all rules and regulations passed under the public acts of the province it is not necessary that all such regulations be either passed or approved by the Lieutenant-Governor in Council. The result may be attained by requiring that all regulations be filed with a named official and by providing that regulations shall have no force or effect until so filed. A provision would be required to take care of regulations now in force.

As all regulations which require to be passed or approved by the Lieutenant-Governor in Council are on file with the Clerk of the Executive Council, the Committee favours that office as a central place for the filing of all regulations, otherwise there would be a duplication of filing of those regulations which must now be filed in that office.

The publication of rules and regulations has been considered by this Committee. It has been suggested that all regulations should be consolidated in somewhat the same manner as the Revised Statutes, and that an annual volume corresponding somewhat to the annual volume of statutes should be published. One of the reasons that the provisions contained in the regulations are not enacted in the statutes authorizing the regulations is that regulations contain provisions requiring more flexibility than is possible with statutory enactments. The statutes are amended during the sessions of the Legislature and with few exceptions there is only one session held each year. While the amendments to public acts passed at each session of the Legislature occupy many pages of the statute book their volume cannot be compared with the volume of amendments to regulations made annually. Further, there are many regulations which are not of general interest. While these facts do not affect the desirability of making the regulations available for interested persons to inspect, they do reduce the necessity for publication.

An alternative mode of publication would be to require that all regulations be published in the *Ontario Gazette* before they have the force of law. However desirable such a requirement might be, the practical aspect must be considered. In this regard there are occasionally sets of regulations passed which would occupy many pages in the *Gazette* but which very few persons would have occasion to consult. In the case of such regulations the Committee feels that the expense involved would not be warranted.

Certain statutes authorizing the making of regulations require that they

be published in the *Ontario Gazette*. In such cases the regulations are invariably published. Other regulations made or approved by the Lieutenant-Governor in Council which in the opinion of the Clerk of the Executive Council, acting on the advice of those having special knowledge of the regulations, are of a general nature having general application, are also published although publication is not required by the statute.

The practice adopted not long ago of publishing a table of proclamations, orders-in-council and regulations which have been passed by the Lieutenant-Governor in Council, in the annual volume of the statutes has proven a convenience to members of the profession and others who have occasion to refer to regulations. It is desirable and would be feasible, if the Committee's recommendations contained in this part of the report are adopted, to publish in a similar manner a list of all rules and regulations which have been passed during the preceding year and up to the time of the publication of the annual statutes.

THE COMMITTEE THEREFORE RECOMMENDS:

1. That all rules, regulations and other delegated legislation passed under the authority of any Act of the Legislature be required to be filed with the Clerk of the Executive Council within thirty days of being passed or approved, as the case may be; that all rules, regulations and other delegated legislation heretofore passed be required to be filed with the Clerk of the Executive Council not later than January 1st next following the session of the Legislature at which legislation requiring such filing is enacted; and, that any such rules, regulations or other delegated legislation not so filed should have no force or effect. (This provision would not affect regulations required to be made or approved by the Lieutenant-Governor in Council as they are now required to be filed with the Clerk of the Executive Council);

2. That the Clerk of the Executive Council be required to keep an index of rules, regulations and other delegated legislation according to subjects as well as according to the Acts under which such delegated legislation is passed; and

3. That a list of all rules and regulations passed during each year be published in the annual volume of the Statutes.

RULES COMMITTEE

CENTRALIZATION OF AUTHORITY

Probably the most important provision in the Statutes authorizing the making of rules for regulating practice and procedure in the courts is contained in section 106 of The Judicature Act. The first subsection confirms the revision of the Rules of Practice and Procedure made in 1913, including tariffs of fees and costs proclaimed by the Lieutenant-Governor in Council, and authorizes the judges of the Supreme Court of Ontario to "pass rules repealing, amending or varying the same". The second subsection authorizes the judges of the Supreme Court to amend or repeal any of the rules and to make any further or additional rules for carrying The Judicature Act into effect and particularly for regulating

and otherwise dealing with the matters indicated in the various clauses. No limitation is placed on the powers of the judges in this regard except that the Lieutenant-Governor in Council must approve of any regulations made by the judges which regulate fees payable to the Crown in respect of proceedings in any court. The rules made by the judges may modify the practice or procedure prescribed by any Statute where such modification is deemed necessary to adapt the rules to the general practice and procedure of the court, unless that power is expressly excluded. Section 108 permits the judges to delegate to a committee of themselves any power or authority conferred upon them as a body. Further powers are given to the judges to make rules under The Controverted Elections Act, The Habeas Corpus Act, The Administration of Justice Expenses Act, The Estreats Act, The Quieting Titles Act, The Matrimonial Causes Act, The Solicitors Act, The Municipal Act and The Municipal Arbitrations Act.

By The Interpretation Act the Lieutenant-Governor in Council is authorized to make regulations for the due enforcement and carrying into effect of any Act of the Legislature. Claus (*zh*) of section 32 of The Interpretation Act reads as follows:

> (*zh*) "Rules of Court" when used in relation to any court shall mean rules made by the authority having power to make rules or orders regulating the practice and procedure of such court, or for the purpose of any Act directing or authorizing anything to be done by rules of court.

The Lieutenant-Governor in Council is authorized to make rules relating to practice and procedure in the courts under The County Courts Act, The General Sessions Act, The Surrogate Courts Act, The Division Courts Act, The Charities Accounting Act, The Adoption Act and The Juvenile and Family Courts Act. Under The Land Titles Act certain general rules may be made by the Lieutenant-Governor in Council or the judges of the Supreme Court, while under The Registry Act the Lieutenant-Governor in Council is authorized to make rules. The Supreme Court may make rules under The Mental Incompetency Act. The Arbitration Act authorizes the making of rules of court "by an authority to whom is committed power of making rules of court", and The Reciprocal Enforcement of Judgments Act simply provides that rules of court for regulating the practice and procedure "may be made". The Devolution of Estates Act provides that "rules regulating the practice and procedure to be followed in all proceedings under this Act and a tariff of fees to be allowed and paid to solicitors for services rendered in such proceedings, may be made under the provisions of The Judicature Act".

The Mechanics Lien Act simply provides for procedure "of a summary character". The Woodmen's Lien for Wages Act permits the judges of the district courts or a majority of them to "prepare and adopt forms of writs, summonses, attachments and other forms for the more convenient carrying out of the provisions of this Act". The Infants Act incorporates by reference the practice and procedure under The Surrogate Courts Act and provides that "the power to make rules under that Act shall apply to proceedings under this Act". The Municipal Drainage Act authorizes the judges of the Supreme Court "to make general rules with respect to procedure before the Referee and appeals from him . . .", and subject to those powers the Referee is also empowered, with the approval of the Lieutenant-Governor in Council, to frame rules regulating

the practice and procedure in all proceedings before him and also to frame tariffs of fees in cases not already provided for.

There are no doubt other provisions in the Statutes authorizing the making of rules which regulate the practice and procedure in the courts but from the foregoing it is apparent that while the judges of the Supreme Court are authorized to make many rules regulating practice and procedure in the courts they are by no means the only rule making authority with regard to practice and procedure in the courts. Nor does there appear to be any satisfactory explanation why so many rule making bodies should exist. In some of the instances cited above it is difficult to understand why authority with regard to the matters in question is given to the particular body so vested.

The distribution of authority has several disadvantages. It renders it difficult, if not impossible, to collect the rules regulating procedure in the various courts with any degree of certainty. The distribution of authority is not conducive to keeping the various sets of rules either consistent in their provisions or uniform in their drafting. It is desirable that one body should be vested with power to make all rules regulating practice and procedure in the courts as far as practicable. The Committee feels that it is not desirable to charge the body responsible for the making of rules in the higher courts, with the making of rules for the division courts, procedure in that court being of a specialized nature and not necessarily in conformity with the procedure in the other courts of the province. Persons well qualified to formulate rules for the higher courts might be quite unfamiliar with division court procedure.

Composition of Committee

In Ontario the judges of the Supreme Court are usually regarded as the rule making authority with regard to practice and procedure in that court. With the exception of certain comparatively minor matters of practice and procedure all the powers to make rules of practice and procedure in the Supreme Court are vested in the judges. There being no barristers or solicitors upon the rule making committee, any new rules or amendments to the rules are necessarily made from the point of view of the judges rather than from that of members of the profession experienced in practice, although members of the profession, of course, may make representations to the judges regarding amendments to the rules. In England a different practice is followed and by subsection 24 of section 29 of The Supreme Court of Judicature (Consolidation) Act, 1925, it is provided:

> "Rules of court may be made by the Lord Chancellor together with any four or more of the following persons, namely, the Lord Chief Justice, the Master of the Rolls, the President of the Probate Division, and four other judges of the Supreme Court, two practising barristers being members of the General Council of the Bar, and two practising solicitors of whom one shall be a member of the Council of the Law Society and the other a member of the Law Society and also of a provincial Law Society. The four other judges and the barristers and solicitors to act as aforesaid shall be appointed by the Lord Chancellor in writing under his hand and shall hold office for the time specified in the appointment."

The practice of having barristers and solicitors represented on the committee

ensures that the point of view of the profession as well as the Bench is before the committee. This is important for while each of the judges from time to time is concerned with matters of practice in weekly court or chambers or in other branches of his work, certain members of the profession, who appear regularly in weekly court and chambers and before the Master, are in contact with difficult matters of practice and procedure more frequently in the regular course of their practice than some of the judges. The advantages to be gained by having the profession represented on the committee are self-apparent while the Committee was not able to ascertain that any disadvantages would result.

As the executive branch of the government is responsible for the maintenance of the courts, it is desirable to have the executive represented upon the rule making committee. This may be done appropriately by appointing the Attorney-General to the committee or by authorizing him to nominate one of the lawyers of his Department to represent him on the committee.

It is desirable that such a committee should have the assistance of a permanent secretary, skilled in the work with which the committee is charged and always available. The Committee considers that the Registrar of the Supreme Court is the logical official to act in that capacity.

Approval of Rules

While some of the problems relating to rules and regulations made under provincial Acts are dealt with in another part of this report, at the expense of possible repetition it is well to point out here that rules, regulations and other delegated forms of legislation as authorized by the Statutes are just as much a part of the law of the Province as that contained in the Statutes. In the Consolidated Rules of Practice many matters are dealt with which are not entirely procedural and in many cases the rights of the subject are vitally affected. In view of this situation the Committee favours a requirement that all rules and regulations relating to the courts be approved by the Lieutenant-Governor in Council before having the force of law.

Rules in One Text

That rules made by the Rules Committee under the various statutes should be conveniently printed in one text naturally follows from the recommendations of the Committee which are set out below. Such a practice should prove a matter of convenience to the profession as well as to court officials and the general public throughout the province.

Amendments Required

If the recommendations of the Committee contained in this part of the report are to be carried into effect, amendments to many Statutes will be necessary, which is not a matter of any great difficulty. It may be pointed out, however, that this does not necessitate new rules under the various Statutes indicated above being brought into force immediately upon the coming into force of the statutes providing for the establishment of the new Rules Committee, for by section 16 of The Interpretation Act the old rules shall continue good and valid until others are made in their stead. It will, however, be necessary to

amend the definition of "Rules of Court" contained in The Interpretation Act, and it is also desirable that the term "Rules Committee" be defined in that Act.

THE COMMITTEE THEREFORE RECOMMENDS:

1. That a committee be established by statute with authority to make, amend and repeal all rules authorized to be made under any statute of Ontario for regulating practice and procedure in the courts over which the Provincial Legislature has jurisdiction but excluding division courts;

2. That such Committee comprise six justices of the Supreme Court appointed by the Chief Justice of Ontario; one county or district court judge appointed by the Attorney-General; three barristers or solicitors chosen by the Benchers of the Law Society in Convocation; the Master of the Supreme Court and the Attorney-General, or a law officer of the Crown appointed by him;

3. That the members of the Committee elect a chairman from among themselves;

4. That the Registrar of the Supreme Court of Ontario be the permanent secretary of the rule making committee;

5. That all rules made by the Rules Committee be approved by the Lieutenant-Governor in Council before coming into force;

6. That all rules of practice and procedure in the courts (with the exception of division courts) be published in one text;

7. That the definition of "Rules of Court" as contained in The Interpretation Act be appropriately amended, and that "Rules Committee" or such other term as may be used to designate the proposed rule making authority, be defined in The Interpretation Act; and

8. That the authority to make rules under The Division Courts Act continue in the Lieutenant-Governor in Council and that such authority be extended to enable the Lieutenant-Governor in Council to prescribe forms for use in the division courts.

SERVICE BY MAIL

The requirement that summonses and other process for violation of Ontario statutes be served personally adds substantially to the cost of proceedings in the courts, and occupies a great deal of the time of police officers and others who are engaged in making services. Many complaints have been received by the Attorney-General and other Crown officials regarding the amount of the costs which attach where a conviction is made under an Ontario statute and almost invariably it is found that such costs are made up principally of charges for effecting service. In England service of certain summonses by mail was authorized by the Service of Process (Justices) Act, 1933. That Act provides that service made pursuant thereto shall however be deemed not to have been effected unless either (*a*) the defendant appears, either in person or by counsel or solicitor, in manner required by the summons; or (*b*) it is proved to the satisfaction of the justices that the summons came to the knowledge of the defendant. While that qualification has been criticized, it appears to the Committee

to be a very necessary one although experience in some of the States of the Union indicates that the necessity of such a provision is doubtful. In a report on "The Growth of Legal Aid Work in the United States", issued by the United States Department of Labour, it is stated at page 41—"In fact service by mail works so well that the Cleveland court, which has used it longest, has discarded registered mail and uses the ordinary mail not merely in small cases but as a regular method of service in all municipal court cases." In order that a person so served may realize that it is in his interest to appear in response to the summons it would be well to indicate, preferably in bold faced type, on the face of the summons, that if personal service becomes necessary, the costs of the proceeding will thereby be increased and may have to be paid by the person to whom it is directed.

A great many prosecutions under Ontario statutes are in respect of violations of The Highway Traffic Act. The licensing system in force under that Act facilitates ascertaining of the names and addresses of offenders in most cases. Because of that fact and because the practice of service by mail is an innovation in Ontario, the Committee favours the adoption of that practice with respect to offences under The Highway Traffic Act. If, when applied to that Act it proves as satisfactory as it has in other jurisdictions, it may be extended to other Ontario statutes.

In order to avoid the purpose of the proposed provision being defeated, service by mail must necessarily be required in each case before personal service is resorted to.

THE COMMITTEE THEREFORE RECOMMENDS:

1. That summonses for violations of The Highway Traffic Act be required to be served by mail;

2. That the summons indicate clearly upon its face that if the defendant does not appear in person or by his representative in the manner required by the summons, service will be effected by personal service and the cost of the proceedings will thereby be increased and may be required to be paid by the person to whom the summons is directed if a conviction results;

3. That provision be made for personal service if the person summoned fails to appear in person or by his representative in the manner required by the summons sent by mail; and

4. That the limitation provision of The Highway Traffic Act be appropriately amended to permit service to be made in accordance with these recommendations.

SUPERANNUATION

COUNTY COURT CLERKS AND LOCAL REGISTRARS, SUPREME COURT OF ONTARIO

While the matter of superannuation does not come within the scope of the Committee's investigation, certain phases of that part of The Public Service Act relating to superannuation were studied briefly by the Committee because

of representations made to it by witnesses who appeared before the Committee to express views with regard to other matters.

The superannuation provisions do not apply to county court clerks or local registrars of the Supreme Court, because the Act applies only to civil servants paid a fixed salary and practically all county court clerks and local registrars are paid on the fee basis in one form or another. Most sheriffs are also paid on the fee basis but, because of a special provision inserted in the Act, they are brought within its superannuation provisions. The Committee was unable to ascertain any logical reason why the Act should be made applicable to sheriffs while other civil servants doing a similar type of work and paid on a like basis and similarly located throughout the province are excluded from the operation of its superannuation provisions.

Magistrates

So far as the payment of salaries is concerned there are two classes of magistrates within the Province. There are those who are paid by the Province, the Province being reimbursed to some extent by receiving a portion of the fines imposed by such magistrates which would otherwise be payable to the municipalities. Payments are made to the Province under subsection 2 of section 15 of The Magistrates Act. So far as these magistrates are concerned there is no difficulty regarding superannuation if they are within the age limit set by the Act when appointed.

The other class of magistrates are those appointed for a particular city in which they hold courts. While all magistrates are appointed for the entire province, some of them are, by the Order-in-Council appointing them, assigned to certain named cities and in the case of these cities the salaries of the magistrates are paid by the cities. Accordingly, as the salaries of these magistrates are not paid by the Province they are not entitled to come within the superannuation provisions of The Public Service Act. This situation could probably be remedied by having the salaries paid by the city to the Province or by some other means.

The Committee Therefore Recommends:

1. That the Public Service Superannuation Board consider the extension of section 53 of The Public Service Act to county court clerks and local registrars of the Supreme Court; and

2. That the Public Service Superannuation Board take steps to bring under the superannuation provisions of The Public Service Act, on a contributory basis, all magistrates who are not disqualified by reason of age.

TAXATION OF COSTS

Although the local taxing officers may tax most items in a bill of costs, certain items must be referred to the Senior Taxing Officer at Toronto. Hence, if a trial takes place outside of Toronto solicitors or counsel must either attend at Toronto or instruct Toronto agents as to the taxation of costs thereby involving expense and inconvenience.

As most local taxing officers are appointed from the ranks of practising barristers, there appears to be no objection to giving local taxing officers jurisdiction in such matters. Any objection which might be taken on the ground that taxations would lack uniformity may be remedied by providing for an appeal to the Senior Taxing Officer at Toronto in all such cases. The present practice is advisable where the local taxing officer is not a barrister.

THE COMMITTEE THEREFORE RECOMMENDS:

That all local taxing officers who were barristers at the time of appointment be empowered to tax all costs including all counsel fees, subject always to an appeal to the Senior Taxing Officer at Toronto.

TRIAL COURT LISTS

Much time is lost and inconvenience occasioned to parties, counsel and witnesses by reason of the present indefinite and unsatisfactory method of preparing trial court lists. The practice followed in most of the courts of the Province is to indicate only the names of the cases which are to be tried the following day. In the Toronto non-jury court a list is prepared weekly and this practice may be followed in some of the other courts of the province. So far as the Committee is aware in no case does the list indicate the nature of the cases or the approximate time which each will require for trial. On more than one occasion an action has been dismissed because of the non-appearance of the plaintiff or his counsel. Under the present practice litigants, counsel and many witnesses may be kept waiting about court rooms, witness rooms or hallways for long periods of time.

The Committee feels that this condition is wrong. While the convenience of the court is of great importance, so also is the convenience of the public, counsel and the witnesses involved.

In the King's Bench Division of the High Court of Justice in England there are two non-jury lists. One is called the "List of Long Non-Jury Actions" and the other the "List of Short Non-Jury Actions." Examples of these two lists may be found in The Weekly Notes. Upon each list the nature of the action is indicated briefly, also the approximate time which the action will require for trial. The List of Long Non-Jury Actions includes actions which will occupy six or more hours.

There is no reason why the practice of indicating the nature of the action and the approximate time it will occupy should not be adopted in all civil courts, with the exception of the division courts, throughout the province. The manner of determining the approximate time which any trial would occupy might require some study and that is likely one of the details which receives attention in England upon the return of the "summons for directions", a procedure unknown in Ontario practice.

In view of the many matrimonial causes actions tried at the Toronto non-jury sittings, the trials of most of which last only a short time, the practice of preparing two lists is desirable in that court and should be followed whenever two judges are holding sittings.

THE COMMITTEE THEREFORE RECOMMENDS:

1. That the practice of indicating the nature of each action and estimated time for the trial thereof upon the list of cases for trial be followed in all civil courts in Ontario with the exception of division courts; and

2. That the practice of the King's Bench Division of the High Court of Justice (England) of preparing a list of long non-jury actions and a list of short non-jury actions be adopted and used in the non-jury sittings of the Supreme Court of Ontario at Toronto whenever two or more judges are holding sittings.

WITNESSES

Throughout the trial of an action the judge, jury, the registrar or clerk of the court and the sheriff remain seated. Counsel are seated except when actually addressing the court or examining or cross-examining witnesses and persons who are charged in criminal proceedings are permitted to remain seated except when addressed by or addressing the court. In Ontario, however, witnesses are required to remain standing except when by reason of infirmity or some exceptional circumstance they are permitted by the court to sit down.

The unusual experience of appearing as a witness in a court proceeding, often before a large number of people, is a nervous strain on many persons. This condition is not reduced by requiring the person called as a witness to stand, frequently for a long period of time, and some times under arduous cross-examination. The Committee is of opinion that as a general rule nothing is to be gained by requiring witnesses to stand while giving their testimony.

Most of the court rooms of the Province, however, are constructed in such a manner that in order to be visible by and audible to the judge, the jury and counsel, the witness must assume a standing position.

THE COMMITTEE THEREFORE RECOMMENDS:

That so far as practicable witnesses be permitted to remain seated while giving their testimony, and that in constructing or altering court rooms, provision be made, wherever possible, for the seating of witnesses in the witness box.

CONCLUSION

In conducting its enquiry and preparing its report the Committee has endeavoured to deal only with matters included in the terms of the order appointing it. It has, however, been difficult on occasions to determine the scope of the Committee's investigation with regard to certain matters coming before it because the language authorizing an investigation covering such a wide field must necessarily be of a general and somewhat flexible nature. The Committee has, however, avoided dealing with minor matters of procedure, proposals for specific amendments to statutes, and other suggestions for changes in the law, except where in its opinion such suggestions or proposals were directed to improving the constitution, organization and system of maintenance of the courts

or simplifying, facilitating, expediting and otherwise improving the practice and procedure in the courts, or effecting economy to the people, the municipalities and the Province generally.

There are, accordingly, numerous matters which were brought to the attention of the Committee which, while not coming within the Committee's jurisdiction, warrant further consideration. In some cases the Law Revision Committee recommended by this Committee would be the appropriate body to consider such matters further, and in other cases the officials of the Attorney-General's Department or the Legislative Counsel's office might very well be charged with the further study required. It should, therefore, be understood by those who assisted the Committee by making submissions that the absence of any reference to any submission in this Report is not necessarily an indication that the Committee does not approve of the suggestion or recommendation made in the submission.

All of which is respectfully submitted.

G. D. CONANT, *Chairman.*
IAN T. STRACHAN,
R. D. ARNOTT,
L. M. FROST.

SCHEDULE "A" TO REPORT

List of Persons and Organizations who were Advised of the Appointment and Sittings of the Committee

The Chief Justice of Ontario.
The Chief Justice of the High Court of Justice.
The Registrar, S.C.O., Toronto.
The Local Registrar, S.C.O., Ottawa.
The All Canada Insurance Federation.
The All Canadian Congress of Labour.
The Associated Credit Bureaus.
The Builders Exchange and Construction Association of Toronto.
The Canadian Automobile Association.
The Canadian Bankers Association.
The Canadian Bar Association.
The Canadian Life Insurance Officers Association.
The Canadian Manufacturers Association.
The Canadian Retail Coal Association.
The Canadian Underwriters' Association.
The Chamber of Agriculture.
The County Court Clerks Association.
The County Judges Association.
The Dean of the Law School, Osgoode Hall.
The Division Court Clerks Association.
The Dominion Board of Insurance Underwriters.
The Dominion Mortgage and Investment Association.
The Hamilton Chamber of Commerce.
The Head of the Law Department, University of Toronto.
The Land Mortgage Companies Association.
The Law Society of Upper Canada.
The Lawyers Club of Toronto.
The London Chamber of Commerce.
The Lumbermen's Credit Bureau Incorporated.
The Magistrates Association.
The Ontario Associated Boards of Trade and Chambers of Commerce.
The Ontario Association of Architects.
The Ontario Association of Real Estate Boards.
The Ontario Fire & Casualty Insurance Agents Association.
The Ontario Insurance Adjusters Association.
The Ontario Mayors Association.
The Ontario Mining Association.
The Ontario Municipal Association.
The Ottawa Board of Trade.
The Property Owners Association.
The Registrars of Deeds Association.
The Retail Merchants Association of Canada.
The Sheriff's Association.
The Toronto Board of Trade.
The Toronto Home Builders Association.
The Toronto Insurance Conference.
The Trades and Labour Congress of Canada.

The Windsor Chamber of Commerce.
All County and District Law Associations.
All County Wardens.
All Crown Attorneys.

SCHEDULE "B" TO REPORT

List of Witnesses in Order of Appearance Before the Committee

F. H. Barlow, K.C., Master of the Supreme Court of Ontario.
His Honour Judge F. M. Morson, retired judge of the County Court of the County of York.
F. J. Norman, Secretary of the Ontario Association of Collection Agencies.
F. G. J. McDonagh, Clerk of the First Division Court of the County of York.
His Honour Judge T. H. Barton, a judge of the County Court of the County of York.
Gerald Murphy, of McMaster, Montgomery, Fleury & Co.
J. Roy Cadwell, Inspector of Legal Offices.
C. L. Snyder, K.C., Deputy Attorney-General for Ontario.
A. B. Gillies, Postmaster, Parliament Buildings, Toronto.
R. C. Buckley, Assistant Inspector of Legal Offices.
A. S. Winchester, Clerk of the County Court of the County of York and Registrar of the Surrogate Court of the County of York.
Dr. Horace Bascom, Local Registrar, S.C.O., Clerk of the County Court, Registrar of the Surrogate Court, Sheriff, County of Ontario, and President of the County Court Clerks Association.
George T. Inch, Local Registrar, S.C.O., Clerk of the County Court, Registrar of the Surrogate Court, County of Wentworth, and Secretary of the County Court Clerks Association.
P. A. Juneau, K.C., Special Law Officer, Department of the Attorney-General for the Province of Quebec.
D. L. McCarthy, K.C., Treasurer of the Law Society of Upper Canada.
Peter White, K.C.
J. C. McRuer, K.C.
G. T. Walsh, K.C.
G. W. Mason, K.C., Chairman of a Special Committee of Convocation of the Law Society of Upper Canada.
K. F. Mackenzie, K.C., Vice-President for Ontario of The Canadian Bar Association.
His Honour Judge L. V. O'Connor, Judge of the County Court of the United Counties of Northumberland and Durham.
G. A. Gale, representing The Lawyers' Club of Toronto.
His Honour Judge G. H. Hayward, Judge of the District Court of the District of Temiskaming.
R. M. Fowler, representing the Management Committee of the County of York Law Association.
F. A. Matatall, Secretary Manager of the Ottawa Credit Exchange Limited and President of the Associated Credit Bureaux of Canada.
R. M. W. Chitty, K.C., representing the Board of Management of the York County Law Association.
The Rt. Hon. Sir Wm. Mulock, K.C.M.G., sometime Chief Justice of Ontario.

R. J. Maclennan, K.C., Solicitor to and Secretary of The Sheriffs Association of Ontario.
Earle Dawe, Vice-President and Manager of E. W. Woods & Co., Limited, Bailiffs.
Stanley Thomson, Registrar of Real Estate Brokers and Registrar under The Collection Agencies Act.
David J. Ogle of the office of the Sheriff of the County of York.
His Honour Judge Daniel O'Connell, Senior Magistrate for the County of York and sometime a judge of the County Court of the County of York.
J. W. McFadden, K.C., Crown Attorney for the County of York.
J. G. Hungerford, an Estates Officer of The National Trust Company.
Harold S. Manning, K.C., President of The Property Owners Association of Ontario.
C. M. Colquhoun, K.C., Solicitor for the City of Toronto.
Alfred J. B. Gray of the Department of Municipal Affairs for Ontario.
Chas. Purnell, representing the Ontario Association of Real Estate Brokers.
R. S. Colter, K.C., Chairman of the Ontario Municipal Board.
Wm. H. Bosley.
C. F. Neelands, Deputy Provincial Secretary.
A. G. Slaght, K.C.
Jacob Finkleman, Professor of Administrative and Industrial Law, University of Toronto.
The Honourable R. S. Robertson, Chief Justice of Ontario.
The Honourable H. E. Rose, Chief Justice of the High Court.
The Honourable Mr. Justice W. E. Middleton.
His Honour Judge James Parker, Senior Judge of the County Court of the County of York.
I. S. Fairty, K.C., Chief Legal Adviser to The Toronto Transportation Commission.

Select Committee to Inquire into the Administration of Justice

Parliament Buildings, Toronto,
March 6th, 1940.

FIRST SITTING (ORGANIZATION MEETING)

Present: Hon. Gordon D. Conant, K.C., M.P.P., Attorney-General of Ontario, Chairman; Hon. Paul Leduc, K.C., M.P.P., Minister of Mines for Ontario; Hon. Ian T. Strachan, K.C., M.P.P., Government Whip; Richard D. Arnott, K.C., M.P.P.; Leslie M. Frost, K.C., M.P.P.; Clifford R. Magone, K.C., Committee's Counsel; Eric H. Silk, K.C., Committee's Counsel; Roy C. Sharp, Secretary to the Committee; MacIntire M. Hood, Secretary to the Attorney-General.

MR. CONANT: Gentlemen, the Committee being present in its entirety, I suggest that we first file a copy of the Resolution constituting this Committee. The Resolution is not immediately available, but it will be in a few minutes. That will constitute the first document on the record, if that is agreeable.

Now, I have here proposals regarding our personnel. First of all, a Secretary is necessary, and if it is agreeable, I would suggest Mr. Sharp, of the Law Clerks' Office.

MR. LEDUC: I will move, seconded by Mr. Frost, that Mr. Sharp be appointed Secretary of the Committee on the Administration of Justice.

Carried.

MR. CONANT: Then it is necessary to have Counsel for the Committee.

MR. LEDUC: I move, seconded by Mr. Frost, that Mr. Clifford R. Magone, Senior Solicitor of the Attorney-General's Department, be appointed Counsel for the Select Committee to Inquire into the Administration of Justice.

Carried.

I move, seconded by Mr. Strachan, that Mr. Eric H. Silk, Legislative Counsel, be appointed Assistant Counsel for the Select Committee to Inquire into the Administration of Justice.

Carried.

MR. CONANT: I might say that, as regards any legislation that results from the deliberations of this Committee, it is most necessary that the Law Clerks' Department should be familiar with it, and be actively associated with the work of the Committee.

Now, gentlemen, I am entirely open wide as to the methods of proceeding here.

I have had these same gentlemen prepare some memoranda, the first of which consists of a collection of names of organizations and persons who might be interested in the work of this Committee. It is a matter for decision, whether we should send a letter out to these organizations, or whether we would announce the sittings of the Committee through the Press. I would like the views of the Committee on that.

Now, if you will just glance at the list, towards the end, 30, you will see: "All County Councils," and then, "Council of the City of Toronto." The thought there was this: that the County jurisdictions are considerably affected by any changes made in the Administration of Justice, and Toronto, being a separate jurisdiction, would be also affected in that it bears a considerable part of the cost throughout, in the enforcing of the Administration of Justice legislation.

Now what is your view, gentlemen?

MR. ARNOTT: A notice should be sent out to these various bodies from the Committee, I believe.

MR. LEDUC: What kind of a notice would it be? That we are open for business, and we are willing to receive them? Would it not be better—I am only offering a suggestion—would it not be better to decide, first of all, what points we would take up, and then notify the people that would be interested in those particular points?

MR. ARNOTT: But I think they should be notified by the Committee, and then they may decide what they will do.

MR. CONANT: I might continue the discussion further, perhaps.

MR. LEDUC: And clarify it, yes.

MR. CONANT: May I crystallize it in this way: on the second memorandum—neither of these memorandums purports to be complete by any means ——

MR. FROST: Mr. Conant, before you go into that, how wide a distribution has this Barlow report been given?

MR. CONANT: Well, when that report was presented to me, we had four hundred copies mimeographed, at a nominal expense, and they have been distributed.

MR. FROST: And they would go to whom? The County Judges, and the Magistrates, and Law Societies?

MR. HOOD: Well, they went to every member of the Legislature, to all County Judges, and to all people who made submissions to Mr. Barlow, to the Crown Attorneys of the province, and then in addition to that, all requests which

we received from associations and individual barristers were taken care of until our supply was exhausted

MR. LEDUC: You did not mention Supreme Court Judges.

MR. HOOD: Supreme Court Judges also, yes.

MR. FROST: I find this: that there seems to be a lack of understanding as to what Mr. Barlow's recommendations were. I don't think that this Inquiry should be confined to lawyers, by any means.

MR. CONANT: Oh, no, no.

MR. FROST: I think that you should make it so that the non-professional or layman ——

MR. CONANT: Oh, quite.

MR. FROST: —— could give just as much information as the lawyers, because, after all, they constitute just as good a basis of inquiry as lawyers do.

MR. CONANT: Quite.

MR. FROST: But, as a matter of opening up, it might be a good thing to get the list of the law associations in the province; after all, they are representative of public opinion, to a certain extent, in their own districts, and it is quite an easy matter to obtain that, for the reason that the Department, I believe, makes grants to many law associations ——

MR. CONANT: Yes.

MR. FROST: —— by means of grants, law libraries, and so on.

MR. CONANT: Yes.

MR. FROST: I think it would be a good idea to send out a copy or two, depending on the size of the various law associations, of the Barlow report, with a request that their association should meet and consider this report, and consider its recommendations, and let us have their views. That would be one way of getting the views of the profession on these matters.

MR. ARNOTT: Mr. Chairman, what would you think of the suggestion of having that report published in the *Ontario Weekly Notes?*

MR. CONANT: Well, I think that is a very good suggestion. There are some 2,700 or 2,800 solicitors in the province.

MR. LEDUC: That would meet your suggestion, Mr. Frost.

MR. FROST: That would be cheaper than having other copies mimeographed?

MR. HOOD: Yes, it cost $350 to have 400 copies mimeographed; we can

have it published in the *Weekly Notes* for $250, and distributed as well. You see, the cost of distribution of these things is also an item. But the *Weekly Notes* would be distributed automatically, and $250 would take care of all the solicitors in the province.

MR. FROST: Well, I think, myself, that that ought to be the first thing that we should do, in order to give this report wider distribution, so that we could get opinions from a wide range of people.

MR. ARNOTT: Well, I would make that a motion, because, after all, the legal profession is keenly interested in it.

MR. CONANT: I was just wondering—before we put that motion, Mr. Arnott—I was wondering if we couldn't accomplish all that is necessary, by more or less abbreviating some of the items that appear in this report. It occurred to me in reading it, that there is some material that does not add to it, and might well be left out.

MR. FROST: Well, you could send a copy of the interim report—I mean that is the summary of it, and it is a great deal shorter than the entire report.

MR. LEDUC: You mean this report?

MR. FROST: Yes, it is made up of an interim report——

MR. LEDUC: You have the summary, first.

MR. FROST: Yes, of course; but after all, that is very abbreviated, is it not? What you might do, you might take the summary of recommendations of the final report, on page two there, and following, pages three, four and five. If anybody is sufficiently interested to inquire, why, they might then look into the reasons.

MR. CONANT: Well, there is one thing we would have to do if we were sending out this report; we would have to give the page reference in the summary. I have it in my personal copy, and when you refer to the recommendations, those page references come in handy.

MR. FROST: Supposing we were to ask the County Judges to help us out in this matter, and, in order to save expense, ask them if they would meet with their lawyers in the various counties, and take up the report in that manner? I believe that the County Judges would be very glad to help out.

MR. CONANT: Well, it is entirely a matter of expense, gentlemen.

MR. FROST: I am inclined to think that if you print this report and send it out to everybody, it will be just another report that will go into the waste paper basket, or onto someone's shelves and remain unread. But if you can get consideration of it by the various law associations, either under the guidance of a county judge, or some other arrangement of that nature, that you would really get something done. To be perfectly frank with you, if you spent $250 and had this report printed in the *Weekly Notes*, it would be just a question as to how many people would read it and how much real consideration we would get from it.

MR. CONANT: I see your point. Let us look as this aspect of the matter. It occurs to me, as Mr. Frost quite properly said, that the work of this Committee is of interest to a great many other people and organizations besides lawyers. It has always run in my mind, that the purpose of having it printed in the *Notes* was this, that that distribution would be limited, almost entirely, to lawyers. These various organizations that we have listed here, even, would naturally not come in contact with it.

I would be disposed to have a rewrite of this report. There is a lot of filling-in here. For instance, when we come to the Rules of Practice, he quotes, *in extenso*, word for word, a lot of Rules. Well now, in the first place, the layman doesn't care anything about that, and in the second place, the lawyer should be able to pick up his rule book, if he is interested, and read that part.

MR. LEDUC: I am looking at this part, for instance: page 31, paragraph 1, "Rules of Practice and Procedure of the Supreme Court of Ontario in Civil Matters." Mr. Barlow gives the whole background of these Rules. Could not that be left out?

MR. FROST: Well, I don't think, if you are having it mimegoraphed, that the additional cost of that would be very much, would it? After all, for a person who is interested in this subject, Mr. Barlow's background and the history that he gives there is very interesting. And very helpful.

But rather I wonder if, after these four hundred copies were written, the stencils were destroyed, or are they still available?

MR. CONANT: What about that, Mr. Hood?

MR. HOOD: It is quite possible that they might still be available, but even at that, the cheapest way to have it done, for the number of copies that would be required, is the method that has been suggested, of having the report printed in the *Weekly Notes* and then have the publishers of the *Weekly Notes* run us off reprints from their type, to whatever number we require. We might buy a couple of hundred reprints of the report only, reprinted from the type that is in the *Weekly Notes*.

MR. LEDUC: Yes, you wouldn't need more than a couple of hundred to circularize these associations.

MR. HOOD: That is the cheapest way of doing it, at this stage.

MR. CONANT: Well, if it is agreeable to the Committee, then, even in its present form, or with some abbreviations, perhaps, we will try to find the funds to publish it in the *Ontario Weekly Notes*.

MR. LEDUC: I think you might arrange to have more than two hundred copies, because you have the law associations. What is the circulation of *Weekly Notes*.

MR. HOOD: 3,300.

MR. LEDUC: Well, if they printed 3,300 copies of the *Weekly Notes*, and then we would get extra reprints?

MR. HOOD: That's right.

MR. CONANT: Well then, gentlemen, are we in favour of the publication in its present form, or with some changes?

MR. LEDUC: Pardon me, I see here you have, in this memorandum, the Toronto Board of Trade, and the Ontario Association of Boards of Trade and Chambers of Commerce. They are all one organization, that I know of, the Associated Boards of Trade in themselves, but there are also some individual boards of trade, for instance, Hamilton, Windsor, Ottawa, which might very well be circularized also. Then there is the Mayors' Association, the Retail Merchants' Association.

MR. CONANT: Have we those down there?

MR. SILK: Not the Retail Merchants' Association.

MR. CONANT: Well, let us complete that discussion first. If it is agreeable to the Committee, we will endeavour to make the finances available, in some way, and we will publish the Barlow report, either in its present form or, if it can be abbreviated to some extent, in the *Weekly Notes*, and perhaps we had better have an extra 500 copies available for any purpose that may arise. Is that agreeable, gentlemen?

Carried.

MR. ARNOTT: Mr. Chairman, with regard to that abbreviation, I think we should settle that right now, because if it is abbreviated to too great an extent, you are going to have inquiries coming in about the report itself.

MR. FROST: I don't agree with that. In looking this report over, he has not put in much material which is not necessary to explain the various points. I think that he has it very well condensed now, and if we start taking out parts of it, the result will be that the saving would be trifling and you might destroy the continuity or reasoning of it. You see, he gives reasons, following his recommendations, of why he makes his finding, and he gives his authorities, and what not, and I think if you start to abbreviate, you would destroy the value of the distribution of this report.

MR. CONANT: Well, this letter of July 7th, 1939, we will deal with that. What should be done there, of course is, if you are going to publish that letter, there should be put in the letter all the correspondence that was discussed in the House.

MR. LEDUC: Is it necessary?

MR. CONANT: I was of the opinion that we should leave the whole thing out.

Carried.

MR. CONANT: Well then, we will publish the whole report, *in extenso*, and we will leave out the correspondence.

MR. HOOD: There is no use putting in those page references there, because the pages will all be different in the printing. They will simply have to refer to the sections of the report.

MR. FROST: That's right.

MR. LEDUC: I think that is sufficient reference.

MR. HOOD: Your paging will be entirely different in the printed copy.

MR. CONANT: Well, I found from experience, that without them it takes some time to find items in the report.

MR. LEDUC: Well, there is one thing that could be done. It would make it more expensive, but it would be to put after each item in the summary, the number of the page it refers to in the *Weekly Notes*.

MR. HOOD: That means an index will have to be prepared after the pages have been set up.

MR. LEDUC: "Cost of Juries," and so on and so forth, you could just put in parentheses, "page so-and-so."

MR. HOOD: That's exactly what the Attorney-General has in his copy. This index will be of no use at all; it will have to come out altogether.

MR. FROST: Would it be a very difficult matter, when this report is set up, to prepare, not a full index, but an index somewhat along the lines of that one?

MR. HOOD: It would simply be a matter of renumbering pages, that's all.

MR. FROST: Well, that shouldn't be a very serious difficulty?

MR. CONANT: Coming back to our first discussion, gentlemen, what is the view of the Committee as to whether we should communicate with these organizations? I will continue that discussion a little further. In the second memorandum, are set out possible subjects to consider. It would be desirable, if it is feasible, to allocate certain days for certain subjects, I should think, and if we sent out a letter to these organizations, it would be in the hope of getting a reply from them to the effect that they are interested in so-and-so, and if they then want to make a verbal submission, they would be advised of the day or date on which we were going to sit on that particular subject. If we don't follow some such line as that in so far as your verbal end of it is concerned, it would mean an awful mix-up, if we had, say, Grand Juries for a half hour, and then something else. But we could only follow that within reason. For instance, if a man came from North Bay, and he wanted to discuss something before the Committee which we were not dealing with that day, we could not say to him: "You go back home and come here next Wednesday." We would have to show some latitude.

Or would we get sufficient contact with everybody, if we were to publish a notice, say, in the trade journals, and daily press and law journals, and so forth?

MR. FROST: I would suggest this: that the Secretary should send out one of these additional copies of the Barlow report, for instance, to the Secretary of every law association, to every County Judge and to these people that you have named in this list, and ask them to give consideration to this report, and to call together people interested in the matter considered and submit, if they care to, written submissions, and if they would prefer to do so, to advise us of the names of any witnesses they think would be helpful, and the lines along which they would give evidence. If you do that, I think that you would get wide publicity, just as wide publicity as you can give it in any manner. And the solicitors for the Committee could sort over that and see what is relevant and material, and it would give us, I think, something to work on. And I think the best method to follow would be to have Mr. Barlow give evidence in the first place; this is his report, he has considered all this; hear him first, and then, arising out of what he said, you will get suggestions and objections from other people.

MR. LEDUC: I think we will have to hear him more than once, because it would be rather lengthy to get Barlow to give evidence on all these items at the same time. I think we should proceed with some recommendations and exhaust them as much as possible.

MR. CONANT: Well, of course, I am rather of the view, gentlemen, that the functions of this Committee are not necessarily supplementary to, or tied in with, the Barlow report. While the Barlow report is a very convenient and a very valuable guide, this Committee is not by any means confined by that report.

MR. FROST: No, but it provides an orderly way to proceed.

MR. CONANT: Yes.

MR. FROST: It provides an orderly way to proceed, and you have his opinion. I must submit this, that I am in disagreement with some of the things that he suggests.

MR. CONANT: So am I.

MR. FROST: And I suppose many of us are in disagreement with some things that he suggests. On the other hand, he has given his consideration to these matters, and we can get his views, and then get the views of other people, and so try to arrive at something.

MR. CONANT: What I had in mind when I made that remark, Mr. Frost, is this: I don't agree with you that we should send out to these organizations copies of the Barlow report, because by so doing we are probably indicating to them that we are going to review the report, and that that is the scope of our Inquiry. I would be in favour of sending out a notice to these organizations, pointing out the purpose of the Committee and stating to the persons and organizations, that if there is any aspect of the administration of justice in which they are interested, or want to make any submission, we would be glad to have their written submission, or hear their verbal submissions. Then, if that organ-

ization or person comes back and says: "We would like to have a copy of the Barlow report," we might send it to them.

MR. LEDUC: I think you might save time by sending it to them, and saying that the discussion before the Committee is not necessarily limited to the report, but that they may present other suggestions. Otherwise, there may be correspondence back and forth, and there may be a waste of time. You might just as well send it in the first instance, but draw to their attention that if they have suggestions to make which are not relative to the Barlow report, it's quite all right.

MR. CONANT: Well, then, we will send a notice to each of these organizations, a first memorandum, and such others as we may have before we adjourn, pointing out the purpose and scope of the Committee's work. Then, if they are interested in any particular phase of the administration of justice, we will be glad to have their submissions, in writing, or, if they wish to make a verbal submission, to so advise us, and we will let them know when they can do so. And we are enclosing a copy of the Barlow report for their convenience, pointing out that the deliberations of the Committee will not necessarily be limited to the subjects that are set out therein, and that they can make submissions either on the matters dealt with in the Barlow report, or on any other matters in which they may be interested.

MR. ARNOTT: I think it would be a good idea, Mr. Chairman, to set out the purpose for which this Committee was appointed, taken verbatim from the reporter's notes.

MR. CONANT: Yes, that can be put in, without all the introductions, and so forth; we can do that, yes.

And I will suggest, gentlemen, that Mr. Sharp will draft that letter as soon as possible, and he will mail a copy of the draft to each member of the Committee not later than to-morrow, and he will either approve of it or make any changes that he sees fit and send it along. Is that agreeable?

Carried.

Now, this memorandum No. 1, gentlemen ——

MR. MAGONE: Before you get away from the printing, sir, are you going to ask for submissions in a notice in the *Weekly Notes?*

MR. FROST: I think it would be advisable.

MR. LEDUC: Well, I don't know; if you ask that, you are liable to have every lawyer in the province making submissions.

MR. MAGONE: Or else a notice to the effect that the Association may be called on.

MR. LEDUC: Would it be better to write to each Secretary of each law association and suggest it to them?

MR. ARNOTT: That is what I suggest. I don't think we should put anything in there except the Barlow report.

MR. LEDUC: I mean, we won't refuse to consider any submissions to us from other people, but if you print this and sent it out to 2,700 lawyers, you might find five or six hundred of them wanting to make submissions.

MR. STRACHAN: Yes, five or six hundred might have an individual case to bring up.

MR. MAGONE: Of course, if you say nothing, are you going to get any response? If you said that the Committee is communicating with the association, and they can get in touch with the association ——

MR. LEDUC: I think it might be a good idea to print a statement that the Committee is communicating with all the law associations of the province, to get the opinion of their members and forward it to the Committee.

MR. CONANT: Would it not accomplish it more directly and easier if we printed, along with this Barlow report, a short notice, or request, or advice, whatever you like, that the barristers or solicitors desiring to make submissions should make them through their law association or law organization? I think that would accomplish all we need.

Carried.

Let us keep this in mind when we set this up for the *Ontario Weekly Notes*, Mr. Sharp.

Now, are there any names that you want to add to this list, gentlemen? As I say, this is not intended to be exhaustive, by any means. You mentioned the Retail Merchants' Association, Mr. Leduc.

MR. LEDUC: And the Ontario Mayors' Association, because they would be interested in the Inquests, and Law of Garnishee, and perhaps, other questions on this agenda.

MR. CONANT: The Retail Merchants' Association, and the Ontario Mining Association.

MR. LEDUC: Then I notice you have here, "Appeals from Boards and Commissions." I don't know if that includes the Workmen's Compensation Board; they might be interested in that.

MR. CONANT: I may say that second memorandum is really a very brief extract from the Barlow report. There are some things added. If we are going to consider No. 25 on page 2 of the second memorandum, of course, that means an enormous field.

MR. LEDUC: You can sit for seven weeks on that point alone.

MR. MAGONE: On the Workmen's Compensation Board alone.

MR. LEDUC: Yes.

MR. HOOD: There are some requests from individual associations in the file there.

MR. ARNOTT: I think the Police Commissions should be added to that list.

MR. CONANT: Police Commissions?

MR. ARNOTT: Yes.

MR. CONANT: Well, how many are there in the province?

MR. HOOD: Around 60.

MR. CONANT: Well now, just a minute. Police Commissions consist of judges, mayors and magistrates.

MR. LEDUC: And all the judges will have a notice.

MR. CONANT: They are all covered.

MR. SILK: And we have the Mayors' Association.

MR. CONANT: They are all covered.

MR. ARNOTT: And they have a Magistrates' Association.

MR. CONANT: Yes.

Are there any other organizations that you can think of?

MR. LEDUC: I see—"13, University of Toronto Faculty of Law." Are there any other universities with a faculty of law?

MR. HOOD: There are no other universities with a faculty of law.

MR. FROST: I don't think you have in that list the county associations.

MR. SILK: Yes, 28.

MR. LEDUC: Now, you have all Crown Attorneys, and all County Councils; what about local Registrars and local Masters?

MR. FROST: Some of them have very good ideas.

MR. LEDUC: We had a very good local Registrar in Ottawa, Mr. McGee.

MR. SILK: There is no local registrars' association.

MR. CONANT: You are speaking of local registrars of the Supreme Court?

MR. LEDUC: Yes, I mean, when you come to discussing the Rules, these men might be able to give us the value of their experience.

MR. CONANT: Yes, I think that is right; the local registrars are the clerk of the County Court too, are they not?

MR. SILK: We have the County Court Clerks' Association.

MR. LEDUC: No. 6. But they are in larger centres. I mean here in Toronto, for instance, there is a different division from Hamilton, and Ottawa, and Windsor, I believe. You might cover those that are not County Court Clerks at the same time; there are only a few of them, and they would be the ones with the most varied experience.

MR. CONANT: Of course, you are getting into the realm, there, of a large class of individuals.

MR. LEDUC: No, there will be a few of those, Mr. Chairman, but because most of them are County Court Clerks, and they are covered by No. 6, I suggest those who are not County Court Clerks should be taken individually.

MR. CONANT: Well, all right, local Registrars who are exclusively local Registrars.

MR. LEDUC: Yes.

MR. CONANT: Then you mentioned local Masters, did you?

MR. MAGONE: I think there are only about two in the province who are not County Judges.

MR. LEDUC: Yes, well they are at the same time local Masters, are they not? In Ottawa the local Registrar is the local Master as well.

MR. MAGONE: No, the County Judge is the local Master.

MR. LEDUC: I think McGee is local Master.

MR. MAGONE: Yes, he is.

MR. CONANT: I think it is far better to deal with organizations, because, human nature being what it is, there are some individuals you get in touch with, who think that it is their duty to unfold a lot of stuff that we will have to wade through, something that, perhaps, is of no value. If an organization sifts it first, then we've got what is of some value.

MR. FROST: I think myself that it is a good idea to deal, as nearly as we can, with organizations, for the reason that with organizations you cut down so much, the volume of evidence, and the number of witnesses; the only place I don't think we should cut down, if we can avoid it, is for the layman who wants to come here.

MR. CONANT: No.

MR. FROST: I mean with the layman who has no organization at all, and

has a lot of good ideas, possibly we should listen to him; but you take, for instance, the lawyers. I don't think there is any necessity to bring up every lawyer who wants to say something; surely he can make his representation through his own local law association, and he has the Ontario law association, and if he can't make his representation through them, why ——

MR. HOOD: I would just like to interject this, Mr. Chairman; you are going to run into a bad situation, if you throw a wide open invitation to laymen to come before your Committee. Judging from the material that comes into the Department, complaining of an individual situation of alleged injustices, if every Tom, Dick, and Harry who thinks he has had a raw deal wants to come in, why ——

MR. FROST: I agree with that, but I think that is one of the places where there should be a little bit of latitude—I mean about going outside of the organizations.

MR. CONANT: Just on that point, you touched a very important point there. While the proceedings before this Committee must be free and open, it is my desire, and the desire of the Government, and I think it is the desire of everybody here, that we should do this work with the minimum of expense consistent with making a real job of it.

MR. FROST: Surely.

MR. CONANT: We don't want to waste the time of this Committee listening to, well, pranks—there's no other word.

MR. LEDUC: The word is well chosen; I was going to say, there is no department that receives as many letters from pranks as the Attorney-General's Department.

MR. CONANT: That raises an important point. I don't want to be misunderstood when I say that, but I think we will have to set up some arrangement, so that Mr. Magone or Mr. Silk will see every witness before they come before the Committee. While their time is valuable, it is not as valuable as that of the whole Committee, and find out what it is about, and I think that you will have to allow them a certain amount of discretion, and if it is a pure prank, we cannot hear him, and that's all there is to it.

MR. FROST: I don't think this is the place to come and air personal grievances.

MR. CONANT: No.

MR. FROST: If you are going to deal with individual cases, you will never get through. We want to get this thing through, in a reasonable time, anyway.

MR. CONANT: Here, Hood gives us this case. Here is a man who writes in:

> "By reason of the heavy snow fall, it is now, and already for several weeks, impossible for me to reach the highway by car."

Now that is the kind of stuff you cannot consider.

MR. FROST: Oh, you can't consider that. If you're going to get into individual grievances, we'll be here 'til Kingdom Come. What has to be done in this thing is to limit this to broad general principles.

MR. CONANT: Yes. So, I think it should be understood that one of our Counsel will see every witness who wants to give evidence, and sort it out and if he is in doubt, he may speak to me, but as Mr. Frost says, we are dealing with general principles, we can't deal with individual grievances.

MR. LEDUC: Oh, no.

MR. CONANT: They are infinite in the number and the extent to which you might listen to them. Then, Mr. Sharp, you will make out a revised copy of this list of persons and organizations, and mail it to each of the members at once, with the additions.

MR. MAGONE: Mr. Silk suggests that there is a Builders' Association which is making submissions from time to time, with respect to mechanics' liens. I don't know the name of it.

MR. SILK: I will have to check on the name.

MR. CONANT: Well, we will add that one.

MR. LEDUC: I mentioned this before; what about the Ontario Associated Boards of Trade and Chambers of Commerce? I know there is one in the north part of the province.

MR. SILK: I don't know very much about that.

MR. CONANT: Yes, I do; I was a Director for some years.

MR. LEDUC: Do they include all Boards of Trade in the province?

MR. CONANT: Yes, they are a sort of clearing house for all boards of trade, and their membership consists of the Boards of Trade and Chambers of Commerce of Oshawa, Lindsay, and so on. Their Directors' Board consists of the Presidents of several of these Boards of Trade. They are a fairly representative body.

MR. HOOD: They have a permanent office in Toronto.

MR. LEDUC: Do they cover the north country?

MR. CONANT: That is the point.

MR. LEDUC: There is an association in the north-west part of the province, I forget the exact name, but ——

MR. CONANT: I think, Mr. Leduc, there are two organizations, when we come to think of it; there is one that functions at the head of the lakes.

MR. HOOD: That's right.

MR. CONANT: Then there is one in northern Ontario.

MR. HOOD: There is one in the Timmins, Kirkland Lake, Cochrane area, and another one at the head of the lakes.

MR. LEDUC: I think these two should be notified, and I might suggest, also, that the Board of Trade of the larger cities, like Hamilton, Toronto, Ottawa and Windsor, London and Brantford ——

MR. CONANT: We have the Toronto Board of Trade.

MR. LEDUC: But you haven't the other larger cities. If you notify the Associated Boards of Trade, I mean the Association, and send them one copy of the Barlow report, it won't be long before you will get a request from the larger cities for copies. You might just as well circularize them at once.

MR. SILK; There would just be five, altogether?

MR. LEDUC: Yes, I mean the larger cities.

MR. SILK: Windsor, Hamilton, Toronto, London, Ottawa.

MR. LEDUC: What about Brantford?

MR. HOOD: I wouldn't get down to Brantford; you're getting down to a smaller city, and you will have to send it to all the rest.

MR. CONANT: Yes, I think those five cities are sufficient.

Well now, this second memorandum.

MR. LEDUC: Before we leave that, is there a Lumbermen's Association, some association of lumber manufacturers or dealers?

MR. HOOD: Yes, there is a Lumbermen's Association, and a Coal Dealers' Association.

MR. CONANT: Is it province-wide?

MR. HOOD: Yes.

MR. LEDUC: Coal Dealers' Association?

MR. HOOD: Yes.

MR. CONANT: Well now, on this second memorandum here, gentlemen, I think I can correctly say that, with the deliberations we are likely to have here this morning, I doubt if you will have to subtract much from this memorandum. I mean, it's rather a large order to sit down to in an hour or a few minutes and cover the whole field, isn't it?

MR. ARNOTT: It's impossible.

MR. LEDUC: Isn't there some question that we might take up at the next meeting? Do you intend to sit to-morrow?

MR. CONANT: No.

MR. LEDUC: You have the intention of adjourning for several weeks, I suppose?

MR. CONANT: On that point my idea was, subject to what Mr. Strachan would say, that we would adjourn to about the second week in April, on Tuesday.

MR. LEDUC: I can't do it, because we may have the Timber Probe sitting, then.

MR. CONANT: Will you be sitting continuously, then?

MR. LEDUC: I hope so. What about sitting the first week in May?

MR. CONANT: It's getting pretty late, then.

MR. STRACHAN: I think, Mr. Chairman, that we should keep in mind the court sittings in Belleville and Lindsay; Mr. Arnott goes to court there.

MR. LEDUC: That would be the first week in April?

MR. ARNOTT: No, the first week in April would be all right, as far as I am concerned.

MR. CONANT: Well, I had hoped to sit all through April, as a matter of fact.

MR. STRACHAN: Yes, we would like to sit right through for some time, if we could arrange it.

MR. CONANT: Is there not this possibility, that—my own thought was that we start, say with the first Tuesday in April, sitting Tuesday, Wednesday, Thursday and Friday, through April; that would cover a certain amount of ground. The evidence would be extended, and, excepting for the contribution he would make while he was here, the absent member can get the whole thing from the evidence that is adduced. It will all be extended in due course. We won't be running a daily copy—I don't think that is necessary—owing to the cost of the machinery that would be set up.

MR. LEDUC: It is quite all right with me; you may sit, and, of course, I may not be able to sit with you all the time, and I am afraid, if we sit for two or three weeks, you will simply have to go ahead without me. But after all, there are four members of the Committee without me, which would be all right, I think.

MR. FROST: I think that, perhaps, we could arrange to work the sittings so that they would not conflict with your Timber sittings.

MR. CONANT: When will they start again?

MR. LEDUC: The 8th of April.

MR. CONANT: May I make this suggestion, that we adjourn to the 2nd of April, the first Tuesday in April. I don't think we can look far enough ahead to see exactly what will happen.

MR. LEDUC: Is there not some question we might take up on that date?

MR. MAGONE: Mr. Silk has brought this to my attention, that by that time we will have a number of briefs, and we will have them copied and indexed, and made for the books of the various members of the Committee. We won't be in a position to know what question can be discussed until we receive these briefs.

MR. LEDUC: No, but isn't there some question here that we may take up for preliminary discussion, or could we not ask Mr. Barlow, for instance, to come here and give us more extended views on certain matters, so that we will have something to go on with?

MR. FROST: Mr. Conant could give us some background as to how Mr. Barlow was appointed in the first place. This is as I understand it; Mr. Barlow was appointed to consider the administration of justice in Ontario, arising out of a long series of suggestions and complaints about costs and all that sort of thing. Perhaps Mr. Conant could tell us just how it arose.

MR. CONANT: Yes, I could give you the background of it, and it perhaps originates as a personal slant. I have felt, for some time, from actual practice, that our administration of justice was due for an overhauling, that we hadn't kept apace with what might have been done in England, or even in the other provinces, and I discussed it with Mr. Barlow. I finally sent out a request in the form of a letter—he wasn't appointed a Commissioner, it was simply a letter of request from myself. He heard some evidence, by way of verbal evidence, and statements, and he got a number of written submissions, and he made his report. His report is really his own individual opinion, based upon his experience, and based upon the submissions that were made to him, and it was never intended by me, at any time, as anything more than a guide to what might be accomplished.

Now, the Grand Jury matter is not new, in the sense that there isn't much Mr. Barlow can tell us about Grand Juries that we didn't already know ourselves. But his report brought it up again, and it was considered as a proper matter for legislation.

I have never seen him since this Committee was set up, but he will be glad to come here at any time that can be arranged, to work it in with his other duties, and elaborate on any of the aspects that he has dealt with here.

I think, myself, that it would be as well, as Mr. Leduc suggests, if we were to meet, say, on the 2nd of April, and start to deal with some particular subject, or some particular subjects, and concentrate our attention on that, and examine the submissions that are made, as they come along, in orderly fashion.

MR. LEDUC: We might perhaps start, I think, Mr. Conant, with 12 and 13.

MR. ARNOTT: Would not 14 have a bearing on that?

MR. LEDUC: Well, yes.

MR. CONANT: Well now, that is a large field for discussion.

MR. LEDUC: I suppose that will be taken up before we take up 19, for instance?

MR. CONANT: There is a big field of discussion in 15, "Division Courts." It is territorial, from the point of jurisdiction, and also there is the possibility of setting up a small claims Court. That would be a very engaging subject to start with, if we wanted to.

MR. LEDUC: And the Secretary might notify all these people, and these associations when he writes to them, that the intention of the Committee is to deal with such a matter at its first sitting. Because, otherwise, we will simply meet here, hear Mr. Barlow, and then the Secretary will have to get in touch with everyone who wants to be heard on a certain matter, and it will take a few days before they can be brought here, in some cases, and we will simply be marking time, waiting for them.

MR. CONANT: What if we were to start off with No. 15

MR. LEDUC: Yes.

MR. CONANT: And go from that into 12, and then say, 13 and 14. Take them in that order, 12, 13, 14, and 15, as a group? They are not unrelated, and they would fit together to make one line of consideration, would they not?

MR. LEDUC: Well, 14 might be left off for the time being, because that is only a matter of arrangement.

MR. CONANT: That is not very important.

MR. LEDUC: Yes, the main thing is the jurisdiction and scope of the Consolidation of the County Court and Circuit Courts. We might start with this; I don't suppose there is any use in touching on the Rules of Practice until we have dealt with that jurisdiction, the matter of jurisdiction first.

MR. CONANT: Shall we follow that procedure, gentlemen? Start with 15, and then deal with 12, 13, and 14? 14 is not a very large matter. We have considerable data on it now. I think I would like the Committee to consider it, because I am of the opinion myself that abuses have crept into the system. I think there is another member of the Committee also that has the same opinion.

MR. ARNOTT: That is correct.

MR. CONANT: Is that agreeable, gentlemen?

MR. FROST: I think that would be all right, as far as I am concerned.

MR. CONANT: Start with 15, then, and go on to 12, 13, and 14.

Well now, it seems to me that some of these topics may be eliminated as we go along, and others may be added. There is an aspect, I think we might as well consider at the present time, and that is this: the scope of the work of the Committee, of course, is broad enough to deal with Rules of Practice, in fact, everything.

Under the present set-up, the Rules of Practice of the Supreme Court are made by the Committee of Judges, and of the County Court also, is that right, Mr. Magone?

MR. MAGONE: Yes.

MR. CONANT: Yes, made by the Committee of Judges of the Supreme Court. Surrogate Court Rules are made by our—in practice they are formulated by the Surrogate Judges and made effective by Order-in-Council, is that right?

MR. MAGONE: Yes.

MR. CONANT: Now go on with your other Rules. Your Criminal Appeal Rules.

MR. MAGONE: The Criminal Appeal Rules are made by the Judges of the Supreme Court by virtue of the power given to them by the Dominion Parliament in the Criminal Code, and the Rules regarding Certiorari and Prohibition and others are made by the Criminal Judges in Supreme Court.

MR. CONANT: And your Matrimonial Causes Rules?

MR. MAGONE: They are made by the Judges, too, under the Matrimonial Causes.

MR. SILK: That is Provincial legislation.

MR. FROST: Doesn't Mr. Barlow recommend that all of those Rules should be gathered together under one book?

MR. CONANT: Yes.

MR. FROST: Which would seem to be a reasonable suggestion.

MR. SILK: Or at least provide Statutes giving authority to judges to make rules.

MR. CONANT: I raised that point for this reason. I think the Committee should know this: The last substantial revision of the Rules was made in what year?

MR. SILK: 1928.

MR. CONANT: It goes further back than that, does it not?

MR. SILK: No, that is the last edition.

MR. STRACHAN: There was a substantial one in 1913.

MR. CONANT: You're right, the 1928 was not a substantial revision, it was a reprint, but the last substantial revision of the Rules was made in 1913. Now, I have this feeling myself, you cannot proceed very far in improving the administration of justice, from the standpoint of simplification, of expediting, or of effecting economies, without very soon getting into the Rules of Practice.

MR. FROST: Do you think, Mr. Conant, that this Committee is really—perhaps the word competent is hardly correct, but do you think we are a proper Committee to consider a revision of the Rules of Practice? I doubt that, very much. I think myself, that what we should do is this: that if we feel that, for instance, the County Court, the Surrogate Court should be consolidated, then there is the County Judges' Criminal Court, if we feel there should be a procedure set up under one Court to do that, that we should make that recommendation, and then ask, for instance, a Committee of Judges to consider the matter of Rules of Procedure, and what not. To be frank with you, I have practiced for about 20 years, and I dont, by any means, consider myself to be an expert in any regard, in the matter of court procedure. Like most lawyers, I trust to God to help me out when I get into a tangle, and I suppose that is the way most of us do. After all, there are experts—Barlow, for instance—there are other experts—some of the judges are experts, some of them are not; some of them admittedly are not experts at all, but if we get into—you take for instance, here, in this report: the recommendations he makes here in connection with changing certain Rules, and what not—it seems to me that that might be—that those questions, instead of us getting into an involved argument here about it, and all of the different views, and what not, that if these suggestions were referred to a Committee of judges, such as made the revision in 1913, why—my idea is to simplify this thing. I can see this ——

MR. CONANT: I hadn't quite completed what I was going to say, Mr. Frost.

MR. ARNOTT: It would be up to the judges, then.

MR. FROST: Here is my suggestion; we are a Committee of five members; we have the assistance of these gentlemen here. It seems to me that our investigation should generally be limited to general principles in this thing.

MR. CONANT: Perhaps, if I complete what I was going to say, your interruption was quite all right, but you might have a slightly different view, if I finish what I was going to say.

Under our present law, the rule-making body are the judges of the Supreme Court. Now, personally, I think that that is an undemocratic arrangement, and it is not in keeping with our present structure of government. Because the judges, with all deference to them, are responsible to no person, and in the making of the rules, they can affect the rights of individuals in many cases, as much as legislation passed by the legislature. In many cases.

MR. FROST: Yes, that is true enough.

MR. CONANT: I am strongly of the opinion, myself, and I am going to argue

with the Committee when the time comes, that the rule-making body should be differently constituted from what it is to-day, somewhat along the lines of what they have done in England. In England, they have made a rule-making body with various ex-officio members; for instance, in Ontario, we might add the Treasurer of the Law Society.

MR. FROST: Well, Mr. Barlow mentions that, does he not?

MR. CONANT: Yes, we might have the President of the Ontario Section of the Canadian Bar Association. I don't know that that is the proper person at the moment, but something of that nature.

Now, if you have an organization of that kind, I would be perfectly content to leave the rule-making to that body, because you would have a more representative body, and you have a representative in that organization who has a different view-point from the constituted and appointed judges.

Now, I am going to go further than that. I have discussed this with the judges, a matter of three or four months ago, and they have had under consideration for some time, some revisions to the rules, and they gave me a copy of it. I am not optimistic that, as long as the judges alone constitute the rules, that they will go very far in what you might call reforms, or towards expediting the administration of justice. They are by nature conservative, and do not like to see changes. So there are two aspects of the matter. In other words, two methods of approaching it. One is this, and this is purely exploratory, just so that you know the situation. One is that this Committee might consider the constitution of the Rules Committee. I think that the present system for the construction of the Surrogate Court Rules leaves a lot to be desired, because we have no well-defined method for setting up our Surrogate Court Rules, have we?

MR. SILK: No.

MR. CONANT: There isn't anybody who is doing it here at all?

MR. SILK: No.

MR. CONANT: If the Attorney-General, I presume it is, feels that they should be made, he may or may not, consult the Surrogate Court Judges; he makes a recommendation to the Council, and they become the Rules; so there is no really definite, clearly defined method. If this Committee—this is just my own view—if this Committee should be reconstituted, it could very well leave to that Committee anything that this Committee felt that it didn't want to deal with. But if the Rules Committee is not to be reconstituted, then I think it is a matter for this Committee to consider and make such recommendations to the Rules Committee as it sees fit.

MR. FROST: Well, just off-hand my own opinion is this: that I rather agree with what you say. I think this: that the Rules Committee might very well be made up of certain Supreme Court Judges and certain County Judges—and I notice that Mr. Barlow suggests, here, that the Chief Justice should appoint four lawyers. Now, I think the appointment of four lawyers is all right, but I don't know just why it should rest with the Chief Justice.

MR. CONANT: No.

MR. FROST: That is the point which you raised. I think that that might well be appointed some other way. I think, for instance, that you might ask the Ontario Bar Association to appoint.

MR. CONANT: And the Ontario Law Societies.

MR. FROST: Or all the Law Societies to appoint or name four men who would be on that Rules Committee.

MR. CONANT: And I think also, to interject this, that the Attorney-General or a representative should be on that, because the Province ——

MR. ARNOTT: Yes.

MR. CONANT: —— it has to create and maintain the machinery. It seems elementary that the executive should be represented on that Committee, doesn't it?

MR. FROST: Yes. Personally, I think some method of that sort might be followed, and it would get away from all this business of us going into these Rules of Court. To be quite frank with you, I'll put all my cards on the table, face up; I'm no expert in complicated Rules of Procedure and I very much doubt if any of the gentlemen here will want to claim that distinction.

MR. CONANT: Well, I have raised the point at this time, gentlemen, because it is rather fundamental—and I just throw out this suggestion—that this Committee might consider it at a very early stage, taking into consideration and hearing representations regarding the constitution of those Committees, because if as an interim decision the Committee is going to decide that we recommend to the Legislature the necessary amendments for the reconstitution of the Rules Committee, that, so far as I'm concerned, would materially affect my attitude towards the details of the Rules. I think that is a logical position to take, whether it is right or not, whether you agree or not.

MR. LEDUC: What is done in the other provinces of Canada? Take Quebec, for instance. The Quebec system, of course, is totally different from what it is in Ontario. Here we have a very short Judicature and quite a large number of Rules; in Quebec they have the Act on Civil Procedure which contains matters that are dealt with by our own Judicature Act, and the Rules are absolutely insignificant. The Judges makes the Rules of Court, but they are very few in number and very unimportant as compared to the Procedure.

MR. CONANT: That is not the case here.

MR. LEDUC: No, that is not the case here. The Judges have very, very vast powers here. What is being done in the other provinces of Canada?

MR. CONANT: Well, I have the data on that. There are several of them that have constituted a Committee, as I recall it, along the lines that we generally discussed this morning, and I raised that point because it is fundamental and it

might well affect the whole course of our deliberations in that, as far as I'm concerned, if the matter comes before the Committee that is a matter of practice, and as the Board is constituted at present I would want to consider it, and I would want this Committee to formally make a recommendation of some kind, you see, and I would approach it from a different standpoint, if the Rules Committee were differently constituted.

MR. FROST: Well, I think myself that in the matter of Rules of Court that in there lies the key for the simplification of our Administration of Justice.

MR. CONANT: Why, certainly!

MR. FROST: I mean there is such a ——

MR. CONANT: Gentlemen, you can't proceed very far; this Committee might sit for six months, but you can't accomplish very much by way of simplification, expediting and economizing in National Administration of Justice without getting in the realm of Rules of Practice and Rules of Procedure. You're bound to, and I think it is so fundamental to our whole inquiry and to the Administration of Justice that we might very well consider commencing our deliberations on that note. I have not the slightest doubt that both Chief Justices and perhaps some of the other members of the Bar will be very glad to come before the Committee and give us their views—I haven't the slightest doubt of it.

MR. FROST: Why not put that on the agenda near the beginning? In fact, I think it might be considered.

MR. CONANT: What do you think, Mr. Strachan?

MR. STRACHAN: Well, I would be inclined to deal with that first. If that is going to be done and set up in different law-forms body, as the Chairman says, it would relieve us of a great deal of consideration, if we are going to get into the Rules of Procedure we might get into.

MR. FROST: One thing that impressed me very much in Mr. Barlow's report was, his suggestion that all the Rules of Practice, Criminal and Civil, should be consolidated in one volume. If you do that and you get a good consolidation Committee, a great many of the discrepancies between various Acts, like the Division Courts Act and the County Courts Act, would be discovered and simplified. I think that would be a very effective method of simplifying it.

MR. CONANT: Mr. Frost, that has been in our minds for a year, and the situation is this. When the Rules are reprinted and republished, as they have to be, I want to include in one volume, all the Rules of Practice for all the Courts. The Committee of Judges have made what can only be described as partial amendments or revisions of the Rules. I am, personally, of the opinion that they haven't gone nearly far enough to meet what I had in mind, and what I think the amendments at the present time require. I have succeeded in having their idea that the Rules should be reprinted, held up, pending the deliberations of this Committee, but before they are reprinted and reconsolidated in this one volume, I am strongly of the opinion that all the Rules should be thoroughly revised. Your Matrimonial Rules can stand to revision, your Criminal Appeal

Rules and certainly your Surrogate Court Rules require revision. Now, as far as I'm concerned, I would be quite prepared to put the formulation or revision of all the Rules in one rule-making body.

MR. LEDUC: Well, all right, when you come to that. Everybody, so far, has taken it for granted that there should be a Committee, either of Judges or Judges and Lawyers, responsible for making these Rules. Has any thought been given to consolidating these Rules and making them an Act of the Legislature?

MR. CONANT: Under the present laws they don't have to be an Act of the Legislature.

MR. LEDUC: I know, but I am here to study it.

MR. CONANT: I think it is wrong. I never realized it until I went into it six months ago, but in the present system, the Committee of Judges make the Rule to the Supreme Court, to the County Court, Matrimonial Court and Criminal Appeals ——

MR. LEDUC: Quite so.

MR. CONANT: —— and they promulgate them without any Order-in-Council, without taking them into the Legislature, without any contact with the Legislature or with the executive whatsoever. I think that is a wrong system.

MR. LEDUC: That is exactly my opinion.

MR. FROST: You mean to say they actually have powers of Legislature?

MR. LEDUC: Right.

MR. CONANT: Absolutely. I'm not saying that they have or would abuse that power, but fundamentally the principle is wrong. Now, when we constitute any organization you can think of, whether it is a medical organization or anything else, and give them power to make rules, they have to come back for a validating Order-in-Council. I think that is almost a universal case, isn't it, Mr. Magone?

MR. MAGONE: Pretty well, yes.

MR. CONANT: I don't remember any exceptions to that. Now, those Rules, set up by such special organizations, are not nearly as fundamental or as vital to our people as the Rules of Practice in all our Courts.

MR. LEDUC: That is exactly my opinion. Should these Rules be qualified and made an Act of the Legislature—be passed by the Legislature?

MR. FROST: I think that they should be confirmed by Order-in-Council before they become effective.

MR. CONANT: Yes.

MR. FROST: That isn't the case now, is it?

MR. CONANT: Oh no, not by any means, oh no! I think that the Committee, as Mr. Strachan said, may very well consider first on its agenda, the advisability of recommending to the Legislature the constitution of one rule-making body for the province.

MR. MAGONE: Of course, we can't deal with Criminal Appeal Rules or Rules regarding Certiorari.

MR. CONANT: No, those are expressed by the Criminal Code, but we can deal with everything else.

MR. FROST: Of course, those Rules are not so far-reaching, are they?

MR. MAGONE: No, they are simply Rules of Procedure, they are not like Rules of Practice which, as Mr. Leduc says, are really subject of law.

MR. LEDUC: I think we might well give consideration to that point, whether or not we should incorporate these Rules in our Judicature Act, or have a different Act of the Legislature and have the Legislature pass upon them.

MR. CONANT: Go ahead, Mr. Leduc.

MR. LEDUC: The power should be left to the Judges to make certain Rules for anything that is not provided for. But I think that all these Rules affect the rights and privileges of the citizens of this country. You mentioned, earlier in the discussion, that a certain system was not a democratic system; I think the most democratic way is to have the Legislative Assembly—the representatives of the people pass upon them.

MR. CONANT: Well, would it be agreeable to the Committee?

MR. LEDUC: I'm sorry Mr. Conant, but I think that before we start discussing the Rules of Practice, we might just as well discuss Judicial Reports.

MR. FROST: Well, I think that may be all right. Those items 12 to 15 may be considered, and following that ——

MR. CONANT: 27, gentlemen, is the subdivision we are discussing: "Rules of Practice Committee." It is very brief.

MR. LEDUC: What I mean is this: before we start discussing what Rules should be made and how they should be made, and so on and so forth, we should know to which Courts they shall apply. I think the first thing we should do is study the constitution of the Courts and then we can go into the Rules afterwards.

MR. FROST: Yes, perhaps that would disclose some of the discrepancies and overlapping, wouldn't it?

MR. LEDUC: Yes, exactly.

MR. CONANT: Well, I should, perhaps, go a step further, and this is my way of reasoning, or at least suggesting, that we should deal with this constitution of the Rules Committee at an early stage, because the Chief Justice—I think it was Mr. Justice Middleton wasn't it?—furnished me with a copy of the revisions, and as soon as this Committee was constituted by the Legislature, I saw the Chief Justice. I had not gone through the Rules very carefully, because they came to me while the Session was on, so when I saw the Chief Justice I said: "Now, as you know, the Committee has been constituted. I can't tell at this stage what will be the scope of the work; I would like you to just hold these Rules in abeyance until the Committee has functioned long enough to see whether we are likely to effect what you have done." Well, they evidently set their mind on July the 1st to make these Rules effective. I am quite sure that if this Committee considered this matter, and gave any indication that they might favour a reconstitution of the Rules Committee, that would effectually dispose the whole matter, otherwise, I would be embarrassed by the requests of the Judges to provide funds to reprint these Rules.

MR. LEDUC: But Mr. Chairman, suppose we decide on a change in the Rules Committee, or a different system of making Rules, this change would take effect only after the next Session. In the meantime, we can not interfere with the rule-making powers of the present Committee.

MR. CONANT: Yes. But Mr. Leduc, the present Committee wouldn't put these into effect if there was a reason to think there might be any change.

MR. LEDUC: I see. Well, I don't suppose it will take a great many days to consider these points 12 to 15, and we might proceed immediately after with the consideration of the Rules Committee and the Rules of Practice.

MR. CONANT: Well, that is quite agreeable. I mean to say, it won't affect the time factor very much, anyway.

MR. LEDUC: No.

MR. CONANT: So we'll deal with items 12 to 15, and subject to what may transpire, branch into 27, is that it?

MR. LEDUC: Well, 19 and 27 are supposed to be considered together.

MR. SILK: How about 26?

MR. CONANT: No, 26 is entirely a different matter. We'll deal with 12 to 15, and then 19 and 27, is that agreeable, gentlemen?

MR. FROST: Yes.

MR. LEDUC: 19 and 27 would be the second item on the agenda.

MR. CONANT: Yes. 12 to 15 would be the first item of the agenda, if I construe the wish of the Committee properly, and 19 would be the second, and 27 would be the third.

MR. LEDUC: Well, 19 and 27, of course, will have to be considered together.

MR. CONANT: Yes, quite; they are all very closely related.

MR. LEDUC: You have also 30, which is a matter of Jurisdiction Procedure.

MR. CONANT: Well, that is, of course, of hardly sufficient importance to constitute a separate item.

MR. LEDUC: No, no, no, but it would probably be discussed in connection with 19.

MR. MAGONE: That should not be in connection with Rules of Procedure, but particularly in connection with motor offences.

MR. LEDUC: Oh, I see.

MR. CONANT: That subject will come up if we discuss and seriously consider what I call a Small Claims Court. That is a necessary element in a Small Claims Court where you are setting up Courts, say, of a jurisdiction of $100.00 and allowing service by mail or by the plaintiff himself.

MR. FROST: I would suggest that this business of getting large service fees and what not for serving a small claim of four or $5.00 against some poor man who can hardly pay the four or $5.00, let alone the service, seems to be utterly ridiculous to me.

MR. LEDUC: Service by registered mail would be just as effective.

MR. STRACHAN: Do you think we should now consider whether we should give any special invitations? I mean in regard to the items we are going to consider first?

MR. CONANT: Well, your County Judges Association has covered all of 12 to 15—your County Court Judges will give you all the submissions you want on that, won't they?

MR. LEDUC: Well, the Law Societies may have suggestions to offer also, especially when we come to the Courts. I would suggest that the Secretary should tell them, when he sends notices, that the first item in the agenda is this, so if they want to give evidence or make representation they may do so.

MR. FROST: Well, for 12, I presume, the suggestion is that there should be a consolidation of these various Courts into one Court in each County?

MR. CONANT: Yes, or district.

MR. LEDUC: That is, you would do all your Court work before the County Circuit Court work before the County.

MR. FROST: Yes.

MR. CONANT: That is a matter, for instance, that Mr. Barlow might very probably, and with considerable value, give us his views on.

MR. LEDUC: I think we should hear him on the 2nd of April.

MR. CONANT: Now, regarding that Division Court. Perhaps I may be pardoned for telling the Committee on that Division Court and Small Claims aspects of the wide discussion with Judge Barton in town here. He has had considerable experience in Division Court, he might be able to give us valuable help on that. Who was it that discussed the possibility of Small Claims Court?

MR. MAGONE: It may have been Barton, but I wasn't present. Barton has been taking a lot of the Division Court.

MR. LEDUC: As to some of the Judges purely ruling all districts might have something very interesting.

MR. HOOD: There is the Division Court Clerks Association.

MR. CONANT: Yes, that's right. Well, Mr. Magone and Mr. Silk will have to work out who should be particularly contacted for that first item on the agenda, and on the second item, the Rules of Practice and the Committee. I should think both Chief Justices, Mr. Justice Middleton and Mr. Barlow, should be advised.

MR. LEDUC: Well, on that point of Division Courts I would suggest one ——

MR. CONANT: No, we're dealing with the other.

MR. LEDUC: Pardon me.

MR. FROST: 19 and 27.

MR. CONANT: Yes. Well, the Law Societies and Canadian Bar Association would be particularly interested in that, wouldn't they?

MR. STRACHAN: I think we might get the expressions and submissions from the counsels. I think we can leave that to the counsel.

MR. CONANT: Is there anything else before we adjourn?

MR. LEDUC: I would like to suggest, for item 15, one man in Ottawa, Joseph Constantine, who is the dean, I believe, of the County Court Judges, and he may have some suggestions. He has been sitting for 37 years in the County Court and Division Court bench.

MR. STRACHAN: And His Honour, Mr. Morrison.

MR. CONANT: Yes, I think we should have some of these Judges.

MR. LEDUC: There is no compelling, but if they want to be heard we'll be glad to hear them.

MR. CONANT: Yes, or make submissions. I think that very often you get just as much out of a wise submission as you can out of them coming here. I think you should make it clear in your letter that we'll be glad to consider written submissions.

MR. CONANT: Well then, we'll adjourn until April 2nd.

Meeting adjourned until April the 2nd, 1940.

SECOND SITTING

Parliament Buildings, Toronto,
April 2nd, 1940.

MORNING SESSION

Present: Hon. Gordon D. Conant, K.C., M.P.P., Attorney-General of Ontario, Chairman; Hon. Paul Leduc, K.C., M.P.P., Minister of Mines for Ontario; Ian T. Strachan, K.C., M.P.P.; Leslie M. Frost, K.C., M.P.P.; Richard D. Arnott, K.C., M.P.P.; Clifford R. Magone, K.C., Committee Counsel; Eric H. Silk, K.C., Committee Counsel and Secretary.

MR. CONANT: Gentlemen, at our last meeting, the organization meeting, we appointed the officials of the Committee, including Mr. Sharp as Secretary of the Committee. At the time, I overlooked the fact that Mr. Sharp was only loaned to the Law Clerks' Office for the duration of the Sessional work, and that he was due to return to the Treasury Department on April 1, and I would therefore suggest a new appointment, and take the liberty of suggesting Mr. Silk, whom we have already appointed to be associated with Mr. Magone. I think Mr. Silk can very nicely combine the duties of both offices, and I have a motion, by Mr. Leduc, seconded by Mr. Frost, that Mr. Silk, Legislative Counsel, be appointed Secretary to the Administration of Justice Committee in lieu of Mr. Sharp.

Carried.

MR. MAGONE: Mr. Chairman, at our last meeting, we outlined the procedure to be followed for the first week, and following that, sent a notice to a number of associations, advising them that we expected to discuss the Division Courts, the Consolidation of county and district courts, courts of general sessions of the peace, county court judges' criminal courts, and surrogate courts, County court jurisdiction, interchanging of judges in county court districts, the Rules of Practice, and the Rules of Practice Committee. I think it is now important that we should know where we are going from here, and that the Committee might outline the next order of business, so that we may know. That is set out in Memorandum No. 2.

MR. CONANT: Was there not a separate extract, setting out the things we were going to deal with first?

MR. FROST: I think, Mr. Conant, you are probably referring to the circular letter of March 11.

MR. CONANT: Well then, are you prepared to proceed with the items we were to consider first, Mr. Magone?

MR. MAGONE: We are ready to proceed with items, 15, 12, 13, 14, 19, and 27, but I would like the Committee to indicate what they wish to take up next, in order that we may be prepared for it.

MR. LEDUC: Would it not be just as well to take up the organization of the courts before the Rules of Practice?

MR. CONANT: Well, there is an observation that I think is pertinent to make at this time, gentlemen, and concerning which I would like to have the Committee's views, and that is this: when you contemplate the whole field of the Administration of Justice, and the improvement of the constitution, organization, and maintenance of the courts, facilitating, simplifying, expediting and otherwise improving the practice and procedure, effecting economy, which is the broad scope of our reference to a large part of it, it would be impossible to allocate any particular percentage or definite part as involved in the Rules of Practice, and, as one of the members of the Committee remarked at the previous session, it is doubtful whether this Committee should, or could, deal exhaustively and constructively with the whole matter of the Rules of Practice. And I think that we should, at an early stage, perhaps when we have dealt with the items 15, 12, 13 and 14, which do not particularly involve the Rules of Practice, and which can be properly considered without becoming involved in the Rules of Practice, I do feel that after we have completed that, we should hear all submissions that might be offered, and give consideration to this question of the constitution of a Committee for the making of Rules of Practice, having in mind this fact: that if a Rules of Practice Committee is constituted to accomplish what now has been referred to this Committee, then we could, and would, quite properly, leave to that Committee, the various items that have to do with practice, as distinguished from matters of legislation or general jurisdiction. That is my feeling, and in response to Mr. Magone's request for guidance, I would suggest that we instruct counsel that, after we have completed items 12, 13, 14, and 15, we should give consideration to the matter of constitution of such a Rules of Practice Committee, so that, if it is decided that the Rules of Practice Committee should be constituted in a way likely to meet the situation, matter of practice would be more or less isolated from the work and consideration of this Committee and left for that Committee to determine. Now that is only my own view. I would like to have the views of the other members on that point.

MR. FROST: Well, I am quite satisfied with that procedure. I think, too, that if we proceed, for instance, with item No. 19, that we might get Mr. Barlow's views in connection with that, and also of others as well, and I think, possibly, after so doing, we might come to some conclusion on the matter, and probably leave that out for further consideration later on. I do not think that we are competent to make rules, or suggest changes in the rules. I think that is a matter for a Committee of experts. I agree with you, Mr. Attorney-General.

MR. CONANT: Is that agreeable to you, Mr. Strachan?

MR. STRACHAN: Yes.

MR. CONANT: Very well; we will proceed then, Mr. Magone, and until your submissions are completed, with items 12, 13, 14, and 15, and then we will deal exhaustively and more or less finally with the question of the Rules of Practice Committee, which encompasses items 19 and 27 of your original agenda.

I quite understand, and the members of the Committee do, no doubt, that in considering items 12, 13, 14, and 15, some references may be made to the Rules of Practice, but I think it is the wish of the Committee that, so far as is practicable, that your submissions should be confined to these items, 12, 13, 14, and 15, leaving, so far as is practicable, and so far as is convenient, all the submissions on the Rules of Practice and Rules of Practice Committee for continuity of submission.

MR. MAGONE: Yes. Mr. Chairman, I had intended, this morning, to ask Mr. Barlow to come here and give evidence; also, last week I wrote to Sir William Mulock, and sent him a copy of Mr. Barlow's report, and asked him if he would indicate when it would be convenient for him to appear and give his views to the Committee. I received a letter from Sir William saying that he would be here at ten-thirty, but I think that, while we are waiting for him, we might ask Mr. Barlow to give us his submissions.

MR. CONANT: All right. I have only this observation to make in connection with that. While I am sure we are all glad and anxious to hear Mr. Barlow, we want to arrange his hearings, as far as possible, to meet his official demands on his time, and I think that should be kept in mind. Mr. Barlow is a very busy man. And subject to that, of course, we are glad to hear from him at any time.

MR. MAGONE: I think we will be able to arrange that, Mr. Chairman. We might take Mr. Barlow one day a week, or half a day a week, and fill in the rest of the time with submissions from other sources.

MR. MCCARTHY (Treasurer, Upper Canada Law Society): Mr. Chairman, on behalf of the Law Society, may I take this opportunity of assuring you, sir, and the other members of your Committee, of our co-operation in the work that you have undertaken. I may say that Convocation as a whole, went over Mr. Barlow's report, and we have had the benefit of having the Judges' recommendations before us. At Convocation we dealt with the report clause by clause. There were certain suggestions which we felt we were not in a position to deal with at all, and as to which we made no recommendation. On others, we thought we could speak for the profession as a whole, and we have made certain recommendations. Mr. H. Percy Edge has been retained by the Law Society to attend your Committee sittings, and to report to us from time to time.

If, at any time, you wish any member of the Benchers or of Convocation to attend, or to assist you in any way, I am able to give you their assurance that either myself or the Chairman of Convocation, Mr. Mason, will be here, on any occasion you may wish, to assist you in any way.

With regard to the matter on which you spoke just now, Mr. Chairman, that is the Rules of Practice Committee, we felt as you do, and made no recom-

mendations with regard to the Rules, because we felt, as you do, that the members of the Rules of Practice Committee are the people who should deal with the rules, and as soon as that body is formed, we would be glad to co-operate with them. But that would involve, of course, an amendment to The Judicature Act, which could not be accomplished until the next session of the Legislature, because, under The Judicature Act as it stands at present, the revision of the rules is in the hands of the judges. But once a Rules of Practice Committee has been formed, and The Judicature Act amended to provide that, you have our assurance, Mr. Chairman, that we will be glad to sit in with you and assist in any way we can.

I am authorized to say this, that, in so far as the suggestion that Mr Barlow makes is concerned, that is that there should be a change in the Rules of Practice Committee, we are heartily in accord with Mr. Barlow's suggestion. In other words, Convocation thinks that the members of the Bar should be represented on that Committee.

Mr. Edge will be here throughout the sittings, and any time you want either myself, or any member of our Committee, of which Mr. Mason is the chairman, we will be glad to assist you and attend at any time.

MR. CONANT: I am sure, Mr. McCarthy, and I think I speak for the Committee, we appreciate that attitude of the Law Society, and I think it would be well to take this opportunity to say that the purpose, and the hope, of this Committee, is to be constructive. We are not here to destroy old forms without building something better. And that can only be accomplished by the fullest co-operation of all the sections, classes, and vocations that are concerned with the Administration of Justice.

We are nothing much more than a "clearing house" for ideas. It is my own conception of our function, to take the ideas and the views that are expressed, to sift them, to arrange them, and to express to the Legislature our conclusions from those views. That, as I say, is my own conception of our function.

And we certainly appreciate the attitude of the Law Society, and, undoubtedly, we will call upon you—I hope not too frequently—but at any rate fairly frequently, for assistance and guidance.

MR. MCCARTHY: We will be glad to be of assistance, Mr. Chairman. Mr. Edge will represent us during the sittings, and he will be in communication with us at any time you see fit to have him do so.

MR. CONANT: Thank you, Mr. McCarthy. I see Mr. McKenzie here, also.

MR. K. F. MACKENZIE, K.C. (Ontario Section, Canadian Bar Association): Mr. Chairman, I am here on behalf of the Ontario Section of the Canadian Bar Association, to express the same sentiments on behalf of the lower class of the Bar that Mr. McCarthy has expressed on behalf of the Benchers.

We will be glad and are anxious to assist this Committee in its work. The feeling of the Ontario members of the Canadian Bar Association is that this is a most important Committee, and that it is desirable, and, in fact, necessary, that the cost and time consumed in litigation should be cut down. I personally

will be glad to co-operate in any way, and any member of the Council of our Association will be glad to co-operate. If Mr. Magone wants any member of the Council, or any person not covered by Mr. McCarthy's undertaking to come here and assist and give his views, I will gladly come myself or procure them to come.

MR. CHAIRMAN: Well, I am sure the Committee is pleased to have Mr. MacKenzie come here and express those views. With all respect to other classes, I am sure the lawyers can and should be the most helpful in assisting us to plot a course in order to achieve that which the Committee has been instructed to achieve. And it is only with the co-operation of the lawyers that we will succeed, and the Committee certainly will appreciate any assistance they may give.

It does not necessarily follow that the individual members of this Committee, or the Committee collectively, will agree with all the views that are expressed, but that is not a reason why the submissions should not be made, for such disposition as the Committee might see fit.

MR. MACKENZIE: I might add, Mr. Chairman, the Bar has not made recommendations with regard to these matters, because there is divergence of opinion on a great many subjects, and we do not feel that we should put before you, as views of the Bar Association, something that wasn't unanimous, but that does not mean that we are not glad to assist and give our views, and produce people who will give their views, on either side.

MR. CONANT: Well, we will have to try to act as judge and jury, and sift them out, Mr. MacKenzie. Thank you.

Mr. Gale, have you anything to say?

MR. G. A. GALE: Yes, Mr. Chairman, perhaps at the risk of being impertinent, in view of the representations already noted, I should say that, when you asked Mr. Barlow, in the first instance, to survey this question, a Committee was formed of the members of the Young Lawyers' Club, of which I was elected Chairman, to co-operate with Mr. Barlow, and during the course of his survey we did make a submission, in writing, to him, and subsequently conferred with him on these matters.

The Committee has been instructed, by the Lawyers' Club, to continue in office during the sittings of this Committee at the present time, and I would like to offer the co-operation of the Lawyers' Club, and of this special Committee. We will endeavour to be present at all sittings, and to render whatever aid the Committee feels we might render.

I may say that, as you know, sir, the Lawyers' Club is perhaps the only official representation of the younger lawyers of Toronto.

MR. CONANT: We appreciate your offer of co-operation, Mr. Gale. And I don't think you should offer any apologies for representing the younger lawyers. I think they are just as entitled to their views as the older talent.

Now, Mr. Baker, have you something to say?

MR. BAKER: Yes; I am not appearing for a lawyers' group, but rather for those for whom lawyers act; the Property Owners Association of Ontario. Our membership is made up of some 35 groups, including building companies, real estate companies, loan companies, trust companies, etc., and we are interested in the consideration of mortgage laws. We are the ones who have to take such actions, and, unfortunately, on many occasions, the matter of expense is an important consideration, and I think that that expense may be reduced, and we hope that this Committee may give us some assistance in this respect.

I will be glad to give you any assistance that I can, or to obtain any information you may wish at any time. I expect to be on hand at least during the time the Mortgage Act is being discussed.

MR. CONANT: Thank you, Mr. Baker. Mr. Laidlaw?

MR. LAIDLAW: I represent the Real Estate Boards, sir. I was very much interested on receiving a copy of Mr. Barlow's report and an invitation to attend, and while I have not had an opportunity of consulting the Real Estate Boards with respect to recommendations, I am quite sure that the members will be very glad to co-operate in every way they can, and give any assistance possible in connection with the procedure in regard to mortgage actions. We are also very much interested in No. 24, "Appeals under The Assessment Act" as to which there has been a long standing feeling of injustice under the recent system, as is so clearly set out in Mr. Barlow's recommendations.

I will be glad to attend and give whatever information we can, if we are kept informed as to when those particular subjects will be considered.

I may add, we are having the convention in London two weeks from to-day, and we will take the opportunity, at that time, of getting the views of the representatives of real estate dealers and brokers from one end of Ontario to the other, and I hope we will be able to present some recommendation to you as a result of it.

MR. CONANT: We will be glad to have your submissions, Mr. Laidlaw. Mr. McDonagh?

MR. MCDONAGH: Mr. Chairman, I am not representing anyone, except perhaps one who is interested as a member of the Bar and as a Division Court Clerk.

MR. CONANT: Perhaps Mr. McDonagh will give us some suggestions when we come to these first four items, Mr. Magone.

MR. MCDONAGH: Yes, I am to co-operate with the Committee.

MR. CONANT: May I, at this stage, make this observation, gentlemen: of course, a work of this kind must be organized and kept in hand, and I would ask you to get in touch with Mr. Silk or Mr. Magone regarding anything that you want to bring before the Committee, and as briefly as possible submit to them what the matter is and the nature of it.

I think it is proper to make this further observation: that it would be impos-

sible, in the space of time that is at our disposal, and in anything short of several years, to cover the whole field of law reform. It is a vast subject, that practically knows no end. It is my view that the Committee will direct its attention to those matters with what might be called a more urgent or more obvious need, without endeavouring to exhaust the entire field. And that leads to the further observation that the submissions should be of a nature general in their application. I had an example of what I don't mean, in that connection, in a submission that was made a few days ago, which was a special plea on behalf of a special and a very limited section of the community. Mr. Magone knows the submission I refer to.

We cannot deal with all the individual and small sectional grievances in the province. That is not possible, and I ask and suggest that the submissions be more general, and have to do with the whole and larger field of the Administration of Justice, rather than with that of a small or particular class of the community, whether it be related to the lawyers directly or to any particular business organization.

Very well, Mr. Magone. You may proceed.

MR. MAGONE: I am calling Mr. Barlow first.

F. H. BARLOW, K.C., Master, Supreme Court of Ontario.

MR. MAGONE: Now, Mr. Barlow, will you kindly turn to page 33 of your report, dealing with Division Courts. Now in your recommendations, you suggest that:

1. That in place of the Division Court there be set up a small claims Court as a part of our County Court system, with a jurisdiction limited to all claims not exceeding $100.00, except those set out in sec. 53 of the Division Courts Act together with replevin, trover, interpleader and any other complicated proceeding (which latter should be named).

2. That the procedure be simplified;

3. That all services be made by registered mail;

4. That a procedure be adopted to enable a Judge to deal with contested matters in an informal manner;

5. That the fees be paid on a lump sum basis of $2.00 for claims not exceeding $50.00, and $3.00 in other claims, one-half thereof to be refunded where the claim is settled or paid before judgment;

6. That the territorial limit of the Courts at present existing be abolished and that the jurisdiction be made county-wide;

7. That claims exceeding $100.00 now dealt with in the Division Court be placed within the County Court jurisdiction;

8. That the County Court practice and procedure be applicable to the same,

except that claims not exceeding $300.00 go to trial on a specially endorsed writ and affidavit of merits without a jury, and without an examination for discovery unless otherwise ordered by a Judge; that such cases be placed on a separate list for trial; and that a reduced tariff of counsel and solicitor's fees in such actions be made applicable thereto.

Now, Mr. Barlow, would you explain what mechanics would be involved in that? Would it be a repeal of The Division Courts Act and an amendment of The County Courts Act?

WITNESS: Well, in my opinion the present Division Courts Act should be repealed regardless of what is done, because the present Act is based upon The Division Courts Act that was passed in 1850, and has, since that time, merely had additions made thereto, until it is probably the most complicated piece of legislation that we have on the statute books; instead of being simple and direct, as a small debts court should be, so that the individual might be able to know, without difficulty, the procedure, it is next to impossible for him to know anything about it. And so, regardless of what is done, I certainly would repeal the present Division Courts Act. I would simplify the whole Act.

Q. Well now, in England, they have no such thing as a Division Court, I understand?

A. No.

Q. The jurisdiction now exercised by the Division Court is in the County Court?

A. Yes.

Q. I understand, too, Mr. Barlow, that in England they have certain County, Borough and other Municipal Courts, which are presided over by Justices and Recorders, who have jurisdiction in small claims?

A. Who have jurisdiction in small claims, yes, and they have a practice similar to that in the Province of Quebec.

MR. CONANT: Would you mind repeating that?

MR. MAGONE: In England there are small debt courts, in some cases called Borough Courts?

WITNESS: Called Borough Courts, yes.

Q Yes, and other Municipal Courts and Parish Courts, presided over in some cases by Justices, Magistrates and Recorders, who have jurisdiction over small claims?

A. Yes.

Q. They differ in different parts of England, I understand?

A. Yes, it is all drawn up as a matter of custom, I believe.

MR. CONANT: Mr. Magone, is it your intention to cover at this time a general survey of several jurisdictions?

MR. MAGONE: Yes, I just want to go through some of the small debt acts of the other provinces.

MR. CONANT: All right.

MR. MAGONE: In Alberta, I understand, there is a Small Debts Court presided over by a Magistrate, with a jurisdiction of $100.00?

WITNESS: Yes, I believe so.

Q. And in British Columbia?

A. Yes, they have a small debts Court there; I don't know what the jurisdiction is; you may know.

Q. I understand it is $100.00.

A. $100.00.

Q. And it is presided over by a stipendiary magistrate.

MR. LEDUC: You have all these statutes, I suppose, Mr. Magone?

MR. MAGONE: Yes.

MR. CONANT: And these sheets are the summary?

MR. MAGONE: Yes, sheets 59 to 69 are the summary.

Q. Then, in Manitoba ——

MR. CONANT: Now on sheets 60A you have: Small Debts Recovery Act, No. 39—what jurisdiction is that?

MR. MAGONE: That is Manitoba.

MR. CONANT: All right.

MR. MAGONE: And the Manitoba court is presided over by a Justice of the Peace or Magistrate with a jurisdiction up to $100.00?

WITNESS: Yes.

Q. Then there is a similar Court in New Brunswick, called a Parish Commissioner's Court, with jurisdiction, in debt, up to $80.00, and in actions of tort to $32.00, and in addition to that, apparently, there is a Justices' Court, with a jurisdiction, in debt, up to $20.00, and in tort to $8.00?

A. Yes, that goes away back, prior to Confederation.

Q. In Newfoundland, I believe, there is a small debts court, Mr. Barlow, with a jurisdiction up to $200.00, trial by a stipendiary magistrate or two justices of the peace?

Q. And in Nova Scotia there is a small debts court called a Municipal Court, in which the stipendiary magistrate has jurisdiction up to $80.00 or one justice of the peace up to $20.00?

A. Yes.

MR. FROST: Actually, Mr. Barlow, in these other jurisdictions, is that a sort of parallel system to our Division Court system?

WITNESS: It takes care of practically the same claims, at least it takes care of the small claims, I should say. You see, our Division Court system, here, takes care of claims from $1.00 up to, in certain instances, $300.00, and I think, in some of them, $400.00.

MR. LEDUC: $400.00, yes.

WITNESS: Yes, but in these other jurisdictions, where they are presided over by a magistrate, I know of no instance—well there may be one instance there—where they go over $100.00. Most of them are under $100.00, and even in the Province of Quebec, which Mr. Magone hasn't mentioned, magistrates try up to $100.00 there.

MR. CONANT: Well, Quebec isn't on these sheets, can you tell us briefly what the system is there?

WITNESS: Well, Mr. Leduc is probably more familiar with it than I am.

MR. LEDUC: No, I have been out of touch with the Quebec system for a number of years.

WITNESS: The jurisdiction is up to $100.00 and the trial is before a magistrate and not a judge.

MR. FROST: In that event, they would have some civil machinery that would operate in conjunction with the magistrates?

WITNESS: Oh, yes, they have the same—at least I wouldn't say they have the same as we have here, but a simplified procedure by which a claim is put in to the magistrate, and notice given of the claim, and then it comes up for disposition by the magistrate.

MR. MAGONE: As I understand it, Mr. Barlow, the order of procedure is to apply for a summons to the magistrate, in the same way that one applies for a summons in a quasi-criminal matter?

MR. LEDUC: I don't think that is the procedure. I believe they issue writs the same as in the higher courts. I believe that is the method of procedure there.

WITNESS: Yes, we have a procedure here, by which small wage claims may be collected by the magistrate by the issuance of a summons.

MR. CONANT: Well, there are other examples; for instance, deserted wives.

MR. FROST: Yes, deserted wives.

WITNESS: But that is all the same type of procedure.

MR. MAGONE: Well then, just to complete this list that we have here, there is a similar court in Prince Edward Island, presided over by a magistrate?

WITNESS: Yes.

Q. What the jurisdiction is there, I am not sure.

A. I haven't looked it up.

Q. It is called the Municipal Court, there, and in Saskatchewan, they have a Small Debts Recovery Act, with a jurisdiction of $100.00

A. That is part of the district court out there, is it not?

Q. It is the Small Debts Recovery Act, a separate Act, and it is presided over by a justice of the peace. Now, Mr. Barlow, in most of those jurisdictions where they have this small debts recovery, in districts travelled by magistrates, it is usual for the complainant or plaintiff to apply to the magistrate for a summons, and attach to the summons a copy, a simple copy of the claim in writing, is that right?

A. That is the way it is done, and that is also the way it is done in our Division Courts here, a claim is attached to a summons, which the Division Court issues.

Q. Then in some of the jurisdictions, the summons that the magistrate issues may be served, in some cases, by registered mail, and in others by the plaintiff or any other person?

A. Yes, certainly.

Q. It is the exception, where it must be served by a constable, I understand?

A. Well, I m not sure of the practice in other provinces with reference to service, Mr. Magone. The special Act will show, though. I know that where they have set up small debt courts in different states of the Union, that service there is practically always by registered mail.

MR. CONANT: Perhaps it should be explained, for the benefit of the gentlemen who have graduated from Division Court practice, that under our Division Court of Ontario, all process must be served by the bailiff, is that not correct?

MR. MAGONE: That is correct.

WITNESS: All process must be served by the bailiff, and he gets 20 cents a mile, whereas the Sheriff, for serving Supreme Court writs, gets 15 cents a mile.

MR. FROST: I think service may be made by leaving it at the residence, is that not so?

MR. CONANT: Well, that is not peculiar to Division Courts.

MR. FROST: No, I suppose not, but it seems to me, in Division Court, under a hundred dollars—

WITNESS: Yes, under a certain amount, Mr. Frost, I think probably you are right. I don't know about that. Mr. McDonagh will know all about that.

MR. MAGONE: Well then, Mr. Barlow, in your report, did you consider a small debts Court, constituted in the same way as that in the other provinces?

WITNESS: Well, I don't know that I should, perhaps, express an opinion on that, Mr. Magone. My thought had not been that jurisdiction should be taken away from our County Court, just that they should preside in even the small debt Courts that would be established as part of our system. Because it has been the practice, for so many years, here, that judges do preside, and I think, for the better administration of justice, it would be better continued in that way.

Q. It would place a tremendous burden on the magistrates?

A. It would place a tremendous burden on the magistrates, which would probably mean the appointment of double the number you now have. But I think, so far as the public generally are concerned, they would feel that they were much better protected, if the practice continued to have the County Judges preside in Division Courts.

MR. STRACHAN: In Toronto, our magistrates couldn't cope with it. They try nearly a hundred thousand cases a year now, in our magistrates' courts, and, as you say, we would have to double their number.

WITNESS: Of course, you must remember this, Mr. Strachan; that if a small claims Court were set up, with a jurisdiction not exceeding $100.00, it would cut out a certain proportion of cases, although I don't know what proportion it would be.

MR. MAGONE: We can get the number of cases later.

MR. CONANT: I was going to make the observation: that, in our Province, if you were to shift this jurisdiction to the magistrates, it would mean a revision of our whole judicial economic structure, in the sense that by and large, your County judges have not got the demands of work on them that the magistrates have, and you would be relieving one branch of the judiciary which can quite easily take care of it, from the standpoint of their volume of work, at the expense of another branch which, I think equally so, is fully burdened with work.

WITNESS: And there is another thing to remember, Mr. Chairman, and

that is this: that even though a Division Court case may involve less than $100.00, the same involved points of law often times arise that arise in the larger cases, and the same consideration should be given to it. And if you have a county judge, who is dealing with matters of that kind all the time, he is much better qualified to give service to the public generally, than a magistrate, who is not, and cannot be, as efficient.

MR. CONANT: Is there any constitutional aspect of it, Mr. Magone?

MR. MAGONE: There is nothing involved. We now appoint the Division Court judges by statute, at least we appoint a County Court judge as Division Court judge; the appointment rests with the province. The other provinces all appoint the magistrates to preside over these small debt courts.

MR. STRACHAN: That is every County Court judge is a Division Court judge too?

MR. MAGONE: Yes. But, in your experience, Mr. Barlow, the County Court judges are not overworked, outside of Toronto?

WITNESS: Well, I wouldn't say outside of Toronto; I know they are certainly overworked in Toronto and in certain other jurisdictions. I will leave them to speak for themselves as to that.

Q. I am talking generally, with respect to this jurisdiction they have, if this work were taken away from them, it involves a substantial part of the work of the County Court judges?

A. Oh yes, the ordinary County Court judges, throughout the Province, aside from the larger cities, have sufficient time to take care of it.

Q. Yes.

A. And, in fact, many of them are asking for more work.

MR. FROST: Mr. Barlow, may I ask you this: in connection with this small debts court that you refer to in this section of your report through your recommendations, would your idea be that that small debts court should, taking for example the counties of Peterborough, or Hastings, or Victoria, that it should sit at various places throughout those counties, or that it should be confined to the county town?

WITNESS: No, I would not confine it to the county town, necessarily, Mr. Frost. My idea would be that where you make a change, your change should be, shall I say, as little felt as possible. My thought is that the present Division Court setup should, perhaps, be left very much as it is at the present time, but that these Division Courts could only try these claims up to $100.00, and the result would be, inevitably, that instead of having, as we have, ten or twelve in some of the counties, that they would gradually disappear, and you would bring in everything else into your county town. Now, with modern means of travel, with the exception of a few counties, I don't see why any matter that involves more than $100.00 should not come to the county town, and if it does

come there, it is going to help in many ways. Namely, the county judge is going to be at home, instead of off ten or fifteen or twenty miles for the day. He is going to be there, available for Surrogate work, promotions, for any matters that arise in the County Court and Surrogate Court, as well as in the smaller court.

Q. Perhaps, as far as the public is concerned, there wouldn't be any real saving, at the moment, for the reason that you would still have to employ your Division Court clerks, the bailiff, and so on.

A. There would be a saving in this way, Mr. Frost; that gradually the work of courts would be so small ——

Q. Of course, is it not happening now, Mr. Barlow? Mr. Magone, without actual figures, is there not a reduction in Division Courts at the present time?

MR. MAGONE: We will get that from the Inspector, Mr. Frost.

WITNESS: I don't know, I am sure.

MR. FROST: Well, the point is this, that a Division Court would be limited, according to your suggestion, to a claim of $100.00?

WITNESS: Yes, approximately that.

Q. Of course I think you would find that, if you were to put that limitation on the Division Courts, you would automatically abolish them, because you may say that is a public improvement, but the minute you do that you abolish them, for the reason there would not be sufficient business.

A. Well, perhaps that is a good thing, to bring everything into the county town. That is the very thought I had, behind it.

Q. Well, take Simcoe County, for instance; they have the town of Barrie, which is the county town; then you have the town of Orillia, which is larger than Barrie, 30 miles away; you have the town of Midland, the town of Collingwood, and so on. Now it does seem to me that if you make it that claims involving more than $100.00 should be taken away from Orillia, Midland, and Collingwood and taken down to Barrie, that that may seem more radical than at first would appear.

A. Oh, it is.

Q. You might for the same reason say that the $500.00 claims should not be taken to Barrie, but there has never been any difficulty about it.

A. Yes, but are there not more claims, for instance, under $500.00?

Q. Oh, I suppose that is true. I mean, I must admit, that I think that in these recommendations you have made, there is a great deal of common sense. For instance, take the example you give at the bottom of page B34, about a judge going to a certain place, and there being no cases to try when he arrives,

and the clerk of the court gets $4, the bailiff $4, the stenographer $8, and the judge $6, with mileage of $3. It doesn't look right, I agree with you.

A. No, and that is going on all the time.

MR. LEDUC: Yes, or the judge goes down for one case, and the defendant doesn't show up.

MR. CONANT: In other words, you have a cost of $25, and no cases.

WITNESS: Yes.

MR. ARNOTT: Would it not be a simple matter, Mr. Barlow, for the Division Court clerk to notify the Judge that there weren't any cases to be tried that day?

WITNESS: Quite true, Mr. Arnott, and many of the judges have that arrangement that they shall be so notified.

MR. CONANT: Have they not all?

WITNESS: His Honour, Judge Coleman, tells me that he always finds that ——

MR. CONANT: Have they not all that arrangement?

WITNESS: I would gather not.

MR. FROST: Well, of course something may be devised to take care of that situation.

MR. MAGONE: Mr. Barlow, there are abuses of the system?

WITNESS: Apparently there are, yes.

Q. Is it not a fact, Mr. Barlow, that the County Court Judges' Association have asked for increased jurisdiction?

A. Yes, they have asked for increased jurisdiction.

MR. CONANT: How is that related to this, Mr. Magone?

MR. MAGONE: It is related in this way, I suggested before, that the County Court Judges outside of Toronto are not very busy; that is an indication of it; they have asked for increased jurisdiction.

MR. LEDUC: Increasing it downwards?

MR. MAGONE: Increasing the amount upwards, of County Court jurisdiction.

MR. CONANT: You should perhaps recall to the mind of the members of the Committee that there is on the Statutes now, provision for increasing the jurisdiction, which can be brought into operation by Order-in-Council; is that right?

MR. MAGONE: That is true, on the recommendation of the County Court judges. So that, if this Division Court jurisdiction were taken away from the county judges, and given to the magistrates, in a number of cases county judges would not have nearly enough to do?

WITNESS: Well, that is quite true. I would not take it away from the County Court judges and give it to the magistrates.

MR. STRACHAN: There is no serious suggestion that we give it to the magistrates, because we have so many laymen acting as magistrates, and even a $5 claim might involve very serious points of law.

WITNESS: Quite right.

MR. MAGONE: My reason, Mr. Chairman, for dealing with this exhaustively now is this: that, apparently, in every province in the Dominion, there is a small debts jurisdiction, vested in the magistrates and justices of the peace, and you received a large number of recommendations, I understand, Mr. Barlow, suggesting a similar jurisdiction here, did you not?

WITNESS: I had certain recommendations, yes.

MR. CONANT: Well now, were they sufficiently specific that they were suggesting magistrates, and such tribunals, or just generally a small claims court?

WITNESS: Oh, just generally that the Division Court should be presided over by a magistrate. But there are not so many of those, Mr. Magone. Those recommendations, as I recollect now—I could easily tell by going through a memorandum I have, but I haven't it here.

MR. MAGONE: Yes, well I think probably we may come to those, and I may read some of the recommendations of the various organizations that wrote to you, and have written to us.

MR. FROST: Mr. Barlow, where would you think the real saving would be to the public in limiting these claims to $100.00? Would you think that it would come about in the gradual disappearance of the Division Court throughout Ontario, and its concentration in these cases in county towns?

WITNESS: Yes, it would concentrate practically all of them in county towns.

Q. Well, there is another angle to that; first of all, is there not some advantage in having these courts throughout the county, from the standpoint of bringing justice close to the people? I have heard that argument.

A. Why, it may be, but ——

Q. Of course, personally, I would not lay so much stress on that, in these days.

A. You have seen them operating, as I have.

Q. Yes.

A. Well, just what ——

Q. Well the point that bothers me is this ——

MR. CONANT: Have you never attended a Division Court in a small town on a cold winter's day?

WITNESS: Yes, and they sat around the stove.

MR. FROST: Well, after all, what is wrong with, for instance, trying a case involving say a couple of hundred dollars, on a note or something of that nature, in a court in some perhaps isolated village? What difference is there between that and trying a case, say, of only $100.00? Isn't there this to it: that, supposing Mr. B. lives up in some isolated point, say, in the district of Algoma, and he is a hundred miles away from the county seat.

WITNESS: Oh, yes.

Q. Isn't there this to it, that the matter of bringing the witnesses there, and so on, in the end, is cheaper to the public, than bringing them down to the county seat. You will find a number of cases, in our counties, where it is a hundred miles to the county seat.

A. There are certain instances of that kind, Mr. Frost, and there is no doubt that some provision should perhaps be made. You speak of Algoma; now, I will go so far as to say this, so far as Algoma is concerned, that it works a hardship, in county court cases up there, to bring litigants and witnesses as far as they have to in certain instances, and there were recommendations made, from that district, that some provision should be made for certain places, fixed, for trial, even for county court actions, so that they would not have to travel the distances they do.

Q. I had in mind, for example, certain places in the County of Ontario, Mr. Conant's county, where it is a hundred miles from Rockford down to the county seat of Whitby. Again, in Victoria and Haliburton, it is a hundred miles Dorset to Lindsay, and it is more than a hundred miles from the localities around Bancroft down to the county seat. Now do you not think that you might accomplish many of the things you want to accomplish here—and many of your suggestions, I think, are thoroughly sound—by revising the Division Courts Act, making it more simple, making it more workable and modernizing it? I agree with you in what you say here, for instance, that many of these things have come down from 1850, and they have just been added to, and subtracted from.

A. Adding more and more to it.

Q. Yes?

A. You must remember this, though, Mr. Frost, that when this Division Court system was set up, originally, we were back in what I chose to call "the horse and buggy days"; people, in travelling ten or fifteen miles with a horse,

consumed much more time than it now takes to travel seventy and, perhaps, a hundred miles by car.

MR. CONANT: Yes, and when you consider it from that angle, it takes away much of what you have said with reference to it.

MR. FROST: Yes.

MR. CONANT: Mr. Frost's question as to the economy effected raises this aspect of the matter, and I would like you to approach it from this angle, Mr. Barlow: that, in the final analysis, the citizen is the one who is benefited or otherwise by whatever may result from our deliberations. Now your experience of office indicates that it not infrequently happens that a small claim is cluttered up with costs.

WITNESS: It is.

Q. Now approaching it from this angle, supposing we were to revise the Division Court Act, as it badly needs, but create, within that Act, what we might call a small claims division, up to $100.00 or whatever it might be, and make, for those claims, the simplest possible procedure, with a block system of costs, so that a man could go into court, be he a doctor or a merchant, with a claim of $50 and know exactly what it would cost him; have these cases on a special list on Division Court day, and, what is perhaps of most importance in that connection, that all those claims could be served by the litigant himself, or by registered mail.

Now I mention that for this reason: Mr. Frost has touched, very properly, and very capably, upon the question of territory, to the effect that the geography of the thing is a difficult question to meet, and the number and distribution of Division Courts is an equally difficult thing to meet. Because Mr. Frost and the other gentlemen may not know it as well as I do, but we have in our Department now a policy that, when there is a vacancy in the office of clerk or bailiff, we endeavour to close that Court if the number of cases handled in one year is less than fifty; that is our policy, and we have succeeded, in some cases. But in the majority of cases there is such a clamour arises from the locality, that it is a practical impossibility, in the present state of public opinion. But you are perfectly right that, with the modern forms of transportation at our disposal, there are far too many Division Courts. Time will take care of it, but it does seem to me, Mr. Barlow, that there are practical difficulties that confront us, and I would like you to direct your remarks, if you will, to the possibility of creating, within our present structure, a simplified, inexpensive, definite procedure for these small claims. What would be your views on that?

MR. MCCARTHY: Mr. Attorney-General, may I implement what you and Mr. Frost have said by saying that that is the view of Convocation.

MR. CONANT: Thank you, Mr. McCarthy.

WITNESS: There is no doubt, Mr. Chairman, that this simplified procedure could and should be, in my opinion, created as far as small claims are concerned.

MR. CONANT: Before you enter on that, if you will pardon me, I intended to ask this: there is also the other difficulty that, unless, and until your distribution, until the number of Division Courts is considerably reduced, you would have an uneconomical arrangement, because, with the Division Courts dealing only with small claims, you might have a judge going fifty or a hundred miles to try no cases, one case, or two cases. Whereas if you leave with him, in that Division Court, the jurisdictions he now has, with the classifications that I have roughly outlined, he will be more likely to have work at the court to justify the expenses involved in visiting that court. That was another item I had in mind. Now will you deal—pardon me for interrupting you—with the possibility of creating, within that Court, a simplified procedure on small claims.

WITNESS: Well if I understand you correctly, Mr. Chairman, your thought is that claims, say, up to $100.00, should be dealt with by simplified procedure?

Q. Yes.

A. Claims which are not, of course, subject to appeal?

Q. Yes?

A. And with very much less in cost to the litigant?

Q. Yes?

A. That is very possible; there's no question about it.

Q. Yes?

A. But it is quite true, what you say, that in that event the revenue accrued to a court would be practically nil.

Q. Yes?

A. And if it is going to function in these outlying jurisdictions, either it must be taken care of by the local municipality, or by the central Government, or you must add to it a higher jurisdiction. If you do that, you are practically back where you were before, so far as jurisdiction is concerned, except that you would probably be able to collect—at least the clerk would be able to collect his fees.

Q. Well, just dealing with that; I'm glad you mentioned that. The jurisdiction of the Division Court now cuts off, very definitely, at certain defined points.

A. Oh yes, it does.

Q. Would it be feasible, under certain conditions, to increase that, having in mind, for instance, as Mr. Frost has said, that in the county I come from they have to travel eighty or one hundred miles to the courthouse?

A. Well, Mr. Chairman, I think that would be very unwise, because if you

do that, why then you are taking a retrograde step, and you are building up something that never would have to be built up in its present form if we had had the means of travel at the time the system was originally set up that we have at the present time.

Q. Of course you have in mind that there is no examination for discovery?

A. As a matter of fact, I don't think that there should be any examination for discovery in small claims. My suggestion here is that even in the increased jurisdiction, and when I say increased jurisdiction I mean jurisdiction over $100.00, when you go into County Court, I suggest that that should be dealt with without examination for discovery, except in special cases.

Q. Well I don't think there is any difference on that part of examination for discovery, but you have touched upon a very vital point.

A. But you see, Mr. Chairman, the difficulty that I see at the present time is that your expense is largely a result of decentralization. My thought has been to try and bring everything more or less to the county town, so that it will be dealt with there at a minimum of expense.

MR. LEDUC: Have you given any consideration to the situation of the north?

WITNESS: Not particularly, Mr. Leduc, except that I realize that there is something that has to be dealt with, in my opinion, on an entirely different basis from the counties in the older part of Ontario.

Q. Well, what I had in mind was this: somebody mentioned Algoma; you find the same situation in practically all the northern districts; for instance, now, Hearst is about 150 miles from Cochrane.

Q. Yes?

Q. Then you have Geraldton, which is a little town but growing fast, about 170 miles from Port Arthur.

A. Well, Geraldton was one of the places that I was especially thinking of, because I was talking to a lawyer from there, and he mentioned the fact that he had to travel a long distance with his witnesses, and it would be much less expensive if the judge and his clerk could come to Geraldton and try even County Court cases there.

Q. Yes, and the same thing applies to Kenora?

A. Yes. Oh, I think that must be dealt with ——

Q. Special provisions must be made for it?

A. —— dealt with especially, yes.

Q. Yes?

A. And not only as to small claims, but also as to some of the larger claims, and I think some real consideration should be given to the north.

Q. Well, we are getting away from the Division Court, but you would be prepared to say that County Courts should sit in more than one district in some places—I should say District Courts?

A. The District Courts, I would say they should, yes.

MR. FROST: At the present time, Mr. Barlow, there is no provision for that, is there?

WITNESS: Not that I know of.

Q. Well, if a judge feels, on representations regarding a particular case, feels that it would be of convenience to the public, for instance, that the County or District Court should be held some place other than the county town, is there any real reason why that should not be done?

A. No, I ——

MR. CONANT: Are you referring to non-jury trials, Mr. Frost?

MR. FROST: Yes, non-jury trials.

WITNESS: No, I don't think there is, and my recollection now is that I have been told of one or two instances in the north—it may have been Geraldton, Mr. Leduc—where they suggested to the Judge that if he and his stenographer came down, that there would only be the expense of two, whereas if they all went to the District town there would be the expense of perhaps a dozen, and while there is no special provision for it, he acceded to it and did come and try the case. That is my recollection.

MR. MAGONE: I see in Chapter 103, Sec. 13, subsec. 2:

> "The Lieutenant-Governor in Council may, where it is deemed necessary or expedient, direct that the sittings provided for in subsection 1 shall be held at some other time and in some other place than the time and place specified in the said subsection 1."

MR. FROST: Supposing that were left at the discretion of the County Court judge, so that if he wanted to go to Beaverton, say, to try a case, he could go there?

WITNESS: I don't see there is any reason why it should not be done.

Q. It seems to me that that is something that might provide for a saving.

MR. LEDUC: Mr. Barlow, you referred to a small claims Court having claims up to $100.00; now Mr. Frost has remarked, and he is borne out by the Chairman, in his remark, that in certain cases, that would create a hardship on the witnesses, because they would have to travel great distances to reach the Court. The same situation would exist in the north?

WITNESS: Yes.

Q. Could you not solve the difficulty by extending the right given to the Lieutenant-Governor in Council in Districts to the counties, and have the County Court, if necessary, sit in more than one place in the county?

A. You could solve it that way, yes.

MR. FROST: There is merit in the suggestion. I can see that.

WITNESS: You could solve it in that way, and at the same time, your own clerk would handle all these matters.

MR. LEDUC: Yes.

WITNESS: And so far as the convenience of the litigants is concerned, it would be met by the county judge sitting in various places.

MR. LEDUC: Yes.

MR. CONANT: Well, coming back, my colleagues, to Division Courts, I am still disposed to the idea, although I am not prejudging this, that the solution lies, Mr. Barlow, in a simplified machinery procedure, with definite costs, and with a definite method of service within our present framework of Division Courts, up to $100.00, but Mr. Frost raises this very pertinent point, that under that arrangement a great many courts, and particularly the bailiffs in those courts, would find their earnings largely depleted.

MR. LEDUC: You would abolish the bailiffs.

WITNESS: Mr. Chairman, your bailiffs will practically disappear with service by registered mail.

MR. CONANT: Yes.

WITNESS: And then you will have to fall back, for the enforcement of judgment by way of execution, you will have to fall back, I think then, upon your sheriff, and I am not sure that that isn't quite all right.

Q. Well, would it not be feasible, Mr. Barlow, to meet the situation so far as the bailiffs are concerned, at any rate, by following the practice of enlarging the territorial jurisdiction of the bailiffs, both to meet that situation and also with the hope of attracting better men to the positions?

A. Quite true.

Q. Wouldn't that be the solution?

A. Quite true.

MR. FROST: Do you mean to extend the bailiffs' jurisdiction beyond the county?

WITNESS: Oh, no, within the county.

MR. CONANT: I think every active practitioner here can call to mind—I can —adjoining Division Courts, a few miles distant, where you have a Division Court bailiff here and another one four or five miles away, and neither one of them is making enough out of it to make it a real job. Now if that Division Court bailiff was functioning in both Division Courts, and with the same judge, they would never sit the same day, and that might be a solution, would it not?

WITNESS: Quite true.

MR. FROST: I could never see any real objection to a bailiff, for instance, on the border of Ontario County, acting as a bailiff in Durham County, but under the present set-up he is prevented from doing so.

WITNESS: It is even more difficult than that, Mr. Frost, because each Division Court has its own little territorial jurisdiction within the county, and he acts within his own little territorial jurisdiction.

MR. LEDUC: I don't think it would be wise to extend his jurisdiction outside the county. You have to stop somewhere, unless you give him jurisdiction in the whole province.

MR. FROST: That may be going far afield, but at the same time——.

MR. CONANT: May I interrupt there, Mr. Frost, because I want it brought up at some time. Mr. Magone, you are seized of this point; I would like the Committee to consider, at some time, the question of border jurisdiction in the province. We have a lot of Division Courts which are one mile from the border of the county, and the nearest Division Court in the next county may be twenty miles away, and I think we could consider a rearrangement of those jurisdictions. I would like you to refer to that.

MR. FROST: Am I not correct in saying that, at the present time, a Division Court bailiff may act only within his own county?

MR. LEDUC: I think he is appointed bailiff to a certain Division Court.

WITNESS: Yes, but what Mr. Frost says is right, I think; he cannot enforce the execution outside of that.

MR. FROST: I think this, now; for instance, supposing you take a bailiff, say in Oshawa, and he has to enforce an execution in Beaverton; I don't think that that bailiff should be permitted the fees and the mileage, and so on from Oshawa to Beaverton, but oftentimes you will find a good bailiff, who is looking for work, and he is a good man for all parties, he is prepared to go up to Beaverton and do the work up there and carry it out very satisfactorily for both parties concerned, I think that, provided there is some limitation in his fees, I don't see why he shouldn't have the jurisdiction to do that.

WITNESS: Mr. Frost, Mr. McDonagh can probably tell us, but my recollection now is that an execution issued here must go to the bailiff of another Division Court.

MR. MAGONE: Is that so, Mr. McDonagh?

MR. MCDONAGH: It's covered in Section 165, subsection 2:

"The Clerk, at the request of the party prosecuting the judgment or order, shall issue an execution to a bailiff of the Court or to a bailiff of any other Court within the county."

MR. FROST: Well then, we are all right, yes.

MR. CONANT: That is on a transcript, is it?

MR. MCDONAGH: Well, it doesn't say so; it should say. That is one thing the Act is not very clear on.

MR. FROST: Has not the practice been, though, that a bailiff in the county is authorized to enforce an execution?

MR. MCDONAGH: The practice is to issue the execution to the bailiff of your own court; if you wish him to go to another court, you send a transcript to the judge, and it is done there.

MR. CONANT: That's right.

WITNESS: There is a further point, Mr. McDonagh; can a bailiff of the 1st Division Court go out into the jurisdiction of the 8th Division Court and make a seizure?

MR. MCDONAGH: We do not do that.

MR. FROST: Of course it is being done in some places?

MR. MCDONAGH: It is being done, but then you run into the difficulty which we are trying to avoid, of getting into the jurisdiction of another court, because they are quite jealous of their fees, naturally, because that is the way they are paid.

MR. FROST: That arises really from inefficiency in the bailiff service? You will find, perhaps, one good bailiff and twenty-five poor ones?

MR. CONANT: Would you say it is quite that high, Mr. Frost?

MR. FROST: You would say probably ten poor ones, would you?

MR. MCDONAGH: I think the answer as to that is that when the Act was framed, the bailiff of the Division Court was supposed to have knowledge of those in his jurisdiction; but the city affairs changed that, now, because, the bailiff in Toronto can't know the circumstances of the individual living in West Toronto or North Toronto or East Toronto.

MR. CONANT: Well, Mr. Barlow, is there anything other than the curtailment of revenues to these various Division Courts that would arise out of a

small claims Division Court, and a simplified procedure with a block tariff of costs? Any difficulty that you can see?

WITNESS: No, I can see no difficulty in it at all, Mr. Chairman.

Q. You think that is feasible?

A. I think it is feasible, quite.

Q. That would meet the desire to simplify or provide inexpensive procedure for small claims, wouldn't it?

A. It would do that, and the Act covering the procedure should be simple, and the forms simple, so that any layman would be able to understand them.

Q. Then when the judge went to that court, whether it was Beaverton or whatever it was, presumably he would have his small claims as a separate list?

A. A separate list.

Q. And he could either try them first or last or whatever he might determine?

A. I don't know whether it still is the practice, but it used to be the practice in Toronto to take ——

MR. LEDUC: Cases under $100 first?

WITNESS: Yes, under $100 first; I think that is still the practice.

MR. STRACHAN: Yes, that is still the practice.

MR. CONANT: That possibility would fit into the present framework of the Division Court?

WITNESS: Oh, it can be made to so fit, yes.

MR. LEDUC: But don't you think, Mr. Barlow, that it might be better to reduce the jurisdiction of the court?

WITNESS: To do which?

Q. To reduce the jurisdiction of the Division Court and make it strictly a small claims court, and transfer other cases to a higher court—County Court?

A. That is my original recommendation, and my original recommendation was made with the thought that I have already expressed, namely, you should centralize as much as possible for the purpose of economy and saving in the time of the judge, which will make him more available.

MR. CONANT: You mean, Mr. Leduc, instead of having a small claims division and the present jurisdiction, you would make it all a small claims court, reducing the jurisdiction?

MR. LEDUC: Yes, except of course, coupled with the right being given to the Lieutenant-Governor in Council to authorize County Court to sit in more than one place in large counties.

WITNESS: What Mr. Leduc has in mind is this, I presume: that if there were a case, we'll say, a hundred miles away in any one of our counties, a judge going up there to try a Division Court of small claims could also set the venue for a County Court action for $200, $300 or $500.

MR. LEDUC: Right. I would not go, perhaps as far as that, but take, for instance, the case of Geraldton, which has been mentioned here before—and the same would apply in some southern counties—why not give the right to the County or District Court judge to hold County or District Court in Geraldton?

WITNESS: Quite right, I quite agree with you.

Q. You might do the same thing in southern counties which are very large. Mr. Arnott, of course, knows Hastings better than I do, but I suppose he could very well suggest one place in the northern part of the county where County Court could sit a certain number of times every year.

A. Quite true.

Q. If you were to do that, you would reduce the jurisdiction of the Division Court to $100?

MR. FROST: What difference would there be in that? Supposing a judge has a case, a non-jury County Court case, if he says, "I'll try that at some other point," that could be fixed by Statute?

MR. LEDUC: Well, I don't see any objection to it.

WITNESS: There is this one feature, that has not perhaps been considered here, namely, that small claims of under $100 are very often dealt with by the litigants in person, and very seldom is a claim of over $100 dealt with except through a solicitor, and where you have solicitors, the solicitors are usually centered in the county towns.

MR. LEDUC: Yes?

WITNESS: And then it rests with them to make their arrangements with the judge as to whether, if your suggestion were to be carried out, they should have it in the county town, or whether they should go out to this outlying district to try it, and it would work out in that way very satisfactorily. But my main thought about the small claims court is that the litigant himself oftentimes comes into his small actions, and that it should be simplified so that he can understand it; it should be made convenient, and as easy as possible for him to get his matter settled.

MR. CONANT: Coming back to the Hon. Mr. Leduc's suggestion, which, briefly, was that the jurisdiction of the Division Court should be perhaps decreased to some extent and make it all a small claims court, with simple procedure and

block system of fees, and service by the litigant, and so on, are you then not aggravating the difficulty that confronts me as the practical administrator of this business, in that you would be further depleting the revenues of your Division Courts?

WITNESS: I am not so sure. The real question to be considered is not the service to the public. A small claims court, it seems to me, should not be looked upon from the standpoint of even maintaining itself, but it should be a service that should be rendered to the small litigant.

Q. Yes, but I presume that you will concede, Mr. Barlow, that, whereas I have outlined a small claims division of the Division Court, and dealt with the difficulties that arise there, Mr. Leduc's suggestion would aggravate that difficulty, would it not?

A. You mean financially?

Q. Yes.

MR. LEDUC: You could probably temporarily reduce the number of Division Courts.

WITNESS: That is the very thought I had behind it, that it would reduce the Division Courts largely in number, so that you would only have, in each county, Division Courts in a very few centres.

MR. CONANT: Well then, I have no doubt that that would result, in a very short time, in having a great many less Division Courts than you have now, limited to the larger centres.

WITNESS: And with the result also of much more efficiency.

MR. FROST: Well, if you followed that course, the reduction would just take place naturally?

WITNESS: Oh, just naturally, yes.

Q. Well, don't you think that if you followed Mr. Conant's—I won't say his suggestion, but along the lines of his questioning—supposing you were to introduce in Division Court a small claims division, as it were, claims for less than $100, and leave the other jurisdiction, for the moment, and clarify it and cut out all the deadwood and make it a decent, understandable Act, don't you think that probably five years would see the disappearance of some of the superfluous Division Courts, and the concentration of them—I think there is a tendency to concentrate now, anyhow—don't you think that that might accomplish what we are after in this matter?

A. I don't know, Mr. Frost.

Q. You see, you might get away from the territorial consideration. At the present time, a man comes in from a very distant part of the county, to his lawyer in the county town, and says: "I have a claim for $300," which is within the

jurisdiction of the Division Court. The lawyer says: "Well, that is in Division Court No. 10; we must sue it there." It has to be sued there, and counsel, from the county town, travel away out there, and the judge travels away out there. It would be much cheaper to have the litigants come into the county town. Of course a great deal of that is done by arrangement now.

A. Oh, I presume it is.

MR. CONANT: Well, it seems that we have arrived at some conclusion.

MR. FROST: Mr. Conant, before you leave this question, I think that you are going to find this, that in connection with a matter of this sort, you really have to arrive at a compromise. You know what I mean, when you begin to abolish Division Courts, instead of getting the co-operation of the public, you are going to raise a devil of a row.

WITNESS: You see, my thought is, not to abolish them at all but—

MR. CONANT: To starve them.

MR. FROST: No.

WITNESS: No, I wouldn't say that.

MR. LEDUC: After all, you know we should remember that some 20 years ago the jurisdiction of the Division Court was only $200—$100 and $200, whereas now it is $400.

WITNESS: Yes, $60 for damages, and now $120; it used to be very small.

MR. CONANT: Well, we seem to have arrived at two possible suggestions, or solutions; one is a small claims division of the Division Court, and the other is making the whole Division Court a small claims court, simplifying the procedure, with a block tariff system, and perhaps some decrease in jurisdiction. Have you any other suggestions to make to meet the situation? I think that crystallizes our discussion so far.

MR. LEDUC: Well, except for this, Mr. Chairman, I would like it remembered that special consideration should be given, in any event, to the northern districts.

WITNESS: Quite right.

MR. LEDUC: On account of the great distances the people have to travel up there.

MR. CONANT: In respect to Division Courts, you mean?

MR. LEDUC: Well, yes, that is what we are discussing at the present time.

MR. CONANT: Very well, then; let us proceed.

MR. LEDUC: For instance, if you should decide to have a small claims court

in the southern counties with a jurisdiction of $100, it might be better, in the districts, that that jurisdiction should be $200 or more. What I have in mind is this: take the case of a man living at Hearst, having a claim of $250; well, it could be a real hardship on both parties to force them to travel to Cochrane, which is the district town.

WITNESS: That is one of the great difficulties they have.

Q. It is quite different from a man who lives at Mimico, or Newcastle, and who has to come to Toronto.

MR. CONANT: Well, but that special provision or consideration, Mr. Leduc, would only arise in the event of the adoption of your suggestion.

MR. LEDUC: Oh, yes.

MR. CONANT: It would not arise with the scheme I outlined.

MR. LEDUC: No.

MR. CONANT: But I think you are right; that should be taken into consideration.

MR. CONANT: Well, proceeding on from that, we have mentioned the simplification of The Division Courts Act; were you going to go on with that next, Mr. Magone?

MR. MAGONE: Yes, Mr. Barlow, the Hon. Mr. Conant, in his questioning, indicated that possibly the present Division Court Act could be used as a framework for the new small claims court; is that not so?

WITNESS: No, I would repeal it and start again.

MR. LEDUC: Oh, yes.

MR. MAGONE: Start anew?

WITNESS: I certainly would, because it has just been added to, here and there, all the way through, until it is practically unintelligible.

MR. LEDUC: I believe the jurisdiction of the Division Court is more complicated than that of the Supreme Court.

WITNESS: It is.

MR. CONANT: Well, now, have Mr. Barlow outline whether there is any other Act as a model, or what line he would recommend following in revising that Act, or in recasting it.

MR. MAGONE: Probably you might do that, Mr. Barlow. Your suggestion, in your recommendations, is that the Division Court be consolidated with the County Court, and a small claims division constituted.

WITNESS: Well, perhaps that interpretation might be taken from it; I didn't intend that it necessarily should be consolidated with the County Court, but that there should be a small claims court, which I would still continue to call the Division Court, because the public are accustomed to that name. I wouldn't call it a small claims court; I merely called it that to illustrate it, as to what I really mean, you see, but I would still call it the Division Court, but with this lessened jurisdiction. And as far as simplified procedure, and so forth, is concerned, there are plenty of precedents to be found in recent legislation in the different States of the Union, some of which I have down at my office, where the whole matter is set out, so that, as I say, the layman can read it and understand it. It is just a matter of wording.

MR. STRACHAN: Would you need a separate Act at all, Mr. Barlow? Could it be included in our present County Courts Act?

WITNESS: There may be something in what you say, Mr. Strachan; yes, I think possibly it could be done. It's just a question of machinery, that's all.

MR. MAGONE: If we did that, would we not lose our jurisdiction to appoint the judge of the court?

WITNESS: Oh, no, why would we lose it?

Q. Well, if we made it part of the County Court, in view of the fact that the Dominion has the right to appoint County Court judges, then, as I say, if we made this Division Court jurisdiction part of the County Court jurisdiction, we would lose the right to appoint the judge.

A. Well, if there is any point to that, Mr. Magone, we can draw up a special Division Courts Act.

MR. LEDUC: What judge do we appoint?

MR. MAGONE: We appoint a County Court judge by Statute.

MR. CONANT: Let me get this clear; Mr. Magone has mentioned that before; isn't he automatically a Division Court judge when he is appointed County Court judge?

MR. MAGONE: Just because this legislation says so.

WITNESS: There is no special appointment made. The Legislature merely says that by virtue of his appointment as County Court judge, he becomes Division Court judge.

MR. MAGONE: Yes. Well, if that suggestion were followed through, would you make the small claims division as the court is now, that is, a court of equity and good conscience.

WITNESS: Oh, yes, because there is no appeal from it. It should be a court of equity and good conscience.

Q. What did you say about providing for informal sittings? I believe you said something about that in your report.

A. Yes, that can be done. It could be left to the discretion of the judges, I presume.

Q. That is as to sitting in chambers without gowned counsel?

A. Counsel are never gowned in Division Court.

Q. But if you made it part of the County Court they would be?

A. Oh, I wouldn't have them gowned, not in Division Court.

Q. And as to pleadings, Mr. Barlow?

A. No pleadings. Merely as at present, your statement of claim, which sets out briefly what it is and the evidence.

MR. CONANT: I am not sure, Mr. Magone, that we have not rather confused this. There are two suggestions before the Committee. One, propounded by myself, a small claims division of the Division Court; another, propounded by the Hon. Mr. Leduc, making the whole Division Court a small claims court, and different considerations would arise under those, it seems to me, although, in either case, it would be necessary to revise the Division Courts Act. I was asking Mr. Barlow, or started to ask him, if he had in mind, or could offer to the Committee, any more or less general suggestions, as to what he had in mind when he said the whole Act should be scrapped and a new one constructed, and I go as far as asking you if there were Acts in other jurisdictions which might be used as a model.

WITNESS: Yes. Well, I said there were, Mr. Conant, so far as your small claims court, if we might so call it, and, as I say, I would continue to call it a Division Court, even if you decided to give it jurisdiction only up to $100. But if you adopt the further jurisdiction that you suggested, might still be left there, you might have to have a little more complicated machinery, although, at the present time, all claims are put in and dispute notices are filed in exactly the same way, whether it is $10 or $300.

MR. LEDUC: Or $400.

WITNESS: Or $400.

MR. CONANT: Yes, but if you were continuing the Division Court as it exists to-day and as distinguished from a small claims court, you still think that Act would have to be amended?

WITNESS: Oh, I think the whole Act should be repealed and a new simplified Act drawn up.

Q. Yes.

A. Simplified procedure.

MR. MAGONE: Mr. Barlow, isn't the great criticism of the present Act, or one of the big criticisms, the cost of litigation in Division Courts?

WITNESS: Yes.

Q. Well, if we continue the Division Court sittings, as they are now, in different places of the county, could you reduce the costs of litigation in that court materially?

A. You mean to the litigants?

Q. Yes, without having the Province make contributions to it?

A. I would certainly think so.

MR. FROST: Well then, Mr. Barlow, getting on to a very touchy question, wouldn't you then be bringing Division Court cases, what are now Division Court cases, within the County Court tariffs, and wouldn't you then be again increasing the costs?

MR. LEDUC: Oh, no, there is a recommendation made for that.

WITNESS: Oh, no, I made a recommendation here that reduced tariffs, counsel and witness fees, be made applicable thereto. Oh, no, I would reduce that, I would take care of that, Mr. Frost.

MR. FROST: Frankly, I had thought, myself, that they might well be graded; there is too much of a jump now, between Division Court costs and County Court costs.

WITNESS: Quite true; I agree with you.

Q. I think possibly that is something that should be graded throughout; it would be far more satisfactory and more equitable. It does seem ridiculous, at the present time, that a claim is tried in Division Court, and there is a certain cost, and the minute you are a dollar over that, you increase the cost not by a small amount, but by many times.

A. Oh, yes.

Q. It's ridiculous.

A. If you get judgment for damages for $120, you get merely disbursements, and perhaps a small counsel fee of $10 or $15, I just forget now.

MR. LEDUC: $25 is the limit.

WITNESS: But if it is $130, you can tax it on County Court scale; that is not right.

MR. CONANT: Mr. Barlow, having in mind the administration of justice in all its aspects, would you express any opinion as to which you think would

be the better system? That is to say, the small claims court within the present Division Court framework, but with an entirely revised Act for the present framework, or a small claims court throughout, perhaps with decreased jurisdiction, and everything else dealt with in County Court?

WITNESS: My opinion would be to have a small claims court not exceeding $100, under the name of a Division Court, with as I have said before, an informal procedure, and everything else over and above $100 thrown into the County Court, but with special procedure, and a special tariff to take care of it.

Q. Up to a certain limit?

A. Up to, say, something like the present limits of the Division Court.

Q. Well, now, you are looking at the—and I don't say this offensively—more or less idealistic or theoretical standpoint. What suggestions have you to offer towards meeting the practical difficulty of continuing the machinery, the clerk and the bailiff, of these hundreds and hundreds of courts, when their revenues would, undoubtedly, be cut to practically nil?

MR. LEDUC: Well, may I interrupt there, Mr. Chairman; if the service of a summons is made by the plaintiff or by anyone, could not the office of bailiff be abolished and all the work done by the clerk?

WITNESS: I think the bailiff practically disappears, except so far as services are required under an execution. The large part of the bailiff's work, at the present time, is serving summonses; the work of enforcing executions is comparatively small, and that, as I said a while ago, could very well be done, I think, by the sheriff. But you speak of these hundreds and hundreds of courts. It is true, there are all those courts, but I say that is the very thing you should gradually get rid of them, and you would, under this scheme, gradually get rid of them, and instead of having ten or twelve in one county, you would have three or four, which would be presided over by a clerk, with perhaps one bailiff to look after all of them, and it would be much more efficiently done, and as I have said a while ago, your distances would be taken care of because of the methods of travel used.

MR. CONANT: Well, then it comes down to this: if you adopted the plan of having one small claims court, to distinguish it from the present structure, with a simple procedure and a block system of court fees, service by mail or by the litigant, and perhaps with a decreased jurisdiction, and all the rest to go into the County Court, with the present machinery of the Division Courts, that is the clerk and the bailiff, and the bailiff would have nothing to do except probably an occasional seizure?

WITNESS: That's all.

Q. That might very easily, and, I think, properly, and certainly more effectively, be done by the sheriff in most cases, and the bailiff and the clerks——.

MR. FROST: Mr. Conant, you run into an additional expense there again; in the ordinary small seizure, a local bailiff does that a good deal more cheaply

than a sheriff does, having to bring a sheriff for a considerably greater distance. I don't know whether you find that, Mr. Arnott?

MR. ARNOTT: Yes.

MR. CONANT: Would it be feasible to set up, just as we do now, by Order-in-Council—we set up Division Court jurisdiction by Order-in-Council, and we give each Division Court a certain territorial jurisdiction; would it be feasible to appoint, what you might call "bailiff's areas" by Order-in-Council, appoint a bailiff for these two or three townships, and for the other two or three townships, and so on?

MR. FROST: Well, knowing the practical difficulties that you encounter if you take your bailiff and give him jurisdiction in a whole county, the good bailiff is going to supersede the bad one, and the bad ones are going to be dropped out, and, in the end, you are going to be able to effect, in a very painless way, the changes which your bailiffs require.

MR. CONANT: I'm not sure it would be painless to the Attorney-General.

MR. FROST: I know, but he doesn't feel pain anyhow!

MR. CONANT: All right, Mr. Magone.

MR. MAGONE: I was wondering, Mr. Barlow, would it be possible to appoint sheriffs' deputies or agents in other parts of the counties?

WITNESS: That occurred to me a moment ago, Mr. Magone. I suppose it is not impossible to take care of it in that way. Mr. Arnott says the northern part of Hastings County is a long way from Belleville; the sheriff could very well have a deputy up there, who would look after the odd seizure there would be; I suppose there would be very few in a rural district, is that not right, Mr. Arnott?

MR. ARNOTT: Well, if you are going to reduce the solicitors' fees in the County Court, why not reduce the sheriffs' fees in connection with these executions that are placed in his hands.

WITNESS: I think you are quite right; that would have to be taken into consideration.

MR. CONANT: Your mileage is a large item.

WITNESS: But you would get around it, Mr. Conant, if you adopted that idea.

MR. LEDUC: I think, in cities like Toronto, Hamilton or Ottawa, we could keep a bailiff for Division Court, because he would have enough work to do.

WITNESS: Yes, it is only in the outlying districts that that would apply.

MR. CONANT: Going a step further, the present jurisdiction is $120 and $240, is it not?

MR. MAGONE: Yes.

MR. CONANT: Whether you left it at that or decreased slightly, you would be throwing into County Court the balance of the cases; where would you draw the next line, for making another category of costs in the County Court? Take it this way: suppose you left the jurisdiction the way it is, and made it all small claims, $100, $200 and $400; you mentioned, I think, in passing, that you would have another scale of fees for the lower claims in the County Court?

MR. LEDUC: Oh, no, Mr. Barlow had in mind transferring all claims over $100 to the County Court, and making a special scale of fees for those.

MR. CONANT: I see.

WITNESS: For those up to the present Division Court tariff.

MR. CONANT: Where would you draw the next division line, $500?

WITNESS: Well, there is a line drawn now in the County Court tariff, as I understand it.

Q. Well, I have sent for the tariff, and we will have it here very shortly.

A. Well, I think it is $40 to $500, and $70 afterwards, is that right? I haven't seen that tariff recently, Mr. Conant.

Q. Well, I think it is relevant to have it at this point.

A. But I do know that is taken into consideration.

Q. As I understood it, if you had limited the present division, or made it a small claims court up to $100, that everything else would go in the County Court, and then for claims say up to $500 you would have a special or lower tariff of fees than the County Court costs, is that it?

A. No.

MR. LEDUC: Might I suggest this: in the Province of Quebec they have a Magistrates' Court. They have only two courts in the city of Montreal, the Circuit Court, which is the equivalent to the Magistrates' Court.

WITNESS: Yes.

Q. The main court is the Superior Court, and they have a tariff of fees which is based upon the amount involved. I am speaking generally, there are some special cases, which are looked after, but generally speaking, the actions are divided into four classes, according to the amount involved, and the fees are fixed according to the class of the action. Would it not be possible to do the same thing in our County Court?

A. Oh, quite possible, quite possible.

Q. And there are some differences in the fees.

A. Yes.

MR. CONANT: What have we now, Mr. Magone?

MR. MAGONE. Preparation for trial, including notices of trial, notice adduced, subpoenas, and advising of evidence, ten dollars, subject to an increase, in the discretion of the judge, in cases involving more than $200, up to twenty-five dollars. That is preparation. Then counsel's fees at trial, twenty-five dollars, subject to an increase in the discretion of the judge, in cases involving $200 or more, to a sum not exceeding fifty dollars, or in cases involving $400 or more, to a sum not exceeding seventy dollars.

MR. CONANT: We could further break that down, if we wanted to?

WITNESS: Oh, yes, you could break it down as much as you like.

MR. MAGONE: Well now, Mr. Barlow, I think you mentioned that you would have a fairly simple Division Courts Act; would you not have to deal particularly with interpleader, such is done now in the Division Courts Act?

WITNESS: Interpleader is in the Division Courts jurisdiction, is it not?

Q. No, there is provision for it.

A. Of course we are again trying to delve through this jurisdiction, that even lawyers don't understand.

MR. CONANT: Yes.

WITNESS: There is no reason, Mr. Magone, where the amount involved is small, why it should not be dealt with in Division Court, except that the expense involved by seizure, and so on, might make it prohibitive.

MR. LEDUC: Section 54 of the Act sets out the cases where the court has jurisdiction, and surely that could be simplified?

WITNESS: Certainly it can be simplified.

Q. I draw your attention to subsection 2 of section 54.

A. Yes.

Q. And the proviso there.

MR. CONANT: We have all burned the midnight oil to figure that one out!

MR. LEDUC: It's ridiculous.

MR. MAGONE: There is provision in the Division Courts Act, Mr. Barlow, for the examination of judgment debtors, for instance; that is a special jurisdiction in The Division Courts Act?

WITNESS: Yes, I believe so.

Q. Let me deal with a few other special provisions.

MR. CONANT: And more particularly with the orders that result.

MR. LEDUC: Well, that is one point, now, because there is not that jurisdiction in the County Court.

MR. MAGONE: No.

MR. LEDUC: With regard to your reference to a judgment summons, — I am not expressing my opinion now, but why should a poor devil be subject to a judgment summons if he owes $100, and not be subject to it if he owes $500.

MR. CONANT: That is the present law.

MR. LEDUC: I know, and I think it is most unfair, whichever way you look at it.

WITNESS: Well, with reference to that, Mr. Leduc, may I call your attention to the Lacombe law, which you no doubt know very well, in the Province of Quebec, which, in my mind, is something that should be considered by this Committee, and perhaps it will take the place of our present system of judgment summons.

MR. LEDUC: There is a class of people in this province to whom the Lacombe law would not apply, because you cannot garnishee their wages, that is, the federal and provincial civil servants.

MR. CONANT: What is the Lacombe law, briefly?

WITNESS: I don't know if I can tell you, Mr. Chairman; I think Mr. Leduc understands it better than I do.

MR. LEDUC: Briefly it is—I forget the exact procedure, but it amounts to this: a man against whom there is an execution issued, can go to the clerk of the court and agree to pay to the clerk, on pay-day, a certain proportion of his salary, or wages, which is fixed by statute, and as long as he keeps up his payments, no order of execution can be issued against him, and any other person having a claim against him goes to the clerk of the court, files his claim, and the moneys paid in by the debtor are distributed pro rata, at certain intervals, to the creditors. Now in this province you can garnishee the wages on pay-day; in Quebec you can get an order from the judge declaring the seizure not to be in effect unless the debt is not paid.

WITNESS: Or unless notice is given by the employer that the employee is no longer employed by him, and unless that notice is given, the employer is still liable to it in the proportion.

MR. FROST: Do you think, Mr. Barlow, that that is a very great improvement over our system?

WITNESS: It is a great improvement, because it does away with ——

Q. Pyramiding costs?

A. —— pyramiding costs of taxable proceedings by each individual debtor, and for each weekly or monthly payment coming along.

MR. STRACHAN: If a man is paid in advance, here, you cannot garnishee his wages.

WITNESS: Yes, but I have had instances even in the higher courts, where you would have to have an attaching order taken out every month. There there is one for all time.

MR. LEDUC: And the court costs would be very little.

WITNESS; Usually very little.

MR. FROST: And the poor debtor goes along and pays every month.

MR. CONANT: Mr. Magone, have you any more questions you wish to ask?

MR. MAGONE: Yes, Mr. Barlow, there are special provisions, in The Division Courts Act, regarding evidence; that is the books of account used in evidence? My reason for asking this is to find out whether you would consider continuing these provisions in the new Act.

WITNESS: You must remember, Mr. Magone, that if you adopt my suggestion, that the claims be limited to $100, with no appeal, then the whole matter is dealt with informally by the judge, and he can take his own evidence, in his own discretion in these matters. That is the way in which they are handled in the States.

MR. LEDUC: It applies only to cases where less than twenty-five dollars is involved.

MR. MAGONE: Yes, not more than twenty-five dollars; but Mr. Barlow interprets the jurisdiction of the Division Court judge as permitting him to take that kind of evidence in any case, as I understood your answer?

WITNESS: Well, in the small claims court. I don't know what happens directly in the other provinces, but I imagine it is very much the same. There is no appeal and it is left entirely to the discretion and good judgment of the judge or officer trying the case to decide the merits as between the parties without being tied down to evidence.

MR. LEDUC: In other words, it is a court of justice.

WITNESS: Exactly.

MR. MAGONE: You wouldn't make the rules of evidence apply?

WITNESS: I wouldn't make the rules of evidence apply. We have in our present Evidence Act too many things that tie it down and make it difficult to get at the real facts.

MR. STRACHAN: Judge Morson solved that pretty effectively.

WITNESS: He solved it very effectively, Mr. Strachan. He didn't pay any attention to any rules and he got by with it.

MR. MAGONE: Would you abolish the procedure for a new trial set out in the Act in section 16?

WITNESS: Oh, no, I wouldn t abolish that. There may be cases in which a new trial should be granted. That should be left to the discretion of the judges.

Q. Then arbitration, section 156: where the judge, with the consent of the parties, may order arbitration?

MR. LEDUC: Does that happen very often, Mr. Magone?

MR. MAGONE: I don't think so.

MR. LEDUC: I have never heard of one.

MR. MCDONAGH: It hasn t happened in the First Division Court since 1934.

MR. LEDUC: Would you leave that out?

WITNESS: I would leave that out.

MR. MAGONE: With respect to executions against lands? As I understand it the execution must be over thirty dollars and must be returned *nulla bona?*

WITNESS: That's right, it must be over thirty dollars and must be returned *nulla bona* in order to have an execution by the sheriff.

Q. Would you leave that as it is?

A. Oh, I presume it is quite all right as it is, Mr. Magone.

MR. CONANT: Should there be executions against land in small claims?

MR. LEDUC: Sometimes it's the only thing that he has.

WITNESS: Yes. Of course you must remember that at the time that Act was passed forty dollars was worth a great deal more than it is now.

MR. CONANT: Yes.

WITNESS: If you consider it from that standpoint, perhaps there shouldn't be any execution against lands on claims of less than $100.

Q. Any claim up to $100, you say?

A. Yes.

MR. MAGONE. I wonder how often it would happen that there would be a sale of land for a claim over forty dollars and up to $100?

WITNESS. Not very often.

Q. Not very often. It wouldn't be used very often, anyway. Then there is a suggestion of yours, that The Creditors Relief Act be applied to executions under The Division Courts Act, I think?

WITNESS: I don't know, is there?

Q. Not in connection with Division Courts, but some place else, under the provisions of the Act as it is now the bailiff makes his seizure in the Division Court and the money is distributed to the creditors, whereas, if the sheriff made made the seizure, it would be available to all the creditors.

A. Oh, yes, I remember now.

MR. LEDUC: Is that under XIII, page B37?

WITNESS. Yes.

MR. FROST. I think that suggestion is proper too.

WITNESS: Well, it is bringing it in line with the suggestion making the Lacombe law applicable, by which every one gets part of it. That is the intention of it.

MR. MAGONE: It would involve extra work for the clerk of the Division Court every time there is a seizure?

WITNESS: Oh, yes, I suppose so. Yes, I suppose that is true.

Q. The Division Court, Mr. Barlow, is the only court now in this province that is self-supporting, is it not?

A. I think you are quite right, as far as I know.

Q. And it is the poor man's court?

A. It is the poor man's court, and there is a very large surplus aid to the province.

MR. LEDUC: There is another way of fixing that, you know; it is to make the other courts self-supporting.

WITNESS: Well, there is a lot to be said for that.

MR. MAGONE: In some jurisdictions, in connection with a small debts practice, the judgment is registered with the County Court clerk, and it becomes a judgment of that court, does it not?

WITNESS: I think there is that practice, yes.

Q. Would that work out in connection with our Division Courts here, and reduce the cost of proceeding?

A. Then give that part of an execution to the sheriff?

Q. Yes.

MR. LEDUC: I don't get your point, Mr. Magone; you suggest that the judgment of that small claims court be filed with the clerk of the County Court?

MR. MAGONE: Yes.

MR. LEDUC: Then it becomes a judgment of the County Court, and the procedure of the execution follows the practice of the County Court?

MR. MAGONE: Yes.

MR. LEDUC: So there would be no execution procedure in the small claims court?

MR. MAGONE: Yes.

WITNESS: If you do that, why, then that leaves nothing for the bailiff at all to do, and that solves your question of bailiffs.

MR. MAGONE: That is what I had in mind.

WITNESS: It does, it solves your question of bailiffs, Mr. Magone. I would think very properly, too, for a further reason, that the clerks of the Division Courts throughout, that is the small Division Courts, have not the same facilities of keeping track of things over years that a County Court clerk has, and if all these were sent to the County Court clerk, then you would have a permanent record.

MR. LEDUC: Would that be satisfactory in all cases?

WITNESS: Well, you might have to make exceptions in some of our larger courts, Mr. Leduc; I am thinking, again, about the smaller rural courts.

Q. The rural courts, yes.

A. Because it is the rural courts that are more important, so far as this Committee is concerned, than the city courts.

MR. MAGONE: Mr. Barlow, the submissions that were made to you by various organizations, did they not complain that it was very difficult to get the bailiff to act after the issuance of an execution?

WITNESS: They complained that it was very seldom that the bailiff actually realized on an execution.

MR. LEDUC: In nineteen cases out of twenty there is a return of *nulla bona*.

MR. FROST: Where is that?

MR. LEDUC: Generally.

MR. MAGONE: Generally, Mr. Frost.

MR. LEDUC: I think it is worse in the cities than in the rural districts.

WITNESS: Yes, there's no doubt about that.

MR. CONANT: You touched upon a very important point there, because, in my observation, that is one of the places where our Division Courts system falls down.

WITNESS: It does fall down.

Q. The inability, unwillingness or something, of the bailiffs to get any results on executions. I think everybody at this table has experienced that.

MR. MAGONE: Is the reason for that, Mr. Barlow, probably because the fees of the bailiff have to be paid before he does anything? Do you think that is true?

MR. LEDUC: The cause may be that a bailiff is sure of his fees.

MR. FROST: I think that arrangement is largely due to inefficiency. You take if there are a dozen Division Court clerks, some Division Court has a very small amount of business, and the bailiff is appointed to that court and he is asked to make a seizure—well he has another occupation, and the result is that he rather shys at making a seizure, and the result is that you will find about one good bailiff in a county and that good bailiff is the man who is getting the work, and he makes it his business to serve the summons, make seizures and look up the Landlord and Tenant proceedings, and so on, and that is the reason, I suggested, a while ago, that the bailiffs' jurisdiction should be made county-wide; I think you would get rid of a lot of that inefficiency that you have at the present time.

MR. MAGONE: Well, just along that line, Mr. Barlow, you might answer that; if you made the Division Court jurisdiction the whole county, is there any objection to having a bailiff and a sheriff?

WITNESS: There is no objection to have both; the sheriff could do all the work.

MR. LEDUC: With deputies?

WITNESS: Yes.

MR. MAGONE: Yes, with deputies.

MR. FROST: I agree with that, but if you are going to have a Division

Court, I suppose you have to have some Division Court machinery. If you are following out your suggestions and actually abolishing Division Courts, and putting all those cases in County Court jurisdiction, then of course the sheriff is the machinery, and the bailiffs automatically go, but on the other hand, if you leave the Division Court there, it may be pretty difficult to abolish your bailiffs.

MR. MAGONE: Yes, well, I asked Mr. Barlow a question that was suggested by the legislation in some of the other provinces, that is, that once you get judgment in the Division Court, you transfer the judgment to the clerk of the County Court and it becomes a judgment of the County Court then, and the sheriff of the county is the one who acts on an execution.

MR. FROST: I think, myself, and wouldn't you think, Mr. Barlow, that there might be merit in that suggestion?

WITNESS: Great merit.

Q. Providing that there is a limitation in the fees that would be charged?

A. Yes, according to the amounts.

Q. Yes, according to the amounts.

A. Quite true, I think the real solution is there, that the judgment in the Division Court is registered with the County Court clerk, filed with the County Court clerk, and execution issues, and it then becomes a judgment of the County Court, having been filed with the clerk of the County Court, and the execution issued from the County Court on that is directed to the sheriff, and the sheriff of the county or his deputy then enforces that execution anywhere in the county.

MR. LEDUC: You said a few moments ago, Mr. Barlow, if I remember rightly, that it couldn't apply to the larger Division Courts?

WITNESS: I said it wouldn't apply—I said it shouldn't apply, necessarily, to the larger Division Courts.

MR. STRACHAN: They could not handle it in our County Courts?

WITNESS: No, they couldn't handle it, because it's a different thing; as has been done throughout most of our legislation, you would have to make special exceptions so far as Toronto is concerned, and probably Hamilton, London, Windsor and Ottawa.

MR. CONANT: Now I am rather intrigued with that idea. Let us take a practical example. Would it be feasible to have, say, in my own county of Ontario, a sheriff, who would have deputies say, in Marmora, another in Thora, and another for Uxbridge and Agincourt?

WITNESS: Quite.

MR. FROST: And they would only get mileage for those particular districts?

WITNESS: They would just be employed the odd time. Yes, that is very feasible.

MR. MAGONE: I see that in Manitoba that procedure is adopted under the Small Debts Recovery Act.

MR. FROST: Have they deputy sheriffs, then?

MR. MAGONE: Yes, Manitoba isn't divided into counties, but into districts; they call it a County Court clerk in the Act, but I think they have three or four districts in Manitoba.

MR. CONANT: Would you call those deputy sheriffs, Mr. Barlow?

WITNESS: Yes.

MR. MAGONE: I notice there is provision in the Administration of Justice Expenses Act, Mr. Barlow, for a constable, in making distress, in the Constables' Tariff.

WITNESS: Is that a constable to protect the bailiff?

MR. MAGONE: No, a constable under The Summary Convictions Act may be required to make distress of goods, is there any reason why township constables couldn't be appointed deputy sheriffs for the purposes of these small claims?

WITNESS: No reason.

Committee rises for lunch recess.

AFTERNOON SESSION

F. H. BARLOW, K.C., Master, Supreme Court, Ontario, Recalled.

MR. CONANT: You may proceed, Mr. Magone.

MR. FROST: Mr. Barlow, have you found your report has been widely read by the lawyers?

WITNESS: I think it has been very widely read.

Q. Well, what comments have you received?

A. Very favourable.

MR. MAGONE: We will have some reports, Mr. Frost, from various organizations and societies, with respect to Mr. Barlow's report, and we propose to divide them up and put them in separately; that is, we will put in those dealing with Division Courts first, and those dealing with Consolidation of Courts next,

and so on, in order that it will be kept clear on the record. Now, we had almost finished with Division Courts before recess, and at that time, the suggestion was made that the judgment of Division Court be made a judgment of the County Court, and Mr. Silk reminded me at noon that the execution might be issued directly by the clerk of the Division Court to the sheriff, and cut out one step in the procedure; would that be feasible?

WITNESS: There is no reason why that should not be done, Mr. Magone, and the only reason I had in filing it with the County Court clerk was that it might be a more permanent record than perhaps what there might be kept in the individual Division Court, and you would find then a record of Division Court judgments for the whole county in one central office.

MR. CONANT: Judgments on which executions had been taken.

WITNESS: Of course. So far as your executions being issued by the clerk directly to the sheriff, that could be provided for without legislation.

MR. MAGONE: The Supreme Court judgments, County Court judgments, and Division Court judgments, would all then be in one office, the office of the sheriff?

WITNESS: No, the executions.

Q. The executions, I mean, yes.

A. Yes, the executions would all be in the one office.

MR. CONANT: And then that would also be of some value in your Creditors Relief Act operation?

WITNESS: Quite true. It would mean a centralization of them for that purpose too, yes.

Q. Yes, so that you could make a distribution apply to all judgments?

A. Quite true.

Q. That is a merit, too, then?

A. Yes.

MR. STRACHAN: Could our sheriff's office in Toronto cope with that situation, Mr. Barlow, or are we still dealing with the rural areas?

WITNESS: No, again, Mr. Strachan, as Mr. Leduc mentioned this morning, exception might require to be made so far as Toronto is concerned, and perhaps two or three of the other larger centres.

MR. CONANT: Yes, I think it would.

MR. MAGONE: Mr. Barlow, will you turn to page B29 of your report. On page B31 you recommend that:

"1. That the necessary legislation be drafted and passed for a consolidation of the County Court, the Court of General Sessions of the Peace, the County Court Judges' Criminal Court, and the Surrogate Court, into one Court to be known as 'The County and Probate Court of the County of. . .' with a provision that in all matters in which a County Court Judge is *persona designata* that the jurisdiction be conferred upon the Court and that the practice and procedure applicable to such Court shall be followed.

"2. That Rules of Practice and Procedure applicable especially to such consolidated Court be drafted and adopted."

Now, Mr. Barlow, can you tell the Committee what would be accomplished by making that consolidation?

WITNESS: Various things would be accomplished. Probably the first thing would be one set of officials, who would be responsible for the carrying out of the duties of the one court, with deputies where necessary. Another feature would be that all documents would be filed in the one office, and available, in a search, in the one office.

Q. Yes?

A. And another feature would be, of course, a saving in expense, quite naturally.

Q. Well, do you mean by that it would cut out the duplication in books?

A. Cut out a duplication of books, yes. At the present time, I understand that where a judge acts as *persona designata*, there is great question as to if orders made shall be entered, and where they shall be filed; there is no special practice, apparently; so I am told by county judges.

MR. CONANT: Because there is no one functions as officer of the Court?

WITNESS: There are no officers of the Court so far as that particular duty is concerned, yes. This recommendation that I make here, of course, is primarily one made to me by the County and District Judges' Association, and they, from their daily experience as judges in these various courts that are mentioned here, have first-hand information, and I would suggest to the Committee that the Chairman of that Association—I think it is His Honour Judge Holmes, of Walkerville—should be called and perhaps some of his Committee, and their evidence be taken, because they can speak with much more authority than I can, because I am only speaking of what information I obtained in connection with the Survey.

MR. MAGONE: Are you familiar, Mr. Barlow, with the legislation in Saskatchewan? I understand they have done just that.

WITNESS: They have done just that in Saskatchewan. I have not read the legislation in detail, but I do know they have done it.

Q. That is they have created a County and Probate Court, and cut out of that Probate Division the County Judges Criminal Court Division?

A. Yes.

Q. And I don't think they have any General Sessions of the Peace, have they?

A. No, they have not.

MR. CONANT: Would that involve any very considerable revision of our present statutes and rules?

WITNESS: Well, I don't know just how far that would have to go. I would say that it would probably involve considerable revision, Mr. Chairman.

Q. Yes?

A. Yes, I think it would, because at the present time, each one of these is set up as a separate court, with a separate Act applicable to it.

MR. MAGONE: As far as the County Court Judges Criminal Court is concerned, that is a jurisdiction as conferred upon county judges by the Criminal Code?

WITNESS: Quite right.

Q. And then, as I understand it, the Ontario Legislature has passed an Act, known as the County Court Judges Criminal Courts Act, and it is merely for the purpose of setting up, as it were, the machinery by which the provisions of the Criminal Code might be carried out?

A. That's quite true, yes.

Q. But if the County Court Judges Criminal Courts Act of our province were repealed, altogether, I don't suppose it would have any serious effect, because the jurisdiction is now conferred by the Criminal Code upon the judge who acts as chairman of the General Sessions?

A. He acts as chairman of the General Sessions and that jurisdiction is conferred upon him, yes. You must remember that almost the same situation existed in this province prior to 1881, with reference to our Superior Court, and you had four divisions there, of Queen's Bench, Common Pleas, Exchequer, and Chancellery, was it?

MR. CONANT: Yes.

WITNESS: And they, each one, had their own officers and separate practice prevailed for each court, and the Queen's Benchers, then, I think, had the permanent jurisdiction, as I recollect, and it was very, very cumbersome. The Chief Justice of each Court represented the Chancellors of the Chancellory Court. Of course that was all done away with as long ago as 1881. I think it

was 1873, when the Judicature Act was passed in England; am I correct as to that date?

MR. MAGONE: Yes, I think it was.

WITNESS: 1873, yes, in which they did very much the same thing, and we followed suit here in 1881. They established a somewhat similar consolidation in Prince Edward Island in the late '70s.

Q. Yes, I think so.

A. Were you calling my attention to that?

Q. I don't know the date of it.

A. Were you calling my attention to that?

Q. No.

A. What happened down there might be interesting; there were two lawyers who were not on the best of terms, and one of them succeeded in getting himself made Chancellor, and the other one, who became Attorney-General, then revised the procedure in the courts, by which the Chancellory Court was done away with.

MR. STRACHAN: The officials of the County Court, the County Court Clerks' Office has nothing to do with this?

WITNESS: The County Court Clerks' Office has nothing to do with it, and the clerk of the peace, in practically all the counties with the execption of Toronto and one or two others is the Crown attorney, and you have the anomalous position of the Crown attorney reading an indictment, swearing the witnesses, and then examining and cross-examining.

MR. CONANT: Yes.

WITNESS: Which is a ridiculous situation.

MR. MAGONE: That is the result, Mr. Barlow, simply of practice? There has been no clerk appointed to the County Court Judges Criminal Court?

WITNESS: Oh, I think the Act provided that the Crown attorney shall be clerk of the peace.

Q. No, the County Court Judges Criminal Courts Act, Chapter 105, provides that the judge of every county and district court or a junior judge or deputy judge thereof, authorized to preside at the sittings of the Court of General Sessions of the Peace, and to quote the section in question:

1.—(1) The judge of every county and district court, or the junior or deputy judge thereof, authorized to preside at the sittings of the court of the general sessions of the peace, is constituted a court of record for the trial, out of sessions and without a jury, if any person com-

mitted to gaol on a charge of being guilty of any offence for which such person may be tried at a court of general sessions of the peace, and for which the person so committed consents to be tried out of sessions, and without a jury, and the court so constituted shall have the powers and perform the duties mentioned in Part XVIII of the Criminal Code.

(2) The court so constituted shall be called the county or district court judges' criminal court of the county or district in which the same is held, as the case may be.

And that is all. Then there is a further provision with respect to appeals, under the Criminal Code, and the Summary Convictions Act.

A. Where is the provision that I speak of, with reference to the Crown attorney being clerk of the peace, is that in the Court of General Sessions Act?

MR. CONANT: Do you mean that the clerk of the peace shall be clerk of the court, Mr. Barlow?

WITNESS: No, I am dealing with the Crown attorney being clerk of the peace.

MR. MAGONE: No, the General Sessions of the Peace Act provides for the appointment of a clerk who is the clerk of the peace.

WITNESS: What is the exact provision in that regard, do you mind looking that up?

MR. MAGONE: Chapter 104, Section 10:

(1) There shall be a clerk of the peace for every county and district, who shall be appointed by the Lieutenant-Governor in Council.

. . . . . .

(3) Except in the County of York every clerk of the peace shall be ex officio Crown attorney for the county or district for which he is clerk of the peace.

WITNESS: That's the point.

Q. Then there is Part XVIII of the Criminal Code, which provides for speedy trial, and that section 1, sec. 824, which reads as follows:

"The judge sitting on any trial under this Part, for all the purposes thereof and proceedings connected therewith or relating thereto, shall be a court of record, and in every province of Canada, except in the Province of Quebec, and except as hereinafter provided, such court shall be called the county court judges' criminal court of the county or union of counties or judicial district in which the same is held."

and then Sec. 823 (1):

"In the Province of Ontario, judge means and includes, any judge of

a county or district court, junior judge or deputy judge authorized to act as chairman of the general sessions of the peace."

Now, my suggestion is that it is simply a matter of practice, because the judge who sits in court of general sessions of the peace as judge of the court, clerk of the peace is also clerk of the court?

A. That's true.

Q. Do you not think that is the way it arose?

A. That is the way it arose, quite apparently.

MR. CONANT: Is there any reason why the County Court clerk could not act as clerk of that court?

WITNESS: There is every reason why he should, I would say. Except perhaps in a jurisdiction like Toronto.

Q. Yes, quite.

A. But in the ordinary, smaller jurisdiction, yes.

MR. MAGONE: A simple amendment to the County Court Judges Criminal Court Act would fix that?

WITNESS: Oh, yes.

Q. In so far as the general sessions of the peace is concerned you have the same Dr. Jekyll and Mr. Hyde procedure?

WITNESS: Yes.

MR. CONANT: Yes, I well know that.

MR. MAGONE: But if you had the clerk of the County Court acting as clerk of that court, then you should abolish the clerk of the peace, should you not, because he is the clerk of the general sessions of the peace?

WITNESS: I think you are quite right, you should, yes.

MR. CONANT: Well, of course if you go into it further, you will find that he does perform functions other than that.

WITNESS: But there is no reason why the County Court clerk should not perform all those functions.

MR. FROST: That is the point.

WITNESS: Then you would have all the documents in one office, again.

MR. STRACHAN: What other functions does he perform?

MR. CONANT: Certification of certain things.

MR. MAGONE: And the naturalization jurisdiction.

MR. CONANT: Yes, I forget all the details, but there are some other functions.

MR. MAGONE: There are a lot of duties come to him with respect to the drawing up panels of juries.

MR. CONANT: Yes. I don't think you could abolish the office, but I think it is well worth considering making the clerk of the County Court the clerk of both of those courts and to keep the records of those courts too, very well worth considering.

MR. CONANT: Now, Mr. Barlow, if you were having one court, styled as you have suggested here, would you add to that probate division, a county court division, county judges criminal court division, and so on?

WITNESS: Oh, no, I don't see any object in doing it; most of those separate divisions were entirely abolished so far as the Supreme Court is concerned, and there is no longer a chancellory division, or an exchequer division, or a criminal division or a civil division.

Q. In other words, you would be placing that court in much the same position that our Supreme Court is in now?

A. Only that it would be an inferior court, and the other is the superior court; that's all; they are parallel.

Q. And the nature of the case would determine the practice that was followed?

A. Quite true.

Q. Yes.

A. We can well recollect when, down at Osgoode Hall, we had a separate set of officials, with a Master in Ordinary, and a clerk to the Master in Ordinary, and a Master in Chambers and a clerk to him, and there was a clerk in Chancery —I've forgotten some of the others, there was the criminal end of it, anyway, there was a separate clerk for that, too, but that has all been done away with.

Q. But I asked before, Mr. Barlow, and you will know better than I do, when the change was made in Ontario here, in the beginning of the 80s, I think it was, it involved a considerable revision of all the statutes and rules and everything else?

A. It did; there is no question about that.

Q. And, obviously, it would be the same thing here.

A. The same thing here. You will find that under the Act in 1881, which

combined all these divisions, the judges of the different courts at that time were made judges of the combined court, and so on.

Q. With regard to your observation about officials, in most of the counties, at the present time, there are the same officials for all parties?

A. It has come to be so very largely, that is true, although not entirely true; but one of the difficulties is they occupy the position but they have a separate set of books, and a separate place for many of the orders for each division, and so on. There is a terrible lot of clerical work that could be simplified, so they tell me.

MR. MAGONE: When the change was carried out, in 1883, it didn't become absolutely effective in Ontario until a short time ago, and I understand that there were two offices in London, the clerk of the court, and the other the local registrar, were both local registrars of the high court, do you remember that?

WITNESS: I didn't know that, no.

MR. CONANT: Is that so?

MR. MAGONE: Yes, they didn't discharge the officers out of hand, but they abolished one office and made him local registrar of the Supreme Court, as the offices became vacant. In London you had your choice; if you liked Mr. Wells, who was the clerk of the old Court of Chancery, you would start your action there, if you didn't like him, you would go to the registrar of the King's Bench division, and start your action there.

MR. FROST: I suppose the purpose of that was to avoid discharging certain officials there?

MR. MAGONE: Yes.

MR. FROST: The idea being to let time cure the difficulty?

MR. MAGONE: Quite.

WITNESS: The same thing happened here with regard to the judges; the chief justices of the Chancery Court held that title as long as they lived, and gradually, when they died or retired, the office disappeared.

MR. CONANT: That was Mr. Justice Plaxton?

WITNESS: He was the last one.

MR. FROST: Well, this consolidation does seem to be a natural step, does it not?

WITNESS: I am surprised that it hasn't been done long ago.

Q. In effect, it is in operation, in some places, now?

A. It is in operation by reason of bringing the different parts together and letting them all work together, but separately, that's all.

MR. CONANT: Taking my own county, you know there is an absurd situation there; you have the same man, who, one minute is clerk of the county court, and the next minute he is surrogate court registrar, and the next minute he is something else. It makes no sense nor reason.

MR. MAGONE: And this consolidation would not involve any such gradual changes as were necessary in the consolidation of the superior court?

WITNESS: Oh, no, because it is almost being done now.

MR. FROST: Mr. Barlow, I submit that this is one point in your report on which I thought your grounds were well taken. Would you mind telling us this; your report has now been published; no doubt this recommendation has been very widely read; have you had any objections to this? Or have you heard any reasons advanced why this should not be done?

WITNESS: No, on the contrary, I have heard the very opposite to what you speak of, that is recommendations that it should be done, and that it is something that is only the natural trend.

Q. That is what I found too. The only objection I found at all was the suggestion that we would be better to let well enough alone, but if you are going to adopt that attitude, you will never change anything.

A. You will always find those who are reactionary, and never want any change.

Q. Never want any changes at all, no.

MR. CONANT: Of the formal submissions that have been made with direct reference to Mr. Barlow's report, there is a report of the judges?

MR. MAGONE: Of the Supreme Court, yes.

MR. CONANT: Did they make reference to it?

MR. MAGONE: On page 12, yes; they go through Mr. Barlow's report and refer to all his recommendations.

MR. CONANT: What is their attitude?

MR. MAGONE: Consolidation is on page 12; they say:

"This is a matter for grave study and consideration before taking any action.

"It is doubtful whether any advantage is to be gained by consolidation of the local civil courts with the local criminal courts. That would appear to involve the already over-burdened officer, who commonly acts as local

registrar of the Supreme Court, clerk of the County Court, registrar of the Surrogate Court and sheriff, taking over also the duties of the clerk of the peace. Consolidation of these offices has already reached a point where the efficiency of the local officers has become gravely impaired. Whether there is in truth any advantage to be obtained from the uniting of the county courts and the surrogate courts may be a matter for investigation, but there will be no saving in the number of officers in most counties by that consolidation.

"It might be noted that the provision set out in the latter part of Clause 1 of the Commissioner's recommendation, viz., in matters in which the county judge is *persona designata*, is already provided for in the main by the provisions of The Judges' Orders Enforcement Act, 1937, R.S.O., chapter 123.

WITNESS: I don't know what that has to do with the matter. In fact, I haven't looked it up, but my reference to the difficulty where a judge is *persona designata* comes to me from the county judges themselves, who either wrote me or with whom I discussed the matter, and who told me of the difficulty of finding officers for the work, and so on.

MR. FROST: It says here:

"That would appear to involve the already overburdened officer, who commonly acts as local registrar of the Supreme Court, clerk of the County Court, registrar of the Surrogate Court and sheriff, taking over also the duties of the clerk of the peace. Consolidation of these offices has already reached a point where the efficiency of the local officers has been gravely impaired."

Have you found that these gentlemen were overworked and that their efficiency is impaired?

WITNESS: Not that I know of. I certainly have not heard of it; in fact quite the contrary.

Q. Well, that's what I thought.

A. The information which I have comes from the county judges, who are in a position to know, I would think.

Q. You say, for instance, here in the city of Toronto ——

MR. LEDUC: Well, there is no consolidation here.

MR. FROST: But if there were consolidation here, they would have to have more assistance, but there is no reason why, in an office where there is a lot of work, why there could not be extra help taken in?

WITNESS: No question about it at all. The large portion of this report, and particularly on this particular matter which we are now dealing with, does not refer to the city of Toronto at all, because we know that there are offices

here that have to be manned, and whether they are manned by a registrar and half a dozen clerks, or one clerk and so many deputies, doesn't matter.

Q. That's the point.

A. But it is outside, the outlying counties, that I had in mind, and it is the recommendation of these judges, who have had experience throughout the province, that I have followed.

MR. LEDUC: Mr. Barlow, I suppose when you say Toronto, you include all the other large cities?

WITNESS: Yes.

Q. There is an official who is registrar of the Supreme Court, and one who is clerk of the County Court?

A. Quite.

MR. MAGONE: Mr. Barlow, with respect to the suggestion of the judges that The Judges Orders Enforcement Act covers that part of your submission dealing with *persona designata* jurisdiction, The Judges Orders Enforcement Act, chapter 123, says:

> "Subject to the provisions of the statute under which he acts where jurisdiction is given to a judge as *persona designata*, his orders shall be entered in the same way as orders made by him in matters pending in the court of which he is a judge and may be enforced in the same way as judgments of the court."

Does not that get over the difficulty suggested by you?

WITNESS: It would appear to, wouldn't it?

MR. LEDUC: In which court would it be entered?

MR. CONANT: That is not the difficulty that arises in this *persona designata* business; you are all right after you have your order, but there is no machinery for taking care of your preliminary steps and proceedings; isn't that the case, Mr. Barlow?

WITNESS: Quite right, sir.

Q. Now, after you have your order, and entered the proceedings in court, you file your papers, and he puts them in a big envelope, and when you go up with your motion, you have them. At the present time, and I have known this to be the case, the judge is the custodian of those papers; there isn't any other place to take them.

A. There is no place to file them; that is the complaint.

Q. And the judge, in many cases, has very wholesomely and completely lost them.

A. There is no clerk of the court whose duty it is to take charge of those papers and produce them.

Q. And if the clerk loses them, you can censure him wholeheartedly.

A. But if the judge loses them, you have no remedy.

MR. MAGONE: Would not your recommendation involve this: that in matters which are now *persona designata*, such as, shall we say, Unmarried Parents' Act, and matters of that kind, with an informal procedure, you would have a court action with a clerk and everyone present and the corresponding increase in costs?

WITNESS: Give the jurisdiction to the court, and not to a judge, and if you give the jurisdiction to the court then you have the court's machinery to use.

Q. Is there any advantage in having all the machinery of the court available in the initial stages? Do you not only need it after you have judgment?

A. We certainly need it in the initial stages, just as you need such machinery on any application that comes before the court, somebody with whom the papers can be filed and who is in charge of them, and who will know where they are when wanted.

MR. CONANT: There is only one aspect of this, Mr. Magone, pardon me for interrupting your line of questioning. I don't mind prejudging this item, because I have had some very singularly difficult experiences, where the clerk of the peace opens the court and swears the witnesses, and reads the indictment, and addresses the jury, and examines the witnesses—all within an hour, as you have seen it happen. I think that is the most absurd thing I have seen. There is only one difficulty that arises there, which should not be a difficulty, but it would have to be met; there are certain fees that pertain to that work. Under the Administration of Justice Expenses Act, the clerk of the peace gets certain fees from that.

MR. MAGONE: Yes.

MR. CONANT: It would be a matter of consideration as to how those fees would be adjusted if you rearranged it, would it not?

MR. MAGONE: Yes, well, power is given to do that by Order-in-Council, Mr. Silk reminds me.

MR. CONANT: I understand that. That is why I wanted that amendment last year.

MR. MAGONE: Yes, instead of having all those items under the heading of clerk of the peace, the only amendment necessary would be to change it to clerk of the County Court Judges Criminal Court.

MR. CONANT: Well, yes, that's right; it is not a large part of the earnings of the office.

MR. MAGONE: No, it is very easily remedied.

MR. CONANT: While we are here, let us have some record of the views this assemblage represents. The consolidation might be made effective in all excepting the county of York, and the counties of Wentworth, Middlesex, Essex and Carleton; would those be the exceptions?

WITNESS: I see no reason why the consolidation should not be made effective in all those jurisdictions as well, Mr. Chairman, and then you would have a uniform practice. What I do say is that it is not—there is not the same necessity for it there.

Q. Yes?

A. But there is no reason why it could not be made applicable to those jurisdictions as well, and it merely means that instead of having a registrar or a separate registrar and a separate clerk of the peace, and so on, you would have one clerk of the court, or one registrar, whatever you might call him, and deputies for these other divisions in those larger cities.

MR. MAGONE: I suppose it would be reasonable to make an exception apply only where there is a separate clerk of the peace, and that would only be Toronto?

WITNESS: Yes, that could be done.

MR. CONANT: Well, now, you have County Court jurisdiction; were you going into that yet?

MR. MAGONE: Yes, but we have read the recommendation of the Supreme Court, which is against Mr. Barlow's recommendation; I think I should read in the recommendation of the county and district judges, which is favourable.

MR. CONANT: All right.

MR. MAGONE: This is the recommendation of the County and District Judges Association for the Province of Ontario, and they say:

> "We fully endorse the recommendation that the County Court, the Court of General Sessions of the Peace, the County Judges Criminal Court, and the Surrogate Court, should all be consolidated under the name of County and Probate Court of the County of....., and that there should be included therein all matters in which County Court judges are now *persona designata*, and that the Rules of Practice and Procedure applicable especially to such a new consolidated court should be drafted and adopted."

Then there is a recommendation from the Lincoln County Law Association, one of the associations which has apparently gone carefully into it, and on page 3, they say:

> "Our Committee approves of this consolidation, provided that it in no way interferes with the present remuneration of the County Court judge. It was felt that the judges' salary, at the present time, is not enough, and

if it were lessened, it would be difficult to obtain the high standard necessary for our judicial system."

And the Elgin County Law Association:

"This association is in favour of the recommendation of Mr. Barlow as to consolidation of the County and District Court, Court of General Sessions of the Peace, County Court Judges Criminal Court, and Surrogate Court."

The Toronto Board of Trade similarly concurs in the recommendation.

MR. G. A. GALE: May I interject, Mr. Chairman, that during our discussions with Mr. Barlow, at the time this was brought up, the Lawyers' Committee was heartily in accord with his recommendations.

MR. CONANT: May I suggest, Mr. Magone, that you have your staff put those extracts in one memorandum, as part of the recommendations to the Committee, and let each member of the Committee have a copy. Do you agree with that, Mr. Frost?

MR. FROST: Yes.

MR. MAGONE: Well, I have been reading them into the record for the purpose of getting a copy of the recommendations all together.

MR. CONANT: Well, you can do it that way, I suppose.

MR. MAGONE: I intended to read a good deal into the record, sir; if we have copies made of everything, it is going to mean an awful lot of typing.

MR. CONANT: Are you going to read those further at the present time?

MR. MAGONE: No, I am separating them, and reading them at the time the particular matters come up.

MR. CONANT: All right.

MR. MAGONE: On page 72 of your report in the *Weekly Notes*, Mr. Barlow, you deal with County Court Districts.

I understand, Mr. Barlow, that that was done about 1919, at the request of the then Government of the Province of Ontario?

WITNESS: So I believe.

A. And that the Government of the Dominion acquiesced and passed an Order-in-Council approving of the formation of the Province into County Court districts?

A. Yes.

Q. After the Province had passed an Order-in-Council separating the Province and the districts?

A. Yes.

Q. There has been a good deal of criticism, I understand, just as to the operation of that system?

MR. CONANT: Well, now, Mr. Magone, pardon me, but I think the effect of that system should be put on the record, and explained a little more clearly as you go ahead.

MR. MAGONE: The effect of that is under Section 18 of The County Judges Act:

> "The Lieutenant-Governor in Council may order that a county or two or more counties shall form a County Court district for the purposes of this Act, and the district so formed shall be erected and established as from a day to be named by the Lieutenant-Governor by his proclamation in The Ontario Gazette."

Then under section 20:

> "After the erection of a County Court district, the several county courts, courts of general sessions, division courts, courts for the hearing of appeals and complaints under The Assessment Act or The Voters' Lists Act, and all other courts which a county judge may hold in each county shall be held by the judges, including the junior judges in the district, in rotation so far as may be practicable in view of the respective general length of service and strength of the other judges, and the special duties assigned to junior judges as well as in view of other offices, if any held, by any of the judges, and all other circumstances."

Then, following that, an Order-in-Council was passed by the Lieutenant-Governor dividing the Province into a number of districts, and grouping such counties as Lincoln, Welland, Haldimand, Norfolk, Brant and Wentworth into one district, and the same all over the Province, and following the passage of that Order-in-Council, in 1928, that superseded an earlier Order, the Governor in Council, at Ottawa, passed an Order, under section 34 of the Dominion Judges Act, to provide that:

> "Each of the County Court judges of Ontario in any county or provisional judicial district in the Province be and is hereby required to hold any of the courts and to perform any other duty as County Court Judge in and for the whole County Court district."

MR. CONANT: So that each judge has concurrent jurisdiction in the whole district?

MR. MAGONE: Yes.

MR. CONANT: All right.

MR. MAGONE: And that is so, apparently, in matters over which the Provincial Legislature has jurisdiction, and, by reason also of a Dominion Order, in matters over which the Dominion has jurisdiction.

MR. CONANT: Now, Mr. Magone, have you any evidence or submissions to present to us as to what was the genesis of that? What was the purpose of that?

MR. MAGONE: I haven't any.

MR. FROST: Mr. Barlow gives us the answer to that in his report:

> "This was originally conceived to relieve County Court judges from the embarassment of trying cases of which they might have a more or less personal knowledge within their own county and also to relieve them from what is sometimes embarrassing, namely, the same counsel appearing before them continuously."

MR. BARLOW: That's it.

MR. MAGONE: I think, my recollection is, too, that there were a number of counties where judges were actually crying for work, and that it was designed for the purpose of permitting judges from one county to go into another county and to work out some system of rotation, to that there would be a division of the work.

MR. STRACHAN: And to relieve the judge of some of the work, such as the case of Judge Elliott, for instance.

MR. MAGONE: Yes. In some counties there would be two judges, and one judge would be very busy, while the other judge would not be so busy, and to permit the junior judge, where there was one, to be used around in the other counties where he was required.

MR. CONANT: Well, now, how is this worked out? Let us——

MR. FROST: Just in connection with that, before you go ahead with your request, Mr. Attorney-General, doesn't that same condition apply as regards magistrates, or do you know that, Mr. Barlow?

WITNESS: You mean does the same practice apply?

Q. Yes.

MR. MAGONE: Well, the magistrates now have province-wide jurisdiction; they are appointed for the whole Province of Ontario, and it is just a matter of direction by the Attorney-General through the Inspector of Legal Offices.

MR. CONANT: As to where they sit, yes.

MR. FROST: Mr. Attorney-General, Mr. Barlow says this, in his report; he says:

"The result is that not only do a number of the County Court judges seldom try a case within their own county, but they travel long distances for the purpose of taking Division Court sittings, with the result that the municipality and the Dominion Government are put to a very considerable and very unnecessary expense by reason of the absence of the judge from his own county town."

Now, I suppose this is common knowledge; I think that is a fair comment on what is taking place. I think it is a fact. You take, for instance, with regard to magistrates; we have magistrates who will exchange courts, and they will travel long distances, and their mileage charges are charged up to the public in some way or other, and I think that same thing is happening as regards the judges.

On the other hand, the reason that you have given there, that this was done to release county court judges of the embarrassment of trying cases in which they might have an interest, and also in saving them from the embarrassment of having the same counsel continuously appearing before them, I think that is true; do you then think there is some happy medium we might strike in between those two points? I know your difficulty; you are going to ask: where are you going to establish the medium? But there is that to it; the County Court judge sits in the same court, he has the same lawyers appearing before him; the result is that oftentimes, perhaps likes and dislikes enter into the situation, many things that are not desirable and many things which are desirable, on the other hand. We know that abuses are taking place in the matter of excessive travelling expenses, and I wonder if there isn't some happy medium there.

MR. CONANT: Well, there is no question, Mr. Frost, of abuses creeping in. The Committee, I think, will take my word for this statement: last June, I was called to the telephone one Monday morning by the clerk of one of the county courts not far from Toronto, who wanted to know what he was going to do for a judge—I think his sessions started sitting in June—what was he going to do for a judge. I inquired and found out that the judge that was coming to that court was from another county, and that he had been taken ill, and on further inquiring, I found that every one of the four judges of the four counties constituting that district were changing around in the whole district, and I have since made further inquiries and find that that has been the common practice practically since this arrangement was set up, and made statutory. Now I think it is stretching our credulity to have us believe that that is the situation the law was intended to meet, isn't that right?

MR. FROST: Quite.

MR. CONANT: There is no doubt about that. And we must do something about it. I may say, though, that this has been in the consideration of my Department for some time. We have compiled the figures—which I have sent for and will file here in due course—as to the expense accounts involving the county judges for the province for the last year, I think, and also we have had correspondence with the Department of Justice, and in due course, Mr. Magone, you will ask Mr. Snyder to come and outline the correspondence and the present situation as it affects this Department and the Department of Justice.

But I think it is proper, at this stage, for Mr. Barlow to say, if he cares to do so, whether there is any solution, having in mind, I feel, that there are occasions when interchanges are necessary and desirable.

MR. FROST: I do, too.

MR. CONANT: There is no doubt about that. It may be on account of sickness, it may be on account of a judge being interested in a case, or related to the litigants. But our difficulty arises—and I have studied this in my own way in my own Department for some time—that we have no central authority who can meet and decide upon particular cases involved. There is no chief justice of the County Court, so to speak. There is no co-ordinating officer for the county courts of Ontario.

Now, if you had a co-ordinating office or officer, be he who he may—I don't know who he would be—who could deal with the question of interchanges with some semblance of dealing with them on their merits, of course, that would be the ideal system. But perhaps Mr. Barlow, from his vast experience, can suggest if and how that can be met.

MR. FROST: Mr. Barlow, the question you raised here mainly comes from mileage, does it not?

WITNESS: Well, it comes from mileage, and it also comes from a per diem allowance of ten dollars in cities and six dollars, I think it is, outside cities.

MR. CONANT: When they are away from the county town.

WITNESS: Yes, per day.

MR. FROST: I wonder why that should be? It does seem to me that some of these mileage allowances are ridiculous. Why should, for instance, a judge or a magistrate, if he is going, for instance, from one town to another, receive more than out of pocket expenses? Now I mean reasonable out of pocket expenses.

WITNESS: I am not sure that it is put on the bases of mileage, so far as our judges are concerned, or not. I think it is put on the basis of per diem allowance, plus travelling expenses. It comes under, as Mr. Magone said, under The Judges Act, and the same applies to our Supreme Court judges in travelling on circuit, the same per diem and the same expenses, and I think it is put on the basis not of mileage, but actual railway expenses; is that right?

MR. MAGONE: Yes, and a per diem.

WITNESS: Yes, plus railway expenses.

MR. FROST: The allowances, then, are really beyond our jurisdiction?

WITNESS: Your magistrates in the Province who travel by car, as many of them do, they are allowed a mileage, so much a mile if they use their own car.

MR. CONANT: Mr. Barlow, I don't want to interrupt, but I think we can

get this in a very definite and succinct form from Mr. Cadwell or Mr. Snider, and I don't think it is worth while struggling with here.

WITNESS: Yes.

Q. But I do think—pardon me for interrupting—but I do think it is worth while having Mr. Barlow present to canvass the situation as to how a proper interchange might be regulated, if there is any way of doing it. I don't know of any.

A. Mr. Chairman, some time ago, and you have mentioned it again to-day, you raised the question of a chief justice of the County Court, if you wish to call him such; someone, anyway, of the County Court judges who should have control over all other judges throughout the province. As it stands at the present time, once a judge is appointed judge of the County Court, there is no one except the Minister of Justice who has any control over him, and he very little; there is no direction at all. And I notice that under the County and District Judges Act, with the section setting up the county court districts, a provision is made that:

> (2) The judge in a county court district who, in point of time, is senior in appointment to office shall convene the meetings referred to in this section. . . ."

That is only a slight indication of what might be done, but I do think this question of interchange of county judges can only be solved by some central control, and that central control can perhaps best be done by a senior judge whose duties would be supposedly limited to keeping the machinery working smoothly throughout the whole Province, and where necessary, the application would come to him, and he would rule, and that would be a check on unnecessary travelling and motoring from place to place of these various judges. It seems to me quite unnecessary that a county judge should travel a long distance into another county merely for the purpose of holding Division Court, as happens continually. It is more likely to happen in a county court case, or in a criminal case, at the sessions, or in the county judges criminal court. But the Act here covers everything, even to courts for hearing appeals and complaints under The Assessment Act and The Voters' Lists Act, and all other courts which the judges may hold in each county.

MR. MAGONE: Well, the appointment of a chief justice is beyond the jurisdiction of this Committee; we can only consider it and recommend it?

WITNESS: It is beyond the jurisdiction of the Province, I presume.

Q. Even among the county judges already appointed, the jurisdiction of the Provincial Legislature would not go so far as to permit them to name a chief justice of the County Court?

A. I don't think that the Province has any power to name anyone county court judge, and say that he shall have control over the other County Court judges. That is a matter of Dominion jurisdiction, I would say.

MR. CONANT: Well now, have they not had a somewhat similar situation, and found some remedy, in some of the other provinces?

WITNESS: I don't know, Mr. Chairman.

MR. ARNOTT: Mr. Barlow, would it not naturally follow, if your recommendation were carried out here, that there would be action taken at Ottawa?

WITNESS: I'm sure—well, I wouldn't say I am sure, but I would presume that Ottawa would be glad to co-operate.

Q. Yes.

A. With any legislation that this Committee might decide was necessary for the purpose of taking care of the situation, because they apparently are very much alive to it.

MR. CONANT: Yes. There is no doubt about that; but we are still confronted with the problem of how to reconcile the need for interchange, that sometimes exists and arises, with some kind of control or co-ordination.

WITNESS: Well, as I said before, if you have one ——

Q. You see—pardon me—Mr. Frost mentioned the case of magistrates. Well, none of them present any difficulties, because the magistrates accounts are audited all the time; they go to the Criminal Audits, and if there is an abuse, we step on it.

A. Yes, and they are controlled by your Department.

Q. Yes.

MR. FROST: This interchange of judges, though, is authorized by an Act of this Legislature?

WITNESS: Supplemented by an Order-in-Council of the Dominion, though, which gives it force; otherwise there would be no jurisdiction, in a judge of one county to go into another county, as I understand it.

MR. CONANT: In criminal matters.

WITNESS: In criminal matters, yes.

MR. MAGONE: We might get some help, Mr. Chairman, from what applies in the other provinces. We wrote a letter to the Legislative Counsel of the other provinces, and in Alberta, with respect to that, the answer is:

> ". . . in connection with the points you raise as to travelling district court judges, I would call your attention particularly to the amendment of 1936, which for district court purposes amalgamated the 16 existing judicial districts and set up two district courts, one, the district court of the district of northern Alberta, the other the district court of the district of southern

Alberta. . . . With respect to travelling expenses, these are paid by the Dominion Government; the Province does not bear any share."

It does not indicate that they have had any difficulty there, but it was just done in 1936 in Alberta.

MR. FROST: What would be the effect of that? That means the per diem allowance would be out, if the judge was acting in his own judicial district; he would have authority to act everywhere, but he would get his travelling expenses only?

WITNESS: No, I understand he would get his expenses and a per diem.

MR. MAGONE: Yes.

MR. FROST: Out of his town?

MR. MAGONE: County town, yes.

WITNESS: Yes.

MR. MAGONE: They get it now when they are out of the county town. For instance, a County Court judge of York, holding a Division Court in Newmarket, gets a per diem.

MR. CONANT: We understand, and probably Mr. Barlow and Mr. Magone can assist us in the answer, that at the present time a county judge gets a per diem allowance whenever he is away from his county town?

WITNESS: Whenever he is away from his own county town, he does, yes.

Q. So that if he goes from Whitby, let us say—only because I am familiar with that territory—to try a case at Uxbridge, he gets six dollars a day, is it, Mr. Magone?

MR. MAGONE: Yes.

WITNESS: Six dollars a day plus travelling expenses.

MR. CONANT: And if he goes to Oshawa, he gets six dollars?

WITNESS: Yes, I presume so; yes, it is a question of being outside his own county town.

Q. Yes, I see.

MR. MAGONE: And in Manitoba, the province is divided into districts.

"I have no complaints regarding travelling expenses of our County Court judges, and no information in the Department which would assist you."

MR. CONANT: That is a young province. They are not versed in the ways of the world yet!

MR. MAGONE:

"I think the practice in Manitoba is different from that in Ontario. We have four judicial districts, and a judge is assigned to each district. In the eastern judicial district, there are four judges. The Judges Act provides that where a judge is absent, the judge of a neighbouring judicial district can act in his stead. The expenses incurred by the relieving judge are, I believe, paid from the Department of Justice. I am asked, from time to time, to approve of expense accounts."

That practice is, in other provinces, that where a judge from one county or district goes into another county or district, the Attorney-General of the province is asked to approve of the account before the Department of Justice will pay it.

MR. CONANT: I am not certain that I am in favour of that.

MR. MAGONE: In New Brunswick they have a system of county court districts, but no complaints, apparently, regarding travelling expenses of judges.

MR. FROST: I thought travelling expenses were all paid by the Dominion Government.

MR. CONANT: Oh, yes, our jurisdiction would extend to an amendment to our own Act, if we saw fit, and so far as we would have legislative jurisdiction, and recommendations to the federal authority. Obviously that is as far as we could go.

WITNESS: Yes.

Q. Yes, and if any control was to be exercised, it would have to be by some Dominion arrangement, would it not, Mr. Barlow?

A. It would have to be by Dominion arrangement, because the judges are appointed by the Dominion. As an illustration, the Dominion appoints the chief justice of our high court.

Q. Yes.

MR. FROST: What is meant by this, Mr. Barlow?

". . . but they travel long distances for the purpose of taking Division Court sittings with the result that the municipality and the Dominion Government are put to a very considerable and very unnecessary expense."

Why the municipality?

WITNESS: Well, there are certain costs that are paid by the municipality, I understand. Now, in this illustration that I have given on page B34, where a letter was received from the reeve of Blyth, setting out for the clerk, four dollars, bailiff, four dollars—Now I understand that those two items, and also the stenographer's fees, are paid by the municipality. But the judge, and his mileage, are paid by the Dominion Government.

Q. But in that case, apparently, the reeve was taking some objection that he has paid the last two items.

A. Yes, well I don't know, he may not have known ——

MR. CONANT: What page is that on?

WITNESS: Page B34, of the Report in the *Weekly Notes*, the breakdown of that expense item mentioned.

Q. Well, Mr. Polson, gentlemen, whom I have sent for, will be able to explain the details of that.

A. He will know the details of it, but I understand the first three items are paid by the municipality, and the other two by the Dominion Government.

Q. Well, now, Mr. Barlow, you would not recommend repeal of those provisions about interchange in their entirety, of course?

A. I haven't recommended their repeal in their entirety because ——

Q. The necessity does arise?

A. The necessity does arise. But it seems to me that if a plan could be evolved by which they would be subject to a central control, that it would do away with the abuses that arise.

Q. Yes.

A. The recommendation that I did make here was that it should be limited to County Court district matters and courts of general sessions of the peace, and also county court judges' criminal courts.

Q. Yes, you have a suggestion here that in order to prevent in part the situation that is responsible for such an abuse, we may make it only apply to certain functions.

A. Certain functions.

Q. And leave ——

A. The more important.

Q. And leave the judge in his own county to exercise the remaining functions within his own county.

A. Quite right. But I think that it should go further, and I think the only proper solution of it is a central control to prevent abuses arising.

Q. Well, now, is there anything more on this point?

MR. MAGONE: Just this: most of the objections raised are with respect to the judge taking Division Courts, are they not?

WITNESS: I presume they are the ones that the most objection is taken to, yes.

Q. And if we repealed the provision by striking out the word "Division Court" in section 20 of The County Judges Act, that would leave, I presume, only the judge of the County Court of the county or the junior judge to take Division Court sittings?

A. Quite true.

Q. That is in the county for which he is appointed?

A. Quite true.

Q. Then, Mr. Barlow, if there is any difficulty, that could be got over, I presume, by having the judge appointed a barrister of ten years' standing, as they used to do?

A. Quite true.

MR. CONANT: Yes.

WITNESS: Or the Attorney-General, I think, has power to direct a judge to go from one county to another.

MR. CONANT: Do you see any reason, Mr. Barlow, why, in Division Court matters, especially if we revise it as we have in mind, a judge should sit in other counties than his own?

WITNESS: I don't see any reason for it at all.

Q. With that provision, that if it is a case of a relative or something that he cannot fairly try, you can easily appoint somebody?

A. Very easily appoint somebody.

Q. It would not happen once a year?

A. Quite true.

MR. CONANT: Here is Mr. Polson now. Mr. Polson, in this question of the expenses of the Division Courts, how is the municipality involved in that expense?

MR. HUGH POLSON: Just to the extent of the county ——

Q. Just a minute, before you go into that, I want on the record, your official position?

A. Assistant Inspector of Legal Offices.

Q. You have been in that position for how many years?

A. Ten years.

Q. Now go on; tell us about the matter.

A. Well, the counties have to pay the stationery, books, etc.

Q. Yes?

A. The procedure books, the county pays all that. The municipality in which the court is located has to pay the clerk and the bailiff four dollars each sitting, where they are earning less than $1,000 per year.

Q. That would apply to most of the courts of the province, would it not?

A. Quite a number of the smaller ones, yes, but very few cities. It runs from about twenty-four dollars to eighty dollars, I would say, in the municipalities.

Q. Yes.

A. The municipalities have never objected to that, because they figure that the Division Courts brought in a certain amount of trade to the town, people coming in, and so on.

Q. All right.

A. Some counties have objected—I think Mr. Arnott's county objects once in a while to the excessive expense of the books, because there are so many courts down there, far more than they need.

Q. Yes?

A. Hastings County could be looked after by about three courts.

Q. Well then, who pays the judge?

A. The Dominion does.

MR. ARNOTT: Who pays the court stenographer?

MR. POLSON: The Dominion pays all expenses in connection with that.

MR. FROST Do they pay the court stenographer too?

MR. POLSON: Going with the judge?

Q. Yes.

A. The Dominion pays it. We don't pay it.

Q. I understood the counties paid that.

A. It may be the county.

MR. CONANT: I think you had better look that up. Mr. Cadwell, you are the Inspector of Legal Offices, can you settle that point? I don't think the Domintion pays the stenographer; I think it is part of the county's expense. Can you tell us?

MR. CADWELL: No, I haven't it definitely, sir, but my impression is that the county has to pay it.

MR. CONANT: Well, get it and let us have it to-morrow, will you, please? File a copy of a memorandum with Mr. Magone as to a breakdown of these costs in Division Courts, costs of books, costs of clerk, bailiff, stenographer, and judge, and file that memorandum with Mr. Magone to-morrow.

MR. CADWELL: Well, Mr. McDonagh has given me the reference here, sir, Section 88, subsection (4) of The Division Courts Act, Chapter 107, R.S.O. 1937.

MR. CONANT: Yes?

MR. CADWELL:

"(4) The fees and expenses of a shorthand writer appointed under sec. 17 of The County Judges Act attending for the purpose of taking down the evidence as provided in subsection (1), shall be borne and paid in the same manner as fees and expenses of a shorthand writer attending a sittings of a county or district court."

And are paid by the county, of course.

MR. CONANT: Yes, that's the answer.

Here is a letter from the Deputy Minister of Justice, Mr. Magone. I think we should read it and have it placed on the record.

MR. MAGONE: Very well; this is a letter to the Deputy Attorney-General, dated January 27th, 1940.

"Referring to your letter of December 7th last, I have given some consideration to the question of the interchange of County Court judges in the Province of Ontario. It seems to me that if the conditions of which you complain are to be remedied, it will be necessary to amend the provincial legislation on the subject, or that some effective action be taken by your Department to apply the same rules to the travelling expenses of the county judges in Ontario as are applied to the county judges in other provinces.

"As you are aware, sections 20 to 22 inclusive of The County and District Judges Act, Chapter 102, R.S.O. 1937, require the judges to hold courts within a group of counties in rotation, or in accordance with the provisions of section 21. Reference may also be made to section 34 of The Judges Act of the Dominion, although I am informed that all the cases which have given rise to complaints are cases in which the judges had interchanged arising within their own group of counties, under the provisions of the Ontario Act, and not in the exercise of the power incurred by section 34, subsection 2 of the Dominion Judges Act.

"By paragraph (d) subsection (1) of section 21 of the Dominon Act, it was provided, as you know, that: 'no travelling allowances shall be granted to a judge of a County Court in respect of any attendance at a place not within the county or district for which the judge is appointed, unless it appears to the satisfaction of the Minister of Justice that the attendance was duly authorized and necessary.' This provision is strictly followed in all the provinces of Canada. Whenever a County Court judge holds a court outside his own county, he sends his account to the Attorney-General of the province for approval. Usually that approval takes the form: 'Certified that the holding of the above court was approved and the attendance was necessary" and is signed by the Attorney-General or his deputy and sent here for payment. The Department places great confidence in the above certificates, and relies upon them implicitly, and I may say, for your information, that complaints about County Court judges travelling in other counties of the province are exceedingly rare in practice. However, this provision of the Dominion Act is not carried out in Ontario because of its apparent conflict with the provisions of the Ontario Act regarding the grouping of counties and the rotation of judges."

I might interject, there, that the Deputy Minister of Justice has apparently forgotten about the Dominion Order-in-Council which authorizes ——

MR. CONANT: Yes.

MR. MAGONE: —— the Dominion judges to act.

"Nevertheless, although County Court judges in Ontario are appointed judges of the County Court of a certain county or union of counties, no cognizance is being taken of the grouping system so far as their appointments are concerned.

"Possibly the time is propitious to bring the County Court judges under the provisions of the above-mentioned Dominion Act. But you will observe, from the above, that the question is one primarily for the consideration of the provincial authorities. So far as this Department is concerned, we will be glad to co-operate in any scheme which will improve the administration of justice and at the same time tend to reduce the travelling expenses of the judges.

"I quite agree with you when you say that the interchange system can only be run on a proper basis if there is some person other than the judges involved to sanction the interchanges.

"(Signed) E. STEWART EDWARDS,
"Deputy Minister of Justice."

MR. CONANT: That part of the letter can be made part of the record. The rest of it has to do with something else. I don't want it involved in these proceedings. Now what does that bring us to, Mr. Magone?

MR. MAGONE: Well, I think to this. I was asking Mr. Barlow if the complaint regarding interchange was principally concerned with the sittings of the Division Courts, and I understood him to say that it was.

WITNESS: So far as I know, that is the real complaint.

Q. Well, then, by simply deleting the words "Division Courts" from section 20 of The County Judges Act, we would then be in a position, if a judge took a Division Court out of his county, in the same position as in the other provinces, apparently, which is made apparent by the Deputy Minister of Justice's letter.

MR. FROST: That is, he gets consent from the Attorney-General?

MR. MAGONE: Yes.

MR. CONANT: Then, Mr. Barlow, your report is properly framed to meet Mr. Magone's objections or observations?

WITNESS: Well, not entirely so, Mr. Chairman, because section 20 of The County and District Judges Act is as follows:

> "After the erection of a County Court district, the several County Courts, Courts of General Sessions, Division Courts, Courts for the hearing of appeals and complaints under The Assessment Act or The Voters' Lists Act, and all other courts which a county judge may hold in each county district, in rotation so far as may be practicable in view of the respective general length of service and strength of the other judges, and the special duties assigned to junior judges as well as in view of other offices, if any, held by any of the judges, and all other circumstances."

So that section 20 as it now stands ——

Q. It is a nominative section?

A. It is a nominative section; all that Mr. Magone suggests taking out is the word "Division Courts".

Q. Yes, but your report is more exclusive than that, or more limited than that, because you would limit their jurisdiction to the hearings to be heard in the County Courts, and Courts of General Sessions.

A. And I will add to that County Court Judges Criminal Courts.

Q. Well, then, Mr. Magone, if that were amended to cover the County Court, the Court of General Sessions of the Peace and the County Court Judges Criminal Court, would you not then be meeting the situation as to all these other functions that have been exercised, Division Courts, Assessment Courts, and so on *ad infinitum?*

MR. MAGONE: I would think so.

MR. CONANT: Yes. Is that what you would recommend?

WITNESS: That is what I would recommend, yes.

Q. Taking the conclusion of your recommendation and adding to it the County Judges Criminal Courts?

A. Quite true.

Q. And then you would have it within reasonable limits, is that it?

A. Yes.

MR. MAGONE: Now, I think I should read into the record some of the observations on Mr. Barlow's recommendation. They are all very short.

On page 35 of the Supreme Court judges' observations they say:

"The Committee agrees with this recommendation in principle, but with the understanding that the Commissioner's recommendation should refer, not only to the County Court and the Court of General Sessions, but also to the County Judges Criminal Court."

MR. CONANT: That is exactly what we just said, yes.

MR. MAGONE: Yes. And then the Elgin Law Association; their recommendation is "that a County Court judge shall have jurisdiction in any court as a resident county judge, and that the County Court judges be interchanged, but that the expenses of such interchange be limited to hotel and travelling expenses.

And that the powers of a local judge of the Supreme Court under Rule 210 be extended, so that he may have full authority in his own county to deal with all matters in his own county as to items 7 and 10 of Rule 208."

MR. CONANT: Well, they are simply recommending the present practice less per diem?

MR. MAGONE: Yes. Then the Lincoln County Law Association:

"Your Committee is not in favour of the suggestion of the Barlow report that the jurisdiction of County Court and district judges be limited to matters to be heard in the County Court, Court of General Sessions; it was felt that the present system meets the convenience of the litigants and counsel. In some cases, a county judge would prefer to not hear some particular case, and it would preclude him from calling in a neighbouring County Court judge of the same district to hear the case."

Then the Board of Trade of the City of Toronto:

"The Master recommends that the County Courts Act be amended so as to limit the jurisdiction of the County Court districts to matters heard in the County Court and in the Court of General Sessions. This will restrict County Court judges from hearing matters or arguments other than those heard in these courts in adjoining counties. Generally the Board concurs with this recommendation, but is of the view that the restriction should not be so rigid as to prevent judges in one county hearing cases in another county in the event of the judges in such county being unable to attend the courts because of illness or for other reasons."

WITNESS: They overlooked the provision for that.

MR. MAGONE: There is provision for that interchange under those circumstances?

WITNESS: Yes.

MR. CONANT: Yes.

MR. MAGONE: There is an item on the agenda, Mr. Chairman, in respect to County Court jurisdiction.

MR. CONANT: Well, just before we leave this subject, and referring to your observation, if our statutes were amended to limit the interchanging jurisdiction, say, to County Courts, General Sessions and County Court Judges Criminal Courts, then what other safeguard would there be, Mr. Barlow? What do you make from this, what other safeguards would there be?

WITNESS: I don't think I understand your question, Mr. Chairman.

MR. CONANT: In your recommendation, you recommended the interchanging jurisdiction be limited to County Courts, General Sessions and County Court Judges Criminal Courts.

WITNESS: Yes.

Q. Now, I understood Mr. Magone to make the remark that the interchange in other cases would be subject to some further control or jurisdiction; what was the remark, Mr. Magone?

MR. MAGONE: Well, I thought that section 20 providing that the judges should act in these cases in rotation, might very well be repealed and would leave the judge in the county to take cases in his own county except under circumstances that might arise, in which case he could call in another judge from another county.

MR. CONANT: But in some of the other provinces, as the Deputy Minister of Justice's letter seems to indicate, there is a system whereby these expenses are approved by the Attorney-General's Department, is that so?

MR. MAGONE: Yes, only where the county judge goes out of his own county at the request of a judge of another county to take a case, then the expenses are only paid by the Dominion if the Attorney-General approves that going beyond the county was necessary.

MR. CONANT: Would that not cover all the other cases?

MR. MAGONE: That would cover all the cases except those provided for by your amendment.

MR. CONANT: That's what I am getting at; so it all comes to this: that we might amend our statute to limit the courts in which there would be an inter-

change, and, in addition to that, the interchange—or the expenses arising from that interchange, might be subject to the approval of the Attorney-General, is that it, Mr. Magone?

MR. MAGONE: Yes.

MR. FROST: Well, there is just this: that the judge could leave his county in connection with a County Court matter, a Court of General Sessions matter, or a County Court Judges Criminal Court matter, he has the power to interchange with other judges in connection with those courts, but if it involves anything else, a Division Court case, or an Assessment Appeal, he has to go to the Attorney-General to get consent before he can do it.

MR. CONANT: Well, I just want to get that clear; is that the way you put it, Mr. Magone?

MR. MAGONE: Yes.

WITNESS: That's right; that's the practice in some provinces.

MR. CONANT: That is, in these cases in which he would be entitled to take absence under our statute, there is no further control required, there would be no control or audit, is that it?

WITNESS: There would be no control or audit of his accounts.

MR. MAGONE: Yes, we wouldn't have any more control than we have now in those cases.

MR. CONANT: All right, then, it would give him jurisdiction in other cases, but in those other cases it would be subject to approval?

WITNESS: Mr. Chairman, no more jurisdiction than he now has; as I understand it, at the present time, if a judge, as illustrated by you, is absent from one of the courts in a district, you have power to direct a judge from another County Court outside that district to go into that county town and hear cases there in which event, of course, his expenses are taken care of. That is already provided for, and has been provided for for years before these districts were set up.

MR. CONANT: Yes.

WITNESS: But under this County Court Judges Act ——

MR. FROST: The exchange is very wide.

WITNESS: —— under sections 19 and the following sections, the practice is for the judges to meet and set up a regular circuit within that district, and the judge from Kingston goes to Belleville, the Belleville judge goes to Picton, and the Picton judge goes to Napanee, and so on, and then also the various Division Courts.

MR. CONANT: Well, I am not quite clear; I would like to get the record clear on this point; if our Act is amended so that the judges in the entire district had jurisdiction for the County Courts, the Courts of General Sessions, and the County Court Judges Criminal Courts, would his accounts be subject to approval in those courts?

MR. MAGONE: No.

WITNESS: No more than they are now, and they are not.

MR. CONANT: No. Then is it your idea that he would be given jurisdiction above that under any other special circumstances, or subject to any control?

WITNESS: I would not change the practice that now exists, which practice is ——

Q. No, we're getting away from it. As I understand the scheme we set up a demarcation here; on this side of the wall are County Court cases, General Sessions cases and County Court Judges Criminal Court cases.

A. That is jurisdiction of the county and district courts.

Q. There would be no other control?

A. No.

Q. On the other side, there are all other cases, Division Courts, Assessment Courts, and so on.

A. No, in those, he must stay within his county unless permission is given by you.

Q. In which case what?

A. In which case he gets expenses the same as he does now.

Q. Approved by whom?

A. I don't think they are approved by anybody.

Q. Don't you think they should be approved by somebody, in the latter case?

A. Possibly so, it would be a control.

MR. FROST: That is a Dominion Government matter; once he is authorized to do it, the expenses are authorized by the Dominion Government, and you haven't really anything to say, except that ——

MR. CONANT: Well, Mr. Frost, apparently the letter of the Department of Justice would certainly not be adverse to some measure of check or control, is that right?

MR. MAGONE: Yes.

MR. FROST: What they said in their letter is this: that, for instance, if you authorized a judge to go into another county to try a division court case, that his expenses, I think, are subject to your O.K. and then they accept the account on the approval of the Attorney-General.

MR. CONANT: Yes, well then, it comes down to this: trying to crystallize it, again, in cases of County Courts, General Sessions or County Judges Criminal Courts, the right of interchange would remain as it is, and the method of paying expenses would remain as it is, that is to say no control, but in all other cases, the interchange would be at the direction of the Attorney-General, and before the expenses in connection with them were paid, they would be approved by the Attorney-General. Does that crystallize it?

MR. MAGONE: That crystallizes it.

MR. CONANT: Is that right, Mr. Barlow?

WITNESS: That's right.

MR. CONANT: All right, Mr. Magone.

MR. MAGONE: Before leaving that, I want to read the observations of the judges of the County Court with respect to Mr. Barlow's recommendations:

> "Apparently Mr. Barlow has been misinformed as to the present set up of County Court districts when he states that 'the result is that not only do a number of the County Court judges seldom try a case within their own county but they travel long distances for the purpose of taking Division Court sittings with the result that the municipality and the Dominion Government are put to a very considerable and unnecessary expense by reason of the absence of the judge from his own county town.' We are not aware of any such condition existing anywhere, and if it does exist, appropriate rules should be made to prevent such action. We also feel Mr. Barlow was mistaken as to the reason for the constituting of the County Court districts. These were not constituted to relieve County Court judges from embarrassment, but they were provided in order to equalize the work between the County Court judges, having in mind the area and population of the adjoining county, the number of County Courts, and the age and physical health of the respective judges. Furthermore, there are now no junior judges except in large cities, and if a judge is ill or absent, some other judge must take his work. If there has been an abuse of the system of interchange, it can be remedied by proper regulation, but doing away with all Division Court interchange is not practical; as for Mr. Barlow's suggestion that there only be interchange for County Courts and General Sessions, we believe that the interchange for Division Courts should be preserved, and that there should also be interchange, as there is at present, with respect to County Court Judges Criminal Courts and in Surrogate Courts."

MR. CONANT: Just before leaving that subject, the figures are now avail-

able, and as Mr. Snyder, who has been dealing with it, is here, and with the permission of the Committee, I would ask him to give us any figures he has. I don't think the names of the judges should be mentioned at this stage. Are you agreeable to that, gentlemen?

MR. ARNOTT: Yes.

MR. CONANT: That is as to the expenses incurred by some judges.

MR. SNYDER, DEPUTY ATTORNEY-GENERAL: Mr. Chairman, these are given as some examples ——

MR. CONANT: Given by whom?

MR. SNYDER: Given by the law firm of Nickle & Nickle, of Kingston, who made inquiries and reported to the Hon. Mr. Lapointe, Minister of Justice. They have to do with judges who hold office in the eastern part of the province. One judge was paid for travelling expenses, in the year ending March 31st, 1938, the sum of $158.37; that is travelling expenses only. Another judge was paid travelling expenses for $705.10 . Another judge was paid travelling expenses amounting to $1,900.64. Another judge was paid travelling expenses of $1,185.50. They are merely given as examples of what is going on in eastern Ontario.

MR. CONANT: Well, Mr. Snyder, has anybody in our Department ——

MR. FROST: Does that cover the per diem, Mr. Snyder?

MR. SNYDER: Just travelling expenses.

MR. CONANT: Was anybody in our Department instructed by me to compile those for the whole of Ontario?

MR. SNYDER: Yes.

MR. CONANT: Are they being compiled?

MR. SNYDER: They are being compiled, yes.

MR. CONANT: Do you know when they will be ready?

MR. SNYDER: Just as soon as we get the information from Ottawa.

MR. CONANT: Well, have these figures completed and bring them to the Committee as soon as possible.

MR. FROST: Could you get the per diem allowance too, Mr. Chairman? It involves no more work.

MR. CONANT: Yes. Mr. Snyder, you will direct your attention to that, and see that somebody in the Department gets the per diem and travelling expenses of all the judges in the province for the last available year, and bring them to the Committee, because I think that is important in the consideration of a matter where we are talking about dollars and cents. All right, Mr. Magone.

MR. MAGONE: There is a provision in the Dominion Judges Act for travelling allowance to District Court judges of $500.00 per annum. This is the provision of the Dominion Judges Act with respect to a judge performing duties outside his county, in section 34:

"It shall be competent to any County Court judge to hold any of the courts in any county or district in the province in which he is appointed, or to perform any other duty as a County Court judge in any such county or district, upon being required so to do by an order of the Governor-in-Council made at the request of the Lieutenant-Governor of such province.

"2. The judge of any County Court may, without any such order, perform any judicial duties in any county or district in the province on being requested so to do by the County Court judge to whom the duty for any reason belongs.

"3. The judge so required or requested as aforesaid shall while acting in pursuance of such requisition or request be deemed to be a judge of the County Court of the county or district in which he is so required or requested to act, and shall have all the powers of such judge."

Then there is provision for retired County Court judges acting in certain cases.

MR. CONANT: Now there is no doubt about ample statutory authority for jurisdiction in these interchanges.

MR. MAGONE: No, even in the absence of a district set-up, such as we have.

MR. CONANT: Yes. Well, are you going to deal with County Court jurisdiction now?

MR. MAGONE: Yes, I was. Mr. Barlow, in his report, doesn't deal with County Court jurisdiction, I think.

WITNESS: No, I don't recollect that I did, Mr. Magone.

Q. But there is an extended jurisdiction given to County Courts in an amendment to The County Courts Act?

MR. CONANT: What is the effect of that?

MR. MAGONE: It hasn't been brought into force yet. The effect of this amendment is to strike out the figures 800 where they occur, and to increase that to 1,000. That is an amendment to The County Courts Act of 1937, which was to have been brought into force by proclamation. It has never been proclaimed. I don't know whether the Committee wanted to deal with that.

MR. CONANT: Well, I think we should discuss it, and hear everything there is to be said about it. Have you any views in the matter, Mr. Barlow?

WITNESS: I had the matter called to my attention during the course of

my survey, and I felt that no steps should be taken to vary the jurisdiction as it is at the present time, and therefore did not include any reference to it in my report. It seems to me that the limit has to be drawn somewhere. Originally, the jurisdiction of the County Court, I think, was $500; and it was raised, some years ago to $800, and now the question is of raising it to $1,000. When one considers that, with the consent of the parties, an action for any amount may be brought in the County Court, I think that it is as far as the jurisdiction should go at the present time.

MR. FROST: I agree with that.

MR. CONANT: Well, Mr. Barlow, have you any means of forming an opinion as to the extent to which the optional jurisdiction is used. I mean by this, in regard to the present practice in most cases, the litigant issues a writ in a County Court, and unless the other party objects, it stays there.

WITNESS: Quite right.

Q. Is that practice not considerably used?

A. It is used quite considerably. I understand our figures, from our county of York could be very easily obtained, which would show the number of cases of decreased jurisdiction. With reference to my general knowledge with reference to it, I would say there are a very large number of them.

Q. And then there is the other angle to it, Mr. Magone. It seems to me you might question Mr. Barlow on this, the relative burden upon the Supreme and the County Court, because that would have some relevancy if there was any thought of increasing the jurisdiction.

MR. MAGONE: Yes. Well, are you prepared, Mr. Barlow, to know what increased work would be placed on the county judges if the jurisdiction were so increased?

WITNESS: No, I have no figures which would tell me anything with reference to it at all. I don't know what increased burden would be brought upon them, I am sure.

MR. CONANT: Well, do you think that the County Court judges are carrying relatively a greater burden than the Supreme Court judges, or the County Court judges?

WITNESS: The County Court judges in the city of Toronto are carrying a very heavy burden. The same applies to them, I understand, in the city of Windsor, and the city of Ottawa. As to the other jurisdictions, as far as I know, they are not burdened anything like the same etxent.

Q. Well, the effect of an increase in jurisdiction would be to shift it from the County Court judges—

A. Shift it from them to the Supreme Court judges.

Q. Shift it from them to the Supreme Court judges, is that it?

A. Or no, rather the other way, it would shift the burden from the Supreme Court to the County Court judges.

Q. Yes, from the Supreme Court judges to the County Court judges; well, there might be some merit to it from that aspect of it?

A. Well, there might be, but I don't know that I would care to express an opinion further than what I have done. With my experience, I would think that you perhaps would get a little more useful information from the County Court judges and some of the Supreme Court judges.

MR. MAGONE: I have a recommendation from the County Court judges, which is dated 1934, which you may remember, Mr. Chairman, which is referred to in the submissions made by the County Court judges just recently, and in that they ask for an increased jurisdiction. It was taken care of in the amendment. I will read part of it.

> "It is, however, proposed that the jurisdiction of the County Court, and thus of the contemplated consolidated court, should be widened. Already, indeed, County Courts have the right to deal with matters formerly under the exclusive jurisdiction of the Supreme Court, but only if formal objection is made. In practice wide advantage has been taken of this right, with apparent satisfactory results. The present proposal simply makes this practice obligatory rather than optional, and it is suggested that such a course will simplify and expedite trials. The extent to which the jurisdiction should be widened is not one that can be readily determined, although, as requested by the Hon. the Attorney-General, we now make certain suggestions.
>
> "For the present it is suggested that section 19 of the County Courts Act be amended by striking out the figures '$800.00' in clause (a) of the said section and inserting the figures '$2,000.00'; by striking out the figures '$500.00' wherever used in any of the clauses of such section and inserting therein the figures '$1,000.00'; and by substituting for the figures '$2,000.00' in clauses (g) and (h) in such section the figures '$5,000.00'; and also that the figures '$5,000.00' be substituted for the figures '$2,000.00' in subsection 2 of section 19. Clause (b) of section 19 (1) might also be amended by deleting the words 'except actions for criminal con. and actions for libel'."
>
> "Some years ago the jurisdiction of Division Courts was practically doubled. One inevitable result has been the very pronounced narrowing of the jurisdiction of County Courts. Now the ground covered by the latter court is so greatly restricted as to render it of little use except where advantage is taken of its optional jurisdiction. Even without consolidation it should be increased. Already we have some Surrogate Court matters within the competence of the judge of that court in which sums are involved of great magnitude, while in Mechanics' Lien actions and in various other proceedings dealt with by the County Court judge as *persona designata* there is practically no limit. There seems to be no great reason for granting such wide jurisdiction to the County Court judge acting in some capacities and withholding it in others."

Then the judges of the Supreme Court, in answer to that recommendation, said:

> "The increase in the jurisdiction of the Division Courts has been accompanied by some increase in the jurisdiction of the County Courts, and it may be expedient to increase the latter jurisdiction still further, but not, we venture to think, to the extent suggested by the County Court judges. We would be in favour of an increase in the jurisdiction in all cases to $1,000.00, and would recommend that that include both actions founded upon contract and actions founded upon tort."

MR. CONANT: How does that jibe with the amendment made?

MR. MAGONE: That is the same as the amendment, practically. The County Court judges asked for $2,000 and the Supreme Court judges recommended $1,000.00, and that is what was done.

MR. CONANT: Have you any other references, Mr. Magone?

MR. MAGONE: No, that is all that deals with the jurisdiction of the County Courts.

MR. CONANT: The merit of this, gentlemen, is that it would shift some of the work from the County Court to the Supreme Court, is it not, and also the merit that litigants especially in outlying counties would have available, in a larger number of cases, County Court machinery and County Court judges?

MR. FROST: Mr. Chairman, just discussing that angle of it, here is the situation; there are many cases, beyond the ordinary limit of County Courts, I suppose dozens of them, that are being tried by County Court judges rather than Supreme Court judges right now?

MR. CONANT: Yes.

MR. FROST: I think it largely depends upon this: many County Court judges have an aptitude for certain types of cases, and when it is known that they have, they receive any cases along those lines.

MR. CONANT: Yes.

MR. FROST: On the other hand, if they have not, then it goes to the Supreme Court, and I think that you are probably safer to leave the rates where they are; the difference, actually, is only $200.

MR. CONANT: Yes. Well, we can consider that in Committee. Can you add anything further, Mr. Barlow, on that point?

WITNESS: No, I have nothing further to add.

MR. CONANT: What were you intending to go into next, Mr. Magone?

MR. MAGONE: Well, we have some more recommendations to-morrow in

connection with Division Courts. Judge Barton and Judge Morson in the morning, and in the afternoon, Mr. Cadwell.

Committee rises until following morning.

THIRD SITTING

Parliament Buildings,
April 3rd, 1940.

MORNING SESSION

MR. CONANT: Gentlemen, at adjournment yesterday, our counsel, Mr. Magone, asked for some guidance from the Committee as to the sequence of the course of our inquiry.

May I say that I have given it some thought since then, and discussed it with Mr. Magone and Mr. Silk, and if I may do so, I will make the suggestion that when we have completed that which we have in hand, that is, items 12, 13, 14, and 15, and 19 and 27, that we revert to the beginning of this proposed memorandum or agenda and simply take them as they come, or such of them as we decide to deal with. While it is possible to pick and choose here and there, I don't know that there is any better sequence than has been set out in this memorandum. But of course it is for the Committee to decide; that is only a suggestion.

I note there is also, more or less, a logical sequence here; take No. 1, for instance: "grand juries"; then "petit juries", "pre-trial" and so on, following along more or less logically. But I would like to hear the members of the Committee express themselves as to whether they are in agreement with that or not.

MR. ARNOTT: Well, it would be a more orderly procedure, Mr. Chairman, I think.

MR. STRACHAN: I would be in favour of that, Mr. Chairman, because then we can anticipate what we are coming to.

MR. CONANT: Is that satisfactory, Mr. Frost?

MR. FROST: I am satisfied, yes.

MR. CONANT: I might add this: that there are some items here which I doubt if they merit consideration, or, certainly do not merit a very lengthy consideration. For instance, number 6; I don't know that there is any issue there. Our Coroners Act has been revised substantially within the last couple of years, and as far as I know, there have been no representations for any further revisions, have there, Mr. Magone?

MR. MAGONE: No, I think they have been taken care of in the recent amendment.

MR. CONANT: Yes, that is one we might jump, and perhaps number 13, "court reporters"; I don't think that there is anything that arises there. And so, as we go along, there may be some items that the Committee feels that, unless submissions or representations arise in the meantime, we may feel there is nothing to be gained by dealing with them. So I think I express the wish of the Committee, Mr. Magone, and Mr. Silk, in saying that, when we have completed the items that we now have in hand, we will start back at the beginning of your agenda and proceed subject to what departure may be necessary to meet the convenience of the witnesses, or those making submissions.

Now, then, have you something ready for us to go on with, Mr. Magone?

MR. MAGONE: Yes, Mr. Chairman, Judge Morson has kindly consented to attend the sittings of the Committee and give his views and his experience in connection with Division Courts.

HIS HONOUR JUDGE F. M. MORSON, County York.

MR. MAGONE: Judge Morson, you were county judge in the county of York for 43 years, I understand?

WITNESS: Yes.

Q. And you sat on the bench—

A. Forty in the County Court, as a matter of fact, and three in the Surrogate Court.

Q. So that you occupied the bench in the county of York longer than any other judge in the province, I think?

A. In Canada.

Q. In Canada. And during that time, you had a great deal of experience in the Division Courts, as all of us know. Now, judge, certain recommendations have been made to the Committee with respect to amendments to the Division Courts Act; among them was a recommendation by Mr. Barlow which is set out in his report.

A. Yes, I read it.

Q. I wonder if you would care to give the Committee your views with respect to Mr. Barlow's recommendation, first, that the Division Court might be abolished and its jurisdiction consolidated with that of the County Court, and a small debts division of the County Court formed to take care of small claims?

A. Well, I have three, what I might call serious objections to that; in the first place, it is going to increase very materially the County Court lists. And of course, that, as a matter of fact, would increase the cost of the sittings of the County Court, and it would delay, of course, litigants and their cases being heard. Take a case of $101.00, for instance, which can be tried in the Division

Court; the litigants may have to come to the county town, where it is suggested all of the cases be tried, which is a very serious objection, to my mind. For instance, I am not familiar with the distances in a great many counties, but supposing the litigants had to come to a county town from an outside place far to the north; look at the expense he incurs in coming that distance to attend the court, and in addition to that, all the witnesses may be up in that district. You see, the Statute the way it is now, it fixes, just to overcome that difficulty, it says that the jurisdiction shall be where the cause of action arose, or where the defendant resides, so that they had in view, apparently, that feature. It is not fair to bring them from one end of the county to the other, and it creates expense.

Another reason, in my view, is that if the Division Court cases are put in to the County Court, of necessity there are pleadings in the County Court, as I understand it, formal pleadings, and so on; now a poor defendant, in a case of $101.00, if he has his case tried in the County Court, must follow the procedure of the County Court, and of necessity he would have to engage a lawyer to draw his statement of defense, and so on, and that, of course, adds to the cost, and in my view that one feature alone, in itself, is the strongest reason why the Division Court cases should not be tried in the County Court. And, of course, the County Court list would be increased, and while the list of the County Court may not be so bad out in the smaller counties, in so far as the county of York is concerned, it is absolutely objectionable.

Q. Judge, in Mr. Barlow's recommendation, he suggests that a small debts division be formed and that the judges sit outside the county town for the trial of small debts.

A. I understand, but then why? The Division Court now tries those cases of small debts; it's the same judge, and so on; now why have a separate court? Of course, if you put all cases over $100 in County Court, of necessity you must have this small debts court; I agree with that; if you are going to transfer the Division Court cases over $100 to the County Court, then I agree that you must have a small debts court, or whatever you call it, to try cases under $100; I agree with that, but not otherwise, of course.

Q. Judge, probably we might get your views with respect generally to the working of The Division Courts Act; in your experience, are there objections, do you recall?

A. No—well, there are certain objections to some of the procedure; for instance, take the judgment summons; there's part 1 and part 2; you lawyers all know what that means. No. 1 is when you bring them up on a judgment summons, examine them, and make an order that they pay so much a month; and if they fail, you have No. 2; then they have to show cause why they didn't obey that order. Well now, I think I would do away with that, because I think it is only fair to assume that, in the case of a judgment for $20, for instance, if a man doesn't pay a judgment of $20, isn't it fair to assume that the poor devil hasn't got the money? There may be isolated instances where a man wouldn't pay that has the money, but speaking generally, don't you think that where a man fails to pay a small judgment, it is his inability to do so rather than wilfulness? And if that is so, then what is the use of the show cause summons to bring

him—to go to that expense to bring him up and examine him as to why he did not pay that debt? I think that the ordinary inference, the reason is that he hadn't the money. Then if counsel for the plaintiff hears or knows that he has some money and that he has concealed it, or something, then get an order from the judge to bring him before him and examine him. I think some form of procedure of that kind could be enacted, but I certainly would do away with this No. 2.

Q. That is just the No. 2, the show cause summons?

A. Oh, yes, that's all, the show cause. Oh, I wouldn't do away with No. 1, because I think that is only right, to have the right to bring a man up to show why he wouldn't pay his debts.

MR. CONANT: You mean you would put the onus on the plaintiff to show—

WITNESS: Yes, to show, Mr. Chairman, whether he has money or not. They could realize under the execution if they found out certain facts that the plaintiff has heard of or discovered.

Q. By the way, that is the procedure in attachment proceedings, is it not? Before you can attach a debt, the plaintiff has to show—

A. Oh, yes, he has to make an affidavit.

Q. That's right.

A. That's true in attachment proceedings, yes, but talking about that, I think I would suggest that I would not go to the expense of an attachment order in judgments under, we will say, $25, because I am very strong in that belief of human nature that in a small judgment or debt the debtor, as a rule, is honest, and will pay if he can. Then if he can't pay the $20 judgment, it seems pretty hard to get an attachment order and attach a small amount of money that is due—I mean, you know, depriving him of what little money he has to live on. An attachment order would do that. I think, therefore, that I would limit attaching orders to judgments at least over $25. That follows from my own experience, and I think it would be a good thing.

MR. MAGONE: Are there other matters of procedure where you think improvements might be made?

WITNESS: Well, yes, I would do away with juries in Division Courts. You see, in cases over $100, there cannot be many disputed facts, it wouldn't be a trial on facts, because the jurisdiction of the Division Court in cases over $100 is limited to cases where the amount is ascertained by the signature of the defendant, such as promissory notes, or contracts, or something of that nature, and there cannot be many facts to try them on; that is one reason why there is no necessity for a jury; it is more a question of law.

Q. Judge, in your experience on the bench, can you say how many juries you had, in Division Court cases?

A. Yes, I think so. I think, in my 40 years on the bench, I don't believe I have had 20 juries; I'm sure I haven't.

Q. Well, that is a fair indication.

A. In fact, in the last few years, I never had any. I suppose they thought my guess was as good as a jury's!

Q. Judge, what about the service of process in the Division Court?

A. Well, I don't like to say anything that is going to hurt the bailiffs, and so on, but—

Q. Probably you may as well now, judge!

A. I think probably the costs are far too heavy in Division Courts. I don't like to say that because it may affect people's positions, you know, but I must be honest about it, and I think your bailiff's costs are far too high.

MR. CONANT: Your Honour, I might remark that this Committee is very much concerned with the simplification and the lessening of Division Court costs; is there anything that you can say to indicate ——

WITNESS: Yes, well I agree with you.

Q. —— how justice can be done and expenses reduced? That is a very interesting point to this Committee.

A. Well, of course I agree with you that the expenses should be reduced, but I suppose the only way you can reduce them, as far as I can see, are the costs which plaintiffs pay when they enter a claim through Division Court procedure, and the bailiff's costs, such as costs of service, and so on, and mileage, and I suppose the only way that you can lessen the costs is by reducing the cost in both these cases, both to the clients and to the bailiffs. But of course I wouldn't be prepared to fix the amounts. There are others who know more about it than I do who can do that, but I quite agree with you, Mr. Chairman, that the costs are far too high in Division Courts, and that the bailiffs costs are too high.

Of course you must remember that the bailiff may have to travel a long way to enforce a judgment, you know, in cases of that kind, and that is another reason why there is objection in cases tried in the cities.

MR. MAGONE: Well, would there be any serious objection to the service of process by registered mail?

WITNESS: I was just going to refer to that. Now, to my mind, that is a very dangerous suggestion. Mr. Barlow was suggesting that the service of summonses be made by registered mail. Now, Mr. Chairman, in my view, that is a very dangerous suggestion. I'll tell you why. You probably know, from your own cases, as I do from mine, that when the bailiff serves a summons, the law very properly requires an affidavit of service to prove that he has served it, and it is under oath, and it is fair to assume that it is true; but if you send a registered

letter, as you know, the registered letter remains in the post office, as far as the county is concerned, and supposing the defendant—it doesn't follow that he is going to call at the post office every day, and according to procedure, he has to file a defence within a certain time, and he may not call at the post office in time to get that registered letter and to be notified that he is being sued, and therefore, he would be too late in entering his defence, and he would have to apply to the judge for leave, and so on.

MR. LEDUC: I was going to say this, judge; a man sending a registered letter can ask the post office to get a receipt from the addressee?

WITNESS: Yes, but the letter carriers make mistakes, just as I do and everyone else does, and that is too uncertain. You see, it is very important; when a man is sued, he has to put in a defence within a certain time, or judgment goes in against him, and if he fails to do that, just look at the cost the man is put to, to apply to the judge, and so on. I don't think that's fair.

MR. CONANT: Your Honour, don't you think that could be met in this way: suppose a system were set up whereby service might be made by registered mail, and at the end of the prescribed time, the judgment, if there was one, by default, would be in the nature of a decree nisi, let us call it, or something like that, and there would be a further period of fifteen days before the judgment would become absolute.

WITNESS: I know, but Mr. Chairman, again, it is possible for a defendant to be away from home, probably for a month or longer. You can't tell. I mean, it may be an isolated case, but still, it is only fair to that one man that he should have proper notice before any judgment is issued against him and a decree nisi entered.

MR. LEDUC: But if we insist on the defendant signing a receipt for the letter?

WITNESS: Ah, that's a different thing, of course; my point is that by registered letter, he may not get the registered letter in time. But that's perfectly true; I am quite willing to agree that if there is a receipt by the defendant, it's just as good, and in fact, better than the affidavit of the bailiff.

Q. Yes.

A. Yes, but he's got to get it.

Q. Oh, yes.

A. My point is, he may never get it by a registered letter, because the letter carriers might not deliver it, or he might not be home. But I agree with that, absolutely.

Q. Yes, but if the time for filing the defence starts with the date of the receipt of the letter, as shown by the signature?

A. Well, the date of the receipt of the letter—it must start from that date, of course.

MR. CONANT: What about allowing the plaintiff to make the service himself, if he wants to?

WITNESS: Well, I think that is rather a hardship on plaintiffs, that they should be called upon to serve a summons.

Q. No, no, make it optional.

A. Make it optional?

Q. Yes, if he wants to.

A. Oh well, yes, make it optional, but insist that he makes an affidavit of service.

Q. Yes.

A. Oh yes, there is no objection to that; there's no objection to the plaintiff serving it, if he wants to.

MR. FROST: In case of a registered letter service, too, judge, I suppose there is the possibility that if a debtor knows there is a registered letter waiting for him with bad news in it, he may not call for it at all?

WITNESS: And if he knew that—as he probably might hear -that that is what it is, that he is being served that way owing to a change in procedure, he might say: "Oh, a registered letter for me? No chance, I'm not going near the post office." That is a very good point, I agree with that.

MR. CONANT: Then, of course, the court would have to adopt some other means, but while we're on that point, Mr. Magone, perhaps His Honour -there is on our agenda later on, the question of service of summonses by mail, and perhaps His Honour might direct his attention to that, and he might express some opinion. I think the Committee knows what I mean, traffic summonses. The item is on our agenda, and I think it is due to the fact that representations have been made that in a great many summonses, for instance, traffic cases and minor offences, the costs are enhanced by the mileage that is involved in serving the summons. We have recommendations, I am sure, and will consider it at the proper time, as to permitting summonses to be served by mail, and perhaps His Honour ——

WITNESS: You mean summonses for traffic offences, for instance?

Q. Any minor offence, by-law summonses.

MR. MAGONE: By-laws, and minor infractions of the law, like traffic offences.

WITNESS: Well, I don't know that there is any procedure laid down for that, is there, in any Act?

MR. CONANT: Not now.

WITNESS: I am not aware of any procedure; they just go and leave the summons at the house of the defendant or the culprit, whoever he may be.

MR. MAGONE: Yes. The present procedure is that the summons must be served by a constable, either upon the accused personally, or by leaving it at his residence with someone, a party over the age of sixteen years.

WITNESS: Yes.

Q. The suggestion has been made, and we have it on our agenda, to deal with the question of sending summonses by registered mail.

A. Oh, of course; I don't see any objection to that, because I think it's fair to assume that the registered mail—the person to whom it is sent will get it, you know.

Q. That is a summons for a minor infraction.

A. You see, there is no particular time, I imagine, although there may be a date for appearing in court, I imagine.

Q. Yes.

A. But some people might take that objection, too, you know; I mean to say, some people think it's very important in that way, it's a pretty serious thing to put in the hands of officials like police, for instance, procedure which may result, probably, in a heavy fine, don't you see, without the culprit or the defendant, whoever he may be, having knowledge of that fact. Now, for instance, leaving it at the house—supposing he sticks it in the letter-box, and supposing the people are all away? May I—I am not familiar with it—ask, when a policeman serves it, what evidence is there of the service?

Q. An affidavit.

A. He makes an affidavit?

Q. An affidavit of service.

A. I see. Well, of course, that is proper, in a way, but then again, it's the same difficulty about serving these Division Court proceedings, he may be away, don't you see?

MR. CONANT: Yes, but, Your Honour, supposing we had a system that, in minor offences, where the fine, perhaps, ranges from $1 to $10, in minor offences, service could be arranged by registered mail, and with a return receipt signed by the person to whom it is addressed?

WITNESS: Oh, yes, I think that would be quite all right, Mr. Chairman.

Q. Yes.

A. Oh yes, I think so.

Q. Well, would it not cut down the costs that are ultimately levied against the defendant considerably?

A. Well, I have never been fined, I'm sorry to say, but I don't know how they fix the costs, I'm not aware of that procedure. I don't know just how it is arrived at.

MR. CONANT: Is not the mileage part of the costs in those prosecutions, Mr. Magone?

MR. MAGONE: Yes.

WITNESS: Is the mileage ——

Q. Yes, the mileage for service of the summons.

A. Yes, because from what I hear from people in Toronto here, who get fined, the fines are not all of the same amount.

Q. Yes.

A. They fine them $5, for instance, for parking five minutes in a row in a spot, or something of that sort; well, don't you see, the whole system, there, as I understand it, of fixing the amounts of the fines ——

MR. FROST: The costs are oftentimes more than the fine; that is another trouble.

WITNESS: Yes; of course, people who are committing offences have to pay the penalty, I suppose it is their own fault, in other words, but ——

MR. CONANT: Well, can you suggest any other way, Your Honour, of how we can reduce the expensive costs that are involved in the ordinary small claim that goes into the Division Court? You have had considerable experience.

WITNESS: Well, as I say, Mr. Chairman, I would fix, probably, in some proportion, the costs for a claim under a certain amount, for instance, a claim under $10 or $15 or $20, I would fix a small amount—say $2 or something like that; fix them in a graded scale, according to the amount.

Q. You mean a block system of costs?

A. Well, that's what you might call it. For instance, on a claim for $10, the costs should not be as on a claim for $100.

Q. Well, is it not a fact, judge, that sometimes it happens that the costs will exceed the amount that is involved in the claim?

A. Yes, exactly, that is why I am suggesting that you should fix it on a graded scale; certainly.

Q. Is there not, also, this difficulty, that when a merchant, or whoever it

may be, enters the claim in court, at the present time he has no way of knowing what those costs are going to amount to?

MR. LEDUC: Well, he is asked for a deposit.

MR. CONANT: Yes.

WITNESS: Well, that is just what I have been saying. You can fix it on a graded scale, the cost up to the trial; I would say for a claim of $10, $2, and on $25, probably $3, and so on; I mean, that is a matter for people who are more familiar with that thing, such as the clerks; they are more familiar with that, I suppose, and they would be the logical ones to be asked to give any advice on that, because it affects their department.

MR. LEDUC: Seeing we are talking of costs, Mr. Magone, have we a tariff of fees in this book?

MR. MAGONE: Mr. Polson, is the tariff of fees in Division Court set out in the pamphlet?

MR. POLSON: Yes.

MR. CONANT: At the present time, the costs of the Division Court are made up of various items: cost of issuing summonses, cost of entering judgment, 25c. for adjournment, so much for mileage, and so on, is that not so?

WITNESS: Yes.

Q. And when it's all over, there is an itemized statement made up by the clerk, and it consists of all the various items that go into the costs as set down in the tariff, and that is what somebody has to pay?

A. Yes.

Q. The plaintiff is primarily responsible for it?

A. Yes.

Q. He recovers it if he can, is that it?

A. Yes, he is the only one that can recover it.

MR. LEDUC: Well, I note here, in this tariff of fees payable to the clerk of the Division Court, I note the fees payable on the issuing of a summons, and I cannot help but notice this: if you issue a summons in a Division Court on a promissory note for $400, you pay $4; if you go to a County Court and issue a writ on a note for $800, you pay $3.

WITNESS: Yes, exactly.

Q. Then, if you go to the High Court, the Supreme Court of Ontario, and issue a writ on a note of $10,000, you pay $2.10.

A. Well, that all bears out what I say, that the costs of the Division Court are too high.

Q. Much too high.

A. As I am saying, yes.

MR. MAGONE: But, Mr. Leduc, the fees in the County Court, are on the block tariff system, and the fees in the Supreme Court are not, so the issuing of the writ in County Court involves four or five subsequent steps—at least the fee paid involves five or six steps.

MR. CONANT: Ten cents for this, and ten cents for that, and so on.

MR. MAGONE: Yes, so that in the Supreme Court, by the time you have taken the number of steps $3 pays for in County Court, you would have paid for more than in County Court.

MR. LEDUC: Yes, but the amount is much larger.

MR. FROST: Mr. Leduc's point is that the cost, in Division Court, for an amount, say, involving $400, is $4, while a litigant might be in Supreme Court for $1,000,000 and it would only be $2.

WITNESS: You've got to remember that that $4 is only the deposit; there may be other costs added to it afterwards. That is only to enter the action.

MR. LEDUC: Yes, then there is copy of summons, 25 cents.

WITNESS: Yes, you must remember that.

Q. Yes, receiving and entering bailiff's summons, 25 cents; then 25 cents for each affidavit.

A. Yes. Well, of course, that is how these amounts are made up.

MR. FROST: Well, on a $20 claim, I presume that the deposit asked by the court would be somewhere in the neighbourhood of $20?

MR. CONANT: Oh, no.

MR. LEDUC: On $20?

MR. FROST: I'm sorry, I meant on $400.

MR. LEDUC: They ask us about $10 or $12 in Ottawa.

MR. FROST: In view of that, it does seem to be a poor man's court.

WITNESS: That is another reason why the costs should be graded, sure.

MR. CONANT: Well now, Your Honour, if the Legislature were to change

the system to this extent: by putting into effect a block system whereby on, say, $25, the cost would amount to so-and-so, then for claims ranging from $25 to $50 it would be so-and-so, whatever the scale might be;

WITNESS: Yes?

Q. A definite fixed cost to cover everything in connection with that case, and then, added to that, the right to make service by registered mail with return receipts, or by the plaintiff himself ——

MR. FROST: With an affidavit of service.

MR. CONANT: —— with an affidavit of service as served by the plaintiff, or his employer, or, in other words, served by anybody—as in a County Court writ or a Supreme Court writ, where anybody can serve it—could you suggest anything more we could do to make more definite and to decrease the costs that are involved in Division Court actions? Is there anything else?

WITNESS: No. Well, it seems to me that if you had a definite amount for a definite judgment, say for $25, so-and-so, that you couldn't do anything any better than that. How else could you do it? On a claim for $25, the cost would be, say, $2, and on a claim for $50 it would be $3, and so on. You can't do it in any other way.

Q. Yes.

A. I don't see how you can do any different. That's the only way to do it.

MR. ARNOTT: Well, Mr. Chairman, under that block system fixing the costs in that way, what would those costs include, up to judgment, or ——

WITNESS: Everything.

MR. CONANT: Everything.

WITNESS: That would be for the whole thing.

MR. ARNOTT: Cost of execution and everything?

WITNESS: I think perhaps we ought to consider—it would be up to the judges in any event, as to what comes after that. For instance, the costs of an execution, you can't very well ——

MR. CONANT: I think perhaps that's right.

WITNESS: You can't very well fix those costs, I should think. Supposing, for example, the bailiff has to go away out, 50 miles, in order to execute?

MR. CONANT: Yes.

WITNESS: You see, you couldn't possibly fix those costs, and I think in fixing the costs, it should only be up to judgment.

Q. Yes.

A. I think I would limit it to that. That's a very good suggestion. You see what I mean?

Q. Yes.

A. Because no human being can tell what the costs would be afterwards, in enforcing that execution, and I think it would be rather hard on the clerks and bailiffs to fix the definite amount beforehand, which might not be anything likely to repay the costs of the execution, enforcing the execution.

MR. ARNOTT: In other words, it is up to the judgment creditor to find the assets out of which he can realize his judgment?

WITNESS: Well, you don't ——

Q. Well, I mean it boils down to that; as far as the costs after that are concerned, it's up to him?

A. Oh, yes; judgment No. 1, you see, covers that; he can be brought up and examined under oath, and you can find that out; that covers that point.

MR. CONANT: Yes.

MR. MAGONE: With respect to the jurisdiction of the court, Your Honour, some submission has been made that the jurisdiction be limited to claims of a $100 and that all the other jurisdictions be thrown into County Court.

WITNESS: Well, I touched on that at the outset, and I think I said that the objection to that is that it would increase the lists of the County Court, increase the costs, and the litigants and witnesses would have to come to the county town for the trial, and the one other serious objection to that is that there are only so many sittings in County Court, and the litigants would have to wait for a long time, which they would not have to do if it were in Division Court, because there the sittings are far more frequent and they get their cases disposed of.

MR. CONANT: Put it on the basis of cases that are not appealable.

WITNESS: Well, of course, all cases over a $100 are appealable, and then you would have to amend the statute on that and to fix the amount of the judgment which is appealable.

MR. MAGONE: Well judge, until a few years ago, the limited jurisdiction in the Division Court was $120, and then it was increased?

WITNESS: Yes, I think it was increased.

Q. From time to time?

A. And as a matter of fact, talking about that, I don't see any objection to increasing it another hundred; you might just as well make it $500 as $400, and

that would help to reduce the County Court lists, because, I hope the judge in Division Court has as much intelligence as he has when he is in the County Court—at least, I hope so!

MR. CONANT: Well, Mr. Magone, you have in your hands now a list of the deposits that prevail in Toronto; read that out, will you, please?

MR. MAGONE: This is the amount of the minimum deposit required by the clerk on the entering of the action in Division Court; amount of claim $1 to $10, minimum deposit required, $3.50; on claims of $10 to $20 deposit, $5; $20 to $60, deposit $6; $60 to a $100, deposit $7; $100 to $200, deposit $9; $200 to $300, deposit $11; $300 to $400, deposit $13.

WITNESS: Well, you see, one answer to that is that it does not necessarily follow that those amounts will be used up in the action.

MR. CONANT: No.

WITNESS: And if there is any balance left over, the plaintiff is entitled to get it back.

MR. LEDUC: But whatever he gets back is usually under a $1?

WITNESS: Well, I wouldn't say what he gets back.

Q. It is usually under a $1?

A. I would rather not express an opinion on that unless you force me to.

MR. MAGONE: Your opinion is the jurisdiction of the Division Courts might be increased?

WITNESS: Yes, I would say so; I think the judge could just as easily try a $400 case as a $500 case, and the advantage of that is, it would lessen the cases in county court, and the county court, of course, is more expensive than the Division Court, and to that extent it benefits the parties to the action.

MR. CONANT: Do you, at the same time, suggest that the jurisdiction of the Division Court might be increased and that there be no juries in Division Court?

WITNESS: Well, up to $500; oh, no, I don't say there are to be no juries, Mr. Chairman, remember, I didn't say that. I said that the juries can be asked for by counsel, and the judge can refuse him; there would be no juries unless the judge thought it a proper case for a jury. That is what I mean. Oh, I don't say that there should be no juries in the Division Court. I say only by order of the judge.

Q. Yes, I see.

MR. MAGONE: Well ——

WITNESS: Because the judge should be the proper one to say whether it is a

case for a jury or not, and as I said before, in the jurisdiction over a $100 and up to $400, if they bring an action where the amount is ascertained by the signature of the defendant, it is more a matter of law than a question of fact, and the jury, of course, can't deal with questions of law, and there could be very few facts, that is compared with a case where the amount is ascertained, such as under a contract, in which the defendant could not very well deny it.

MR. LEDUC: Are there many actions in the Division Court tried with a jury?

WITNESS: Well, as I told you a moment ago ——

Q. I am sorry, I wasn't there.

A. In my own experience, I don't think, in forty years on the bench —well, I didn't try Division Court cases all that time, of course, but in my experience, I don't think I have had more than twenty jury cases at the outside. That is in Toronto, of course; I am not speaking for outside of Toronto. I don't know about that.

MR. CONANT: Well, Your Honour, supposing we were to do this: just direct your thoughts to this suggestion: supposing we were to leave the Division Court as it is, with, perhaps, increased jurisdiction, or at any rate, as it stands, with or without increased jurisdiction, and we created a small claims part of that court procedure, for claims say, up to a $100, with a block system of costs and with every economy of form, procedure and expense that we could devise, and still with proper safeguards, what would you think of that?

WITNESS: Well, why can't you leave it as it is, except in cases under a $100 and fix the costs by a block system—I mean, leave the court as it is; why not?

Q. Well, do you or do you not feel this, Your Honour, that when you get up into the larger sums, something approaching the present maximum jurisdiction, that it would be a better safeguard to have the service effected by personal service?

A. Well, you mean serve the summons?

Q. Yes.

A. Oh, well, I told you what my view about the service of the summons is, and I think they should all be served by the bailiff, and with an affidavit of service. I would not serve any cases in Division Court by registered mail, or any other way than by someone, at all events, who must make an affidavit. I wouldn't say that is is necessarily confined to the bailiff.

Q. Yes, but would you not make a distinction, Your Honour, or would it not be reasonable to make a distinction in that connection between a claim, say, involving $25 and a claim, say, involving $200?

A. Well, I see what you mean.

Q. Yes.

A. You suggest that they can serve all claims under $100 by registered letter, and over that, it would have to be by the ordinary process of service?

Q. Yes.

A. Well, but then, Mr. Chairman, may I say to you that I think that a plaintiff who sues for $25 is just as entitled to the same consideration as a man in the case of $500. I mean, he is entitled, surely, to be sure that his claim is served properly—his summons is served properly, rather, and so on. I mean, why should the poor man, in other words, the poorer man be treated differently from what you might call the rich man, who has the big claim? You see, the root of the whole thing is, to my mind, that a defendant must have notice of the proceedings against him, I don't care whether it is $10 or $1,000.

Q. Yes, but Your Honour, what the Committee is particularly concerned with—I think I may speak for the Committee, is that the great mass of cases, and I think probably the majority of cases in Division Court are for less than $100, would that not be right?

A. I beg your pardon?

Q. Most cases in the Division Court would be for less than $100?

A. Yes, well the answer to that is, as I said before, the costs are too great, and if you fix the cost in cases under $100, that answer meets that point, it seems to me. In that way, don't you see, you fix the costs for small amounts, but not so for amounts over $100. I wouldn't suggest for a minute that you fix the costs in cases over $100.

Q. Well, that's what we're getting at.

A. That covers the costs in the small claims, by reducing the expenses, and it's the same judge who tries the smaller cases as well as the larger ones, so the only difference is that you fix the costs of the smaller claims.

Q. Is this your statement, Your Honour, then, that you would leave the court as it is, with, perhaps, some improvements to the machinery, but in small claims, up to $100, you would set up a block system of fees, graduated, and permit the service by the plaintiff or by registered mail, and make those smaller claims on a basis that the costs would be certain, and the costs would be the minimum, is that your view?

A. Yes, but you are saying again, service by registered mail. I'm afraid I can't agree with that. That's only my view, of course.

MR. FROST: Well, if there is a receipt for it?

WITNESS: Oh, that's a different thing.

Q. Well, supposing it were on that basis.

A. Well, you can provide for that.

Q. That, say, it is served by registered mail, and if there wasn't a return of receipt, or the letter was returned, then it would be referred to the judge for service in some other way, either by the plaintiff or ——

A. Well, don't you see, that is going to increase the trouble involved in the procedure, unnecessary trouble, I think.

MR. CONANT: But that wouldn't be difficult; you could have it so that it should be by registered mail or by a person.

WITNESS: But if it is put in by registered mail, Mr. Chairman, the person serving must produce a receipt from the defendant that he got the letter. I would be sure to include that, of course.

MR. MAGONE: Would not the receipt involve proof of signature?

MR. STRACHAN: But registered letters are not delivered in rural districts.

MR. ARNOTT: Mr. Chairman, under the Act as it stands ——

WITNESS: That is evidence.

MR. ARNOTT: Under the Act as it stands, where the amount of the claim exceeds $30, the service shall be personal, but where the amount does not exceed $30, the service may be on the defendant, his wife or servant, or on a grown-up person on the premises of the defendant's dwelling house or place of business; what would be your reaction to increasing that to the case of a claim of $100?

MR. FROST: That doesn't get around your mileage costs. You take, for instance, a $20 claim; the bailiff gets 60 cents plus mileage.

MR. ARNOTT: I think it does get around it.

MR. FROST: No, for the reason that, supposing a man is five miles from a Division Court.

MR. ARNOTT: Well, I can't see, frankly, under your registered letter system, how you are going to be sure that the defendant receives service.

WITNESS: That is my objection.

MR. LEDUC: Supposing there is a receipt for it.

MR. STRACHAN: Well, registered mail isn't delivered in rural districts; they have to call for it.

MR. ARNOTT: They would never call for that letter.

MR. STRACHAN: If he hears of a registered letter, and he knows there is a claim against him, he will just leave it there.

WITNESS: Yes, you've got to realize that it's tremendously important that

the defendant should be made aware of the proceedings against him, because it is unfair to him to take advantage of doing it behind his back, if I might use the term.

MR. CONANT: Your Honour, if you, in your advocacy of the increase of the Division Court jurisdiction ——

WITNESS: Well, I am only just making a suggestion.

MR. CONANT: Well, I know, that's what you are here for. Would you permit the examination for discovery?

A. Well, it's not usual now.

Q. No, but supposing you were increasing the jurisdiction another ——

A. —— hundred dollars? Well, as I say, that is really if substantial amounts are set, because you see, Mr. Chairman, the jurisdiction over $100 is only given by the fact that the defendant has acknowledged the debt in some form, by his signature, that is by a promissory note or a written contract, or lease or something of that sort, you see, and I wouldn't think you would want an examination for discovery.

Q. I see.

A. And I wouldn't suggest that at all, because I think, in a great many cases, there have been examinations when they weren't necessary—well, I wouldn't say what for; there are too many lawyers here!

MR. LEDUC: Well, there are no lawyers' fees in Division Courts; that wouldn't be the reason?

WITNESS: Oh yes, excuse me, I don't agree with you, in claims over $100.

Q. Oh, yes, in the discretion of the judge.

A. I know, but there are counsel fees. There are fees, not in the discretion of the judge. I am going to stand up for counsel now; they are entitled to counsel fees; the judge fixes the amount.

MR. CONANT: Your Honour, supposing you were increasing the jurisdiction of the Division Court all along the line, let us say, arbitrarily, by 50 percent, and you gave the court the right to determine whether examination for discovery were permissible or not.

WITNESS: Oh well, there's no harm in determining in cases of that kind, an examination for discovery, as they do in the County Court, if the judge thinks that it is proper; there is no objection to that.

Q. Well, Your Honour, throughout The Division Courts Act, which is rather a stupendous work, now ——

A. Well, may I just interrupt you at that point; I notice Mr. Barlow says that is one reason why there should be—the Division Court should go into the County Court, but he doesn't tell you that it deals with so many different things, such as duties of the clerks, the rules and regulations, and so on. That the actual procedure part is limited to a very small amount. The Division Courts Act has the duties of the bailiffs, duties of the clerks, and a dozen and one things that have nothing to do with what I call the litigation part of it. And that is, to a certain extent, misleading. I mean to persons who don't know; they say: "Oh, my goodness, this is a tremendous Act; 237 sections." Well, I will venture to say that not more than fifty of those sections cover actual Division Court work.

Q. Well now, coming to that, Your Honour, what would you say as to this: supposing the Act were revised, and so as to leave to the discretion of the judge a great many of the details and provisions that are now set out in the Act?

A. But what details?

Q. I beg your pardon?

A. Please, what details do you want to leave to him?

Q. Well, we have already mentioned two; the question of whether there should be a jury or not.

A. Yes, that is proper.

Q. And we have dealt with the hypothetical case of examination for discovery.

A. Yes, I agree with that.

Q. Then we had one here yesterday, what was the matter brought up here yesterday, Mr. Magone?

A. About the Division Courts?

Q. Yes.

A. I didn't see anything; there was nothing in the report in the paper about it.

Q. There was an item that came up, under the Act, and somebody remarked that it could be left to the discretion of the judge. Well, do you think that there are provisions in there that could be left to the discretion of the judge, rather than making them part of the Act?

A. Well, off-hand, I can't think of anything. But if you want me to look over the Act with that point in view, I might look over it and send Mr. Magone a memorandum as to what I thought.

MR. MAGONE: I think it was arbitration we referred to yesterday.

MR. CONANT: Yes. That's right.

WITNESS: Arbitration?

MR. MAGONE: Have you ever had a case of arbitration in Division Court?

WITNESS: Oh, goodness, as far as abritration, I would never agree to any case being referred to arbitration in Division Court; who would be the arbitrator?

MR. FROST: I would like to ask His Honour a question arising out of this jury business. I was very much struck, Your Honour, by what you said, as to the fact that you only had, I think, roughly, twenty-five jury cases in your long ——

WITNESS: Yes, about that.

Q. —— period on the bench, and I suppose, in that time, that you have tried thousands, perhaps tens of thousands of cases?

A. Well, may I say to you, in the latter twenty years, there were two courts, as you know, and there were over six thousand cases entered into each court, that would be twelve thousand cases in the two courts, in a year, and I think I always tried eight thousand cases a year, at the very least.

Q. Well, I just noticed this, that in the Division Courts Act there is a provision for paying a jury fee, and that jury fee is 25 cents on every claim over $100, and then it is graded below $100, and that jury fee is paid into the municipality, under section 137. Now, I suppose the Division Court suitors have, in that period of time that you have been on the bench, paid thousands and thousands of dollars into the court and, I suppose, into the municipalities to provide for a jury, and in your experience, you have had only some twenty-five juries?

A. Yes, but then they don't pay any money out until they demand a jury, surely?

Q. Yes, they do.

A. No, I don't think so.

Q. I may be wrong, Your Honour, but—

A. What does it say?

MR. CONANT: Mr. Polson knows all about that.

WITNESS: There may be all kinds of methods, but I think ——

MR. FROST: Is it not true, Mr. Polson, that in every case over $100 there is 25 cents levied as a jury fee?

MR. POLSON: Yes, that is collected every year and paid over to the municipality.

MR. FROST: And in the City of Toronto, Judge Morson says there have been tens of thousands of Division Court cases, and only twenty-five juries in all that time.

MR. POLSON: Yes.

MR. FROST: Well, the municipalities are supposed to set up a fund, I notice, under the name of Division Court Jury Fund; where does the money go, that must be substantial surplus.

MR. CONANT: They build sewers with it!

MR. POLSON: I think it goes into the other courts, towards the expenses of other courts.

MR. FROST: That is something like the Highway Improvement Fund!

MR. CONANT: Well now, Mr. Magone, if Judge Morson wants to look over the Act, we will have him back later.

WITNESS: I went over the Act carefully.

MR. MAGONE: You have been here for over an hour, now, do you feel you might continue? We felt you might be tired.

WITNESS: Me, tired?

MR. LEDUC: Judge, the reference to arbitration made by the Chairman is in respect to section 156 of the Act, which reads:

> "(1) The judge, with the consent of the parties or their agents, may order the action, with or without other matters in dispute between the parties, being within the jurisdiction of the court, to be referred to the arbitration of such person or persons, and in such manner and on such terms as he may deem just."

Have you had many cases of that kind?

WITNESS: Well, I always thought that I was capable of trying any case, and therefore I never sent it to any arbitration.

Q. I see. Do you think there is any useful purpose to be served by keeping this provision in the Act?

A. Oh, well, not in the Division Court, because the amount involved is at the most $400, and surely every judge is able to decide a case such as that, I don't care how technical it is, and if he can't he had better get off the bench. But I notice there, Mr. Barlow's suggestion with regard to the County Court cases, that they call in an assessor; of course, I think that is to be considered, in a way, because, while we are supposed to know everything, it is sometimes a very vital proposition, and speaking for myself, I have had cases involving for instance, electricity and electrical machines, where experts were called and talked about

things of which I don't know any more than the man in the moon, and all I could do was the best I could; it probably would not be worth while, in Division Court, to give the right to call in assessors. It is an added expense, and I don't think it would be a wise thing to do. In County Court, I am not expressing any opinion; that is a county matter.

MR. MAGONE: Judge, what is your opinion respecting the execution against lands; at the present time, there must be a *nulla bona* returned.

WITNESS: Oh, yes.

Q. Do you think the execution, in the Division Courts, should be against lands at once?

A. Oh no, oh dear no. I think it is quite right to exhaust the goods first. I don't think it right to go and put a lien on lands for a small amount, or any amount, before you have endeavoured to collect by the ordinary summons against goods; oh no, I would not approve of that.

MR. CONANT: Well, just on that point now, Your Honour, from the standpoint of economy and simplification of procedure ——

WITNESS: Yes?

Q. At the present time, when a judgment comes back unsatisfied, or *nulla bona*, then the clerk must issue a transcript, does he not?

A. Well, if he wants to go to some outside county, yes.

Q. What does he do when he wants to execute against lands in his own county?

A. He has to issue an execution against goods; when they are returned *nulla bona*, then he has to reissue against lands.

Q. Not the clerk of the Division Court?

MR. LEDUC: Yes.

WITNESS: Certainly; at least they did in my day. I think that's right.

MR. CONANT: Well, where does that writ go to then?

WITNESS: It goes to the sheriff.

Q. Oh yes, I see.

MR. LEDUC: What about judgment summonses, judge, are you in favour of keeping them?

WITNESS: No. 1—I think we discussed that—I am in favour of No. 1 only, and I would do away with No. 2, but give the right for examination by order of

the judge if he thought it wise to do so, but of course, no judge would give it unless he had reasonable evidence to suppose that there was something that could be realized upon it.

MR. CONANT: Yes. Were you sitting on the bench after the amendment was passed limiting the garnishees before judgment?

WITNESS: When was that?

MR. CONANT: What year was that, Mr. Magone?

MR. MAGONE: No, I think it was three or four years ago.

WITNESS: There was nothing that I recollect when I was on the bench. Talking about that, I think it is a good idea to limit the amount, for instance, that a garnishee can only be issued on an amount, we'll say, over $50, I should think, because, as I say, the poor devil who can't pay a judgment under that amount is pretty hard on him, and if he has a little money coming, and you should go and stop that money, which might deprive him and his family of their only means of support, I am opposed strongly to that. I think it's a hardship. As I say, we have to deal with these matters on the assumption that the people as a whole are honest.

MR. MAGONE: The present law on garnishee is that there is no garnishee before judgment on wages.

WITNESS: Oh, no.

Q. That was done when you were on the bench?

A. Oh yes, and that's very proper, too, and you know, in this age when so many people are on relief and there is so much unemployment, that garnishee system is rather a hardship.

Q. Well, are you in favour of continuing the garnishee before judgment in the Division Court?

A. Garnishee before judgment? I certainly would, except—well, I might limit that, I would say, over $100 might be all right, or over $200.

Q. That is, where the amount owing ——

A. Where the debt in the judgment owed is over $200.

MR. CONANT: That is not very clear; you mean the debt owing to the defendant?

WITNESS: I am talking about a garnishee after judgment; I think that you should not have any garnishee after judgment unless the judgment was $200 or over.

Q. What about the garnishee before judgment?

A. I would be opposed to that, I think.

Q. In all cases?

A. No, in cases under $100, because, as I say, Mr. Chairman, the garnishee ties up and prevents a man getting money.

Q. Yes, but we are not clear; are you referring to ——

A. I am talking about a garnishee before judgment.

Q. Yes?

A. Well, don't you see—

Q. Well, just a minute; when you speak of a limit, do you mean the amount owing to the defendant?

A. No, no, I mean the amount of the judgment on which he is to be garnisheed.

MR. LEDUC: You mean the amount owing the primary creditor?

WITNESS: Yes, the amount of the debt.

MR. CONANT: That wouldn't be the yardstick, the amount owing to the primary debtor?

WITNESS: No, no, I mean no garnishee should be issued on any judgment either before or after judgment, unless the amount is over $100.

MR. LEDUC: But, excuse me, judge, how would you collect that if you didn't have a garnishee? Take the case of a man ——

WITNESS: Well, my point is this; that is the very thing that I want to stop, that the poor man, who can't pay $100 on a judgment, we'll say, the only inference is he can't afford to pay it, and if he can't afford to pay it, isn't it a hardship on him and his family if you tie up what little money is due them? That is the way I look at it. You've got to consider them; look at the Government, how they consider people on relief.

Q. I know, but judge, you mentioned ——

A. I may misunderstand you, or perhaps I don't make myself clear.

Q. No, but you stated, if I understood you correctly, that when the amount of the judgment owing to the plaintiff or to the primary creditor ——

A. Yes.

Q. Is under $100 ——

A. Yes.

Q. There should be no garnishee?

A. Yes, absolutely.

Q. Now, you take the case of a man with all kinds of money, and earning ——

A. Well ——

Q. Excuse me, judge, let me finish my argument, will you? —— earning a fairly large salary, and owing his grocer $90; then if the grocer could not garnishee against that very rich man, he would have no way of collecting.

A. Then, I will add a clause, that no garnishee should be issued on claims under $100, unless by order of the judge, and you could show him those facts.

MR. CONANT: Well, with all deference, Your Honour, it seems to me you are using your own yardstick. We might provide that there is no garnishee unless the amount to be garnisheed was a certain amount, but the amount of it claimed by the defendant shouldn't be garnisheed.

WITNESS: Well, how are you going to know the amount that is owing?

MR. LEDUC: Well, judge, might I suggest this: I have reference to the garnishee of wages—that we should exempt a proportion of the wages.

MR. FROST: There is that provision now.

MR. LEDUC: There is, yes, but it's not very much.

WITNESS: I would increase it, and very probably, as you say, I would not allow garnishee, as a matter of fact, on claims under $100 unless with the consent of the judge, and then possibly a garnishee on an amount over a certain amount. Have I made that clear?

MR. LEDUC: What are the exemptions, Mr. Magone?

MR. MAGONE: The exemptions are: $2.50 a working day on $15 a week.

MR. LEDUC: Well, should we not adopt a sliding scale for exemptions?

MR. FROST: That's not too bad.

WITNESS: No, but if a man earns $40 a week ——

MR. FROST: He is exempt up to $15.

MR. LEDUC: That is, you can garnishee up to $15 of his salary?

MR. FROST: And under $15, you can garnishee nothing.

MR. LEDUC. No.

MR. MAGONE: That Act could be clarified; it is not very clear.

WITNESS: Oh yes, I don't think you would have any difficulty in that.

MR. CONANT: I doubt whether it would be very wise to interfere with the exemption system.

WITNESS: Well, it's so long ago since I have been dealing with it, but ——

MR. MAGONE: Then, judge, with respect to the Creditors Relief Act; the bailiff collects an amount of money in the Division Court, and there is no distribution—that is in the Division Court—among creditors?

MR. CONANT: Would you mind repeating your question, Mr. Magone?

MR. MAGONE: Well, under the Creditors Relief Act, if the sheriff realizes on the judgment, in the County Court or the Supreme Court, that amount is there to be distributed among all the creditors, if they want to come in; they are notified.

WITNESS: Certainly.

Q. Now, in the Division Court that is not so?

A. Oh no; why should it be; every creditor is entitled to prove his judgment, sure, without sharing it with anybody else. Oh, you can't interfere with that.

Q. Even though it is interfered with in County Court and in Supreme Court?

A. Well, one reason really is that there are larger amounts, probably, realized under those circumstances. I wouldn't approve of that at all.

Q. You don't think it should be interfered with?

A. Oh, no; there is no such provision in the Division Court; why add it?

Q. With respect to appeals, do you suggest that any change be made in the present system regarding appeals to the Court of Appeal?

A. For the Division Court?

Q. Yes.

A. Oh no, I don't think so.

Q. You don't think it requires any change?

A. Oh no. No occasion for appeals, you see, except in cases over $100.

Q. Yes. Well then, with respect to the new trial procedure, was it used extensively in application for a new trial?

A. Oh, very rarely; in a great many cases, as a matter of fact, it was simply made for purposes of delay. You ask me if there were many new trials; for what

reason, for default, or because I was wrong in my judgment? What reason? Let's get that, first.

Q. Well, applications for new trial because the plaintiff or the defendant thought you were wrong?

A. Well then, they were right to apply, but may I say now that you ask me, that, to my knowledge, I had no application for that reason while I was on the bench.

MR. FROSY: Mainly for default, I suppose?

WITNESS: Yes, mainly, but I don't want to ——

MR. CONANT: Well, it is invoked sometimes?

WITNESS: Yes.

MR. FROST: Mr. Chairman, how would it be if we asked His Honour to make some short recommendations in writing, for things that he would suggest it might be worth while having?

WITNESS: Well, I have some things here that I brought for that purpose, as a matter of fact. "Reduced costs of Division Court juries," "attachment orders;" we dealt with that, did we?

MR. MAGONE: We didn't deal with it very fully, judge, if you care to elaborate on it?

WITNESS: Only as to the amount; I think there should be no attachment order under a certain amount—I would say $25.

Q. Oh yes.

A. "Service by registered mail," I have dealt with that.

MR. CONANT: Your Honour, as one of the members of the Committee has suggested, if you would prepare a memorandum and file it with us through Mr. Magone, we would be very glad to have it, with any observations you may care to make.

WITNESS: Well, other than what I have made?

MR. CONANT: Or including what you have made. If you would.

WITNESS: Yes, I'll be only too glad to.

MR. CONANT: Thank you. I am very grateful to you, Your Honour, for your assistance in coming here to-day.

WITNESS: Not at all, Mr. Chairman, it's a great pleasure and a great honour, if I might say so, to be called.

MR. CONANT: Thank you very much.

F. J. Norman, Secretary, Ontario Association of Collection Agencies

Mr. Magone: Mr. Chairman, Mr. Norman is the Secretary of the Ontario Association of Collection Agencies. Mr. Norman, your members do a great deal of business in Division Court?

Witness: Yes.

Mr. Conant: How many members would there be in your association, Mr. Norman?

Witness: Well, we have 80 members, but there are a total of 120 agencies in the province.

Q. They are all licensed now, are they?

A. All licensed and controlled by the Ontario Securities Commission.

Mr. Magone: What do your fees amount to, that you pay to the Division Courts in the province in a year?

Witness: During the nine-month period since the agencies were licensed, according to the figures furnished to the Ontario Securities Commission, the collection agencies in the Province of Ontario paid to the Division Courts, for costs, $70,000; that is an average of $100,000 a year.

Q. That is for the nine-month period?

A. Yes.

Q. Now, you have given me certain recommendations; among them ——

Mr. Conant: May I ask, in that connection, is most of this work done with or without solicitors?

Witness: Well, I should say most of it is through solicitors; for the smaller amounts, such as doctors' bills, retailers' bills, and so on, the agencies act directly, but for the larger ones, household furniture, wholesalers, and so on, would be mostly through solicitors.

Q. Well, would the larger part be with solicitors or without solicitors?

A. Without solicitors.

Mr. Arnott: Solicitors would only be called in in cases of dispute?

Witness: Disputes, or examinations.

Mr. Magone: Have you any idea how these claims are divided, between the extended Division Court jurisdiction and the lower jurisdiction, that is under $100?

A. Well, that comes again under the heading of classification of accounts; if it were a doctor or a private person, or a retail store, or any business like that, of course, they would come under $100.

Q. Are most of your claims under $100? Could you say that?

A. Yes, they would be.

MR. LEDUC: How many claims would that represent, Mr. Norman, that $70,000?

WITNESS: Well, that I could not say, sir.

MR. CONANT: And you have been active in Division Court work yourself?

WITNESS: We have been using the courts for a number of years.

MR. MAGONE: What are your chief criticisms concerning the Division Courts?

WITNESS: Our chief criticism, in so far as the creditors and the debtors are concerned, is the cost, and we think that can be overcome by substitution of service by registered mail. On ordinary writs, and also on judgment summons proceedings, there is no substitution of service. In judgment summons, consequently, an evasive debtor can avoid service; there is no substitution of service on that.

MR. FROST: You would be running into difficulties, if you asked to commit a man for contempt and you were not absolutely sure he was served.

WITNESS: Well, they would be served with what would be called a return card, and the person who served the writ, his name would be on the return card, and the registered letter would prove that they were in touch with him, or that they could get in touch with him.

MR. ARNOTT: That doesn't prove it conclusively.

MR. FROST: I must admit I have some sympathy for serving a small claim by registered mail, but when you get down to serving judgment summons proceedings by registered mail, that is somewhat different.

WITNESS: Well, that would have considerable cost.

MR. MAGONE: That is not the only consideration.

MR. FROST: How about the liberty of the man? You are asking the court to commit a man to gaol for contempt on refusal to appear.

MR. LEDUC: Which is really gaoling him for debt.

MR. FROST: Yes.

MR. CONANT: At any rate, your organization feels that the cost of service is the objectionable feature of Division Court proceedings, is that it?

WITNESS: The biggest objection. We have given you instances of several cases of excessive costs.

MR. FROST: You mean pyramiding costs?

WITNESS: Yes.

MR. ARNOTT: Just before you come to that, Mr. Norman, can you tell us how many cases are represented by that $70,000 paid?

WITNESS: No, I don't know.

Q. And how many of those you were able to collect?

A. Well, they could be got, but they are not on file.

Q. We can't do very much without that information.

MR. MAGONE: What is your experience with respect to returns from execution?

WITNESS: Well, I would say are 60 percent realized.

Q. 60 percent?

A. Yes.

Q. So that you are fairly well satisfied with it?

A. With the service?

Q. With the service rendered by the bailiffs?

A. Yes, but we don't get the same service from the same courts, or different courts.

MR. CONANT: What is that?

WITNESS: We don't get the same service in all courts.

Q. The results are not uniform?

A. No, they are not uniform; some are better than others.

Q. Well now, would you say that is due to the difference in the ability or efficiency of bailiffs throughout the province?

A. Well, I should say it is due to the inefficiency or efficiency of bailiffs.

Q. Yes.

A. We have had clerks of courts write and tell us that they didn't know what to do, and ask us what procedure they should follow.

Q. One of our clerks in Ontario here?

A. Yes.

Q. I couldn't concede that; all our courts are entirely efficient.

A. Well, that can be produced. Consequently, the creditor, and the debtor, have to pay for all that.

Q. Well then, Mr. Norman, you say you object to the costs that are involved, and principally due to the present unalterable provision that the bailiff must serve process, is that it?

A. Well, to the service.

Q. Well, that is the present provision?

A. Well, every time the clerk of the court dips his pen in the ink he charges 25 cents.

MR. LEDUC: Do you know anything about the Quebec system of bailiffs, Mr. Norman?

WITNESS: No, sir.

MR. ARNOTT: Mr. Chairman, I would suggest, if Mr. Norman could break that down, and show us the number of cases put in and those that they were successful in collecting in, and those that they were not successful in collecting on ——

MR. CONANT: Could you do that, Mr. Norman?

WITNESS: Yes, sir.

MR. CONANT: And then let Mr. Magone have it, please.

MR. MAGONE: There is just one other item.

MR. CONANT: What about the block system? Let Mr. Norman discuss that; what does he think of that?

MR. ARNOTT: That would show, Mr. Norman, the number you obtained judgment in, and those that were settled before that?

WITNESS: Yes.

MR. MAGONE: You have a recommendation on page 1 of your brief, regarding a block system?

WITNESS: Yes, this is up to $100, because the jurisdiction now is $200 or $400.

MR. CONANT: What do you suggest, up to $100?

WITNESS: Well, that depends on the bailiff or the clerk of the court. I mean, there has to be sufficient charged to take care of their expenses.

Q. Yes, but what is your suggestion? What scale do you suggest?

A. Do you mean the amount, sir?

Q. Yes.

A. Well, that would have to be governed by the size of the account.

Q. Yes, but have you any scale that you are recommending?

A. No, we haven't any scale.

Q. Well, do you recommend a block system of fees?

A. Yes, up to $100.

Q. On claims up to $100?

A. Up to $100.

Q. But you don't make any suggestion as to what the fees should be?

A. No, we don't do that, sir.

MR. MAGONE: You have made a suggestion regarding service by registered mail. What about service by the parties?

WITNESS: Well, what do you mean by that? That the plaintiff, as in some cases they now do, serve judgment summonses when the identity of the debtor is not known?

MR. CONANT: Oh yes, but under the general practice—we don't need to take time on this—the bailiff serves all process, is that the general practice?

WITNESS: Yes.

Q. Do you think there should be any departure from that?

A. No, sir.

Q. You don't think the parties themselves should be allowed to serve?

A. Well, as I say, on the judgment summons.

Q. Oh yes, but that is the exceptional case.

A. Now I am just trying to explain, sir, that in the case of judgment summonses, sometimes the plaintiff is ——

Q. But that is only a small part of the work of the court; the big part of the work of the court is service of claims; what do you think of that, all claims to-day should be served by the bailiff; do you think there should be any departure from that practice?

A. Yes, I think in the small debts court, the plaintiffs or their agents should be allowed to make service.

MR. MAGONE: In addition to registered mail?

WITNESS: Yes.

MR. FROST: Is there anything in the written representations there that would be interesting?

MR. MAGONE: Yes, I have a copy of it and am filing it with the Committee. There is one more thing, with respect to the Creditors Relief Act; I see you do not agree with the recommendation of Mr. Barlow?

WITNESS: No, sir, I don't see how that could possibly work.

Q. You mean?

A. It wouldn't be fair. It wouldn't be fair to the creditors, because there would be all this delay, and notification to the clerk of the court.

Q. Well, what is your reason—why should this be different from the County Court?

A. Because the amounts of the claims and the number of claims there may be in the smaller court.

Q. What difference does that make? I mean, is there any difference in principle, between an account of $95 and one of 95 cents?

A. No, there is no difference in principle at all.

Q. Is there any real reason why the Creditors' Relief Act should be applied to one and not to the other?

A. Because the costs are far excessive in the larger courts.

MR. CONANT: Your organization does not want that extended to the Division Courts?

WITNESS: No, sir, it's not fair to think that one creditor should put up all the costs and these other creditors—these writs are published in Dun and Bradstreet's—should get the benefit of the other's expenses.

MR. FROST: He gets the preference.

WITNESS: Well, but if it's not realized, he doesn't get his costs; it's not fair.

MR. MAGONE: I think that is your submission, is it?

WITNESS: Yes.

MR. CONANT: Well now, Judge Morson suggested an alteration in the procedure of the judgment summons, did you hear his recommendation?

WITNESS: No, I didn't.

Q. He recommended that, after the first judgment summons, nothing further should be permitted, unless the plaintiff could establish there was reasonable grounds for believing that the man could pay.

A. Well, I hink that is practically the procedure now, sir; isn't it at the discretion of the judge, if there is another judgment summons?

MR. LEDUC: The judge can refuse to act, but you can get further judgment summonses.

MR. CONANT: It is a default summons, I think they call it; what do you think of that?

WITNESS: Well, the way it is now, I think, is fair.

Q. Yes, but the judge doesn't think it's fair. The judge takes this view, that the present practice shouldn't continue, because you are perhaps pursuing a man who has no means of paying, and you are adding costs unnecessarily; now he says that after the first summons, nothing further should follow, unless the plaintiff can come along and establish, to the satisfaction of the court, that there is really grounds for believing that the man can pay, and presumably is avoiding payment.

A. Well, I believe that is practically the procedure followed now.

MR. LEDUC: Oh, no.

MR. CONANT: Oh, no; what do you think about garnishees? You know the present practice of law, do you?

WITNESS: Yes, sir.

Q. What do you say as to that?

A. Well, I don't ——

Q. The present exemptions.

A. I think they are quite in order.

MR. LEDUC: You think they are enough?

WITNESS: Yes, sir.

MR. CONANT: I see.

WITNESS: There is only one thing more I would like to speak about, with reference to the County Court.

Q. Well, before you leave that, what do you think about juries in Division Court?

A. I think they should be abolished.

Q. You think they should be abolished?

A. Yes.

MR. FROST: Did you ever have a jury case?

WITNESS: Not in Division Court.

Q. In Division Court, the practice is, is it not, that the debts are paid in order of priority? Is that not it?

A. Yes, sir.

Q. Or in order of priority of going into court?

A. Into court.

Q. Supposing you were opposed to the Creditors' Relief Act provisions, which are applicable in other courts, and there are half a dozen summonses put into Division Court on the same day, say an hour apart, don't you think there should be some method of giving to the creditors rateably, rather than in order of priority?

A. No, sir, first come, first served, I think.

Q. I know. But it is a principle that we have not recognized in other courts; it does seem to me that perhaps there is room for improvement there.

A. Well, I don't see how it could be improved there, sir. I guess that would practically be the Creditors' Relief Act again.

MR. CONANT: You want to say something about the County Court, Mr. Norman?

WITNESS: Well, at the present time, we can have the debtor examined as a judgment debtor, but there is no order goes with that examination, so that I can quote a case ——

Q. That is what they call "examinations in aid of execution", is it not, Mr. Magone? Examination for discovery, I believe.

MR. CONANT: No.

MR. LEDUC: No, no, it's an examination after judgment.

MR. CONANT: Examination in aid of execution, I believe it is.

WITNESS: There is one specific case ——

Q. Well now, your objection to that is that it gets information, but gets no results, is that it?

A. It very rarely gets information, sir.

Q. What do you suggest?

A. In a specific case, a man borrowed $1,000 off a lady that could barely afford it; they had no intention of paying this money back. She put up $32 to issue a County Court writ; the man has a good job, he buys a new car every year, he lives on Lonsdale Road. They had him examined and didn't discover anything. Now, there is nothing further that can be done. That man is just switching everything to someone else's name.

Q. What do you suggest should be done?

A. That he be examined and ordered for monthly payments.

MR. FROST: On the same lines as the Division Court?

WITNESS: Same lines as the Division Court.

MR. FROST: Of course, that is one curious thing; I think that oftentimes creditors reduce their claims to get them in the Division Court, owing to the fact there are more collection facilities there.

WITNESS: That is very often a fact.

MR. LEDUC: Well, as I pointed out yesterday, it is unfair; a man who owes $50 goes to goal, and a man who owes $1,000 gets away with it.

MR. FROST: There's the point; a man owing a small claim, he can be brought up and badgered and orders issued against him, and so on, but the man that owes $1,000, he can go before the examining officer and give a lot of easy answers, and that is the end of it.

MR. CONANT: Well now, personally, I am interested in that, because I have had some sad experience along that line. Do you think that those cases are frequent?

WITNESS: Very frequent, sir.

MR. LEDUC: What do you think of the garnishment of wages, having to garnishee them every pay-day?

WITNESS: Well, I can only speak partially on that, but I am much against garnisheeing any man's salary.

MR. FROST: Well now, of course, there is an absolute exemption for $2.50 for a man making $15 a week, or 70 percent of his salary, which may, in the discretion of the court, be altered.

WITNESS: Yes, it's pretty well covered.

MR. LEDUC: Yes, but what I had in mind is the necessity of issuing a new garnishee on pay-day.

WITNESS: Well, that isn't necessary?

MR. FROST: It adds tremendously to the costs; there are many specific cases of small claims where garnishees are issued every pay-day, where the costs exceed the collections.

WITNESS: Yes.

MR. CONANT: Are you familiar with the system set up in Quebec to meet that?

WITNESS: No, sir.

Q. Well, coming back to your suggestion about your inability, in claims in the County Court—and it's the same in the Supreme Court ——

A. Yes.

Q. —— to enforce your judgment, have you anything to add to that?

A. No, sir.

Q. Other than that you think there should be some procedure?

A. Well, the same procedure as in the Division Court, order and show cause.

MR. CONANT: I see. To-day, we have no jurisdiction where that is in force, Mr. Magone?

MR. MAGONE: I don't know, off-hand.

MR. CONANT: Do you know of any jurisdiction where there is some procedure such as that?

WITNESS: No, sir.

MR. CONANT: Will you make a note of that, Mr. Magone, and see if there is anything that can be found on that?

MR. MAGONE: Yes. Only one more thing; you mentioned something about leaving the jurisdiction of Division Courts as is?

WITNESS: Yes.

Q. As far as your association is concerned, you are satisfied with it?

A. Yes, we are quite satisfied with it; not with the expenses, of course.

MR. FROST: Don't you think, Mr. Norman, that the present Division Court procedure is really something that has come down from the old days in England, and I suppose in this country, when you could put a man in gaol for debt? Actually, that is what Division Court procedure amounts to now?

MR. LEDUC: Judgment summons procedure.

WITNESS: Yes.

MR. FROST: Do you think that is just?

WITNESS: Well, it all depends on the cases.

MR. LEDUC: You said a moment ago, you were against garnisheeing a man's wages. Is it not worse to put him in gaol because he can't pay, or refuses to pay?

WITNESS: Oh, yes.

MR. FROST: I often wondered this: supposing a man owes some creditors, say, $50; the judge looks over the situation, and he says: "This man should pay $2.50 a month, and if he doesn't pay the $2.50 a month he goes to gaol." Do you think that's right?

WITNESS: Well, it doesn't go ——

Q. Well, that's the way it works.

A. Yes; of course, our consideration is for what we call "amounts debted". There are few of those; there more; there is "evading liability; obtaining credit under false pretences;" that is mostly where the Act works.

Q. Well, is this not true? That in County Courts and Supreme Courts, the procedure there is on the basis that you have the right to examine a man, and if you find that he has assets, then you can ——

A. —— issue an execution.

Q. Yes, issue an execution, and take those assets.

A. Yes.

Q. The Division Court, which is a small man's court, and a poor man's court, is operated on the basis that the judge can say: "You pay these moneys,

whether you have assets or not." In other words, "get out and work for it;" and if you can't earn enough money to pay the amount, then the judge directs you to gaol. Do you think that is correct?

A. Yes.

Q. Well, why should there be a difference between the little man's court and the big man's court, shall I say?

A. Well, there isn't any difference; that's why we are advocating—

Q. That is why you are advocating the same principles of the Division Court in the Supreme Court?

A. Yes, certainly.

MR. CONANT: I certainly agree, of course, that there is a discrimination against a little man to-day, but my experience has been that the provision about committing to gaol is very, very seldom used.

MR. STRACHAN: Never.

MR. CONANT: It is very seldom carried to its ultimate conclusion.

MR. FROST: I know one case in your county, in which a man did thirty days.

MR. ARNOTT: Was that for contempt, or refusal to pay?

MR. MAGONE: Well, they are all to be dealt with on the basis of contempt.

MR. FROST: Yes, on the basis of contempt because he didn't pay.

MR. CONANT: What happens is this: in the first place, a court won't make an order for committal to gaol unless the circumstances are exceptional, and you are showing that the man is able to pay, and holding the court in contempt. In the second place, ninety-nine times out of a hundred, when an order is made, the man will pay it; isn't that right?

WITNESS: Then he pays before his costs rise, and if he can give a good reason why he should not pay, it is stayed.

Q. Yes. I am not defending that system so much as pointing out and indicating my view that, good or bad as that system may be, it should apply to all courts.

A. Oh, yes.

MR. MAGONE: Well, there are jurisdictions where you can get an order, and others where you can't.

WITNESS: No, you can only get orders for commitment in Division Courts.

Q. But you know that some judges will give you an order, and some others will not.

A. We find, on an average, if a man is actually in contempt, then he is incarcerated.

Q. My reason for saying that is—I didn't ask Judge Morson about this, but I doubt whether he sent more than one or two men to gaol in his whole experience.

MR. LEDUC: I've known more than that to be sent up in the city of Ottawa in the last ten years.

MR. MAGONE: Yes, that is what I was asking Mr. Norman, whether in some jurisdictions it wasn't easier to get an order than in others.

MR. FROST: In other words, the threat, or power to send them to gaol has a tremendous effect?

WITNESS: It has a moral effect.

MR. MAGONE: Practically the only difference between Supreme Court and County Court and Division Court is, that while you can get an order of attachment in the Supreme Court and County Court ——

WITNESS: If there is anything to attach.

Q. You must first find there is something to attach.

A. Yes.

Q. —— you can't get an order of a judge directing him to make payments because of his ability to work.

A. That's the difficulty.

Q. It's the difficulty that arises in the collection of accounts from doctors, dentists and lawyers, who don't have to work if they don't want to. Well, I think that is all from Mr. Norman.

MR. FROST: Are there any instances that you have there of pyramiding costs?

WITNESS: Yes, there is one here, very recently, which was handled by our own solicitor. There was one concern which had two claims against two men, who were in the same work, in the same store, and lived in the same building; the claim was sent to Haileybury, but it was out of their jurisdiction, so it was sent down to North Bay.

MR. CONANT: How much was the amount of the claim?

WITNESS: One claim was for $20.27, and the other for $55.00; the total costs of service on those two claims was $37.01.

Q. For the service?

A. For the service of the writ only.

Q. That would be a grand total, of costs ——?

A. It hasn't gone any further.

Q. You will have exhausted it by that time.

A. Well ——

MR. LEDUC: Do you think—$37.01 for service fees in those two cases?

WITNESS: Yes, the total debt amounted to $75.00 and we paid the bailiff and clerk $37.01.

Q. That's an average of $18.50 on each claim?

A. Yes.

MR. ARNOTT: Where did these debtors reside?

WITNESS: Timagami.

MR. LEDUC: The bailiff is entitled to 60 cents for service, the rest would be mileage, I suppose?

WITNESS: Mileage and clerk's fees.

MR. CONANT: Just taking that case—could they have been served by registered mail?

WITNESS: Oh, yes, sir.

Q. You knew where they were?

A. Oh, yes.

Q. Where did they live?

A. They were operating a store in Timagami.

MR. FROST: Why would the service be so terrific?

WITNESS: Double service.

MR. LEDUC: And the mileage, both ways, was ——?

WITNESS: Seventy-two miles, I think.

MR. CONANT: Of course, that is a rank abuse, where a bailiff takes, perhaps, two or three claims and goes over the same mileage, and charges mileage in each case.

WITNESS: I had a similar case in Toronto, from the city hall to Parliament Street; two creditors, and the same man, a dry goods store, double service, $4 for each service. The debtor was sued under his name, operating such and such a business; they drew up two writs, made two services. When questioned as to how they could serve him, they couldn't tell us. They served one man with the two services.

Q. And charge double service?

A. Yes.

Q. Could you have served that man by registered mail?

A. Oh, yes.

MR. FROST: Well, you could have served him personally.

WITNESS: Certainly, anybody could have gone along and served him.

MR. LEDUC: $4 for service only?

WITNESS: Yes.

Q. $2 for each?

A. No, $4 each.

Q. $4 each?

A. Yes.

Q. Well, what is the distance between Parliament Street and the city hall?

A. About three miles, I would say.

Q. Well, that would be 60 cents for mileage; and what was the amount of the claim?

A. The claim was $200.

MR. ARNOTT: What happened in each of those actions, after service was effected?

WITNESS: They didn't go any further, because the man made an assignment of the papers.

MR. LEDUC: There is something wrong there, Mr. Norman, because if it's one or two miles, the service should be $2.

WITNESS: Well, I have been trying for years to figure out the tariff, but I have never been able to arrive at it.

MR. MAGONE: Well, what about taxation?

WITNESS: Well, we find that useless, because it just means more costs.

Q. You have attempted it, have you?

A. On occasions, and they just charge us 25 cents.

Q. Did you ever have the cost produced on taxation?

A. Never.

Q. You never have?

A. Never in my experience.

Q. Do you know how much you paid in taxation?

A. Very few.

MR. LEDUC: Oh, I don't think taxation is any use there; it's all on the tariff.

MR. MAGONE: But that is an instance where they might have reduced on taxation.

MR. LEDUC: Yes. I would like to get some explanation of that $4 service charge.

MR. MAGONE: Can you give us any explanation, Mr. McDonagh?

MR. MCDONAGH: The matter was never discussed with me, and if it was $4 for service, the charge was unquestionably excessive. I can't see how they can arrive at $4 for service. Parliament Street is at most, a mile and a quarter from the city hall.

MR. LEDUC: That would mean about $1.90.

MR. MCDONAGH: Not any more.

MR. CONANT: Is this claim from your court, Mr. McDonagh?

MR. MCDONAGH: I presume it is, and if he will give me the number, I will have it checked.

WITNESS Excused.

F. G. J. MCDONAGH, Clerk, First Division Court of the County of York.

MR. CONANT: Mr. McDonagh, how long have you been clerk?

WITNESS: Since 1934.

Q. Are you a lawyer?

A. I was, yes.

MR. MAGONE: And I suppose you are yet?

WITNESS: I am, yes. I submitted certain recommendations to Mr. Barlow, a copy of which I submitted to the Chairman, and my first recommendation was that the whole Act, Rules, Tariffs and Forms be reviewed, simplified and rewritten. And I have gone over Mr. Barlow's report carefully, and on January 22, I submitted my constructive criticism to Mr. Cadwell, which I presume has been discussed, and on January 9, I wrote Mr. Cadwell in regard to the matter of the Creditors' Relief Act, and the manner in which that would work out in a busy Division Court—

MR. CONANT: Have we copies of Mr. McDonagh's submissions?

MR. MAGONE: Yes.

MR. FROST: I wonder if Mr. McDonagh would go over his submissions.

MR. CONANT: Yes. It would help if we had them before us also; however, you may go over them.

WITNESS: I am still of the opinion that that solution is to simplify and rewrite the Act. As I said in my first paragraph to Mr. Barlow, the Act was originally drawn in "horse-and-buggy" days, and it appears to me from time to time sections have been added for the purpose of clearing up some point, without any attempt to consolidate the necessary suggestions in that section of the Act pertaining to the point in question, with the result that instead of having a simple Act, we now find it rather a complicated one, and impossible for a litigant to understand.

MR. CONANT: Well, may I suggest, Mr. McDonagh, with all deference, I think it would meet our convenience better if we could take a glance at each one of your paragraphs, and if you could summarize it to us. We can then read the report at our leisure.

WITNESS: Yes, sir. Well then, in my suggestions, of course, I had to take into consideration the criticisms that were levelled at the procedure, and the first one arises in regard to issuing a County Court writ for $3, and in the Supreme Court for $2.10, while the cost in Division Court was lost sight of. The payment to the clerk takes care of the issuance of the summons, making copies of same, transmission to the bailiff, the service, the return, the listing for trial, the calling in court, the trial, the judgment, the issuance of execution, return of same, and all entries incidental to these various items of procedure and interlocutory proceedings such as orders ——

MR. LEDUC: Have you got a special item on issuing writs of execution?

WITNESS: Yes, but the money is paid into the court ——

Q. Oh, quite.

A. It is paid into the Division Court when you issue a writ for $2.10.

Q. Oh, I beg your pardon. I thought you had a special amount.

A. No; that's not the way the litigant looks at it, but he has to pay the Division Court fees.

MR. CONANT: Well now, wait a minute, I don't quite understand your submission.

MR. LEDUC: Mr. McDonagh is speaking of the deposit that is paid to him when an action is brought to his court.

WITNESS: That is the claim I meet with most, that the deposit required is more than they have to pay in the Supreme Court. Of course, in the County or Supreme Courts, as you know, the solicitor issues the writ, and then he has to attend to the service; then some other solicitor enters the appearance, and there is the statement, and so on.

Q. And for each one they have to pay 10 cents?

A. They pay as they go along, and they have to do the work, whereas, in the Division Court, when you file a claims it's like starting a wheel, and it goes along until the conclusion of the action. In other courts, you have to start a wheel every time you want to take a separate proceeding. That was the point in the criticism.

Q. On claims from $300 to $400, your fee for issuing a summons is $4?

A. Yes, sir. In that connection, I prepared for the assistance of Committee, a hundred 1938 cases, picked at random out of the book and in succession, and show the average cost of that hundred cases. I gave it to Mr. Cadwell, who has it at present. Then I had that broken up into the different groups that the Division Court tariff provides—$1-$10, $10-$20, $20-$60, and so on. I also took my returns for last year, and the total amount of fees earned was $29,848.65, and the number of proceedings was 7,643, which gives an average cost of $3.09; over a period of years, if the returns of Division Courts are examined, the total fees divided by the number of proceedings in the year will bring the average cost very close to $4.

MR. CONANT: Now, are you including in that service, mileage and everything?

WITNESS: No, the clerk's fees.

Q. I beg your pardon?

A. That doesn't include the bailiff's fees.

MR. FROST: Could you give us any information on this bailiff end of it?

WITNESS: Well, the break-up of the hundred cases shows the clerk's fees and the Division Court costs.

MR. CONANT: Have we that break-down available now?

MR. FROST: Yes, I think it would be a good thing if Mr. McDonagh explained it.

WITNESS: While that is coming, possibly if I touched on the matter of judgment summonses—

MR. CONANT: Before you leave that,—I think it is proper to deal with it now—what do you think as to the feasibility of a block system? Let me explain, first, what I mean by that: a system whereby a man who entered a claim in court, let us say up to $50, knows that he is going to pay this certain definite, fixed, certain amount for the whole thing.

WITNESS: Yes.

Q. And then, up to $75, another certain amount; up to $100, another amount. Something of that nature; do you think that is feasible?

A. I think it is feasible, and that it would save a considerable amount of book-keeping, which is required to be done under the present system.

Q. Yes.

A. I think it would be very advantageous; as far as the larger courts are concerned, I have tried to frame my remarks with the experience of one who has practiced before the courts, and one who has been clerk of the court.

Q. You have been both on the outside looking in, and on the inside looking out.

A. Yes, and the situation which I must mention, of course, is that in regard to the courts outside of Toronto, or apart from mine, shall I say, where the only remuneration the clerk receives is that derived from his fees.

Q. Yes.

A. And in many cases, the clerk may make $100 or $200 a year out of his Division Court work, and a block system might cut down the remuneration which those clerks receive. And the only cost in connection with those courts, in so far as the government is concerned, is their inspection, and while the remuneration of the clerk outside might be cut in that manner, where the volume of business is great, as in the Toronto courts, I don't think it would make any appreciable difference.

Q. Well, from the standpoint of the public, would it, or would it not be more satisfactory, if, say, a doctor or a merchant, entering a claim for $50, knew at that time what he was going to be in for?

A. Yes, it would be of assistance to him. As it is now, when the summons

goes out to the debtor, on the summons is the amount of the claim, and in one corner, it gives the costs, exclusive of mileage, and then the bailiff, adds on the mileage, so that the debtor actually knows the amount of costs up to the time he is served with the summons, if he pays that money in court.

Q. Supposing we had a system, as has been suggested here, whereby, in claims up to $100, we had a block system, perhaps, in three jumps, or four, if you like, up to $50, $75 and $100, and in addition to that, we set up procedure for service by registered mail with a return receipt, or by the plaintiff himself if he wanted to make service himself, do you think that would be feasible?

A. I think that would have to be given considerable consideration, especially the service by registered mail. Quite frequently we have orders for substitution of service by registered mail, and the time for entering a dispute is not enlarged, and in many cases the post office returns the registered mail after a default judgment has been signed. And as far as the receipt is concerned, Mr. Arnott brought up the point that that is not conclusive of service, the signature that you get from registered mail receipt. I can give some instances in connection with that, in the case of wives dealing with stores without the knowledge of their husbands; they receive the mail while the husband is away at work, and the husband has no knowledge of it until the bailiff goes out. We have had that happen quite frequently.

MR. LEDUC: Mr. McDonagh, whenever anyone brings you a claim, you ask for a deposit of so much, which varies according to the amount involved?

WITNESS: Yes.

Q. So that the plaintiff knows pretty well, and it was my experience in Ottawa, that the amount deposited usually covered the costs; there might be a few cents returned or a few cents due.

A. Up to and including judgment.

Q. But don't you agree that a deposit of $30 for an action of from $300 to $400, which means a cost amount of approximately $13, is too high, as compared with the costs in Supreme Court, for instance, cost of recovering judgment?

A. At first blush it does seem too high, yes, but on the other hand, there is a substantial amount involved, and those are usually on notes.

Q. Exactly; you take a case in the Supreme Court of several thousands of dollars; I forget now what the actual court disbursements are, but I don't believe they are much above $13.

A. No, they are around that. In this list that Mr. Cadwell has, there is only one over $13, and I think that one is $25, but of course, there may have been several services in connection with that one, which brings the total up.

MR. STRACHAN: Mr. McDonagh, outside of Toronto, are the Division Courts self-supporting?

WITNESS: They are self-supporting in that they don't cost anything, but the inspection; but the Division Court clerk may be the butcher, or the baker.

Q. If his earnings are cut down appreciably, I suppose the loss will have to be made up by some person, or the Government?

MR. CONANT: Just a moment, they are self-supporting to this extent: nobody subsidizes the clerk or the bailiff, but they are subsidized for the expenses of the court in the municipality?

WITNESS: The municipality is required to pay them $4 for each sitting of the Division Court.

Q. Yes, where they earn less than $1,000 a year?

A. Yes.

Q. But coming back to that substitution of service, would it be feasible to set up a system of this nature, whereby you would permit of service by registered mail with a return receipt? Now in the first place, the majority of those people could be reached and would show up, would they not?

A. They would receive the papers.

Q. Yes, and most of them would show up, would they not?

A. Yes, because default judgments run about forty-five percent.

MR. LEDUC: I was going to ask you that; forty-five percent?

WITNESS: Yes.

MR. CONANT: Would it be feasible to set up this procedure; where a service has been made by registered mail, and the person does not show up, and no appearance is entered, then the plaintiff must prove his claim, and what you might call a judgment nisi would be signed, allowing, say, another fifteen days, within which time the defendant could come along, enter an appearance, or whatever you might call the document, and have the right to have his claim placed on the list. Would that not be feasible?

WITNESS: Except that you would be changing the procedure in this: that you would be depriving the plaintiff of the right of default judgment.

Q. Yes, but the plaintiff would adopt that procedure at his option.

MR. FROST: If you did that, do you think the average claimant could say ——

MR. LEDUC: "I've got fifteen days more!"

MR. FROST: Yes. "I'll just ask the bailiff to serve this and if I can collect it, why ——

MR. STRACHAN: Yes, otherwise he'd have to make two appearances in court, and our Division Courts here in Toronto are sometimes an all-day sitting.

WITNESS: It is now. We haven't Judge Morson any more!

MR. STRACHAN: And to ask the plaintiff to come up once, and then to open up again and go through the same procedure, it means two days off a man's time.

WITNESS: May I suggest this: that, in the case of service by registered mail, the time for entering a dispute be enlarged until the registration certificate has been obtained. Then, upon an order of the judge, default judgment may be signed, and you're not leaving it in the discretion of the clerk at all, but placing the responsibility on the judge. My experience with service by registered mail has not been satisfactory. And then, of course, you come to the question of service of judgment summonses by registered mail, which Mr. Norman mentioned.

MR. CONANT: But I don't think that I expressed myself clearly, perhaps. I have no intention of prefacing my remarks with the statement that registered mail service would be compulsory, or the only system of service, but if you allowed to the plaintiff that option, to adopt that practice if he wished to, or service by bailiff, or personal service, if he desired, allow the plaintiff the option of service by registered mail, with the knowledge beforehand that it would have the same subsequent effect as personal service, would it not be feasible, if he adopted that option, to allow the defendant an opportunity, after the judgment nisi, if you like to call it that, to come and defend himself, if he wants to?

WITNESS: Yes, that would be feasible, but of course, I suppose you should, as is done in divorce actions, give the defendant notice of the judgment nisi.

Q. Well, supposing that you provided also that notice of the judgment summons should, too, be sent to him by registered mail—you send out the registered notice, you send out the claim by registered mail, and the defendant doesn't show up at all, it is placed on the list, the plaintiff proves his claim, the judge delivers judgment nisi, and the defendant is advised of that by registered mail, he is advised that he has 15 days if he wants to move against his judgment, surely he has all the protection that he should have then?

A. Yes, he has the protection, but you are doing away with one of the effective steps in Division Court proceedings, and that is the quickness, the speed with which you can obtain a judgment and send your bailiff out.

Q. Oh yes, but you are overlooking the fact that this is an option that the plaintiff may or may not adopt.

A. Oh, at the plaintiff's risk?

Q. Entirely, yes. The plaintiff may say: "Now here is a gamble; I don't know whether I will ever get anything out of this claim or not, but I am going to sue, but I am going to keep my costs down." That is the way he would keep his costs down. He may say: "I don't care, I may get judgment or I may not, but I'll have it done by registered mail, because I don't know whether I'll get anything or not." There are a great many cases like that, are there not?

A. Yes.

Q. Is that not feasible?

A. Yes, it is feasible, but I have one thing in the back of my mind, dealing with the type of man that you want connected with the administration of justice, in the person of your bailiff. Bailiffs in outside Division Courts now make very little.

Q. Well, that is another problem.

A. That is the principle, I suppose.

Q. We have to struggle with that, but that doesn't affect your court so much, it affects outside courts?

A. Yes.

MR. FROST: Mr. McDonagh, have you any suggestions for reducing service costs?

WITNESS: No, I haven't, because I have had an opportunity to examine the returns of the bailiff in Toronto, that is in my own court, and they don't make very much money as it is now, because they have to employ extra help.

Q. Well, what I am coming at is this? Supposing the bailiff system is wrong; have you any alternative to suggest?

A. Supposing it was decided that the bailiff system was cumbersome, that the bailiffs were poorly paid, and that it leads to inefficiency, taking it as a whole, and actually, I think that is the case outside of Toronto, where one bailiff in every ten is efficient and the rest of them are not earning their living from bailiff work, and they are just taking a little gravy out of it—and in many cases, personal matters enter into it, and they don't want to seize on somebody because he is a friend of their wife, or something like that—the result is that we might come to the conclusion that the bailiff system was outgrown, now have you any alternative to suggest, any way that you might save money?

The only alternative would be to turn it over to the sheriff and let his deputy do it.

Q. Well, would there be any saving in costs there?

A. I don't see that there would be any saving, because the sheriff's man would have to be paid.

Q. Well, you heard that example Mr. Norman gave here a little while ago, regarding those claims that were served up around Timagami with service costs at around $37? Is there some reasonable way in which that might be overcome?

A. The only way that could be overcome would be by registered mail; your distances are so great that if you have to have a personal service, that is where your mileage costs are so great.

Q. Well, do you suppose you could send the summons to the closest county constable and let him serve it?

A. That could be done, but it cuts in on the clerk and the bailiff of that particular territorial jurisdiction.

Q. I recognize that, but the complaints are that people with small claims are paying too much money?

A. Yes, well where your mileage runs over five or six miles, your costs do seem out of proportion to the claim.

MR. MAGONE: Why should there be any mileage?

MR. FROST: This whole thing gets down to this: it isn't so much what the clerk's charges are, because, after all, I suppose the work he does for the little he gets out of those cases is quite substantial, and he takes the place of a solicitor or some one else who draws up the papers and charges; but the great difficulty in these Division Court matters arises in service costs, bailiff costs. Now is there any way of meeting that situation?

A. Not ——

Q. Now Mr. Barlow makes this suggestion: service by registered mail. Now at first glance, that seems to be a reasonable and practical suggestion. It is obvious, on consideration, that there are objections to it. Then there is the question of permitting the plaintiff to serve, and save costs. If that is objectionable, then there is this alternative, of giving the plaintiff the summons, and letting him have it served, and letting him produce an affidavit of service from someone who has properly served it.

MR. CONANT: Just as an ordinary writ.

WITNESS: Yes, just as an ordinary bill, tax bill, you can only tax the cost of service if it is served; you can't tax it otherwise.

MR. FROST: Would it assist you if you had that provision in Division Court?

WITNESS: Well, on a general rule, it might reduce the actual disbursements the litigant has to make, but it affects that principle.

MR. CONANT: Oh yes, but this becomes apparent, I think, to us, when we look over this, that under our present system, we are trying to keep alive officials by subsidizing them at the expense of the public, isn't that right?

MR. FROST: Absolutely.

MR. CONANT: Isn't that it, gentlemen?

MR. ARNOTT: Yes, I think so.

MR. FROST: Mr. McDonagh, I am not familiar with your situation in

Toronto, but take for instance, in some of the counties, particularly the larger ones, you have there, say, a dozen Division Courts; in some of those Division Courts there are very few cases in the course of a year?

WITNESS: Yes.

Q. The municipality bears the cost of the Division Court, and perhaps the municipality wants it because it's a public service to the community, even though there is little business done there; the clerk and the bailiff, they make a little bit of gravy out of it in addition to their other occupations—most of them have other occupations, and this is just a sideline.

A. Yes.

Q. Now, it becomes necessary to serve a summons in a territory of that kind, and this one bailiff who has to do it, he may live thirty miles from the man who is served; the result is service costs are out of proportion altogether. Now, is there not some method by which the plaintiff could be given the privilege of serving that summons in the same way that he does in the Supreme Court, or County Court, and make the service himself, or get a neighbour to do it, or the local policeman, and so save himself a lot of money?

A. Outside of the larger centres, I think that could be worked out. In the cities, I regret to say this, we are dealing with many people who haven't the knowledge of value, and I would hesitate very much, sitting as judge on some of the affidavits that are filed in service in this city.

Q. Well, of course, that is a very serious matter. They leave themselves open to severe punishment.

Committee rises for lunch recess.

AFTERNOON SESSION

HIS HONOUR JUDGE T. HERBERT BARTON, of the County of York.

MR. MAGONE: Judge Barton, you are one of the county judges of the County of York?

WITNESS: Yes.

Q. And you have been on the bench for how long?

A. Six years.

Q. In that time, you have taken a number of Division Courts?

A. Oh yes, thousands of them.

Q. Have you read the recommendations of Mr. Barlow, on page 33 of his report?

A. Yes.

Q. And in connection with those recommendations, can you say whether you agree or not with them?

A. Well, I decidedly do not agree with all of them.

Q. Dealing, then, with the first one, in connection with the consolidation of the Division Court, the County Court?

A. Well, I think that would be a great mistake, for the simple reason that if, as Mr. Barlow suggests, the cases over $100 were tried in County Court, it would mean the appointment of two or three more judges in the County of York, anyway, for this reason, that on a case being tried in County Court, the lawyers take their time, and it might last possibly a day or a day and a half; last week, I had a $216 claim suit in the County Court, and it took a day and a half. I mentioned to counsel in the case, that had we been in Division Court the case would have been through in an hour or an hour and a half at the outside. It means we would have to have seventy-five more cases a month put on the County Court list, and our list now runs about fifty to sixty cases a month, and we would have seventy-five more cases a month, so that you can see we would need one or two more judges to try them. And we are sitting continually every month in County Court non-jury, and we have fifty to sixty cases.

Then, as far as the small claims are concerned, I don't think they should go to County Court either. I think the Division Court Act should be left as it is, but claims under $100 should be—well, of course, there is no appeal on cases of $100, but I think the fees should be smaller; the fees are much to large in small cases. Last week I had a man before me on an attachment order, and the claim was $5 and the costs were $13.50.

MR. CONANT: What's that?

WITNESS: The claim was $5, the judgment against him was on a claim of $5, and the costs, up to last week, were $13.50.

MR. FROST: How would that be?

WITNESS: The cost of judgment would be two or three dollars, and then he had been up on a judgment summons, which would be perhaps five or six dollars more, and then there had been a garnishee, or something of that kind, an attaching order, which still runs the cost up; so in the end it came to $13.50 in addition to bailiff's fees, and bailiff's fees on realizing execution, if he could realize.

MR. MAGONE: Judge, before getting into the question of fees, and we will deal with that quite extensively later, would you have the same objection to cutting down the jurisdiction of the Division Court to claims of $100, and making it purely a small claims court?

WITNESS: Well, then the cases over $100 would go into County Court.

Q. You have the same criticism to offer?

A. Yes, for this reason; a man may sue for $110; you'd have to have statement of claim, defence, and pleading, and then there would be examination for discovery, and so on, and it wouldn't work; the costs would be so high it wouldn't work. I don't see any objection to leaving it just the way it is now, with the exception of lessening costs of less than $100.

MR. CONANT: In that connection, would you favour a block system in claims under $100?

WITNESS: Yes.

Q. On a graduating scale?

A. Yes.

Q. So much for $50, so much for $75, and so on?

A. Yes, I think Mr. Barlow had the right idea when he suggested the block scale; in cases up to $50, the fees would be $2—that is a little low; and in cases up to $100, $3—that's too low. But I think it should be on the boxed scale.

For instance, you have a case in Division Court, which is being defended, and for some reason or another, the parties can't go on; one week one man wants an adjournment, next week another man wants an adjournment, and for each adjournment it costs 50c. or 75c. On small claims, that is awfully high.

We are getting along awfully well the way we are. The cases are being tried quite properly, I think, and as far as the cases over $100 are concerned, we have the increased jurisdiction; we sit on Tuesdays, in Toronto, for small claims and anything under $100.

Q. They are all on one list?

A. One day, yes. Then on Wednesdays, we have cases over $100, increased jurisdiction cases, and there is a reporter that takes down the evidence, because they are appealable. Then on Thursday, all damage actions—there are quite a number of actions for damages, as the result of automobile accidents, and it is working out very well. We are sitting all the time, but we are getting through. We are not there after four or five o'clock in the afternoon.

Q. Well, I think this Committee, Your Honour, is concerned with simplifying and making the procedure as inexpensive and as simple as possible.

A. Well, it can't be any simpler than it is.

Q. Now for small claims, say up to $100, if we had the block system of fees, you would have certain fees; can you suggest any way in which we can minimize the costs of service of process?

A. Well, there have been some suggestions they should be served by registered mail. I think that would be a good idea, if you can get a receipt for the registered letter.

MR. MAGONE: Would you not require some evidence of signature in those cases?

WITNESS: Well, when you get the receipt, it has the man's name on it, and we assume that he gets it. I am issuing orders every day for substitution of service, if the bailiff can't get out.

MR. CONANT: By mail?

WITNESS: Yes.

Q. What is your experience with that?

A. Never have any trouble; never had any trouble at all. The man usually gets it right off the bat.

MR. MAGONE: Of course, if a man appears and defends it there couldn't be any objection.

WITNESS: No.

Q. It's only in cases of default judgment.

A. Even now, in actions up to $30, they serve by leaving it at the premises; they don't have to serve the person.

Q. Have there been objections to that?

A. No.

Q. If there is an objection after default judgment, the judge has power to ——

A. They can always move to have the judgment set aside.

Q. Is that often done?

A. Yes, quite often. Well, when I say quite often, I mean once a month or so.

Q. Well then, the principle objection you have is with respect to fees?

A. That's about the only thing.

Q. About the only thing.

A. And those fees could be minimized in this way; at the present time, a plaintiff could come along and issue a judgment summons; I think we should only have one judgment summons; if that is not obeyed ——

MR. CONANT: What do you mean, on one claim?

WITNESS: Yes. They have what they call a judgment summons; then if that is not obeyed, they issue what they call a show cause summons, for which there is no authority under the Act.

Q. Well then, what would you substitute for that?

A. Just have the one summons, one judgment summons, and then if it is not obeyed, have an application to the judge to commit the man for disobeying the order.

MR. MAGONE: If there is no provision for show cause in the Act, there is no provision for the fee?

WITNESS: It has always been chargeable, and that has been in vogue for about seventy years, I believe.

Q. Yes, I know it has been the practice.

A. Yes.

Q. Your idea coincides with that of Judge Morson.

MR. FROST: It is just like the thing we found this morning, in connection with that jury fee being paid into the municipalities; the municipalities don't apply it to the cost of the juries, but they use it for buying books, and so on.

WITNESS: I want to say something about that, too, if I may.

MR. CONANT: Well, then, we get it down to this, Your Honour; your view is, I take it, that the work, the procedure might be simplified, the costs decreased by dealing with claims below $100 in a specific category, by means of block fees ——

WITNESS: Yes.

Q. —— and by means of allowing service other than by the bailiff?

A. Yes.

Q. We discussed registered mail; what would you say to allowing the plaintiff himself to serve the process?

A. I am afraid that would be abused, because a great number of the plaintiffs are foreigners, and I think they would swear they served it, whereas they may not have.

Q. Well, outside of Toronto, then?

A. Well, that may work outside.

MR. FROST: Well, Your Honour, you have raised the point about service by registered mail, and I understood you to say that first of all, in connection with substitutional services made by registered mail, that you had no difficulty?

WITNESS: We have no difficulty.

Q. That has been found to work reasonably well, and furthermore, you have found that summonses which apply to claims of less than $30, where they are left at the residence of the person served, that you have found that satisfactory?

A. Yes.

Q. One of the witnesses here this morning raised this point: he said that he was afraid of service by registered mail, for the reason that there is always the possibility that that letter isn't handed to the person who it is intended to receive it, and he raises this point, that sometimes wives, for instance, run up bills ——

A. Yes.

Q. —— and they get the registered letter and don't turn it over to the old man. Now, do you think there is sufficient importance in that to justify throwing aside this suggestion of service by registered mail altogether?

A. I don't think so, for the reason that they can all move to set aside the judgment; and if the money is owing, and the wife knows it is owing, he should have judgment against her for the amount.

Q. You mean it's a question of equity and good conscience?

A. Yes, after all, the goods are goods the wife bought for the house, usually, and the husband is liable for it.

MR. MAGONE: Judge, that brings us to the question of the bailiff.

MR. CONANT: Just before leaving that, supposing we were to adopt this practice, briefly, allowing service by registered mail, with the receipt to be receipted and returned ——

A. Yes.

Q. And that, where the case was not defended, or where no one showed up, requiring proof of the claim, and then a notice to be sent to the defendant, to the effect that final judgment will be decided against him in this claim unless he intervenes within fifteen days, or something like that. Would that not cure it?

A. Yes, that would cure any defect; I should say that would be all right, or even if judgment has been signed, send him a notice to the effect that judgment has been signed against him for so much.

Q. Yes, and if he wants to move to set it aside ——

A. Yes, to come in within twenty or fifteen days.

Q. Yes, the form of it is not important now.

MR. FROST: Just a moment, on that point, what would you think of allowing the plaintiff, at his option, to serve the summons himself, subject, of course, to proof of service?

WITNESS: The Attorney-General just spoke about that a moment ago. I say it's all right, but proof ——

MR. CONANT: He said it was all right excepting in Toronto.

WITNESS: We have so many foreigners here who sue these claims themselves, and I doubt if, in every case, some of them would be served; they may put it in their pocket and then come back swearing they served it.

MR. CONANT: Yes, but Your Honour, we must take this into consideration: the same thing is possible in County Court actions and Supreme Court actions; they may be served by anybody.

WITNESS: Oh yes, that's true. Well, we have never had any trouble.

MR. FROST: Of course, on the other hand, your bailiff costs here in the city are not the serious matter that they are outside, in the province.

WITNESS: No, we haven't the mileage.

Q. I was just talking to Mr. McDonagh at noon, and their territory here is comparatively small, and therefore the huge mileage that piles up on services involving thirty or forty miles does not arise.

MR. MAGONE: That brings us, judge, to the question of the bailiff. If you provided for service by registered mail, his fees would be substantially reduced?

WITNESS: Oh yes, they would.

Q. And in the courts throughout the province, his income would practically vanish?

A. Yes, and I think it likely would in Toronto, to a great extent.

Q. Yes. Well now, would there be any objection to sending your process from the Division Court, to the sheriff?

A. Then how would the sheriff be paid?

Q. The sheriff would be paid under the fees of his office.

A. Yes, it would be paid by the plaintiff.

Q. In the same way.

A. In the same way. Well, that would still keep the costs up.

Q. Well, that would be costs after judgment.

A. Yes, costs after judgment.

Q. Yes, but my question was directed to this: that the fees of a bailiff for costs after judgment, would not justify an officer like the bailiff ——

A. Oh no, I see what you mean.

Q. —— continuing in office.

A. Yes, I see what you mean. You mean send the execution to the sheriff.

Q. Yes.

A. Oh yes, you might do that.

Q. And the sheriff could appoint agents, if necessary.

A. Oh, yes.

Q. Or deputies, throughout the county.

A. Yes.

Q. Is there any objection to that?

A. Well, except from the bailiffs' point of view, there might be; I don't think so, otherwise.

MR. CONANT: Your Honour, with all deference, I suppose your experience has been mostly in the city of Toronto?

WITNESS: Oh yes, and the County of York; we go up, about five or six months in the year, we go out as far as Sutton.

Q. But the difficulty in meeting the bailiff situation in the rural districts, perhaps, has not come within your experience?

A. No.

MR. MAGONE: We have heard something, judge, about the difficulty of realizing on judgment in Division Court, and the suggestion has been that it is, possibly, in a large number of cases, due to the inefficiency of the bailiff.

WITNESS: Well, I don't know about that.

Q. Have any applications been made to you, under the Act, because of the failure of the bailiff to realize?

A. No, none.

Q. This provision is in the Act?

A. Yes. Well, I hadn't heard of any. I thought they might write the Division Courts inspector.

Q. Well, we might have some complaints from him. Then we dealt with the matter of judgment summons.

A. Well, I think there are too many judgment summonses issued altogether. Last year, in Toronto alone, there were 837 judgment summonses issued.

MR. CONANT: For what period?

WITNESS: For one year, 1939, there were 837 judgment summonses issued. That is one Division Court.

MR. MAGONE: Then, judge, if the execution were issued and placed in the hands of the sheriff, then the provisions of the Creditors' Relief Act would apply to the Division Court judgments?

WITNESS: Yes.

Q. Would there be any objection to that?

A. There might be, because some of these small tradesmen have claims there for $25 or $30 against a man who may have a large number of judgments against him, and the bailiff can pretty often get that out of him without making a seizure.

Q. Yes. You think then, that some amendment should be made to provide for Division Court judgments?

A. You mean the Creditors' Relief Act?

Q. Yes, under the Creditors' Relief Act.

A. I should think so, because the amounts are all small; there could be an amendment as far as small claims are concerned.

Q. Yes.

MR. CONANT: I didn't get that clearly this morning, Mr. Magone; under the Division Court Act, in executions, it's the early bird that gets the worm, is it?

MR. MAGONE: Yes.

MR. CONANT: If he makes a seizure under a Division Court judgment, he can go on to a sale and get his money, while the other fellows look on as they like, is that it?

MR. MAGONE: Yes.

MR. CONANT: In the other courts, it is divided up?

MR. MAGONE: Yes, the sheriff must hold the money in his hands for thirty days, and must do certain things, and other creditors, even though they are not judgment creditors, have a chance to come in.

MR. CONANT: You think the present practice in Division Court is proper?

WITNESS: I think so, yes.

Q. Why?

A. Except on larger claims, of four or five hundred dollars; I think that should go into the sheriff's hands.

Q. Why is it proper in the Division Courts, when it is so contrary to the practice of other courts?

A. Well, you get a small grocer, who is keeping these people from starving, and they run up a bill, and he gets a judgment for $25 or $30, I think that should be paid.

MR. FROST: You think it would have the effect of cluttering up the courts with these small cases, if these small cases were placed in the sheriff's hands?

WITNESS: Oh yes.

Q. But you think there might be some provision for the larger claims?

A. Yes, they might go to the sheriff. But there have never been any complaints about the present workings, as far as I know.

MR. MAGONE: This report suggests the Creditors' Relief Act may be made to apply to Division Court judgments.

WITNESS: Yes, exactly.

Q. Then, have you ever used the provisions in section 157 of the Act, with respect to arbitration, judge? There is a provision there that on the application of the parties, the judge may refer the matter to arbitration.

A. No, I have never had one of those. I think they could do that even without these provisions.

Q. I think probably they could, under the arbitration ——

A. You see, this Act seems quite long; the first fifty sections of it deal with the duties of the court, formation of the court, and the bailiff, etc.; the Act could not be shortened very much there. It really is not very complicated.

MR. MAGONE: The operating sections of the Act are not long?

WITNESS: Oh no, they are not long.

Q. And the special procedure sections in the Act take up a good deal of space, such as interpleader, I think?

A. Yes.

MR. CONANT: What about the jurisdiction sections, from 53 on, would you say they are perfectly simple?

WITNESS: Yes, I think so. We don't seem to have much trouble.

MR. MAGONE: Then, with respect to juries.

WITNESS: Oh yes.

Q. What would you say with respect to juries in Division Courts?

A. I would certainly abolish the juries in Division Courts.

Q. In all cases?

A. Yes.

MR. FROST: Yes, you were going to mention something about the juries, judge.

WITNESS: I find that last year, we had four jury trials in Toronto.

MR. CONANT: Four jury trials?

WITNESS: Yes, at a cost of $583.28.

Q. That is the cost of the jurors?

A. The jurors were paid $75, and the jury fees paid to the county treasurer were $508.28.

Q. For four juries?

A. Yes.

Q. What was the amount involved?

A. Not more than $50 each, with only one or two cases in each jury.

MR. FROST: Actually, the amount paid to the juries was much less than the juries' fees?

A. Yes, the jury was paid $75 and the jury fees paid to the county treasurer were $508.28. Of course, if there were no juries in the Division Courts, there shouldn't be any fees paid to the county treasurer.

Q. The county treasurer made a substantial net profit on that section, apparently?

A. Yes.

MR. CONANT: From whom?

MR. FROST: Well, you see, under section 138, or 137 rather, there is an assessment made on every case in Division Court, whether there is a jury or not.

WITNESS: Yes.

Q. And that accumulation, of all those, amounted to nearly six hundred dollars in this last year, and of that you say only $75 was paid out to the juries?

A. $75 was paid out to the juries.

Q. With the result that the rest of it goes into what is known as the jury fund?

MR. CONANT: Yes. Would you abolish juries, Your Honour, in the increased jurisdiction cases?

WITNESS: Yes, I would.

Q. In the whole set-up?

A. Yes; there are so few of them, what is the use of having the juries? And most of these jury cases are usually automobile accident cases, which we can try as well as a jury.

Q. Supposing we didn't go quite that far? Supposing we were to apply, to our Division Courts, at any rate, the practice they have in Quebec and England, and many other jurisdictions, that in no case shall a case be tried by a jury unless by an order of the judge; how would that be?

A. That would be all right.

Q. You think that would meet it?

A. But then, you would still have all these juries fees to pay to the county treasurer, wouldn't you?

Q. Yes, you would be maintaining the skeleton.

A. Yes.

MR. FROST: And it is expensive.

WITNESS: I would abolish it entirely for this reason: any large case over $120 is not a damage action case, and it is not usually a jury case anyway; it would be a case in which a question of law would be involved; you can only issue up to $120 in damage actions in jury cases, but our Act applies to all cases. You can have a jury in any case; if a man gives you a promissory note for $300, and you sue on that, he can delay that case for three months by applying for a jury. I have had that done to me more than once when I was practicing.

MR. MAGONE: Then, judge, what has been your experience with respect to applications for a new trial?

WITNESS: Well, it's rather unsatisfactory, the way it works out at the present time; quite a number of applications are made, and they are filed with the clerk, and then they are left there until some of the solicitors come along and bring them before the judge. Well, there ought to be some other way of doing it; they ought to make their application direct to the judge, instead of filing them in the court, or else file it in the court and appear before the judge on a certain day, the day named in their application. They don't do that any more, they just put the paper on file, and the clerk brings them down.

Q. And that causes delay, too?

A. Oh yes, a great deal.

Q. Then with respect to subsection (3) of section 116?

A. Oh yes.

Q. That has been mentioned here, with respect to application made for a new trial within fourteen days.

A. Yes.

Q. Or where the summons has not been personally served.

A. Well, you see, subsection (2) says:

> "If reasonable excuse for the delay is shown to the satisfaction of the judge, the application may be made at any time within fourteen days after the expiration of the first mentioned fourteen days."

Well, then, subsection (3) says:

> "Where the summons has not been personally served, the application may be made at any time within fourteen days after the judgment has come to the knowledge of the defendant."

I think that should be struck out, because that must apply to a default judgment, otherwise, the man would know all about it. And if it doesn't apply to a default judgment, then he wants to set aside the judgment, so it wouldn't be a new trial he is asking for.

Q. Well, if it were a case of a judgment after hearing, it would come under subsection (1)?

A. Yes.

Q. That is whether it had been personally served or not?

A. Yes, of course.

MR. CONANT: Well, have you any other suggestions to offer us, Your Honour, other than what I tried to crystallize a moment ago, as to how to simplify and make less expensive the functions and the privileges of the Division Court?

WITNESS: Well, not to simplify it, but I would say to reduce the fees; that's about the only thing I can suggest, because the matter is very simple now. The layman can go to a Division Court and say: "I want to sue so-and-so for wages." He doesn't even have to prepare particulars for his claim; the clerk does that for him. It's very simple. He pays the summons cost of four or five dollars, and the summons is issued, and served. You couldn't have anything simpler.

MR. MAGONE: Your suggestion really amounts to this: that the block tariff, which is now fixed to claims under $10, be carried along farther, and right up?

WITNESS: Yes.

MR. MAGONE: It has not been mentioned before, Mr. Chairman, but there is a block system with respect to claims under $10.

MR. CONANT: Then you add to that your comment regarding means of service, other than by the bailiff?

WITNESS: Oh yes, I think service by registered mail, with a return receipt, should be quite sufficient.

MR. MAGONE: Judge, can you tell us why the cost of a judgment summons is so high, usually about $5 or so?

WITNESS: Usually six.

Q. Usually six dollars?

A. I don't know why it is so high. Mr. McDonagh might be able to tell you that. It is altogether too high, anyway.

MR. CONANT: Is that graded according to the amount, the cost of judgment summons?

MR. SILK: It's usually around six dollars.

MR. CONANT: Is it graded according to the amount involved?

MR. MCDONAGH: Yes, it is, and the costs are sometimes raised, due to the fact that you have to pay a debtor, say, $1.50 conduct money to attend the hearing.

MR. MAGONE: Are the present provisions with respect to appeal satisfactory in the extended jurisdiction court?

WITNESS: Oh yes, quite.

Q. You have no suggestion to make as to an alternative procedure?

A. No, there is no defect at all that I know of.

Q. I see. Or as to counsel fee?

A. Well, I think they are all right, with the counsel fee in cases over $100; we don't always grant it, but very often do, though not more than $10 or $15.

MR. FROST: What is your view, judge, in connection with this Division Court procedure, and the judgment summons procedure? I mean, what is your view of the fairness of it? It was brought out here this morning, that in County Court, and in Supreme Court, a man may have a judgment against him for $5,000, and $5,000,000, and ——

A. Yes, you can't put him in gaol.

Q. No, he is examined as to his assets, and examined under oath and that ends it. In Division Court, a poor man may have a judgment of $50 against him, and he is brought up in Division Court and an order is made, and if he doesn't pay a certain amount of money within a certain time, he goes to gaol. I think it is entirely wrong.

MR. CONANT: Which one is wrong?

WITNESS: Any judgment summons—I mean a committal order to send a man to gaol for not obeying an order on a judgment summons.

Q. But deal first with the order to pay.

A. Oh, that is all right, but if he doesn't pay, then I would move before the judge to commit him for contempt, that's what I would do, instead of the present practice. But I think that is wrong, too, I don't think a man should be committed for contempt for not paying.

Q. Well, how would you end it up?

A. You can't end it up, as far as I can see; they always have another step, and they always exercise it, and that is attaching the poor beggar's salary. We are signing, I think, a dozen attaching orders a day up there.

MR. FROST: I often question, myself, the grounds of our law as it stands at the present time, of sending a man to gaol for debt, anyway.

WITNESS: Yes, it doesn't seem right.

Q. It does seem to be a hang-over from the middle ages.

A. That's right. Twenty-one were committed last year.

MR. CONANT: Did they go to gaol?

WITNESS: They did go to gaol, but I let them out after a day or so.

MR. CONANT: We have an anomalous situation here, Your Honour; there

are apparently submissions here, that in our Division Court, the poor man's court, we have the rather elaborate and certainly drastic procedure of judgment summonses and committals.

A. Yes.

Q. And when you get out of the Division Court, into County and Supreme Court, there is nothing of that nature at all.

A. No, and you can't do a thing.

Q. A man may have an income of $10,000 a year, you can examine him as to that income, and that's as far as you can go?

A. Yes.

Q. The court doesn't make an order, or anything else. Which is right, or which is wrong?

A. I think the Division Court one is wrong.

Q. You think there should be no order?

A. Well, you might want the examination, but if you find the man has any assets, put the bailiff in, and seize these assets.

Q. You don't think there should be any judgment summons?

A. I think not.

Q. You would abolish all judgment summonses?

A. Yes, because they have a remedy by an attaching order, under section 114.

Q. So you would put the poor man on the same basis as the ——

A. I think so.

Q. —— as what you might call the rich man?

A. Yes.

MR. FROST: I must submit, I can't see what on a small claim a man should be subjected to imprisonment, and then have a totally different system, with no imprisonment, in connection with a larger claim.

WITNESS: No, I don't either.

MR. MAGONE: Are there many applications made to you for attaching orders? I am dealing with the attaching after a person's committal to jail, in which the claim is paid after the order is issued.

A. Oh, yes.

Q. I mean, doesn't it have the result of an effective remedy?

A. Yes, it is. I had a man in my office last year, and I knew the man could pay if he wanted to; well, I said: "You go down to gaol for ten days." He looked at me, and he said: "You don't mean that?" I said: "Of course I mean it." Well, he put his hand in his pocket and paid for the whole thing.

MR. CONANT: Yes, that's the other side of the picture.

WITNESS: Yes, but that happens very seldom.

MR. FROST: One in a thousand.

WITNESS: Yes.

MR. MAGONE: Is that not a matter for the discretion of the judge?

WITNESS: Well, if you abolish judgment summonses, there won't be any discretion.

Q. Well, my question is directed to, shouldn't there be?

MR. LEDUC: Mr. Magone, might I ask if this procedure of judgment summonses exists in any other province?

MR. MAGONE: Well, in some of the other provinces, the procedure is by way of summary conviction, and the provisions of the Summary Convictions Act.

MR. LEDUC: For the ordinary summons debt?

MR. MAGONE: Yes.

WITNESS: I thought they had the Lacombe law in Quebec.

MR. MAGONE: Yes, they have it there.

MR. LEDUC: The judge mentions the Lacombe Act.

MR. MAGONE: Yes, in Quebec; but not in the other provinces. In some of them they have a similar Act. In one of the other provinces, you may even get process by which a debtor may be arrested before a summons is issued for debts under $100.

WITNESS: Yes.

MR. LEDUC: Judge, you mentioned the Lacombe Law; are you familiar with it?

WITNESS: No, I am not. I was just told about it. I don't know very much about it.

MR. MAGONE: Well then, judge, I suppose it comes down to this, does it not, that if the judge exercises a reasonable discretion, there will be no abuse?

WITNESS: In what way?

Q. With respect to committals to gaol.

A. Oh, yes, there would be no abuse, but that system of issuing a second judgment summons, called a show-cause judgment summons, if a man does not appear, we have no alternative but to issue a committal.

MR. LEDUC: And you can go on issuing them forever, a third, and so on?

WITNESS: Yes.

MR. MAGONE: You say you have no alternative but to issue a committal?

WITNESS: What else can we do, if a man doesn't appear when he is served.

Q. Well, that is a committal for contempt of the order, or for not appearing?

A. Yes, it is, but why should he be committed for that? I mean, without being heard. There shouldn't be a motion to commit him for contempt.

Q. Well, is that not exactly on the same basis as the Supreme Court, if there is no attendance on the direction of the Court?

A. No, then ——

Q. They move for an attachment.

A. Yes, well that's what I say; they move, but here they get the order for committal without any motion. The man doesn't appear, you see, in answer to his summons, and they get the order for committal right there, instead of moving for it.

MR. CONANT: The examination is turned into a motion?

WITNESS: Yes.

MR. MAGONE: Moving for it would involve extra expense, I suppose?

WITNESS: Yes, I suppose it would.

MR. LEDUC: Yes, but after all, when you are dealing with the liberties of a subject, what are a few dollars more or less.

MR. MAGONE: Yes, but Mr. Leduc, I am getting back to that point, it rests with the discretion of the judge; and in the one case it is within the discretion of the Supreme Court judge, and in the other within the discretion of the Division Court judge. In one case he is brought up on a motion, and in the other on a summons.

WITNESS: Yes, without any motion.

Q. Yes.

A. But you see, in the Supreme Court, if he gets a subpoena to appear, say, on an examination for discovery, I can't issue a committal order for him right there, they have to make an application to the judge to get a committal order.

MR. CONANT: Judge, if you were to abolish all this procedure of judgment summonses, would it interfere substantially with the effectiveness of the court in collecting.

WITNESS: Yes, it might.

Q. It would.

A. Of course, I think it would be a good idea to retain the judgment summons provisions in claims over, say $50, or $100. Because those claims are large enough to warrant the plaintiff examining and looking to see what the man has, but on these little claims, these grocers' accounts, those are where they hold the club over the poor chap's head.

MR. FROST: Well, after all, the fear of possible imprisonment is a tremendous thing, for some people, is it not?

WITNESS: Oh, yes; they would go out and borrow the money rather than do that. Then they would have to pay that.

Q. Yes, it is oftentimes just a matter of robbing Peter to pay Paul, and giving Mr. Smith enough money to keep him out of gaol?

A. Yes.

MR. CONANT: You would retain the judgment summons for cases over $100?

WITNESS: I think it would be all right to retain it for cases over $50.

Q. And abolish it in other cases, under $50?

A. Yes.

Q. Let the small fish go?

A. I think so, just have the one judgment summons, not have any more than one, for after all, if you once have an examination, you know what the man has, and know if he is able to pay.

MR. LEDUC: You wouldn't abolish the examination?

WITNESS: Oh, no, that is the judgment summons, that I would abolish, in cases under $50.

Q. You would?

A. Yes, I think so, because they can always attach a man's salary under section 141.

MR. CONANT: Subject to all the exemptions there?

WITNESS: Yes, exactly.

MR. LEDUC: The man may not have a salary, but he may have a small income from investment, and yet not think it worth while to pay his grocer?

A. Yes, but that is the other side of it.

Q. Yes.

MR. CONANT: If you are going to retain it in the larger cases in the Division Court, do you think it should be extended to the County Court and Supreme Court?

WITNESS: Well, of course, we have the examination for judgment debtors.

Q. I know, but nothing results from that.

A. No.

Q. Other than literature or information, perhaps.

MR. LEDUC: Or else assimilate the examination in the Division Courts to what it is in the County and Supreme Court?

WITNESS: But we can't make an order in the County Court, for payment by summons.

Q. I know.

A. Well, the Attorney-General means to extend that to the County Court, and Supreme Court, the payment by summons.

Q. Yes, extend it so that in the County Court or Supreme Court a person could be examined and the judge could order him, for instance, to pay $25 a month.

A. Yes; I don't see why he shouldn't.

Q. And make an order to that effect.

A. I think that is a good solution.

Q. And yet, if a man doesn't pay, commit him, is that the idea?

A. That is the other side of it. That is getting back to imprisonment for debt.

Q. Exactly.

MR. FROST: Of course, that is just exactly what we have in Division Court. We have imprisonment for debt.

WITNESS: Yes, that's what you have.

MR. MAGONE: Are you in favour of the present system of garnishee, in which an order must be obtained every week, or every month?

WITNESS: Well, I don't know, the interpretation of garnishment proceedings by Mr. Justice Riddel is, the money has to be actually owing, not only when the garnishee summons is served, but the day it is issued; that is that Bridge-Hart, page 66, Ontario Lower Courts, and he said, after all, if the debtor can't sue for the money, why can a debtor's creditor, and of course, there is something in that. Well, that means that, if a man is being paid on Saturday morning, the creditor can't get an attaching order until Saturday morning. Then, when he goes to serve it it's too late.

Q. Well, we are coming back to the Lacombe law; I think the provision of that is, you may serve the employer with a notice, and as long as the employee is in his service, he must pay.

A. So much a month?

Q. So much a month or a week.

A. Yes, well, I think that's a good idea.

MR. LEDUC: Well, that's the general law in Quebec; it simply attaches the salary even though not due.

WITNESS: Well, of course, they cannot here, although the wording of the Act says, "due or accruing due," but that is not the interpretation Mr. Justice Riddell placed on it.

MR. FROST: Do you think that is a fair proposition? If a man is brought up before you on a judgment summons, and it appears he is getting a certain salary, do you think it reasonable that you should issue an order that his employer should pay in $5 a week, or $5 a month into the court, or whatever you find, and have just one summons, and one set of costs governing the whole thing?

WITNESS: Yes, I think that would be feasible, and very reasonable, too.

Q. On the other hand, do you think this: that is, to say to some man that comes up before you, now you are a big, able-bodied man, and I think that you are capable of earning $5 a month to pay on this claim, and if you don't do it, I am going to send you to gaol; you don't think that is right?

A. No.

Q. Well, I agree with that.

MR. ARNOTT: Don't you think there, if you tried to make the employer a collection agency, that the result would be that the man would lose his job?

MR. LEDUC: Oh, no, I think it is the opposite.

WITNESS: No, that procedure is adopted in some of the large places in Toronto, the Tip-Top Tailors, and one of the Government's own Commissions, the Hydro-Electric Power Commission, will take these attachment orders. I have given some against some of their employees, and I have said to the lawyers, these are no good, they are against the Government, and they said the Hydro-Electric Power Commission have some system of paying so much a week.

MR. LEDUC: I think there is more danger of the man being fired if his salary is attached every pay day.

WITNESS: Yes, it gets to be a nuisance that way.

Q. Yes.

A. Some firms used to have a rule that after two garnishees the man would be discharged, but I think they have sort of slackened up on that a bit now.

MR. MAGONE: Judge, some suggestion has been made here, that we have in the Division Court what amounts to imprisonment for debt. The judges of the Division Court have no power to imprison for not paying the debt?

WITNESS: Well, that is practically what it is. What they are really imprisoned for is contempt of the court in disobeying the judge's order.

Q. Well now, supposing you issued your judgment summons, and you hold your examination, and an order is made; then there is a show cause summons issued?

A. Yes.

Q. If the defendant appears in answer to the show cause summons; has the judge then power to commit him?

A. Well, what we do, we commit him for ten days ——

Q. Well, what I am getting at is this: have you power to commit him when he appears in answer to the show cause summons?

A. I don't know where we get it, but we always do. I have raised the point several times to the late Inspector of Legal Offices. I think Mr. Denison looked into it and he said, "this has been in force about seventy years, I think we had better continue it." But there is no provision for it.

MR. CONANT: Oh, yes, anything that has been in force for seventy years is the law, and customs, and the constitution enter into it there.

MR. MAGONE: It gets back to what Mr. Frost was suggesting, that it is for contempt of court in not obeying the order of the court to pay so much a month.

WITNESS: Yes.

MR. FROST: Of course, it amounts to the same thing, in effect; the power that the court has, of ordering imprisonment for non-payment, is really held over the heads of these people, and the result is that they go out and beg, borrow or steal the money.

WITNESS: Yes.

Q. In order to pay it on this particular debt.

A. Yes.

MR. CONANT: Yes, but haven't we got a very fundamental problem there, which is this: unless you have that threat in the background—when you bring a man up on a judgment summons, he is examined as to his earnings, and if he hasn't any earnings, you don't make any order?

WITNESS: Oh, no.

Q. Now then, if there is nothing further the man, by lying under a palm tree and fanning himself, escapes payment of the debt?

A. Yes.

MR. FROST: On the other hand, I say this: if you recognize that principle, then I think you should extend it to the big fellow.

MR. CONANT: I agree with that.

MR. FROST: The man who owes $5,000, say; and if you don't apply it to the big fellow, then it should be abolished.

MR. CONANT: I am not advertising it at the moment, but I think it should be uniform.

MR. FROST: Personally, I think it should be abolished; it is imprisonment for debt, directly or indirectly; it is a relic of the dark ages, and ought to be done away with.

WITNESS: That was my idea.

MR. MAGONE: Is the difficulty not this, with respect to Supreme Court and County Court Acts, that if you get a substantial judgment over a man in the Supreme Court, you've got a hold on him for the rest of his life, which is not true in Division Court?

MR. LEDUC: It's twenty years in Division Court, isn't it?

MR. MAGONE: Yes, then if he starts to pay, each time he pays you've got a fresh starting date. Take a man owing $10,000; in a judgment in Supreme Court, if he were ordered to pay $25 a month—well, I haven't figured it out, but it would probably keep him busy for fifty years.

MR. ARNOTT: It probably would be better to abolish it absolutely, and it would resolve itself in bringing before the public just what the situation is, and there would be no credit given at all; it would be all cash and carry.

MR. LEDUC: But I think it goes further than that; he can be examined as to his means, and also if there is any money owing to him, of course.

WITNESS: Oh yes, it includes everything; if he has any bank account, mortgages, or anything.

Q. Yes.

MR. CONANT: The size of his family, and everything; he will tell you who has been sick, and who has been in the hospital, and so on.

WITNESS: Yes.

MR. CONANT: Supposing we go into the consolidation of courts now, Mr. Magone?

MR. FROST: Just before you go into that; you handled, last year, I suppose, hundreds of judgment summonses?

WITNESS: Yes, about a hundred a month; about a thousand altogether.

Q. Well, what proportion of those judgment summonses did you find absolutely hopeless, and out of which you couldn't make anything?

A. Not more than 25%.

Q. You find that roughly a quarter of them are ——

A. Absolutely hopeless; the others obey the order; whether they can make the money or not, I don't know. Some, after examination, we just have to dismiss them. But very often the debtor himself will say: "Well, I'll start to pay so much on such and such a date," and we make an order for him to commence to pay on that date. And I don't think he pays, half of the time. Then they issue a show cause summons, another six dollars.

MR. CONANT: Having made the order, you have done your duty?

WITNESS: Yes.

MR. CONANT: That is a big problem.

MR. MAGONE: Judge, have you given any thought to the recommendation of Mr. Barlow, with respect to the consolidation of the courts? It is on page B29.

WITNESS: Oh, no, I have not.

Q. You have not considered that?

A. No, I haven't considered that, at all.

Q. Well, the recommendation is that these various courts mentioned here, be consolidated as one court, to be known as the County and Probate Court of the County of . . .

A. Oh, they couldn't do that. I don't think that would be feasible at all.

Q. You don't think it would be feasible?

A. Oh, no. I haven't given it any consideration, but from first blush, it seems to be out of the question entirely.

Q. Well, do any reasons occur to you why it would be unworkable?

A. Well, it works too well the way it is now; what would be the object? I'm sorry, but I haven't read this; I had better not say anything about it.

Q. I see. It was explained to us that it would eliminate a lot of bookkeeping; there would be only one set of books in the office of the County Court, and one set of officials, and you would have your work all concentrated in one set of offices instead of different parts of the building.

A. You would have to have a separate office; you couldn't possibly consolidate the Surrogate Court; that keeps two judges going all the time.

MR. CONANT: I think, Mr. Magone, we can qualify that in that there was a distinction made for the larger jurisdictions, was there not?

MR. MAGONE: Yes.

WITNESS: I think, if the Surrogate Court were left the way it was, the others could be consolidated, because they all go to the County Court now, anyway.

MR. CONANT: You are only speaking of your experience here?

WITNESS: Oh, yes.

Q. As a matter of fact, in most of the counties, there is one set of officials for all the work?

A. Well, we have one official for our Surrogate and County Court here, Mr. Winchester is the registrar, and the County Court Clerk, and they have two offices and two sets of clerks.

MR. LEDUC: You have a practical consolidation here, in that you have only one head?

WITNESS: Just one head, yes, but I think the Surrogate Court should be left the way it is.

MR. MAGONE: Well, we probably shouldn't bother Judge Barton any more, if he hasn't considered this phase of it.

MR. CONANT: No.

MR. MAGONE: Are there any other suggestions that you can think of, judge, in connection with Division Courts?

WITNESS: I don't think so. The question the Attorney-General was speaking of, that is about the attaching of the salaries, I think something should be done about those sections. Have the attaching order apply, not only to the present month's salary, but to the future months as well.

MR. LEDUC: Until the debt is paid.

WITNESS: Yes, but that should not be done with the examination of the employer; I should think he would have to tell us what he earned.

MR. CONANT: Or else a letter from him?

WITNESS: Oh, yes, that would be quite all right.

MR. CONANT: Yes. While His Honour is here, while this doesn't arise strictly out of the Barlow report, perhaps we could discuss item No. 14 with him, Mr. Magone, as to whether His Honour has any views on the matter.

MR. LEDUC: Interchanging of judges?

MR. CONANT: Yes.

WITNESS: That doesn't work in Toronto. You mean, where they have jurisdictional districts?

MR. MAGONE: Yes.

WITNESS: We haven't that here.

MR. CONANT: You never worked in a district?

WITNESS: I have never gone up to those districts to relieve the other judges I don't know why they do it, but there must be some reason for it, I suppose.

MR. MAGONE: Well, Toronto is in the district with Peel, and ——

WITNESS: Oh? Is it?

Q. Is it not?

A. Well, we didn't know that.

Q. I understood it was.

MR. CONANT: Do you know, Mr. Silk?

MR. SILK: No, it is not in any County Court district; it is separate.

MR. CONANT: Well, that doesn't arise here, then.

WITNESS: No, we had Judge Cochrane from Peel before the junior judges were appointed, Judge Cochrane from Peel for two weeks last fall, but I don't know why the system works or how it works, but I see the result of it.

Now, on the question of territorial jurisdiction, there is some suggestion of abolishing that territorial jurisdiction. I think that is wrong. We have too many courts here now, but I don't think the territorial jurisdiction should be abolished. We have a court at Woodbridge, and sit there four or five times a year, and one or two cases, at most, from Woodbridge, could be attached either to West Toronto, or there should be a court at Weston.

MR. LEDUC: You mean, the territory should be enlarged?

WITNESS: Yes, for some of those courts; for instance, there are so few cases, and Newmarket and Aurora are so close together, and we are never up there more than an hour or so each month, so one of those courts could be abolished if you think it wise.

Q. I'm sorry judge, I didn't quite get your point; what you had in mind was, that a certain number of Division Courts should be abolished, and their cases added to the other courts?

A. Yes, I think that would be quite easy.

MR. CONANT: But the question of jurisdiction, I think, was set upon the basis that in order to avoid this dividing of a county into jurisdictions for this court and that, each court would have county-wide jurisdiction.

WITNESS: Oh yes.

Q. Now just let me explain; you take the case of issuing a writ in County Court; the plaintiff has a pretty wide jurisdiction as to where he can issue. He can issue in Belleville, Toronto, or anywhere, can he not, almost?

A. Yes.

Q. You get over a great deal of the difficulty in territory, in that respect; why should not the same apply to Division Courts in a county?

A. For the reason that a man might sue in Toronto, a man in Sutton, fifty miles away, and he would have to come down to Toronto to defend a $10 action.

MR. FROST: That raises the old question that used to be used a great deal, that is providing that the venue should be at a certain place.

WITNESS: Precisely. I think the present Act, as far as the jurisdiction is concerned, protects those people.

MR. LEDUC: You mean territorial jurisdiction.

WITNESS: Yes, but as Mr. Barlow said, we have gone past the "horse and buggy days", and I think there could be fewer courts.

MR. LEDUC: I don't know whether you dealt with the jurisdiction of the court, as I arrived a little late, but don't you think the jurisdiction, as contained in section 54, could very well be simplified?

WITNESS: Well, there is one section there that could be explained. That is subsection (1), (d), (ii):

"the balance of the amount not exceeding $400, which amount is so ascertained";

What do they mean is so ascertained, the original amount, or the amount he is suing for, is $400?

MR. CONANT: You mean, whether the original amount was $400, or the balance was $400?

WITNESS: Yes, what amount do they want ascertained, the balance or the original amount?

Q. Oh, I imagine it refers to the original amount, does it not?

MR. LEDUC: Well, if you go up to (c), judge:

"an action . . . where the amount or balance claimed does not exceed $200".

Why the proviso there?

WITNESS: So the Division Court judge won't have to go into a long set of accounts; it might be a broker's account for $50,000, or $60,000, and the balance only $100, or $200.

Q. You might have the same trouble with the small accounts?

A. Oh yes, unquestionably.

MR. CONANT: But there is some dividing line.

WITNESS: Yes, there is a dividing line. I think that is what that was for.

MR. FROST: I agree with you, Your Honour, in connection with section 54, (d), (ii), if you take (d) there and read (ii) it doesn't add up.

WITNESS: It doesn't explain what it means.

Q. I mean, in subsection (d) "does not exceed $400", and then it goes on to say, "the balance of the amount not exceeding $400." Which amount is "so ascertained"?

MR. CONANT: Has there not been considerable amount of litigation through the years on this question of interpretation of those sections?

WITNESS: Oh yes, a great deal.

MR. LEDUC: There are hundreds of them.

MR. FROST: Bicknell & Segar.

WITNESS: Yes.

MR. CONANT: Well, without dealing with it in detail, it does seem to me that, from the litigation that has arisen from those sections, they would merit close attention, with a view to redrafting them, in order to clarify them?

WITNESS: I think so. I think we should.

Q. Through the years, they have been proven to be very difficult to construe and apply?

A. Oh yes, the question, for instance, of extrinsic evidence:

"an amount shall not be deemed to be so ascertained, where it is necessary for the plaintiff to give other and extrinsic evidence beyond the production of a document and proof of the signature to it;"

But what is extrinsic evidence?

Q. Yes, it seems to me we might arrive at more finality and simplicity, if in that case, as in other cases, the decision of a judge should be final.

A. Yes.

Q. For instance, supposing we revise this so that, in the final analysis, the trial judge shall have final jurisdiction as to whether it is within his jurisdiction or not? Would that not overcome a great deal of our trouble?

A. Oh yes, a great deal. That would avoid a great many appeals, because there are quite a number on that question of jurisdiction alone.

Q. Yes. Because, after all, it is purely an arbitrary application of the law?

A. Oh yes.

Q. And when the Appeal Court is through, they have only determined what the Legislature might have determined under the same circumstances?

A. Yes, exactly; quite right.

Q. I am very much disposed to that view that was expressed here yesterday, that a lot of these things we should leave to the Division Court judges to settle, because it is supposed to be a poor man's court, a court of simple procedure.

A. Yes, exactly.

Q. And if you are going to try to take care, in this Act, of every imaginable contingency, you're just simply building a pyramid of complications.

A. Yes, exactly. You just can't.

MR. CONANT: Well, thank you very much, judge, for your valuable assistance.

—— Witness excused.

MR. MAGONE: Mr. Chairman, I have Mr. Gerald Murphy here, from McMaster, Montgomery & Fleury.

GERALD MURPHY (of McMaster, Montgomery & Fleury).

MR. MAGONE: Mr. Murphy, you are with McMaster, Montgomery & Fleury, Collection Department?

WITNESS: Yes.

Q. You have charge of collections in the Division Courts?

A. Yes.

Q. You do a lot of business with them?

A. Quite a lot.

Q. How many cases a year, approximately?

A. That we have?

Q. Yes.

A. Well, for instance, this week alone, including judgment summonses, I have just come this morning from the East Toronto Court, that is the ninth Division Court—including judgment summonses, I think it was eleven cases I had. To-morrow morning I am going to the West Toronto Court, and they are easily the same number, roughly ten or twelve.

MR. CONANT: How many would you have in a year?

WITNESS: You mean actually in the court?

Q. No, altogether, the number of claims.

A. Number of claims, or claims placed in the Division Court?

Q. Claims entered in court.

A. Oh, I would say hundreds; I wouldn't say; it would be closer to a thousand than to hundreds.

Q. I see. Well, I think that qualifies you.

A. Yes.

MR. MAGONE: How many years have you been doing this kind of work?

WITNESS: Since 1918, with the same firm.

Q. Well now, Mr. Murphy, have you some suggestions to make to the Committee? Probably it would be easier if you made your suggestions or presented your criticisms to the Committee.

A. Yes. Well, I think possibly before this Committee actually sat, I did go into the question of Division Courts very thoroughly, and I sent a copy of my recommendations to Mr. Silk and Mr. Barlow. I won't go into it in detail to-day, as it is quite long, unless anyone feels they would like to ask me about it after going through it. Have you got it there?

Q. I have it here, yes. I thought you might just touch on the headings themselves, and deal with them.

A. You mean my headings or Mr. Barlow's headings?

Q. Well, now, with respect to the question of costs. Probably you might give us that first.

MR. FROST: He might follow his memorandum.

WITNESS: Well, I'll make it as brief as I can.

MR. CONANT: Yes, just summarize it.

WITNESS: Yes, the first suggestion I have here, as shown by Mr. Magone's copy, says that I thought, at the time they amalgamated the first and tenth Division Court in Toronto, they possibly made a mistake; I thought they should have moved one of the courts to North Toronto. There is a big section in North Toronto and it is growing steadily, and there is no Division Court reasonably handy in that section. In other words, the city limits, from the city hall, are, I believe, seven or eight miles. And my suggestion was they should have opened a court farther north, instead of closing one down.

The next suggestion is that, generally speaking, the Division Court costs are too high. I point out, here, for instance, that I might go into Division Court, and issue an execution against goods on a claim, we'll say, of $200, or $300; I have to pay the clerk for issuing execution against goods for $2 or $3; then that comes back; then I issue the same form against lands. In other words, I pay two sets of fees to the clerk to get an execution. In some cases that will run up to $5 or $6. Now I can get the same combined effect in the Supreme Court of Ontario, for $1,000,000, for $1.10.

MR. CONANT: You are referring to a writ of fiat?

WITNESS: Yes. In the Supreme Court I get one for $1.10, which binds both goods and lands. In Division Court I get one only against goods, for maybe a claim for $200.

MR. FROST: Just in that connection, who draws up the tariff of fees in Division Court?

MR. POLSON: Originally by the Board of County Judges.

MR. FROST: Well, tell me, is this tariff just another case of different rule and fee making bodies, operating separately, and the result being that there is nothing parallel to the course things take in the Supreme Court. I mean, we haven't studied the question of rules yet, but I understand that we have half a dozen rule-making bodies.

MR. CONANT: That is true.

MR. FROST: And I suppose that is true in connection with these tariffs?

MR. CONANT: Yes.

MR. FROST: It seems to me unbelievable that you should have such differences in connection with County and Supreme Court and Division Court. There should be something to make those uniform.

MR. CONANT: Well, I think, if I may say so, Mr. Frost, that when we come to the question of the Rules of Practice Committee, that will be developed, and I think it will be shown that we have several different systems or tribunals for setting up the rules in Surrogate, County, Supreme, and Division Courts, and Criminal Appeal Rules, and so on.

WITNESS: Might I answer Mr. Frost, there. Those figures in connection with Division Court that I mentioned are these; if the claim is only $60, it costs me 50 cents for my execution against goods, and another 50 cents for execution against lands; that is a $1.00 for a claim of $60, as compared to $1.10 for an enormous amount in the Supreme Court.

MR. LEDUC: In a matter of $400, it will cost you $4.00?

WITNESS: Yes, and it will cost me $1.10 in the Supreme Court, whether it be a matter of $400 or $4,000,000.

The next suggestion is one practically recommending that the block system be put in, including both bailiff and the clerk; it would take some working out.

MR. CONANT: And have that block system go through the entire jurisdiction, or for claims up to $100?

WITNESS: No, Mr. Conant. As you know, the present Division Court tariff deals with the question of claims not exceeding $20, then claims not exceeding $50, $200, $300, $400; well, I would get a sliding scale, for sake of argument, I would get a sliding scale; I would like to go to the Division Court

on a claim of $20 and pay $2.00, and have that cover everything, and on a claim of $200, I would like to pay in $6.00 to cover everything, or some such set amount. Under the present system, I think I know what it is going to cost me; I take a chance and tell my client it's going to cost about $5.00 or $6.00; I pay $6.00 to the clerk of the court; we then are ready to go on, and the costs to date are $6.00; then we go down to court, with our witnesses, you've got your witnesses, and we find our case isn't on the list; why? We go in and find that $6.00 was not enough; and they say: "You should have asked;" well, probably I should have; but in order to remedy that I have to get an order restoring it to the list, for which I am charged 50 cents or 75 cents or $1.00; and up go the costs; if, under my suggested system, we had paid $2.00 or $3.00 or $4.00, that wouldn't have occurred, that petty little thing, to hold us up. And careful consideration should be given, I think, towards getting a proper, equitable amount, so that nobody is going to beat anybody else. I think that would work out very, very satisfactorily; I have discussed this with the clerks of the West and East Toronto courts, and in fact, went into the matter quite thoroughly with them, and they are quite in accord with that. They don't think the court officials would have any objection to that, providing a certain amount of attention is given, first, to setting the amounts.

MR. CONANT: Now, arising out of that, Mr. Murphy, you will appreciate that one of the imponderables, or one of the items to anticipate, is the question of the mileage involved in service; how would you get over that?

WITNESS: Yes, I would get over that in this way, Mr. Conant: try and set a happy medium. No law or rule is going to be absolutely infallible. Take for instance, the bailiffs here in Toronto. I issue a summons at the city hall, to be served across the street; the bailiff walks a hundred yards, and serves it; that is a fraction of a mile; they get $0.20 for a fraction of a mile; but on the next one they may walk almost a mile. And so on. Now, if there were some consideration given to it, and then something definitely set. For instance, we might say he is to get $0.30 mileage on each one, whether it is a fraction of a mile on this one, or four miles on that one. Ordinarily, he would get 20 cents on one and 80 cents on the other; well, take off an average and fix an amount that he would get as mileage on each one. Now, possibly that wouldn't work up in the north, for instance, if you are sending your bailiff out from Port Arthur, where they travel longer distances.

MR. LEDUC: But it would work in the city?

WITNESS: It would work in the cities. And in the average centres, I think it would work in the districts also.

MR. MAGONE: Why should it not be actual travelling expenses?

WITNESS: Well, the only difficulty is this: if it is going to be actual travelling expenses, Mr. Magone, it gets away from what I was saying a moment ago. I can say to my client: "Are you prepared to gamble $6.00, $10.00, or $12.00?" In this way, I have to tell him it will be about so-and so. And he might say, "I'll take a chance." Perhaps he is a poor man; he pays up the $12.00, and we get started; then we find the mileage is $12.10.

MR. LEDUC: But Mr. Magone, there is another point; in some cases up North, the bailiff goes and makes the service, spends the whole day there, and then gets his travelling expenses.

WITNESS: I would like to see this considered from every angle. I don't want to see anything done to suggest that the bailiffs be done away with, or that they be asked to work for nothing, because nobody appreciates more than I do the difficulties the bailiffs have to meet. They have a pretty tough job. They may have to make a service, and they will go out and make five or six calls and not effect service; they don't get paid for the five or six calls. Finally they locate their man and serve him, three miles from the city hall, and he gets service costs for that, even though he spent a lot of time on it. My suggestion would be, if it could be worked out in some way, that a flat amount could be paid in each time, and included in that flat amount would be a flat amount of mileage for the bailiff. That would work out very satisfactorily, except for cases up north. I know of one case, I just forget whether it was Port Arthur or North Bay, where the bailiff, without saying a word to us, took the summons and away he went, and the actual service was $18.00. Well, of course, that does set you back.

MR. LEDUC: We had an example like that this morning.

MR. MAGONE: Before you leave that, what would you have the block tariff system cover?

WITNESS: I would have a block system covering all services, up to a judgment, whether it be a default judgment or judgment in court, up to and including that judgment, and the filing of execution with the bailiff. From then on, there would be no block system.

MR. CONANT: Well, what would you think of the possibility of meeting this mileage problem, in small claims up to $100, by registered mail?

WITNESS: I think for small claims you could have it somewhat the same as it is now. Now, on claims for $30, you have non-personal service, and it works out very well. Here is my only objection to service by registered mail: while it would certainly save a great deal of time in certain cases, but as Judge Barton or someone else mentioned here a while ago, if you could get a receipt showing that some member of the family—not necessarily of the household, because that might be anybody—but if you could get a receipt back by registered mail—here is the only difficulty: a man comes to your house to-morrow morning with a registered letter, and you say: "Oh, I'm not taking any registered letter in at all." Then where are you? The postman can't force him to take a registered letter.

MR. CONANT: Well, of course, I should have explained that that was only suggested as an optional method, not the only and compulsory method.

WITNESS: No. I mentioned that matter of registered mail, here, but I mentioned that very thing, that it might be overcome if it could be shown that that letter had actually been received by a member of the defendant's family, and I don't know whether I mentioned it, but I felt, and still do, that very

often—and you would be surprised how debtors suspect everybody walking around—a postman comes along and says: "I have a registered letter for you," and the answer would be: "Oh no, I'm not taking it." Then the difficulty would be, the postman would send it back with no service effected.

MR. CONANT: I know, but you're no worse off.

WITNESS: Well, how would you get around it then?

Q. You still have the other means of service, by the bailiff.

A. Yes, but would you have both ways of serving?

Q. Oh yes.

A. Oh, well ——

MR. FROST: What would you say of having the plaintiff serving it himself?

WITNESS: I heard Judge Barton making that remark, and there is a lot in it, but you'd be surprised how many people there are who—I shouldn't say you'd be surprised, perhaps—that don't have altogether the respect for a statutory declaration or an oath that they might have, and they might come back and say: "I served it." And then, six months later, you might have the other party coming along and saying: "I never got it." Then, where are you going to be?

MR. FROST: Well, you can do it in County Court and in Supreme Court, on larger claims?

WITNESS: Yes, but on larger claims, as a rule, you are dealing with more business-like people.

MR. CONANT: And a different degree of integrity applies, do you think?

WITNESS: I do, Mr. Conant, I don't think in that respect that a small claim, say of $25, is the same as a larger one of $500. I would have no objection to the plaintiff serving himself, subject to permission being given by the judge, or something like that. But to have it wide open, that the individual would serve all his own summonses if he wants to—another objection I might have is this: I am trying to cover all angles as I go along: the bailiff is going to be part of your Division Court, if he's there, and you're not going to get a bailiff to give an awful lot of attention to it, if he feels that on one case he is going to have 20 cents taken off, and somebody else is going to chisel him on something else, I don't think he is going to be whole-hearted; I think there might be a tendency towards that.

Q. Have you anything else now?

A. Well, there are several points; the next point is this: when this witness fee tariff was drawn up, the witnesses were allowed 75 cents. That is all right in certain cases, but take automobile cases: you and I have a crash; we each

have claims of $100; we each have a $200 interest in the case, and we get the very same witness fee as a witness who has no interest at all; he saw the accident, is called in off the street, and he takes all day off and gets 75 cents. I think that the independent witness, there should be a little attention given to him. You would get better results. Just as in Police Court, you know what happens there; "I never saw a thing."

Now, the next matter I mention is one of detail, and it would save a lot of running around, and save the judges and everybody else's time, and that is that all particulars of claims served and disputes entered be given in proper detail. At the present time, they say it's a poor man's court; I sue somebody; he writes a letter to the clerk of the court and says: "I dispute that claim." That, under the present rules, is sufficient to make me call all my witnesses and come to court. And I don't know who to call.

MR. CONANT: You don't know what you have to meet?

WITNESS: I don't know what I have to meet; I bring down my auditor, my book-keeper, clerk, and then, when I get down, I find he says: "I paid it." If I had only known that in the first place, but I am stuck with all those witnesses.

MR. LEDUC: And sometimes the defendant is not there.

WITNESS: Sometimes he's not there at all. He just writes a letter. If the clerk were instructed, as a matter of ordinary business routine, that a statement should be complete, and a defence should be complete—as Mr. Leduc says, I pay $5.00 to sue somebody, and he comes along and doesn't pay a five-cent piece, merely write a letter, whereas I am put to the expense of bringing my people down, wasting time, and he doesn't even appear; it has cost him nothing to delay matters, and it has put me to more expense.

Q. Yes, and it is still worse when a man travels 40 miles, and when he gets there, finds that the defendant is not even present.

A. Yes. Of course, I was speaking pretty well from the standpoint of Toronto, as was Judge Barton. I only experience the odd case, where I go outside of Toronto.

Now, the next thing here is ex-parte. In Toronto, the judges have tried to be very, very lenient with both plaintiffs and defendants, and especially a defendant can run an ex-parte and get the good nature of the judge and get the assistance. That is possible.

MR. CONANT: You think the ex-parte should be limited?

WITNESS: As long as he pays for it, but, as I said before, he gets some relief, that is taxed on the records against the plaintiff, although the defendant gets a relief, or gets a stay of execution and it doesn't cost him anything. If they were to pay these things forthwith, the persons applying would be forced to pay for what they get forthwith, just as in the County Court or Supreme Court. There would be no hardship worked there.

Now, the next point is under section 174. This, in my opinion, is rather a

foolish one. I know that a man has no goods at all, but I know that he has some land that I can realize on some day, and I want to file an execution against his land, but before I can file against his real estate, I must go to the expense of issuing an execution to the bailiff against goods, when I know he has no goods. Why can I not, after getting judgment, immediately file against his lands?

MR. MAGONE: On making an affidavit, or something of that kind?

WITNESS: Yes. Then I mentioned adjournments. They should not be granted without payment forthwith. That is the same thing.

Then I come down to the question of judgment debtors. Now, except in a very few cases, it is a very simple matter for judgment debtors to reach the court. Under the present circumstances, if the judgment debtor resides within three miles of where he is to appear for examination, he gets no conduct money, no mileage, or anything else. But if he is over three miles away, he must get 75 cents and 10 cents per mile. Well, to-day things have changed to what they were when the Act was drawn up, with cheap transportation, and so on.

MR. CONANT: Your suggestion is that the amount payable to a judgment debtor should be reduced?

WITNESS: And put on a set basis, a small amount. I say here:

> "In the larger cities, it is probably in every case possible for a judgment debtor to attend court and return at no greater expense than 25 cents."

It could be embodied in that section that that would not apply except in cities and towns over a certain size. But you take, for instance, Toronto; every year there are thousands of dollars paid out in conduct money for people to attend at the city hall, the East Toronto Court or the West Toronto Court, and yet they come down in street cars.

MR. MAGONE: Who takes your case off the list if you happen to be a little short?

MR. CONANT: The question is, who puts it on?

WITNESS: The clerk of the court assumes, under the tariff, that he shall be paid, and I suppose the strict interpretation allows the clerk to say that if he is not paid in advance, well—"no tickee, no washee."

MR. MAGONE: Your case might be on the list, but it's not called; yet it is on the calendar?

WITNESS: It is on the calendar, but it is not put on the list to come before the judge.

Q. Yes. But it is not on the calendar outside the Division Court?

A. Oh, no.

Q. It's not on that list?

A. No.

Q. I thought they sometimes put them on that calendar of cases outside the court room. You would bring your witnesses down and wouldn't know then, that you're not on?

A. No. I understand the practice is followed, by the First Division Court, which I don't use at the present time, I understand the practice there is that the list which is put up is made up of only the cases prepared to go on; all fees paid and ready to go on. Of course, I don't know, and shouldn't say, what the clerk's discretion is under those matters, at all.

Q. You said you didn't use the First Division Court?

A. No.

Q. Is that the First Division Court of the County of York?

A. Yes, I put most of my cases—I pretty well divide my cases in cases East of Yonge Street, which all go to the Ninth Division Court, and cases West of Yonge Street, which go to the Eighth Division Court, and I find it works very satisfactorily. And while I am on that point, I will say that those two clerks and bailiffs give wonderful service, both of them.

Q. Have you any reason for not going to the First?

A. Oh, no, I get better service in these other courts.

MR. LEDUC: Quicker service?

WITNESS: Quicker service, and good service; we have never had any question of these few odd cents we mentioned. It is possibly from the standpoint of convenience, very satisfactory.

Q. We have the same thing in Ottawa; a lot of people use the Seventh Division Court, because it's not so busy as the First one.

A. Of course, as I say, we do issue a lot of claims, and whether these two clerks thought it was worth their while to give us a little special attention, I don't know, but we do get wonderful service.

MR. CONANT: They may want your business.

WITNESS: And very sensibly, they are getting it, both of them are getting it.

MR. MAGONE: How do you avoid the question of jurisdiction?

WITNESS: If the question of jurisdiction is raised, Mr. Magone, by the defendant, when he is served with a summons he is entitled to move the proper jurisdiction, in which case, if his objection to my jurisdiction is correct it is

transferred—I just forget the rule now—it is transferred to the proper jurisdiction, which might be the First Division Court, and the terms of that transfer are that the defendant is put to no more expense than if the writ had been issued in the First Division Court originally. That is provided for, but in what rule, I have just forgotten.

Now, in the second part, Mr. Magone, I will just go over that very quickly, just taking the actual sections as they stand.

Now, referring to section 64, subsection 2, and to sections 72, 73, and 79 of the Division Court Act, as to where a case shall be tried. Now in respect to that, a peculiar situation came up in a case that I have before me. I haven't the name of the case here now, but the defendant resided in Quebec, and these sections all say that the action shall be tried where he resides. This man actually resided in the Province of Quebec, possibly a quarter of a mile over the boundary line, but he was possibly one mile from the office of the Division Court clerk, which was in Ontario, and the defendant was employed in the Ontario town in which the Division Court was situated, but a strict interpretation made it impossible for the bailiff to effect service under this section, as the defendant's abode, as defined by a recently reported case, was not in the jurisdiction. That should be enlarged to get over the difficulty at that point, that is that the point of employment is not his abode or place of business. I might have a wonderfully good job with Eaton's down here, and live a mile across the United States line, and I'm not subject to these sections. I'm not in business here, and I don't reside here.

MR. FROST: The section says "may" though.

WITNESS: Which are you looking at now, Mr. Frost?

Q. I was looking at section 64, subsection 2.

A Well, "the residence of the defendant." If he resides in Quebec, as in this instance?

Q. Well, you went from 64 to another section.

A. I went ahead, from 64 to 72, 73, and 79.

MR. LEDUC: You gave us the case of a defendant residing outside of the Province of Ontario. Is that not provided for in section 67?

> "(1) Where a claim is within the proper competence of a Division Court, the action may be brought, notwithstanding that the residence of the defendant is, at the time of bringing the action, out of Ontario, and the action may be brought in the court of the division in which the cause of action arose or partly arose, but the court may refuse to allow the action to proceed if it appears that the action is one which ought to be tried elsewhere.
>
> (2) The service of the summons may be made by a bailiff of the court out of which it issued or by any person who may, either before or after the service, be approved by the judge or by the clerk, but such summons shall be served at least fifteen days before the return day thereof.

(3) The affidavit of service, if not made in Ontario, may be sworn before any officer or person having authority to administer oaths under the Evidence Act.

I may not understand your point.

WITNESS: Well, I am anticipating the question of a judgment summons as well, under that section 67; would you think that that would apply to a judgment summons in examination that only applies to a claim ——

Q. But what is your jurisdiction to examine a judgment summons if the defendant resides outside of the province?

MR. MAGONE: If he is served while he is here, the courts have jurisdiction.

WITNESS: Well, that is a technicality; I don't know whether you gentlemen feel it is worth while to waste your time with it.

Q. Wouldn't you get an order for substitution?

A. You could. You certainly could, yes, for the service of the writ originally, but I don't think you could for the writ of judgment summons, because he must reside here.

MR. ARNOTT: Mr. Chairman, are we going to set this Committee up as a rule-making Committee?

MR. LEDUC: Well, this is not a matter of rules, this is a section of the Act.

WITNESS: Well, gentlemen, as far as I am concerned, I would just as soon answer any questions, but I was asked to run over this as quickly as I could, and I am doing that, as far as I can. But if you would care to ask me questions, it's all the same to me.

MR. MAGONE: Does this deal with amendments to the particular sections of the Act?

WITNESS: Yes.

MR. LEDUC: What is the next thing you suggest, Mr. Murphy?

WITNESS: Well, section 67, subsection 4, says:

"(4) Where service of the summons has been effected out of Ontario, the judge may allow, as costs in the action, a sum towards the expenses incurred in effecting service, not exceeding in the whole, $5.00."

Well, if you send any division court action to be served in California, by the time you send a Yankee solicitor out to a bailiff, you might find your $5.00 wouldn't cover it.

Q. You would suggest putting in the actual costs?

A. Yes. Now, sections 72 and 73 ——

Q. You are treading on dangerous ground there.

A. Yes, well, we'll take section 73 first, Mr. Leduc.

> "An action by or against a judge may be brought in any court of a county adjoining that in which he resides."

Well, my suggestion is there, why not have it in the county in which he resides? Is the judge bound to reside in the county in which he is judge?

Q. What do you want to change there?

A. Well, I would think it would be in a county adjoining that in which he is the judge.

Q. Well, he may live in the county adjoining that in which he is a judge.

A. Well, we won't waste time; these are technicalities.

MR. MAGONE: I think Mr. Murphy had in mind division court districts; that it should be brought in a court outside his division court district.

MR. STRACHAN: I don't think it occurs very often.

WITNESS: No, as I say, I went through this, Mr. Strachan, piece by piece.

Now, if you refer to sections 90 and 93. Under section 90, he may sign default judgment at any time within one month. Why restrict that to one month? Very frequently, by consent of both parties, the defence is not put in, or the judgment is not signed, and maybe after three or four weeks he'll say, "go ahead, put in your defence"; why should we go and have to pay a clerk an additional fee? And the same thing applies to section 93; the very same thing. I think the time limit should be cut, and there should be no fee for doing either of those. If the judgment hasn't been signed, I should be entitled to put in my defence.

MR. LEDUC: Well, in the other courts, they have so many days?

WITNESS: Exactly, there is one year; we can do it in one year. And why should it not be here? Why should the poor man's pocket be put to additional expense?

Now, I will go from there to something that was discussed very recently. I was asked to discuss it with some clerks and lawyers not very long ago, and the general feeling was pretty well that the block system, worked out properly, given some consideration, would work out very satisfactorily; also, to not abolish the Division Court at all; if anything, possibly, increase it to the jurisdiction which was suggested, two or three years ago, when it was amended, but did not come into force until a certain date. You will always have small cases, and if you are going to transfer them to the County Court, you are going to have more

cumbersome machinery for doing it. I don't see any advantage at all, of taking small cases to a County Court; if you put them in the County Court, they are going to come out as County Court trials. I don't see that anybody would benefit.

MR. FROST: You think you are only going to clutter up the County Court?

WITNESS: I think so, Mr. Frost. Now there is another thing; under the Division Court, now, you can have what they call an attachment order for garnishee after judgment. I can walk into any clerk and say, "I want a garnishee after judgment." And without any affidavit or anything else, he can issue a garnishee after judgment. But to get an attaching order, which serves practically the same purpose, I must go and disturb a judge. Why could not attaching orders be served on the order of a clerk, who has power to issue a garnishee after judgment? I don't see the necessity or the difference that one should require a judge's signature, and the other does not require a judge's signature. They are both served for the same purpose.

MR. FROST: Yes, that's correct.

WITNESS: In Toronto, I would say the judges must be called on 20 or 30 times a day to sign Division Court attachments, which could be just as well issued by the clerk, because they must be entered up in the clerk's books later on. Why could he not do the whole thing?

Q. Have you given Mr. Magone a copy of those submissions?

A. Yes, Mr. Magone has a copy, Mr. Frost.

Q. There are a lot of points in there that might tend to simplify things.

A. Yes, and they might have some effect. I am just jumping over them now; it wouldn't be fair to take the time of the Committee on a lot of little details, but I had, at that time, gone over the whole Act, section by section.

MR. MAGONE: Have you ever had a jury action in Division Court?

WITNESS: I, myself, no; once we served a jury trial notice, and I just forget what happened to it. We didn't go on with it. And I don't think, generally speaking, that juries are necessary in Division Court.

MR. LEDUC: Well, you say you have been with McMaster & Montgomery twenty-two years, since 1918?

A. Yes.

Q. You probably entered 20,000 claims in Division Court since that time?

A. I would say so.

Q. Out of which, probably 10,000 went to trial?

A. Yes.

Q. And you never had one jury trial?

A. No, and on that jury trial, I don't know whether you gentlemen understand, but under the section here, on every case entered in Division Court, there are a few cents collected ——

MR. STRACHAN: 25 cents.

WITNESS: Yes, and there might be 10,000 cases entered, all of which pay a fee. I forget the number of that section.

MR. STRACHAN: Mr. Magone, have you discussed judgment summonses with Mr. Murphy?

MR. MAGONE: What is your experience with respect to judgment summonses?

WITNESS: I agree thoroughly with what you gentlemen said; it does seem absurd, that in a small claims court, a man can be committed and sent to gaol, whereas, in a higher court you can't. I have one observation on that; it is a poor man's court, but there is a poor creditor very often, as well as a poor debtor, and if a man has $20 in salary coming to him, or wages, or some little thing, it is just as well to have some quick way of getting to it.

Now the committal order does seem very, very severe, but in my experience—and I don't want to be considered as being hard-boiled at all, and I think I can prove that if a man comes to me, he doesn't find me too hard to get along with—but it is surprising the number of committal cases that I know of, when a judge finally does send a man to gaol; I would say there is not one per centum of the committals actually enforced, where the man doesn't find the money, either before he is in gaol or after he has been there a few hours.

MR. LEDUC: But you were talking of a man earning some wages.

WITNESS: Yes.

Q. But if we had a better system of attaching wages, or garnisheeing wages, wouldn't you assume the same result ——

A. In anticipation of what you are going to say, I think something along the lines of the Lacombe law would be very satisfactory. But we haven't got that. I am in favour of it.

Q. You are in favour of it?

A. I think the Lacombe law should work out very satisfactorily.

Q. While Judge Barton was giving evidence this afternoon, we talked of making the garnishee served at any time, and not wait until the salary is due.

A. Yes.

Q. Do you agree with that?

A. I think if the Act were made to cover that, Mr. Leduc, but as it stands now, it wouldn't have that effect. I serve a garnishee summons on an employer, and it says, "any money that you owe John Jones are attached."

Q. That is the present form of the summons.

A. But if the Act were amended ——

Q. Yes.

A. —— that the service on an employer of the summons in proper form, would have that same effect as the Lacombe law, that as long as that man is there, a certain amount—whatever the court should decide—is taken out, that will cut out all the numerous attaching orders, judgment summonses, and everything else.

Q. Isn't that your experience, that you have to garnishee a man's wages week after week, and pay-day after pay-day, and it only results in profits for the bailiff and other officers?

A. Yes.

Q. But if we were to adopt the Lacombe law, wouldn't we then be able to do away with a judgment summons?

A. Well ——

MR. FROST: I don't suppose so much the judgment summons as the committal end of it.

MR. LEDUC: That's what I mean.

WITNESS: Yes, the committal end of it; there are, in this way, many, many people, I am speaking of debtors now, that, unless you have some way of extracting it, you just don't get it. The mere fact of having them come up and having an order issued ordering them to pay $5.00 a month is all right. But the moment they walk out, they just say: "I'm not going to pay that money."

Q. But if the salary could be attached?

A. That would do away with a lot of the committals.

Q. You would use the examination to find out what salary he earns, and so on.

A. Yes, I wouldn't abolish the examination, no matter what the size of the judgment.

Q. Right.

A. But the committal might very easily be done away with, if there were the Lacombe law or some other law to take its place.

MR. MAGONE: In how many cases in a year would you have to apply for a committal order, out of your thousand cases?

WITNESS: I suppose you are asking me in how many cases I have asked the judge to allow the committal to be enforced?

Q. Yes.

A. Well, you see, Mr. Magone, there are many, many cases in which the committal order is made as a matter of form; then we write the man and say: "At this morning's court you didn't appear, and the judge made such and such an order." I am not calling that a committal order, if you are asking of actual enforcement?

Q. Yes.

A. Well, in the last year, I would say there had been twenty-five or thirty cases in which the bailiff has been instructed to actually enforce the committal, and of that twenty-five or thirty, there is only one that I know of now, where it did not result in the whole thing being paid outright and this man came out on an order of Judge Lovering, and, through family reasons, we all felt that possibly the man, while he didn't show it, he did have a peculiar mental kink, and he was released without paying anything.

Q. What is done, the bailiff arrests the man and brings him before the judge again?

A. The practice is this, Mr. Magone. A man gets a summons to appear this morning, in which he receives a notice: "If you do not appear on such and such a date, you may be committed to the common gaol for ten days." Then if he doesn't appear, the judge will, as a matter of routine, make an order for committal for ten days in default of appearance. Then the bailiff of that court will get in touch with that judge in another week, and say: "Now, Your Honour, on what day will you give an extra appointment for the order you gave John Jones to appear on the morning of a week ago to-day?" Then the debtor will receive another notice pointing out that he didn't appear, but that the judge has granted him another appointment to appear and show why the committal order dated to-day should not be enforced. In other words, he gets two chances. Then, if he appears before the judge the second time, he purges his contempt very easily by saying: "I didn't understand it" and that's the end of it. But, if he doesn't appear the second time, the judges in Toronto are now allowing the order for committal to be issued. Then the bailiff goes out and gets him. Sometimes he does use discretion and talk to the fellow, but he is entitled, under that second order, to forthwith put the man in gaol.

MR. FROST: And is all that procedure set out in the Division Court Act and rules?

WITNESS: No.

Q. All that has happened is, that that system has been devised in Toronto to meet your situation?

A. Yes, to meet the situation, and to get the creditors their rights, and at the same time not strictly speaking, because, under section 183, every man against whom such an order is made, can be forthwith arrested, but the judges here thought that very drastic, and say we don't know what's in their mind and therefore we will give them another chance. Possibly that might be brought about by section 184, which says that he shall not be liable to be committed unless the judge is satisfied that his non-attendance was wilful. Well, if it is brought to his attention a second time and he still does not appear, then the judges are inclined to believe it is intentional, and that is how that came about.

MR. FROST: Do you think that that procedure is partly necessary, owing to the fact that the garnishee and attaching proceedings are clumsy, and so on?

WITNESS: Well, they are clumsy.

Q. And it is expensive?

A. It's expensive.

Q. Do you expect that if some system were introduced, such as the Labombe law, that some of these other provisions might be scrapped?

A. Yes, and I will go further; under the present system, there are a large number of employers who will assist their employees. Possibly we serve a garnishee summons on a man, and he says: "Oh, this fellow, I paid him in advance last week" or something like that. You have no way, you are in the hands of the employers, whereas, if we had something like the Lacombe law, if they wanted to pay him in advance, that's their own business, but they must satisfy his creditors, by setting something aside. But there is nothing to cover that to-day, and, as the judge pointed out here, if I want to attach a man's salary, I can't make my affidavit and take out my order until when it is due, that is, say, Saturday morning; well, I can't get a judge until ten o'clock; I get it signed, and by the time I get it done, two or three hours are gone, the place of business is closed and everybody has gone, and everything is lost, fees and all. Under the Lacombe law, I would say: "Too bad, Mr., but I'll see you next week."

MR. LEDUC: No, that's not the Lacombe law, that is the general law in Quebec.

WITNESS: Oh, I thought it was the Lacombe law.

Q. No. The Lacombe law gives you a chance to make a declaration to the court and deposit the money and all the creditors come in and share in the proceeds.

A. It's like—I understand that it is for this reason that it cuts out more than one similar order?

Q. Yes.

MR. FROST: Who makes the Division Court rules?

WITNESS: I understand they are made—well I think Mr. Polson might answer that better than I could.

MR. MAGONE: They are made by the Lieutenant-Governor-in-Council, since 1935. Before that, they were made by the Board of County Court Judges.

MR. FROST: Who prepares the tariff, the fees; is it the same body?

MR. MAGONE: Yes.

MR. FROST: Well, have you any improvement for that situation?

WITNESS: On the question of fees, you mean?

Q. No, no, on the question of rules and tariff.

A. Well, I don't know; I think maybe, I wouldn't say all the County Court judges, but I think a couple of County Court judges ——

Q. Well, Mr. Barlow suggested that, in connection with the consolidated rules, there should be certain judges appointed, and certain barristers appointed; do you think that would improve the working of the Division Court Act?

A. Well, I would almost think so. I don't just remember, whom did he suggest would be on that Committee for that, do you remember, Mr. Magone?

MR. STRACHAN: Four judges and four barristers.

WITNESS: I think it would be a good idea to have a County Court judge on there who is a Division Court judge, because the Supreme Court judges never have much practice in that respect, as a rule.

MR. FROST: There are many people who are not barristers or judges, who have a very intimate knowledge of the workings of the Act and can give very good suggestions?

WITNESS: That is why I suggested a County Court judge, because he knows the workings, naturally; I would think, somebody that is working with it; that is my opinion. A Supreme Court judge—I'm not trying to suggest anything there, but they don't touch the smaller things at all.

MR. FROST: It was suggested a moment ago that a very eminent counsel in Toronto didn't even know there was a Division Court Act; therefore he would not be, probably, as competent to make rules as someone who was not a solicitor at all, and with a more thorough knowledge of it?

WITNESS: Like everything else, there is a technical knowledge, and a practical knowledge.

MR. LEDUC: Well, thank you very much for coming, Mr. Murphy.

—— Witness excused.

Committee rises until ten o'clock following morning.

FOURTH SITTING

Parliament Buildings, Toronto,
April 4th, 1940.

MR. CONANT: Gentlemen, before resuming our hearing, may I say that Mr. Leduc has spoken to me about the advisability of bringing up some official from Quebec, or presumably a Montreal man, to explain the Quebec law concerning garnishees and attachments, and the Lacombe law. I have only this observation to make: the Government, naturally, would like to keep the expenses of this Committee down to a minimum, or at least down to reasonable proportions. I suppose in this case we would have to pay the expenses involved, and perhaps we should hear from Mr. Magone as to what he has to offer us in lieu of bringing this man to Toronto.

MR. MAGONE: Mr. Chairman, there is a report here from a lawyer, Chartron, of Ottawa, who forwarded a copy of the Act to Mr. Barlow in June, 1939. It isn't very long, and I think we could digest it and give it to the Committee, and you probably would get as much from that as you would by bringing someone up, with this exception, that you won't get the practical working out of the law.

MR. CONANT: The results.

MR. MAGONE: Yes.

MR. CONANT: Well, what do you think, gentlemen? It is important, and if we recommend a change, and our recommendations are carried out and put into practice, it would have far-reaching effects for some people. I am not at all settled in my view. What is the view of the Committee?

MR. FROST: I wonder if there is somebody here in the city, who has some knowledge of this?

MR. MAGONE: We might find out. The only man that I can suggest off-hand is Mr. Arthur Rogers, the secretary of the Canadian Bankers' Association, who spends alternately two years in Toronto and two years in Montreal, and he is just back from Montreal to start his two years in Toronto.

MR. FROST: I think it would be a good thing to see if we could get somebody around here that has a good working knowledge of this law, and that, together with the digest Mr. Magone or his staff would prepare, would probably save a lot of expense. On the other hand, if that can't be done, and we find that that is not satisfactory, then we might get somebody up from Montreal.

MR. STRACHAN: I think we should exhaust the possibilities of some person here first, before we decide on that.

MR. CONANT: Well, that is very proper. Then, Mr. Magone, will you get in touch with Mr. Rogers and see if he can offer the solution, and also go into Mr. Silk's suggestion that possibly some member of the Canadian Manufacturers' Association might be able to help us out. Also, let us have a digest of what you have to date.

MR. MAGONE: Very well.

MR. FROST: Some of these collection agency people might know something about it.

MR. CONANT: Well, the gentleman that was here yesterday was asked that, and he didn't know anything about it.

MR. MAGONE: It is my intention to call on Mr. McDonagh now.

F. G. J. McDONAGH, Clerk, First Division Court of the County of York, recalled.

MR. MAGONE: All right, Mr. McDonagh.

WITNESS: Mr. Chairman, yesterday, the representative of Norman and Company mentioned, as I understood him, two actions in which the costs of the bailiff's services were given as over $4. I went down to the office at noon yesterday, and obtained a copy of the detailed costs, and there is only one claim, not two claims, and the amount of the claim is $400, not $200, as he stated it, and there are two defendants, not one defendant, and the bailiff's costs are $4.40, which is provided for in the tariff.

I have the detailed statement here, if you care to look at it.

MR. MAGONE: Were they served at the same place, Mr. McDonagh?

WITNESS: At the same place, on Parliament Street.

Q. Was one or two mileages charged?

A. Two mileages.

Q. Two mileages?

A. Yes, 40 cents, yes, that is only one mileage, but at 20 cents a mile.

Q. That's what I meant. He didn't charge mileage for each of the two defendants?

A. No.

MR. CONANT: Just following that up, as it struck me, when it came up the other day, as being rather remarkable, if a bailiff goes out with half a dozen summonses, does he charge full mileage on each one of those?

WITNESS: Yes, sir.

Q. Even though he may travel one mile to serve one, and an additional mile, including the first mile, to serve the next one, and so on?

A. Yes, if he had six cases, in which all the defendants resided in the house, he would be entitled to charge his six mileages on that.

MR. STRACHAN: Well, of course, Mr. McDonagh, the bailiff does have to make half a dozen entries?

WITNESS: Oh yes.

Q. And they only charge the one mileage?

A. In Toronto, it is the frequent thing, rather than the infrequent thing that the bailiff may go three times to the house, and not find the defendant there, and he only gets paid for the one visit.

MR. CONANT: He has to deliver the goods before he gets paid.

WITNESS: Yes.

Q. I suppose there is that justice to it, that those lucky strikes, in a sense, level off the blanks they draw.

A. Yes. It averages up pretty well. Then there was one other point brought up by Mr. Leduc: I mentioned that the average costs received last year by the clerk of the Division Court were $3.89.

Q. That is extending over how many cases?

A. That is 7,643 proceedings, and the average costs of the clerk were $3.89. The average costs of the bailiff, $2.51.

Q. Which gives a total average cost of $6.40.

MR. LEDUC: Have you any information as to the number of cases you have, say, under $60 and under $100?

WITNESS: Yes, I have that here; possibly I may read it into the record?

Q. Yes.

A. Number of actions, for last year, from $1 to $10, 429; from $10 to $20, 2016; from $20 to $60, 2,624; from $60 to $100, 1,126; from $100 to $200, 1,173; from $200 to $300, 170; over $300, 105. Number of judgment summonses, 837. Number of transcripts, 142.

Q. That is transcripts sent to other courts?

A. Yes.

Q. Yes?

A. And then we have a group which is called, "other actions," which includes attaching orders issued from the Supreme Court, usually from the Masters, or from the County Court direct to the Division Court, 45. And then there is number of appeals, 1; that is an appeal under the Master and Servant Act; it's the only one, the only active appeal. It used to be, under the Summary Convictions, that certain cases in the Police Court got to the Division Court judge; that is changed to County Judges Criminal court now. If it is a conviction in the matter of wages in the Police Court, the appeal is to the Division Court judge. I may say that causes considerable confusion in the profession, because everything else goes to the County Judges Criminal Court judge, and this comes to the Division Court judge.

MR. CONANT: Most of your cases, at least your largest class, is from $20 to $60?

WITNESS: Yes.

MR. ARNOTT: Mr. McDonagh, you have 7,643 proceedings?

WITNESS: Yes.

Q. Tell me, how many of those went to judgment?

A. I haven't the number that went to judgment.

Q. Can you tell me the total amount involved in those proceedings?

A. Yes, $450,494.31.

Q. And how much was realized out of those proceedings?

A. Well, there was actually paid into court, $75,619.92. Of course, in a sense, that doesn't give a true picture, because it doesn't show the settled actions.

MR. CONANT: No. It would be impossible to get that?

WITNESS: Yes, it would be impossible, except from this list I have, of the selected hundred cases, I may be able to show the picture there.

Q. Yes.

A. In connection with that item of 837 judgment summonses, I have the number of committal orders issued, and the number of committal orders issued was 237, and the number actually committed, 21. In that connection, may I make an observation, from my experience.

MR. LEDUC: Excuse me, Mr. McDonagh, when you speak of judgment summonses being 837, that includes the show cause summons?

WITNESS: That includes the show cause summons.

Q. And further show cause?

A. Yes, which I have contended since I have been appointed, that there is no statutory authority for a show cause summons, but I can't get anywhere, apparently, in having it stopped. But the proceeding in Toronto is different to other counties, as far as I can ascertain. The debtor is served with a judgment summons, and it must be personal service, and he is given conduct money if he is over three miles away, and that summonses him to appear on a certain day. If he doesn't appear, the judges are satisfied that the non-appearance is wilful and they issue—they direct a committal. Then the bailiff takes out an appointment with that judge in chambers, and a registered letter is sent to the debtor in a plain envelope, rather than with the name of the Division Court on it, advising him to appear before the judge to explain to the judge why he wasn't at the appointment of the summons. If he doesn't appear, then, in most cases, the judge directs that the warrant be executed. Now my observation is this: that that man is not being committed to gaol because he failed to pay the debt, he is being committed to gaol because he did not obey the process of the court, and dealing with the population we have in Toronto, I feel that that is a most important part of the proceedings of the Division Court.

MR. FROST: There isn't any objection to that, though; there isn't any objection to imprisonment for failing to obey the summons of the court to appear and answer questions relating to the assets that the man has, and all the rest of it, but the point, I think, that was raised here yesterday, was the objection to the courts making an order and saying: "You must pay so much every week, and if you don't pay so much every week, then you go to gaol." There, I think is where the objection came in. It wasn't from the standpoint of contempt, but it was when you were carrying that further and making it actually an offence, a penal offence to fail to pay a debt. There is the point.

WITNESS: I see that point, but my experience has been, and I may say I have sat as deputy judge in summonses myself, that there have practically no persons committed to gaol in Toronto for failure to make payments.

Q. Yes, but nevertheless, the threat is there.

A. The sword is held over him, yes.

Q. Yes.

MR. CONANT: But your submission, as I understand it, is really that committing to gaol is punishment for contempt of court?

WITNESS: For contempt of the court, yes.

MR. LEDUC: Officially, that is what it is.

MR. FROST: Not officially, you mean in practice; officially, you go to gaol, under this Act, for failure to observe a judge's order.

MR. LEDUC: Yes, you're right.

MR. CONANT: Could we put it in another way, Mr. McDonagh? Isn't this correct, that if a person against whom a judgment summons has been taken out,

would obey each and every summons and come, at the appointed time, and make out anything like a reasonable case to the judge, whether it was all true or not, it is extremely unlikely, in fact I doubt if any judge would commit him to gaol?

WITNESS: In York County, they would not be committed to gaol.

Q. No?

MR. FROST: I know of a case here, recently, in which the judge looked into a certain man's affairs, and felt that he was able, with his earning powers, to pay so much on a debt, and he accordingly made his order. The judge, probably, was aware the man could pay it; he made his order, and the man was to pay so much money a month, whatever it was; the man didn't do it. After some further court proceedings, the man went to gaol for thirty days for failing to do that, and he served his thirty days, too. I can remember the case. Now the point is this: isn't that just going a bit too far in this thing? You say that that is the practice?

WITNESS: Yes.

Q. The practice is the alternative, the practice is to use these judgment summons proceedings as a basis of examination of judgment debtors; don't you think we might do better to make the practice the law, and do away with the practice of jailing a man for failing to pay any money?

A. Well, as far as my experience goes, the man is committed for contempt, and in the case that you have cited, that man was examined by the judge, and the judge didn't believe him, apparently. Now, that is contempt of the court, that is not failure to pay.

Q. Well, on the other hand, do you think that that principle, then, should be extended to other courts?

A. Well, the principle is in other courts, if you wish to examine a judgment debtor ——

Q. Yes?

A. —— before one of the examiners, and you served him with an appointment and he doesn't appear, then you move to commit him for failure to appear.

Q. I have no objection to that.

A. But that is what happens in this court, except that you haven't the other motion, and you have lessened your costs.

Q. But haven't you additionally, in this court, this right? The judge has the right to examine a man and to say: "Now your earning capabilities are so much money, I order that you pay the plaintiff so much money." And if he doesn't make that payment, then he can be sent to gaol, and some people are sent to gaol for that?

A. Yes, well that might be in other counties, I couldn't say.

Q. I know, but isn't that the law?

A. Yes, that is the law.

Q. Well, there is the point that I am making.

MR. STRACHAN: Mr. McDonagh, are not the large part of these small claims for bills incurred from small merchants and shop keepers?

WITNESS: That's what they are.

Q. And isn't the law to avoid the situation that, when a man hasn't any money, he goes to the grocery store, and the minute he can avoid it, he goes to the chain stores and the cash and carry?

A. Yes.

Q. And I would suggest this law is to protect the small shopkeeper.

MR. FROST: Yes, but this law has been there long before the chain stores came in.

MR. STRACHAN: It seems to me we are giving lots of sympathy to the debtor, but no person gives much regard to the poor man who has advanced the money.

WITNESS: Well, at the present time, with all deference to the members of the Bench, there does appear to be, shall I say, a debtor complex, and not a creditor complex. Protect the debtor, let the creditor spend his money.

MR. FROST: Well, I think we would do a lot better to revise our law to meet the present situation and to frame a reasonable attachment law, somewhat after the Lacombe law, and then abolish these things which can be injustices, and which are, in many cases, injustices.

WITNESS: Well, of course, one of the difficulties, in the Supreme and County Courts, on your examination of the judgment debtors, it is all taken down, and you take your own time examining the debtor, whereas, in the Division Court, in the larger centres, you have a list of thirty to forty judgment debtors to appear, and they appear at ten o'clock and are finished at half past eleven. Sometimes, even a little earlier than that, and there is no report of it at all, and very few of the debtors are sworn. I mean, I have sat in, I suppose, three or four thousand of them, anyway, and the examination is very cursory. The thing is to get through.

MR. LEDUC: Mr. McDonagh, I think you have given the best argument why the more important cases should be taken out of the Division Court and put in County Court.

WITNESS: Examination of the debtor?

Q. Not only that, but how many cases are heard during one day when the Division Court sits?

A. Well, our average lists will run about thirty-five cases.

Q. Thirty-five cases?

A. That is on Tuesday, on the cases under $100.

Q. Yes?

A. On Wednesday, that is increased jurisdiction, maybe seven or eight, at the present time.

Q. Not more than that?

A. Not more than that. Then, on the damage cases, you may run around forty to forty-five.

Q. In one day?

A. Yes, and included in that forty-five would be, possibly, another six or seven which are increased jurisdiction, over $100.

Q. Yes?

A. And they get pretty complete hearing; the counsel insist on it.

MR. CONANT: Forty-five hearings in a day?

WITNESS: Damage cases, yes.

Q. You say a complete hearing for forty-five cases in a day?

A. Well, of that forty-five, there are a lot of assessments of damages, and there is no provisions in the Division Court Act for no pleadings, and every damage case must go before the judge; you can't have default judgment, and I think that should be overcome in some way, in that a defendant may, in a damage case, appear at the trial and have his defence admitted, and take the plaintiff by surprise, and cause additional costs. I think there should be some way in which, as in the other courts, undefended damage action pleadings may be noticed closed, and upon affidavit, possibly, the clerk, in very small claims, might be allowed to sign a default judgment.

MR. CONANT: I am rather disturbed on this whole thing. I see some of my brother committee members don't, perhaps, share my view. Although I don't know exactly what their view is, you made a remark there, which is very pertinent. Let me ask you a question; supposing there were removed from the law, the ultimate provision to commit to gaol, to what extent would it effect the collection machinery of the Division Court?

WITNESS: I think it would destroy its effect, sir.

MR. LEDUC: But if you have a better law concerning attachment of salaries and garnishee proceedings, wouldn't that help?

WITNESS: You are referring to the Lacombe law?

Q. No, no, let us not confuse the Lacombe law and the general law of the Province of Quebec concerning attachment of salaries.

A. Oh, I thought the two went together.

Q. Oh no, because the law concerning the attachment of salaries was there before the Lacombe law was passed. The Lacombe law was passed to avoid costs, to avoid the necessity of securing judgments against a man more than was necessary; I think we will have a witness from Quebec to explain it better than I can, because I haven't applied it myself for a number of years, but I think the difficulty is caused by the law which says that a salary must be attached after June the 4th; that makes it practically impossible to attach a man's salary.

A. Yes, well of course, it was—that is, used by the judges as being the law; at the present time you have, in the Division Court, both the garnishee summons and the attachment order; the garnishee summons costs more than the attachment order, and I have known judges to dismiss garnishee claims because they should have taken out an attachment order.

MR. STRACHAN: What meaning is given by the judge in an attachment proceeding to the word "accruing"? I never could understand why a man who was paid in advance, it was held that you couldn't garnishee his wages.

WITNESS: Well, they have given no meaning to accruing; they just disregard it.

Q. Disregard it?

A. Yes.

MR. CONANT: Coming back to committal orders, Mr. McDonagh, what was it you said, that it would destroy ——

WITNESS: If committal orders were removed, it would destroy the effectiveness, as it is to-day.

Q. Yes.

A. Possibly Mr. Leduc's suggestion of attachment proceedings would help to keep its effectiveness.

Q. Yes, but isn't there this fundamental weakness in any machinery you may set up for garnishees or attachments, that, without the sword you have referred to, all a man has to do is to refrain or refuse to work and he is absolved from all responsibility?

A. Yes.

MR. LEDUC: If the man doesn't work, the judge won't make an order ordering him to pay.

WITNESS: May I just cite a case, to give you an example of how far these things go sometimes; in connection with the judgment summons of a gentleman who was born in Europe somewhere, and he owed a milk bill of $25, and it finally got to judgment summons, and he was, after all the proceedings, taken to gaol; his wife went up to the judge's house crying, and the judge directed that that man be released.

Q. He cried, did you say?

A. She cried. Then they proceeded, afterwards, with another judgment summons, and the committal order, and the costs had gone up, I think, to $40. The claim was only $25, but the costs had gone to $40. She appeared in chambers before a judge and swore that that man was out of town, and that he wouldn't be back for a month; the bailiff's man got the assistance of the Toronto Police Force and went up with a sergeant and a policeman, and one went to the front door and the other went to the back, and when the man at the front door tried to open it, this debtor jumped out the back door into the arms of the police sergeant. I mean, that is the type of stuff we're up against with these people who are confirmed debtors.

MR. STRACHAN: They are very well known to the clerk of the Division Court, a lot of them?

WITNESS: Yes.

Q. A professional debtor?

A. Yes, you see them on the judgment summons.

MR. CONANT: Isn't the desirability or the undesirability of the present law largely dependent upon the wisdom and the judgment with which it is applied by the judges?

WITNESS: Oh, there is no question about that.

Q. Yes, I remember in my own experience, when a judge in my own jurisdiction—the only committal I ever got from him was on a similar situation, when evidence was brought into court that this man was sick, and my client whispered to me that he wasn't, he had been seen on the street that morning; we hustled around and brought in evidence that he was loafing around the back streets of the city, and we committed him that day, because it was obvious deception and evasion. That is the only committal I ever got in twenty-five years of practice.

MR. FROST: In that case, that was a pure case of contempt.

MR. CONANT: Yes.

MR. FROST: I have no objection to that at all.

MR. CONANT: Where are you going to draw the line?

MR. FROST: I object to carrying it farther than that, and letting the judge investigate this man's affairs, and after a cursory examination—you take, for instance, your forty cases that come up in court on a judgment summons: he says, "Well, you are able to pay $5 a week, and you are to pay $5 a week, and if you don't, you go to gaol." Now I think that is going too far.

WITNESS: Well, Mr. Frost, may I say that the practice is not that.

MR. FROST: I know, in practice you don't do that.

WITNESS: It is the debtor who agrees; he comes before the ——

Q. But that is not what the Division Court Act says?

A. No, I agree that the Act says that ——

Q. The Act just says exactly what I am saying; the judge may investigate this man's affairs, order him to pay so much money, and if he doesn't pay that money, then he goes to gaol.

A. Yes, well I've never seen ——

Q. I know, but that is the point, and you mark my words, that is the trouble with a lot of these collection agencies, who are using as a club the threat of sending people to gaol.

MR. CONANT: Well, do you think we can accomplish much more in pursuing this any further?

MR. FROST: No, I don't think so.

MR. CONANT: I think we might make this observation; that even in the highest courts in our province, that all the members do not always agree.

MR. LEDUC: No, but I think I would make a suggestion at this point, Mr. Chairman; there has been a great deal said about the Lacombe law, and I have mentioned, myself, the method and procedure adopted in Quebec for the attachment of wages, and so on and so forth; would it not be in order to have someone from the Province of Quebec, either an official of the court or an official from the Attorney-General's Department, to tell us exactly what it is?

MR. CONANT: Well, unfortunately, we discussed that the first thing this morning, when you were not here, and the Committee left it this way; Mr. Magone has certain information on it, and he believes that he can unearth, in the city here, a man who has practiced under that law, and who can perhaps supply the information.

MR. MAGONE: Well I thought, Mr. Leduc, that I might get Mr. Arthur Rogers, the secretary of the Canadian Bankers' Association, who spends two years alternately in Montreal and in Toronto, and he might tell us how the law works.

MR. LEDUC: Well, it's not solely in the Lacombe law that I am interested, it is also the general procedure in the Province of Quebec concerning the garnishee and attachment of wages.

MR. CONANT: Well, I think it is agreed, and decided, Mr. Leduc, that from what Mr. Magone now has available—if we cannot get somebody here, who, along with the information available, can give sufficient evidence, we may bring somebody from Quebec. We will canvass those possibilities in the meantime; is that agreeable to you?

MR. LEDUC: Quite.

MR. CONANT: We can bring him down any day; say to-morrow, or the next day?

MR. LEDUC: Because I think, myself, that that system is a good one, and I would like this explained completely to the Committee. If Mr. Rogers does not feel that he can do it, and can give only incomplete information, I think we ought to have an official from the court in Quebec, or an official of the Quebec Attorney-General's Department.

MR. CONANT: Well, all right, Mr. Magone; you first exhaust your inquiry here, and see what you can get.

MR. MAGONE: Yes.

MR. CONANT: Mr. Magone quite properly pointed out that, while he can, without difficulty, produce before the Committee the law, we should have evidence as to its operation and practical results.

MR. LEDUC: Yes, certainly.

MR. CONANT: All right, Mr. Magone; you may proceed.

MR. MAGONE: Mr. McDonagh, in connection with judgment summons, what is the practice to get a show cause summons?

WITNESS: There must be an affidavit filed by the plaintiff's solicitor or agent, setting out that he believes that the debtor is able to pay the judgment.

Q. I see. Well that, apparently, is provided for in section 182, subsection (8), is it not?

A. Well, I think you could argue on that, Mr. Magone; I have gone into it quite thoroughly, and at the present time, in fact, Mr. Moore is making a research on it, and after I discussed it with the judges, we came to the opinion that the show cause summons, as such, is not authorized by statute, except that there is a form provided for in the forms which are authorized by statute.

It is a technicality, but I think when you are committing a person to gaol your technicality should be right.

MR. CONANT: Well, I was going to ask if there isn't any provision for that show cause summons, and if a committal is made for contempt of that summons?

WITNESS: Well, Mr. Chairman, with regard to that, I have discussed this with some of those who are most interested in it, and they say that the answer is that nothing will happen, because knowledge can't be shown on their part.

MR. CONANT: Well, you take it and shove it under the umbrella with the public authorities' protection?

WITNESS: That's the answer I got.

MR. CONANT: That is not very sound.

MR. MAGONE: Doesn't your objection boil down to this: instead of calling it a show cause summons, they call it a judgment summons No. 1 or No. 2?

WITNESS: Yes, I think that a simple act would clarify it. That's what happened; it was in there possibly fifty or sixty years ago, and in some revision, that section just happened to drop out.

Q. Well, is that your main objection, that they call it a show cause when they should call it a judgment summons?

A. That is the main objection, yes.

Q. I see.

A. That is, the form is there in the forms, but there is no provision in the Act to authorize the form.

MR. FROST: Is it shown in the forms of the Division Court?

WITNESS: Yes, I think it is form No. 24, or used to be.

MR. ARNOTT: Do you believe, Mr. McDonagh, we should have a show cause after judgment summons is issued, has been issued in the first place and been defaulted on?

WITNESS: Yes, I think we should, but I think the affidavit required to obtain that summons should be stronger than it is at the present time, because as it is now, a student in an office comes up and swears the debtor John Jones has means to pay the debt and he doesn't even know who John Jones is.

MR. MAGONE: Mr. Chairman, Mr. Silk has been up investigating the possibility of getting a Quebec lawyer, or someone to explain the Lacombe law to us, and he has been in touch with the Canadian Bankers' Association, the Canadian Manufacturers' Association, and the C.P.R., also the Law Society, and apparently there is no one here who can help us.

MR. CONANT: Well then, does the Committee wish to have someone brought up? What is your wish, gentlemen?

MR. FROST: Well, I certainly think that, if it does not involve too much expense, it is desirable for this reason, that if we are going to make recommendations to discard the present system and introduce one that is more effective and that is going to save the people money, and probably is going to save the province money, I think we should get the best advice we can.

MR. CONANT: Yes, it is rather far-reaching.

MR. FROST: You take the case that Mr. McDonagh just mentioned there, the case of a claim for $20, and by reason of judgment summons after judgment summons, that amount increased to pretty near double the amount. Now, it seems to me that if there is to be one application, and the judge is to investigate that man's affairs and make an order, that his employer, as long as he was employed in a certain position and getting so much money, might well pay so much money and end all this duplication and endless evasion. It seems to me that on something so full of possibilities for saving the people's money, we should get the best information we can.

MR. LEDUC: Well, I think we could get a man from Montreal, probably, which would be cheaper than getting him from Quebec, and if the Committee wishes, I can get in touch with the authorities, and by Monday we could probably get an official of the court.

MR. CONANT: I would suggest Mr. Magone get in touch with the Attorney-General of Quebec; he would probably recommend a man from Montreal, would he not?

MR. MAGONE: He may; if they have a salaried official there, we might get a salaried official, to come down by paying his expenses; if we get someone else, we would probably have to pay fees as well.

MR. LEDUC: I believe the clerk of the Circuit Court in Montreal would know all about it, because, if I am not mistaken, that is where these declarations are made, under the Lacombe law.

MR. CONANT: Well, Mr. Magone will look after it.

MR. LEDUC: Mr. Magone, you might ask that he be not only prepared to give evidence on the Lacombe law, but also on the general practice and procedure touching garnishee of wages and attachment and so on.

MR. CONANT: Very well, you will look after it, Mr. Magone, and have him here by Tuesday.

MR. MAGONE: Yes, sir. Well, Mr. McDonagh has a statement of statistics that I think would be interesting, showing what happened in a hundred typical cases.

WITNESS: Yes.

MR. LEDUC: Yes, I think that would be very interesting.

WITNESS: I didn't pick any particular hundred, I just asked one of the girls to take one of the books and take out a hundred cases, as it went along.

MR. LEDUC: Consecutive cases?

WITNESS: Yes, it shows all the details, amount of claim, bailiff's fees, clerk's fees, and so on. I took off the average, and the average amount of the claim is $65.70; the average amount of the clerk's fees, $3.83; average amount of bailiff's fees, $2.48; average amount of disbursements, $0.48, which gives an average total cost, including disbursements, of $6.79. The number of default judgments was percent. The number of judgments at the trial, 20 percent; the number of personal services, 99 percent; the number in which executions were issued, 32 percent; the number of settled actions, 24 percent; and the substitutional services, 1 percent. And then, I have had those fees broken up, into the average in the grouping under the present provisions, of $10 to $20, and so on, and the average costs in actions from $1 to $10, is $2.96; in actions from $10 to $20, $4.86.

MR. LEDUC: The first was cases of $1 to $10?

WITNESS: Yes. And from $20 to $60, $6.13; from $60 to $100, $7.17; and from $100 to $200, $9.28; from $200 to $300, $9.92; and from $300 to $400, $10.11. There was only one case in that group which would bring the average up a little higher, but I think it is a fair picture.

MR. LEDUC: Does that include the cost of execution?

WITNESS: As far as the proceedings taken in court.

MR. FROST: Bailiffs?

WITNESS: Bailiffs and disbursements, and so on.

MR. CONANT: Of course, it is unnecessary for me to make this comment, but I think it is pertinent at this time, that those figures would certainly, in my opinion, at any rate, not be a safe guide for the whole province, because your mileage here is low.

WITNESS: Yes, my mileage is low.

MR. LEDUC: But even so, Mr. Chairman, I notice that the cost is 86 cents of disbursements even in a case involving less than $20.

MR. CONANT: That's right; 25 percent of the amount involved.

MR. LEDUC: Then it rises sharply from $6.13 in cases from $20 to $60, then it rises, from cases of $100 to cases of $200, it rises by $2.

WITNESS: Yes. In connection with that, I will leave the report with you, because it shows the number of executions.

MR. LEDUC: I suppose, out of those hundred cases, you would have very few over $100?

WITNESS: We would have, in this hundred cases, twenty over $100.

Q. That is one-fifth?

A. Yes.

Q. But when you gave the earlier figures, Mr. McDonagh, I took the average, very roughly, of 6,513 cases that you have, excluding judgment summons and transcriptions, and so on, and I arrived at a conclusion that, roughly, the amount involved in each case was $75.

A. Yes.

Q. And that the costs were $6.40.

A. Yes, that is the way it works out. Now, I have also had twenty-five judgment summonses or show cause summonses taken from the books, to show the average costs there, including disbursements, and that runs at $7.14.

Q. That is the average cost?

A. Yes, of course, as Mr. Murphy pointed out yesterday, many of these debtors reside more than three miles from the courthouse, and they are handed 75 cents and ten cents a mile, and some of them get as much as $1.95, and they never think of applying a dollar on the judgment; they will come down and make $1.95 for the day.

MR. CONANT: Just at that point, I think these figures are very enlightening, at least they are to me, I should say, but my remarks of before still applies, that that is hardly an accurate or a safe picture for the province?

WITNESS: I quite agree, sir.

Q. And I wonder if the Committee would not favour the suggestion of picking out a Division Court clerk in a good rural district, and instructing him to compile similar figures, and have him come down and give evidence about the Committee? I think we should have that.

MR. LEDUC: Yes, and furthermore, I think we should have the Division Court clerk of Ottawa, because—of course, I haven't been in Division Court in Ottawa for some time, but it seems to me the number of cases there was nearly as great as it is in Toronto, although Ottawa is a much smaller city.

WITNESS: Of course, we have three courts here.

Q. Well, we have two in Ottawa.

A. Well, strictly speaking, they are not wholly within the municipality.

Q. But the people use them?

A. Yes.

Q. As they use the Seventh Division Court in Ottawa.

MR. CONANT: Well, I suggest again, as a matter of expense, that we bring the clerk from Hamilton, Mr. Leduc?

MR. LEDUC: All right.

MR. CONANT: How long has the clerk been in office in Hamilton?

MR. CADWELL: He has been there for many years. I think, if you are going to have a clerk from a rural district, that you should get one from Sudbury.

MR. CONANT: Oh, well, it doesn't make that much difference.

MR. CADWELL: They have special conditions of service, and so on.

MR. LEDUC: Why not have one from Barrie or Orillia, or Peterborough.

MR. FROST: I think you might get Smith, from Orillia, he is a good man.

MR. CADWELL: He is in the army now.

MR. CONANT: Well, I think Mr. Magone and Mr. Cadwell can pick out a man.

MR. FROST: I think we had better get a man from a reasonably large district.

MR. CADWELL: Well, the Division Court clerk in St. Catharines has a broader experience than any I know.

MR. CONANT: Would he have a large rural district?

MR. CADWELL: Yes, considerably large rural district.

MR. FROST: We have Mr. McDonagh, with a strictly urban area and a small district to travel; now, if you could get somebody that has a large rural district, you might get the other side of the picture, of a man having to travel many miles to attend court or serve summonses.

MR. CONANT: Well, gentlemen, may I suggest that Mr. Magone and Mr. Cadwell can work this out.

MR. CADWELL: If you will leave it to Mr. Magone and myself, we will endeavour to get a suitable man.

MR. CONANT: Is that agreeable?

MR. LEDUC; Yes. Might I suggest this: why not ask the Division Court clerks of the larger Division Courts—you mentioned Hamilton, for instance; why not have the Division Court clerks of Hamilton, London, Windsor, Ottawa, send you statements of the number of cases they have, together with the number of cases with judgment and executions, and so on. We don't need their evidence,

as we will have the evidence of the clerk from Hamilton, say, but we will have the figures.

MR. CONANT: Yes. Mr. Cadwell, you might follow Mr. Leduc's suggestion.

MR. LEDUC: You might include Sudbury.

MR. CONANT: Set up a questionnaire along the lines of Mr. McDonagh's evidence, and get the figures.

MR. CADWELL: I will do that.

MR. MAGONE: Now, Mr. McDonagh, you want to speak about the Creditors' Relief Act?

WITNESS: Yes. Mr. Barlow's suggestion is that the Division Court clerk be required to search the sheriff's office before making any claim. What might be good in theory might not be practicable, as far as the Division Court is concerned. For instance, in the First Division Court of the County of York, many judgments are paid at the rate of 50 cents a week, or $1.00 a week, or a month, and there would be at least five thousand payments in a year, and if I had to search every time in the sheriff's office, with five thousand payments out in a year, I would clog the sheriff's office as well as my own, and I would have to have a certificate of clearance; that is how it affects the busy court, and as far as the effect on the court which is removed from the sheriff's office, it would have to be done by mail, and new payments may be made while the mail is in transit, or new executions may be filed, and I think it would clog the machinery, rather than help the situation.

MR. FROST: Yes, it is hard to see how you could work in the Creditors' Relief in the Division Court, having regard to the numerous payments; do you think there might be—supposing there are several payments in the same court against the same man, do you think then, you could work out some system for creditors' relief, in a case like that?

MR. CONANT: You mean for the Division Court?

MR. FROST: Yes, it seems to me there is some injustice to this extent; A is a debtor, he is sued by B at one o'clock in the afternoon, by C at one-thirty, and so on, and the first man gets it.

WITNESS: The first execution does.

Q. Yes, the first execution; there isn't anything rateable about it.

MR. LEDUC: The debtor could protect one of his creditors by letting the case go through by default.

WITNESS: Yes, there is a provision in the Division Court Act regarding garnishees or persons who are interested in garnishee money; they may apply to the judge for direction.

MR. CONANT: But in cases of executions, the early bird gets the worm?

WITNESS: First come, first served, yes.

Q. That seems to be unfair.

A. They have to wait until the first one is paid off. What they do (and that is where fees mount up), they keep these executions renewed, and it costs 25 cents to renew for a six months' period, and they may have to keep their executions alive for a year, or a year and a half.

MR. CONANT: I think we understand that, yes.

MR. FROST: There might be something, perhaps in the individual Division Courts, where there are a number of suits against the one man, that under some conditions, the procedure might be applied rateably among those creditors after the style of the Creditors' Relief Act.

WITNESS: I think that would be very advisable, and would save the defendant's costs.

MR. LEDUC: Well, there is an instance of the Lacombe law, you see.

WITNESS: Yes.

MR. MAGONE: Then you would have some difficulty too, would you not, in connection with the Master and Servants Act, where a judgment is given in a Police Magistrate's Court for wages?

WITNESS: Yes.

Q. And that becomes a judgment of the Division Court, does it not?

A. It becomes a judgment of the Division Court. That doesn't bother us so much, because the Division Court clerk, I think, is relegated to Twenty-two Acts as well as his own Division Court Act.

Q. Yes?

A. It is the appeal from the decision of the magistrate that I think creates the confusion, as all other appeals are to the County Court judge.

Q. Did you say you only had one appeal last year?

A. There was only one appeal last year.

Q. That could be very easily corrected by providing that the appeal shall be in the same manner as under the Summary Convictions Act?

A. Yes.

Q. I see there is provision in the Master and Servants Act, that the appeal may be tried with a jury?

A. Yes.

Q. Well then, Mr. McDonagh, have you anything else?

A. I understand the members of the Committee are going to be supplied with a copy of my recommendations to Mr. Barlow before his report was made, and my constructive criticism to the inspector of legal offices, after his report. I don't think I need labour anything that is contained in that. I have endeavoured to make it as constructive and as clear as possible.

MR. FROST: Might it not be advisable, if Mr. McDonagh gave us briefly, his criticisms of the Barlow recommendations? That is, if it isn't too lengthy? After all, we are here to hear these things.

MR. CONANT: Well, that was the method we started with, was it not, Mr. Frost?

MR. FROST: Yes.

MR. MAGONE: Your observations on the Barlow report were given to Mr. Cadwell?

WITNESS: Yes.

MR. CONANT: Have we a copy of them here?

WITNESS: Well, I have my copy. To sum it up, practically, my observations are that the situation which exists in regard to Division Courts and its procedure, can be pretty well done away with if the Act, rules, tariff, and forms are reviewed, simplified and rewritten.

Q. What is that again?

A. That the Division Court Act, the rules, the tariff and the forms be reviewed, simplified, and rewritten. I mean that, while it may be perfectly clear to some of the judges sitting on the bench, what they think the law is, the Act, in my opinion, is not clear. I think it is one of the most complicated Acts we have.

MR. LEDUC: Agreed.

MR. CONANT: Well, you have lots of support for that statement.

WITNESS: Yes. For instance, section 54, subsection 2, which I mentioned in my report to Mr. Barlow, has been mentioned; in the first place, that is now before the Court of Appeal again on a motion of probation.

MR. CONANT: Mr. McDonagh, isn't it the case, that this Act, this court, was originally intended as a poor man's court, for the adjucation of claims with a minimum of expense?

WITNESS: Yes.

Q. And now we have an Act that involves a complicated procedure, it is

difficult to apply, in many cases, and, from your experience—and you appear to have made a successful study of this—don't you think it would be possible to revise the whole thing and cut out a lot of deadwood, and yet get something that is workable?

A. I think you could, so long as you have somebody doing the work who is familiar with what the Division Court is supposed to be. I mean, it has to be governed by the practical viewpoint, so far as the drafting is concerned.

MR. MAGONE: Could the number of sections be materially reduced, do you think?

WITNESS: Well, I don't know that I would say materially. I think possibly you could cut out 30 percent of it; for instance, if you look at section 87, dealing with service on partnerships.

MR. CONANT: Yes.

WITNESS: You have nine subsections to it, and when you read them all through, you don't know where you are at. Incidentally, sir, in that connection, may I make one observation with regard to The Partnership Registration Act; it may not be pertinent, but we have run into it; there is nothing in this Act which requires a person to be over twenty-one years of age, and we have had instances of some people having their children, their girls, registered as the proprietor of the partnership.

Q. Yes.

A. And when they are sued, they are minors. I mean, the father and mother are working the store, and they are doing the business, and the girl is along with them, and it is a fairly tight defence in law. I think the Act should be amended to say that it must contain a declaration that they are over twenty-one.

MR. CONANT: Well, I don't think that we can hope, gentlemen, to explore all the details of the Division Court Act; we can only touch what might involve the high spots. There is just one thing I want to ask you there, and I want to have it clearly on the record. The present practice for setting up Division Court Rules, let us get that clearly.

MR. MAGONE: Well, I think the present practice is under section 65, that the Lieutenant-Governor in Council has power ——

WITNESS: Yes.

MR. MAGONE: To set up the rules.

MR. CONANT: That is the present law?

MR. MAGONE: Yes, and also fix the tariff.

MR. LEDUC: Under section 65.

MR. CONANT: What is the practice? There has been nothing done since I've been in office.

MR. MAGONE: That's right, there hasn't been.

MR. CONANT: It would come, naturally, under my department, I should imagine. When were they last revised, does anyone know?

WITNESS: Section 217, and it reads:

> "The Lieutenant-Governor in Council may make rules for regulating any matter relating to the practice and procedure of the courts, or to the duties of the officers thereof, or to the costs of proceedings therein, and every other matter deemed expedient for better attaining the ends of justice, advancing the remedies of suitors, and carrying into effect the provisions of this Act and of all other Acts now or hereafter in force respecting such courts."

MR. CONANT: Well, we will take the practical application of that; since I have been in office, there hasn't ever arisen; I suppose if there were revisions to be made now, certainly the officers of the Attorney-General's department would not make the revisions, because none of our staff practice in that court.

MR. SILK: No. That section was new in 1935.

MR. LEDUC: I just came across something in that section; it says:

> "The Lieutenant-Governor in Council may make rules for regulating any matter relating to the practice and procedure of the courts . . ."

WITNESS: Yes.

Q. Now, if you go back to the interpretation section, there is no interpretation of the word "courts"; could that mean all courts, or only the Division Courts?

MR. SILK: Oh, it is contained in the Division Court Act, so I don't see ——

MR. LEDUC: Yes, but it says "the courts".

MR. CONANT: That is bad.

WITNESS: In another section it says, "the Division Courts existing at the time of this Act being passed shall continue."

MR. CONANT: While the law is perfectly clear that it is done by an Order-in-Council, we know as a matter of practice, that it is all based upon preliminary work done by somebody?

WITNESS: Yes.

Q. Now, what should be the machinery for preparing and propounding these rules?

MR. LEDUC: I think, Mr. Chairman, if I may say this, the Lieutenant-Governor in Council is empowered to make rules, and as you state, these rules could be brought to the Council by the Attorney-General, and I suppose the Attorney-General could get his information from the clerks and judges of the courts, and so on.

MR. FROST: Well, as regards the other rules, there is a rule-making body of judges?

MR. CONANT: That is just what I am coming to, Mr. Frost.

MR. FROST: Do you think that there might not be some method of having these rules kept up to date from time to time, and to have some sort of a committee of Division Court officials and judges, who would keep this Act up to date? Now, there are some things in here that, as you or Mr. Barlow mentioned, go back to 1850. They are antiquated and out of date, and there are some things such as you mentioned, like the show cause summons, on which a rule-making body could sit periodically and make recommendations, and then submit them to the Attorney-General.

MR. LEDUC: It would be an advisory committee?

MR. FROST: Yes, it would be an advisory committee, I agree; we should not give them power to legislate.

MR. CONANT: That would work out in this way, Mr. Frost; we have quite a few bodies that set up rules, chiropractors, and other such people—I mention them particularly, because they are always wanting rules passed or made, and in most of those cases it is provided that they make rules for the conduct of the business organization, subject to the approval of the Lieutenant-Governor in Council; they set up these rules, they bring them in, and the Attorney-General looks them over, he takes advice, if he thinks it is necessary, and then they are put through by Order-in-Council.

MR. LEDUC: But may I interject this; these are independent bodies.

MR. CONANT: Oh, yes.

MR. LEDUC: It is a different set-up or organization from these which are provincial courts and part of the machinery of this province.

MR. CONANT: What I had in mind was this: if, at a later stage, this Committee were to consider them and recommend the reconstitution of the Rules and Practice Committee, I am not sure, at this moment, that that should cover or include the Division Courts, because it would have to be—you would have to bring in division court clerks, and I don't think it would jibe.

MR. LEDUC: No.

MR. CONANT: But I am not, also, so sure whether we shouldn't set up a similar organization dealing only with division court rules, and call it the Rules of Practice Committee of the Division Court, so that it would be the rule-making

body, and subject to the ruling of the Lieutenant-Governor. What would you say as to that, Mr. McDonagh?

WITNESS: I think that the division court rules should be drawn by a body separate from that of the Supreme and County Courts, and that it should consist of those who are familiar with the Division Courts. I would have, possibly, if I may suggest it, a judge from Toronto, a municipal division court clerk, a rural division court clerk, a representative of the young lawyers' club, and a representative of the collection agencies, to sit under the direction of the inspector of Division Courts.

MR. CONANT: Yes. Well, I think that is a thing the Committee might consider in due course.

MR. MAGONE: Well, with respect to that, I might point out, and Mr. Silk has brought it to my attention, that there was a Board of County Judges, whose duty it was to revise these rules. They sat from time to time, usually once a year, and they came down to Toronto, usually, to hold their sittings. That was found to be expensive and inefficient, and that is the reason this amendment was passed. Now, if the section were left as it is, the Attorney-General then could constitute his own committee?

WITNESS: Yes.

Q. At any time?

A. Yes.

Q. When he thought it necessary, and not when the judges thought they wanted to come to Toronto, but when the Attorney-General thought the rules should be revised.

MR. LEDUC: I agree with that point. I would much rather have it that way.

WITNESS: May I say, sir, I wouldn't have the judges constitute your committee, because I ran into this ——

MR. CONANT: You wouldn't have what?

WITNESS: The county judges constitute your committee.

Q. None of them on it?

A. I would have one, but as it was previously, it was the judges alone, and at their annual meeting, they are supposed to go into these things, and when I inquired about certain rules, and so on, when I was first appointed, I was told the judges committee had changed the 1914 regulations, and when I asked for a copy of them, it wasn't possible to get it. So that there were no records kept of the proceedings, or if they were kept they were not available to the inspector of Division Courts.

MR. LEDUC: I am inclined to agree with Mr. Magone; the Attorney-General could form his own advisory committee.

MR. FROST: I agree with that, too. I suggest you might do it in this way; if you just made it a rule that each year the inspector of Division Courts was to convene a committee, which would be named by yourself, to consider the provisions of this Act, changing of rules, and so on, or if one year is too often, make it every two years, but I think that would correct a lot of difficulties you are having with this Act.

MR. CONANT: That brings to mind, am I right, that there was some suggestion of expense being inordinately high in connection with that?

MR. MAGONE: Oh, yes, that was one of the objections to it. I might say that it wasn't all the county judges, but a committee of five of them appointed by themselves.

MR. CONANT: Well, I think it is clear to the Committee. All right, Mr. Magone.

MR. MAGONE: Mr. McDonagh, you were dealing generally, I think, with your observations on Mr. Barlow's report. Have you completed those observations?

WITNESS: No, all I said was my whole suggestion really boiled down to reviewing, simplifying and rewriting the Act.

Q. Yes.

A. I wouldn't want to belabour the Committee with details of how sections 61, or 5, should be amended; I don't think that is what you want me for.

Q. No. Well, we dealt with the suggestion that was made, that the judgment of the Division Court might be made a judgment of the County Court, or that the execution might be issued directly by the division court clerk to the sheriff of the county.

A. I heard that. As far as Toronto and the cities are concerned, I don't think it would be effective. The costs, I think you would find, would be the equal of what the costs are now, because you would have to reduce the sheriff's tariff to meet that condition. I can see where it might be effective in places where you have to travel fifty or sixty miles, by having deputy sheriffs to do that particular type of work.

Q. Well, following that, supposing the Act were amended to provide for service of summonses by registered mail or by the plaintiff himself, would that materially reduce the income of the bailiff in Toronto?

A. Well, as I understood it, the Attorney-General's idea on that was that it was to be optional.

MR. CONANT: Oh, yes.

MR. MAGONE: Yes.

WITNESS: That would reduce the income of the bailiffs in Toronto, there is no question about it.

MR. CONANT: Well, isn't the answer to that, Mr. McDonagh, that you have a number of bailiffs in this work?

WITNESS: Well, I have two official bailiffs to my court.

Q. Yes. Well, both here and throughout the province, it would ultimately reduce the number of bailiffs, isn't that true?

A. Yes, it would reduce the number of bailiffs.

MR. MAGONE: But, in so far as the courts in Toronto are concerned, it wouldn't reduce the income to such an extent that they couldn't carry on?

MR. CONANT: I think the way to put that question is this, to the extent that you couldn't maintain the bailiffs' service.

MR. MAGONE: Yes, that is better.

WITNESS: No, you could maintain a bailiff's service; it would mean a reduction in his staff, and the bailiff himself might well have to work himself, out on some of it, because you put a man in the position ——

MR. CONANT: Well, I think we understand that problem fairly well, Mr. Magone. Is there anything else, Mr. McDonagh?

WITNESS: No, I think the whole thing boils down to the rewriting of the Act.

Q. Yes. Well, I think if we were to rewrite the Act, whoever is in charge of it should get in touch with Mr. McDonagh.

A. Is there anything else you would like me to give you now, sir?

MR. MAGONE: I think that is all from Mr. McDonagh, Mr. Chairman.

MR. CONANT: Thank you very much for your assistance, Mr. McDonagh.

—— Witness excused.

J. ROY CADWELL, Inspector of Legal Offices.

WITNESS: First of all, Mr. Chairman, I have the copy of these expenses, which you asked me to prepare.

MR. MAGONE: That is a break-down of the costs, is it?

WITNESS: No, the general expenses of the municipalities and counties. It was covered the other day, and this just summarizes what was ultimately decided.

MR. LEDUC: Taking No. 1 first, Mr. Cadwell:

"In each municipality in which a Division Court is held, the municipality is required to furnish a proper court room and other necessary accommodation."

Does that apply also to the districts?

WITNESS: Yes, that applies to the districts. They don't require to supply an office or office accommodation in the counties, but they must provide court accommodation.

MR. CONANT: Well, but in the districts, what does that mean, that it comes back to the province?

WITNESS: Yes.

Q. Well, that is what we want to know.

A. Yes, it comes back to the province eventually, in the districts, because the province looks after the district courts.

Q. Yes, all right. Now this item 2—were you going to examine Mr. Cadwell on this, Mr. Magone?

MR. FROST: Have you anything in particular in there about the cost of juries?

WITNESS: No, I haven't anything in connection with the expenses regarding costs of juries.

Q. Well, the counties, I presume, are saddled with the costs of juries, are they not?

A. They are, yes, they receive, I believe, 25 cents for each case.

Q. Well, what rather interested me in asking that question was this: that each division court case contributed so much towards the cost of juries, and apparently the cost of juries in the province is very much less than the municipalities receive from this jury fund, and I understand that, just by way of practice, and unofficially, they apply that to the cost of the books, is that right?

A. I imagine that is the practice, Mr. Frost.

Q. Actually speaking, they should set up a separate fund for this jury fund, and it should be used for that purpose only?

A. As a matter of strictness, it should be kept in a separate fund for that purpose.

MR. MAGONE: Is there anything in the Act which says it should be kept separate?

A. No.

MR. FROST: Other than that it should be kept in a separate fund, called the jury fund.

MR. LEDUC: Going down to No. 2, there, Mr. Cadwell:

> "Where the fees and emoluments earned by a clerk or bailiff are less than $1,000 a year, the local municipality in which the Division Court is held shall pay to the clerk and bailiff respectively, the sum of $4 for attending each sitting of the court."

WITNESS: That's right.

Q. Now, outside of the cities and towns, how many local municipalities are there where a clerk and bailiff earn $1,000 or more?

A. Very few.

Q. Very few?

A. Yes.

MR. CONANT: What is that?

WITNESS: Very few.

MR. LEDUC: In rural municipalities, there are very few where the earnings of the bailiff and clerk amount to $1,000 a year.

MR. CONANT: Oh, well, in the vast majority of our courts it wouldn't amount to half of that.

WITNESS: That's right.

Q. Are you following that up? On that point, Mr. Cadwell, although it is, perhaps, not immediately relevant, you have been compiling figures from time to time within the last year?

WITNESS: Yes, sir.

Q. Regarding a number of cases?

A. Yes.

Q. Following my indication of policy, where the number of cases in the court was down below fifty, and where there was a vacancy, we would do all we could to close the court, is that right?

A. Yes.

Q. Yes. Now, can you give the Committee some idea of the number of cases that are tried by some of these small courts?

A. Well, we have some courts that have as few as eight cases a year.

Q. Eight cases a year.

A. I could tell you of one right away. We have four courts in Victoria County that, at the present time, average about nine cases a year.

MR. FROST: Where would they be?

A. Bobcaygeon with ten cases, Woodville with about nine cases, and there is Omemee with a similar number of cases.

Q. That is largely due to the fact that, in the case of Omemee, Lindsay Division Court is quite a big one and most of the cases are tried there?

A. I was going to refer to that when I went over my opinion of the Barlow report, to indicate that, as far as the territorial jurisdiction is concerned, if that were increased to a county jurisdiction, it would tend to eliminate the smaller courts.

MR. CONANT: That is the answer, yes. But I want to pursue that, if I may, because I think there is a popular misconception; Mr. Cadwell can confirm this observation or otherwise, that in our effort to abandon these very small courts is frequently met with the objection, "Well, they don't cost anybody anything." Isn't that right, Mr. Cadwell?

WITNESS: Yes.

Q. Now, that is not correct, is it?

A. No, that is not correct, because the municipality, or somebody has to pay. It's true that we don't pay ——

Q. Quite.

A. —— the division court clerk or bailiff any salary, but whether it is the municipality or the county or the federal government, somebody must pay for the operation of the court.

Q. Well, when the judge goes out to one of those small courts, or any of them, where their earnings are less than $1,000 a year, what happens?

A. The county has to pay for a court reporter.

Q. Yes?

A. The municipality has to pay for the attendance of the bailiff and clerk.

Q. Yes?

A. And the federal government would have to pay the expenses of the judge.

Q. Yes. Now while, of course, the expense is divided between three jurisdictions, yet the tax-payers, in the final analysis, have to pay the expenses.

MR. LEDUC: Absolutely.

MR. FROST: Of course, it is fair to say that, for some of those small courts, many of the judges—and I can say this for the judge of the County Court of the County of Victoria—are very reasonable about that; if there isn't a case there, he always ascertains that and he doesn't appear, and therefore there is no court, and there are no charges.

WITNESS: Well, that is the recommended procedure, but I have information on file which indicates that in some counties the judge instructs the clerk of the court not to notify him if there isn't any case.

MR. CONANT: What is that? Just a minute, I think that is a statement of the utmost importance; pardon me, Mr. Frost, will you repeat that, Mr. Cadwell?

WITNESS: I have information that, in some of the counties, a judge has given instructions to the clerk of the court not to notify him if there aren't any cases, because, otherwise, he goes, and receives the expense account for attending.

Q. Well now, what does the judge get from that, what does he make out of it?

MR. FROST: His $6 a day and his mileage.

MR. CONANT: I want it on the record; tell us what he gets?

WITNESS: He receives his $6 a day and his expenses.

MR. MAGONE: The expenses or mileage, in the case of the judge?

WITNESS: No, it's expenses.

Q. Yes, I don't think the Dominion pay mileage, do they?

A. Not to my knowledge.

MR. CONANT: But there must be some yardstick where he drives a motor car?

MR. ARNOTT: I understood he got mileage.

MR. CONANT: The Dominion must set something.

WITNESS: And now, I was going to go through the Barlow report.

MR. CONANT: Well, just on that last observation of yours, that some judges do not allow advice to be given to them so that they would go out, ostensibly to get their fee and mileage, how can that be overcome?

WITNESS: Well, I don't want to put the onus on our division court clerks, because they are necessarily under the jurisdiction of the judge, and the judge can make it rather difficult for a clerk if he wants to. If anybody is to be responsible for it, I think it would be the government that pays the expenses.

MR. MAGONE: Would not a direction from the Inspector of Legal Offices get over that?

WITNESS: Well, the county judges do not come under the jurisdiction of the Inspector of Legal Offices.

MR. CONANT: Under whose jurisdiction do they come?

WITNESS: The Deputy Minister, at Ottawa.

Q. And what jurisdiction does the Deputy Minister at Ottawa exercise, in practice, I mean?

A. Well, in practice, I doubt if he exercises any supervisory jurisdiction.

MR. MAGONE: Well Mr. Cadwell, I don't find myself in agreement with that last statement. If the judge is acting as division court judge, he is our judge?

WITNESS: Yes.

Q. We pay him $1,000 a year?

MR. LEDUC: What for?

MR. MAGONE: We pay the county judges $1,000 a year for carrying on ——

MR. CONANT: All professional services.

MR. MAGONE: —— any duties imposed upon them.

MR. CONANT: Yes.

MR. MAGONE: By any provisions in our statutes.

WITNESS: They are appointed, as I understand it, under the Surrogate Courts Act, and paid for doing that work.

MR. LEDUC: I thought that was the understanding.

MR. FROST: How is it some judges don't receive anything, they receive no provincial salary at all; I thought it was only on the appointment as ——

MR. LEDUC: I think what you say, Mr. Magone, applies to Supreme Court judges.

MR. MAGONE: Oh, no.

MR. SILK: The Supreme Court judges get it under the extra-judicial proceedings.

MR. CONANT: I had in my hands yesterday, a list, Mr. Magone, of the compensation of all county judges; have you it here?

MR. MAGONE: No, I haven't it here.

MR. CONANT: If you had it here, it could be put on record; it was compiled at the request of Mr. Frost. I sent him a copy and we should have a copy here.

MR. FROST: They all get provincial salaries, that's right, Mr. Chairman.

MR. CONANT: Yes.

MR. LEDUC: I thought they were paid that as surrogate court judges.

MR. MAGONE: No.

MR. CONANT: That list should be placed on record, Mr. Magone.

MR. LEDUC: Would that be in the public accounts?

MR. MAGONE: Yes, I might give a very short history of this thing. Formerly, the county judges were appointed surrogate court judges by the province, under its power to appoint surrogate court judges. The senior judge was usually appointed surrogate judge, and his fees were commuted at $1,000 per annum for his surrogate work. In counties where there was a junior judge, he did not receive the $1,000 per annum.

MR. CONANT: That is, the junior judge didn't?

MR. MAGONE: Yes. But where the fees earned by the surrogate judge were over $1,000, the junior judge received the surplus fees over $1,000, up to $666; why that amount was set I don't know. And in a number of counties, at the end of each year, we would get an account, I think through the Inspector of Legal Offices, from the junior judge, and pay him that amount. About 1919 the Act was amended to provide that every county judge in the province would receive, for any services he performed under the provisions of any provincial statutes, the sum of $1,000, except in the County of York, Middlesex, and Wentworth, where the senior judge was paid $1,600.

MR. CONANT: Yes, those figures are there.

MR. MAGONE: That was afterwards amended, in so far as the County of York was concerned, to provide that every county judge and junior judge in York would receive $1,600. The result is that now in York, all the judges receive $1,600 and all the judges and junior judges throughout the province receive $1,000.

MR. LEDUC: Has the $1,600 been abolished in Middlesex and Wentworth?

MR. MAGONE: Yes.

MR. MAGONE: As the judge receiving that salary vacated office, the amount reverted to $1,000.

MR. FROST: Well, why should there be a per diem allowance at all, in connection with division courts?

MR. MAGONE: It is supposed to take care of his hotel expenses. It is a living allowance.

MR. FROST: Yes, but he receives expenses though, does he not; he gets his expenses?

MR. MAGONE: I don't think so, Mr. Frost. My understanding is that the $6 is a living allowance. It says so in the Dominion Judges Act, and anything he gets in addition to that is a travel expense.

MR. FROST: Well, according to the Dominion Act, he then receives something every time he leaves the county town, is that it?

MR. MAGONE: Yes. It is in section 21 of the Dominion Judges Act.

MR. LEDUC: I think it is $10 for high court judges and $6 for county court judges.

MR. MAGONE: Section 21 reads as follows:

> "There shall be paid for travelling allowances to each judge, whether of a superior or county court, and to each local judge in Admiralty of the Exchequer court, except as in this section otherwise provided, in addition to his moving or transportation expenses, the sum of $10 for each day, including necessary days of travel going and returning, during which he is attending as such judge in court or chambers at any place other than that at which he is by law obliged to reside, if such attendance has been in any place which is a city, otherwise he shall be paid the sum of $6 for each day he has so attended."

MR. LEDUC: Oh yes, you're right.

MR. CONANT: This whole question, of course, gentlemen, is proper to our inquiry, but it is a little remote in this respect, that, after all, it is a federal matter. This Committee might properly, I think, if it saw fit, formulate and submit to the federal authorities its recommendations.

MR. FROST: Well, in what way would that account that was referred here the other day, of a judge down in eastern Ontario, who got $1,000 for travelling expenses, how in the world would that ever be compiled?

MR. MAGONE: That could only result, I think, from a judge from one remote part of the district attending Division Court in some other remote part of the district, so that his moving expenses would be heavy.

MR. CONANT: Well, I am not sure, gentlemen, whether we could or could not properly make any submissions to the federal authorities.

MR. LEDUC: I think we might just as well stick to our own ——

MR. CONANT: I don't know whether we could or not, but I would like more particularly to examine, Mr. Magone, any provincial legislation that might affect this situation.

MR. MAGONE: Well, I was going to ask Mr. Cadwell if the Inspector of Legal Offices might not direct the clerk to advise the judge if there were no cases?

MR. LEDUC: The best thing would be, when we amend the Act, to put it in the Act.

WITNESS: I would prefer it to be in the Act, because, as I say, I wouldn't want to have the clerk in the position of depriving the judge of anything he thinks he is entitled to receive.

MR. CONANT: You are not suggesting a conspiracy of any kind, are you?

WITNESS: Not at all.

MR. LEDUC: There is another point that must be remembered also, that a judge will travel to a court where there is one case, he will get there, find the plaintiff, and find that the defendant does not deem it advisable to appear. And in that case, you can't blame the judge or the clerk, or anyone.

MR. CONANT: No. Well, is there anything else from Mr. Cadwell, Mr. Magone?

MR. MAGONE: Yes. Were you going to deal, Mr. Cadwell, with the recommendations of Mr. Barlow?

WITNESS: Yes, I was going through the recommendations. The first recommendation, in relation to amount of jurisdiction, I would like to leave that for a later period. The second recommendation, that the procedure be simplified, I think that is essential, that there be some simplification of the Division Court Act, the forms and rules.

MR. CONANT: You mean a revision of them?

WITNESS: I think they will have to be revised and simplified.

MR. FROST: You heard the suggestion this morning, of a Committee sitting periodically, in connection with division court rules; do you think that would be advisable?

WITNESS: Well, I think you will have to go further than that, if you are going to simplify the procedure generally, because the Act itself is one of the most complicated documents we have; it has been amended, in substance, by the rules and by the number of cases that affect the Act, and as far as being capable of ordinary interpretation by the layman, it can't be done, and I think, if you are going to have a division court Act that is supposed to satisfy the poor man and his claims, the Act should be simplified.

MR. FROST: You heard what Judge Barton said here yesterday? He thought it was quite simple, perfectly simple.

WITNESS: It is perfectly simple to him, to a judge that has been on the bench as long as Judge Barton, and has made a special study of it.

MR. STRACHAN: As a matter of fact, it isn't simple to the judges; there is a great difference of opinion, even in the higher courts, as to the meaning of some of the sections.

WITNESS: You only have to look at Bickell and Segar to see that the Act certainly is not simple.

MR. STRACHAN: There are more decisions on that Act than on the Mechanics' Lien Act.

MR. MAGONE: Do you think we might abolish Bickell and Segar if we amend the Act, Mr. Cadwell?

WITNESS: Well, I was going to suggest that either the Small Claims Court be made a Small Claims Court and to eliminate The Division Court Act, or the present Division Court Act be simplified. When the matter was first discussed, and Mr. Barlow brought out his report, our department drafted a small type of court, and if you would like to receive parts of that, it might be very helpful.

The first suggestion we had would tend to redistribute the 304 Division Courts in the province on the basis of population and service rendered, and reduce the number of courts to not more than 138, without territorial restriction.

MR. MAGONE: How many are there now?

MR. FROST: If you do that, without territorial restrictions, you would get into the old difficulty of a poor man who lives down by Ottawa being sued by a thrashing machine company down in Sarnia.

WITNESS: Well, I am thinking of territorial jurisdiction in the county.

MR. MAGONE: Yes.

WITNESS: The only problem that is attached to that is, that the bailiff's fees are greater under the present system, the greater the distance the defendant is from the Division Court in mileage, because the bailiff receives 20 cents a mile for services. Incidentally, the highest service we have to pay our sheriff is 15 cents a mile, and why the bailiff receives 20 cents a mile, I don't know.

MR. MAGONE: Are they both one-way payments?

WITNESS: Yes.

MR. FROST: It's another example of things not being carried out in a parallel manner.

MR. CONANT: Well, they are working that out now.

WITNESS: Another reason I recommend that, is, if that were done, you would get a better calibre of clerk and bailiff. If you only pay a man $250 a year, and some of our clerks and bailiffs receive much less than that, the work must necessarily be part-time work, and with the complicated Act that you now

have for them to study, the average clerk either won't take the time to study it, because it isn't worth while, or he hasn't any background to study it, even if he would take the time. And if we are going to have a more efficient court, it would seem that you would have to have a more efficient personnel in the operation of that court. Now, this simplified procedure, if you accept it, would be simply that the plaintiff would file a notice of claim with the division court clerk, accompanied by an itemized account of the debt, and then, the second thing, the clerk would receive the claim and make an entry in the procedure book, and then the clerk attaches to the notice of claim, a blank form for the use of the defendant in entering a dispute, and both of these are sent, by registered mail, to the defendant.

MR. CONANT: I don't know, Mr. Magone, that we should take time with that detail. I don't think this Committee can settle more than general principles.

MR. MAGONE: Yes.

MR. CONANT: Don't you think so, Mr. Frost.

MR. FROST: I agree with you, Mr. Chairman.

MR. ARNOTT: Mr. Cadwell, you recommend the reduction of the number of Division Courts, and you considered diminishing the number of sittings, for instance, in the small towns?

WITNESS: Yes. Well, your section 9 of The Division Courts Act sets the number of sittings.

MR. ARNOTT: Well, it says:

> "(1) A sittings of the court shall be held in each division once in every two months, or oftener in the discretion of the judge who presides over the division courts of the county, and the judge may appoint from time to time; alter the times and places for holding such courts, subject, however, to any discretion which may be made by the Lieutenant-Governor in Council and shall notify the clerk, thereof."

WITNESS: The problem under the present Act, if you delay the number of sittings, is that so many of the workings of the court are relative to the sittings, that they might be delayed a matter of six months or a year in relation to a claim that you want to collect. That is the problem.

MR. CONANT: May I interject this: it does suggest itself to me, that that section 9, and I thought of it before, should be under some control by the Inspector of Legal Offices.

MR. ARNOTT: That is my point.

MR. CONANT: Because you have the possibility of the same abuse creeping up that has been at least suggested here, and then I don't consider, for my part, a court every two months as practical; three or four courts a year would be plenty.

What would you say, Mr. Cadwell, from your experience, if that section 9 were made the final disposition of something under the control of the Inspector of Legal Offices, or the Attorney-General, or something of that kind?

WITNESS: Well, that would help, provided you leave the Act as it is. But it is difficult for me to think of improving the Act and simplifying it by simply changing one section of the Act.

Q. Yes.

A. It needs a complete overhauling.

Q. Yes.

A. If you are going to gain any results as far as the convenience and service to the public generally as concerned.

MR. CONANT: Well, I think the Committee have that consideration in mind. Is there anything further, Mr. Magone?

MR. MAGONE: Yes, I wanted to ask Mr. Cadwell about surplus fees; have you a statement with respect to the surplus fees that are paid over to the municipalities?

WITNESS: I don't understand that, "paid over to the municipalities".

MR. FROST: Juries' fees?

MR. MAGONE: No. Oh, they are paid over to the province, are they?

WITNESS: Yes, the surplus fees are paid to the province.

Q. Probably you had better just tell the Committee how this surplus fee fund is made up, first.

A. Well, under The Division Courts Act, there is a percentage of a certain amount, whereby the clerk, after paying the expenses of the court, and so on, pays a percentage to the province.

MR. CONANT: Yes.

WITNESS: Part to himself, and part to the province. And the same is true of the bailiff. I can give you the exact divisions; perhaps I have them here.

MR. CONANT: Of course, that only affects comparatively few courts?

WITNESS: Yes, there are only perhaps about fifteen or twenty courts in the province that that affects.

Q. Yes.

A. That amount is tending to increase, not because there is greater business

in the courts, but the courts are operating more efficiently now in that percentages have been commuted on salary basis.

Q. Yes.

A. Which means there is greater surplus to the province.

Q. Well, you don't suggest any revision of that?

A. I don't think it would be advisable to make any change in that at the present time, because the Act provides that it can be changed by Order-in-Council by commuting the officer in question.

Q. Yes, it is a matter of reconciling provincial revenues with reasonable compensation to the officials of the county involved, isn't that it?

A. Yes.

MR. MAGONE: As Inspector of Division Courts, Mr. Cadwell, what is the principle complaint you get about Division Courts?

WITNESS: Well, the principal complaint is that the bailiff is not prompt enough in following the procedure of the Act, that there is a delay and that the costs are excessive. Those are the general ones.

Q. In connection with the fee that the clerk requires to be deposited with him in court, on entering a claim, are large surpluses built up by the clerk, unearned fees?

A. Over the province generally, I would think that there would be very little. There are some surpluses, but my experience, outside of the larger cities, is that, although the Act says that a deposit should be made, in many cases it is on the credit basis, with the result that our division court clerks and bailiffs, in several instances, are not receiving the money that they should receive.

Q. But, in some of the larger centres, there is some cause for complaint, is there not?

A. I haven't received any.

Q. Probably I might recall to your mind the case, Attorney-General versus Howard, I don't know whether you are familiar with that case?

A. Yes, I am.

Q. That was a case where a large surplus was built up by a former clerk of the Division Court.

A. Well, over a period of time, in a court like we have in Toronto, with the number of claims we have, if there is an overpayment of 50 cents on each claim, you can see how high it would become in a year, and that was evidently what happened in relation to the Howard case.

Q. And there is no duty upon the bailiff to inform the plaintiff or his solicitor that there is a surplus there?

A. No.

Q. With the result ——

MR. CONANT: Why shouldn't there be a duty on the clerk to inform them?

WITNESS: I presume the reason is that the plaintiff is expected to look after his case.

MR. MAGONE: Wasn't it quite a large surplus built up? Do you remember the amount, or the approximate amount?

MR. CONANT: Six thousand dollars, wasn't it?

MR. MAGONE: Something like that.

MR. FROST: I thought it was thirteen thousand dollars.

WITNESS: I don't remember the amount, but I think it was something like that.

MR. MAGONE: I am informed it was over ten thousand dollars in four years, in this particular case.

WITNESS: Yes.

Q. Have you any knowledge of that?

A. No, I haven't.

Q. And it was held, I understand, that the clerk was in the position of a trustee, personally responsible for that money?

A. That was the judgment, I believe.

Q. It wasn't money that was paid to the court, it was paid to the clerk.

A. That's right.

Q. Yes, so that when the clerk died, in that case, it was impossible to collect it from his estate?

A. That's what I understand.

MR. FROST: In other words, each individual suitor should go to him and say: "I want my 50 cents back."

MR. MAGONE: Yes.

MR. FROST: That's peculiar.

MR. MAGONE: And in this particular case, the Attorney-General brought an action, suing on behalf of all the suitors who had paid money in, and the court held that it was in trusteeship, and each individual suitor would have to bring an action by himself.

MR. FROST: That's a peculiar situation.

MR. CONANT: Yes. Wouldn't the situation be met if, at the close of each year, these clerks were obliged to forward to the province, the Treasurer or the Attorney-General, surplus money in hand, and a statement on how they were derived, and then the province hold those funds, and they would be available for anybody who came along and claimed them.

MR. MAGONE: Yes, some scheme could be worked out, Mr. Chairman. That is my reason for bringing it up, so that it might be worked out.

MR. CONANT: Well, I think it's very proper to bring it up at this time.

WITNESS: Well, I don't know what the former practice was, but it couldn't occur under the present practice, because we require the clerks to deposit all moneys in the clerk's trust account, and at the end of the month, the amount for his fees and the amount for bailiff's fees is deducted and the amount that is properly payable to the suitor's trust fund is paid out and there isn't any surplus.

MR. ARNOTT: That's right.

MR. CONANT: Is it audited?

WITNESS: Yes.

Q. By competent officials?

A. Yes, by two auditors under my department.

Q. They are chartered accountants, are they?

A. They are accountants.

Q. How long has that practice been in force?

A. Well ——

Q. It's since I came here, is it not, that that practice was started?

A. Yes, I think it was started in 1937, after you took office.

MR. MAGONE: So that if a clerk now dies, his successor in office takes over that fund?

WITNESS: That's right.

MR. CONANT: I think, in all our outside services, Mr. Cadwell, not only

do we periodically audit, but when one official dies and another takes over, there is an audit for the transfer, and it is taken over on an audited statement basis?

WITNESS: That's right. And another change too; formerly the account was in the personal name of the clerk of the court, whereas at the present time, all the accounts are in the name of the court.

Q. Yes.

A. And not in the name of the clerk.

MR. MAGONE: In your opinion, should a provision not be inserted in the Act, instead of making it merely a departmental regulation?

WITNESS: I think it should be in the Act, yes.

Q. Did you have a copy of a block system of tariffs that you wanted to submit to the Committee?

A. Yes, I have. On first considering the Barlow report, I indicated there was a very simplified method of procedure that you use if you wished. That is set out in this memorandum, and it can be filed, if you wish.

MR. CONANT: That can be filed, Mr. Magone, that is Mr. Cadwell's suggestions for simplified procedure.

WITNESS: That is if you are taking into consideration limiting the jurisdiction of the court to $100.

Q. Yes.

A. If you are going to leave the court in its present form, I see no point in limiting the jurisdiction of the court to $100. In fact, I would be in favour of increasing the jurisdicton of the court, in that, if you have the costs of the court constant, and you increase the jurisdiction, you reduce the costs, and under the simplified method such as outlined here, with the assistance of some of the division court clerks, we have worked out a block system of costs, and they are as follows: (and this is for all services from entering action or issuing a judgment or interpleader summons up to and including judgment and issuing execution or transcript. That is, it doesn't go all the way, but it goes up to judgment, including execution).

Q. Yes. Does it include the cost of service?

A. Yes.

Q. Bailiff's fees?

A. Including everything up to that time. Where there is one defendant, where the claim does not exceed $10, that is up to $10, the complete charge would be $2. From $10 to $20, the complete charge would be $4, and if there is an additional defendant added, 80 cents. From $20 to $60, the complete charge

would be $5, and for each additional defendant, $1. Between $60 and up to $100, the complete charge would be $6, and for each added defendant, $1.25. From $100 up to $300, complete charge, $9.50 and for each added defendant, $1.50. Where the claim exceeds $300, the complete charge will be $12.50, and for each added defendant, $2.25. And then I have added a note, after two adjournments, if there are more than two adjournments, 75 cents for each adjournment.

MR. FROST: How does that compare with Mr. McDonagh's schedule? In the first place, under $10, it is $2, as compared with $2.09. From $10 to $20, it is $4, as compared with $4.86. From $20 to $60, $5, as compared with $6.13. From $60 to $100, it is $6, as compared with $7.17. From $100 to $300, it is $9.50, as compared with $9.92. And for the maximum claim it is $12.50 as compared with $20.11.

MR. CONANT: Well, it is a little lower all the way down the line.

WITNESS: Well, it can be done for less, because you haven't the book-keeping. Under the present system, you have to keep track of all the individual fee items, and there is probably twenty-five or thirty for the clerk and about ten or twelve for the bailiff, and it doesn't cost so much to have the book-keeping done, and another thing, I think this would increase the business of the Division Court.

MR. ARNOTT: There is a tendency not to use the court now, on account of those costs?

WITNESS: Exactly.

MR. CONANT: Well, if I may interject, I am strongly of this opinion, that it is not only the amount involved, but also the uncertainty of the amount involved. I think that is the primary factor. Under our present system, if you enter a claim in a Division Court, and particularly in the country, you can only guess what the costs are going to be before you get through with it; is that not right, Mr. Cadwell?

WITNESS: That is right, sir.

MR. MAGONE: Yes, and that is the reason this surplus is built up in this court.

MR. FROST: In connection with the block system, that includes up to what, execution?

WITNESS. Up to and including judgment, execution or transfer.

Q. Well, supposing a claim is entered in court, and it is settled, who gets the refund?

A. Well, that would be one of the cases where it would be to the advantage of the clerk. There are other cases where it would not be to the advantage of the clerk.

MR. CONANT: It would average up?

WITNESS: Yes, it would average up.

Q. Just following that for a moment, should there be any difference in what you might call the strictly urban courts and the rural courts? For instance, there are courts in the province where the total mileage possible would not exceed, perhaps, five miles, and then you have courts in the province where the mileage might run to fifty miles.

A. Well, that is one of the big problems in dealing with the Division Court, that it ranges from a small mileage to a great mileage.

Q. Yes.

A. And it ranges from a small number of cases to a large number of cases. If it were practical and possible, there should be some difference between the suburban municipalities and the rural municipalities. That is a matter of legislation.

Q. Well, there is also this other anomalous situation, that if you had one block system for the province, you would be enriching the urban courts and perhaps impoverishing the rural courts, when what we require is the very opposite, we need to enrich the rural courts and perhaps deduct something from the revenues of the large urban courts, isn't that correct?

A. Well, the only reason that the large urban courts have a surplus is not because of the difference in fees, it is in the volume of business.

Q. Yes.

A. But in approaching this problem, you can't make any progress in dealing only with one aspect; you have to consider the total Act and the total number of changes that you are making, and then apply your block system and you will arrive at the result that you want to arrive at.

MR. CONANT: Is there anything further from Mr. Cadwell, Mr. Magone?

MR. MAGONE: I don't think so, unless Mr. Cadwell has something further.

WITNESS: This only takes you up to execution. Now then, for judgment summonses, which is a separate case, under the present Act, where the claim does not exceed $10, the charge would be $2, between $10 and $20, the charge would be $3.25, and between $20 and $60, the charge would be $4, between $60 and up to $100, $4.75, and from $100 up to $300, $7, while for claims over $300 the charge would be $10. Now that is keeping in mind that under the present Act there is not only one action, but there are several actions that may go on at the same time, in a Division Court, relative to the same case, and the proposal ——

MR. CONANT: You mean the same defendant? You said case.

WITNESS: I meant the same defendant, yes, and the proposal would be that you would have only one action and you would eliminate the additional types of actions that we have at the present time; that is, you would eliminate show cause actions, and you would only have a judgment summons. You would eliminate garnishee types of actions, and only have attachments, and so on.

Q. How would you break down—for instance, in your block system, with a charge of $4 for claims between $10 and $20, how would you break that down between the clerk and the bailiff? I don't want the details, but would you break it down as a matter of legislation, or a matter of departmental regulation, or what?

A. Oh I think it could be looked after better by departmental regulation or by Order-in-Council.

Q. By means of a percentage, sliding scale arrangement, or something of that nature?

A. Yes, it could be worked out on the basis of percentage; it would run roughly, perhaps, 40 per cent. to the bailiff and 60 per cent. to the clerk.

MR. MAGONE: Mr. Cadwell, in connection with the number of cases in the Division Courts of the province, what was the total number of cases in 1939?

WITNESS: The total number of cases in 1939 was 78,011 cases.

Q. And of those how many were under $100?

A. Of those there were 54,785 under $100.

Q. That is, roughly, 25,000 over $100?

A. That's right.

MR. CONANT: Well, that rather justifies our concern as a Committee with cases up to $100, does it not, as they constitute two thirds of the total number?

MR. MAGONE: Yes.

WITNESS: Well, they constitute two-thirds of the volume of work, but they don't constitute that same proportion of the fees, because the fees are much larger on the larger cases.

MR. CONANT: Yes, but I think the Committee has approached that aspect of it from the standpoint of the citizens involved, and you are dealing with two-thirds of the citizens that invoke the Division Court when you deal with cases up to $100, isn't that so, Mr. Cadwell?

WITNESS: That is right, yes.

MR. MAGONE: You would have, roughly, 25,000 cases thrown into the County Courts?

WITNESS: That's right.

MR. MAGONE: Only one other thing; you might touch on this; your suggested tariff is based on the assumption that summonses be served by registered mail?

A. Summonses be served by registered mail on claims up to $30, which, at the present time, don't require personal service.

Q. Your suggested tariff is based on that?

A. Yes.

Q. And over that amount, what?

A. Over that amount, it would be the ordinary procedure of serving them personally.

MR. FROST: Have you used that in estimating these costs? That would reduce those costs in those small cases again, would it not?

WITNESS: No, I have taken that into consideration, in that if they were served by registered mail, the bailiff would have to pay 12 cents for the registration, and do the work of sending the registration out, and he would gain on the cases below $30.

MR. CONANT: Well then, your block system, as you have outlined it, is based on the present system of service throughout, is that right?

WITNESS: No, service up to $30 claims by registered mail.

MR. ARNOTT: After that, personal service?

WITNESS: Yes.

MR. MAGONE: By the bailiff?

WITNESS: Yes.

Q. Well, does this fee include bailiff's fees?

A. It includes the bailiff's fees.

Q. But not his mileage?

A. His mileage, yes.

Q. Plus his mileage?

A. And his mileage, yes.

MR. ARNOTT: It covers everything.

MR. CONANT: Yes, that's what I understood.

MR. MAGONE: Isn't it conceivable that in the north country, the amount of travelling expenses the bailiff would have to pay would exceed the amount of the fees?

WITNESS: Well, I think the same procedure would have to be followed as is followed now; specific instructions are given to the bailiff, and he is allowed his expenses for that particular work.

MR. CONANT: Yes, we have a different scale in the province now for travelling expenses for the north country, as compared with the counties, for instance?

WITNESS: Yes.

Q. For instance, with our provincial police, our agricultural representatives, our coroners, and so on, they are on a different mileage basis in the districts than they are in the counties?

A. That's right, but there is no provision for making a difference under the present Division Court Act, but in practice there is a difference made.

Q. Well, if you were setting up a block system, of course, the mileage system they have is a fairly generous one, and the mileage calculations take care of themselves, but you would have to make a distinction for the districts?

A. I think you would, yes.

MR. FROST: Supposing you have your block system apply to the claims up to $100, that means two-thirds of all the cases, and allow service on those by registered mail, instead of only on claims up to $30?

WITNESS: Well, there is this problem in relation to registered mail, and you can allow it up to $100 if you wish, but it sometimes is difficult to serve by registered mail, because people sign for it, and you may get judgment against a man for $100 and he has never seen the papers.

MR. CONANT: Oh yes, we would have to consider that.

WITNESS: That is the problem.

MR. FROST: What impressed me about that was what Judge Barton said yesterday; he said he had found substitutional services by registered mail had been quite satisfactory.

WITNESS: Well, there have been very few substutional services; that may be the reason.

MR. CONANT: There seems to be a suggestion here that different methods should apply in Toronto to what applies in the rest of the province?

WITNESS: Well, we have a peculiar type of debtor in Toronto, I believe.

MR. FROST: Well, Mr. Cadwell, obviously the bailiff situation in Toronto is not as serious as it is outside of Toronto, do you think that you could do this: supposing in Toronto you had the whole thing under this block system, because the bailiffs are, say, all within an area of ten miles, a radius of ten miles, rather, and supposing outside of Toronto, where you are dealing apparently, from what these judges think, with more honest people, supposing that there would be a block system, say, up to $100, and after that, that the summonses might be served by the plaintiff or some other person, that is, he might get the local constable, for instance, to serve the summons, or something of that sort, with an affidavit of service, what would you think of that?

WITNESS: I don't think there would be any objection to that; it is the practice, as you know, followed in the County and Supreme Courts, of allowing the plaintiff, if he wishes, to serve the summonses. I do know that the judges recommend that the sheriff serve them, even in the Supreme Court, but the plaintiff at least has the right to serve them.

MR. CONANT: Well, I think it boils down to this, does it not, gentlemen, that the block system, where it was applied generally to the whole Division Courts Act, would have to be subject to some modification for the districts, and perhaps some distinction made between rural areas and purely urban areas in the province?

MR. FROST: I think so.

MR. CONANT: I think you might direct your attention to that, Mr. Cadwell; anything further, Mr. Magone?

MR. FROST: Just one other point, Mr. Cadwell: we mentioned here previously, the fact that we have good bailiffs and bad bailiffs; that condition exists in every county. Where you have bad bailiffs, the business of a particular Division Court is affected, no doubt?

WITNESS: Yes.

Q. On the other hand, there is this to it, that in the poorer courts, the bailiffs are usually not good, I mean, they are more or less men that are put in to fill the position, and they haven't any qualifications, any particular interest in it. What would you think of the suggestion, take Victoria County as an example, of giving your bailiff jurisdiction all over the county, that is, that he could make seizures and services over the whole county, provided that, in connection with his services, if they were not on the block system, that for his services he should not receive any more fees for services or seizures than the bailiff would in the particular jurisdiction that he goes into. For instance, the bailiff in Lindsay, if he goes up to make a seizure in the jurisdiction of the Fenelon Falls Court, he wouldn't receive any more money than the Fenelon Falls man would if he made it. In other words, he wouldn't be adding on mileage; what would you think of that?

A. Well, I think that that would be a satisfactory arrangement. The same effect can be arrived at by giving the court a county jurisdiction.

Q. Yes, I suppose so.

A. And having a block system for the bailiff fees.

MR. CONANT: Yes. It seems to me the Committee might very well consider that, because it may be that in economizing jurisdiction, it would mean great difficulty for our courts that are too small, and they might die a natural death.

MR. FROST: Quite.

Witness excused.

Committee rises for lunch recess.

AFTERNOON SESSION

C. L. SNYDER, K.C., Deputy Attorney-General for Ontario.

MR. MAGONE: Mr. Snyder, you have certain information with respect to the complaints regarding judges' travelling expenses?

WITNESS: Yes.

Q. And have you a list there of the amount of expenses incurred by certain judges?

A. Yes, I have. Since I was before you the other day, I have been able to compile a list of expenses entailed by district and county judges of the province for the year ending March 31st, 1939. These figures are submitted by the Auditor-General of Canada. I might point out that the amounts set out in these schedules are described in the Auditor-General's report as travelling expenses, and answering Mr. Frost in particular, they include mileage at 8 cents per mile, a per diem allowance of $10 a day when the judge is sitting in an outside city, and $6 per day when he is sitting in something less than a city. Now, I understand that the Committee has been concerning itself particularly with division court matters. I am going to take the liberty, just for a moment, of expressing my own personal view, that that doesn't go far enough to meet the situation.

MR. CONANT: Well, please don't leave that statement that way, to say, "that doesn't go far enough."

WITNESS: Division court matter only, in my opinion, would not sufficiently cover the situation to cause the complaints to cease.

MR. CONANT: That isn't clear enough; isn't this what you mean: if the interchange is purely optional in other than division court matters only, that wouldn't cover that situation?

WITNESS: That is what I hoped to say.

Q. All right. Now go ahead.

A. Now I can give certain examples. I have been looking into this matter for many months, and I have had an interchange of correspondence with the Department of Justice.

I know of one part of the province where the local judge rarely, if ever, sits on a criminal matter, and frequently, in fact almost always, a judge comes a distance of 112 miles to sit on even a trivial criminal case. That is in the western part of the province. Now, the same thing happens, I know, in the eastern part of the province, and to a much greater extent, the figures reveal. And most of the complaints come from the eastern part of the province. I can give you two examples of something that happened this very week.

MR. CONANT: I suggest to the Committee that perhaps our purpose can be served by eliminating names?

MR. FROST: Oh, yes.

MR. CONANT: Yes. I don't think it wise to use the names.

WITNESS: Is it all right to mention municipalities? I can get over it without doing so.

MR. CONANT: Well, I will leave that to your judgment.

WITNESS: All right. In a county town near Toronto, a number of summary appeals were heard the day before yesterday, that is appeals to the county court judge from a magistrate's decision. In one case, heard in a town not far from Toronto, a judge was brought in from away up in the Georgian Bay area, and brought to within twelve miles of Toronto to sit on a summary matter.

MR. CONANT: Have you any idea of the distance involved?

WITNESS: Not as to exact mileage, but the distance was from fifteen miles from Toronto to the Georgian Bay.

Q. Yes?

A. This particular judge, of course, in that case, would be allowed mileage at 8 cents per mile each way, and a per diem allowance of $6 per day. Yet I notice that he is quoted in the press, when he allowed the appeal, as saying:

> "If there were some way of making the province pay for it, I would do it; the counties are being saddled with enough of the cost of criminal justice now."

MR. MAGONE: That is costs to the defendant he is speaking about?

WITNESS: He allowed the appeal in this case.

Q. Yes.

A. And did not allow costs to the successful appellant, but stated if he could make the province pay he would gladly allow the costs. Those are the remarks from the judge who, in addition to his salary, gets the mileage and a per diem allowance.

MR. CONANT: Well, with regard to that remark, I think the Committee will bear with me when I say this: that it is pertinent to make the observation now, that that is an entirely gratuitous remark, and had nothing to do with the merits of the case, and I rather resent the implications involved. I think that should be placed on the record at this time.

WITNESS: Now, in the very town from which this particular county judge came, another serious matter was being heard. A very well-to-do citizen of that community had appealed to the County Court, following his conviction for driving while intoxicated. Now, the judge in the town which was being supplied by the judge whom I have just quoted, didn't go up there, but they got another judge from another part of the country, and he goes in and hears this appeal, and the Crown Attorney writes me as follows:

> "In my opinion, Judge ———— gave the most discouraging judgment a judge could possibly give. The community is up in arms about the whole matter."

A man is supposed to have escaped justice because he had money, and because a strange judge is brought in to hear the case at 8 cents a mile, plus $6 a day per diem.

MR. MAGONE: Does the Crown Attorney indicate by his letter that that was deliberately done?

WITNESS: That is the innuendo.

Q. That is the innuendo. Yes.

A. And the Crown Attorney asks to carry the appeal to the Court of Appeal. Of course, there is no jurisdiction to do so.

I believe, Mr. Chairman, that the letter of Mr. Stewart Edwards, Deputy Minister of Justice, has been filed?

MR. CONANT: It was indicated for that purpose, yes.

WITNESS: In which he states the fault is not of the Dominion, but of the province, and it may be that this Committee might consider removing from The County and District Judges' Act, the sections which cause this interchange of judges.

Q. How old is that section?

A. Some are from 1919, and some 1909. Mr. Edwards says complaints

come from the Province of Ontario only, and that the procedure followed in all the other provinces is not followed by the Department of Justice in Ontario because of the Ontario Act, and he points out, and I think he points out most correctly, that if it wasn't for those sections in the Ontario Act, we would follow the procedure of the other provinces, and then the Department of Justice would pay the expenses of a judge interchanging with another judge only on the written approval of the Attorney-General of the province, and I am concerned ——

Q. Well, now may I interrupt, because I think it is proper, at this time, how would they have jurisdiction? Is there another section there that gives them jurisdiction?

A. The Dominion ——

Q. No, a judge officiating outside of his own county town.

A. Oh yes, in fact it says here that "they shall rotate".

Q. Yes, I know, but is there a section there giving them jurisdiction in other counties than their own?

MR. MAGONE: If that section were removed, you mean?

MR. CONANT: Yes.

WITNESS: Oh no.

Q. Then how would you give them jurisdiction?

A. Under the Dominion Act, whereby, under subsequent circumstances and approval forthcoming from the Attorney-General, they may go to another county and sit. That is arising out of emergencies in the administration of justice, such as illness, or something of that sort.

Q. Well, how would you meet it in civil matters? How would they get jurisdiction in civil matters?

MR. FROST: Well, the same thing would apply.

MR. CONANT: I think I know the answer, I am only asking it to get it cleared up.

WITNESS: I haven't concerned myself with civil matters, only criminal administration; the Attorneys-General of the other provinces, when the thing comes up, certify that the attendance of the judge at the above court was approved and necessary.

Q. Well, then, that would work out in this way, would it not, Mr. Snyder, if those sections were removed, every judge would stay in his own back yard?

A. Yes.

Q. Excepting in cases of illness, or where the nature of the case was such that the judge couldn't properly try it?

A. Yes, it is set out in the Dominion Act.

Q. Yes. Then, in that case, is a direction issued by the Department of Justice or the Attorney-General?

A. No, the Statute says:

> "The Judge of any county court may, without any such order . . . perform any judicial duties in any county or district in the province on being requested so to do by the county court judge to whom the duty for any reason belongs."

But then the judge must be careful, because unless he is going to have your approval, his expenses won't be paid.

Q. I see. So before it was undertaken, if expenses were expected, they would get in touch with the Attorney-General?

A. Yes.

Q. And get his previous approval as a foundation for his subsequent approval of their expenses?

A. Yes, unless it was an emergency matter, and we had to o. k. it afterwards, if it was done in good faith.

Q. That's right, yes.

MR. FROST: Mr. Snyder, there was some suggestion here the other day that Mr. Barlow, in his report, or his recommendations, was drawing the line a little bit too fine; the suggestion was this: that those sections that were passed in 1919 should be limited only to County Courts, Courts of General Sessions of the Peace, and County Judges' Criminal Courts, but that in all cases involving assessment appeals, Division Court cases, cases arising under any other statutes or any other cases, that in all of those cases the judge should stay in his own county, except where authorized by the Attorney-General. In other words, that the provisions for rotation would still apply as regards County Courts, General Sessions of the Peace, and County Judges' Criminal Courts. Now the purpose of that was ——

MR. CONANT: While you are looking that up, with regard to this list that Mr. Snyder has filed, I don't want the names used by the press; the gentlemen of the press will please keep that in mind.

MR. FROST: What would you think of that, Mr. Snyder, a limitation along those lines?

WITNESS: Well, I don't think that meets the bill at all, Mr. Frost.

Q. Well, doesn't your main abuse occur in so far as Division Court cases, and cases of that kind, are concerned?

A. And County Court Judges' Criminal Court also.

Q. I see the point.

A. That is, if there is a case coming up non-jury, and there is no excuse at all, the judge seems to come from the next county to hear the case.

Q. Here are the reasons Mr. Barlow gave in his report:

> "Under this Act certain counties have been formed into districts and the county judge is given jurisdiction anywhere within the district. This was originally conceived to relieve county court judges from the embarrassment of trying cases of which they might have a more or less personal knowledge within their own county and also relieve them from what is sometimes embarrassing, namely, the same counsel appearing before them continuously."

Now, personally, I feel that there is some merit in the rotation system, provided it isn't carried to ridiculous extremes. And I just wonder whether you couldn't keep some of the good points of this, namely, the rotation of the judge in other districts, where he meets other lawyers, where he perhaps faces just a little different system of circumstances, and which keep him, and will keep any other judge, from getting in a rut, you see, and at the same time to cut off the things which are now, I believe, causing the difficulties to which Mr. Barlow refers.

Now, I have run into this: I know that some judges refuse to go into other districts, or to permit other judges to come into their districts to try division court cases on account of the expenses; I know there are some judges that are very, very honest in that regard, and are trying to protect the public.

WITNESS: York County is an outstanding example of that.

MR. MAGONE: York County is not in a district.

MR. FROST: I just wondered, Mr. Snyder, if we could not keep the good points of the system and at the same time, either cut down or eliminate the bad points?

WITNESS: Well, I have heard some of the solicitors from the western part of the older part of Ontario say, that if they appeared in a county town before one judge one week, they didn't know where he would be the next week; they might have to go to any one of three county towns, if a matter was to be continued, or an order decided. Most of the protests from lawyers come from the western part of the province, and from Crown Attorneys, from the eastern part of the province, and from citizens.

MR. CONANT: Following that, Mr. Snyder, do you think it would go far enough in correcting the situation to limit it to leaving the County Court, the

Court of General Sessions of the Peace and the County Court Judges' Criminal Court, in their present state?

WITNESS: No, I don't think it would, sir.

MR. MAGONE: Would it help, Mr. Snyder, if the sizes of the districts were reduced? For instance, you will now find a county court district embracing five or six counties; would it help to reduce that to two or three counties?

WITNESS: Well, personally, I don't think it should be more than two, that is so far as the older part of Ontario is concerned; as it is now, in a district with which I am very familiar, the choice exchange is between two cities that are 112 miles apart; they skip the city in between!

Q. Yes.

A. That is the two at each end of the district.

MR. CONANT: Well then, in order to more or less summarize that ——

WITNESS: And going further than that, sir, in answer to your question, it isn't so bad, in that part of the province, in Division Courts, as it is in County Court Judges' Criminal Courts. That is, if a man has been committed for trial in one city, elects speedy trial, it seems to me, for no reason at all, the judge at the other end of the district will go all the way down to hear that one case and come back. And there are city expenses there, throughout. In the eastern part of the province, the big complaint is about the Division Courts.

Q. There is no co-ordinating, or central authority, in each one of these districts? The judges of that district just ——

A. The senior judge of the district arranges the schedule.

Q. Is that the arrangement?

A. Yes.

MR. MAGONE: He is required to call a meeting?

WITNESS: An annual meeting, and he presides.

MR. CONANT: But then, he doesn't deal, and that meeting doesn't deal, with the day-to-day, and the week-to-week shifting that is going on?

WITNESS: No, it does not.

Q. Well then, that is done just by an arrangement of the moment between the judges, I suppose?

A. Quite.

Q. The senior judge, Mr. Snyder, hasn't any real control?

A. No control; he is really a chairman, to arrange things.

Q. Yes.

A. If you notice the schedule that I have given you, you will see that the travelling expenses for the County of York, where about 70 percent of the criminal work of the province is carried out, is approximately $250.00 out of a total of $34,000.00; that shows the unfairness of the thing. That is, you can take all the judges of York County, with about $250.00, and compare that to the judge of the smallest county of the province, where it is about $1,500.

Q. Well, we have a rather strange mixture here; we are told that when it comes to personal services, we can't trust the people of Toronto; now we are told the judges in this district are the examples of probity and decorum.

A. The senior judge of the county didn't charge the government for one cent for travelling expenses last year.

Q. Well now, your recommendation is what? You think those sections should be removed, setting up the districts and the interchanging of judges in the districts?

A. Yes. In other words, I think we should have the same rule in Ontario as in the other provinces.

Q. Leaving the interchanges, where necessary and desirable, to be approved by the Attorney-General, and the expenses to be passed by the Attorney-General?

A. Yes.

Q. And the federal authorities to pay it on his approval?

A. That's right.

MR. MAGONE: Would it correct a great deal of the abuse, Mr. Snyder, if your suggestion were followed out in that not more than two counties be included in one district?

MR. CONANT: What sections are those, Mr. Snyder?

WITNESS: From 20 on, sir; 20, 21, 22, Chapter 102, R.S.O. Answering Mr. Magone's question, I think that depends; Ontario is such a large province, that in some parts of the province, I would say yes, in other parts, no.

MR. MAGONE: That is particularly true of the districts, I suppose?

WITNESS: Yes, take Thunder Bay; they have two judges there: a senior and a junior judge, and it is a long way from Port Arthur to Kenora.

MR. CONANT: Dealing specifically with the Attorney-General's Depart-

ment, if that arrangement were in effect, would you consider the office of Inspector of Legal Offices the proper medium to deal with it, subject to the Attorney-General's review, and so forth?

WITNESS: Yes, I would say yes. Mr. Edwards, the Deputy Minister, says that they will accept the approval of the Attorney-General or the Deputy Attorney-General, and it might be that, in the case of Ontario, they might accept the approval of the Inspector of Legal Offices.

Q. No, but you wouldn't suggest that the Attorney-General, whoever he may be, should look after details?

A. Not at all.

Q. But in his department, the Inspector of Legal Offices would be the proper branch to keep these things in hand?

A. Personally, sir, I would say the Inspector of Legal Offices and his deputy.

MR. MAGONE: Mr. Snyder, I notice that in the Judges Act, "each judge of a District Court of Ontario shall receive a travelling allowance of $500.00 per annum."

WITNESS: Yes, you find quite a few of those in the districts. You see, Rainy River, Cochrane, and so on.

MR. FROST: Those are in districts, are they?

WITNESS: Yes.

MR. CONANT: From the Dominion?

MR. MAGONE: From the Dominion. It doesn't look as if, in the districts, there was very much interchange?

WITNESS: No, I have only known of one interchange in the past year, and I arranged that myself because of the sudden resignation of the judge at Cochrane.

MR. CONANT: Yes

MR. MAGONE: Who do the complaints come from, with respect to judges' travelling expenses generally, from municipalities, or ——

WITNESS: From municipalities, from Crown Attorneys, and particularly from legal firms and barristers.

Q. And have complaints come to your notice, where a judge travels to hear Division Court cases, and no cases were there?

A. I have had cases of that kind brought to my attention, yes, sir. Travelled some distance, I might say.

MR. MAGONE: I think that is all, Mr. Snyder, unless you have anything you wish to volunteer.

MR. CONANT: Thank you, Mr. Snyder.

——Witness excused.

MR. MAGONE: We will now hear Mr. Gibson, Postmaster of Toronto, regarding registered mail.

A. M. GIBSON, Postmaster, City of Toronto.

MR. MAGONE: Mr. Gibson, we have had certain suggestions to the effect that summonses might be served by registered post.

WITNESS: Yes.

Q. Is it possible to get back a receipt from the person to whom the letter is addressed?

A. Yes, there is such a thing as what they call a return card. You pay 10 cents extra; it is about the size of a postcard, and the man to whom the letter is addressed signs that card and they return it to you.

MR. CONANT: That is by way of a receipt?

WITNESS: Yes, but you get a receipt at the Post Office when you mail that letter; this is a receipt from the man himself who got the letter.

MR. MAGONE: What is the practice with respect to registered post, if the person is not at the address?

WITNESS: Well, there probably is a forwarding address.

Q. If there is none?

A. You mean they haven't found him?

Q. Yes.

A. We hold that from ten to fifteen days.

Q. From ten to fifteen days, the letter is held?

A. Unless it is stated on the envelope "return in five days" or whatever the case may be.

Q. Do the post office authorities pay attention to those notices on letters, "return forthwith", or "return in five days"?

A. They should; that's their business.

Q. Do you know, in practice, whether they do?

A. Well, in our case, it goes through the departments.

Q. There is no difficulty here?

A. No difficulty here.

Q. Well, do you know what the practice is in a rural section, where there is rural mail delivery?

A. If a person gets a registered letter, the carrier leaves a card in the box, stating there is a registered letter, or a parcel; and they are to be at that box the next day to receive that and sign for it. If they are not there, it is returned to the post office, and they've got to call for it personally.

Q. Do you know how long they keep it in the post office under those circumstances?

A. Well, they'll keep it there for ten or fifteen days.

Q. And then would return it to the addressor?

A. Yes.

Q. I see. Well, is that all you can tell us about it?

MR. CONANT: Well now, just a minute; that card that the recipients or addressees sign, that goes back to the post office?

WITNESS: No. For instance, if you send me a registered letter with an A.R. card, I sign that, and you get that card back.

Q. I get it back?

A. You get it back.

Q. I see. Thank you very much, Mr. Gibson.

—— Witness excused.

MR. MAGONE: Now we have come to a point, Mr. Chairman, where I should like to synopsize or read the various recommendations that have been made to us.

MR. CONANT: On the points we are considering?

MR. MAGONE: On the points we are considering, namely Division Courts, by law associations and other associations.

MR. CONANT: I discussed this matter with Mr. Magone, gentlemen; there is quite a lot of these, and I make this suggestion, that Mr. Magone go over these submissions, summarizing them and indicating them to be included in the record. To read them all would take a long while, but if they go in the record they are

always available, and I think we could get what we need out of them for our present purposes. What do you think, Mr. Frost? Are you agreeable to that?

MR. FROST: Quite.

MR. CONANT: Are we all agreeable to that, gentlemen?

Carried.

MR. CONANT: Very well, Mr. Magone, you may go over the submissions and indicate, quite briefly, as to what they are to the reporter, so that he may include them in his report.

MR. MAGONE: The first of these is from the Report of the Judges of the Supreme Court. A copy of it is before us.

MR. CONANT: There should be someone available to make a list as you go along, so that, without waiting for the extension of the notes, we can turn them up. I will do the best I can.

MR. MAGONE: In the Report of the Judges of the Supreme Court, page 13, they agree that there are too many Division Courts in the counties, but they do not think that

> ". . . the proposed curtailment of the jurisdiction of the Division Courts is desirable, or in the public interest. Beyond question, the recommendation would involve a substantial increase in costs to litigants in any except small cases. There is no general complaint that the Division Court procedure is not adequate for all the cases within its present jurisdiction, and it would be a reversion to the practice long since abolished, to adopt the recommendation."

They also suggest that

> "While doubtless, litigants would appreciate a reduction in the fees of the clerk and bailiff in the Division Court, that is a matter of government policy."

MR. CONANT: Yes.

MR. MAGONE: Now, I will deal first with the observations that have been made on Mr. Barlow's report by the County and District Judges' Association. I think I should read this, as it is rather important. It is on page 2 of their submission.

MR. CONANT: All right.

MR. MAGONE:

> "We are thoroughly in agreement that the number of Division Courts in some counties could be reduced, and that the Division Court should be made a branch of the County Court. We do not agree that the

jurisdiction of the Division Court be reduced to not more than $100.00. We are of the opinion that the public, generally, would not endorse such a drastic reduction, and we believe that the convenience of the public, especially in counties of large area, necessitates courts sitting in different parts of the county.

On page 26 of his report, Mr. Barlow, in discussing the reduction of the number of Division Courts, refers to an instance which was brought to his attention, where a judge attended a Division Court, and there was not a case to be heard, resulting in the expense of $25, including clerk's and bailiff's fees, judges' and stenographers' fees and travelling expenses. We cannot understand how such a thing could arise, unless there were cases to be tried which were settled at a time too close to the hour of the opening of the court to prevent the attendance of the judge and stenographer. The practice followed in most counties is, that some few days before the sitting of the court, the clerk sends the list of cases to the judge, and if there is a claim exceeding $100.00, the judge notifies his stenographer, who goes with him to the court. In the event there are no cases to be tried, or if those on the list are settled prior to court day, the clerk notifies the judge by telephone, and there is no attendance by the judge. The stenographer should never attend unless there is a case of more than $100.00 to be tried."

Then, the Elgin County Law Association, in a letter from Mr. McClurg, the Secretary, recommends that:

"The Division Courts, as they are now, be retained, except that there be a single court for each county, with the office of the clerk located at the county seat. That the sittings of the court be held regularly throughout the county, to be selected by the resident county judge, with the bailiff of such court resident at each such place of sitting, so that the process may be forwarded to the bailiff of the court for service there.

The Association opposes the establishment of a small claims court as recommended by Mr. Barlow, in view of the fact that those members of the Association who have had experience with such courts in the United States and in certain western provinces, have found it most unsatisfactory."

Then, the Board of Trade of the City of Toronto, on page 1 of their submission, recommends that there should be established, within the Division Court, an optional simplified procedure for the collection of small debts, coupled with lowered costs. The Master has recommended that the Division Court be abolished, with claims coming under division court jurisdiction not exceeding $100.00, placed in a small debts court set up as part of the county court system, the Small Debts Court to have a simplified procedure of lowered costs; he then recommends that the remainder of the county court jurisdiction and division court jurisdiction in claims exceeding $100.00, be transferred to the County Court. The Board is of the opinion that, if claims from $100.00 to $200.00 are placed under an even modified form of county court practice, it would be found that they cannot be handled as expeditiously as they can under the present system.

They recommend that the Small Claims Court proposed by the Master be increased to $200.00, or, alternatively, if the jurisdiction has not been increased with respect to the division court jurisdiction, be transferred to the county court practice and procedure, and there should be written into The County Courts Act the supplementary procedure now in The Division Courts Act, relating to orders for payment and contempt proceedings on failure of observance.

That is what we were dealing with this morning, when we were reviewing the judgment summons process.

Then there are submissions from several county law associations.

The Lindsay Law Association recommends that:

> "The amendment to The Division Courts Act, increasing jurisdiction in cases of tort from $120.00 to $200.00 be assented to, and that a suitable tariff be created and counsel fees be increased in cases of such increased jurisdiction."

The Southwestern Ontario Bar Council, recommends that:

> "The costs in Division Court be reduced, that they are too high, as at present.

That association represents the following counties: Oxford, Middlesex, Kent and Lambton.

MR. CONANT: And what is their recommendation?

MR. MAGONE: That the costs are too high in division court actions. They recommend a basis which will keep the amount of court costs proportionate to the amount involved.

There is a recommendation from the—a separate recommendation from the Oxford Law Association, which is that

> "The Division Courts Act and Rules be amended to provide that no person be entitled to commence proceedings in the Division Court other than a solicitor or the litigant person."

That is to cut out the agent.

MR. FROST: Well, what merit could there be in such a proposal?

MR. MAGONE: Well ——

MR. CONANT: You mean, for the lawyers, or the public?

MR. FROST: Well, I mean for both.

MR. MAGONE: I suppose their objection is that a number of collection agencies send in an agent rather than a solicitor to do the collecting for them.

MR. FROST: I don't see any particular objection to that. A lot of lawyers wouldn't be bothered with collections anyway.

MR. MAGONE: The Kirkland Lake Bar Association makes a submission to provide that

> "The Division Courts Act be amended for the payment of counsel fees in actions which involve less than $100.00, such fees to be at the discretion of the judge, but not to be less than $5."

The Waterloo County Law Association, recommmends that

> "The number of courts should be reduced drastically, so as to confine the courts only to the larger centres. And that the Division Courts be given judgment summons jurisdiction in respect to judgments in any court up to some set figure, which should be at least as high as the maximum limit of the division court jurisdiction."

The County of York Law Association recommends that the Division Courts in the City of Toronto should be amalgamated, but does not favour a reduction in the number of Division Courts in the County of York outside of Toronto. The Board does not feel that there is sufficient evidence to justify the forming of this conclusion with regard to Division Courts in other counties. With respect to registered mail, the Board is opposed to the adoption of this proposal, and recommends that the division court bailiff should be put on a salary basis, and that the present fee system be abolished. It also recommends that the Act be amended to permit the plaintiffs to serve summonses if they so desire. With respect to the 1937 amendment, they say:

> "At the time this legislation was introduced into the Legislature, the Board recommended that it should not be proclaimed until further consideration should be given to it."

The Board is of the opinion that, unless there is a preponderance of public opinion in favour of the change, and a decided expression from members of the profession, the Act should not be proclaimed. As to the suggestion that all small claims be tried by magistrates, the Board is strongly opposed to this proposal. It, however, recommends that all magistrates should be chosen from the legal profession. With respect to attaching orders in the Division Courts, they recommend that the Act be amended to provide that an attaching order would bind any money owing at the date of service of an attaching order, provided in all cases, that the order must be served within ten days of its date. It also recommends that consideration be given to some enactment, whereby garnishee proceedings in respect of salary or wages would be more in the nature of the appointment of a receiver. It is suggested that the garnishee should apply to the judge for directions, with the judge having discretion, as at present, in respect to the proportion of wages which are exempt.

Then there is a Supplementary Memorandum from the County of York Law Association in which they say:

> "The Board's investigation indicates there are a number of undesirable

features in the present practice in the First Division Court of the County of York, which leads to inconvenience for the public and for the legal profession as well. Considerable evidence has been obtained by the Board to indicate there is widespread dissatisfaction with the present practice. The following specific recommendations are suggested by the Board:"

MR. CONANT: Who is "the Board"?

MR. MAGONE: The Board of the County of York Law Association.

MR. CONANT: All right.

MR. MAGONE:

"The office hours are now from ten to four, and the sittings of the court commence at ten a.m. There is no opportunity for a party or his solicitor to transact business in the Division Court with respect to a case on that day's list before court opens. The closing hour of four o'clock is considered too early."

They recommended:

"That the office hours be increased from nine-thirty to four-thirty.

Before the amalgamation of the Division Courts I and X, there were two division court offices in the city hall, and division court trials were held on four succeeding days in each week. Trials now only take place on three days in the week, and this has resulted in long lists and delays, with resulting inconvenience to the public and the legal profession. The Board recommends that the Division Court should sit for trial purposes on five days of the week.

The notice on a division court summons now states that if the dispute is not filed within eight days, the plaintiff may recover judgment. In certain types of actions, judgment may be signed forthwith, upon default. In other words, for example, actions in which damages are claimed must go to trial, but the defendant is not permitted to enter a dispute after the time limit of the judge's order ——

MR. CONANT: It seems to me that is a detail, something in the category of what Mr. Cadwell started on this morning. I don't think we can hope to deal with details like that.

MR. MAGONE: This is a matter of substance, that is that you can't enter a dispute after the eight days have elapsed, unless you get an order from the judge, and the payment of the fees, and they recommend that a defendant be permitted to enter a dispute on payment of the fee. They also speak of the present practice of the clerk requiring a deposit, and they recommend that, where the amount of the deposit is not all used in cases, that the clerk be required to notify the plaintiff that there is an amount there that has not been used.

They also state that the present practice is that, here there is a long list of cases for trial, and they cannot be disposed of before adjournment, they are placed on the list for trial at the next court, and that a fee is charged by reason of the adjournment, through no fault of the litigant himself, and an extra fee is charged. They recommend that that be changed.

Then there is a recommendation from the Associated Credit Bureaus of Canada.

MR. ARNOTT: Who are they?

MR. MAGONE: They are a bureau of collection agencies, with a long list of members.

In these recommendations, they agree that a number of small division courts might be eliminated or consolidated with other courts, and that service by registered mail should be permitted.

It is generally an approval of the Barlow Report.

Then Mr. Rogers, secretary of the Canadian Bankers' Association, submits that the banks feel that the scale of charges in Division Court, except for claims below $50, is too high.

> "Either the maximum amount which can be sued for in the Division court should be lowered, so that actions may be taken in the County Court for claims in excess of $50, or the costs of the former court should be scaled down to compare favourably with County Court costs. It is possible to sue, obtain judgment, and examine in the County Court on a claim for $2,000 at less total expense than it costs to get judgment in the Division Court on a $400 claim."

He submits also, that there should be procedure in the Division Court for obtaining an examination before a special examiner, not for the purpose of obtaining an order, but to discover assets. The present procedure regarding the examination before a judge should not be disturbed, but under the present judgment summons proceedings, there is neither time nor facility to examine the debtor adequately.

He also suggests that:

> "that the procedure with respect to Division Court executions be amended so that they—as in the case of County Courts and Supreme Court—shall rank ahead of subsequent chattel mortgages and bills of sale."

MR. CONANT: That could only be done, of course, by being recorded in the office of the clerk of the County Court?

MR. MAGONE: Yes.

MR. FROST: Is there any provision for placing a division court judgment in the sheriff's hands?

MR. MAGONE: No. The present practice is that the execution is handed to the bailiff for execution against goods, and after a *nulla bona* is returned, a special execution is filed against lands.

MR. CONANT: Yes. Now, the question I asked yesterday, about execution against lands going to the County Court—it is the writ that goes to the sheriff after it is issued by the clerk of the court?

MR. MAGONE: Yes. The practice in Division Court would be that the first writ of execution that is issued is against goods only, and it isn't until *nulla bona* is returned that you get your execution against lands, and then it is filed in the county sheriff's office.

It is also suggested that there should be third-party proceedings in Division Court. Apparently there is no provision now, and you must bring separate action.

MR. FROST: Well, there is power for a judge to add on such other persons as may be necessary; I think he can add a defendant where it isn't added by way of ordinary procedure.

MR. CONANT: Yes. I wonder if that arises often?

MR. FROST: I think it does.

MR. CONANT: I don't recall ever having it arise.

MR. MAGONE: The North Bay Board of Trade agrees with the Barlow report, that the costs of Division Courts are too high for small accounts.

The Windsor Chamber of Commerce recommends that all garnishees against wages be handled through a small claims court, recommended to be set up by the Barlow report, regardless of the court in which the judgment has been obtained. They also recommend the pooling arrangement and the pro-rata distribution to creditors of amounts realized by the bailiffs.

MR. CONANT: I suppose that would involve considerable machinery?

MR. ARNOTT: I am afraid some of these things, such as that, would complicate the Act more than it is at the present time.

MR. CONANT: That is the principal objection I see to that.

MR. MAGONE: Then they also recommend thst no plaintiff should be represented in court, except personally or by his solicitor.

MR. CONANT: That is the Windsor Chamber of Commerce submission?

MR. MAGONE: Yes, that is the plaintiff they are talking about.

MR. CONANT: They must have a lot of lawyers on the Board of Directors.

MR. MAGONE: None of the officers is a lawyer.

And they agree with the report about service by registered mail.

With respect to service by registered mail, it might be interesting to the Committee to point to an Act of the Imperial Parliament in 1933, Chapter 42, which provides for the service of process issuing out of a justice's court by registered mail.

MR. CONANT: What kind of claims would that involve?

MR. MAGONE: Summonses for violation of traffic laws, and so forth.

MR. CONANT: How do they work it there?

MR. MAGONE: In some cases, justices hold a small, simple jurisdiction, in this way:

> "Provided that, notwithstanding that a summons has been sent by post in the manner authorized by this subsection, service shall be deemed not to have been effected unless the defendant appears either in person or by counsel, or his solicitor, or it is proved, to the satisfaction of the justices, that the summons came to the knowledge of the defendant; for the purposes of the foregoing paragraph B, the production of a letter or other communication which purports to be written by or on behalf of the defendant, in such terms as reasonably to justify the inference that the summons came to the knowledge of the defendant, shall be *prima facie* evidence that the summons came to his knowledge."

An then there is a provision, saying:

> "Where, by reason of the proviso in subsection 1 the service of the summons is deemed not to have been effected, the justice may issue another summons on the same information and direct that it be served."

MR. CONANT: Well now, our post office return receipt would be the equivalent to that letter they refer to?

MR. MAGONE: Yes. They probably have that procedure over in England.

MR. ARNOTT: It's the same idea, the same principle.

MR. MAGONE: The same principle is involved, yes. This Act came into operation on the 1st of January, 1934. I haven't heard any comments on its operation.

MR. CONANT: That is a rather valuable guide.

MR. MAGONE: Yes, and I think the safeguards set out in that Act are probably ample, if it has been found to work there, because they haven't any amendments to that.

MR. CONANT: No amendments.

MR. FROST: What Act is that?

MR. MAGONE: An Act of the Imperial Parliament, 1933, Chapter 41.

Judge McKinnon, of Guelph, says that there are obviously too many division courts in his county, and that in Wellington County, it takes about one-quarter of the judge's time for division court duties, and that about 20 percent of the days set aside for division courts are wasted, due to the fact that there are no cases to be tried.

He suggests that the Act be amended to permit the judge to determine the number of sittings of the court in each county, according to the extent of business. He suggests four sittings a year would be ample for division courts outside of county towns.

MR. CONANT: Yes, I think that section is due for an overhauling.

MR. MAGONE: One of his reasons for suggesting the consolidation of division courts is, that the place provided for holding court throughout the county is entirely unsuited for the holding of any court. The room is one that is not used except at rare intervals, and its condition is often filthy and lacking any reasonable provision for heating or ventilation.

Another reason he suggests is, that in these places, there is no accommodation for witnesses, and that is particularly true in cases of extended jurisdiction involving motor car accidents, where there may be a number of witnesses on both sides. If a jury is demanded, there is no jury room.

He suggests that the jury sections might be eliminated from the Act.

MR. CONANT: That the jury sections might be eliminated?

MR. MAGONE: Yes.

MR. CONANT: We have not any submissions yet from anybody, that thinks the jury should be continued, have we?

MR. FROST: No. In fact, we asked, the other day, the Law Society if they had any objection, but ——

MR. H. P. EDGE: I don't recall, sir. Mr. McCarthy did say he was entirely in accord with the representation of the Chairman, and the report, if I may, so far as the benchers are concerned, is that the Division Court be retained, but the number of division courts should be reduced, and that the court and bailiff and clerk fees be reduced and made simple in cases under $100, and that the procedure be simplified. I don't believe it is amplified beyond that. I think Mr. McCarthy did say he was in accord with the statement as made by the Chairman, but I have heard nothing with regard to the matter of juries.

MR. MAGONE: I am just looking at a number of recommendations of judges and lawyers.

MR. FROST: I think it would be a good thing to give a copy of those recommendations to the Inspector of Legal Offices, in order that departmental

officials may go over them, and they may suggest many good points in the matter of procedure and so forth, that may be brought up later on.

MR. CONANT: Yes.

MR. FROST: After all, there are some very good ideas there.

MR. ARNOTT: Is it the intention to incorporate those in a letter?

MR. CONANT: Oh yes, the references are being summarized and will go into the record in due course; is that not the intention, Mr. Magone?

MR. MAGONE: Yes.

MR. CONANT: Of course, there is this further observation: that if, resulting from a report of this Committee, a redrafting of the Act were undertaken, those submissions, particularly some of the detail that is set out there, might be matters for consideration at that time.

MR. FROST: Yes.

MR. MAGONE: Then there is a recommendation from the General Counsel of the Toronto Transportation Commission, in which he says that they are not only legal advisers for the Transportation Commission, but they are also brought in contact with the domestic problems of their employees, and he says:

> "The costs for institution of actions in the Division Courts for small claims are, as a matter of fact, higher in proportion than in the higher courts, whereas the reverse should be the case; they should be substantially lower. I see no reason why most services should not be done by registered mail."

He also suggests that the amount of time taken out of a workingman's day to press a small claim makes it almost impossible for him to proceed with same. Further:

> "I suggest that a real small claims court be set up for the larger cities, where the fee for entering an action would be nominal, and where the session for the same would be held in the evening."

MR. CONANT: Did Mr. Flaherty sign that?

MR. MAGONE: Yes.

> "I am sure the services of a junior member of the bar, to act as judge in such courts, could be secured for a very reasonable amount, and those taking such work would receive an invaluable training. This would also relieve the present intolerant congestion in Division Courts in the larger cities."

There is provision, as you know, in The Division Courts Act at the present time, for the appointment of a member of the bar by the judge.

MR. CONANT: Yes.

MR. MAGONE: There is a suggestion, also, regarding third-party procedure.

MR. CONANT: I might say, that the usefulness of that third-party procedure would seem, to me, to be out of proportion to the extent to which it would add to and clutter up the Act.

MR. FROST: Of course, there could be, in Division Court, a very simple method of adding third parties. I think there is this difficulty, that I am not just quite sure now, under what section is it, but there is no third-party procedure, but the judge has power to add them, in order to bring all matters and all parties before him.

MR. ARNOTT: Section 89:

> "The judge may, at any stage of the proceedings, upon such terms as may appear to him to be just, order that the name of the plaintiff, defendant, or garnishee improperly joined be struck out, and that any person who ought to have been joined or whose presence is necessary, in order to enable the judge effectually and completely to adjudicate upon the questions involved in the action, be added as plaintiff, defendant, or garnishee."

MR. CONANT: Yes.

MR. ARNOTT: And then, subsection 4:

> "A person who is added as a defendant or garnishee shall be served with a copy of the summons, the original summons being first amended, and the proceedings against him shall be deemed to have commenced from the date of the order making him a party; but if the application to add any person as a party defendant or garnishee be made at the trial, the judge may make the order in a summary manner, upon such terms as to him may seem just, and may dispense with the service of a copy of the summons if such person or his agent consents thereto."

MR. CONANT: Yes.

MR. FROST: I think one of your difficulties is this: the judge may add, for instance, a defendant to the case, but the difficulty is that, under this procedure, I don't think that he can make any finding as between defendants.

MR. CONANT: No. But what I had in mind was: from my experience in third-party procedure, it is pretty difficult and pretty involved. You have been through it, I presume?

MR. FROST: I agree with that. I think this section 89 might be made a little broader.

MR. MAGONE: If that suggestion were to be followed in Division Courts only, you would have contribution between joint tort-feasers coming up too,

and you would find, where a judgment for two hundred dollars was given, with 50 per cent. contribution, that probably you would have—in the Division Courts perhaps more than in any other court—that only one of the defendants is insured, or has any money. So that is a problem that would have to be dealt with at the same time, and I think probably it should be dealt with by this Committee, in any case not only in connection with Division Court claims, but in connection with all claims where there is contribution between tort-feasers, so that, if a man were found to be only 50 per cent. liable, as between the defendants, or as between tort-feasers, then only 50 per cent. of the amount of judgment should be collected from him, and not 100 per cent. and then allow him to sue his joint tort-feaser and recover from him, if he can.

MR. FROST: That raises a big question. You will find a great deal of disagreement on that.

MR. MAGONE: I have no doubt but what you would, Mr. Frost.

MR. FROST: Take, for instance, the case where two men are each 50 percent liable for causing an accident. Well, as it stands now, the person who is injured can collect from either or both of these parties, isn't that right, I mean for the amount of his damages?

MR. MAGONE: Yes.

MR. FROST: If one man has the money, or if one man is insured, he can collect the whole thing from him. What you suggest is that, if they are 50 percent liable, that the injured man collects 50 percent from one and 50 percent from the other?

MR. MAGONE: Yes.

MR. FROST: Well, on the other hand the argument might be advanced that the man who was injured would not have been injured unless one man had contributed 50 percent to the injury, so that, in all equity, he should be entitled to the amount from the people who caused the trouble, and let them settle the matter between themselves.

MR. MAGONE: Yes, I suppose that is the argument that is advanced in connection with it.

MR. CONANT: Have we anything further on this group, Mr. Magone?

MR. MAGONE: Yes.

MR. FROST: However, on that question, I wouldn't say to add a lot of involved third party procedure to this Act, but I think perhaps this section 88 might be strengthened by giving the judge the right to apportion the damages or the claim as between defendants. I don't think that is provided in the Act at the present time.

MR. CONANT: There is no provision for contribution.

MR. FROST: No, and there might be, just in a general way, the judge might be given the summary power to do that.

MR. CONANT: Well, I think that is worthy of consideration. What is there next, Mr. Magone?

MR. MAGONE: The county judges, in the submission they made to the Committee, referred to their submissions of 1934, which were sent to the judges of the Supreme Court and they replied to it.

MR. CONANT: This is on jurisdiction, I suppose, is it?

MR. MAGONE: Yes. And on page 2 of the submission of the county judges, dated December 31st, 1934, they suggest that:

> "The Division Court is already, in effect, a branch of the County Court, although not legally so, the only statutory link being the judge. In the event of consolidation it could be designated, as in other provinces, 'the small debts division'. The proposed absorption of this court into a consolidated court would facilitate the placing on record with the sheriff or some other central officer in each county, information with aspect to executions against goods issued out of the lower branch of the consolidated court. Under the present system, it is difficult for interested parties to learn of such executions, since they are solely dealt with for the most part by the various bailiffs throughout the county in separate, unrelated courts."

Then the judges of the Supreme Court, replying to that recommendation, say:

> "The increase in the jurisdiction of the Division Courts has been accompanied by some increase in the jurisdiction of the County Courts, and it may be expedient to increase the latter jurisdiction still further, but not, we venture to think, to the extent suggested by the County Court judges."
>
> . . . . . .

then, further:

> "The consolidation of the Division Court and County Court, if that meant the abolishing of all the local County Court offices throughout the province, would probably be met by a popular outcry. The present system of Division Courts meets the popular need and has the popular sympathy. If all that is meant to be done is that the Division Court offices should be constituted local offices of the new court situated everywhere throughout the province, it will not be long before every town that is now the proud possessor of a Division Court office, when it finds that the Division Court office is the local office of the Superior Court of Ontario, will wonder why it may not be in truth treated as the local office of that court."

I should explain that in their recommendation, the county judges asked that the name of their court be changed to "Superior Court of Ontario".

MR. CONANT: Well, just on that point, the county judges in 1934 wanted their court called the Superior Court of Ontario?

MR. MAGONE: Yes.

MR. CONANT: That, presumably, would be somewhat in line with the Quebec system, would it not?

MR. MAGONE: Not entirely.

MR. CONANT: Mr. Leduc?

MR. LEDUC: No, there is only one court, really, in Quebec, that corresponds to the Supreme and County Courts here, and that is called the Superior Court. It has jurisdiction from $100 to any amount.

MR. CONANT: That's what I mean.

MR. LEDUC: Then the court corresponding to the Division Court here is called the Magistrate's Court, or, in the City of Montreal, the Circuit Court. The Circuit Court and the Magistrate's Court have the same jurisdiction, up to $100, with the exceptions that we find here in our Act. But I don't see any reason for changing their name.

MR. FROST: Why would there be any necessity for any change?

MR. CONANT: What was their justification for wanting to call it the Superior Court?

MR. MAGONE: Their recommendations at that time went a great deal further than they did lately; they wanted a Board of County Judges set up as a Court of Appeal, to hear appeals from division courts and county court judges, with another appeal to the Court of Appeal.

MR. LEDUC: Oh well, they had in Quebec, formerly, a Court of Revision, which was composed of three judges of the Superior Court sitting on appeal from judgments of other judges of the Superior Court, and then there was an appeal to the Court of King's Bench, but that was some twelve or thirteen years ago, and they have cut it down, and I think it would be a retrograde step in this province to create another court like that.

MR. MAGONE: Oh yes, we had it here some years ago, Mr. Leduc, in a separate division of the Supreme Court; the Divisional Court was composed of three judges and the Court of Appeal of five.

MR. FROST: When was that submission made? Is that a recent submission?

MR. MAGONE: 1934. But there was a compromise arrived at, as the jurisdiction of the County Court was increased to $1,000.

MR. FROST: But that has never been proclaimed?

MR. MAGONE: No.

MR. FROST: So actually, the compromise didn't amount to anything?

MR. MAGONE: They compromised on paper.

MR. LEDUC: Oh no, I would be strongly against creating a court of appeal.

MR. CONANT: I think, generally speaking, we want fewer courts, rather than more courts.

MR. LEDUC: Yes.

MR. MAGONE: May I say for your benefit, Mr. Leduc, I read the recommendations of the county court judges, and I am now reading the comments of the supreme court judges on those recommendations.

MR. LEDUC: Go ahead.

MR. MAGONE:

> "Undoubtedly it is true that, if the Division Court goes out of existence as a separate entity, the right of the province to appoint the judges of that court is automatically surrendered or suspended. That right, however, is more academic than real, since it has never been exercised."

Those are the observations of the supreme court judges on that, and this is the reply of the county court judges:

> "The objection that the advantages and conveniences of the present Small Debts Court would be lost if it became part of the County Court, is based upon an entire misconception of what is contemplated. It's actual effect will, in practice, be slight and there will be preserved to the litigants and the general public, all the advantages now enjoyed by them. All the trials, as at present, will be heard at sittings held in various parts of the district to deal with actions now within the competence of the Division Court, and there will be no more danger of the intermingling of other cases than under the present system. The local division court offices throughout the province will neither be abolished nor will their character be changed."

That is practically all the submissions with respect to division courts.

MR. LEDUC: I was going to say this: I don't know whether it has been touched on while I was away, but we have had some most interesting submissions from Judge Morson and Judge Barton, but they are both in the position where all their lives have been spent here in the City of Toronto. Their conditions are totally different from what they are in the rest of the province; is it the intention of the Committee to call other county judges?

MR. MAGONE: Well, as I understood it, Mr. Leduc, we had no authority to call judges from other parts of the province, because of the expense involved; but we have submissions from all over the province, and we thought by calling judges, we were merely implementing the submissions we already have.

MR. LEDUC: Well, there may be some points which are not covered by the submissions, and which we might like to discuss with them.

MR. MAGONE: Yes, no doubt.

MR. LEDUC: After all, the report made by this Committee may have very far-reaching effects, and although I am not very keen on spending money myself, if we spent a few dollars to get submissions from judges in rural and semi-rural districts, it might be an advantage to us.

MR. STRACHAN: I agree with Mr. Leduc, Mr. Chairman, I think the picture in Toronto is entirely different from that of the remainder of the province. I wouldn't want to see us just get the picture from this particular city, and, speaking for myself, I would like to hear from a very busy County Court judge.

MR. LEDUC: I would like to hear from a purely rural district, and from another district having a fairly large city, and then from one of the northern districts. Then I think you would have the complete picture.

MR. STRACHAN: I don't know whether the Federal Government would pay his travelling expenses or not.

MR. MAGONE: I think they would if the Attorney-General signed the account.

MR. CONANT: We have, of course, this difficulty: that most of our verbal submissions have been, and will, to some extent be, limited to the city of Toronto and this district. I am very glad to arrange for one of the outside judges to come, if he would be of any help to you, gentlemen.

MR. MAGONE: And there is this difficulty, sir, if I might bring it to the attention of the Committee: that we are only dealing with one subdivision, that of Division Courts, and if we start calling someone from outside of the city to give you his submissions with respect to Division Courts, we might be expected to do it with respect to every item on the agenda.

MR. LEDUC: Not necessarily. Take the Rules of Practice, for instance; they are the same in Toronto as they are in every other part of the province; but conditions are certainly different, ——

MR. MAGONE: Undoubtedly.

MR. LEDUC: —— in Toronto from what they are in the rest of Ontario, and we don't get the proper picture if we get the Toronto side only.

MR. CONANT: I think we are all agreed on that, Mr. Magone; you can arrange to bring in a judge. That is a matter which might probably be determined by the Committee, if you like, as to which judge to bring in.

MY. LEDUC: I think it should be; that is not in the same category as the matter we discussed this morning, and which was left to you, Mr. Magone.

MR. MAGONE: No, I think it should be determined by the Committee. I have only one suggestion, which I am not submitting dogmatically at all, but Judge O'Connor of Cobourg is a very able outside judge.

MR. FROST: Well, you couldn't do better than take Judge O'Connor's opinion; after all, he has been a judge, now, for twelve or more years, and for years before that he was quite outstanding as a practicing counsel.

MR. LEDUC: That would take care of a semi-rural district.

MR. CONANT: Well, that is practically a rural district.

MR. FROST: Yes.

MR. CONANT: Is that agreeable, gentlemen?

MR. ARNOTT: Yes.

Carried.

MR. CONANT: Well then, Mr. Magone, you will arrange with Judge O'Connor to suit his convenience.

MR. MAGONE: Yes.

MR. LEDUC: What about the judge from the north? There is a man we could get; he is an ex-judge, but he was on the bench in Cochrane for a good many years, Judge Caron.

MR. FROST: It wouldn't necessarily have to be an active judge.

MR. CONANT: I think that is a good idea.

MR. LEDUC: He lives in Ottawa now, and was retired last October or September. Then if you could get a man from Wentworth county, or Middlesex, for a semi-rural area.

MR. CONANT: Well both those counties have new appointees.

MR. LEDUC: What about Essex?

MR. MAGONE: I think Judge O'Connor of Cobourg sits in quite a number of large towns.

MR. CONANT: I think, with all deference to your views, we have, immediately available, a number of city or urban judges right here in Toronto. I don't think there is anything to be gained from bringing a man from Windsor or Ottawa.

MR. LEDUC: No. Then, if you have a judge from a rural district, who has had experience with the north ——

MR. CONANT: Well, I think if we can get Judge O'Connor and Judge Caron we have covered the field pretty well.

I may say this, that I am not at all clear in my mind, as to the possibility of consolidating the courts, as recommended by Mr. Barlow, under the one name. Still, I suppose we should get all there is available on that point.

MR. MAGONE: You are referring to the consolidation of the Division Court with the County Court?

MR. CONANT: No, no, county judges criminal court. The difficulty that occurs to me, at least the point on which I am not clear—I can quite understand it in the county in which I practiced, where it would be very easy, but I am not quite sure whether that arrangement would work in the larger centres, and no witness, as yet, has clearly indicated that.

MR. LEDUC: That's why these people coming from outside will be useful. I am sure that, in Oshawa, you have a man who could do the surrogate court and county court work at the same time? We have the same situation in Ottawa.

MR. STRACHAN: We haven't in Toronto.

MR. LEDUC: Well, here they have two distinct offices.

MR. STRACHAN: Well, we are handicapped, in the City of Toronto, by the lack of space in the city hall.

MR. CONANT: Well, so far as I am concerned, gentlemen, and Mr. Magone, I would like a little clearer explanation of the situation in Toronto here, on how that consolidation would affect the City of Toronto.

MR. MAGONE: I have Mr. Winchester down for to-morrow, sir.

MR. CONANT: That may cover the point, but I haven't got it clear in my mind yet. At the present time, I can see a very considerable advantage and value of it in outside counties, but I want to see how it would apply in Toronto.

MR. LEDUC: But you have at present, here in Toronto, if I understand the situation, one official, Mr. Winchester, who is at the same time, clerk of the County Court and registrar of the Surrogate Court, and he has under him two separate sets of officials, one set doing surrogate court work and the other set doing county court work; even if you had all the consolidation in the world, in a place like Toronto you will find you will have, in the same office, some people doing one type of work and other people doing another type of work.

MR. MAGONE: Quite.

MR. LEDUC: That is no obstacle to consolidation. In other counties, people can keep on doing what they are; now, one stenographer will be doing county court work, and in five minutes will be turning to some other work. That takes place all the time in Oshawa, I suppose, and in all outside districts.

MR. MAGONE: Well, Mr. Barlow, in his recommendation suggested probably the only effect it would have would be to reduce book-keeping. I don't see how that could happen.

MR. STRACHAN: I don't see how it could happen in the City of Toronto.

MR. MAGONE: They would have to keep separate books for surrogate court and county court work.

MR. LEDUC: I think the only practical effect would be to have one name for the courts.

MR. MAGONE: I think so.

MR. FROST: But in the end, your saving would be negligible.

MR. MAGONE: I don't think there would be any saving. Mr. Winchester might be able to show that there would be if there were consolidation, but I can't see how you would save book-keeping, except possibly in connection with the general sessions and the County Court Judges' Criminal Courts. The only difference is, you have a jury in one and none in the other.

MR. CONANT: Well now, I would make this suggestion. You are going to have Mr. Winchester. He is an inside man. Now, one of the best local registrars that I know of, is Dr. Bascom, of Whitby; he has been there a long time, and I think he is thoroughly competent. That is my own view, and my officials confirm it. I think he would give you the country office viewpoint.

MR. FROST: Yes, he is a good man.

MR. CONANT: I think you had better bring him down to Toronto to appear before the Committee, Mr. Magone.

MR. FROST: I think that savings in the machinery and methods of the various courts could largely be effected, over a period of time, by, for instance, the Inspector of Legal Offices, just gradually eliminating certain duplications, and suggesting changes, and bringing in amendments from time to time. Your difficulty at the present time is that you have a great mass of statutes, some referring to Surrogate Court, some to County Court, and so on. If you try to make any radical alterations without a general revision of those statutes, you are certainly going to run into difficulties.

MR. MAGONE: Yes.

MR. FROST: As far as consolidation is concerned, I think that you could probably suggest, at the moment, a preliminary consolidation of County Judges' Criminal Court, for instance, and County Court.

MR. CONANT: Yes.

MR. FROST: Now that, I should think, would be something that would avoid duplication.

MR. CONANT: And is most logical, too.

MR. FROST: It is logical and sensible, but were you to, for instance, at the

moment, join the Surrogate Court with them, the saving would probably not amount to anything as compared with the confusion that it would cause. On the other hand, with the County Judges' Criminal Court and the General Sessions and the County Court, they are naturally together anyway.

MR. MAGONE: Yes.

MR. FROST: The fact is, I believe, that most people now think they are together.

MR. MAGONE: Yes, I think so.

MR. CONANT: Gentlemen, I am not, at present, disposed to dismiss the matter as peremptorily as that, because I am impressed with this fact, in the province, up until the early eighties, we had the King's Bench, and the Chancery, and so on, and so forth. Now that situation is at least comparable with the situation that exists in our County Court and Surrogate Court and Sessions and County Judges' Criminal Court, and as it was accomplished by merging them all in one court, so it may reapply to the present situation. I am impressed with that aspect of it, gentlemen, and I can't dismiss it from my mind without more information. You will deal with that, then, Mr. Magone.

MR. MAGONE: Yes.

MR. CONANT: I think that on the other points, we have a great deal of very pertinent and very valuable data available. Now, what do you intend to go on with?

MR. MAGONE: Mr. Winchester and Dr. Bascom for to-morrow; that is all I have at the moment.

MR. CONANT: Very well. Then it was suggested by one of the members of the Committee that we might, perhaps to-morrow afternoon, and as a Committee only, discuss the submissions up to date, and perhaps arrive at some interim agreement on our views. I can see the value of that, because it is now fresh in our minds, and we will be saved the labour of reading a lot of evidence that we will have to read, perhaps, months from now. But the only difficulty I see is that, our views as formed, say to-morrow afternoon, might be altered by subsequent submissions.

MR. FROST: That is true; on the other hand, if we do, as we go along and every few days, make findings, interim finding on matters as they stand then, if necessary, we can review these findings, and we will avoid getting into a hopeless tangle at the end and having to sort it all out.

MR. CONANT: Yes. Well, are we agreed on that, gentlemen?

MR. LEDUC: Yes.

Carried.

Committee rises until following morning.

FIFTH SITTING

Parliament Buildings, Toronto.
April 5th, 1940.

MR. CONANT: Very well, Mr. Magone, you may proceed.

MR. MAGONE: Mr. Chairman, this morning we are dealing with the question of consolidation of the courts, and first I would like to call Mr. Buckley, Assistant Inspector of Legal Offices.

R. C. BUCKLEY, Assistant Inspector of Legal Offices.

MR. CONANT: Mr. Buckley, how long have you occupied that position?

WITNESS: About two years.

Q. And you travelled to all outside courts, auditing and so on?

A. Yes, throughout the entire province.

Q. Yes, I think you should be able to tell us something about it.

MR. MAGONE: Mr. Buckley, the suggestion has been made by Mr. Barlow in his report that the County Court, the Surrogate Court, the Court of General Sessions of the Peace, and the County Court Judges' Criminal Court be amalgamated into one court, to be known as the County and Probate Court. Can you see that any economies would be effected by making that move?

A. Yes, there would be economy.

MR. CONANT: The way you framed that question, Mr. Magone, might suggest that you were against it. I would say, what economy would there be, if any?

WITNESS: There would be a saving in the administration and possibly a benefit to the public through attending one office.

MR. LEDUC: You mean, Mr. Buckley, saving in the administration in the local offices?

WITNESS: In the local offices. We have one example in a provincial district now, where not the general sessions, but we have practically all other offices combined under one official. One official holds several different titles: division court clerk, surrogate court clerk, and so forth, and it has proved that it can be done.

MR. CONANT: Was that economical in that case?

WITNESS: It's a very small district, but one assistant or deputy handles all the work of the combined offices. In the majority of other offices, you must have not only the official, but a deputy or possibly some additional clerks.

MR. MAGONE: Mr. Buckley, in most of the counties of the province the offices have been combined in so far as the clerk is concerned, have they not?

WITNESS: In so far as the Surrogate and County Court clerks and the sheriff.

MR. CONANT: And the local registrar also, in many cases?

WITNESS: Yes.

MR. MAGONE: Of the Supreme Court?

WITNESS: Yes.

Q. But, in so far as the County Court Judges Criminal Court and the General Sessions of the Peace are concerned, the clerk of the peace is the clerk of that court?

A. Yes.

Q. There is no instance in the province where he also holds the office of county court clerk?

A. No.

MR. CONANT: Take one of those offices where there is a present *de facto* merging in one individual of these offices; physically, how would that work out? Is there a different set of books for each court?

WITNESS: Yes.

Q. Well, explain it to us; that is what I don't understand, and perhaps some of the other members of the Committee don't understand; what would be accomplished by this amalgamation?

A. In the book-keeping system, it would have to be an internal arrangement there, so far as the book-keeping is concerned, because there is a different type of book required for the different work.

Q. Yes.

A. Your county court clerk would still have to maintain his register, and so on and so forth.

MR. LEDUC: You would have to have all the same books for each court?

WITNESS: Practically, there would be a saving probably by combining a few books, such as cash books, but records would still be kept entirely separate, but they could be kept by the one system of bookkeeping.

MR. ARNOTT: Isn't it done at the present time in that way?

WITNESS: No, they are all kept separate.

Q. No, but one deputy looks after them, does he not?

A. Well, in a great many counties there will be a deputy surrogate registrar and a deputy county court clerk.

MR. CONANT: Would this consolidation do away with that?

WITNESS: It should.

MR. LEDUC: In how many counties have you found that condition, Mr. Buckley? I have in mind Ottawa, which is a most important county.

MR. CONANT: The most important, I would say.

MR. LEDUC: Well, for me it is. We have there the county court clerk, who is also registrar of the Surrogate Court; he has three stenographers, who do the county court and surrogate court work. Could you effect any saving there?

WITNESS: None. I don't believe you could effect any saving in that particular instance, because it is a very, very busy court, and all the clerks are very busy throughout the year.

MR. CONANT: Well, going over the whole province and taking the general picture.

WITNESS: I don't believe there would be a great saving.

MR. MAGONE: What would the saving, if any, be? At least, it would be in connection with what?

WITNESS: In connection with the clerical staff.

MR. LEDUC: And very little there?

WITNESS: And very little there.

MR. MAGONE: In the smaller counties, where the clerk has an assistant in his surrogate office and an assistant in his county court office, there might possibly be a saving in those instances?

WITNESS: There might be.

MR. LEDUC: But, are there a great many or few of these counties in the province, where there is a different room for a surrogate court office and another room again for the county court office?

WITNESS: Yes, there are.

Q. There are?

A. Yes, and a different room for the sheriff.

Q. Take for instance, Victoria County; would they have a different room for the county court work, and another room for the Surrogate Court, and another room for the sheriff?

A. In quite a few, sir.

MR. FROST: In Victoria they have changed that; the sheriff had a different room, and so on, but they consolidated them in the one office.

WITNESS: In the past two years we have had quite a few of them consolidated, that is, they maintained entirely separate offices and physical set-ups, and we tried to get them to work together, as it were, under the one heading.

MR. LEDUC: I don't see it couldn't be done without consolidating the courts, because it is done in Ottawa, and it is very satisfactory, and after all, Ottawa is an important district.

WITNESS: Very.

MR. MAGONE: Would there be a saving, Mr. Buckley, in the number of books that would be required in the offices if they were combined?

WITNESS: The number of books is required, I believe, by the Statutes.

Q. Well, the Committee might change the Statutes.

A. Well, then they would not require as many books. There are a great number of books that are required in offices, that are used very, very seldom.

MR. CONANT: Very little?

WITNESS: Very seldom.

Q. Very little?

A. Very little, sir.

MR. MAGONE: Well for instance, in the County Court and in the Surrogate Court, you have a procedure book?

WITNESS: Yes.

Q. You could carry on your book-keeping with one procedure book, if there was an amalgamation?

A. I doubt if you could.

MR. LEDUC: Oh no.

WITNESS: I don't think you could.

MR. MAGONE: You don't?

WITNESS: I think you would require a separate procedure book for each type of office.

MR. LEDUC: The work is so different.

MR. MAGONE: In Surrogate Court you have a procedure book for contentious and non-contentious matters?

WITNESS: Yes.

Q. So that, in the combined offices, you have three books, one procedure book for the County Court, and two for the Surrogate Court?

A. The procedure books, yes.

Q. Well, it would be possible to get rid of one of those, would it not?

MR. LEDUC: What would be the ultimate saving? Instead of using one page in one book, we would use one in the other. You would use the same amount of paper ultimately.

WITNESS: The surrogate registrars, with whom I have discussed that matter previously, have all maintained that they do require the separate procedure books; one for contentious and one for non-contentious matters.

MR. MAGONE: Yes, that is one of the reasons advanced by those in favour, that it would save in the number of books required for the offices.

WITNESS: Well, in books of that nature, most all offices now have them, and they use them so seldom that the same book they now have will remain good for at least another twenty or thirty years before it is filled up.

MR. FROST: Well, taking another view, from the standpoint of simplification and cutting out deadwood and useless names and what not, might there not be something gained by consolidation from that angle?

WITNESS: Unquestionably. Unquestionably. In my opinion it would be better to consolidate them, for the public going to one office, where they could have their entire matter placed before the one official who would look after the whole thing.

MR. LEDUC. But that is a situation *de facto* in Surrogate Courts, leaving aside the Criminal Courts?

WITNESS. Yes.

Q. But as a matter of fact, this situation exists now in every county in the province?

A. Yes, towards consolidation.

Q. Yes. I mean the clerk of the County Court is in most cases also registrar of the Division Court?

A. Yes, I think that in the majority of counties the sheriff of the Surrogate Court is also local registrar of the Supreme Court and sheriff.

Q. Yes.

MR. CONANT. Well, Mr. Buckley, I suppose in the two years you were working at your present position, you were in every court of the province?

WITNESS. Not quite.

Q. Well, most of them?

A. Most of them.

Q. Ninety percent of them, I suppose?

A. Yes.

Q. Now, from your experience—by the way, are you a chartered accountant?

A. No, sir.

Q. You are an accountant?

A. Yes, sir.

Q. From your experience, have you any suggestion whereby you think we could simplify or eliminate waste motions, or waste of any form, from your two years' experience?

A. In the legal offices that I was in, the present trend is that we have been eliminating waste very rapidly in the last two years.

Q. Yes.

A. I do not know of any further loopholes.

Q. Well, that has been our definite policy?

A. Yes.

Q. During the last two years, to lop off the unnecessary expenses?

A. Yes.

Q. But I may say, there are two angles to this: one you might call the internal economy of the thing, and then there is the convenience and economy to the public, is that not correct?

A. Yes.

Q. Now, so far as the convenience and accommodation to the public, have you had any experience to express any opinon on that?

A. Well, there is not a great deal of inconvenience to the public, as all the offices are in the one building. They may have to go from one floor to another.

MR. FROST: There isn't so much inconvenience as there is complete mistification as to what it all means, don't you think that is so?

WITNESS: Quite a bit of that, sir.

MR. MAGONE: It's good for the lawyers.

MR. FROST: I think it's got to the point now, where it's not good for the lawyers either, because all they can do is look wise.

MR. CONANT: Is there not this angle, if we had a consolidated court you could put on the lists for the sessions, every kind of case that came within that court, county court cases, surrogate court cases, and so on, am I right?

MR. MAGONE: Yes.

MR. CONANT: At the present time, you have to constitute separate courts for these various classes of cases, County Courts, Surrogate Courts, and so on.

MR. MAGONE: Yes.

MR. LEDUC: Well, is it not the practice of the county court judge to sit out of term and hear surrogate court matters?

MR. MAGONE: Yes, I understand that is so. Mr. Winchester will tell us about that.

MR. MAGONE: Mr. Buckley, can you tell us, if this consolidation were made, what the effect of it would be?

WITNESS: The effect would be to help the Crown attorney, who acts as a clerk of the peace and then turns around, in criminal cases, to act for the Crown; that would be taken away from him, and then the clerk of the court's duties would properly be under a clerk appointed by the government entirely away from the Crown attorney.

MR. CONANT: Yes.

MR. MAGONE: As far as the public are concerned, now, Mr. Buckley, have you had any experience with this, that they think they are being tried in the County Court in criminal cases?

WITNESS: No.

Q. When they are in the general sessions?

A. I have had no experience with that.

Q. You have had no experience with that.

MR. CONANT: I would like to ask you if you can express an opinion as to this; under our present system, as you know, the clerk of the peace is the clerk of the County Judges' Criminal Court and clerk of the sessions, as far as it affects criminal cases?

WITNESS: Yes.

Q. Do you think that their records are as well kept as the records of the clerks of the County Court and of the registrars?

A. Their records have been well kept in practically all offices, sir.

Q. The clerk of the peace?

A. The clerk of the peace.

Q. You mean the crown attorneys throughout the province?

A. The Crown attorneys' records as to the court cases. That's what you mean, sir, the records as to court cases?

Q. The records of that court.

A. Well, the records of that court have always been well kept.

Q. I see. Well, I am surprised to hear you say that, although I am glad to hear you say it.

A. Yes, their records have been well kept. That is entirely separate from the records as to the operation of fees.

Q. Yes.

MR. MAGONE: Apart from the inconvenience to the Crown attorney, Mr. Buckley, would it not require an extra clerk to attend the general sessions in County Court Judges' Criminal Court?

WITNESS: Well, I don't think it would require an extra clerk.

MR. LEDUC: The clerk of the County Court would act?

WITNESS: Yes.

MR. MAGONE: You think he could act?

WITNESS: Oh yes, I think so.

MR. LEDUC: Would that apply also to the larger districts, Mr. Buckley? Take Hamilton, Windsor, London, Ottawa; could the clerk of the County Court have sufficient time to act also as clerk of the peace?

WITNESS: I would think so. Other than Toronto, of course; there is a

separate clerk of the peace, due to the enormous number of courts here; you would still have to carry that; I am speaking in general, throughout the province. I am quite certain one man could look after it.

MR. CONANT: That is the present clerk of the County Court?

WITNESS: Yes.

MR. MAGONE: I think that is all from Mr. Buckley.

MR. CONANT: Thank you very much Mr. Buckley.

Witness excused.

ARTHUR S. WINCHESTER, Clerk of the County Court and Surrogate Court for the County of York.

MR. MAGONE: Mr. Winchester, you are the clerk of the County Court and registrar of the Surrogate Court in the county of York?

WITNESS: I am.

MR. CONANT: How long have you been on that work?

WITNESS: About four and a half years, sir; five and a half years rather.

MR. MAGONE: Before that you were clerk of the County Court?

WITNESS: Well, I was appointed clerk of the County Court in the latter part of October, 1934, and registrar of the Surrogate Court in the latter part of December—about the 26th of each month, I think it was.

MR. LEDUC: December of the same year?

WITNESS: December of the same year, sir.

MR. MAGONE: Mr. Winchester, how does the amalgamation, or practical amalgamation, work out in your case?

WITNESS: It works out very satisfactorily.

Q. You, of course, have a fairly large staff in both offices?

A. Yes, I have a staff of seven in the Surrogate Court and a staff of eight in the County Court.

Q. Well, have you separate offices for those two courts?

A. Separate offices. Yes.

Q. In different parts of the City Hall?

A. Yes, it's on the West wing, room 109 for the County Court office, and room 111 for the Surrogate Court office. Between them, room 110 is occupied by Mr. McWhinney, who is registrar of the Admiralty Court and Special Examiner.

Q. You are in the same wing of the building?

A. Same wing of the building. There is no access between the offices except by way of the main corridor of the City Hall.

Q. Mr. Winchester, if the offices of the Surrogate Court—or at least if the courts were amalgamated, can you tell the Committee how that would work out in your opinion?

A. Well, so far as we are concerned, there would be no difference that I can figure; we are practically amalgamated now. You can't have the same rules of practice that would apply to both courts, you must have your rules of practice that apply to Surrogate Court work, because it's entirely different in its nature from County Court work. You would still have to have your rules applicable to each of the branches.

Q. That is, different rules?

A. Oh yes, they would be quite different.

Q. You mean, in all cases?

A. Well, I don't know ——

MR. STRACHAN: He is referring to the amalgamation of the County Court and Surrogate Court.

MR. MAGONE: Yes, only the two so far.

WITNESS: Yes, the same rules in the County Court would not apply to Surrogate Court work. You could draw up a County Court rules, and then have an appendix, or something or another division and put Surrogate Court rules in there.

Q. Have a separate part dealing with it?

A. Have a separate part. You could do that, yes. I mean that the practice in the County Court is entirely different from the practice in the Surrogate Court.

Q. You mean one couldn't ——

A. One set of rules would apply to both functions.

Q. Would there be any objection to amalgamating the two offices and putting your clerks all together for the two?

A. Yes, in the City of Toronto that wouldn't be feasible. In the County of

York, rather, that wouldn't be feasible. We do, I would say, between 40 and 50 per cent of the work that is done in the entire province, and there is such a volume of work there that it wouldn't be feasible. I would be strongly against two sets of rules in the one office, because it would lead to endless confusion and it wouldn't advance the administration of justice at all in my opinion.

MR. LEDUC: Well, suppose the two courts were amalgamated; wouldn't you keep on having certain employees that would specialize in surrogate work, and others who would specialize in County Court work?

WITNESS: Exactly, sir. In the County of York, you would have to have a deputy who knew his surrogate work from A to Z and the same in the County Court.

Q. And you wouldn't, of course, have enough room in 109 to put all your employees?

A. We haven't enough room in either room at the present time, sir, for the employees that are there. Our County Court office is too crowded as it is at the present time, both for our own purposes and for the public.

Q. So that even if the courts were amalgamated, so far as York is concerned, it would mean exactly the same number of employes and would occupy exactly the same space?

A. Quite so, sir.

MR. MAGONE: Mr. Winchester, in Toronto, is one judge assigned to Surrogate Court work?

WITNESS: No, they work in rotation. Some years ago I made the suggestion that two judges be assigned to surrogate work only, and one judge could take contentious matters one month and the other judge could take non-contentious matters. That would work out ideally so far as our Surrogate Court is concerned, and it wouldn't affect the County Court and Civil Courts at all.

But that suggestion wasn't considered very strongly, but I still think that that would be a great help to us, because in the surrogate court work to-day, we are absolutely lost when a judge will take something else on and forget all about his surrogate court appointments, and we have people running around the hall and don't know where to go.

Q. I see. And then, in connection with the sittings of the Surrogate Court, they sit out of county court session do they not, or in between?

A. Just what do you mean?

Q. I mean, is there any fixed session for the sittings of the Surrogate Court?

A. Well, the judges take them in rotation. For instance, one judge will take the Surrogate Court in January, another will take the Surrogate Court in February, and another will take the Surrogate Court in March, and so on,

throughout the year. And in the Civil Courts, we have one judge who will take the non-jury one month, and possibly take a jury court the next month, and possibly take Chambers the following month.

MR. LEDUC: Your judges sit practically every day in the year, don't they?

WITNESS: Yes, I would say that the six judges sit on an average of six days—six juridical days a week. Each one of the six judges would be occupied throughout the whole year. I would say the six judges would be occupied every day.

Q. Well, you see, that is a unique situation in Toronto. You haven't that in the rest of the province.

MR. MAGONE: You have nine judges here.

WITNESS: We have nine judges now, yes.

Q. Well then, Mr. Winchester, dealing with the general sessions and the County Court Judges Criminal Court, could that, in your opinion, be made part of the County Court?

A. Well, I think it could be done, the same way as the Surrogate Court and the County Court were united. I haven't had much experience in the Court of General Sessions. It would mean that the same staff would have to be kept on there. There would have to be a deputy in charge, and it would have to be, so far as the County of York is concerned, confined to the same room as that is in now, or other space found for it.

Q. The effect would be the same, would it not, as now exists in Supreme Court, of having a civil branch and a criminal branch in the County Court?

A. Exactly.

Q. Well, it apparently works all right in the Supreme Court?

A. There again, you would have to have your set of rules that would apply to the criminal branch only; you couldn't have the same set of rules applying to civil actions as you would have applying to criminal actions, and you would have to have a staff that is conversant with criminal procedure. You couldn't expect the same staff that looks after civil work to look after the criminal work. That is just my opinion.

Q. And speaking, I suppose, only with respect to your own office?

A. Yes.

MR. LEDUC: There is a separate official as clerk of the peace in Toronto?

WITNESS: Yes.

Q. Has he got a considerable staff in Toronto?

A. He has a staff, I believe, of three ladies and two gentlemen, who are clerks of the court.

Q. I see.

MR. CONANT: You don't think there would be any internal economy?

WITNESS: Not very much, sir.

Q. What about economy or convenience of the public?

A. I don't think it would be advanced at all, sir.

MR. MAGONE: Could you reduce the number of books in your office?

WITNESS: There is one book I have been trying to get rid of in the surrogate court office for some time, but without success; that is the book in which the bonds are copied. It's quite useless and takes up a lot of time, and costs about $36 per book. We are about eighteen months behind, I guess, in the copying out of bonds in the surrogate office, and some of these bonds have been cancelled before they have been entered in the bond book.

It is a useless book, a fifth wheel, and can be easily done away with by the filing of the duplicate bond, which would be a very simple thing. But that is the only book that I know of that could be dispensed with.

Q. That is a book required by the rules?

A. It is a book required by the rules, yes.

Q. Mr. Winchester, were you called by Mr. Barlow to give your views before he made his report?

A. No, I wasn't.

Q. In connection with the jurisdiction of county judges as *persona designata*, could any improvement be made with respect to that?

A. Well, I have suggested an improvement in regard to The Change of Name Act, if that is what you mean, whereby a judge who gave the appointment has to hear the application, and it has been changed so that any judge, in case of illness, or if the judge can't appear for some other reason, may hear it.

MR. CONANT: I think Mr. Magone had reference to the records, though.

MR. LEDUC: The keeping of records, yes.

MR. MAGONE: Yes, I understand from Mr. Silk that that was amended last session, to take care of that.

WITNESS: So far as the change of name is concerned, it might go into the County Judges' Act.

MR. CONANT: What he had reference to was *persona designata* cases. According to the law at the present time, there is no requirement as to the functions of the county court clerk.

WITNESS: Yes.

Q. And those papers sometimes, if not usually, are simply left with the judge, and he acts as clerk, and judge, and everything else, is that right?

A. That's right, yes. We very seldom hear of it, but—in The Adoption Act, The Landlord and Tenant Act, we have adopted a procedure down there that the judges have approved, that everything comes through us first.

MR. MAGONE: So that in practice it is a matter in the court?

WITNESS: All but, I guess, in a few instances. I don't know of any cases off-hand where it isn't, but so far as our court is concerned now, we insist upon all the papers coming through our office first.

MR. CONANT: Would it not be better to require, in all the *persona designata* cases, that the records should go through you and be kept by your court?

WITNESS: I think so, sir.

MR. MAGONE: You are talking about Unmarried Parents Act cases, Adoption Act cases, and cases of that kind, where the jurisdiction is given to the judge and not to the court?

WITNESS: Yes.

Q. You have adopted that?

A. We have.

Q. You have adopted a procedure of having them come to the court?

A. We have adopted the procedure; we have spoken to the judge and we have had the judges insist that all documents be filed in our office before the application was made Any new judges appointed, we can convey that information to them and they adopt that practice There was a time there, that we would get an order filed in our office and we wouldn't know what it was all about, and we would trace it down and find that some person had gone directly to a judge, had his order signed, and we had no trace of anything in the office until that order was given to us, and so we put a stop to it in that way.

Q. What do you do with respect to fees in those cases, Mr. Winchester?

A. The fees are provided for in the rules of practice and procedure.

Q. That is the general filing fee?

A. We have no filing fees with us, it's a fee on an application before a judge.

Q. I see.

A. And that fee is one dollar where there is no evidence taken, or two dollars where there is evidence taken. But we presume that there will be evidence taken in all cases, so we charge the two-dollar fee.

Q. That is, you adopt the tariff of the County Court?

A. We adopt the tariff of the County Court.

Q. Even though the matter is not in the County Court?

A. It may, technically, not be within that tariff.

Q. I see.

A. But we put it in.

Q. Well, that is something which should be cleared up, should it not?

A. Yes, that is something that should be cleared up.

MR. LEDUC: Perhaps I might ask this, Mr. Winchester, how many writs are issued in your office, the county court office?

WITNESS: I thought you were going to ask that, sir, so I went down and got the information. Last year, there were 1,630, in 1939.

Q. 1,630 writs issued out of the County Court?

A. That is about 80 or 90 less than the year before, in 1938, when I think there were 1,720.

Q. These are writs of summons?

A. Writs of summons, yes.

Q. Now, what about applications for probate?

A. I'm sorry, I haven't the surrogate statement with me.

Q. Approximately, have you any idea?

A. Approximately? Oh, I think approximately 3,000 applications. I could get it for you.

Q. Now, you said that you have 1,630 writs issued in the County Court; that is an average, I suppose, from 1,600 to 1,700?

A. That is about the average.

Q. What is the proportion of those cases that go up for trial?

Actions entered for trial with a jury were 107, and actions entered for trial without a jury, 276.

Q. So that is about one case out of four that goes to trial?

A. Yes, sir.

Q. I see.

A. Well, that is one case out of four that is entered for trial, but then, some of those are settled.

Q. Well, would it be fair to say that one case out of five actually goes to trial?

A. That would be about right.

Q. Yes.

A. There are more settlements in trials with a jury than there are in trials without a jury.

Q. Now, we were discussing, yesterday, fees in the Division Court. In County Court, for an action, say, for $500, where judgment is given by default, what would be the fees payable to the court?

A. $6.00.

Q. That is $3.00 on issuing the writ?

A. Yes.

Q. And $3.00 on judgment?

A. Three dollars on judgment, yes.

Q. And we must add to that, of course, the sheriff's fee for serving?

A. Well, if they issue execution, that will be another dollar in our office.

Q. I'm not speaking of that.

MR. CONANT: Service.

WITNESS: Oh, service, about $3.00, I believe it is, sheriff charges are about $3.00 I believe.

MR. LEDUC: Yes.

WITNESS: Two dollars in the County Court.

Q. Two dollars?

A. Two dollars in the County Court plus mileage.

Q. So the total, we will say the man lives five miles away from the sheriff's office ——

A. That would be $2.50.

Q. $3.50?

A. $2.50.

MR. CONANT: So you have $8.50 altogether?

WITNESS: Yes.

MR. LEDUC: You see, the average, in an action from $200 to $300 is $9.92.

MR. CONANT: Yes.

MR. MAGONE: Mr. Winchester, the only jurisdiction in County Court now is with respect to appeals?

WITNESS: Yes, that is all, appeals from Magistrates Courts in certain matters.

Q. Yes, well, are there many in the County of York?

A. Oh, we will have about ten this month, I believe they run about ten a month.

Q. And do you keep separate books for appeals in criminal cases?

A. We don't keep—well, yes, we do, now, we have a matters index file and we keep all our papers in there, but we don't keep separate books of account; it goes into the general account as an application before a judge on which we charge $2.00.

Q. You assimilate the civil tariff to the criminal appeal?

A. Yes, we had seventy-two in 1939; we had seventy-two criminal appeals in 1939.

Q. Yes, in your experience as clerk of the court, can you tell the Committee whether the trial *de novo* takes longer than an appeal under The Liquor Control Act on the record?

A. Well, I don't know; I never attend these trials, and I don't know just how long they would take. They would take longer.

MR. CONANT: The *de novo?*

WITNESS: *De novo*, yes, they would take longer.

Q. Well, they are all *de novo*, excepting the liquor appeals?

A. Yes.

MR. MAGONE: Then, in Mr. Barlow's report, he deals with the question of county court procedure, at page B31, and makes a recommendation there.

WITNESS: Yes.

Q. That is the county court procedure, and the recommendation is on page B32, and reads:

> "At the present time all orders in the County Court are signed by the county court judge. As it often happens that a county court judge, by reason of being engaged elsewhere, is not to sign an order made, it is suggested that the judge should be required to endorse his decision upon the notice of motion, and that the order itself should be signed by the clerk of the court."

A. Yes, I would be in favour of that, very strongly. We had a case here just a short time ago, when the judge gave an order about the 26th of the month, and he was not there for the following month, and a new application had to be made before another judge, whereas, if it had been endorsed on the notice of motion, we could have signed it in our office, and there would have been no delay.

Q. That is the practice in the Supreme Court now, is it not?

A. I couldn't say.

Q. You don't know?

A. I don't know, no.

MR. CONANT: Are all orders in your court signed by the judge himself?

WITNESS: Yes, sir, all orders are signed by him. I sign the judgments in the office, but the judges sign all the orders. I don't know, but I think the judgment is rather more important than an order, and why a clerk should be allowed to sign a judgment and not an order is strange to me.

MR. CONANT: Mr. Winchester, why do the county judges sign these orders?

MR. CONANT: That would be a matter of rule amendment, would it not, Mr. Magone?

MR. MAGONE: I think it would, but I am just asking; why do the judges sign the orders in the County Court?

WITNESS: Well, in so far as I know, it has been the practice before I went in there, and it has been the practice since, and I believe it is, because there is no provision for the clerk to sign an order.

Q. I see.

A. Well, at any rate, the clerk has no knowledge of what the order should be, at any rate. We have no knowledge of what order a judge makes.

MR. CONANT: Oh yes, but if a judge were to endorse it on the notice of motion, a brief summary of his judgment would be on it and you could sign the order all right?

WITNESS: That would be all right, yes.

Q. The solicitors would work it out for you.

A. Yes.

MR. LEDUC: If there is any doubt as to the order conforming with the decision ——

WITNESS: That is what we do at the present time; if a judge will endorse on the back of a record his judgment, if a judgment is presented to us, we compare the wording of the judgment on the endorsement with the record and if they are similar we sign the judgment; if there is any variation, we refer them to the judge, and the judge must amend the endorsement on the record.

Q. To sum it up, the suggestion would be to assimilate orders to judgments?

MR. CONANT: Yes.

WITNESS: Yes, that would be a good thing.

MR. MAGONE: You don't attend in Chambers?

WITNESS: No, I have been trying to get that through down there. We have a system that I don't like, and Judge Barton has spoken to me about it, he doesn't like it either. But they don't do anything to remedy the situation. That is, when the judge is sitting in Chambers, he might want a file, and he will send the solicitor down for that file; we give the solicitor the file and take a receipt for it, but there is no guarantee that all the papers that are in that file will reach the judge, nor is there any guarantee they will reach us in the same condition as they went out, and we can't afford to have a clerk running up and down all the time, and I made the suggestion to the judges that I would provide them with a clerk, provided that they held their Chambers in chamber hours, where a clerk could take all the papers in there and present them to the judge and keep them under his control.

MR. CONANT: Yes.

WITNESS: But we can't afford to let a clerk run around the hall, up with one file, and down again, and then up with another file, and so on.

MR. STRACHAN: That would involve the filing of notice of motion, the same as they do in the Supreme Court?

WITNESS: Same as in the Supreme Court, and I don't see any objection to it. Some file their notice of motion, but the majority don't.

Q. Chambers are very informal matters?

A. Too informal, in my opinion.

Q. And that is a very important matter?

A. That is my opinion again.

Q. I agree with you.

A. Well, I took issue with one of the judges very strongly a short time ago, in which case there was no chamber judge, and some person came into the office and wanted to know where he would appear, before what judge he would appear, and he said, "well, find out what judge is hearing the application." "Well", I said, "do you expect this man, or one of us to run around and find out which judge is hearing the application?" You appoint a judge to sit in Chambers and have him sitting in Chambers, and we will send a man up to that judge; but if we don't know who is sitting in Chambers, what's the use of having a Chambers?

MR. CONANT: Well, that is really a matter for the judges to arrange?

WITNESS: Yes.

Q. I should think the senior judge ought to arrange that.

A. That is the irregularity of these Chambers proceedings that is causing us quite a lot of trouble, but that would have to ——

MR. STRACHAN: You have no record of the order made? There is no book that you have that tells you what the judge is?

WITNESS: We have no record of chamber work at all. No record at all.

MR. MAGONE: Mr. Winchester, who sits in court as clerk, down in your court? Is it a permanent official of your office?

WITNESS: Well, I have assigned a specific duty to each of the clerks in the office, and this clerk is the junior clerk in the office and it is his duty to be in court—when there is one court sitting, it is his duty to be in court at that court, and if there are two courts sitting, I assign another one of the staff to the court.

Q. Of the permanent staff?

A. Of the permanent staff.

Q. Well, what do you do when there are three or four courts sitting?

A. We have had as many as five courts sitting at one time, and there are two men who have sat occasionally in court, oh, possibly about ten times in a year, and if they are available, why, we call for them, and get them on the telephone to come and sit in the court.

Q. Well, what authority have they to sit as clerks of the court?

A. None that I know of.

Q. None that you know?

A. None that I know of.

Q. Does that apply to your regular staff down there?

A. That applies to the regular staff; that applies to the clerk that is in the court all the time.

Q. Do they swear witnesses?

A. Yes, they swear witnesses.

MR. CONANT: Well, that works all right; that is the best answer?

WITNESS: Well ——

MR. LEDUC: But isn't that a matter to be remedied? Can't these people get deputy clerks?

MR. MAGONE: Is there provision for a deputy clerk?

WITNESS: There is provision for just one deputy, and he can't leave the office; he has to be in the office.

MR. LEDUC: No provision for appointing a clerk of the County Court?

WITNESS: There is no provision for appointing more than one deputy.

MR. MAGONE: Or more than one clerk.

MR. CONANT: Like the British Constitution, these things grow, just as, the other day, we had the case of show cause summonses; there is quite a mystery there, about the issuing of those.

MR. MAGONE: Doesn't the judge swear the witnesses when there is a part-time clerk?

WITNESS: I think there is a case in regard to that; we looked it up here a short time ago, in which the Court of Appeal has held that it is the judge who swears the witness, although it is the clerk who utters the words; the clerk hands the bible to the witness, and repeats the oath, and I think the Court of Appeal held that that was the judge who swore the witness.

MR. LEDUC: The clerk is only "his master's voice"?

WITNESS: That's it, sir.

MR. LEDUC: Mr. Winchester, before you go, you gave me the number of writs issued in the County Court. Well, outside of that, of course, the judges do a lot of civil work?

WITNESS: Oh, a lot of chamber work.

Q. What about mechanics' liens?

A. We have nothing to do with mechanics' liens.

Q. You haven't?

A. No, that is in the Supreme Court only.

Q. What about applications for matters coming up under Surrogate Court?

A. Well, there are contentious cases in the Surrogate Court that are taken by the judge, who is assigned to the Surrogate Court for that month, such as true bills and solvent forms, and where a will is being attacked for lack of mental capacity, or something like that.

Q. You have a judge sitting in Surrogate Court all the time, I understand, or practically all the time?

A. Yes, we have practically two judges doing surrogate court work every month; Judge Barton has been assigned by Judge Parker to do the contentious matter in Surrogate Court; he looks after practically all the contentious matters.

Q. You have nine county court judges here, and between the county court work and the surrogate court work, and the criminal work, I suppose they are busy all the time?

A. They are kept busy most of the time, sir.

Q. Now, the suggestion has been made that the jurisdiction of the Division Court be diminished, and that certain actions be transferred to the County Court; if this were done an additional judge or additional judges would be required to handle that work?

A. I don't think so; they are handling it now, sir.

Q. Of course, yes; you're right.

MR. FROST: On the other hand, once you take a case from Division Court and put it in County Court, there are more formalities?

MR. STRACHAN: It takes longer to try.

MR. FROST: I mean, it takes longer to try?

WITNESS: Yes, well, I don't know that it takes longer, it takes longer to get to trial; I don't think it should take any longer to try it.

MR. FROST: Well, of course, I may be wrong.

MR. ARNOTT: As a matter of practice, Mr. Winchester, doesn't it take longer to try?

WITNESS: Well, I don't see why it should, as it is the same set of facts.

MR. STRACHAN: They go through seventy cases a day in Division Court.

WITNESS: Not now. Those days are gone; they went out with Judge Morson.

Q. They have a bigger list.

A. Well ——

Q. You have put six cases a day on your non-jury, isn't that right?

A. Five or six cases a day, that's right.

MR. LEDUC: In County Court?

WITNESS: Yes.

MR. STRACHAN: And you don't get through your list?

WITNESS: We get through our list; there are no cases left over at the end of the month.

Q. No, but I mean, they don't average six cases a day to try?

A. No, that would not be the average; I'm sorry, I might have brought our list for this week. Judge Jackson was on the non-jury this month, and I don't know how many cases he disposed, of, but he was through before 11 o'clock on Monday, and he was through before 12 o'clock on Tuesday, but of course, that is the first week, and the first week is a washout, so far as the County Court is concerned.

MR. LEDUC: No, the figures given by Mr. McDonagh were, thirty-five cases, approximately, under $100.00, and seven to eight cases over $100.00.

MR. CONANT: That is a day?

MR. LEDUC: Yes.

MR. CONANT: What do you think, Mr. Winchester, have you any views on the increased jurisdiction in the County Courts?

WITNESS: That is to increase the jurisdiction of the County Court, and take it away from the Supreme Court?

Q. Well, obviously?

A. Well, I didn't know just whether it was from the Division Court to the County Court or from the County Court to the Supreme Court.

Q. Well, I am dealing with the other angle at the moment; you know the provisions of the Statutes, which say that an Order-in-Council must be made out increasing the jurisdiction; have you any views on that?

MR. FROST: Or would it be better to leave it just up to consent, as it is now?

WITNESS: Well, at the present time, they go through, there is a tacit consent if they don't dispute the jurisdiction, and it goes ahead.

MR. CONANT: Quite.

WITNESS: I don't know, sir; I did have some views on that at one time, when the Statute was first passed, but I haven't paid any attention to it since. I really have forgotten. But I don't think it would make much difference, so far as we are concerned.

MR. MAGONE: That is all I intended to ask Mr. Winchester, sir.

MR. CONANT: All right, thank you very much, Mr. Winchester.

Witnessed excused.

DR. HORACE BASCOM, Local Registrar, Whitby.

MR. MAGONE: Dr. Bascom, what offices do you hold?

WITNESS: Local registrar of the Supreme Court, clerk of the County Court, sheriff, and registrar of the Surrogate Court.

Q. Well, Doctor, before we get into the question of amalgamation of the courts, will you tell the Committee how the amalgamation of the offices that you hold works out in practice?

A. It has worked out very well so far. The only objection I see to it is that the sheriff's office is down at one end of the hall and the office for my other three offices is at the other end of the hall.

Q. Well, that is a matter of geography?

A. Yes, it's a matter of geography, but if they were all in one office, the consolidation of the offices is quite satisfactory.

Q. Yes. You don't have any difficulty about the Supreme Court sitting at the same time as the County Court?

A. No. No, we haven't had any difficulty. Well, we had one clash, I think, in the last six or seven years, that's all.

MR. FROST: But it can always be arranged?

WITNESS: Oh yes, we have the County Council Chambers for the County Court; we take that in case they do conflict.

MR. MAGONE: Well, you heard Mr. Winchester's evidence with regard to his offices?

WITNESS: Yes.

Q. Can you see any reduction, or any economy in amalgamating the four courts?

A. For a matter of convenience, I think it would be a very good thing, but as far as the financial end of it is concerned, I can't see that there would be very much saving. I think there are only two offices in the province, and that is Barrie and Ottawa, where the one official doesn't run them all.

Q. You say that as a matter of convenience, it would be a good thing?

A. Yes.

Q. Convenience to whom?

A. Convenience to everybody, because you would have all the records in the one office.

Q. Yes.

A. As it is now, the Crown attorney and clerk of the peace practically runs the court; he has to swear the witnesses, and keep his own minutes, and he has no clerk, whereas, if the courts were amalgamated ——

MR. CONANT: Well, that refers particularly to the General Sessions and the County Judges' Criminal Court?

WITNESS: Oh yes, that is the only one I am speaking of.

Q. Yes.

A. In that case, he would have a county court clerk who would take down the minutes and keep his records, and have all the documents in his file.

Q. Open court, and swear the witnesses?

A. Yes.

Q. And all the rest of it?

A. Yes, I can see a great advantage in it in that way, but I think, financially, as far as most of the counties are concerned, there wouldn't be any saving.

MR. MAGONE: Well, would it be any great increase for the county court clerk to make him clerk of the general sessions?

WITNESS: No, not in our county, it wouldn't be very much. It's additional work.

Q. Well, your county is fairly typical, is it not, of the province?

A. Outside of the cities.

Q. Of older Ontario, that is?

A. Outside of the cities, yes.

Q. And you think it would work out very well there?

A. I think so. I think it would be quite all right.

MR. FROST: The fact is amalgamation, and the elimination of different systems, is desirable, is it not?

WITNESS: Yes, I would think so. At the present time, we have really no book of rules that applies to everything. The Surrogate Court is entirely different from some of the others, and it is more or less indefinite about the charges and fees.

MR. LEDUC: Dr. Bascom, how many employees have you?

WITNESS: Three.

Q. Three, and you have one, I suppose, in the sheriff's office?

A. Yes.

Q. Who does exclusively sheriff's work?

A. Yes.

Q. And would the other two do surrogate court work?

MR. CONANT: One is deputy sheriff.

WITNESS: Yes, one is deputy sheriff, does outside work, and the other, a lady, she runs the sheriff's office, keeps the books, and in my own office as local registrar, I have a deputy.

MR. LEDUC: You have a deputy?

WITNESS: Yes.

Q. Those are the three mentioned?

A. Yes.

Q. Now, if you were made clerk of the peace in addition to all your other offices, would you require any additional staff, or could you get along with the staff you have.

A. I hadn't considered that, but I really don't know how much work the clerk of the peace has to do; that's the point.

MR. MAGONE: Well, the amalgamation of the courts, as I see it, wouldn't mean that you would become clerk of the peace.

WITNESS: Oh.

Q. That is, you wouldn't carry out all the duties the clerk of the peace now carries out.

MR. LEDUC: That's what I mean.

MR. CONANT: You would be clerk of the court.

MR. MAGONE: Yes.

MR. CONANT: I have been through this, and I have always felt that the functions of the clerk of the peace, that is the, keeping of the records of the County Judges' Criminal Court and the Court of General Sessions, and the work of the court, that is the clerk's work in the court, should be performed by the county court clerk.

WITNESS: I quite agree with you.

Q. Then the clerk of the peace still would have some functions to perform, such as the voters' lists, and so on.

A. Well, he has a lot to do with the selection of juries, too.

Q. Yes, I don't think that would need to be disturbed. My recollection of the clerk of the peace's office is that most of the duties consist in signing things, is that it?

A. The clerk of the peace? Well now, I don't know much about the clerk of the peace, but there is a lot of clerical work, you know, in the clerk of the peace's office.

Q. Yes.

MR. LEDUC: That is what I had in mind.

MR. MAGONE: I think, Doctor, it comes to this: there are certain duties he performs as clerk of the general sessions of the peace?

WITNESS: Yes.

Q. And certain other duties that he performs under Statutes?

A. Yes.

Q. That are simply given to him because he is an official in the county, and naturalization is given to him under a Dominion Act?

A. Yes.

Q. I don't think we can get closer than that to it.

MR. LEDUC: Well Mr. Magone, I am afraid I misunderstood you. I understand that your idea would be to assign to the clerk of the County Court, the court duties performed by the clerk of the peace?

MR. MAGONE: Yes.

MR. LEDUC: And leave the other duties to the Crown attorney?

MR. MAGONE: Yes.

MR. FROST: For the moment, anyway?

MR. LEDUC: Yes.

MR. MAGONE: Doctor, Mr. Winchester mentioned the bond book kept in Surrogate Court, and suggested it be done away with.

WITNESS: I think that would be a good idea, to do away with it, because we have the bonds.

Q. Yes. It's just a question of copying them?

A. Yes, and we have to copy them; I've got one book there that I just got, a new one; the other one is full.

Q. Well, that is a matter for the Rules Committee.

A. I never refer to it at all.

Q. Then, what do you do in your court in connection with *persona designata* matters, Unmarried Parents' Act cases, and so forth?

A. How do you mean?

Q. Do you keep records of it, as clerk of the County Court?

A. Oh yes.

Q. And do you charge the fees prescribed in similar cases in the county court tariff?

A. Yes. There is a regular scale of fees that apply to those Unmarried Parents' Act proceedings.

Q. They are set by Order-in-Council?

A. Yes.

Q. But in other *persona designato* cases, you simply assimilate the fees in other county court matters to these cases?

A. Yes, landlords and tenants, for instance, we charge $2.00.

Q. Yes, I see. Have you had any experience in connection with summary conviction appeals?

A. Oh yes.

Q. Can you say whether it takes longer, more of the court's time to hear *de novo* appeals than it does to hear Liquor Control Act appeals?

A. In Liquor Control Act appeals, you mean?

Q. Yes. Liquor Control Act appeals are on the record.

A. They are trials *de novo* are they not?

Q. No, under the Liquor Control Act, the appeal is on the typewritten record before the Magistrate, and the others are trials *de novo*.

A. Yes.

Q. Which usually takes the longest time?

A. Well, the *de novo* trial.

Q. Do you have many *de novo* trials in your county?

A. Well, quite a few.

Q. They take up a good deal of time?

A. Oh, I wouldn't say that; I suppose we would have five or six in a year, that's all.

Q. I see. What is the practice, in your county, with respect to signing orders; does the judge sign the orders himself?

A. Yes.

Q. Do you attend in Chambers on these cases?

A. Yes.

Q. Well then, if you attend in Chambers on those cases, haven't you authority, under the rules, to sign orders?

A. I don't think I have.

Q. You don't think you have?

A. No. I think it would be a good—Mr. Barlow's suggestion that the judge give his decision on the notice of motion, and the let clerk sign the order would be a good thing.

Q. Rule 531 says:

> "Every judgment shall be signed by the registrar and the proper officer in whose office the action was commenced; every judgment order pronounced by the court or by a judge in Chambers shall be settled and signed by the registrar or the officer attending court in Chambers at which the same is pronounced, but the judge pronouncing such order may himself settle or sign the same."

A. Well, we don't attend in all chamber matters. Sometimes there is a motion there that we don't know anything about.

Q. Yes, I was just wondering if it wasn't because you weren't present that you hadn't signed the order.

A. No.

Q. You don't do it in any case?

A. No.

Q. I see. You don't do it in any case?

A. No.

Q. Well, do you think the suggestion of Mr. Barlow is a good one?

A. Yes, I do. I would endorse that, definitely.

Q. You can obviously attend as clerk in all the courts, can you, Doctor?

A. Yes, I do.

Q. You sit in all of them as clerk?

A. Oh yes.

Q. You don't have the difficulty that Mr. Winchester has?

A. Oh no, we don't have so many courts.

MR. CONANT: Dr. Bascom, Ontario county is grouped with Victoria County, Peterborough and Northumberland, as what you might call a judicial district, isn't it?

WITNESS: Yes.

Q. And is there much interchange of judges in that district?

A. Yes, there has been a good deal.

MR. FROST: That is in County Court matters?

A. Yes, County Court and Division Court.

MR. CONANT: Criminal?

WITNESS: Yes, criminal cases, too.

Q. On what circumstances was the occasion for these interchanges usually based?

A. Well, now, I couldn't tell you. I suppose it is a matter the judges arrange themselves. I don't know the reason for it. I think sometimes there is a little too much pressure of business in one county, and they seek relief in that way, by getting another judge to come in and take a case for them.

Q. Well, take your general sessions of the peace. You have four a year, have you not?

A. Two. General sessions of the peace twice a year.

Q. Yes, but you have a non-jury too?

A. Oh yes, non-jury.

Q. What do they call that?

MR. MAGONE: County Court Judges' Criminal Court?

WITNESS: No, non-jury sittings of the County Court.

MR. CONANT: In April and October?

WITNESS: Yes.

Q. And then you have the general sessions in June and December?

A. Yes.

Q. Now are those usually manned by your own judge or by an outside judge?

A. Well, I have in mind the last three years, when the general sessions of the peace have been taken by two judges from the district. We had lengthy sessions of the peace two years ago, and Judge Cochrane came down from Peel and took three weeks.

Q. Yes, but that was because another outside judge who was allotted to your court took sick?

A. Yes.

Q. Your own judge wasn't scheduled to take that court anyway, was he?

A. No, I think not. And I think the judge, as you say, that was allotted to us took sick and Judge Cochrane came down from Peel.

Q. Yes.

MR. FROST: Well, Dr. Bascom, within reasonable limitations, do you—would you be prepared to say as to whether or not you think that there is some merit in an exchange of judges within a limited area? Now, Mr. Barlow mentions in his report that judges, for instance, carrying on their courts with the same counsel invariably appearing before them, with local interests involved in the cases, and a number of things of that sort—that that provided the background whereby these exchanges came about.

WITNESS Well, I think the original intention was good, but ——

Q. Well, the original intention, Doctor, was more or less confined to County Court sittings, and things of that court, but not Division Court, isn't that right?

A. Yes, that is my opinion.

Q. I mean now it has got to be extended to cover assessment appeals, and Division Court cases, Unmarried Parent's Act cases, and a whole lot of things of that sort?

A. Yes.

Q. But the original idea was that they would more or less exchange the general County Court sessions among themselves?

A. Yes. I think it would work out all right if it were to apply to County Court matters particularly.

MR. LEDUC: Dr. Bascom, I don't know if you have the figures here, but could you tell me how many writs were issued from your County Court last year?

WITNESS: I couldn't tell you.

Q. Approximately?

A. About fifty.

Q. And how many of these fifty would go to trial? How many cases?

A. Oh, less than ten.

Q. Yes?

A. I presume.

Q. About ten?

A. Eight or ten.

Q. That would be a conservative figure?

A. Yes.

MR. CONANT: Just on that interchange, one more question, Doctor, as you you know, the present system arises out of an amendment to the Act allowing interchanges *ad lib?*

WITNESS: Yes.

Q. Supposing we were to repeal these sections, putting it back to the previous system, and that is a system that is fairly general throughout the Dominion, that the interchanges would only take place where there was a requirement by the Attorney-General, and the account were certified by the Attorney-General, do you think that would meet all the reasonable requirements of your district?

A. Undoubtedly.

Q. Yes?

A. Undoubtedly it would. Taking Ontario county, which is a pretty busy county, I can quite conceive of a judge having too much work.

Q. Yes?

A. And wanting some assistance. I don't see any disadvantage in affording him that assistance.

Q. Yes, but wouldn't that work out this way, taking that very case; you've got too much work in your county, and the judge, presumably, would go to you and say: "Dr. Bascom, I wish you would get me some assistance." And you would call up the Attorney-General's office, and so on.

A. Yes.

Q. And you would explain that you want to run two courts next week, as the case may be; that wouldn't hold matters up very much, would it?

A. Oh no; no, it wouldn't.

MR. FROST: On the other hand, I think that there is a good deal to be gained; you take, for instance, a district such as Northumberland, Victoria, Ontario and Peterborough; take for instance Judge O'Connor; I think that it is a good thing generally to have Judge O'Connor come into one of the other county towns, and perhaps Judge Smoke go down to Cobourg, and so on; I think it has a good effect on the judges themselves, it keeps them out of a rut. They see new faces, they are faced with new conditions, new methods—I wouldn't say new methods—but perhaps a little different procedure, and, perhaps, if you lop

off some of the things that are objectionable now, such as these interchanges of Division Courts, and so on, that you will cure the main trouble.

MR. CONANT: Well, we are leaving a pretty wide doorway, I am afraid, Mr. Frost.

MR. MAGONE: Is there any inconvenience to it, arising from the present system, from the judges being away, Doctor?

WITNESS: From the judges being away on these interchanges?

Q. Yes.

A. No, I don't think that makes any difference, because they can apply to the judge that is there.

Q. I see. Doctor, what about the increased jurisdiction of the County Court? The amendment of 1937 increasing the jurisdiction, have you any remarks with respect to that?

A. Well, as far as increased jurisdiction is concerned, I suppose sometimes you would have to consider the judge that is going to try the case.

MR. CONANT: What's that?

WITNESS: Sometimes you would have to consider the calibre of the judge who is going to try the case, whether you think the jurisdiction should be increased.

Q. I remind you that justice is equal in all respect.

A. It should be.

MR. MAGONE: There is only one other question I would like to ask you while you are here, Doctor; I think we should ask you about this: there is a recommendation by Mr. Barlow, that the office of the court crier could be abolished. What are the duties of the court crier at the present time?

WITNESS: Well, he opens the court and he collects 20 cents for each witness.

MR. MAGONE: For swearing the witness?

WITNESS: No, he doesn't swear the witness.

Q. He doesn't swear the witness? For calling the witness?

A. Yes.

Q. That isn't provided for in any Statute, is it?

A. That twenty cents fee?

Q. No, the fee is, but the duties of the court crier?

A. I don't know that it is.

Q. It is a relic of the ages?

A. Yes, I think it is.

Q. Yes. The fee is provided in the Administration of Justice Expenses Act,

A. Yes.

MR. CONANT: Well, Doctor, could or couldn't that be done by some other official?

WITNESS: Oh yes.

Q. Pardon?

A. Oh yes, you could do away with the twenty cents fee and let a sheriff's officer or constable do it.

Q. Well, of course, it always seems to me that the twenty cent fee is more irritating than important.

A. Yes. Because you will find that, as soon as the case is over, you will find the crier goes over and approaches the solicitor for a fee.

Q. And sometimes the solicitor hasn't got the money. I've been that way.

A. And if he forgets to do it and sends him a bill, the solicitor is out that much.

MR. MAGONE: He swears the Grand Jury, does he not?

MR. CONANT: Oh no, that is the constable.

MR. MAGONE: Well, the tariff provides for the crier swearing the witness and the jury; in practice he doesn't do it?

WITNESS: Oh no, he never swears the jury.

MR. CONANT: Well, as a matter of common sense, in our courts down there, couldn't you perfectly well call the witness and do the nominal things that are now done by the crier without adding anything that you could appreciate to your work?

WITNESS: Certainly.

Q. Yes.

MR. MAGONE: Usually counsel calls out the name of his witness loud enough for the witness to hear?

WITNESS: Yes.

MR. CONANT: Yes, there is no doubt about that.

MR. MAGONE: Then he gets a fee of, I think, $3 from the county for attendance, doesn't he?

WITNESS: Yes.

Q. $3 a day?

A. Yes.

Q. The crier is appointed by whom?

A. Well, I think the sheriff appoints the crier, doesn't he?

Q. I think so; I think that is the practice.

A. Yes.

MR. CONANT: Well, you are the sheriff; you ought to know.

WITNESS: Well, I have never had to appoint one yet.

MR. MAGONE: Is there any difficulty about getting a judge for Chambers work in your county?

WITNESS: Sometimes.

Q. There is difficulty sometimes?

A. Yes.

Q. What does that arise out of?

A. The judge is not there.

Q. He is away in some other county?

A. No, he may not be away in some other county, but he is not in the building.

MR. CONANT: That usually happens about the 1st of May, doesn't it?

WITNESS: Fishing season, yes.

Q. Well, in that court crier matter, if we were making a change, we would have to vest somewhat of the same powers in the sheriff or the sheriff's officer, would we not, because the clerk of the court might be out when a witness is to be called?

A. Well, the clerk could have his deputy in the court room.

Q. Yes, but wouldn't it prevent any possibility of a gap if the sheriff or the sheriff's officer were vested with the powers of the crier?

A. Oh, you mean for the crier's duties?

Q. Yes.

A. Oh yes, the sheriff's officer could do that.

Q. Yes.

A. Oh yes, I thought you had reference to the clerk of the court.

Q. Oh, no.

MR. MAGONE: That's all, Dr. Bascom.

MR. CONANT: Thank you very much, Dr. Bascom.

Witness excused.

GEORGE T. INCH, Local Registrar and County Court Clerk, County of Wentworth.

MR. MAGONE: Mr. Inch, what offices do you hold?

WITNESS: Local Registrar of the Supreme Court, Clerk of the County Court, and Registrar of the Surrogate Court.

Q. There is a sheriff?

A. Yes.

Q. And that is in Hamilton?

A. Yes.

MR. CONANT: Supreme Court, County Court, and Surrogate Court?

WITNESS: Yes, sir.

MR. MAGONE: What is your set-up in Hamilton, with respect to the offices of clerk of the County Court and Surrogate Court? Are you in different offices?

A. No, we are in the same offices, and I have a deputy and three girls, and they all wait on the counter and each girl has her own particular books to enter. But if one girl gets behind, then the others go over and help.

Q. In your office there is a real amalgamation then?

A. Yes.

MR. CONANT: An amalgamation *de facto* if not *de jure*, is that not so?

WITNESS: I am not so good on my Latin, sir.

MR. MAGONE: Does it work out well, in your county?

A. We have had no trouble at all. It works out very smoothly.

Q. What is your reaction to the suggestion of Mr. Barlow that there should be consolidation of the courts, including the Court of General Sessions of the Peace?

A. I can't see that there would be very much saving. If I were given the records, of course—we have a fairly large county—if I were given the records of the clerk of the peace and the Crown Attorney, who is a permanent official there and has an office in the courthouse, I would need at least another girl to look after the entering and keeping of the records, and so on.

Q. How many clerks has the Crown Attorney?

MR. CONANT: Well, does the clerk of the peace employ a girl now for that purpose?

WITNESS: He has a girl in his office.

Q. Well, that wouldn't add to the total, to the aggregate?

MR. FROST: Well, I think, Mr. Inch, that the question was just of the County Court clerk taking over the duties of the clerk of the peace in relation to the County Judges' Criminal Court, that was about all that was suggested.

MR. CONANT: Well, the actual sittings of Criminal Courts by county judges, put it that way.

WITNESS: In our county, and I have been in office 13½ years—14 years this coming July—and ever since I have been there, during the jury sittings, of which the clerk of the peace would be clerk, I have always, or my deputy has always acted as clerk; but we do not pay as much or as close attention to that court as we would do where it is a jury sittings in a civil matter. We attend and call to roll the jury in the morning, and we are there for the opening of the court, the Crown Attorney passes over the indictment and we keep the records, just the same as we do for a civil action. We call the jury and enter it up in our book, and when the sittings are over, we then send the book up to his office, which is in the courthouse, and his girl takes the full particulars of the trial out of that.

Q. Well, then, you are again doing *de facto* what might be accomplished *de jure?*

A. Yes.

Q. Well, that is exactly what I have in mind, that the clerk of the County Court should do all those things.

A. Well, Mr. Ballard and I felt that it didn't look very good, and the

county never objected to paying the $4 fee; we just put it in the bill for the sittings and it looked much better to have a different man swear the witnesses. It doesn't look good to have a Crown Attorney pull a man's card out of a jury box and then say "challenged"; that's what we felt.

Q. Yes.

A. That's why we do it.

Q. What do you do with County Judges Criminal Courts?

A. We do not attend.

Q. He looks after that himself?

A. Yes.

Q. Couldn't you take that on?

A. What with the surrogate contentious matters, and the passing of accounts in surrogate matters, and the courts that we now have, I think that we are about two hundred days of the year in court now. They used to hold it every Tuesday, but what they do now, I don't know, sir.

Q. Of course, in actual practice, the sittings isn't quite as bad in County Court and Criminal Court as it is in the sessions, because, as you say, in the sessions, the clerk of the peace has to run the ballot box, and all the rest of it; that's not the same, of course, as the County Court Judges' Criminal Court?

A. There is one objection I saw to it; if we kept all the records of the County Court Judges Criminal Court in our particular county, Mr. Ballard's office, the Crown Attorney's office, is upstairs at the opposite end of the building from us, and if he were preparing for trial and had to interview the witnesses and so on, the records and exhibits would have to be sent up to his office for him to have, and then brought back to our office.

MR. MAGONE: That, of course, happens in the county of York, where the clerk of the peace and Crown Attorney are a separate official?

WITNESS: Yes, if they were amalgamated, I would like a Committee of your staff, sir, to lay down definitely the duties which we would have to perform, and the duties which the Crown Attorney and clerk of the peace would still continue, so that we wouldn't have any friction between officials; I don't think there would be, but that is one thing that came up at the executive meeting of the County Court Clerks' Association, that if the amalgamation did take place, we would like specifically laid down what out duties were.

Q. Do you get many inquiries, in your office, about criminal cases that are in the general sessions?

A. Oh, occasionally we get calls; more so now that we have appeals from the Magistrate's Court.

Q. Yes.

A. You see, a man elects trial by a higher court; the people know he has gone above the police court, and they will call up and ask when so-and-so's trial takes place.

Q. Yes.

A. And what is the matter, it wasn't in the Police Court, and sometimes, after looking it up and expecting that it is an appeal, we then find that it is a matter that is in Mr. Ballard's office.

Q. Well, that is just the point I had in mind; the general public are inclined to think that it is a matter in the County Court once it leaves the Police Court?

A. Yes, they are.

MR. CONANT: Well, it does seem to me that, excepting perhaps the larger jurisdictions, your office should be the clearing house for all those courts.

MR. MAGONE: What is your experience in connection with these summary conviction appeals, Mr. Inch, do the appeals in *de novo* trials take longer than the others?

WITNESS: Yes, they do. Last year, I think we had 20; I saw a list of them that was gathered by one of the girls, I think it was 19 or 21, and I think half of them were argued, by consent of the Crown Attorney and the solicitor in the case on the evidence that was taken in the Police Court.

MR. CONANT: Half of them on the evidence?

WITNESS: Yes, sir, that's where the attending solicitor, sir, ordered a copy of the evidence and the reporter ran off a copy for the Crown Attorney, and when they got in, they said: "We might just as well argue on the evidence that was taken."

MR. CONANT: Dr. Bascom, in your county are there many cases of summary appeals disposed of in that way?

DR. BASCOM: Yes.

MR. CONANT: Counsel agree to take the evidence of the trial?

DR. BASCOM: Yes.

MR. CONANT: What proportion, would you say?

DR. BASCOM: I should think half of them.

MR. CONANT: I see. That's important.

WITNESS: I couldn't vouch for the percentage, sir.

MR. CONANT: Oh no, that's quite all right.

MR. MAGONE: Have you had any experience with this, Mr. Inch, or would you know, that there are very often more witnesses called on the trial *de novo* than in the original trial before the magistrate?

WITNESS: I have known it to happen, yes.

Q. You don't know how often that happened?

A. No. Well, just in the cross-examination of the witnesses, I have heard the Crown Attorney say: "Well, were you at the original trial? Why weren't you called then?"

Q. They were weak on that point, I suppose. What is the practice in your court with respect to signing judgment? Does the judge sign or do you sign?

A. We sign all the judgments, but we have an endorsement; we have authority to sign, but if there is no endorsement on anything, we haven't any authority to sign.

Q. Well, Chambers?

A. Well, we don't attend Chambers; we have two judges and there is only the deputy and myself, and as I say, we are about two hundred days of the year in court, and that doesn't include the passing of accounts; it is a big County Court, and there seems to be in our county an awful lot of audits, to which my deputy attends, mostly.

Q. I see.

A. But we have no authority. Of course, if we were in Chambers, and we had the book and wrote down what the judge said, we would have authority under the rule which you quoted a moment ago, but we would have to have an endorsement in an official book to do so.

MR. CONANT: Would it help you if you had authority to sign both judgments and orders?

WITNESS: It would save the solicitor's time, and save everyone's time, because quite often you get a motion, and when you come back to get your order signed, the judge is tied up in some other matter and you can't go breaking in, where if the judge endorsed it and put his conditions on it and signed it, we have authority to sign the order.

MR. MAGONE: Mr. Inch, in County Judges Criminal Court, the sheriff or deputy sheriff attend?

WITNESS: Yes, of course, they are responsible for the prisoner, you see.

Q. Yes, well, could he act as your deputy, as deputy county court clerk?

A. Yes, he could.

A. Well, we have nothing to do with the opening of the court.

MR. FROST: Is there any statutory authority for that now?

WITNESS: No.

Q. I understood a moment ago that there was no statutory authority for the employing of a deputy where you are loaded up with work.

A. Of course I never tried to appoint more than one deputy.

Q. Well, you have one deputy, but that one, I suppose, is appointed by the Government?

A. Yes, sometimes, when we have the Supreme Court and County Court sittings, what will happen is that Mr. Caldwell, he is the deputy sheriff, goes over and sits in my seat and takes over for me, and he also is a notary public and has authority to swear witnesses. I always said that a person who wasn't a notary public or a commissioner for taking affidavits hadn't authority to swear a witness, but under this case that Mr. Winchester cited, I believe anyone has, if that is the law.

Q. Well then, you can always get around that point, if you find you are loaded up with courts and you can't be in two or three places at once, you can get somebody else to act for you?

A. Oh yes. But I haven't done it; I've just said to the deputy sheriff: "Would you mind looking after the exhibits and swearing the witnesses?" And he has the books there, with the entries.

MR. CONANT: What about the crier? Do you think you could possibly get along without a court crier?

WITNESS: Oh yes, we have an old gentleman there, he is about 80—I had to smile when you remarked on how long they live—he is an old gentleman about 80, and he was sheriff's officer for 40 years, and then he was sheriff's bailiff for 20 years, and then he was appointed crier and has been there ever since.

Q. Well, as a matter of common sense, to put it briefly?

A. Oh, yes.

Q. That could easily be done by somebody else, could it not?

A. Yes. But you asked the question of Dr. Bascom about swearing the jury; the crier is authorized, I don't know where it is, but he is supposed to hand the book to the juryman when he is sworn.

MR. MAGONE: Yes, I think the only place you will find it is in the Administration of Justice Expenses Act.

WITNESS: He always has, anyway, in our county.

Q. Mr. Inch, would the amalgamation of the courts suggested by Mr. Barlow save book-keeping?

A. I don't think so.

Q. You can't see where it would?

A. I don't think so. I think it would be the same. The only thing, we would have to have some more columns in our own book, but I think Mr. Cadwell could work that out to give us more columns in our book to show it.

Q. To save the number of books?

A. Yes.

MR. LEDUC: Which would mean purchasing a new book immediately?

WITNESS: No, it would just mean we might be able to use some of the columns that are in the book already; when we report each year, we have to break down all the money we take in under the five headings that you know of.

MR. CONANT: You were a lawyer when you were appointed, Mr. Inch?

WITNESS: Yes.

MR. FROST: Mr. Inch, in connection with the amalgamation of these various courts, you have read what Mr. Barlow said in his report, aside from the mere question of expense, because I rather agree with you in that I don't think that would make very much difference, do you think, as a matter of convenience and simplification, and so on, it is advisable?

WITNESS: The detail in our office now is tremendous. There are so many different things, you see, and it's just putting so much more in it; Mr. Winchester objected to having two sets of rules of practice in the one office; well now, we have two, we have the surrogate and the consolidated rules, and then we are affected by the criminal rules, with respect to criminal trials in the Supreme Court.

Q. Yes?

A. And then you have these additional rules, and the additional filing and additional detail in the other court—but everything is possible, Mr. Frost, the only thing is ——

Q. The point is this: as Mr. Conant said, 20 or 30 years ago, we had the Court of King's Bench, which was consolidated ——

MR. CONANT: In the 80's.

MR. FROST: Is it that long ago?

MR. MAGONE: Yes.

MR. FROST: Wasn't there something else much later?

MR. LEDUC: Justice Latchford couldn't have been Chief Justice in those days?

MR. STRACHAN: No, I think he was Chief Justice of the Second Divisional Court of Appeal.

MR. CONANT: But it was in the 80's when they abolished the King's Bench.

WITNESS: They did in law, but not in fact; where there were any officials they carried on, and as those officials died, the amalgamation came about, and while it was in effect in law, it was not in fact until those officials died.

MR. FROST: Was that not the case with Chief Justice Meredith?

MR. CONANT: Yes, the Court of Common Pleas.

MR. FROST: Wasn't that office really virtually abolished in 1910?

MR. STRACHAN: He was appointed to it just before the office was abolished.

MR. FROST: In 1883; it's surely not that long ago? But aside from the question of when it took place, it did take place and was an improvement?

WITNESS: Very much so.

Q. And are we not just faced with about the same situation now, in that we have a multiplicity of courts, and that sooner or later common sense calls for an amalgamation?

A. Yes, but then you are amalgamating the civil and the criminal; in that case it was merely all civil, you see.

MR. CONANT: Oh no, you have the Supreme Court.

WITNESS: But then you see, sir, in practice all we get in Supreme Court, we get the indictment, the jury returns a true bill, and after they get rid of the grand jury on follows the trial. As soon as the trial is completed and the man is sentenced, or the man discharged, we forward the exhibits back to the clerk of the peace, and we send the indictment under the criminal rules to the central office and we have no record left at all, excepting the record of the trial in the book.

MR. FROST: Why would that necessarily be interfered with by this?

WITNESS: That wouldn't be interfered with, but then the record is in the County Judges' Criminal Court. Oh, it is possible, and I think it would work out. I think Mr. Barlow has gone to a lot of trouble in the recommendation he made, and in addition to that, when he came into the county clerk's office, whatever the title the man would have then, he could search everything with respect to personal property.

MR. CONANT: Yes.

WITNESS: That was along the same lines, you know, having everything with respect to personal property in the County Court office, excepting executions, which would be in the sheriff's office, and if they were amalgamated, then everything would be in there, but I don't think it would be feasible to amalgamate in the larger counties.

MR. STRACHAN: But the work of the County Courts has been increased tremendously in recent years by Statutes referring matters to the county judge, don't you find that?

WITNESS: Well, you have your Children of Unmarried Parents Act, and now your Dependant's Relief Act.

MR. CONANT: The Change of Name Act.

WITNESS: Yes, there are all things just mounting up.

MR. FROST: On the other hand, aren't you up against this aren't you up against the continual piling up of deadwood, and at various times, you've got to have a clearing of those things, you've got to consolidate or add, as the case may be?

WITNESS: Oh, I quite agree with you, Mr. Frost.

Q. I mean Mr. Barlow was appointed, I suppose, by Mr. Conant with the idea of making suggestions to simplify things, and to get away with the tremendous amount of detail that we have now, such as rules that are not parallel, and so on. Now we have to start somewhere; don't you think that, perhaps, this is one step that could be taken without putting things too much out of joint?

A. Oh yes, I don't think it would put the place out of joint, and I was just thinking of a thing that you mentioned to me, sir, shortly after you were appointed, that is with regards to outside places, where the Crown Attorney's office is out in some building that isn't even fire proof, whereas, if the law were passed, they would all come into the central office. But if you do make a recommendation of that kind, I would keep my hands off Toronto, because I think I have the largest combined office outside of Toronto, and it's just about all one man wants to look after.

MR. FROST: Well, of course, that is exceptional.

MR. CONANT: Well, we have found Toronto to be exceptional in many respects since we started this hearing.

WITNESS: Well, you see, they have such a tremendous amount of work. Take our county, for instance; we have over 10,000 additional sale agreements a year; they will have four times as many here, they will have over 40,000 The chattel mortgages are about 20,000 a year; and, I think, in outside counties, taking all things by and large, you would have all the records in one place, where there would be a vault provided by the county, and the people would know

that all the records were there if they wanted to search. It would be more convenient.

MR. CONANT: Of course, this doesn't concern us particularly, but the matter that we have to consider is that it would hardly be logical or feasible to have, throughout the province, a court known as the County and Probate Court, and then, in the county of York, have an entirely different set-up. That is one of the difficulties that presents itself.

WITNESS: Oh yes.

MR. FROST: You would be jumping out of the frying pan into the fire by doing that.

WITNESS: Yes.

MR. CONANT: It would mean further complications.

MR. FROST. Yes. Of course, in Toronto, I think part of their difficulty is due to overcrowding.

WITNESS. They haven't sufficient space.

Q. Yes, they are all working on top of each other.

A. We have the same trouble in our vault We were very fortunate in that the Inspector of Legal Offices made a suggestion that helped me out very much, and arranged with the registrar of deeds to get rid of a lot of my old documents in the registry office; that helped us out immensely.

MR. MAGONE: You have no authority to destroy any court records?

WITNESS: No, but the Inspector of Legal Offices made arrangements with the registrar of deeds, and that relieved me.

MR. FROST: Yes, that would relieve your difficulty, if they had a central place to send records after a certain number of years.

WITNESS: Yes.

MR. CONANT: You have no experience with judges interchanging, have you?

WITNESS: Yes, we used to have a lot of it, sir, but since Judge Schwenger has been appointed, we have had practically none. We have had the odd case, but before Judge Schwenger was appointed, together with Judge Lazier—and they were both appointed the same month two years ago last January—up to that time, Judge Boles of Norfolk and Judge Cowan of Brant did a tremendous amount of work in our county.

Q. Well, your judges were ill then?

A. Yes, one was old and the other was ill, sir.

Q. Yes, but you get along now with your own judges?

A. Yes, and when we have pressure of work, and there are these outside Division Courts in small places, they get a lawyer of ten years' standing, or five years' standing, to go out. There is one thing that does help the judges, and I think it is a good thing, and would be especially good in small places; where a very prominent citizen is coming up for trial, they get a judge from the district; our district is Brant, Norfolk, Lincoln, Haldimand, Welland and Wentworth. It's a great convenience to a judge to be able to do it.

Q. Well, that could be met equally well by ——

A. By the suggestion that you made; all they would have to do would be to write in to your department.

Q. Yes. Or telephone.

A. And state the reason and ask for an outside judge.

MR. MAGONE: Is there anything else you wanted to bring before the Committee, Mr. Inch?

WITNESS: No, sir, not unless there is any question you want to ask.

MR. CONANT: Thank you very much for your assistance, Mr. Inch.

Witness excused.

MR. CONANT: Is there anything further for this morning, Mr. Magone?

MR. MAGONE: Well, I have some submissions from organizations, in connection with consolidation. I can read or summarize them now, or this afternoon, just as you wish.

MR. FROST: Well, we have Dr. Bascom and Col. Inch here now, it might be a good thing if you read some of these suggestions, as they might have something to say about them.

MR. INCH: May I bring up a matter? I was asked to by the President of our Association; it is the matter of superannuation of County Court clerks. We are not civil servants, and do not have the advantage of superannuation when we get to the end of the road, and the sheriffs got that right in 1921. The trouble is quite a number of them, when they are appointed, are too old, and our members have been fighting for years to become civil servants, and have the right to pay into the superannuation fund, and become civil servants, just as people working in the building here, and just as the sheriffs.

MR. CONANT: As far as the sheriffs are concerned, it applies to those who were below the age of 55 at the time of appointment, I think, or the time of it coming into force?

MR. SILK: At the time of the appointment.

MR. MAGONE: There is power now, under the Public Service Act, to bring in any class of public servants by order of the Lieutenant-Governor in Council, and it does not require an amendment. It is really a matter for the government of the day; "the Lieutenant-Governor in Council, upon the recommendation of the Superannuation Board, may extend the operation of this part to any other class of public officer employed in connection with the administration of justice, whether such officers are paid by fees or salary, or partly by fees or partly by salary."

MR. INCH: Well, we pointed that out when we were put on salary, three years ago, or four years ago now, and we were promised that we would be allowed to come in under that but nothing was ever done about it, and our Association, every year, have made application; two or three times it looked as if we were going to get the right, and then we didn't. But there is nothing like security to keep a man strictly on the narrow path, and to make him feel that at the end of the day he is not going to be turned out with nothing. Because, I don't know what the experience of the gentlemen of the Committee is, but no matter how much we get, we live up to it; that is only human nature, apparently. And whereas we carry insurance, superannuation is far better and cheaper than insurance, and if you can see your way clear to recommend that, I am sure the County Court clerks would certainly be very much obliged.

MR. CONANT: Well, I presume it has always been a matter of the cost involved.

MR. INCH: At one time the County Court clerks could have had it for the asking, and they wouldn't ask for it.

MR. FROST: Colonel, do you think this superannuation should be on some contributory basis?

MR. INCH: Oh yes, on the same basis as that of the other civil servants.

MR. FROST: How would you get around the question of age in some cases?

MR. INCH: Well, if he is over age, a man can't get insurance, and if he is over age, he can't get superannuation, that's all; it is just his misfortune; it wouldn't be fair to load up the superannuation fund to which the others have contributed by putting on a lot of men who are too old.

MR. CONANT: No. All right, Colonel, thank you.

Do you want to deal with these written submissions now, Mr. Magone?

MR. MAGONE: Yes. They are very, very short. I have read most of the submissions that have been made on the question of consolidation at a previous session. But there is one submission from the County Court Judges Association which was made very recently.

MR. FROST: Well, Mr. Magone, I think Mr. Conant asked this question yesterday, in connection with the amalgamation of the courts; so far, we have had no one who has expressed opposition to that, other than the fact that they

have stated that they didn't think it would make very much difference in the matter of expense; do you know of any real objection, or any objection that has been expressed to amalgamation other than that?

MR. MAGONE: No, I don't think there have been any.

MR. FROST: I mean, there is always the opposition to getting away from an old procedure, and old customs, and so on, and I suppose that will apply to this, too.

MR. MAGONE: Well, it hasn't been expressed.

MR. FROST: Well, go ahead with your submissions.

MR. CONANT: Just outline them briefly.

MR. MAGONE: Their recommendation is, that, in connection with the *persona designata* proceedings, that the jurisdiction be conferred upon the court itself, and not upon the judge.

MR. FROST: Would that make any particular change?

MR. MAGONE: Not in practice.

MR. CONANT: That takes care of the question of records, and so on?

MR. MAGONE: Yes. Not in practice, but I would doubt whether there is any real right to charge fees, unless fees are provided for in the Act giving the judge jurisdiction. The practice, as we have heard this morning, is to charge the fees set out in the rules of practice for proceedings in the County Court, whereas, the proceedings are not in the County Court at all, but rather a proceeding before a *persona designata*.

The county judges, on page 3 of their submissions, say:

> "It is felt that some action should be taken to consolidate the courts, in the same way as the Superior Courts were consolidated in 1881 under the Judicature Act. It will be noted that the high court judges did not agree with our recommendations towards consolidation of the lower courts. However, we respectfully submit that they do not actually oppose such a consolidation, but only dealt largely with details."

Now, I have already read the submission of the judges of the Supreme Court, and I will just remind the members of the Committee, that the judges of the Supreme Court say:

> "It is doubtful whether any advantage is to be obtained by consolidating local civil courts with local criminal courts. That would appear to involve the already overburdened officer who commonly acts as local registrar, clerk of the County Court and registrar of the Surrogate Court, also taking over the duties of the clerk of the peace. Consolidation of these offices has already reached a point where the efficiency of the local officers has become gravely impaired."

MR. FROST: I question that very much, with all due respect to the judiciary.

MR. CONANT: We have had one witness here this morning who rather refutes that, and that is Dr. Bascom.

MR. FROST: I think that any impairment there may be, has largely been here in Toronto, and perhaps with Colonel Inch in Hamilton, but that is largely a question of organization and space in their offices.

MR. CONANT: And personnel.

MR. FROST: Yes.

MR. LEDUC: But to be perfectly frank, I don't myself, see any particular advantage to be gained. I have an absolutely open mind on consolidation, but I don't think it will change anything.

MR. MAGONE: The other recommendations and observations on the Barlow report I have already read, and there is no disagreement with his suggestion.

MR. CONANT: Well then, I suggest we adjourn until 2.15 this afternoon, and then proceed as has been indicated.

Committee rises until 10.30 Monday, April 9th, 1940.

Parliament Buildings, Toronto,
April 9th, 1940.

SIXTH SITTING

MORNING SESSION

MR. CONANT: Gentlemen, before we proceed, I would call your attention to the fact that the results of our interim discussion last Friday afternoon have been typed and revised, and appear at pages 70 and 71 of your books, and having gone over it with counsel, I think it expresses the interim opinion of the Committee, subject, of course, to the items which were left at that time.

Now, at that time, in order to keep our agenda more or less straight, we did not discuss, and have not made any interim recommendation regarding item 12, Consolidation, or 13, County Court Jurisdiction, or 14, County Court Districts. I make the suggestion, subject to whatever the Committee may wish, that, perhaps, we may feel that on Friday of this week, or when we reach the conclusion of some particular branch or branches, we might deal similarly with these other items. Items, 12, 13, and 14, and perhaps 15, may develop this week. Is that agreeable to the Committee?

Carried.

I think it will help to keep our record clear. And now, Mr. Magone, will you proceed, please.

MR. H. P. EDGE: Mr. Chairman, just before you proceed, may I ask, in view of the request that has been made by the benchers, that when they appear, they would like the opportunity of making certain representations on the current matters which have been before the Committee, would you consider, sir, that a copy of your interim finding of Friday, might in fairness, be presented to the benchers?

MR. CONANT: Well now, Mr. Edge, I think it is the view of the Committee, and they will correct me if I am wrong, that their interim decisions are matters only for themselves. For this reason, that it is just possible, and probably, that even on items to which they have directed their attention, there may be more submissions made, and before we are through, they might materially revise their interim opinions.

That was only done in order to keep the facts clear in our minds, in view of the fact that there had been such a mass of material, that we might forget what took place during the first week, and for that reason, I don't think it would be advisable.

MR. EDGE: I think I understand, sir.

MR. CONANT: Because you might be shooting at something that might topple itself over before we got through; is that not the view of the Committee?

MR. FROST: Yes.

MR. EDGE: It was only the possibility that the benchers might be a little more direct in their observations, if they saw which way the vane was pointing, that I asked, and I didn't want to appear too inquisitive.

MR. CONANT: Oh no, that's quite all right, Mr. Edge.

MR. EDGE: Thank you very much, sir.

MR. CONANT: All right, Mr. Magone.

MR. MAGONE: I was instructed, last week, to get in touch with two county judges; Judge O'Connor, of Cobourg, and former Judge Caron, of Ottawa. Judge O'Connor has stated that he will be here on Thursday, in the afternoon. Judge Caron says he is very sorry, but that he can't come; he is very ill.

MR. CONANT: I see.

MR. MAGONE: If you wish to instruct me to get some other Northern Ontario judge, I will do so.

MR. LEDUC: Did Judge Plouffe make any recommendations?

MR. F. H. BARLOW, K.C.: Yes, Plouffe made some recommendations. I just forget what they were now, but I think some recommendations came from him and also from the Law Association through him. Judge Plouffe is at North Bay.

MR. CONANT: Then we can decide on Judge Plouffe, gentlemen; is that agreeable, Mr. Frost?

MR. FROST: Yes.

MR. CONANT: Mr. Strachan?

MR. STRACHAN: Yes.

MR. CONANT: Then there is another matter, I understood that, arising out of our discussion regarding expenses in connection with the interchanging of judges, that some of the judges wish to be heard.

MR. MAGONE: Yes, the County Court Judges' Association, through their secretary, Judge Owen, has communicated with me, they are holding a meeting in Toronto on Wednesday, and they desire to be heard on Thursday.

MR. CONANT: Very well; make arrangements with them.

MR. MAGONE: Then, too, Mr. Chairman, I was instructed to communicate with the deputy attorney general of the Province of Quebec, and Mr. Silk had a wire from him, saying that he would designate an officer of his department to appear before the Committee at their expense, a Mr. Juneau, and Mr. Silk has arranged that he come on Wednesday morning.

MR. CONANT: Very well.

MR. MAGONE: Now, Mr. Chairman, we were going to proceed with the rest of the recommendations in Mr. Barlow's report.

MR. CONANT: Yes.

F. H. BARLOW, K.C., Master of the Supreme Court, Toronto, Ontario.

MR. CONANT: Well, are you not dealing primarily with items 19 and 27, Mr. Magone? The Rules of Practice?

MR. MAGONE: Yes, with that first.

MR. CONANT: Yes, well then, gentlemen, Mr. Magone is going to deal with the Rules of Practice Committee. You will find, on page 19 and following of your book, reference to those items. During the week-end, in studying that, I asked counsel to set up a different summary of the different rule-making bodies in the province at the present time, and those are set forth on pages 18 and 18C, and you see there, more or less at a glance, the different rule-making bodies there are now, for the different Statutes requiring rules to be formulated, I suggest the Committee might want to be aware of that, so that, in hearing the evidence, they might have a reference to it. All right, Mr. Magone.

MR. MAGONE: Then on pages 66 to 71 of the book, there is a reference to the rule-making bodies in the other provinces.

MR. LEDUC: The power to make rules in Alberta is vested equally in the

judges of the Supreme Court and the Lieutenant-Governor in council; have they powers to make rules dealing with the same matters?

MR. MAGONE: Yes.

MR. CONANT: Concurrent jurisdiction.

MR. MAGONE: Yes.

MR. LEDUC: So, if Mr. Aberhart doesn't like the way the judges are doing, he can pass his own set of rules?

MR. MAGONE: Apparently, but in practice, they have left the rule-making with the judges of the Supreme Court. And in Manitoba, the power is vested in the judges themselves.

In New Brunswick, the rules are made by the Lieutenant-Governor in council upon a recommendation of the majority of the judges.

MR. LEDUC: Or upon the recommendation of the Council of the Barristers' Society; there again, you may have conflicting recommendations?

MR. CONANT: Well, I don't favour concurrent jurisdiction. It seems to me there should be somebody making the rules.

MR. LEDUC: Yes.

MR. MAGONE: There is a note there; when recommendations are made by the Barristers' Society, they are passed to the judges, and when they are made by the judges, they are passed to the Barristers' Society.

WITNESS: That is in New Brunswick; but isn't the ultimate power in New Brunswick by Order-in-Council?

MR. MAGONE: Lieutenant-Governor in Council, yes.

In Nova Scotia, the rules are made by the judges.

And in Saskatchewan, they are also made by the judges.

MR. CONANT: Are they confirmed by Order-in-Council in those jurisdictions?

MR. MAGONE: Apparently not.

MR. CONANT: Well, then we can, at the same time, turn to the Barlow report and summarize the English procedure. Perhaps we can let Mr. Barlow do that. It is on the very last page of his report.

MR. MAGONE: Mr. Barlow, will you just summarize what the jurisdiction is in England?

WITNESS: The rules of court, in England, are made by the Lord Chancellor,

together with any four or more of the following persons, namely, the Lord Chief Justice, the Master of the Rolls, the President of the Probate Division, and four other judges of the Supreme Court, two practicing barristers being members of the General Council of the Bar, and two practicing solicitors, of whom one shall be a member of the Council of the Law Society, and the other a member of the Law Society and also of a provincial Law Society. And the four other judges and the barristers and solicitors are appointed by the Lord Chancellor in writing under his hand, and shall hold office for the time specified in the appointment.

MR. CONANT: Well then, it's a mixed Committee, there, is it not?

WITNESS: It is a mixed committee, of course; the Bar and the solicitors are separate in England, and in order that representation may be had from both bodies, there are two barristers and two solicitors who are members of this Committee, which is composed as I have said.

MR. LEDUC: It is composed of eleven people, really.

WITNESS: Yes, the heads of the different courts.

Q. No, but outside of the Lord Chancellor there are eleven members?

A. Yes.

Q. And it is sufficient to have four of them in addition to the Lord Chancellor, for them to be approved?

A. Oh, no.

Q. Yes. "The rules of court may be made by the Lord Chancellor together with any four or more . . ."

A. Oh yes, you're quite right, I see what you mean. The Lord Chancellor and any four of them may make the rules.

MR. CONANT: Yes. Well, are those rules effective by promulgation, or ——

WITNESS: By promulgation, with Order-in-Council, as I understand it, yes.

Q. What do you think yourself, Mr. Barlow, dealing first with that angle of the thing, as to whether rules of court, no matter what the tribunal is making such rules, should have the force of law without any governmental or parliamentary sanction, having this in mind, to which you may agree or otherwise, namely, that the rules of practice may affect the rights of the subject, almost to an equal extent as a great many Statutes passed by Parliament. Is that not the case?

WITNESS: I think that is exactly the case. The rules of practice do affect the public, because they are made in order that the public may assert rights which they may have, and have them determined by the courts, and it is only by these rules that that is carried out.

Q. And certainly, at any rate, I think perhaps you will perhaps agree, that

the simplicity or the complexity of the rules might materially affect the burden upon any person invoking the courts, is that not correct?

A. There is no question about it.

Q. Yes. Well, what would be your view as to whether rules, regardless of who the formulating body may be, should be subject to sanction of Parliament, or the Lieutenant-Governor in Council, or some governmental agency?

A. In my opinion, they should be subject to sanction of an Order-in-Council or the Lieutenant-Governor in Council. I think it doesn't want to be too cumbersome.

Q. No.

A. Nor does it want to be something that has to wait until Parliament sits, necessarily.

Q. Well, supposing you had procedure of this kind, and I think there are precedents for it: that the Rules of Practice could be approved by Order-in-Council, and tabled in the Legislature within so many days of the Legislature sitting, or within so many days after commencement of the Legislature; if the Legislature is not sitting; what would be your view of that?

A. It is a practice that has been followed in certain types of regulations, shall I call them, and it is certainly protective and in line with our system of government.

Q. The democratic system?

A. The democratic system of government.

Q. Yes. There is another angle to that, Mr. Barlow; perhaps Mr. Magone and Mr. Silk can help us out on this: there is set up in the Rules of Practice, the tariff of disbursements, as they call it; what is the present position in regard to those tariffs? Those tariffs, first of all, affect the Crown revenues, do they not, Mr. Barlow?

A. They do; they are the moneys that go to the Crown, and assist in the maintenance of the courts and the administration of justice.

Q. Yes, for which the province is responsible?

A. Yes, the province is responsible for it.

Q. Whether there is a dollar or a million dollars of disbursements?

A. Quite right.

Q. And, Mr. Magone, I would like you to place before the Committee, subject to the Committee's wishes, because I think it is important, as to the present system with regard to those disbursements, whether the committee of

judges has the power to fix those disbursements with or without governmental approval or what the situation is. Is the Committee agreed?

MR. LEDUC: Yes, quite; we would like to have that.

MR. CONANT: Because that directly goes to Crown revenue.

MR. LEDUC: Yes.

MR. MAGONE: Well yes, under the Judicature Act, section 106:

> "The Rules of Practice and Procedure, including the tariffs of fees and costs proclaimed by the Lieutenant-Governor in Council under the authority of the Judicature Act, being Chapter 19 of the Statutes of 1913, and all amendments made to such rules by the judges, are confirmed and declared to have the same force and effect as if they were embodied in this Act, but the judges may, nevertheless, from time to time pass rules repealing, amending or varying the same."

MR. CONANT: But that doesn't use the word "disbursement" there.

MR. LEDUC: Oh yes.

MR. MAGONE: Yes, it says "fees and costs."

MR. CONANT: Well now, is that disbursements?

MR. MAGONE: Well, that is the cost of proceeding in court, I think that is wide enough to include the tariffs in the Act.

MR. LEDUC: Mr. Magone, let me get this right; in 1913 there was an Order-in-Council passed approving those rules and the tariffs, equally the tariffs?

MR. MAGONE: Yes.

MR. LEDUC: But since that time, the government has no power to amend them by Order-in-Council? The sole power is in the judges?

MR. MAGONE: Yes, that is the situation.

MR. MAGONE: Well, Mr. Barlow, what do you construe that to mean, do you construe that as giving the judges the power ——

MR. CONANT: Do you construe that as giving the judges power to alter the disbursements, or where does that power rest?

WITNESS: I always thought the power rested with the judges, but it would appear that there may be some question about that. I haven't been referred to any change that has been made, unless something has been done by Order-in-Council.

MR. LEDUC: Well, Mr. Barlow, I think the tariff of fees was changed during the last war.

MR. CONANT: What do you mean by fees, Mr. Leduc?

MR. LEDUC: Fees to solicitors and counsel, as distinguished from disbursements. I think that some time during the last war, there was an increase of 20 percent granted on taxable fees. Now, was that done by Order-in-Council or by the judges?

WITNESS: I don't know.

MR. CONANT: Well, Mr. Leduc, it doesn't appear to me that there is any difficulty or doubt about fees, they have jurisdiction over the fees, but I would like to straighten out this question of disbursements, because the words that are used in the rule book are not the same as in the Statute; the rule book refers to tariff fees; tariff fees are not disbursements; and the Statute uses the words "fees and costs," does it not, Mr. Magone?

MR. MAGONE: Well, I can't see any particular difference between disbursements and costs.

MR. FROST: You mean a disbursement is a cost?

MR. MAGONE: Yes, a disbursements is a cost, and the rules fixing the tariff of fees and costs ——

MR. FROST: Let me get this straight; I was of the opinion that the Rules of Practice were made by a committee of judges, and it wasn't necessary that they should be confirmed by Order-in-Council, and apparently that is not correct; according to the Judicature Act, section 106, the Rules of Practice and Procedure, including the tariff of fees and costs, are proclaimed by the Lieutenant-Governor in Council under the Judicature Act, and all the amendments made to the rules by the judges are confirmed.

MR. CONANT: Well, the explanation of that is, that at that time, they gave the force of law to subsisting conditions, and under subsection 2, they go on to say:

> "The judges of the Supreme Court may, at any time, amend or repeal any of the rules and may make any further or additional rules for carrying this Act into effect;

MR. MAGONE: Yes, and I think, if you look at subsection (h), that will clear the matter up; it says:

> "subject to the approval of the Lieutenant-Governor in Council, for making rules from time to time, regulating all fees payable to the Crown, in respect of proceedings in any court.

WITNESS: My recollection is this: that in 1913, the Hon. Mr. Justice Middleton was especially deputized, whether by Order-in-Council or not, I don't know, but I think so—it is in the front of the rule book, I think—by Order-in-Council to revise the rules. He did so, and then there was an Order-in-Council passed, confirming and giving force of law to the rules which he had made. And that is the reason for subsection (1) of section 106 of the Judicature Act reading as it does.

"The Rules of Practice and Procedure, including tariffs of fees and costs proclaimed by the Lieutenant-Governor in Council under the authority of the Judicature Act, being chapter 19 of the Statutes of 1913, and all amendments made to such rules by the judges, are confirmed and declared to have the same force and effect as if they were embodied in this Act, but the judges may, nevertheless, from time to time pass rules repealing, amending or varying the same."

MR. CONANT: Yes.

WITNESS: And in the next subsection:

"The judges of the Supreme Court may, at any time, amend or repeal any of the rules and may make any further or additional rules for carrying this Act into effect, and in particular, and so on.

MR. CONANT: Yes.

WITNESS: Now, that is the practice at the present time. Now, I would like to have before me the 1927 revision of the Statutes, and also the 1914 Statutes, because there was an amendment made in 1927 with reference to the rule-making body.

MR. LEDUC: Well, look at section 108 of the Judicature Act; is that it?

WITNESS: No. There was a section of the Judicature Act that was repealed in 1927.

MR. CONANT: What was the effect of that section?

WITNESS: In the revised Statutes of 1914, chapter 56, section 110, provision was made there for the making of rules, subject to the passing of them by Order-in-Council, by the Chief Justices, including the Chancellor, and any one or more of the other judges of the Supreme Court, and the treasurer of the Law Society, and any two barristers. That was repealed in 1927, George V.

MR. FROST: But that was the provision in the 1914 rules and it continued until 1927, when it was repealed, and this present section 106 was passed. If we had that section here ——

MR. MAGONE: We have sent for it.

MR. CONANT: Was that procedure invoked indirectly in that interval?

WITNESS: No, I don't think it was; so far as I recollect, there were no changes in the rules from 1913 until 1927 or 1928, when this subsection 106 was passed, and the section that I speak of was repealed, and this new section 106 was passed, and under that there were amendments made to the rules in 1928, when the Rules of Practice were reprinted, and those Rules of Practice of 1928 were made under the present section 106 of the Judicature Act.

MR. CONANT: I see. And then ——

WITNESS: And then I might just go back a little farther, if you care to hear a little history on this, gentlemen.

MR. CONANT: Just let me interrupt you there for a moment; in that revision of 1928, was there any change made in the disbursements?

WITNESS: I can't tell you that without comparing it with the previous book; that is easily found out.

Q. Well, during my practicing days, there were certainly changes made in the disbursements?

A. There were some changes made, Mr. Chairman, and I think, if we had a copy of the rules prior to 1928, we would be able to compare them.

MR. FROST: What about letting Mr. Barlow go ahead with his history of this thing, and its background?

MR. CONANT: All right.

WITNESS: Previous to 1913, there was a revision of the rules in 1897. That revision of the rules was made by a Commission, and I don't think I could do better than to read from the frontispiece of the rules of 1897, which reads as follows:

> "The present consolidation of the Rules of Practice of the Supreme Court of Judicature for Ontario has been prepared by a Commission, issued on the 23rd day of May, 1895, under the Statute of Ontario, 58 Victoria, c. 13, s. 42, appointing the following Commissioners: The Hon. J. A. Boyd, Chancellor of Ontario; The Hon. W. R. Meredith (now Sir William R. Meredith), Chief Justice of the Common Pleas; The Hon. Thomas Ferguson and The Hon. John E. Rose, Justices of the High Court of Justice; The Hon. Sir Oliver Mowatt, Attorney-General of Ontario (now Minister of Justice of Canada); The Hon. A. S. Hardy, Commissioner of Crown Lands (now Attorney-General of Ontario); The Hon. J. M. Gibson, Provincial Secretary of Ontario (now Commissioner of Crown Lands for Ontario); The Hon. Richard Harcourt, Treasurer of Ontario; Charles Moss, Q.C. (now one of the Justices of the Court of Appeal); N. W. Hoyles, Esq., Q.C., Principal of the Law School of Ontario; John Hoskins, Esq., Q.C.; G. H. Watson, Esq., Q.C.; George F. Shelpley, Esq., Q.C.; Charles H. Ritchie, Esq., Q.C.; Thomas Langton, Esq., Q.C.; and James Fleming, Esq., Inspector of Legal Offices."

And that is dated the 22nd of July, 1897, when these rules came into force.

MR. LEDUC: On which Commission, the Government was very well represented?

WITNESS: Very well represented, yes, probably a majority of representation, I might say.

Then, I would like to refer to the Statutes of 1897, if we could get those

also, so that I can build the thing up from there, and in that way I can probably give you a better picture of it.

MR. MAGONE: While we are waiting, Mr. Chairman, Mr. Silk has been in communication with North Bay, and Judge Plouffe is not available; he is in Montreal to-day, and then he is going to Ottawa, and North Bay on Saturday. If we want to get this matter cleaned up this week, we should get in touch with someone else.

There is Judge Stone, for instance, at Sault Ste. Marie. Then there is Cochrane.

MR. FROST: How about Judge Stone?

MR. CONANT: How long has he been there?

MR. SILK: Just a short time.

MR. CONANT: Judge Stone?

MR. SILK: Oh no, Judge Stone has been there for a long time. I mean Judge Dennis, in Cochrane, has only been there five or six months.

MR. MAGONE: Yes, Judge Wright of Muskoka is also a fairly recent appointment; then there is Judge Proulx, of Sudbury, and Judge Hayward, of Temiskaming.

MR. CONANT: I would think that perhaps Judge Hayward is the best one.

MR. MAGONE: Yes, he has been on the bench longer than any of the other judges, in all about twenty-five years, I believe.

MR. CONANT: Is that agreeable, gentlemen?

Carried.

WITNESS: Well now, gentlemen, the Revised Statutes of Ontario, 1897, chapter 51, section 122, provide that:

> "The Supreme Court may at any time, with the concurrence of a majority of the judges thereof present at any meeting held for that purpose, alter and annul any Rules of Practice for the time being in force, and may make any further or additional Rules of Court for carrying this Act into effect, and in particular, for all or any of the following matters:

And then it proceeds to enumerate them; for regulating sittings of the High Court, regulating pleadings, practice procedure in the High Court of Justice, and Court of Appeal, and so on, very similar to the present section 106. But there is also, in this revision, section 125, which no longer appears in our Statutes:

> "The Lieutenant-Governor in Council may, from time to time, authorize the following persons, namely, Chief Justice of Ontario, the Chancellor,

the Chief Justice of the Queen's Bench, the Chief Justice of the Court of Common Pleas, and any one or more of the other justices of the Supreme Court, to make Rules of Court under this Act, every such appointment to continue for such time as shall be specified by Order-in-Council, and the judges so appointed, or any three of them, may make such rules, and the same shall have the same effect as if made by all the judges of the Supreme Court under section 122."

MR. CONANT: That is a peculiar thing.

WITNESS: Well, it would appear that that section is for the purpose of making a, shall I say, more severe revision of the rules, whereas section 122 would be made use of for altering and amending the rules from time to time, as may appear necessary for making the practice consistent, and so on.

MR. CONANT: In minor respects?

WITNESS: More or less minor respects, I would think.

MR. FROST: Was that section 125 really made for the appointment of a Commission similar to the 1897 Commission?

MR. CONANT: Well, I was just going to ask Mr. Barlow, will you look at that section you have just read and see where it comes from? That is the section allowing the Lieutenant-Governor in Council, etc., what is the reference at the end of it?

WITNESS: 53 Victoria, chapter 12.

Q. 58 Victoria, chapter 12?

A. Yes.

Q. Now this Commission, the 1897 Commission is 58 Victoria, chapter 13, section 42?

A. Well, that would be a special ——

Q. A special Act?

A. A special Act; that is a special Act, apparently.

Q. Yes.

A. I think it is a special Act. Now then, those sections remained in the Judicature Act of Ontario, until 34, George V, 1913, section 103.

Q. What chapter?

A. Chapter 19, section 103, there appears the provision under which our 1913 rules were made by the Hon. Mr. Justice Middleton. It reads as follows:

"If and when the Rules of Practice and Procedure, which are being

prepared by the Hon. Mr. Justice Middleton under instructions from the Attorney-General, are approved by the Lieutenant-Governor in Council, the same and the tariffs of costs and tariffs of fees payable to the Crown and the officers of the court contained therein shall, on a day to be named by the Lieutenant-Governor in Council by proclamation, have the same force and effect as if they had been embodied in this Act, and shall supersede the existing rules, and tariffs in section 102 shall, after that date, no longer remain or be in force."

Now section 102 referred to, there is a section dealing with fees on certain proceddings. Then,

"In addition to the . . . which is payable in the proceedings of the Supreme Court, the following fees shall be paid to the Crown":

MR. LEDUC: There you are.

WITNESS: There is the section with reference to it. But that only remains in force until such time as Mr. Justice Middleton had completed his revision, which revision included a revision of the tariffs of costs and tariffs of fees payable to the Crown. And then in the 1914 ——

MR. CONANT: Are you referring to the Revised Statutes of 1914?

WITNESS: The Judicature Act in the revised Statutes of 1914, chapter 56, section 109, is the same as 3 and 4, George the V, chapter 19, that I referred to a moment ago; that is, the 1913 Statutes, and section 110 is also the same as section 125 of the 1897 Judicature Act, chapter 51, which I gave you. And that was carried through until the Ontario Statutes of 17, George V, 1927, when it ——

MR. CONANT: What is the chapter?

WITNESS: Chapter 29, section 38 of which repealed section 110.

MR. LEDUC: What is that, again?

WITNESS: Section 38 of this chapter 29 in the 1927 Statutes repealed section 110, which is the section giving the right to the Lieutenant-Governor in Council, the Chief Justice, and so on--that was repealed, and section 109 was also repealed, and a new section 109 was passed, and with the purpose, I gather from reading it, of giving the judges full power to make rules:

"The judges of the Supreme Court may, at any time, amend or repeal any of the rules and may make any further or additional rules for carrying this Act into effect."

And so on. And it was under that section that the revision of rules was made in 1927.

MR. CONANT: What is the new section?

A. It is section 109, and that section was carried, of course, into the 1927 rules, and then carried into the 1937 rules, where it is 106.

MR. LEDUC: You mean Statutes, I presume?

WITNESS: I beg your pardon, not rules, but Statutes, carried into the revised Statutes of 1937, under chapter 100, section 106, and that is the statutory provision to-day.

Q. Well then, Mr. Barlow, we may take it for granted that the Judges of the Supreme Court have full power to establish tariffs and disbursements?

A. Well, it looks like it, to me.

MR. MAGONE: Well, for fees payable to the Crown, with the approval of the Lieutenant-Governor in Council.

MR. LEDUC: Well, let us be clear on this.

WITNESS: That is subsection (h), yes. Yes, subject to the Lieutenant-Governor in Council regulating the fees payable to the Crown, and that section, of course, requires any change made in any fees payable to the Crown being approved of by the Lieutenant-Governor in Council.

MR. CONANT: I would like to interject this here, for the benefit of the Committee; there was a search made to find, if there were any, the Orders-in-Council approving of such things, and none could be found. Did you make that search, Mr. Silk?

MR. SILK: No, I did not, sir.

MR. CONANT: Well, some one did, I understand. I was in doubt, but in discussing it with some of the judges of the Supreme Court, they felt that an Order-in-Council was not necessary, although they added, quite properly, that the judges would never amend the disbursements, because they represented Crown revenue, without the concurrence of the Government. So that there certainly has been a misunderstanding over the years,and I am definitely of the impression that those disbursements have been amended without the necessary Order-in-Council, if an Order-in-Council is necessary.

MR. LEDUC: Well, we have several tariffs at the end of the rules; we have, first of all, tariffs of fees payable to solicitors in County Court and Supreme Court, and then we have a tariff of disbursements payable where an officer is not paid by salary, or his fees are not commuted, unless especially authorized; I suppose these would be fees payable to the Crown. But then, later on, you have fees payable to county court clerks, and fees payable to sheriffs.

MR. CONANT: Which are all Crown revenue.

MR. LEDUC: Well, they are and they are not.

MR. CONANT: Well, they are now-a-days.

MR. LEDUC: Yes, but according to the tariffs you have, these fees are payable for serving persons, but not to the Crown; but, as you state, in these days, most of these fees are commuted, and become Crown revenue.

MR. CONANT: That's right.

MR. LEDUC: I believe that all these disbursements should be set by Order-in-Council.

MR. CONANT: Or approved by Order-in-Council.

MR. LEDUC: Well, I don't know, after all, it is an indirect form of taxation.

MR. CONANT: Yes, it probably is.

MR. FROST: Well, Mr. Barlow, in the suggestion that you make here, on page B75, there isn't any really radical departure from what we have previously done. It's true that, at the moment, it appears that the judges alone have the right to amend the rules and make new rules, but after 1897, they recognized the fact that judges, representatives of the government, and practicing barristers made the revision of 1897, and it does seem to be common sense that that old practice should be revised and brought up to date. And that is what your suggestion is?

WITNESS: And there was provision for the matter being taken care of in that way up until 1927, when it was amended by repealing the provision.

I was just going to say this, gentlemen: that I have been comparing the tariff of disbursements in the 1913, and in the 1928 rules, that is fees payable to the Crown, and apparently there was practically no change in it at all. I believe the only changes I see are in witness fees, and they are not payable to the Crown.

MR. MAGONE: Apparently from this 1913 Act, then, where certain fees are given to the Crown by Statute, there was a departure, then, for the first time from the principle that fees payable to the Crown should be fixed otherwise than by Statute?

WITNESS: Yes, apparently.

MR. MAGONE: Yes, that would appear to be so from reading it.

MR. CONANT: I don't quite understand.

MR. MAGONE: In 1913, Mr. Chairman, there is provision in the Judicature Act setting out certain fees payable.

WITNESS: Additional fees.

MR. MAGONE: Additional fees payable on the issue of the writ, to go to the Crown.

MR. CONANT: Yes?

MR. MAGONE: By that section 102 the tariff of fees set out in Mr. Justice Middleton's Rules of Practice were approved.

MR. CONANT: By Statute.

MR. MAGONE: Yes, on coming into force, by Statute, and thereafter the fees were fixed by the judges.

WITNESS: It would appear to me, without going ——

MR. CONANT: But just let me interrupt there, Mr. Barlow; you say thereafter those fees, and I prefer the word disbursements, those disbursements were fixed by the judges?

MR. MAGONE: By the judges?

MR. CONANT: I would like you to make a note of it and have somebody search again and see if there have been any Orders-in-Council approving the amendments to the tariff of disbursements since 1913.

WITNESS: I don't think there has been any change in the disbursements since 1913, Mr. Chairman. I have been comparing the disbursements of the 1913 rules with those of the 1928 rules, and I can't see any change in the fees payable to the Crown. And under the provisions of the Judicature Act of 1913, under which Mr. Justice Middleton made the rules, it says:

> ". . . the tariffs of costs and tariffs of fees payable to the Crown and the officers of the court contained therein shall, on a day to be named by the Lieutenant-Governor in Council by proclamation, have the same force and effect as if they had been embodied in this Act, and shall supersede the existing rules, and tariffs, and section 102, shall, after that date, no longer remain or be in force."

Now, section 102 was apparently merely a stop-gap in order to increase the fees for a short time, until such time as the change had been made by the new rules, because it says:

"In addition to the fees otherwise payable on proceedings in the Supreme Court, the following fees shall be payable":

And then it goes on to say, "on every writ, 50c, every judgment, entered," and so on. This is an increase, you see.

MR. CONANT: Yes.

WITNESS: And it was only to take care of it until such time as the change occurred.

Q. Which was taken care of in consolidation?

A. Well, it was taken care of in the tariff of fees and costs, and so on, as set out along with the rules made in 1913.

Q. That's right, with the revision?

A. Yes.

MR. LEDUC: Mr. Magone, talking of these disbursements, have you any

information as to the disbursements paid in other provinces as compared with those in our courts?

MR. MAGONE: No, I don't think we have, not in the Supreme Court. Mr. Barlow, you didn't collect that information, did you?

WITNESS: I didn't directly collect that information. It is all to be found in the same sections with the rules of court in the different provinces, and in some places it is higher, in other places not so high; in some places it is on the block system, which we have here, and I think in the Maritime provinces it is still on the old system of so much for each step taken, copying, engrossing, and so on.

MR. CONANT: Well, I think that is an item that might very well go on our agenda, Mr. Magone. It is not entirely relevant to our present discussion, but it is important, because I think this Committee might very well consider a revision of these disbursements, but I don't think that we should interject it in this question of the rule-making body, any more than to apprise this Committee sufficiently so that it may form a conclusion, as it may very well do, that the fixing of disbursements should be a matter for the Executive, as it affects Crown revenues.

MR. MAGONE: Yes; you will remember, Mr. Chairman, that you instructed certain groups to form themselves into a Committee some time ago for the purpose of going over the rules of practice.

MR. CONANT: Yes.

MR. MAGONE: And at that time, a block system of fees was prepared.

MR. CONANT: Yes. I have in mind that before we conclude—and you might put it on your agenda so that you won't forget—that the Committee might be asked to take that proposed list and consider it. That would be the best way to approach it, I would think. Well, how do you intend to proceed next Mr Magone? I think the historical background has been fairly well outlined.

MR. MAGONE: Yes. Now, Mr. Barlow, on page B76 of your report, you made a recommendation that a rule-making body be set up?

WITNESS: Yes.

MR. MAGONE: Probably I had better read it.

> "Rules of Practice and Procedure may be made by the Chief Justice of Ontario, together with the Chief Justice of the High Court and four other judges of the Supreme Court and four practicing barristers. The four other judges and the barristers to act as aforesaid shall be appointed by the Chief Justice of Ontario in writing under his hand and shall hold office for the time specified in the appointment."

Now, is there a similar body in any of the other jurisdictions you investigated?

WITNESS: Well, I followed there exactly the same practice that is followed in England, by which the Lord Chancellor names the members of his committee, and as the Chief Justice of Ontario really occupies the same position, so far as Ontario is concerned, as the Lord Chancellor, it would seem to me that he should exercise the same functions.

MR. CONANT: Don't you arrive at a tribunal that is entirely the creature of the judiciary in that way?

WITNESS: That may be. It is true that it was departed from in the rules of 1897 and even in the Statutes by which provision was made for the appointment of a committee.

MR. CONANT: Isn't it also the case, Mr. Barlow, that the government of the day must provide the machinery for the courts. That is correct, is it not?

WITNESS: Quite right.

Q. Yes. Why shouldn't the Attorney-General, who has these matters under his department all the time, the machinery of the courts and all the facilities, and so on, why should he not be represented on that committee?

A. It seemed very reasonable that he should be represented, and I notice he was a member of the 1897 committee.

MR. LEDUC: Well, there must have been another reason there, because I remember that the Commissioner of Crown Lands was also a member of the committee. It looked, in that case, as if the Government wanted to be represented, and well represented.

WITNESS: And they were well represented, yes. Of course, I do say this, gentlemen, that too large a committee, in any matter, doesn't work as well as a smaller committee.

MR. LEDUC: Right, but this is also to be remembered, Mr. Barlow: in England, the Lord Chancellor is a member of the Government?

WITNESS: Quite true, he is.

MR. CONANT: Yes?

WITNESS: That's quite true.

MR. FROST: Not really a political member of the Government?

WITNESS: No, but he is a member of the House.

MR. CONANT: The only position we have here that is at all analogous is that of the Attorney-General?

WITNESS: Yes, I suppose that is quite right, Mr. Chairman, that the Attorney-General is, although I really hadn't thought of that, analagous to the Lord Chancellor.

Q. Yes?

A. And might I say, also, that in the War Measures that were passed last September, the Lord Chancellor was given much wider powers with reference to the amendment of the rules than appears here.

MR. FROST: Of course, in Canada we really haven't anybody that is like the Lord Chancellor?

WITNESS: No, not exactly the same.

Q. Neither any of the provincial or the Dominion governments?

A. No.

MR. CONANT: But is this not the case in England, when the Lord Chancellor exercises the functions that are his under that rule-making body or commission, he is representing, of course, the judicial aspect of it, but he is also representing the executive aspect?

WITNESS: Quite true.

Q. And doesn't it occur to you, Mr. Barlow, that while here perhaps he isn't judicial, as he is in England, that while perhaps he should not be given the position of first importance that he has in England, he should at least be a part of the organization?

A. The Attorney-General?

Q. Yes.

A. Well, it is a well recognized fact that the Attorney-General is the head of the Administration of Justice in the province and is responsible for it.

Q. And has to provide the machinery for it?

A. Yes, and that being so, it would appear to me that it would be quite illogical that he should not be a member of that Committee.

MR. FROST: Of course, on the other hand, if the rules have to be confirmed by Order-in-Council, he has the last word anyway, has he not?

WITNESS: I presume he has, Mr. Frost, but ——

Q. I mean there is this merit to the proposal, that these rules are really a highly technical matter, and I suppose the Chief Justice of Ontario, in choosing four barristers, would choose four barristers who are particularly adapted in training and work and so on, to do that kind of work.

A. I don't think there would be any question about that.

Q. And then, if the Attorney-General were represented on the committee,

and in addition to that, subsequently had to pass upon these and to advise the Lieutenant-Governor in Council in connection with the Order-in-Council to be passed confirming them, it seems to me it would be pretty well a check on the whole thing.

MR. CONANT: Is it not a question, Mr. Barlow, as to whether the rule-making committee should be predominantly judicial or predominantly representative of the Parliament of Ontario?

WITNESS: Well, so long as the Parliament of Ontario has the last say, as Mr. Frost has mentioned, by Order-in-Council, they are always protected against anything that might not seem quite right and proper.

Q. Well, put it this way: I suggest this to you, Mr. Barlow: I don't think that we need to differentiate between the Parliament, through its Executive, constituting the rules, and the Parliament, through its Executive, approving the rules, because you arrive at the same thing, but it is a question that this Committee, I think, might properly consider, and I think I would, at any rate, like your view as to whether that rule-making body should be predominantly representative of Parliament or its Executive, or predominantly representative of the judiciary. I think that is the point on which the Committee will eventually have to agree. Do you not agree with that, gentlemen? What do you think, Mr. Leduc?

MR. LEDUC: Well, there is a third alternative that neither should be predominant.

MR. CONANT: Have them "even Stephen"?

MR. LEDUC: Well, that is another alternative.

MR. CONANT: I didn't expect you to give an opinion at the moment, but I wanted Mr. Barlow to direct his remarks to that question.

MR. FROST: Well, surely, after all, it is really a supremely judicial matter, and these judicial men are, or are presumed to be, experts; I certainly think that they should have a predominant part in drawing up those rules, although I agree that in our democratic system, that the government of the day has got to have the last word on it, and I think the Committee being predominantly judicial, on the other hand, the Government of Ontario has the last say as to whether these rules should go into effect or not.

MR. STRACHAN: Just the same, as although the judges being the law-making body, the Legislature may not agree with their interpretation and make an amendment.

MR. FROST: Yes, that's always true.

MR. CONANT: What is your view, Mr. Barlow, as to the rule-making body, whether it should be predominantly judicial or predominantly otherwise, or, as Mr. Leduc suggests as an alternative, all even?

WITNESS: Well, I would think, Mr. Chairman, that it should be pre-

dominantly judicial, that is the judiciary should hold the balance of power on the committee. They have more experience than anybody else with the actual operation of the rules, they see them in operation in the courts every day, and as the practicing barrister sees them from the standpoint of the client, in my opinion he should be represented on there and have the opportunity of making his representations. But in the last analysis, I think that the judiciary should be predominant, because, after all, they are the judges, they are impartial and they are not going to make rules that are not going to be workable and that are not going to, so far as they in their judgment can see, do justice to the case.

Q. Have you in mind, in that statement, that these rules would be finally validated by Order-in-Council or otherwise?

A. Oh yes, finally validated by Order-in-Council.

Q. Then we have as your view, that you think the rule-making body should be predominantly judicial and the rules should be validated by Order-in-Council?

A. And quite properly so, because in a democratic system of government, the Parliament should have the final say.

Q. Yes, but do you express the opinion here that there should be gentlemen of the bar included in the rule-making body?

A. Oh, by all means, I certainly do, that the Attorney-General and members of the Bar should be included in that rule-making committee.

Q. Have you any opinion to express as to how those members of the Bar should be selected, whether they should be ex-officio, or simply selected at large? Perhaps I can make it clearer in this way; whether you think that they should be nominated as, for instance, and I am only using an example, as for instance the Treasurer of the Law Society, the President of the Ontario Branch of the Canadian Bar Association, or some such designation as that?

A. I fear that ——

MR. FROST: The Chief Justice?

MR. CONANT: No, I didn't have in mind the Chief Justice nominating them, because it would be entirely judiciary then.

WITNESS: I would fear, Mr. Chairman, that if you merely designated certain men by reason of their position as ex-officio members, you might not always get men most skilled in practice, and if you are going to have members of the Bar on that committee, they should be men handling matters of practice day by day.

MR. CONANT: Well, then, how would you have them chosen?

WITNESS: Well, if it is felt by the Committee that it should not be left to the Chief Justice, then ——

Q. Well, do you think it should be left to the Chief Justice?

A. Well, that is a real question, Mr. Chairman. When it is considered that the Attorney-General is responsible for the administration of the law throughout the entire province, and, as I say, is the head of the Administration of Justice, it would appear to me that he stands more in the position of the Lord Chancellor in England than any other official that we have here, and that being so, I would think that he would be the proper person to name the members of the Bar that should serve.

Q. Well, that would come down to the government of the day naming them.

A. Well, perhaps so, yes.

MR. FROST: I think, Mr. Chairman, that would be a mistake.

MR. STRACHAN: I do too.

MR. FROST: I am just looking at it in this way: supposing you laid that burden on the government of the day; now, it doesn't make any difference of what political stripe that particular government is, but aways there may be some political debt to pay, or something of that sort, and I think it is a mistake to do it, and the further you can keep rule making, and that part of the courts, away from politics, the better, I think.

MR. CONANT: Oh, there is no doubt about that, there should not even be any opportunity for political interference.

WITNESS: There should be none whatever.

MR. MAGONE: There might, though.

MR. CONANT: That is why I asked you, Mr. Barlow. It occurs to me that that there are two ways of avoiding any interference in constituting this committee. One would be by having the Chief Justice nominate them, and another would be by designating ex-officio members. You see my point?

WITNESS: Yes.

Q. Those are the only two ways that I can see that you could avoid the political aspect of it.

MR. STRACHAN: Or by the Treasurer of the Law Society.

MR. CONANT: I mentioned that.

WITNESS: You mean the Treasurer of the Law Society name them?

MR. CONANT: Well, that is another suggestion, or the Benchers of the Law Society name them.

WITNESS: Personally I think, Mr. Chairman, that my recommendation that the Chief Justice of the province should name them would work out in practice.

Q. Well, I think you will, perhaps, agree with this remark, Mr. Barlow, that the right to appoint is the right to control, is it not?

A. I suppose so.

Q. I beg your pardon?

A. I suppose so.

Q. Yes. Let me say frankly to the members of the Committee, I have given this considerable thought, and while I have been for some time of the opinion that the Bar should be represented, I have never yet been able to arrive at any definite conclusion as to how those members of the Bar should be selected. That is the difficulty that I have always found insurmountable, at least up to now, and that is why I have taken the liberty of dwelling upon it in your examination, thinking perhaps you had some method that would meet it, first of all asserting definitely that it must be removed from the sphere of politics. That is of the utmost importance.

A. That is the reason that I made the recommendation that I did in my report, that they should be appointed by the Chief Justice, because I felt that it should be entirely removed from politics, and I couldn't, at the time at least, conceive of any other means of thus removing it entirely from politics. But I appreciate the point that you have raised and the weakness of it.

Q. Yes, that is that the appointing jurisdiction is also a controlling jurisdiction?

A. Yes.

Q. Yes, and I may say to the Committee, that if the Committee is going to consider a rule-making body, consisting partly of barristers, that that will be perhaps the most important problem that we will be confronted with, that is as to how they ought to be selected.

MR. MAGONE: Mr. Barlow, do you think you would get the desirable members of the Bar on a committee of this kind without fee?

WITNESS: Well, I would hope that we have enough public-spirited members of the Bar who desire to do something for the profession that they would be glad to serve without fee, but it may not be; I don't know.

Q. Well, do you know what the present practice is with respect to the rule-making body?

MR. CONANT: Take England, for instance.

MR. MAGONE: No, I meant in the Supreme Court here. I understand they set up a committee of the judges?

A. Yes; but as I read it, the rules are made by all the judges.

Q. By all the judges?

A. Yes.

Q. But I mean in practice?

A. In practice I believe they set up a committee.

MR. CONANT: Mr. Magone, I have discussed this with the gentlemen of the judiciary to some length and they appoint, and did appoint, a year or so ago, a subcommittee to make some amendments. That committee reported about the 1st of January this year to the whole body of judges, and the whole body of judges considered and perhaps revised them; in the final analysis the rules are formulated by the committee and promulgated by all the judges.

MR. MAGONE: Yes, I knew that was done, Mr. Chairman. I just wondered if the other members of the Committee knew how it was in actual practice.

MR. FROST: How would it be if the Chief Justice were to appoint one barrister, the Treasurer of the Upper Canada Law Society two, and the County Judges' Association one. You have it spread out pretty widely there. And the Attorney-General of Ontario to be represented on the committee, and, furthermore, the Attorney-General of Ontario would naturally have the final say, because the rules would have to be confirmed by Order-in-council.

MR. CONANT: Is the County Judges' Association a sufficiently definite and tangible organization to function in that way?

WITNESS: I don't know, Mr. Chairman, I am not sufficiently familiar with it.

MR. MAGONE: I think it is. Mr. Barlow, had you considered the appointment of a county judge on this body?

MR. FROST: That is another point.

WITNESS: I had not considered that sufficiently to give an opinion on it, Mr. Magone.

MR. CONANT: Doesn't it come to this, Mr. Magone, from your notes it appears to me, I may be wrong, but all boiled down, the making of the rules, as the law stands at present in County Courts, is vested with the Lieutenant-Governor in Council? Mr. Silk, you analyzed that; what do you say? When you get it all boiled down, is not the present law for the rules of the County Court vested in the Lieutenant-Governor in Council?

MR. SILK: Yes, I think that is right, sir.

MR. CONANT: I am speaking of law, I'm not sure whether it is so in practice.

MR. SILK: I think the answer to that is that the section passed in 1935 has not been used, but that section commences: "Notwithstanding the provisions of any other Act, etc."

MR. CONANT: Yes. Well, I introduced that for this reason, Mr. Magone,

because I think this Committee should consider one rule-making body and the various aspects of the rules that could or should be entrusted to that body; that is to say, whether it should be entrusted with County Court rules, Surrogate Court rules, Division Court rules, what should be the scope of that committee, so that when you asked the question whether a County Court judge should be appointed to it, I think Mr. Barlow is entitled to preface his remarks on the assumption that this organization would make the County Court rules, or would not make the County Court rules. Is that not so, Mr. Barlow?

WITNESS: Quite true.

Q. Yes. Because we have an anomalous situation at the present time; we have the situation where the judges make the Supreme Court rules, and the Government of the day makes the County Court rules, is that right, Mr. Silk?

MR. SILK: Yes.

MR. CONANT: Is that not peculiar?

MR. STRACHAN: Yes.

MR. SILK: Then there is a list of rules, on pages 18B and 18C, a good many of which are made by the judges, and some by the Lieutenant-Governor in Council.

MR. MAGONE: Let us examine those for a minute.

MR. FROST: That raises quite an interesting point there, Mr. Chairman. We have such a variety of rules, the question arises as to whether we might not simplify things by having one committee look into the whole rule situation. I know that there may be difficulties in the way, but ——

MR. CONANT: And from that remark follows, Mr. Frost, if I may add this to your comment, that if that policy were to be adopted, you would probably have to that committee judges and others practicing in the County Court, in the Surrogate Court, and so on, would you not? What do you think, Mr. Barlow?

WITNESS: There is no question about it; you would have to ask those who are best qualified and who have the first hand knowledge of them by reason of their experience.

MR. CONANT: Now take those first three items there, items 3, 4 and 5; Judicature Act, County Courts, Surrogate Courts; now our counsel boil it down in this way: the Judicature Act, the rules are made by the judges of the Supreme Court; in County Court, the rules are made by the Government Executive, and in Surrogate Court, the rules are made by the Executive of the Government also.

MR. LEDUC: Yes, in the County Court the Lieutenant-Governor makes the rules, and the tariffs are made by the judges with the approval of the judges of the Supreme Court.

MR. CONANT: Well, I don't know that that commends it any further, does it, Mr. Leduc?

MR. LEDUC: No, it does not.

MR. SILK: Well, Mr. Leduc, I'm sorry, that bracket should go right down to the end. The law as you stated it is what it was before 1935.

MR. LEDUC: Well, who makes the rules, the Lieutenant-Governor in Council?

MR. SILK: Yes.

MR. MAGONE: And the fees.

MR. SILK: Yes.

MR. CONANT: And the fees?

MR. SILK: Yes, under number 18 there is a very special situation. There it is the judges of the District Courts.

MR. LEDUC: Yes, or a majority of them.

WITNESS: Did they ever make any?

MR. MAGONE: No, I don't think so.

MR. CONANT: Mr. Barlow, would there be any practical difficulty—just let us have your views on this—would there be any practical difficulty about setting up one rule-making body to cover, say the rules of the Supreme Court, the rules of the County Court, the rules of the Surrogate Court? Do you think that that would present any difficulty, and if it doesn't, how would you suggest it would be best to meet it, or how would you suggest it could best be done?

WITNESS: As it appears to me, Mr. Chairman, one rule-making body, with proper representation from the different courts, could perhaps best deal with all the rules, because it should be as simple as possible, and without overlapping, and also easily understood and interpreted. If you have two or three rule-making bodies, they are not likely to work in conjunction the one with the other, whereas if you have the one rule-making body to canvas the whole field, you will have a uniform and proper set of rules to govern everything.

MR. CONANT: Wouldn't you have to enlarge your personnel in that case?

WITNESS: Yes, you would have to enlarge your personnel.

MR. STRACHAN: Take your Surrogate Court rules, Mr. Barlow; it has been so long since the judges have practiced in Surrogate Court that the Supreme Court judges wouldn't be as familiar with these rules as with the Supreme Court rules, naturally?

WITNESS: That is quite true, Mr. Strachan.

Q. Wouldn't it involve a fairly large committee?

A. It might involve a fairly large committee.

Q. And senior counsel wouldn't be of much help in drafting the Surrogate Court rules?

A. But you must remember this, that appeals go from the Surrogate Court from time to time.

Q. Oh yes.

A. And in that way, our Supreme Court judges are familiar with the practice in Surrogate Court, perhaps not to the same extent in connection with certain detail; on the other hand, there are certain practices in the Surrogate Court that are similar or should be similar so far as they can be, to the practice in the Supreme Court, and I am thinking of uniformity throughout all the courts.

MR. CONANT: Yes, certain underlying principles.

WITNESS: Certain underlying principles that should follow on through. For the benefit of everybody, it should be uniform as much as possible.

Q. Do you think it would be feasible to extend that to Division Courts?

MR. FROST: That would be difficult.

WITNESS: Oh, I don't think so. No. I wouldn't think so. I think that is something apart, and by itself.

MR. CONANT: Well then, what would be your suggestion as regards Division Court rules?

WITNESS: You mean how they should be made, Mr. Chairman?

Q. Yes.

A. How are they made now, Mr. Magone?

MR. MAGONE: By the Lieutenant-Governor in Council.

WITNESS: I dont see why they can't be taken care of in the same way that they have been taken care of up to now.

MR. MAGONE: That is since 1935.

MR. FROST: If the Attorney-General wants a committee, then, it would be a special committee?

MR. LEDUC: Yes.

WITNESS: Yes.

MR. FROST: I think so, too; it would eliminate complications.

MR. CONANT: Yes, and there is also available the Inspector of Legal Offices, and his assistant, who are constantly dealing with the matter.

WITNESS: Quite true.

Q. But taking all those on pages 18B and 18C, Mr. Barlow, you expressed the opinion that all the rules there might be taken care of by one rule-making body, except for the Division Court proceedings?

MR. LEDUC: Oh heavens, what about the Interpretation Act, for instance?

WITNESS: Yes.

MR. MAGONE: Some of them are purely administrative Acts, such as the Administration of Justice Expenses Act, for instance.

MR. LEDUC: Yes.

MR. MAGONE: And there is a Juvenile and Family Court Act.

MR. CONANT: Well, the Controverted Elections Act, now, where do you think the rule-making body for that should lie?

WITNESS: That should go to the rule-making body, I would think, the same as it does now.

MR. LEDUC: What about number 7, Mr. Magone, the Arbitration Act?

MR. MAGONE: The authority is now divided, Mr. Leduc, between the Supreme Court judges under the Judicature Act, and the Lieutenant-Governor in Council under the County Courts Act.

MR. CONANT: You mean there is a conflict of jurisdiction?

MR. MAGONE: Well, when the Act was passed the rules were made by the judges of the Supreme Court, and the Board of County Judges.

MR. CONANT: Yes. How do you think that should be taken care of, Mr. Barlow, with regard to that conflict?

MR. LEDUC: It is beautifully indefinite: "rules of court for the purpose of carrying out the provisions of this Act may be made by the authority to whom is committed the power of making rules of court."

MR. MAGONE: I don't know what it means; it might mean anything.

MR. LEDUC: As I say, it's beautifully indefinite.

WITNESS: Probably intended to be.

MR. LEDUC: Maybe.

MR. CONANT: Have rules been set up under it?

MR. MAGONE: I don't know of any.

MR. LEDUC: Well, let us not disturb it then; it might give somebody the idea of making rules.

MR. MAGONE: Mr. Silk points out that in item 17, the Land Titles, the Lieutenant-Governor in Council or the judges of the Supreme Court have the power to make rules.

WITNESS: Were there any rules made there?

MR. MAGONE: Oh yes, the rules were made by the Lieutenant-Governor.

MR. CONANT: Well, those conflicts could be cleared up, it seems to me.

WITNESS: Oh yes.

MR. LEDUC: I notice in most of these cases relating to courts, the power to make rules is vested in the judges of the Supreme Court.

MR. MAGONE: Most of them, yes. With regard to the Controverted Elections, rules were made in 1903. I think they were never changed since?

WITNESS: No.

MR. CONANT: Well, there is certainly no uniformity here.

WITNESS: No uniformity at all.

Q. In some cases, it is by the judges of the Supreme Court, in others by the Lieutenant-Governor in Council, and so on.

MR. LEDUC: Well, would it be wise and practical to have uniformity, if one rule making body had power to make rules in all these matters?

MR. FROST: Of course in many of these cases, take number 10 for instance, the judges are now authorized to make the rules.

MR. LEDUC: Yes.

MR. FROST: It would take all those cases out; well, then ——

WITNESS: There are not so many left.

MR. FROST: No.

WITNESS: But all I am thinking of is uniformity, and if you are going to have uniformity, you should have one rule-making body; but so far as any of these Acts merely being administrative Acts, they could very well be excepted from that rule-making body.

MR. LEDUC: I think so.

MR. CONANT: Mr. Silk, perhaps you can enlighten the Committee; I don't quite understand how we arrived at the position where the rules of the Supreme Court are made by the judges, and the rules of the County Court are made by the Government.

MR. LEDUC: Have you the rules of the County Court here?

MR. SILK: No.

MR. MAGONE: Well, the rules of practice of the Supreme Court?

MR. STRACHAN: There are no separate rules, are there?

WITNESS: No, there are no separate rules.

MR. CONANT: No, and I would like that cleared up, Mr. Magone; it seems to me we have arrived at the anomalous position ——

WITNESS: It says here, Chapter 31 of the 1928 rules:

> "All writs answerable in County Court shall be issued by the clerk and shall be under the seal of the court,"

and so on.

> "The judges of the County Court shall have power to act and sit and at any time to transact any part of the business of such courts . . ."

and so on.

And then:

"The practice and procedure in actions in the Supreme Court shall, as far as the same can be applied, apply and extend to actions in the County Court."

MR. CONANT: Well, how do you reconcile that with your statutory provision?

WITNESS: The statutory provision was passed subsequent to this.

MR. MALONE: In 1935.

WITNESS: Yes, it was passed in 1935.

MR. MAGONE: There was, formerly, a board of five county judges; they made rules under the Division Courts Act, and under the County Courts Act, and the Surrogate Courts Act. It was found, for some reason, to be unworkable, I think, expensive and unworkable. The judges used to come to Toronto to hold their meetings, and they would probably take a good deal of time considering matters of this kind, and it would take them away from their districts,

and in 1935 they amended the Division Courts Act and the County Courts Act, abolished the Board of County Judges, and provided the rules be made by the Lieutenant-Governor in Council.

MR. FROST: Well, then, where did these rules come from? It mentions County Court; by what authority?

MR. MAGONE: Well, that is older than mine is.

WITNESS: That is an old authority.

MR. FROST: Perhaps that doesn't exist any longer, then.

MR. CONANT: Well, wouldn't it boil down to this, Mr. Barlow, that as it stands it is all right, but if you are going to change the rules, it would have to be done by Order-in-Council?

WITNESS: Yes, you're quite right, since 1935.

MR. MAGONE: Mr. Silk points out that there is a conflict between the Judicature Act and the County Courts Act. Section 106 of the Judicature Act provides that the judges of the Supreme Court may make rules of practice regulating the practice and procedure in the County Court and Surrogate Court and Supreme Court, and then the County Courts Act provides that the rules of court shall be made by the Lieutenant-Governor in Council.

WITNESS: That is since 1935?

MR. MAGONE: Yes.

MR. FROST: There is a direct conflict now.

MR. MAGONE: Yes.

MR. FROST: Not a conflict, but at least here are two bodies of jurisdiction at the moment.

MR. MAGONE: Yes.

MR. CONANT: What else were you going to take up with Mr. Barlow, Mr. Magone?

WITNESS: Yes, County and Surrogate Courts.

MR. MAGONE: That is in the old statute of 1914?

WITNESS: Yes, it goes back to 1914 and prior to that.

Q. I think you will find it in the 1897 Statutes too.

A. Yes.

MR. MAGONE: Well then, a question was raised by Mr. Leduc at the in-

augural meeting, as to whether our so-called rules of practice don't go too far, that is whether they don't deal with substance of law, and the suggestion was made that those rules dealing with substance of law might be incorporated in the Statutes, and merely the rules of practice, and those properly so called might be left to the body. Was not that your suggestion, Mr. Leduc?

MR. LEDUC: Yes.

WITNESS: I have often wondered where they drew the line between the rules and the Judicature Act, because certain things appear to be in the Judicature Act that might have been in the rules, and certain other things which are in the rules might well have been in the Judicature Act. But that is a matter of study. I think you are quite right, Mr. Leduc, rules of practice should deal only with practice.

MR. MAGONE: If they dealt with practice only, Mr. Barlow, there wouldn't be the same objection to the judges making the rules?

WITNESS: No.

Q. As it is, particularly in mortgage actions, they deal with the rights of the parties?

A. Well, I don't know, I don't think I see anything wrong with the mortgage rules.

MR. LEDUC: Well, just opening the rule book, rule 79 states:

> "A residuary legatee, or next of kin, may have a judgment for the administration of the personal estate of a deceased person without serving the other residuary legatees or next of kin."

Isn't that interfering with the rights of others?

MR. MAGONE: I would think so, and you will find a good many rules, I think, of that kind.

MR. LEDUC: And the next one:

> "A legatee interested in a legacy charged upon real estate, or a person interested in the proceeds of real estate directed to be sold, may have a judgment for the administration of the estate of a deceased person without serving any other legatee or person interested in the proceeds."

This seems to be interfering with the rights of citizens.

WITNESS: That doesn't mean that no notice will be given to them, Mr. Leduc, it means he may get a judgment for administration, but in the administration by the court everybody must be notified. I think that is the intention.

Q. "May have a judgment for the administration of the estate of a deceased person without serving any other legatee or person interested in the proceeds."

That is, that he can obtain judgment for administration of the estate without serving notice?

A. No, no.

Q. No?

A. No, I don't think so.

Q. Well, I just happened to open the rule book at random, and I found these, and I dare say if you look carefully you might find other instances.

A. Well, it is administration by the court, though it is a judgment for administration by the court.

Q. Yes?

A. And when the Court comes to administer, the notice would be given.

Q. Yes, you're right about that, that's right.

A. It's only to make it easier, that's all.

MR. MAGONE: Mr. Barlow, you mentioned other rules in your report; there are criminal appeal rules, of course, and we can't interfere with that rule-making power.

MR. CONANT: That is constituted by the Federal authorities?

MR. MAGONE: Yes. And *certiorari*, is the same, I think.

WITNESS: Yes.

Q. Constituted by the Federal authorities?

A. Yes.

Q. There is one other, that is the rules respecting matrimonial causes; I suppose they would fall into the same category as the rules of practice?

A. All in the same category, yes.

MR. MAGONE: Now, if the members of the Committee are agreeable, we can go to another subject.

MR. CONANT: Well now, Mr. Barlow, in your report here, you have dealt with quite a few rules that you think should be amended. In your suggested amendments, do you suggest that you have exhausted the possibilities of simplification and expedition and economy in the practice of our courts?

WITNESS: I wouldn't say that it was exhausted by any means, Mr. Chairman. The rules that I have dealt with there are entirely those rules that I

myself have come into contact with in practice, where I thought that some change might be made, or rules to which my attention has been drawn by submissions that I received, and after discussing the matter with the various members of the Bar.

Q. But supposing a new rule-making body were set up, disregarding for the moment the exact constitution of it, and Parliament, or the Government, were to say: "Now, we would like the rules of practice completely revised to bring them up to date and in order to simplify and expedite the procedure as much as possible," do you think that there is much that could be accomplished by a thorough examination and study of the rules?

A. I do, I think there is a very considerable amount could be accomplished and they could be simplified in many ways, with the addition of the ones that I have specifically mentioned there.

Q. With benefit to the people, you mean?

A. Benefit to the public generally; it is the public I am thinking of.

Q. And with any economies?

A. Yes, I would say economies in both time and money.

Q. Yes, and would that be a difficult or a lengthy job for a rule-making body?

A. It shouldn't be so very difficult, and when you say lengthy, that all depends upon the body.

Q. Yes. But you think there is a great deal could be accomplished in the way of simplification?

A. Oh yes, I do, definitely.

Q. We have some excess baggage in our rules, have we not, Mr. Barlow?

A. We certainly have.

Q. Yes. And in other jurisdictions, have they made any better progress in that respect than we have?

A. They have just within the last—I think it was the beginning of the year, devised a new set of rules for the Province of Manitoba, in which they have simplified matters very considerably.

Q. Well now, that was a joint tribunal that did that, was it not?

A. That was a committee, so I am told, composed entirely of members of the Bar.

Q. I see.

A. But their Act out there provides, that is the Judicature Act, provides that the rules should be made by the judges, and when they were prepared by that committee, they were taken to the judges and the judges approved of them.

MR. MAGONE: The total number of rules has been reduced from 1,020 to 706. The arrangement and grouping of the new rules is based very largely on the 1928 Ontario rules.

Mr. Silk has a report from the Legislative Counsel in Manitoba in connection with the new rules. "Perusal of these sections will show that in the Court of Appeal Act and the King's Bench Act, the power to make rules is given to the judges of the respective courts. The only requirement being that the rules must be published in the *Manitoba Gazette*. In the Surrogate and County Courts Act the rules are also made by the judges, but in addition to publication in the *Gazette*, they must be approved by the Lieutenant-Governor in Council before coming into force. In actual practice, the rules which were made under the Court of Appeal Act and the King's Bench Act were largely the work of a special committee of the Law Society, under the chairmanship of Mr. E. K. Williams, K.C., and the rules which were made under the County Courts Act were largely the work of a committee of the Manitoba Bar Association."

MR. CONANT: But they have gone quite a long way in simplification, have they?

WITNESS: This perhaps may answer a question that was raised by Mr. Leduc as well as by you, Mr. Chairman: In the preface to the Manitoba rules, I find, stating the attempt which has been made in connection with the revision, among other things, they mention:

> "To eliminate provisions which are essentially matters of substance of law, and to incorporate them in the appropriate statute; to discard provisions which are obsolete, unnecessary and undesirable; to eliminate general references to the former practice, and to substitute therefor specific and clearly expressed provisions prescribing the practice; to bring about uniformity of language throughout the rules; to simplify the procedure."

And since they have completed these rules, they are now working in Manitoba on a set of divorce rules.

MR. CONANT: Well, coming back to that question of personnel, I meant to ask you at the time, and I think it is important to ask you and I want you to deal with it quite impersonally, would you not think it was proper and a good idea for the Master to be a member of the rule-making body or committee?

WITNESS: Of course that—you embarrass me there, Mr. Chairman.

Q. Well, do not deal with the subject personally.

MR. FROST: That would be most desirable, I think, Mr. Chairman. I don't think any man in the province knows more about it than Mr. Barlow.

MR. CONANT: You see, in England, they have the Master of the Rolls; how does that correspond to the Master here?

WITNESS: Well, the Master of the Rolls in England is a judge, of course, and he doesn't do the Master's work in the same way that ——

Q. Well, are there any of these officials in the English system that correspond with our Master?

A. No, I don't think there is any person that corresponds with the Master here.

Q. Well, in any of the jurisdictions, do they have the Master as a member of the committee?

A. Not that I know of.

Q. It strikes me as rather peculiar. You deal with the rules every day?

A. I deal with the rules every day, as a Master's office does, probably, I would say, more than any of the judges do, because, as you know, our judges sit in rotation in weekly court.

Q. Yes?

A. And for the period from January until June, a judge will not sit more than two weeks, and some of them only one, and that is really the only contact that they have with practice, with the exception of what they may have at trials, which is comparatively little. So that, in that way, the Master's Office is dealing with the rules every day, and in that way, speaking frankly, he should be more familiar with the majority of the rules than what the judges are.

Q. Well, if the Master were made a member of the rule-making body, do you know of any difficulty or embarrassment or inconsistencies that would arise from it?

A. I don't know of any, Mr. Chairman.

Q. Just one more question, Mr. Barlow; do you think it would be a benefit, or if it would add anything, if we gave the rule-making body a permanent secretary? For instance, supposing we were to provide that the registrar of the Supreme Court would be the permanent secretary of the rule-making body, would it not give it more continuity, better continuity and better organization?

A. It would make for uniformity, so that there would always be a reference back to the minutes of the various meetings held, and it would be, I think, advantageous in that way.

Q. Well, wouldn't the registrar be the logical man for that position?

A. I would think so. I don't know of anybody else, unless you appointed one of the judges, and I don't think he would want to take that on.

Q. Well, the registrar has a fairly good staff?

A. Yes.

Q. And an office?

A. Yes.

Q. And an organization?

A. Yes, and he is the head of the administrative branch at Osgoode Hall.

Q. Yes, and directly and constantly in touch with all these possible or probably officials, probable members of the committee?

A. Quite true.

MR. MAGONE: Should there be statutory meetings, Mr. Barlow? More than one a year, or two a year?

WITNESS: I would think that perhaps two statutory meetings a year would be sufficient. But I notice in the English *Weekly Notes* that there is hardly a month goes by that you don't find some change having been made in their rules, some amendment having been made in their rules, for purposes of simplification, and so on, going on continually.

Q. Much more than we have been doing?

A. Oh yes, and everything that they do looks towards simplification and ease in practice.

Q. Would you fix the term of the appointment of the barristers so that there would be rotation?

A. Oh, I suppose that might be done, Mr. Magone. I would think that they might, perhaps, fix a three-year term. Sufficiently long that they may become familiar with what they are doing, and yet not too long that they would not have something new to bring forward, because everybody that comes into that rule-making committee should have something to contribute.

Q. Do you think, Mr. Barlow, that anything is gained by having the whole bench available for the discussion of the rules? We have nineteen judges on our Supreme Court bench.

MR. LEDUC: Twenty-one.

MR. MAGONE: Twenty-one, is it?

WITNESS: Well, the only point is that if you have too large a committee, you won't get matters done expeditiously. I can see no reason why we wouldn't get exactly the same benefits, with your smaller committee, with the opportunity that would naturally be given to enable all the judges, in fact to request them,

to come to the committee and take part in the discussion and make representations.

MR. MAGONE: Yes; and now, gentlemen, I think the natural sequence would be to go to the Law Revision Committee, on page 74 of Mr. Barlow's report.

—— Witnessed excused.

Committee rises for lunch recess.

AFTERNOON SESSION

Parliament Buildings, Toronto,
April 9th, 1940.

MR. CONANT: Very well, Mr. Magone; you may proceed. What did you intend dealing with next?

MR. MAGONE: Well, with the concurrence of the members of the Committee, I thought we could go on with the Statute Revision Committee.

MR. CONANT: Well, before you do that, is it your intention to deal with everything that you want Mr. Barlow to discuss at this one time?

MR. MAGONE: Yes, but if he cannot, we will leave it until another day, and go as far as we can with him to-day. To-morrow morning we have Mr. Juneau.

I might say, too, that I have spoken to the chief justice of Ontario and the chief justice of the High Court, and they can't get up this week, but they will set aside a date for some subsequent sitting. Mr. Justice Middleton will then also be available; he has not been available to date, as he has been away ill. I think probably the three of them will be up together.

MR. CONANT. That will be after adjournment?

MR. MAGONE. Yes, after adjournment next Friday.

MR. CONANT: Is that agreeable to the Committee? We are stepping a little bit out of our sequence as outlined. Mr. Magone wants go go on to No. 26, Law Revision Committee; is that agreeable to the Committee?

Carried.

MR. MAGONE: I think it is a natural sequence after having dealt with the Rules of Practice Committee.

MR. CONANT: Yes, it has some relation to it.

F. H. BARLOW, K.C., Master, Supreme Court of Ontario.

MR. MAGONE: Mr. Barlow, did you make an investigation with respect to a Law Revision Committee in England? And in the State of New York?

WITNESS: Yes.

Q. Would you just tell the Committee what the practice is in those two jurisdictions?

A. Well, in England ——

MR. CONANT: Pardon me for interupting, but I think I might say, if the Committee do not already appreciate it—and I think they do—the Law Revision Committee that you are discussing now is an entirely different tribunal, exercising an entirely different function from the Rules of Practice Committee?

WITNESS: Quite right.

Q. Yes, and I think, Mr. Magone, that we had better, before you go into the constitution or methods, to have Mr. Barlow outline the functions of such a committee.

MR. MAGONE: Yes, if Mr. Barlow will do that.

WITNESS: Well, Mr. Chairman, the thought that I had, from my investigation with reference to what has been called here the "report on the Law Revision Committee, is that from time to time, over the years, there are changed conditions, changed social conditions, changed business conditions, and so on, all of which bring you to a time when changes should be made to bring the law which governs throughout the province, into line with these modern conditions. In certain other jurisdictions, such committees have been set up in various different ways, with that purpose in mind. As an example of that, take the doctrine of consideration, which has come down through the years. That has been interpreted differently in different jurisdictions from early times, and that is one of the matters that has been dealt with in England by their Law Revision Committee. Another angle in connection with it, and which is referred to continually by the late Justice Cardoza in his judgments and in his writings, that by reason of changed business conditions and changed social conditions, you find certain decided cases which have laid down certain formulae which have been followed, and which the courts feel themselves bound to follow, no longer are applicable, and that whole matter should be canvassed, and the late Justice Cardoza of the Supreme Court of the United States had no hesitation, where he found that position arising, in reversing an earlier decision of the Supreme Court, perhaps given many years before and which was followed throughout all the other courts, and stating the law anew. Out of that attitude, I believe, of Justice Cardoza, a committee was formed in New York State for the purpose of what they call a "restatement of the law," and they have done a very considerable work along those lines. It is true that their restatement of the law doesn't have the force of a decision so far as being binding upon the courts, at least, not as yet.

MR. CONANT: Unless it is implemented.

WITNESS: Unless it is implemented by legislation, and as far as I know, it

hasn't been implemented up to the present time, but the Superior Court jurisdiction, or, in the U.S.A., the Supreme Court of the U.S.A. has not hesitated to follow the restatement in certain cases. And, without going over it all in detail, unless there is something the Committee want to ask about, that is generally, the idea that I had in mind, that some committee of that kind should be set up here for the purpose of studying these various questions.

Q. They have gone into it quite extensively, have they?

A. Well, in England they have what is known as the Lord Chancellor's Committee—I have forgotten when that committee first started functioning; it must be eight or ten years ago.

MR. LEDUC: 1934.

WITNESS: 1934, was it?

MR. CONANT: Yes.

WITNESS: And I have set out in my report some six matters that they have already dealt with, and they have laid down their findings in connection with it, and in England certain of these findings have been implemented by legislation.

Q. Most of them?

A. Take the first one, the doctrine of non-contribution between joint tort-feasers; we have gone a certain way in our Legislature here with reference to our Negligence Act in that very matter, which has changed from what the old common law had laid down.

Q. Yes, but generally speaking, there is no contribution in Ontario unless there is statutory authority.

A. No contribution between joint tort-feasers except under the Negligence Act, except by Statute.

Q. That is what I am trying to say, excepting in special statutory instances, there is no contribution.

A. Oh yes, that's true.

Q. Yes.

A. And then, the second one that is mentioned here, the legal maxim that personal action dies with the person; that is true here except under the Fatal Accidents Act, and also under the ——

Q. Trustee Act?

A. No, that was done away with here. No, under the Liquor Control Act. I think it is section 100 of The Liquor Control Act, which gives a right of action where a person dies as a result of injuries sustained on hotel premises where he

has been given liquor. I think that is the way you could put it, that there is a right of action there, specifically given, but other than that, the old maxim applied. They have extended it somewhat in England, in dealing with this very matter. And then there are some three others here: The Statutes of Limitation, The Statute of Frauds, and, as I said before, the doctrine of consideration. But there are, from time to time, various matters that arise, that are entirely non-controversial ——

Q. You mean from a political standpoint?

A. From a political standpoint, non-controversial, yet are such that the attorney general and his staff as constituted, haven't neither the time nor the means of properly studying, and it is for that purpose that I suggested this Law Revision Committee.

MR. MAGONE: The recent one was the question that arose out of the decision of Rose and Ford.

MR. STRACHAN: Well, I know something about that decision, because I introduced the amendment to our Trustee Act, and with great respect to Mr. Barlow, the judges in England are very far from being satisfied with their present state of the law, which doesn't involve our law since the amendment I brought down.

WITNESS: Oh no, their law doesn't follow ours. There is still, in England, that right of action.

Q. Well, my amendment changed that under The Public Trustee Act.

A. Quite true.

Q. And now that they have the ruling of Rose vs. Ford, it is very far from having the acclaim of the trial judges.

A. That's true.

Q. And South Africa, and, I think, Australia, have followed our amendment in The Trustee Act.

A. Quite true.

MR. MAGONE: However, the committee would be able to deal with situations of that kind?

WITNESS: Yes.

MR. CONANT: To put it briefly, a committee of that kind would deal with what might be called "lawyers' law", as distinguished from ordinary operating statutes, abstruse or profound questions of law; their finding might then be implemented by legislation or otherwise, as the province might see fit?

WITNESS: Quite true.

MR. STRACHAN: Which would affect large classes of the community, however, one way or another?

WITNESS: Yes.

MR. LEDUC: Now in England, if I understand this memorandum, the Lord Chancellor refers to the committee some questions to be considered?

WITNESS: It is called the Lord Chancellor's Committee, and he refers these questions to the Committee for study.

Q. They don't act of their own initiative?

A. No.

Q. What about the State of New York, is it the same system?

A. I can't tell you in detail. I have read it, but I have forgotten the details.

MR. MAGONE: I think you will get the difference, Mr. Leduc, on page 49 of your ring book, which sets out the purpose of the English committee; this committee is to consider "how far, having regard to the Statute Law and to judicial decisions, such legal maxims and doctrines as the Lord Chancellor may from time to time refer to the committee, require revision in modern conditions."

And then, going to page 54 of the ring book, you will see the purposes of the committee set up in New York. They have apparently very broad powers to examine into the common law and the Statutes of the state.

MR. LEDUC: Yes, "to receive and consider proposed changes, to receive and consider suggestions from justices, to comment from time to time on such interpretations of the law as it deems necessary." I think we ought to have the English system, if we are going to have one here.

WITNESS: Quite right.

MR. MAGONE: If you look at page 66, you will see the comparison; the one, that is the English one, reports on matters referred to it by the Lord Chancellor, whose references are restricted by the terms of the original appointment, while the other is free to study and report on practically any matter which it may determine.

MR. CONANT: Yes, it is pretty wide.

WITNESS: Yes, the American committee is a pretty wide committee, for studying the set up of the laws.

MR. LEDUC: I think that is the work which would be done by the Legislature here.

MR. CONANT: This situation does arise in the administration of justice, that new questions do arise which are tossed around from port to port, and you have conflicting opinions, and nobody is sure what the law is.

WITNESS: Quite true.

Q. That happens not infrequently.

A. That is quite true, it does happen.

Q. And from the standpoint of the people of our province, some definite and final provision should be made to settle that point; now such a committee as this would make their study and their submissions, and the Legislature could deal with it in the light of their finding, isn't that about the size of it?

A. That is the very thought that I had in connection with such a committee.

MR. CONANT: I may say, gentlemen, I asked Mr. Silk to prepare, during the week-end recess, a memorandum as to the problems that might be proper for such a committee to deal with; will you deal with that now, Mr. Silk?

MR. SILK: Do you wish me to read the memorandum?

MR. CONANT: Just that second part of it.

MR. SILK: Well, I suggest that one matter that might very well be referred to such a committee is the law relating to actions for breach of promise of marriage, alienation of affections ——

MR. CONANT: Well, just a minute; I might point out that there is a difference between the law here and in England, and where that is the case, point it out.

MR. LEDUC: By "this Committee," you mean a committee on law revision?

MR. SILK: I mean, the committee that is being dealt with now For instance, in the case of an action for any alienation of affections brought by a wife, we have no such action here, although they have it in England. The same is the case in the case of an action for judicial separation, either by the husband or the wife, and an action for restitution of conjugal rights.

MR. CONANT: Well, what is the case?

MR. SILK: The case is that there is no such action in Ontario, although there is in England. Well then, the reverse is the case for an action of criminal conversation brought by the husband. We have such an action here, but they have not in England. And I understand that in various states of the Union they have abolished—in the State of Michigan, I believe, for example—they have abolished all such actions; I refer to breach of promise of marriage, alienation of affection, and a good many of the actions between husband and wife, or between wife and husband. Now that is the first rider, I suggest in this memorandum, that might be referred to such a committee. Do you wish me to go on with the other matters, Mr. Chairman.

MR. CONANT: Just summarizing them, yes.

MR. SILK: The second matter was some of the offences that were formerly

offences under our Highway Traffic Act, which have recently been transferred to the Criminal Code. The offence of reckless driving, for instance. Mr. Andrew Smith, legislative counsel for Alberta, wrote me not long ago suggesting that, as the offence of reckless driving is now a criminal offence, the question might be raised that no civil consequences would flow from it, and that accordingly we should complement the legislation in the Code with provincial legislation, making it clear that civil consequences do flow from reckless driving, as was formerly prohibited by our Statutes and is now prohibited by the Code. The other matter is that it was your thought, at one time I think, sir, that the type of actions in which a person would be entitled to trial by jury, might very properly be referred to such a committee. The law is rather complicated in that respect now.

MR. CONANT: That reference is only to those statutory provisions ——

MR. SILK: As contained in The Judicature Act, section 105.

MR. CONANT: Yes, we have discussed those actions, either the extension of them or the limitation of them.

MR. SILK: Yes. Then the question of procedure on appeals from summary conviction matters, it occurred to me that that might be a matter to be entirely reviewed by such a committee. Certain portions of The Evidence Act warrant study, and might very well be studied by such a committee, and I have listed, last of all here, the matters which Mr. Barlow has mentioned as having been reviewed by the English committee.

MR. CONANT: Yes. Well, in England, apparently, Mr. Barlow, the committee is entirely an honorary organization?

WITNESS: Yes, I have reason to believe that it is.

MR. MAGONE: With this one exception, sir, that apparently they have a secretary who receives a very small honorarium, a partial honorarium. The situation, I think, Mr. Barlow, is different in the State of New York?

WITNESS: In New York State, to my recollection, there is an endowment there, a fund that was set up for the purpose of providing the cost.

MR. CONANT: Fifty thousand dollars.

MR. MAGONE: Yes, the members are appointed by the governor and each receives five thousand dollars a year.

WITNESS: Wasn't the fund set up by some organization, though?

MR. SILK: No. Fifty thousand dollars was appropriated.

WITNESS: Oh.

MR. SILK: No, that is the fund that was set up for the Legislative committee by Mr. Chamberlain, who is professor of law at Columbia University.

WITNESS: Oh, I see.

MR. CONANT: What personnel have they in England?

MR. MAGONE: It's on page 56 of your ring book, No. 2. The English committee is composed of fourteen members.

WITNESS: Five judges and nine barristers and solicitors?

MR. CONANT: But you have the names, haven't you?

MR. SILK: They are on page 51.

MR. CONANT: Yes, well what do you think, Mr. Barlow, comparing conditions in England and here, geographic, and so on, do you think the committee would function here with the same effect as it would in England?

WITNESS: I don't see why it should not, Mr. Chairman. It is true that we are a smaller jurisdiction, that is smaller in the way of population, of course; we are only one province in the Dominion. But, and while the work might not be as extensive as in England, I can't see why it couldn't be a real advantage to us to have such a committee.

Q. Well now, wasn't there a time—perhaps you can enlighten the Committee on this, Mr. Barlow, or you and counsel combined; we have a system here now, where the province pays each member of the Supreme Court $1,000 a year. That is a relic of the long ago, is it not?

A. Yes, that goes back—I haven't a memorandum with reference to it here, but it goes back to a time when there was a committee appointed ——

MR. CONANT: We had that outlined at one time, Mr. Barlow. What form was that in, that of an honorarium from the province to the members of the Supreme Court? Didn't you have it developed, Mr. Magone?

MR. MAGONE: No, I don't remember having seen it.

MR. SILK: The contribution of the county court judges was dealt with the other day, but it has an entirely different history.

MR. CONANT: I know, but what I am coming at, what I want particularly, Mr. Barlow, is this; I am under the impression, and it is yours, that that contribution was supposed to be for services to the Legislature of the province?

MR. MAGONE: Yes, and it is so expressed now in The Extra-judicial Services Act.

WITNESS: There was originally an Act in the 1897 revision of the Statutes, and under that Act, chapter 29, section 2, commissioners were appointed having a certain remuneration.

MR. CONANT: Well, that was for a specific purpose, was it not, Mr. Barlow?

WITNESS: The commission was issued to the judges in Ontario and to such other persons as they might see fit, and provision was made for the payment, to each of these commissioners, of the sum of $1,000 a year, payable quarterly. And that goes as far back as 1897.

Q. But that only applied to those judges who became commissioners for that particular thing?

A. Yes, that applied only to those judges who became commissioners, and afterwards it applied ——

Q. To all of them?

A. Well, it eventually applied to all the judges, then the judges of the Court of Appeal, and then, finally, about 1912, as I recollect it ——

MR. MAGONE: 1910.

WITNESS: Yes, 1910, an Act was passed called The Extra-judicial Services Act, which provided that every judge should be paid the sum of $1,000 for services which he was called to render by any Act of this Legislature, in addition to his ordinary duties. And under that provision, from time to time, matters have been referred to the judges to report upon, mostly, in recent years, I believe, private Acts.

MR. CONANT: But that is not the only function in recent years. Under the rule of the Legislature, where a Bill has to do with an estate—what do they call that, Mr. Silk?

MR. SILK: Committee on Estates.

MR. CONANT: Yes, where a Bill has to do with an estate and it is a matter of alteration of a Bill, or to construe a Bill by legislation, before that Bill is given its second reading, is that it?

MR. SILK: Yes.

MR. STRACHAN: Yes.

MR. CONANT: It goes to a Committee of Judges?

MR. STRACHAN: Yes, we have had it a couple of times here.

MR. CONANT: Yes, that is the only function that I know that continues at the present time, is it not?

WITNESS: Well, I don't know, Mr. Chairman.

MR. MAGONE: That is about the only one that I can recall.

MR. CONANT: Well, do you know of any other function, Mr. Barlow?

WITNESS: No, I don't know of any other function.

MR. STRACHAN: Making the Rules of Practice.

MR. CONANT: Well, there hasn't been any of that done since 1913, we have been told.

WITNESS: 1928.

Q. 1938? Well, the reason I am directing my remarks to this is this, whether the functions of the Law Revision Committee should or could be performed by the judges of the Supreme Court themselves.

WITNESS: I would think the judges of the Supreme Court would welcome the opportunity to be of service on a committee of that kind, and certainly it would be within their very active field.

MR. STRACHAN: To define the active legislation, too?

WITNESS: No, to report on the necessity for change.

MR. CONANT: And to indicate the nature of changes?

WITNESS: Yes, to indicate the nature of changes.

Q. Well, I have been told, or I have read, Mr. Barlow—perhaps you know whether this is correct or not, but back in the days of Sir James Whitney, I can't give an actual date, the executive used to make much greater use of the judiciary in framing legislation and deciding the construction of legislation than they do to-day.

A. That is what I understand, though I don't know any details of it.

MR. STRACHAN: The Workmen's Compensation Act is an example, by Sir William Meredith.

WITNESS: Yes, that's true.

MR. CONANT: I doubt, Mr. Barlow, if that is the case—I want to make it clear, by way of criticism, that we have this peculiar situation to-day; that, while we pay to the Supreme Court judges $1,000 a year out of provincial revenues, so far as I know, and I would like you to correct me if it is not the case, the only service that the province asks for is on these Estate Bills. And that is indicated also by the fact that when a judge of the Supreme Court is appointed and serves as a commissioner, he is compensated quite above his statutory allowance.

MR. LEDUC: Pardon me, Mr. Chairman, but Mr. Barlow, before you answer that question, on pages 18B and 18C we have twenty-six Statutes, and in a great many of these Statutes the power to make rules is given to the Supreme Court; I suppose that whatever work they accomplish on these rules, or in the revision thereof, would be covered by that $1,000 compensation?

WITNESS: Oh, it would, no doubt it would. As to the actual services which they render, Mr. Chairman, I haven't the information as to that.

MR. CONANT: I see.

WITNESS: Your department, or other departments, would have much more information as to that than anything I have, because I haven't given any specific study to it, nor made any specific investigation as to this matter.

Q. Well, I had to ask these questions because, since reading your report and being aware of the statutory allowance to judges, I have questioned, in my mind, whether the judges themselves wouldn't be quite willing, and whether the Legislature wouldn't be amply justified, in making greater use of the judges. In cold facts, to justify the allowance that is made to them by the province.

A. I am sure that the judges would welcome the opportunity to perform any service of that kind.

Q. The province pays to the judges of the Supreme Court bench in the neighbourhood of $20,000 a year, is that right?

A. Quite right.

MR. MAGONE: Do you know if it is paid by any other province in Canada to-day, to the Supreme Court judges?

WITNESS: I don't know, Mr. Magone. I haven't investigated that.

Q. My reason for asking is, that I think this is the only province that makes such an allowance.

A. You have made an investigation?

Q. No, I think that is so, I am not sure.

A. Well, I'm not sure about it, I can't speak with any degree of authority as to that, because I haven't looked it up.

MR. CONANT: What advantage, if any, would there be in a mixed committee, such as you suggest, and such as they have in England, as compared with the judges themselves dealing with the problem, if you like, submitted by the Attorney-General, or formulated in any way you want to formulate it? It really comes down to that, it seems to me.

WITNESS: Oh, it almost seems to me, Mr. Chairman, that so far as the Law Revision Committee is concerned, that the judges themselves could very well form a committee among themselves to deal with that.

MR. MAGONE: Would they function, do you think, Mr. Barlow, without the assistance of a barrister to do their delving for them?

WITNESS: Well, I don't know, they could speak as to that better than I could. That brings up a point that I learned recently. They have a practice, in the State of Michigan, and perhaps some of the other states, in which each of their appeal court judges, I believe, has assigned to him, each year, a student to

do his delving for him. It is in the nature of a year's post-graduate work for that law student who is assigned to that judge. He can only be assigned for one year, and no more. He is paid an honorarium for the year—I don't recollect now what it is, although I believe I have it somewhere, and it is a marvelous opportunity for that student, and it also is a great advantage for the judge. That is something that this committee, perhaps, cannot give special thought to, but it is something that is worth while considering in the future by some organization.

MR. MAGONE: It is in the nature of a scholarship?

WITNESS: That is what it amounts to, yes.

Q. Mr. Silk tells me that is the practice in the Supreme Court of the United States.

A. The same practice there?

Q. Yes.

A. Well, I presume it applies in other jurisdictions, but I obtained this information with reference to Michigan when I was down in Windsor in January.

MR. CONANT: Well, if you wanted to set up a practice here of referring such problems as Mr. Silk has dealt with, to the judges for their recommendation, no statutory revision would be necessary for that?

WITNESS: None at all.

Q. It could be done?

A. It could be done merely by request by the Attorney-General.

Q. And the feasibility of it would depend entirely upon the willingness of the judges to co-operate?

A. Quite true.

Q. Their response, is that it?

A. Quite true.

Q. Yes. That has never been done in this province, has it?

A. Which, the Revision Committee?

Q. No reference to the judges in the manner that I indicated?

A. Well, unless it may have been done back in the time of Sir James Whitney. I am of the impression that something of that kind was done in those days, but that is something that would have to be investigated.

MR. MAGONE: I have here a copy of an address of John W. McDonald,

professor of law at Cornell, dealing with the Law Revision Committee, in which he expresses this opinion about the assistance; he says:

> "The best man we can get is a young law graduate of high standing, preferably a member of a Law Review Board, because he is familiar with this kind of work, who usually has no fixed opinion to express, and we do not want opinions from it. It is the commission that is to take the responsibility, the subcommittee that is therefore to make the study."

I am just wondering if it wouldn't be necessary to make some arrangement of that kind if a Law Revision Committee were set up among the judges.

WITNESS: Well, it might be, Mr. Magone. I would think that the judges could speak best as to that, though.

MR. CONANT: Well, it occurs to me in that case, that, supposing you were using the judges of the Supreme Court for a Law Revision Committee; the Attorney-General submits a briefed case of statute law on the question; what more would they require that might not be done by counsel of the Legislature, or any other way you might determine? If the brief of the statutory and case law were submitted to them, it seems to me that that would be all that is necessary.

MR. STRACHAN: To do what, Mr. Chairman, to prepare ——

MR. CONANT: To formulate a recommendation as to what statutory action should be taken, if any.

MR. STRACHAN: I can see certain disadvantages in having the same body not only preparing the law, but also interpreting the law; that was the complaint that was made away back in the old days, when that was the common practice, when the judges not only interpreted the law, but also, in many cases, drew up the law.

MR. CONANT: Well, wouldn't that be overcome, to some extent, if you had a committee with some barristers on it?

MR. STRACHAN: Well, I think that the judges have one function, and that is to interpret the laws that are made. The law-making body, in the last analysis, rests in the Legislature.

MR. FROST: Well, for instance, take the Ontario section of the Canadian Bar Association; from time to time, in their meetings, they consider subjects such as some of these subjects that you have mentioned, do they not, Mr. Barlow?

WITNESS: Yes, they do, but the commissioners on uniformity of legislation, under the Canadian Bar Association, deals with very much the same problems in the same way, because their function largely is to bring about a uniform Act, which can be made part of the statute law of each and every province, so that there will be a uniformity of legislation; that is really their function.

Q. Well, what do they do in their organization, they discuss these things, and arrive at certain opinions, or a certain decision, and do they then submit that to the various attorney-generals?

A. They actually draft the Act, and it goes to the various attorney-generals in the Dominion, and they may or may not adopt it.

MR. STRACHAN: Since you have been a member, Mr. Frost, we have passed some legislation along the recommendation of the uniformity commissioners.

MR. CONANT: Oh yes, during this last session.

MR. FROST: Well, wouldn't that be, perhaps, the natural place for suggested law revisions, Mr. Chairman?

MR. CONANT: Well, I don't think it is of that kind ——

WITNESS: No, it is not really of that kind of revision that we are thinking of here, Mr. Frost. As I say, that is a question largely of uniformity throughout the various provinces of the Dominion, and that is a little different.

MR. SILK: The uniformity commission tries to steer clear of matters of policy.

WITNESS: Yes.

MR. SILK: And confines itself rather to matters of uniformity.

MR. FROST: Well, the suggestion here was that the committee should consist of both judges and members of the Bar.

WITNESS: Yes, that was following the practice that they follow in England.

MR. CONANT: You may proceed, Mr. Magone.

MR. MAGONE: Mr. Chairman, I thought that now we might start at No. 1 and go through our agenda. That is, start with grand juries and deal with the subjects in their order.

On page B1 of his report, Mr. Barlow deals with grand juries. Without reading the short historical sketch that is there, I think I might start about half way down the page and read part of this preface to Mr. Barlow's recommendation.

> "In earlier times, many of our magistrates by whom an accused was committed for trial on a preliminary hearing, were laymen with no training in the law and oftentimes, with little or no experience, and the grand jury then was a real safeguard to the accused. Now, our magistrates are full-time officials, with an experience from daily presiding in the Magistrates' Courts, which well fits them to decide whether the evidence is sufficient to put the accused on his trial. Furthermore, the grand jury is expensive. It has been estimated that the cost of grand juries in the Province of Ontario exceeds $50,000 annually.

When one considers that in the County of York alone, seven grand juries are empanelled ——

Just to stop there for a moment, Mr. Barlow, that figure of $50,000 is purely an arbitrary figure, as I take it? There is no way, I suppose, of arriving at an accurate figure?

WITNESS: It is very difficult to arrive at an accurate figure, Mr. Magone, because of the fact that you have attendance of witnesses.

MR. CONANT: Well, isn't there also this: that that may be the direct cost, but we have the question of the hold-up in court procedure, the time of counsel and the time of the witnesses?

WITNESS: Yes.

MR. CONANT: Yes.

MR. MAGONE: It is pretty difficult, if not impossible, to evaluate that.

"When one considers that in the County of York alone, seven grand juries are empanelled each year, and when one considers the cost of attendance of Crown counsel and the sheriff and his officials, and of all the witnesses in each criminal case on the first day of the sittings, the expense attendant thereto is self-evident. Furthermore, a witness in a criminal action must, of necessity, attend a preliminary hearing before the magistrate and at the trial itself. In addition thereto, he must attend on the first day of the sittings, and until such time as the case in which he is a witness, has been heard by the grand jury. It thus results in a hardship and inconvenience to witnesses."

Then you go on to point out that in the provinces of Manitoba, Saskatchewan, Alberta, and British Columbia, the grand jury is dispensed with or never existed, in some cases. And your recommendation, Mr. Barlow, as it appears, starts on page 3, and is that the Criminal Code and our provincial statutes be amended for the purpose of dispensing with the grand jury, and that such amendments embody the same machinery as has been set up in the western provinces and British Columbia. That is for the purpose of inspection of buildings, and so forth?

WITNESS: Oh no.

MR. CONANT: The laying of charges.

WITNESS: The laying of charges, yes.

MR. MAGONE: Oh, I see.

WITNESS: That is the Criminal Code.

Q. Yes, that is the Criminal Code you are speaking about now?

A. Yes.

Q. Now, Mr. Barlow, in coming to that conclusion, you made a study of the laws in other jurisdictions, did you not?

A. In some of them, yes.

Q. Will you just, if you can, outline to the Committee what you found?

A. With reference to what?

Q. With reference to jurisdictions where grand juries have been dispensed with.

A. Well, there has never been a grand jury in Scotland. The grand jury was dispensed with in Ireland in either 1927 or 1928. The grand jury was abolished in England in 1933. There has been no grand jury in South Africa since 1885. There is no grand jury in Australia or New Zealand, no grand jury in our provinces of Quebec, Manitoba, Saskatchewan, Alberta, British Columbia. So really it resolves itself down to the fact that our own jurisdiction, and the Maritimes, are the only places left within the British Empire that have a grand jury. As far as England is concerned, a committee was appointed in 1912 which made a recommendation that the grand jury should be abolished. In 1917, as a war measure, the grand jury was dispensed with, and it was not used until 1928, when it was restored. In 1933, another committee was appointed, and this committee again recommended the abolishing of the grand jury as no longer performing a useful function, and legislation was then passed abolishing it.

MR. FROST: That is in England, Mr. Barlow?

WITNESS: In England.

MR. FROST: There are no other grand juries in England?

MR. MAGONE: With the exceptions that Mr. Barlow will point out.

WITNESS: Yes.

Q. In the ordinary criminal trial there is no grand jury?

A. Not in the ordinary criminal trial, no, it is only in special cases. The Act itself sets out these various exceptions, but I haven't the Act here.

Q. I think you can summarize them by saying that they are more or less offences against the State?

A. Yes, offences against the Crown or the State.

Q. Yes.

A. That is really all, yes, under certain old charges.

Q. Yes.

A. Other than that there is no grand jury.

MR. CONANT: I think the problem, Mr. Magone, in some respects, may be narrowed down to these two aspects; that is, the aspect of inspections, which includes those functions which are now being performed by the grand jury, and the other aspect is what safeguards, if any, are needed to bridge the gap that is created in a case where the Attorney-General lays an indictment.

MR. MAGONE: Well, I thought before getting to that ——

MR. CONANT: Are those not the two main problems, gentlemen, confronting the Committee?

MR. FROST: I think they are. That is one thing that has worried me a little bit, Mr. Barlow. I recognize the fact that we have now a magistrate who is supposed to be a competent man, to review the evidence before a person is committed for trial—and, after all, these grand jury cases are nearly all serious cases?

A. Yes.

Q. Yes, most of them are, and in that case a man appears before a magistrate, there is an investigation into the evidence, the witnesses are seen and heard by the magistrate, if he makes a finding and sends the accused up for trial, I think that we may perhaps reasonably feel that there is sufficient evidence there to reasonably justify a man sending him up for trial; the difficulty comes in in this: supposing the Attorney-General prefers an indictment against man—the word prefers is wrong, but supposing he has an indictment prepared and laid against a certain individual.

MR. CONANT: I think the word is he directs an indictment to be laid, isn't it, Mr. Magone?

MR. MAGONE: Yes, well, preferred is perfectly all right.

MR. FROST: Whatever the word is, the result is a man may be sent up on trial for his life without any previous investigation or inquiry. Now it is on that point that I have had some doubts myself as to whether, if the Legislature, in its wisdom, saw fit to abolish the grand jury, whether there should not be some procedure to make it that a man should have a preliminary hearing.

WITNESS: There may be considerable in what you say, Mr. Frost. I took occasion, this past year, to discuss this very point with the legislative counsel of the other provinces, that is the three western provinces and British Columbia, and also in Quebec, where they have no grand juries and where they operate under the section of the Criminal Code as it now appears set out, and they told me they never had any difficulty at all, and there had never been any question raised. But I would go so far as to say this: that if there is any feeling that any question might arise, that that can be obviated by providing that a county judge shall perform the same functions, if it is thought necessary that it should be done, as the grand jury now performs, and I would think that he would be in a much better position to perform that function than any of the grand juries that we have. And I submit that that would be complete protection.

Q. I have felt for some time that a great many grand juries just reflect the opinion of the Crown counsel who usually goes in with them.

A. You know that from experience.

Q. I found that from experience.

A. Yes.

Q. On the other hand, I was rather struck at some figures that Mr. Conant gave in the Legislature, which rather indicated that about 10 percent, if I remember rightly, that in about 10 percent of the cases No Bill had been returned, which rather indicated to me that perhaps my experience wasn't a true reflection of what was taking place.

MR. CONANT: Of course we could make this observation: whether the percentage is 9 percent or 10 percent you would have to go a little bit farther and have to analyze in what percentage of the cases the Crown was actually pressing the True Bill.

WITNESS: I was just going to say, Mr. Chairman, that I know, and you probably know, that in certain cases the Crown counsel does say to the grand jury that in his opinion a True Bill should not be brought.

MR. FROST: Well, how would a case like that get past a magistrate?

WITNESS: Well, that is very questionable, Mr. Frost, but I would presume that this might very likely be expected, that if we had no grand jury, that our magistrates would be very much more careful than some of them now are.

MR. FROST: In connection with the abolishment of grand juries, there is this other difficulty.

MR. CONANT: May I interject there, I think this is pertinent at this stage—Mr. Magone, you have been in the Attorney-General's Department here for how many years?

MR. MAGONE: More than 25 years.

MR. CONANT: From your experience, how often, and in what classes of cases, has the Attorney-General directed or preferred an indictment? I think that is important, and I think you will agree with me that it is at this stage, because Mr. Magone's experience is broader than that of any of us here, and I think he can indicate that it is an exceptional and peculiar situation that arises.

MR. MAGONE: Well yes, my experience has been that it isn't done, certainly not as a matter of course in any case, nor is it done merely for the purpose of bringing to trial someone whom it is thought might not otherwise get to trial; it is done in cases in which, in one jurisdiction, a person has been committed for trial, and a crime of a similar nature has been committed by the same man in another jurisdiction; then, instead of going to the expense of having preliminaries in two jurisdictions, after a committal or trial in one, they will prefer a grand

jury bill in another. I recall, too, probably only one case in which it was done because of the length of time that might have been taken up by a preliminary, and that is the Home Bank prosecution.

MR. FROST: I was just going to say if that wasn't the Home Bank case.

MR. MAGONE: Yes, that is where the preliminary would have taken up the time of the trial, and where very high-priced accountants were employed.

MR. CONANT: Yes.

MR. FROST: Well, just on that point, in some of these serious cases, I often wonder if it isn't fair that the accused should have at least some indication of the nature of the evidence that he has to meet. Take, for instance, a man who is on trial for his life; why shouldn't there be some form of discovery for that man, in order that he might know what he is going to be up against?

MR. MAGONE: Well, possibly I have a Crown complex, but I think there are enough safeguards surrounding an accused person now.

MR. CONANT: Isn't one answer to that, Mr. Magone, that it is inconceivable that the Attorney-General would lay a charge, or lay an indictment of murder? It has never been done that I ever knew.

MR. MAGONE: No, I never remember of it being done. Of course up till quite recently we were overloaded with procedure; as you know, there was a coroner's inquest, where the witnesses had to attend; after the inquest comes the preliminary hearing before the magistrate, where the witnesses are required to attend again; then there is a hearing before the grand jury, and then there is the trial before the petit jury. We have managed to cut out the coroner's inquest in recent years, by means of an amendment to the Coroner's Act.

MR. CONANT: Where a charge is laid.

MR. MAGONE: Where someone is arrested.

MR. CONANT: Yes.

MR. MAGONE: And the preliminary is something that arose after a coroner's inquest, because in England, now, a coroner's jury may commit for trial, which cuts out the preliminary before a magistrate, and then following that the trial goes on, without an indictment before the grand jury. I never remember a charge of murder, getting back to your question, sir, I never remember a charge of murder being preferred.

MR. FROST: Mr. Magone raises a rather interesting point; he says that he has the Crown complex. Well now, I think, myself, that the Crown complex, with Mr. Magone, would be a very, very fair one. I think that he would be fair, and I think that he would lean backwards if anything, but the difficulty is that there are many Crown counsels who, by temperament, are not that way. I think it is fair to say that the proper Crown complex is this: that the Crown never wins or the Crown never loses.

MR. CONANT: Absolutely.

MR. FROST: But the difficulty is there are many Crown counsel who make it a personal matter; if they lose it, it's a black mark against them. That is one of the difficulties we meet with, and I think that, to get around that human element, that you have to have a safeguard.

MR. CONANT: Well, Mr. Frost, I would like to interject this at this point; by way of an interrogation of Mr. Magone, you made a remark regarding the affording, to an accused person, of an opportunity of learning what his case is and so on. Now, the abolition of the grand jury and the substitution of a judge wouldn't alter that situation in the least.

MR. FROST: No.

MR. CONANT: Because it is all part of our procedure, that the Attorney-General can lay an indictment and to-day he can lay an indictment and it goes before the grand jury and the first the accused knows of all the evidence is when it is on file, am I not right, Mr. Magone?

MR. MAGONE: Yes, and that is exactly what I was going to say to Mr. Frost, that the abolishing of the grand jury has really nothing to do with discovery, such as you suggest, because the proceedings are in private.

MR. FROST: Except this: the names of the witnesses are on the back of the indictment and it gives the accused person the right to have those witnesses placed in the box, and gives him the right of cross-examination. Now that, off-hand, may not appear to be very much, but on the other hand it is a very great deal. I remember I won one case a number of years ago, when I was in Sudbury; Mr. Justice Gagnon was the judge then, and in order to obtain a True Bill, it wasn't necessary to call very many witnesses. Actually, I think there were only a couple of names on the indictment. That is my recollection. But in this particular situation, I remember there had been a large number of witnesses called at the preliminary hearing, and the Crown's case was completed upon calling two or three witnesses. Well, the accused's lawyer pointed this out to the court and claimed that these actually were Crown witnesses, and that they hadn't had the opportunity of speaking to them, owing to the fact they were called to the preliminary hearing. And after I thought it over, I think he was correct. Well, the judge directed they be put in the box and subjected to cross-examination by the accused. Now those are little things that are protection to an accused person.

MR. CONANT: Yes, but if the Bill preferred by the Attorney-General went before a county judge, you would have all of that.

MR. FROST: Yes.

MR. CONANT: You would still have all of that. May I ask this, Mr. Magone, can you think of any better safeguard than the proposal that the Attorney-General's bill should go before a county judge, who would perform the same functions as a grand jury, can you think of any other or better safeguards?

MR. MAGONE: No, sir, I can't think of any, if some such safeguard were thought necessary. I can't think of a better one. But I should say this, that I don't see, from my past experience in the Department, and from the state of the law as it is, why any such safeguard should be considered necessary, for this reason, that as the law stands at present, the Attorney-General may commence a prosecution for very serious offences now, without a preliminary, and without taking a bill before a grand jury, and I refer to a practice that has fallen into disuse but might still be used, if anybody cared to use it; the Attorney-General may file an information in the King's Bench, in the Supreme Court, for anything that was a misdemeanor prior to 1892, incest, blasphemous libel, perjury, and may, by filing an information in the Supreme Court, start a prosecution without any preliminary hearing and without any bill of indictment, and without the intervention of a grand jury, and while he still can do that, I don't see that any safeguards should be required with respect to the other offences that fall under the heading of felonies.

MR. FROST: Of course, the fact that that hasn't been used is some evidence, I think, of the fact that it hasn't been considered to be just the proper procedure.

MR. CONANT: Well, of course I think the Committee is justified in taking this view, if I may make this observation: that, while, since the beginning of time in this province, it is doubtful if there ever has been an Attorney-General who would abuse the right that the Code gives him, we have to guard against the possibility—and I am bold enough even to include the present one in that category—we nevertheless have to guard against the possibility that, at some time, an Attorney-General might be in office who wouldn't be subject to the same restraints that they have been subject to over the years passed. I think that is right. What do you think, Mr. Magone?

MR. MAGONE: Well, I was wondering, Mr. Chairman, we are developing now into more of a discussion than a hearing of evidence, and I wondered if the Committee shouldn't hear some of the report of the English committee and possibly some of the evidence. There are short paragraphs of evidence set out in the report. Doesn't Lord Romer give some of his observations in connection with his practice at the Bar?

WITNESS: You are perhaps more familiar with it than I am, Mr. Magone.

MR. MAGONE: Apparently the English committee brought their report in after hearing the evidence of some of the prominent members of the English Bar.

WITNESS: Well, do you want me to proceed, Mr. Magone?

Q. Yes, if you will, Mr. Barlow.

A. In referring to the report of the Business of the Courts Committee, that is the English Committee which sat in 1933 and made the report on the grand juries, I might refer to certain evidence that was given before them, and which appears in this report.

First, an opinion of Sir Sidney Rollate, then Mr. Justice Rollate, who, when the expiry of the Act suspending grand juries was approaching, that is in

1922, he wrote a pamphlet drawing attention to the purpose and value of grand juries. And he recognizes that grand juries are wasteful in time and money, owing to the necessity of the attendance of witnesses, and they may have to be abolished. And that is borne out in the recommendation that was made as long ago as 1913, when the opinion that grand juries should be abolished was supported by the unanimous authority of the Commission, which included members of both Houses of Parliament, the present Lord Darling, and other members of the legal profession.

Then Sir Archibald Bodkin, who has unrivalled experience of the criminal law, both at the Bar, which he was for twelve years senior prosecuting counsel, and for ten years Director of Public Prosecutions and at the time of this report, Chairman, of the Quarter Sessions at Exeter, also gave evidence. He said that for all Quarter Sessions and Assizes, he would be ready to forego grand juries. He had heard it argued that grand juries were necessary, lest some case should occur in which the government of the day was oppressing some person or persons by the means of the criminal law, but that argument left him unmoved. Immense publicity was given nowadays to any important proceedings, and he himself would be quite as willing to trust to the good feeling of a petit jury, if there should be any case of oppression, as to rely upon the grand jury.

And then a further reference is made to the opinion given at that time in evidence by Mr. Cecil Whitely, who was Chairman of the Surrey Court of Sessions for a number of years and afterwards Chairman of the London Quarter Sessions, and he expressed the opinion also that grand juries served no useful purpose.

And then, proceeding with the report itself:

> "We have endeavoured to consider the merits of grand juries, and have not failed to appreciate that an accused person may rightly value the rejection of a bill of indictment against him without having to stand a trial. Yet we have to balance these advantages against the cost, both in time and money, and the burden of service involved by their retention. We have come to the unanimous opinion, as had the Commission in 1913, that they ought to be abolished, both at Assizes and Quarter Sessions, subject to the impositions and safeguards hereinafter suggested."

And those safeguards are with reference to the Middlesex Grand Jury, which stands on a different basis. Then it goes on to state the cases in which the grand jury is preserved. "Whenever a Governor is charged." That is one case where it is preserved. Or where there is a charge to be tried at Bar in the High Court, the case would be brought before the grand jury of Middlesex. This was in fact the course adopted in the case of Mr. J. E. Ayr, Governor of Jamaica.

MR. MAGONE: I think Sir Roger Casement, in the last war, was tried at Bar by three judges and a jury?

WITNESS: Yes.

Q. Mr. Barlow, can you summarize shortly the advantages that are put forward for the retention of the grand jury?

A. The main advantage that has been put forward in any submission that I have received is that it brings the public in closer contact with the courts by virtue of the opportunity that is given to them, from time to time, to serve upon grand juries, and that they see the court in operation in a way that they might not otherwise have the opportunity to do. And while that may have been the case in time gone by, it seems to me that that is largely past at the present time, with the newspapers, and other means of disseminating information and so on, and the fact that people generally are familiar with all these matters in a way that they were not in earlier times.

Q. You are not overlooking the radio, are you, Mr. Barlow?

A. No; well, we'll put the radio in too.

MR. FROST: In connection with the abolishing of grand juries, supposing the Legislature passed a Bill abolishing grand juries, would it then be necessary to have certain other legislation from the Dominion Government?

WITNESS: The Criminal Code must be amended, Mr. Frost.

Q. That is the purpose of that petition, then?

A. Yes, that is the purpose of it, because the Criminal Code must be amended.

Q. Well, in that matter of the county judge passing upon the evidence in a Bill preferred or laid by the Attorney-General, that would have to be a matter of Dominion legislation too?

A. Yes, that would have to be a matter for Dominion legislation too, yes. At the present time, so far as the other provinces are concerned, section 873 of the Code, subsection 6, covers it, and that would apply.

MR. CONANT: I mentioned a few minutes ago two items that arise out of the question of grand juries; one is safeguards against indictments by the Attorney-General, the other one was inspections by grand juries; now there is another item, Mr. Magone, that I think we should deal with, and that is the question of special juries.

MR. FROST: The matter of inspection of public buildings, that, surely, is not really an important function of the grand jury, is it? Mr. Justice Green used to receive the elaborate reports of grand juries and suggest that they be pigeon-holed with all other reports of grand juries; that is apparently what is done with them.

WITNESS: Mr. Frost, from such investigation as I made, and from information that came to me, I formed the opinion that, in the first place, so far as the County of York is concerned, there have been altogether too many inspections by grand juries. On the other hand, these are public institutions, and so far as the public are concerned, and as a proper safeguard to the public, and so on, I am of the opinion that some inspection body should be appointed, or provision be made for some inspecting body that would inspect, say, not more than twice

a year at most. But so long as you have an inspecting body appointed from the public, you will have a protection there that you otherwise would not have.

MR. FROST: What would you suggest by way of inspecting body.

WITNESS: I would suggest that, from the petit jury panel, some six or seven men be named, say, one or twice a year, whatever is deemed advisable, and that they make the inspection of these buildings, that is now being made by the grand jury, and make their report. And that acts as a protection.

MR. CONANT: When you speak of protection, you mean protection against beaurocratic administration?

WITNESS: Exactly, sir.

Q. Yes, well I think that's right. Well then, there is the special jury, Mr. Magone.

MR. MAGONE: Yes. Mr. Barlow, did you consider the question of special juries in criminal cases?

MR. CONANT: Not only in criminal cases, in all cases.

WITNESS: In all cases, I suppose.

MR. MAGONE: Yes, not only in criminal cases.

MR. CONANT: No, no, most in civil cases.

WITNESS: You practically never hear of grand special juries in criminal cases. I think you had one in Kingston, but other than that I can't remember a special jury in a criminal case.

MR. FROST: How is that brought, under what procedure?

MR. CONANT: Well, we spent many hours and much midnight oil to solve that problem in the first place. I think our figures showed about one a year throughout the province. That is in ten years. Have you those figures here?

MR. MAGONE: I haven't these figures, no. That is in all cases; there hasn't been a special jury in criminal case in my experience in this province until this one at Kingston.

MR. FROST: Under what conditions does a special jury come about?

MR. CONANT: Well, the practice, I think, briefly, is this: that a litigant can have a special jury selected from the grand jury list by paying the cost of the jurymen and all the rest, and there is elaborate machinery set up for the method of impanelling or selecting that special jury.

WITNESS: That's right.

Q. I have always been in some doubt as to whether it should be continued or not, principally because of the fact that it is a tremendously long and involved procedure for selecting it, and it is made use of so very, very seldom. Will you get those figures for to-morrow, Mr. Magone?

MR. MAGONE: Yes.

MR. CONANT: They are available in the department somewhere; I think the Inspector of Legal Offices has them in detail. But it is for this Committee to consider this question of special juries. About the only thing to be said in favour of them is, in my opinion, that the party pays the cost of them. When a special jury is selected, I think they usually deposit two hundred dollars.

WITNESS: I think they deposit two hundred dollars, and if the cost exceeds that, they also pay that.

MR. FROST: In the Kingston case, did the Crown ask for it?

MR. CONANT: No, the accused.

MR. MAGONE: The provision goes back to 1820, in a pre-Confederation Statute, and it is carried on almost exactly in the same words into our present Jurors Act, and the provision is that "in every case whatever, whether civil or criminal trial by a jury, excepting only indictments for treason or felony, His Majesty, or any prosecutor or relator or plaintiff or any defendant, may have an issue joined to be tried by a special jury," and the case at Kingston was a case not of treason or felony, but of reckless driving, dangerous driving, and they asked for a special jury there.

MR. CONANT: We won't get many more requests from the outcome of that case, I suppose.

MR. MAGONE: It isn't likely, no. The question then was there was provision in the Code for a special jury, and we came to the decision that it had never been abolished, and that there probably was the right to a special jury.

MR. CONANT: The Crown, in that case, didn't seriously challenge the right, anyway.

MR. MAGONE: No, he didn't, because our own Statute says there is a right to a special jury, except for treason or felony, and going back to our Interpretation Act, misdemeanour or felony is defined to mean those crimes which were misdemeanours or felonies before the Criminal Code was enacted in 1892. So that the right probably does exist in this province in all cases that were former misdemeanours or that have become statutory crimes since 1892.

MR. CONANT: Of course I think you should add, Mr. Magone, because I think it would be the case, if I were to abolish the special juries, then it would be abolished as far as the Code is concerned?

MR. MAGONE: I think that is probably true, except for this reason, that there is a section in the Criminal Code—I think it is section 102, that mentions special juries.

MR. STRACHAN: Isn't it in cases of difficulty or importance that the sheriff has to hand pick them, instead of picking them at random, pick a special type?

MR. MAGONE: Well, I have never known of that having been done, Mr. Strachan.

WITNESS: Do you mean in a criminal case? I don't remember any.

MR. CONANT: Read us your jury law there, Mr. Magone, at the present time. It defines the type of people who may serve on special juries, doesn't it?

MR. MAGONE: Yes.

MR. CONANT: Well, that is what Mr. Strachan is referring to, are you not?

WITNESS: They are the grand jury panel, though.

MR. STRACHAN: I think in cases of importance or difficulty, the sheriff is asked to try and pick the highest type of jury, and he can't just going down at random; he has to handpick them.

MR. CONANT: You mean a particular jury? How can you do that when the names are drawn out of the box?

MR. STRACHAN: Well, the whole panel would be handpicked?

MR. CONANT: But that panel is set up years before.

MR. MAGONE: I don't know how it could be done.

MR. STRACHAN: I was asking.

MR. MAGONE: No, I don't know how it could be done. I don't know of any case in which it has been attempted. But, Mr. Chairman, you were asking, if by repealing the sections of our Juries Act, it would do away with special juries. There is one section of the Criminal Code that mentions special juries, and only one, the only section that I can find, and that section is consistent with other provisions of the Criminal Code with respect to challenges. That is the general provisions of the Code give a right of challenge in criminal cases, varying in number, and the provisions of our Act dealing with special juries do not allow challenges. So that there is some doubt. I think that is about as far as you can go, to say that there is some doubt as to the right of a special jury in criminal cases, but, to clear it up, I think it would require legislation both here and in Ottawa.

MR. FROST: What would happen, for instance, in the provinces, where they have no grand juries, how do they get around the special jury provisions?

MR. CONANT: They don't have any.

MR. FROST: Do they have any?

MR. MAGONE. The provision regarding the special jury from the grand

jury panel is in our own Juror's Act, and I have no doubt that if they have it in the provisions of the Statutes of the different provinces, they provide that the special jury be drawn from the petit jury panel. Mr. Silk tells me that in Manitoba they name different classes of persons to form special juries, such as bankers, merchants, and so forth.

MR. CONANT: Well, what we would like to have, Mr. Magone, is evidence as to the need or the desirability of continuing the special jury provisions, in whatever form that may be necessary to fit the law to the abolishing of the grand jury, if the grand jury is abolished; is that not right, Mr. Frost?

MR. FROST: Yes.

MR. MAGONE: I will get some information on that point. The section of the Criminal Code which I have referred to is coming back to me piecemeal, and it provides that no motion shall be made to quash a panel of a special jury or a petit jury.

MR. CONANT: That is the only case it is mentioned?

MR. MAGONE: That is the only case in which it is mentioned.

MR. CONANT: That is not a very operative clause though, is it?

MR. MAGONE: No, and that special jury referred to there may be a special jury to hear a murder trial, it may not refer to the same special jury that is referred to in our Jurors Act.

MR. CONANT: That's right, a jury to determine insanity or any other matter of similar nature.

MR. MAGONE: That's right.

MR. CONANT: What do you think about a special jury? Do you think it is necessary or desirable, Mr. Barlow?

WITNESS: The machinery is used so seldom that it seems to me that it is hardly worth while retaining. Furthermore, it is legislation for a special class, in that it is a class that can afford to pay for it.

MR. CONANT: Yes.

WITNESS: And if the principle is to be that there shall be no class legislation, well then, on that ground, it should not be retained.

Q. Well, there is this difficulty, is there not, Mr. Barlow, in reconciling the abolishing of the grand jury with the continuance of the special jury?

A. There is great difficulty in setting up machinery for a special jury if you abolish the grand jury, because the grand jury is a special panel, and a special jury is taken from that grand jury panel, which is composed of a special type of citizen.

Q. Well, don't use the word special.

A. Well, when I say special I mean that it comes within certain classes.

Q. Yes.

A. Certain employment classes.

Q. That is the difficulty, of reconciling the two classes, isn't it?

A. Yes.

MR. CONANT: Anything further on that point, about the reconciling the abolishment of the grand jury with the continuance of the special jury system, Mr. Magone?

MR. MAGONE: I don't think so. I was going to pass to petit jury, if it is all right.

MR. FROST: Do I understand that the Canadian Bar Association, at Windsor, passed some resolution against the abolishing of the grand jury? If so, do you know of any reasons that were given?

WITNESS: No, the Ontario Section of the Canadian Bar Association at Hamilton, a year ago last January, passed a resolution against the abolishing of grand juries. But it was not properly considered, or properly discussed.

MR. CONANT: You were there?

WITNESS: I was there and heard the discussion, and the whole sum and substance of the discussion was you were taking away from the people the opportunity to partake in the administration of justice; that is the very question I raised, and it is the only question that ever has been raised, as far as I know.

MR. FROST: Well, I would like to know, from anyone who feels that grand juries shouldn't be abolished, I would like to know something, or any reasons that they may have that would show the position of an accused person as prejudiced, that's what I would like.

A. Yes, I have not made any suggestion, at any time, that the accused person was prejudiced.

MR. CONANT: Well, will you have some evidence along that line, Mr. Magone?

MR. MAGONE: Yes, we have something along that line. The Lincoln County Bar Association, for instance, they recommend that it be retained.

MR. FROST: Apparently there are lots of resolutions asking that they be retained, but I wonder if we could get some of the reasons behind them. Now, Mr. Barlow has pointed here, in the average case, the fact is in 99 percent of the cases that come up for jury trial, there is a preliminary hearing before a

magistrate, who is supposed to be competent. Then the question arises as to protecting the public in the matter of indictments which might be laid by the Attorney-General, and which might put a man on trial without any investigation of his case beforehand, or without any knowledge of what the evidence might be, and the suggestion is there should be a preliminary hearing conducted by a county judge in a case of that kind. I presume a hearing of that sort would take the place of a preliminary hearing, and it would be a hearing where he could be represented?

WITNESS: No, my thought was that the judge would take the same place and fulfill the same function that the grand jury now fulfills.

Q. Well, would you be prepared to go this far, and say that the investigation by a county judge should be in the form of a preliminary hearing, at which both parties might be represented, just the same as in the magistrate's court at a preliminary hearing? The point I am coming to is this, Mr. Barlow; it seems to me that a preliminary hearing in a serious case, is something which is very fair, and very proper as far as an accused person is concerned. I have a good deal of hesitation in suggesting that an accused person should be put on trial without a preliminary hearing, for the reason that I can't see the fairness of taking a man, for instance, and placing him on trial for murder, say. He knows nothing of the nature of the evidence that may come up; he doesn't know as to whether there are confessions that might be submitted, statements that might be submitted, and so on, and it does seem to me that a fair opportunity should be given to the accused person of knowing the nature of the evidence to be used against him.

WITNESS: Well, I would say this, Mr. Frost, that if it is felt that such a practice as that was necessary, then why not do away with the present practice of allowing the Attorney-General the right to proceed by way of indictment?

MR. CONANT: You might just as well.

MR. FROST: In connection with that, I think it is probably proper to give the Attorney-General, as the chief law officer of the Crown, the right to prefer an indictment, but with certain safeguards.

WITNESS: Well, I know, but if you make that safeguard such that there shall be a preliminary hearing before a county judge ——

MR. CONANT: Then it doesn't mean anything.

WITNESS: It doesn't mean anything at all.

MR. CONANT: No.

MR. FROST: Well, what is the purpose, then, of giving the Attorney-General that right, is it to avoid expenses, as, for instance, in the Home Bank case?

WITNESS: To avoid expense, I presume, and, as Mr. Magone says ——

Q. Well, tell me; I have a hazy recollection of the Home Bank case; didn't the court order that certain particulars should be given to the accused?

A. Oh, Mr. Frost, that is always so; take the present prosecution that is going on, the Paper Box Companies; some 80 or 90 pages of particulars were given there, a regular brief, and that is always the right of the accused, and the Crown must give those particulars.

MR. CONANT: Your percentage, Mr. Frost, if I may interject, in suggesting that one percent of cases are indictments by the Attorney-General is far too high.

WITNESS: Well, I would say one out of a thousand.

MR. CONANT: I doubt whether there would be over one or two a year, would there, Mr. Magone?

MR. MAGONE: I don't think there would be any more than that.

MR. CONANT: I may say I tried to get figures on that, but it is impossible.

MR. MAGONE: It's the question of recollection by someone; that's the only way you can get it.

MR. FROST: In connection with the particulars which are required to be given to an accused, that provision is not used a very great deal, at least in my experience, is it?

WITNESS: Well, Mr. Magone can probably tell better than I can with reference to that.

MR. MAGONE: It is used a good deal.

MR. FROST: Well, in what form, for instance, give me an example.

MR. MAGONE: Particularly in charges of conspiracy, conspiracy to defraud. They want to know what the form of the fraud was, who were the parties defrauded, and so on.

MR. CONANT: When and where.

MR. MAGONE: Yes, well that is generally in the particulars, that is as to time and place.

MR. CONANT: Yes.

MR. MAGONE: And there is provision in the Code, as you know, for obtaining an order for particulars if they are not forthcoming on notice. But in the Home Bank case, the case to which you refer, whereat the Attorney-General commenced prosecution by indictment, I think you probably remember that there was an application made to the County Court Judges' Criminal Court on that case.

MR. FROST: Yes.

MR. MAGONE: And Mr. Justice Middleton granted a mandamus to Judge O'Connel, or Judge Coatsworth, to try it, and it went to the Privy Council on that point, and they upheld the right of a person even who was indicted directly by the Attorney-General to go to the County Court Judges' Criminal Court.

MR. FROST: Well, in that case there was no grand jury required at all.

MR. MAGONE: Oh yes. It wasn't until a True Bill was found that they had a right to go to the County Court Judges' Criminal Court.

MR. CONANT: That's right.

MR. FROST: I see the point. Well now, under this present procedure, a True Bill wouldn't be required? If a grand jury wouldn't be required there would be no True Bill, and they would go directly to trial?

MR. MAGONE: Yes.

MR. FROST: The suggestion is a county judge could be constituted for that, to investigate and see if there is sufficient evidence to place those people on trial.

MR. CONANT: That's right, and after he found a True Bill, if he found a True Bill, the accused would still have the right to elect.

WITNESS: Still the right to particulars also.

Q. In proper cases?

A. Yes.

Q. He couldn't in burglary cases, of course?

A. Oh no.

Q. But in the same cases that he can now, he could.

MR. MAGONE: I might say that, dealing with Mr. Barlow's recommendation regarding grand juries on page 4 of the report of the judges of the Supreme Court, they deal with that question and they say:

> "As was recently stated in the London, England, labour newspaper, *The Daily Herald*, in an article in praise of the British Jury system, and to paraphrase the newspaper in words to this effect: 'No man can be taken from his home without the intervention and protection of a jury of his fellow citizens.' It should be also borne in mind that the Grand Jury in many cases is the means of saving both the public and the accused individual the heavy expense of a petit jury trial.
>
> In the opinion of the committee, it might also be pointed out that the more the rank and file of the citizens are called together to assist in the administration of justice, either as Grand Jurors or Petit Jurors, the better it is for the more complete understanding of our democratic

institutions by the people at large. It is considered to be of great educational value that the citizens come together from time to time and function as Grand Jurors."

MR. CONANT: Of course those observations didn't prevail in practically all the jurisdictions of the British Empire.

MR. FROST: Well, just ——

WITNESS: Yes.

MR. CONANT: Isn't that correct, Mr. Barlow?

MR. FROST: Just one other question in connection with it; if we have one case out of ten, or approximately one case out of ten in which the grand jury brings in a No Bill, does that percentage, do you think, in any way justify the retention of the grand jury? In other words, apparently one case in ten the country is saved the expense of a petit jury, and the accused is saved the expense of a trial, and also, I suppose, the accused is saved the risks that attend any trial, so that it is a protection to the subject—if one case in ten is thrown out by a grand jury. Now when I say one case in ten, I am just using those figures, Mr. Conant, from memory, as you used them in the Legislature last year.

MR. CONANT: Yes, well it was nine decimal something.

WITNESS: Well, of course that is questionable.

MR. CONANT: May I take that up, Mr. Frost?

MR. FROST: Yes.

MR. CONANT: Mr. Barlow, if you have no grand jury, is it not the fact that you would have two additional safeguards that would, in some measure replace the present one? The one is the greater care and caution of committing magistrates and Crown counsel, and also against the present situation is the fact that the present percentage may reflect, in part, the action of the Crown counsel before trying it?

WITNESS: Quite true.

Q. Don't you think that the greater concern of committing magistrates and Crown counsel would, to some extent, offset the percentage that is offered?

A. If there is grand jury, then the magistrate and Crown counsel will exercise much greater care than they now do, because at the present time they say: "Oh well, this man has to go before the grand jury," and they throw the responsibility on the grand jury, and do not accept the responsibility that they would otherwise themselves.

MR. STRACHAN: There is another point that concerns me; the suggestion of the County Court judge taking the place of the grand jury; then, if a True Bill is found by him, the accused under certain cases may elect to go before the County Judges' Criminal Court for speedy trial; isn't there a danger there of one judge finding a True Bill and talking it over with a judge of the same rank,

the man the accused man is being tried by, and even judges are human, and trying to persuade the trial judge to the effect that: "Well, I was right, and your thoughts were wrong on that?"

WITNESS: No, Mr. Strachan, I don't think so, for this reason, that the first investigation is only a preliminary investigation in which you only have certain of the witnesses called, a sufficient number, perhaps, to show and to enable the judge to come to the conclusion that the accused should be put upon his trial. In the other case, you have a full and complete investigation of the whole matter, and may I illustrate that in this way: I have coming before me certain motions, such as, for instance, an application for leave to issue a writ or order out of the jurisdiction, that can only be granted on certain evidence which brings it within Rule 25, and that order is an ex-parte application, and is so made. Then, when the defendant has been served, if he thinks that he should not have been served, that the matter does not come within Rule 25, a motion then comes before me to set it aside, and when that motion comes before me to set it aside, I deal with the thing as a subsequent application, as though it had never been before me, and I must say that it never affects my judgment one way or the other, because I have in the first application only the evidence of the plaintiff by affidavit. In the second application I have the evidence by affidavit of both the defendant and the plaintiff, and an additional evidence by the plaintiff, if he so wishes, and the whole matter is dealt with as though it had never been before me. I think that is very much the same situation.

MR. FROST: I suppose, further, too, the county judge's function would not be to find guilty or innocent, but merely to find if there was sufficient evidence to put him on his trial.

WITNESS: That's all.

MR. STRACHAN: But the difficulty that would appear to me is, with the judicial type of mind that you get in the judge as compared to the grand jury, he may apply entirely different consideration. After all, the idea of the grand jury and the petit jury is not to bring the specialist's point of view to a criminal or civil case, but to get the general cross-cut ——

MR. FROST: Common sense.

MR. STRACHAN: —— and common sense of the community, and I feel a little bit afraid that a common County Court judge sitting instead of a grand jury would really be pre-trying a case before it is tried.

WITNESS: I would think, Mr. Strachan, that in actual experience there would be few, if any, that ever went before the judge to perform the functions of the grand jury.

MR. FROST: There is another point, too, Mr. Barlow, that of those cases, I suppose, here is a very, very small percentage of criminal cases that ever come to a grand jury in any event?

MR. CONANT: Oh yes, most of them, in fact.

MR. MAGONE: Ninety percent of them.

MR. CONANT: Have you those figures?

MR. MAGONE: We have them but—roughly ninety percent, I would say from my recollection.

MR. FROST: Would there be ten percent of criminal cases that come before a grand jury?

MR. MAGONE: Hardly, but ——

MR. FROST: On the other hand, to offset that is the fact that the cases that do come before a grand jury are invariably very serious cases?

WITNESS: Oh yes.

MR. MAGONE: That is hardly so, Mr. Frost.

MR. FROST: Well, for instance, murder and manslaughter.

MR. MAGONE: The general sessions of the peace have exactly the same jurisdiction as a magistrate.

MR. FROST: Oh yes, I see the point.

MR. CONANT: Mr. Magone, there is this other angle to it, and I am propounding this as a question of proposal: should or should we not also add to our procedure, if the grand juries were abolished, a provision allowing the Attorney-General to require any case which had been committed by a magistrate to be submitted to a county judge before it be placed on trial? The idea back of that being that it does occasionally happen that, even after committal, something develops to raise a little doubt as to whether there should be a committal. Would it be necessary, or a proper safeguard, to give the Attorney-General the right to provide that, notwithstanding the fact that the magistrate has committed, to require it to go before a county judge for review?

MR. MAGONE: Yes, I think it would. I think so.

WITNESS: I think it would be very proper.

MR. MAGONE: I have had cases, and I am sure Mr. Frost has had too, when he was acting as Crown counsel, cases in which you feel, in reading the evidence at the preliminary, you feel there shouldn't have been a committal at all, and after preparing your indictment and having ten names on your indictment, and knowing you can't get a No Bill before the grand jury without hearing all the witnesses.

MR. STRACHAN: I think that, Mr. Chairman, so far as the county of York is concerned, would add very many more duties to our county judges, who are pretty well worked as it is. What I have great difficulty in finding now, in these judges, is the time to hear anything.

MR. CONANT: Oh well ——

MR. STRACHAN: That is the point.

MR. CONANT: —— I wouldn't expect it to happen more than once in a thousand cases.

WITNESS: It very seldom happens, Mr. Strachan.

MR. CONANT: Isn't this correct, Mr. Barlow, that at the present time, where a case has once been committed, there is no way of disposing of it excepting a No Bill through a grand jury, or a not guilty by a petit jury, or by a judge, or by *nolle prosequi* by the Attorney-General; isn't that right?

WITNESS: Quite right, yes.

Q. Yes. Now, the procedure of the Attorney-General in requiring that to go before a county judge, might that not be desirable rather than placing upon the Attorney-General the responsibility of *nolle prosequi?*

A. Yes, that would be in his discretion, I suppose, Mr. Chairman?

MR. MAGONE: I was hoping, sir, that we would have Mr. Justice Martin with us, but I don't know when he will be available. He was attorney-general in Saskatchewan, and I had a conversation with him, in which he indicated to me that he often wished that he had some such safeguard when he was attorney-general there, someone to take the responsibility away from him as an administrative officer.

MR. CONANT: I think it is proper for me to say, both as a member of the Committee and as one trying to offer some help, that the procedure of *nolle prosequi* is so sparsely used, and I think that goes down through the years, Mr. Magone?

MR. MAGONE: Yes.

MR. CONANT: Yes, I only remember a few in my time; one of them, I recall, was a case where a man had been recalled three times, retried, technically he was still under charge; we had tried him three times, and it was obviously a waste of time to put him on trial again, and we exercised our power there. I may tell you, although I don't want the name mentioned by the press, it was the Sweetman case. But it does seem to me that a case might arise, not in that category, where facts might come up and evidence might develop, and circumstances might become apparent, where you have a real doubt, and the Crown attorney might say: "Well, I don't think we had better go ahead." And he certainly wouldn't *nolle* an indictment on what you might call merits; we don't do it on merits, we only do it where you have reached a stalemate, or something of that kind.

MR. MAGONE: Yes, the practice has been, as you know, very well defined that, after two disagreements by the petit juries at a trial, it is usually the practice to *nolle prosequi.*

MR. CONANT: Yes, don't you think that that possible safeguard available, of disposition by the Attorney-General, would be valuable, Mr. Barlow?

WITNESS: It would be very valuable, because it relieves the Attorney-General of a responsibility that he ought not to exercise.

Q. And doesn't want to exercise?

A. And doesn't want to exercise, and furthermore, it gives the accused the privilege, in that case, of having his case passed upon by a county judge, who, in my opinion, can perform the functions that now are performed by the grand jury, and better than the grand jury can perform them, because he is accustomed to knowing what evidence should be sufficient to put a man upon his trial, even better than a grand jury can do, as grand juries so often are now by the Crown counsel.

Q. And infinitely at less expense?

A. And at much less expense, yes.

MR. CONANT: Well, what do you intend to go on with next, Mr. Magone?

MR. MAGONE: Petit juries, sir, which is quite a large subject.

MR. FROST: Mr. Magone, have you had any other persons who have given any indication of wanting to say something about this grand jury question?

MR.MAGONE: I have certain reports that I was going to read into the record, some in favour of abolition, others in favour of retention. I was going to ask Mr. McFadden, the Crown attorney, whose views I do not know on the subject, to come up. He is Crown attorney in Toronto and has been for some time, and also Judge O'Connell, in Toronto, who has been on the bench for a long time, and whose views likewise I do not know.

MR. CONANT: May I suggest, if it is convenient, to ask Mr. Ballard of Hamilton. I don't know his views either, but they are Crown attorneys of two large jurisdictions. Don't you think they might help us, Mr. Frost?

MR. FROST: I think so.

MR. MAGONE: I can give you Mr. Ballard's views; he has expressed them in a report.

WITNESS: I discussed the matter with Mr. McFadden on three or four different occasions; there is nothing written, of course, in the case of Mr. McFadden, because of the opportunity to discuss it with him personally.

MR. CONANT: And Mr. Ballard's is in writing.

WITNESS: I think it would be very helpful to have Mr. McFadden.

MR. MAGONE: I think we might ask the chief justice of the High Court trial division, when he is here, about his views on this subject.

MR. CONANT: Well, what are you proceeding with in the morning?

MR. MAGONE: Mr. Juneau, from the department of the attorney-general of Quebec.

Witnessed excused.

Committee rises until following morning.

SEVENTH SITTING

Parliament Buildings, Toronto,
April 10th, 1940.

MR. CONANT: Before the Committee proceeds, gentlemen, I want to call attention to an erroneous impression which might arise from the report in to-day's issue of the *Globe and Mail*, purporting to have to do with my remarks regarding the supreme court judges. I don't want to dwell on the habit that I have seen in other Committees, that use part of every morning in correcting newspaper reports, but I think this is important enough that I may ask the indulgence of the Committee to refer to it. The report reads:

> "Attorney-General Conant said the province pays an honorarium of $1,000 to each justice of the Supreme Court of Canada. 'Executives of the Government used to make more use of the judiciary than they do to-day,' said Mr. Conant, referring to the assistance of the supreme court judges, in the framing of The Ontario Compensation Act. He suggested the province now receives no service in return for the honorarium and said: 'I wonder whether the Legislature would not wish to make more use of the justices and thereby justify the allowance paid.' I think the judges would be, etc. . . . "

Well now, in the first place, the reporter is quite in error, in that he mentions honorarium to the supreme court justices of Canada. There was no mention of them at all. This question had only to do with the justices of the supreme court of Ontario, and the report might give the impression that I was questioning whether the allowance to the justices was justified, or should be continued. Now there is nothing further from my mind. I don't think anything I said could properly be construed in that way. The Committee was discussing it, and questions were directed to the practice, over the years, having to do with the use made of supreme court justices in advising regarding legislation, and it seems to be the opinion of all parties that in former years, the justices of the Supreme Court did advise and make recommendations to the government of the day on matters of legislation, to a much greater extent than they do now, and, in fact, about the only function that they have in connection with that at the present time is in connection with estate bills.

Now that whole discussion, as I recall, and the members may correct me if I am wrong, arose out of the recommendation of Mr. Barlow's report, for the constitution of the Law Revision Committee, similar to what they have in England, and I raised the question as to whether, instead of constituting such a committee as a new and separate organization, the same might not be accom-

plished by referring such legal matters which might be discussed, to the justices of the Supreme Court. The matter of honorarium paid by the province to the justices of the Supreme Court was only incidental to this discussion, and it was by no means suggested or intended as a reason for such an arrangement. I understood, and it was quite generally agreed, and I thought the witness, Mr. Barlow, expressed the same views, that the justices of the Supreme Court would probably welcome the opportunity of further service to the Government and Legislature along these lines. I think it is proper to correct that item, because it has so many inaccuracies, definite inaccuracies, and because the inference that might reasonably follow from it is so entirely foreign to what was in my mind, and I think, also foreign to the discussion with the witness before the Committee.

All right, you may proceed, Mr. Magone.

MR. CONANT: If the Committee care to confirm my remarks regarding that item, I would be very glad to have them do so.

MR. STRACHAN: Well, I agree completely with the remarks of the chairman. The honorarium is not under discussion at all, it was simply incidental and arose, as the chairman put it, out of the suggestion of Mr. Barlow, who intimated that he was sure the judges would be glad to give any service to the government of the day in framing legislation.

MR. CONANT: All right, Mr. Magone.

MR. MAGONE: Mr. Chairman, I have a wire from Judge Hayward, of Haileybury, saying he will try to be with us on Friday, to give us his assistance with respect to Division Courts.

Then, yesterday I was asked to obtain, from the inspector of legal offices, a copy of the report which he made regarding the number of cases in which special juries were called. His report is that, in the last ten years, the number of special juries called in Toronto was as follows: 1933, one, ——

MR. CONANT: Just a moment, can't you shorten that and give it for the whole province?

MR. MAGONE: Well, in the last ten years, in the city of Toronto, twelve special juries; in the city of Hamilton, one special jury was summoned, and not used, and over the rest of the province, in the last ten years, no special juries. The result is that there were thirteen special juries called in the Province of Ontario in the last ten years, all of them that were used being in the city of Toronto.

MR. CONANT: Yes.

MR. MAGONE: Then, with respect to the grand jury, there was a discussion yesterday as to the number of cases in which no bills had been returned by grand juries, and in the year 1939, there were 109—or 119 rather, bills presented to grand juries at the assizes.

MR. CONANT: In Ontario?

MR. MAGONE: Yes.

MR. FROST: Let me see, that was in ——

MR. MAGONE: In 1939, there were 119 bills presented to assize court juries, 109 true bills returned, and 10 no bills.

MR. CONANT: Out of 119?

MR. MAGONE: Yes, 109 true bills, 10 no bills; just under 10 percent. And in the general sessions of the peace, 160 bills presented, 147 true bills, and 13 no bills. The percentage is about the same in each case, sir.

MR. LEDUC: About 10 percent?

MR. FROST: Just in that regard, I might say this, Mr. Chairman, that is one matter that worried me somewhat in connection with the discussion that took place here yesterday. Mr. Barlow, according to my recollection, said that he felt that if grand juries were abolished, that the magistrates and Crown attorneys would be more careful in connection with preliminary hearings. Now what worries me is this: just as to whether they will or not, as to why they shouldn't be careful as it is, despite the fact that there are grand juries. And the fact that we have, here, roughly speaking, 10 percent of the cases, both in Assize Courts and in general sessions of the peace, returning no bills, it might be an indication that the Magistrates Courts, in making these preliminary inquiries, were not as careful as they might be.

MR. CONANT: May I suggest—I don't want to interrupt, Mr. Frost, unnecessarily, but we have Mr. Juneau here and it is along another line; are you disposed to hear Mr. Juneau?

MR. FROST: Yes, I am, I just want to make that reference in connection with this matter, and I would like to say, too, that as far as this grand jury business is concerned, I want to view it with an open mind.

MR. CONANT: Yes.

MR. FROST: To be frank with you, for many years I have not been opposed to the abolishing of grand juries; at the same time, there are arguments against it, and I do want to get to the bottom of it. That point impressed me yesterday.

MR. CONANT: Well, you have more evidence on grand juries, Mr. Magone?

MR. MAGONE: Oh yes, we will have, Mr. Chairman.

Now, the attorney-general of the Province of Quebec has kindly sent Mr. Juneau here for the purpose of giving evidence to the Committee. Mr. Juneau is a King's Counsel, and is special law officer in the attorney-general's department in the Province of Quebec. Mr. Silk saw him this morning, and he is going to take him over the Lacombe law, and the Code of Special Procedure dealing with attachment.

MR. JUNEAU, K.C., Special Law Officer, Department of Attorney-General, P.Q.

MR. CONANT: How long have you been in that work, Mr. Juneau?

WITNESS: Twenty-one years in the attorney-general's department of Quebec.

MR. LEDUC: I might suggest we take attachments first, because it existed in the Code of Procedure before the Lacombe law came into effect.

MR. SILK: I was going to take the jurisdictions of the courts first.

MR. CONANT: Is there not a copy of the law that we can have before us?

MR. SILK: I have one copy here. The law as you find it there being, 697A to 697H of the Code of Civil Procedure, was passed only in 1939, replacing the former law, which was article 1143 of the same Code?

WITNESS: Yes.

Q. Then, Mr. Juneau, I think we will first describe the jurisdiction of the various courts in the Province of Quebec.

A. Very well.

Q. First of all, would you describe, briefly, the jurisdiction of the Superior Court, which, I think, corresponds to our Supreme Court in Ontario.

MR. CONANT: Well, first of all, how many courts have you?

WITNESS: We have the Superior Court, the Circuit Court, and the District Magistrate's Court, besides Courts of King's Bench, of course.

MR. LEDUC: Which is a Court of Appeal?

WITNESS: Yes, in civil matters, and the Court of King's Bench, which sits in criminal affairs, presided over by a judge of the Superior Court.

Q. Now, Mr. Juneau, the Circuit Court exists only, I believe, in the city of Montreal, practically?

A. Practically; it is all over the province, but in the district of Montreal we have no District Magistrate's Court, so it is the Circuit Court, presided over by judges of the Circuit Court appointed by the Federal Government, and in the other districts we have District Magistrates' Courts, established by a proclamation.

Q. Which have jurisdiction in civil matters?

A. Yes, and the same jurisdiction as the Circuit Court, practically; it does away, as a matter of fact, with the Circuit Court. There is, I think, just one question, that of municipal affairs ——

Q. Which is reserved to the Circuit Court?

A. Yes.

Q. But briefly speaking, you might say, Mr. Juneau, that the jurisdiction of the Superior Court embraces all actions from $100 upwards?

A. Yes.

Q. With a few exceptions, as set out in the Code?

A. Yes.

Q. And that the Circuit and Magistrates' Court take care of all civil actions under $100?

A. Exactly.

Q. Right.

MR. SILK: Well then, I think we are now prepared to ——

MR. CONANT: Well, just following that, where do they go from the Magistrates' and Circuit Court, is there an appeal from them?

WITNESS: In certain cases; it is a case of vote, or transfer, if you like, when the case requires it.

MR. LEDUC: But those are special cases?

WITNESS: Yes.

Q. Broadly speaking, there are no appeals from the District Magistrates' Court or Circuit Courts?

A. No.

Q. But there is appeal from the Superior Court to the Court of King's Bench?

A. Yes.

Q. Which is the Court of Appeal?

A. Yes.

MR. FROST: The Circuit Court and Magistrates' Court are civilly like our Division Court with a smaller jurisdiction?

WITNESS: Yes.

Q. And the Superior Court, then, really takes the place of both our County Court and our Supreme Court?

A. Yes.

Q. And the Court of King's Bench is a Court of Appeal which really takes the place of our Court of Appeal?

A. Yes.

MR. CONANT: You have no Appeal Court superior to the Court of King's Bench?

WITNESS: Well, from the appeal to the Court of King's Bench is the appeal to the Supreme Court.

Q. Well, I mean in the province.

A. Not in the province, no.

MR. LEDUC: Some years ago, you had a Court of Revision?

WITNESS: Yes.

Q. Which was composed by the Superior Court?

A. Yes.

Q. And this was abolished?

A. Yes, about ten or fifteen years ago.

MR. CONANT: Can you go directly from the King's Bench to the Privy Council in certain cases?

WITNESS: I believe so, with special leave, special notification.

Q. Yes, I see.

A. And the Lacombe law, of course, is dealt with in the Circuit Court or Magistrates' Court.

Q. I see. All right, Mr. Silk.

WITNESS: And I thought, perhaps, to give you an idea of the importance of this Lacombe law ——

MR. LEDUC: Well, Mr. Juneau, before you go into the Lacombe law, I think Mr. Silk had better deal with the general law as it existed before the Lacombe law, and still exists, regarding garnishment of wages and attachments.

MR. SILK: By the way, Mr. Juneau, how long is it since article 1143, which is the old Lacombe law, was passed in Quebec?

WITNESS: I think you will find the source here.

Q. Just in a general way.

A. It was originally passed by Statute III, chapter 57, 1904.

Q. And would you explain to us what was the law in regard to the garnishment or attachment of wages prior to the passing of the Lacombe law?

A. Well, any plaintiff having a judgment against a debtor, could ask the clerk of the court to issue a writ of garnishee in order to seize the seizable portion of the wages.

MR. LEDUC: Which is set out in the Code, is it?

WITNESS: Yes, under article 599, the wages under $100 are not seizable, no portion is seizable, and from $1 per day ——

Q. You mean under $1 per diem?

A. Yes.

MR. CONANT: That is exempt?

WITNESS: Yes, exempt from seizure, and from $1 to $3 per day, one-fifth is seizable, from $3 to $6 per day, not exceeding $6 per day, one-quarter is seizable, and over $6 per day one-third is seizable, and of course, if a debtor had a judgment against him or five or six or seven judgments, any plaintiff could take a garnishee, so he was liable to two, three or four, or more garnishees on his wages, and the garnishee had to file a declaration and the costs.

MR. LEDUC: Well, let's not go too fast, Mr. Juneau; you said that you would go to the clerk of the court and you would issue ——

MR. CONANT: May I get this clear, pardon me, do you speak of the procedure before the Lacombe law?

WITNESS: Yes, and it is still in existence, because the Lacombe law prevents seizures being taken provided the debtor fulfills certain obligations.

MR. LEDUC: In other words, Mr. Juneau is giving the law as it existed before the Lacombe law, and as it still exists, because it is not in every case that a man whose wages are garnisheed takes advantage of the Lacombe Act; if he has only one creditor, he has no advantage in taking advantage of the Lacombe Act, but Mr. Juneau, you go to the clerk of the court and he gives you a writ of garnishee?

WITNESS: Yes.

Q. You serve this writ upon the defendant and he garnishee? ——

A. Yes.

Q. Is it necessary that the salary be due and actually owing when you serve the writ?

A. Oh, no.

Q. It isn't?

A. No.

Q. Now you serve this writ and the garnishee has to appear in court on a certain day?

A. Yes.

Q. After the issuance or service of the writ?

A. Yes.

Q. And make a declaration as to wages, or salary that he pays to the defendant?

A. Yes, as to the dealings between the two.

Q. Yes. Now, after he has made this declaration ——

MR. CONANT: Then, pardon me, if he is invoking the Lacombe law ——

MR. LEDUC: We are not in the Lacombe law as yet, Mr. Chairman; that is the general law of the Province of Quebec; that is what I want to make clear.

MR. FROST: Well then, Mr. Leduc, the employer, once he is served with a garnishee, must he make a declaration and say how much he makes?

MR. LEDUC: Yes, that is the general law of Quebec. He gives a declaration to the Court just as here in Ontario, stating: "I pay so much to the defendant." Now, when he has made his declaration, I understand you have some kind of procedure, under which the seizure is declared to be tenant?

WITNESS: Yes.

Q. That is, to attach the salary?

A. The future salary.

Q. All future payments of salary?

A. Yes, or anything else.

Q. Yes, but I mean—let us deal with the wages.

A. Yes, the future wages.

Q. The seizure attaches all future wages, until the full debt is paid?

A. Exactly.

Q. That is the general law of the province?

A. Yes.

Q. Now the Lacombe law comes in when a man has several creditors, when he owes money to a lot of people?

A. Yes, and after judgment has been rendered against him, at least one judgment.

Q. Yes.

A. And if, before the expiration of the delay for the issuing of the seizure, or before a garnishee is taken, if he files a declaration with the clerk of the court stating his salary and the date of the payment, and the name of his employer, and other details, and he deposits with the clerk of the court within three days of the date of the payment of his wages, the seizable portion, nobody can take out a garnishee against his wages, from the moment he makes his deposits regularly with the clerk of the court.

Q. Now, Mr. Juneau, first of all, you must go to the clerk of the court and file a declaration?

A. Yes.

Q. That he wants to take advantage of the Lacombe law?

A. Exactly.

Q. He gives the name of his employer?

A. Yes.

Q. The date on which his wages are paid?

A. Yes.

Q. The amount of his wages?

A. Yes.

Q. And agrees to pay the seizable portion on pay day to the hands of the clerk of the court?

A. Surely.

Q. And he also has, I believe, to give a notice to all his creditors that he has taken advantage of the Lacombe law, or has that been changed?

A. I think that was done away with.

Q. It was?

A. I think it was. Personally, I think a debtor should give notice.

Q. But what is the law at present, Mr. Juneau?

MR. SILK: He is not required to give notice.

WITNESS: No, unless we find it in reading the law, but I dind't find any provision concerning the obligation to give notice.

MR. LEDUC: But wasn't that in the old law, Mr. Juneau, that he had to notify his creditors?

WITNESS: Well, no, it was not mentioned in the old law. But the practice is that the debtor gave notice.

Q. That was the practice?

A. Yes, and I think the same practice is followed, but there is no obligation on his part to give notice; but personally, I think the debtor should be obliged to give these notices.

MR. CONANT: The debtor or the clerk, Mr. Juneau?

WITNESS: The debtor. Well, sometimes it is done by the clerk, but at the expense of the debtor. If notice has been given and it has to be served or mailed, then the debtor pays for the notice.

MR. MAGONE: I think it would be well to get these sections in the record, the sections of the Lacombe law in point.

MR. CONANT: Go ahead, Mr. Silk.

WITNESS: Before you proceed, sir, would you like to know the figures for the district of Montreal, and the district of Quebec?

MR. CONANT: Yes.

WITNESS: In the district of Montreal, last year, there were $300,000 paid by debtors for the benefit of their creditors in Montreal only, and these amounts were deposited by 4,500 debtors. And the number of new depositors for the district of Montreal for the year 1939 was 1691. In Quebec, $100,000 was deposited, and we have 2,612 depositors, and I have a note here that last year, 78 of these debtors eliminated their obligations.

MR. SILK: Mr. Juneau, can you give us the population of the district of Montreal and that of the district of Quebec to which you refer? I think that is the judicial district rather than the city.

WITNESS: No, I can't give you that.

MR. LEDUC: Montreal is nearly a million and a quarter.

WITNESS: In the city?

MR. LEDUC: No, that takes in the city, the Island of Montreal, other islands and some counties.

WITNESS: Yes, it takes quite a few districts outside.

MR. SILK: And there were 1691 new debtors in 1939?

WITNESS: Yes. And 4,500 which have been keeping up their payments during the year, in 1939.

Q. Yes, well then, suppose we start with Section 697a, which reads:

"No creditor may seize the remuneration, salary or wages of the debtor who, (a) within seven days from the judgment or from the resumption of work after a period of unemployment, or at any time before the said remuneration, salary or wages are seized, produces a declaration under oath setting forth amount and due dates of such remuneration, salary or wages, and the name, occupation and address of his employer or employers,

"(b) deposits the seizable portion of such remuneration, salary or wages within the three days following the payment thereof, and

"(c) continues thereafter until the extinction of the judgment and claims filed under article 697c, to deposit at each payment, and within the same delay, the seizable portion of such remuneration, salary or wages."

Well, then, it is the debtor, rather than the employer who is required to make the payment into court, is it?

A. Oh, yes, the debtor himself.

Q. The balance of that section seems reasonably clear.

MR. FROST: Mr. Juneau, how long would the immunity last? Supposing a man files a declaration stating what his salary is, and so on, how long would that last? What I am coming at is this: supposing A takes advantage of this Lacombe law, and on the 1st of January he gets so much in wages, and he files a statement accordingly; supposing three months afterwards ——.

WITNESS: He receives an increase?

Q. A very large increase, or an increase in salary; what then?

A. As stated in the next section, he has to file a new declaration; if he does not file a new declaration, he is liable to seizure, and the party who has the judgment against him has the right to issue a garnishee.

Q. The immunity last so long as he is receiving that amount of wages and is paying the proper percentage into court?

A. And so long as he files a declaration, according to any change in salary.

MR. SILK: I think we will find these sections are fairly complete. They deal with all these details. Section 697b:

> "Such declaration and deposit shall be made, if the debtor has his domicile in the city of Montreal, in the office of the Circuit Court of that district, and if his domicile is elsewhere, in the office of the Magistrates' Court of the district or county where he resides. The declaration and the deposit shall be entered under the title of the record of the court rendering the judgment which the debtor seeks to satisfy. Such judgment may issue from another court than that where the debtor makes his declaration and deposits."

WITNESS: If you will permit me, I will give an explanation here. The debtor has to file his declaration in the Circuit Court of the Magistrates' Court, but he may file his declaration upon the judgment in the Superior Court, or in another court.

MR. LEDUC: In other words, the Circuit Court as it used to be, or the Magistrates' Court now, is only a convenient place where to make a declaration?

A. Absolutely. A judgment may be rendered against a party, for instance, for ten thousand dollars in Superior Court, and after judgment is rendered, if the debtor goes into the Circuit Court and files a declaration about his wages, his judgment cannot be executed through a garnishee. It can be executed through another writ, though, if he has movables that can be seized.

MR. SILK: Well, Mr. Juneau there is only one Magistrates' Court for each county or district throughout the Province of Quebec?

WITNESS: We have only one Circuit Court, in the whole district of Montreal, but in the other districts, we have what they call District Magistrate Courts, and County Magistrate Courts.

Q. Yes, but there would only be one section?

A. But their jurisdiction is the same.

Q. But there would be only one Magistrate Court in each district or county?

A. No, there may be more than one.

MR. LEDUC: But Mr. Silk has in mind a situation here in Ontario concerning the Division Court. You have for, instance, the district of Hull?

WITNESS: Yes.

Q. You would have one Magistrate Court for the district of Hull?

A. Yes.

Q. Not more than one?

A. No.

Q. And the same thing would apply to other districts?

A. Yes.

Q. But in one county?

A. Yes, forming part of the district, you could have one or two or three district Magistrate Courts, which have jurisdiction only within the county?

Q. Yes.

A. Not in the whole district.

Q. Have you many of these County Magistrate Courts?

A. About eight.

Q. And how many district Magistrate Courts?

A. Twenty-six.

Q. Twenty-six, one in each district outside of Montreal, approximately?

A. Yes.

MR. SILK: Well, Mr. Juneau, if there are apt to be two or three Magistrate Courts in one county, it is possible that a creditor might have to make a search of two or three court offices, is it?

A. No.

Q. To find out ——

A. Oh, the creditor; well, the debtor will file his declaration in the County Court where his domicile is.

Q. Yes, he is required to file it in the Magistrates' Court of the district or county where he is domiciled?

A. Yes.

Q. But I thought you said a moment ago that there might be two or three Magistrate Courts in the one county?

A. Yes, but not at the same place, you see; you may have—suppose you have a Magistrates' Court—I don't know your divisions around Toronto here, but take Hull for instance.

MR. LEDUC: Well no, let me put it this way, Mr. Juneau; does that section mean that he has to make his declaration at the office of the court in which area he has his domicile?

WITNESS: Yes, but it might be ——

Q. Might be more than one?

A. It might be district Magistrates' Court for the district or one Magistrates' Court for one county, for the county where he has his domicile.

MR. CONANT: Either one?

WITNESS: Either one; he has his choice.

MR. SILK: It couldn't be more than two, though, apparently, so there is no difficulty?

WITNESS: No.

Q. Then going on,

> "A debtor who changes his employment, or whose conditions of engagement are altered must, within seven days, file a declaration under oath with the clerk of the court testifying to such changes."

I presume that would cover an increase in wages, would it?

WITNESS: Yes, sir.

MR. LEDUC: Or a decrease.

MR. SILK: Yes, I refer to the words, "whose conditions or engagement are altered" which would cover either one.

WITNESS: Yes.

Q. Proceeding,

> "If the debtor ceases to work, he must file with the clerk and with the same delay, a declaration to that effect; when he resumes work, he must also, within seven days, file with the clerk another declaration in the manner contemplated in sub-paragraph a of article 697, and comply with the provisions of sub-paragraphs b and c of the same article."

There is nothing to explain there.

WITNESS: No.

Q. 697c:

> "Any creditor other than the plaintiff may file his claim in the record; the plaintiff may also file therein any claim not already included in the judgment."

So that while the first claim must have been reduced to judgment, not so as to the various other claims that may be filed?

A. No.

Q. It must only be a debt?

A. An ordinary account, or a promissory note, or even a claim under a marriage contract, any claim.

Q. Yes. Continuing:

"Each claim must state the nature and the amount of the debt and be accompanied by the documents invoked in its support, and be attested under oath. If the claim be an account, the matter must be produced in detail with the claim. In default of a finding of the documents or of the detailed account in support of the claim, as the case may be, the debtor may, at any time, on a motion certified and proved according to the ordinary rules of procedure, obtain from a judge or magistrate sitting in the court where the debtor makes his deposit, the dismissal of the said claim, until the creditor establish the impossibility for any reason deemed sufficient by the judge or magistrate, of filing such account or such documents, and unless he adduce other proof to the satisfaction of the judge or of the magistrate that his claim is well founded."

MR. LEDUC: Well, that is to avoid fraud and collusion. I mean a friend of the debtor could file a big claim and get back most of the money.

WITNESS: Yes.

MR. SILK: On a *pro-rata* division.

WITNESS: Yes.

Q. It is not unheard of in this province.

MR. LEDUC: Oh no.

MR. CONANT: Well, now, take creditor's judgment, or anything more, where is the issue tried there?

MR. SILK: It is tried before the judge or magistrate of the court in which the original declaration is filed.

WITNESS: But there is another section concerning the contestation of a claim, if it is outside the jurisdiction of the magistrates' court.

MR. SILK: I think we will find out more about that in 697e.

Now, 697d:

"A claimant must, under penalty of annulment of his claim, give notice thereof to the plaintiff and the debtor prior to or within three days following such filing. Such notice must state the name of the claim and the nature and amount of the debt. The documents, or, as the case may be, the account filed in support thereof, and the date of filing the

claim. The service in either of the ways contemplated in the following paragraph, of a copy of the claim, with notice of the date of the filing, may take the place of the above mentioned notice, such notice may be served either by a bailiff or by sending it by registered mail to the last address of the plaintiff or debtor known to the clerk of the court where the debtor makes his deposits. Proof of the service of such notice must be filed in the office of the court with the claim, if the notice is given before the finding of the later and within six days of the filing of the claim; if the notice is given after the filing of the claim, such proof is made by filing the return of the service by the bailiff or, as the case may be, of the registered letter certificate attached to a copy of the notice given with an affidavit that it is a true copy of such notice."

WITNESS: Mr. Chairman, if you will permit me, this law as we read it now may be amended at the present session of the Legislature, and I have been working on a few amendments. If you will permit me, I will read them to you, as my personal opinion, because I cannot say that they will pass.

MR. LEDUC: You cannot foresee what the Legislature will do.

WITNESS: No. 697d says the claimant must file a notice, give a notice to the plaintiff and the debtor, and the cost of this notice, and the serving of the notice, is charged to the debtor, and may be two or three dollars for each claim. So I suggested as to the first paragraph:

"Claimant to file his claim in the record within the 30 days following the first declaration of the debtor, is not bound to give notice thereof either to the plaintiff or to the debtor who are considered as taking communication thereof in the office of the court."

This is suggested so as to save the trouble of giving the notice for the creditors who have received a notice from the debtor. The debtor giving the notice is supposed to acknowledge their claim, so if the creditor files his claim within 30 days, well, the debtor and the plaintiff would be supposed to look at the claim, or to examine it in the record and afterwards the claimant, who files his claim after 30 days, is obliged to give notice. Whether this amendment will be received or not, I don't know, but I think it is worth while considering it, if you have the intention of following this law, because if a debtor has twenty or thirty creditors, well, three times 30 is $90 cost that he will have to pay in the end.

MR. SILK: So that if there are several claims filed, it is substantially the same, there would be no fee for notices?

WITNESS: No, because they would know that within the thirty days, they would have the right to go and examine the claims in the record, and afterwards no claim can be filed unless they receive notice.

Q. Well then, the next section 697e, deals with contesting a declaration.

"The first and any of the subsequent declarations by the debtor may be contested by any interested party in the same manner and with the same

delay as the declaration of a garnishee before the court where such a declaration was made."

Would you just explain that? That refers back to the garnishee proceedings.

MR. LEDUC: Well, it is simply the case where the creditor doubts that the debtor has been right as to his wages. That right is given, of course, to attack his declaration. Do you want Mr. Juneau to give you the procedure showing how it is done in Quebec?

MR. SILK: I thought it might be well to have that before the Committee.

MR. CONANT: You mean, how he examines on his declaration?

MR. LEDUC: How he attacks the declaration.

MR. SILK: The procedure, yes.

WITNESS: There they mention that the declaration of the debtor is contested. Here, also, I would suggest an amendment. I think the debtor can be called, according to our procedure, the debtor can be subpoenaed by the court, to give details concerning his employment or his wages. I mean, before he has made a declaration under the Lacombe law. Under the Lacombe law, the judgment is rendered against a debtor, and we don't know the creditor doesn't know what to do for the judgment.

MR. LEDUC: He examines after judgment.

WITNESS: Examination after judgment, yes. I think the right should be given to the plaintiff or to any creditor to call the debtor to examine him.

MR. SILK: Yes.

WITNESS: Before filing a contestation. If you file a contestation, well, the costs are pretty high, and if you doubt the declaration, and if you have the right to examine the debtor, you may be satisfied with his explanation without a contestation.

Q. Yes.

MR. LEDUC: May I interrupt at that point. Do you know, Mr. Juneau, if there are many contestations of the declarations made by debtors?

WITNESS: No.

Q. Few of them?

A. Of course, I don't know of any, but I understand, there are very, very few.

Q. Well, the Lacombe law has been in existence in Quebec for about thirty-five or thirty-six years?

A. Yes.

Q. And everybody understands it pretty well now, and they know how it functions?

A. Oh yes, and even our clerks will help the debtors to prepare their declarations. Sometimes we think that they go too far and take away too much.

MR. LEDUC: Mr. Juneau, from your own experience, from what is heard of the experience of others, would you say that the debtors are behaving honestly towards their creditors, when they take advantage of the Act? Do you find many cases of fraud or intent to deceive their creditors?

MR. CONANT: And evasion?

WITNESS: No.

MR. LEDUC: You don't?

WITNESS: No, the majority of the debtors take advantage of it in order to try and pay their debts.

MR. FROST: I suppose that would all depend on how far the law was evasion proof? I suppose—because after all, debtors could easily find a way to evade a law, if there are sufficient loopholes in it that they can.

WITNESS: Those who are trying to evade the law will sign a promissory note, for instance, in favour of a relative, and this relative will file his claim, and how to contest that is pretty hard. So, if the claim is for a large amount, well, a relation will receive the largest portion of the deposit and then ——

MR. LEDUC: It has been tried, of course.

WITNESS: Oh yes.

Q. But Mr. Juneau, did you have more contestations and more litigations in the first years of the Lacombe law than you have now, could you say that?

A. No, I have no knowledge of any contestations. Just hearsay.

Q. Well, the law works very smoothly and very well, from the very first?

A. Oh yes.

MR. FROST: Do you find your people who are normally creditors are satisfied with this law? I mean grocers, butchers, and so on?

WITNESS: They are satisfied, but where they complain, where their complaint comes is when the clerk charges them a fee for filing their claim. They don't know whether the debtor will make two or three deposits and stop. That is where the complaint comes in.

MR. LEDUC: That doesn't attach the principle of the law.

WITNESS: No, but I will further, later on, I will give you some suggestions on that.

MR. FROST: How much does it cost to file a claim, roughly speaking?

WITNESS: I think, just filing the claim—it depends on the amount of the claim, it starts from 50 cents to $2.50. If the claim is $4,000, I think it costs the creditor $2.50.

Q. Mr. Juneau, have you ever heard anything of our judgment summons proceedings in this province? Do you know anything about that at all?

A. Just the principle outline.

Q. Have you anything that is comparable in the Province of Quebec?

A. That is?

Q. Well now, for instance, in Ontario, generally speaking, there is a provision that a creditor may bring a debtor up before a judge and examine him—I am referring to the Division Court now. You might say that that is our Small Claims Court. The debtor may be brought up before a judge and examined as to his assets and as to his earnings, and so on, as to his capabilities of earning. Have you anything comparable to that in the Quebec law?

A. Oh yes, after judgment is rendered against a debtor, the creditor may bring—serve a subpoena on him and oblige him to answer that subpoena and give evidence as to his assets.

MR. LEDUC: The evidence is not taken before a judge, though?

WITNESS: No, generally the debtor is sworn before a clerk of the court, and then the affidavit for the plaintiff sometimes is before a stenographer, sometimes just verbally, and he gets all the information he can Of course, if there is trouble during the inquiry, there is pressure brought in to force the debtor to give the exact answer.

MR. CONANT: Well, but of course, the important part of that, may I add—does the court make an order following that examination, as they do here? You see, Mr. Juneau, in our courts here, the Division Courts, a man on whom judgment has been obtained, may be brought up and examined as to his ability to pay, putting it broadly.

WITNESS: Yes.

Q. Following that examination, the judge may order him to pay $5 a month, or whatever it may be. Have you any orders?

A. No, we haven't, but if the debtor states that he has a bank account, for instance, he has to say in which bank, and then a garnishee may be issued.

Q. Yes, but that is only examination, that is only discovery in aid of execution, but you have no order provisions?

A. No order provisions.

Q. Well then, it is unnecessary to ask you whether you have any practice of committing to jail following judgment?

A. No, we haven't got that.

Q. You haven't?

A. No.

MR. FROST: We have in this province, just generally speaking, this provision, that a debtor may be brought up before a judge and examined, and if the judge hearing the evidence thinks that the debtor is capable of earning so much money and, say, paying $5 a month, he may make an order, and if the debtor fails in that, then the judge, if he finds that there isn't a reasonable explanation for that, may send him to jail. He may make out a committal order.

A. Years ago we had imprisonment for debt, but it was before my time.

MR. CONANT: You have no provision like that now?

WITNESS: No.

Q. Now, let me ask you this question, I don't know whether you care to express an opinion or not; without those mandatory powers of the court, that is the right to order payment and without that power to commit to jail, is the machinery for collecting debts impaired?

A. No, I don't think so. Of course, if after the examination of the debtor we find that he has committed fraud ——

MR. LEDUC: Oh yes, that's different.

MR. CONANT: Then what?

WITNESS: Then we might apply the provisions of the criminal code, or if the contract—if he has made a contract which we think is fraudulent, we will take action to set it aside and annul it.

MR. LEDUC: But the judge cannot commit the man to jail?

WITNESS: For non-payment of debt? No. Or if he is trying to do his best to evade the amount, he is not supposed to be sent to jail.

MR. CONANT: Well then, the only definite or positive means of collecting that you have under your law is by attachment?

WITNESS: Attachment, yes.

Q. That is the only definite means?

MR. FROST: Or by execution.

WITNESS: Yes.

MR. CONANT: Well, of course.

WITNESS: Yes, attachment of wages and movable property.

MR. CONANT: By execution or attachment?

WITNESS: Yes.

MR. FROST: This Lacombe law applies only to wages?

WITNESS: Yes.

Q. It doesn't apply to any other assets?

A. Oh, no, no.

Q. That is wages or money?

A. If he has automobile, and he is a depositor under the Lacombe law, this Act is not operative.

MR. CONANT: Your Circuit or Magistrate Court procedure is exactly like that in our County and Supreme Courts here, that is with respect to examination after judgment?

WITNESS: Yes, I think so.

Q. Isn't that a fact?

MR. STRACHAN: Yes.

MR. FROST: On that point, Mr. Juneau, supposing a claim or a judgment is obtained against a debtor, and the debtor is earning, say, $6 a day, which would mean that a quarter of that would be attachable, which would be $1.50, if that debtor doesn't take advantage of the Lacombe provisions, the judge then may order that $1.50 a day be withheld from that man's wages?

WITNESS: That is, the clerk will issue a writ into the hands of the employer and the employer will make a declaration before the court, or before the clerk, that he pays a salary of $6 per day, then an order will issue ordering the garnishee to retain that $1.50 and to deposit it in court at the dates of payment.

Q. Is there any priority as between creditors? Supposing one man files his claim against a debtor, and a debtor doesn't take advantage of the provisions of the Lacombe law, well then, supposing it turns out that there are other people who have debts to attach, and they do attach, is there priority as among them, or ——.

A. There is at least priority for the costs on the first garnishee, and I think the cost of the second garnishee comes after, but I am not positive. I will look that up.

MR. ARNOTT: Just before you go on, Mr. Silk, Mr. Juneau, the collection is then left to the employer?

WITNESS: Upon a garnishee, yes.

Q. Do you find any difficulty there, any objection on the part of the employer?

A. Oh yes, some employers will dismiss their employee.

Q. Dismiss their employee?

A. Oh, yes. And when they don't, they do their best to get settlement, to oblige their men, even big firms.

MR. LEDUC: But in the case of the Lacombe law, the employer isn't brought into the picture at all?

WITNESS: Not at all.

MR. SILK: Well, Mr. Juneau, where a creditor files a claim under the Lacombe law, is he precluded from taking any other steps to enforce his judgment? Could he proceed to issue execution on the same judgment?

WITNESS: Oh, yes, he can.

Q. I see.

A. This just prevents the seizing of the wages.

Q. Of the wages only?

A. Nothing else.

MR. ARNOTT: I must have misunderstood you, then, Mr. Juneau, because I understood, under the Lacombe law, the employer has to retain his percentage of the wages and pay it in.

WITNESS: No, no, you see, the obligation is upon the debtor to file the declaration and make his deposits regularly, within three days after the date of payment.

MR. CONANT: Failure to do which constitutes default on his part?

WITNESS: Yes. And this is one thing, though, after the three days, the creditors who have judgment will go to the court and ask the clerk if such a man has made his payment. This is quite a job for the clerk of the court. We have—a little later, I will make a suggestion on that, because our offices are crowded, upon certain dates, and the clerks and deputy clerks have to answer these questions.

MR. FROST: There is one point, Mr. Juneau, that perhaps you can give us

some information on. Oftentimes, in a garnishee or attachment proceedings, perhaps there is a sum of money, wages, coming to the debtor, and perhaps it is the only opportunity that the creditor has of getting that money, that is to go and attach it, and tie it up. Supposing a dishonest debtor knew that he had, say, $100 coming to him, and he knew that his term of employment was over, and that this hundred dollars might be the last hundred dollars that he would be receiving, supposing he took advantage of this Lacombe law and he filed a statement, and under the provisions of that, he is supposed to, within three days of the receiving of his wages, to pay a certain proportion of that into the court. Now supposing that debtor is a dishonest man, and he files his declaration for the purposes of staving off his creditors, and he receives the money, and he doesn't pay it into the court. Is there any way of meeting that situation under your law?

A. No. But generally speaking, the amount of wages to be paid does not reach the amount of $100.

Q. Yes, of course, I can see that. I think there is much to be said for the case of the man who is receiving steady employment, and who finds himself in difficulties, he makes this arrangement, and it helps him to meet his creditors in a fair, reasonable way. But the difficulty is, and what is the undoing of these laws is, that you run across the dishonest man who wants to beat you.

A. Yes.

Q. And in this case, I wondered about that situation, which so often arises, of the man who has a sum of money coming to him, and it possibly may be the only opportunity that the creditor has had for months, and it may be the only opportunity he will have for many, many more months.

Mr. Leduc: Well, may I interject this: in all likelihood, in the case you mention of $100—I am speaking of the Province of Quebec, the cost of garnisheeing would probably eat up all of the seizable portion of the wages.

Witness: Yes, and this would happen, of course, when a man leaves his employment. Of course, on his last payment he may fail to make his deposit, but if he is continued in his employment he, generally speaking, continues to make his deposits.

Mr. Conant: Well, the only advantage, is this right—I am not quite clear on this yet—the only advantage in this is, as I see it, to avoid multiplicity of proceedings, and to reduce costs by making one proceeding apply to past, present and future receipts, so that they don't have to go on garnisheeing time after time.

Witness: And to stop annoying the garnishees also.

Mr. Leduc: The second advantage of that is you have no execution, once a debtor ownes money to ten or fifteen people, all with judgments against him, if he gets under the Lacombe law, they don't have to execute, it simplifies it.

Mr. Conant: But the claim must be adjudicated, if it is contested?

Mr. Leduc: But take the case of judgment, you take a man who has ten

claims against him, all on judgments, and in this province, every single judgment creditor would have to take an execution for a garnishee. In Quebec that is not necessary. If the man gets under the Lacombe law, he avoids all these executions. If a man has a promissory note, he can file his claim.

MR. CONANT: And if it is contested he comes in?

WITNESS: Yes.

MR. LEDUC: Yes, another advantage is this: according to the Lacombe Act, the debtor makes the payment, his employer needn't know anything about it. He will not fear him, because he is bothered making payments every day.

MR. CONANT: The only advantage appears, so far, to rise out of Mr. Frost's very pertinent question that it is a matter of putting confidence in the debtor. If he violates that confidence, why, nobody gets anything.

MR. LEDUC: That is a disadvantage, but comparing it with the disadvantages under our own law, where you have to seize the salary which is due before it is paid, why ——

MR. FROST: Supposing we changed our law to this extent, that a garnishee should attach to moneys which are due or which will accrue due, then haven't you met the situation?

MR. LEDUC: Oh yes, but I would also like to have the Lacombe law proper brought into this province, to eliminate the multiplicity of costs.

MR. FROST: I agree with that, but supposing you had this, supposing instead of making it the duty of a debtor to pay the money in, supposing there were some provision whereby the employer would pay the money in?

MR. LEDUC: Well, then you have the objection that he may fire the man.

WITNESS: Yes, you take a man working for the C.P.R., for instance, or the C.N.R., or some of those big firms, they hate to send their employees to make a declaration, and then the accounting of this thing means a whole lot of work for them.

MR. SILK: I think we could take care of your point, Mr. Frost, by providing a penalty for such a violation.

MR. FROST: Yes.

MR. LEDUC: Do these cases happen very often?

WITNESS: Of course it happens, but they are followed by garnishees. If the man is a regular employee, then there is a garnishee, and generally, the one who takes the garnishee accepts the amount of the costs and the back payments with the clerk of the court, and it is settled that way, because he knows that if he has more garnishees coming into the employer's hands the man may be fired and he will lose out.

Q. It would be only in the case of a very last payment, and you've got to admit that doesn't happen very often, and the amount in most cases would be very, very small.

MR. FROST: Well, I think you might be surprised at the number of cases where garnishee proceedings are taken where the creditor feels it may be the last opportunity of getting the money.

MR. LEDUC: Yes, but you take in the case of weekly or fortnightly wage earners, there would be perhaps $20 or $40 coming to the man and the seizable portion would be so small that the costs would eat it up.

MR. CONANT: Well, Mr. Silk, will you continue please.

MR. SILK: Yes. There are three further sections, and then Mr. Juneau has some observations after that. Section 697E, dealing with liability for acting in bad faith.

> "Every person who in bad faith, or through inexcusable carelessness, or neglect to properly inform himself seizes the remuneration, salary or wages of a debtor who has complied with the requirements of articles 697a and b, or, who after such seizure refuses to give the debtor a release therefrom, when it has been sufficiently demonstrated to him that the debtor has complied with the provisions of the said articles, is liable to the debtor for all the damages which may be caused to him through the effecting of such seizure, or, as the case may be, the creditor's refusal to grant such release."

So that if that occurs, Mr. Juneau, the debtor would have to sue in court to recover any damages that he had suffered?

WITNESS: Yes.

Q. Then 697g:

> "Any interested party may contest a claim filed in the record, such contestation must be served upon the claimant, the debtor and the clerk of the court where the contested claim is filed, and it must be brought before the court having jurisdiction for the amount in dispute, ——

I will just continue reading it:

> "in the district in which the claim was filed, and the record, if need be, must be transmitted to the office of such court."

Do you wish to explain that?

A. If it were for four hundred dollars, for instance, it could not be contested before the magistrates' court, which has jurisdiction just as far as $99.99, so the contestation would have to be filed in the Superior Court.

MR. LEDUC: But don't you think, Mr. Juneau—I am asking for your

opinion now—don't you think that the magistrates' court could very well deal with the claim if it is over $100?

WITNESS: Oh yes.

MR. CONANT: What is that point, Mr. Leduc?

MR. LEDUC: Well, you see, the magistrates' court has jurisdiction of $100, then if a man files a claim for four hundred dollars, the claim is contested, then the contestation has to be heard by the Superior Court, which has jurisdiction in actions of four hundred dollars. It is simply a matter of establishing whether or not a claim is valid, and the magistrates' court might very well act.

WITNESS: If the law gives him the jurisdiction, it's all right.

MR. CONANT: Are you not hereby enlarging tremendously the jurisdiction of the magistrates' court?

WITNESS: Oh yes, there is that objection, of course.

MR. LEDUC: And there is the case of damages claimed for a motor accident, for instance, where the court of competent jurisdiction would have to pass upon the claim.

MR. SILK: Continuing:

> "From and after the filing of such contestation, the claim remains suspended, and is not to be collocated in the distribution of the moneys deposited by the debtor prior to the final decision upon such contestation, but the clerk must, pending such contestation, retain at the time of the distribution, the sums to which the claimant would be entitled, if his claim had not been contested in order to pay them to the claimant or distribute them among the creditors according to their rights after the final adjudication on the contestation.
>
> "Any interested party may intervene in a contestation to protect his rights or to hasten the proceedings, and the trial of the case when the parties are not proceeding with reasonable diligence.

MR. LEDUC: Do you get many of these cases, Mr. Juneau?

WITNESS: Of course this was passed only last year, so I didn't hear that there was any contestation.

MR. FROST: Mr. Juneau, could you give us any information as to the number of cases in Circuit Courts that you have in the Montreal district?

WITNESS: Yes, I think it is ——

Q. I mean of course the total cases—I think the jurisdiction is $100?

A. Yes, I think it is over 30,000 a year in Montreal.

Q. Well, that might be some indication as to whether, or why, rather, in the county of York, there are 10,600 cases.

MR. LEDUC: One third.

MR. FROST: Yes, one third. And in your case there are 30,000 cases?

A. A year, yes.

Q. For Montreal district?

A. Yes, and the debtors who took advantage of the Act last year were 1,691.

MR. LEDUC: Of course, there may be ten actions taken against the same man?

WITNESS: Oh yes.

MR. FROST: Last year, in the county of York there were ——

MR. LEDUC: I think we might put on the record the fact that the county of York has a population of 850,000.

MR. FROST: Yes, and you have a million and a quarter population?

MR. LEDUC: Easily that.

MR. FROST: And you say that in the Montreal district you had about 30,000 cases?

WITNESS: Yes. Of course, the amount is from, say, $1 to $100; in your courts here, it is what?

MR. FROST: Well, it goes up to $120 in personal actions, but in certain other cases, where it is ascertained by signature, and so on, or by a contract, it varies from $200 up to $400, so that, actually, the total jurisdiction under our Division Court Act is much higher than your jurisdiction.

WITNESS: I guess your lawyers are less active than the lawyers in Montreal.

Q. It may come from that, or it may come from several things, that business might be better, but it also might come from the fact that our Division Court Act is not as efficient as this Act, and the people do not use it, that may be the case.

MR. LEDUC: When you say 30,000 writs issued, you mean writs of summons?

WITNESS: Oh yes, that doesn't mean judgments. Sometimes you can settle before the hearing.

Q. But that doesn't include the writs of execution?

A. No, just summons.

MR. CONANT: May I ask you this one question, because this is what disturbs me, in your Lacombe law, that it is a matter of faith, a matter of putting confidence in the debtor, now, having invoked that law, which puts the debtor on his honour that he will, each pay day, pay into court $2 or $3 or whatever it may be, can the claimant, or the plaintiff, at a subsequent time, if he loses confidence in the debtor, resort to his garnishee remedy?

WITNESS: Not while he is following this law.

MR. LEDUC: But if he doesn't?

WITNESS: Oh yes, then he can.

Q. Suppose that a man pays $3 on a pay day, or within three days and the creditor believes that the man should pay $5, what remedy has he?

WITNESS: He can bring him ——

MR. LEDUC: Oh yes, 697e.

WITNESS: He has a judgment against the debtor, he has the right to bring him before the clerk of the court and examine him, because this is not a garnishee, the Lacombe law stops the garnishee only, but he has the right to bring him before a court every week to find out if he really pays the seizable portion of his wages, and whether he makes more money which he hasn't declared to.

MR. CONANT: Yes. And I want to get this clear: under certain circumstances this can be invoked for judgments of all your courts, including the magistrates' and Superior Courts?

WITNESS: Oh yes.

MR. LEDUC: The examination, that is, yes.

MR. CONANT: No, but the scheme of paying in can apply to all the judgments.

MR. LEDUC: Oh yes, but it is always under the magistrates for service, but it applies also in all the claims against a debtor within the jurisdiction of these courts.

MR. SILK: Yes. Now there is only one section left, and I think your suggestion is that this section is not proper and should be replaced?

WITNESS: Yes, but perhaps it would be well to read it.

MR. SILK: Yes, well it now reads in this way: 697h:

> "The clerk of the court where the debtor makes his deposits collocates in the first place to the plaintiff for his costs of suit, and every quarter fixes summarily, rateably and without cost, the amount coming to each creditor and he remits such amount to the last address which the creditor

has furnished to him, unless the creditor or person authorized by him has claimed it at the office of the clerk within fifteen days of distribution."

WITNESS: This distribution is supposed to be made every quarter, every three months. This has not been put in practice, and it is impractical.

Q. Why?

A. Because the clerk, with all these deposits, if he were to follow that, would have to do all this work within a few days of every quarter.

MR. CONANT: Well, what are you going to substitute for it?

WITNESS: Well, I have here—these, of course, are personal suggestions for an amendment:

"The clerk of the court where the debtor makes his deposit shall collocate, in the first place collocate to the plaintiff for the costs of suit, and shall comply with the by-laws enacted by the Attorney-General."

It may be Lieutenant-Governor in Council, but I'm not sure, to determine the method and the dates of payment. I would have first, the collocations not amounting to $1—we have collocations for amounts as low as 15 cents—and of course it is quite a job to make a cheque for 15 cents, then I would have, the collocations amount to $1 and more, the collocations attributed to one creditor having several claims against various debtors. This happens very often in the district of Montreal, and the amounts are credited to the various collocations will be credited to him in the ledger and he will receive only one cheque for various dividends.

"To determine the method of accountancy and the dates of payments, so as to permit, as far as possible, of the creditors receiving the collocations for a uniform amount based *pro rata* on the amount of their respective claims and the time of their filing."

"To determine what documents are required to justify a clerk in remitting or transmitting any cheque to a person other than the creditor himself."

"To assure the effective carrying of the provisions of section 697a to g, inclusively."

This would give the right to the Attorney-General to do what he thinks is necessary.

MR. LEDUC: To make regulations?

WITNESS: Yes, to help the carrying out of the law.

MR. CONANT: Are your clerks bonded?

WITNESS: Yes.

MR. LEDUC: Now there is just ——

WITNESS: But they are not, however, bonded for a sufficient amount, it happens that we lose once in a while.

MR. LEDUC: I was going to ask you this: it is the practice, I believe, in Quebec, for the clerk of the Circuit Court and the clerk of the magistrates' court to have a list of individuals who are under the Lacombe law?

WITNESS: Yes.

Q. Now this notice is posted, I believe?

A. No, I will explain that. It used to be, but in large offices, like Montreal and Quebec, they exhibit it to anybody who wants the information.

Q. They have a register?

A. A register where they enter the payments that are made, and all the book-keeping, as a matter of fact, it is a bad thing.

Q. What I have in mind is this, Mr. Juneau: You have section 697f, "Every person who, in bad faith or through inexcusable carelessness or neglecting to properly inform himself, seizes . . ." and so on.

A. Yes.

Q. What is the practice in Montreal now? It may not be in the law, but what is the practice in the province of Quebec when a lawyer is handed a claim against a client? Doesn't he go first of all to the clerk's office to find out if a man has taken advantage of the Lacombe law?

A. Yes, that is what he does.

Q. Yes.

A. But it may happen that this man, the man who is living in Montreal to-day is under the Lacombe law in Sherbrooke, and he does not have any way of finding out unless he brings the debtor before the clerk under subpoena.

Q. Yes, but I mean in that case, if he goes to the clerk of the court where the defendant has his domicile?

A. Yes.

Q. Then he has taken all due precautions to find out?

A. Yes, but at the same time he is not liable for damages, but he loses his costs on the garnishee.

Q. Yes.

MR. CONANT: Mr. Juneau, do you have garnishee before judgment there at all?

WITNESS: Yes.

MR. LEDUC: But explain in what cases, though.

WITNESS: These writs issue upon affidavits, when the plaintiff can swear that the debtor intends to defraud his creditors, or intends to leave the province.

Q. Very much like our Absconding Debtors provisions?

A. Yes, exactly.

MR. CONANT: Well, now I want to understand this, see if I get this right: your Lacombe law provides that, where a man is sued, and within a certain time, he may take advantage of this law in such a manner that, without garnishee of present or future wages, he, in effect promises to pay into court the amount that is subject to attachment and the clerk from thereon distributes it between those who have filed their claims?

WITNESS: Yes.

A. Of course, this amounts to the same thing as if the garnishee proceedings was served on the garnishee.

Q. Yes, well now let me say this: that is distinguished from our practice in this respect, that the subsequent moneys or wages due to the defendant would only be made available if a subsequent garnishee or attachment was taken out for each subsequent payment.

MR. LEDUC: That is Ontario?

MR. CONANT: Yes. Isn't that briefly the situation? Of course, there is a lot more to it, but is that the contrast, Mr. Silk?

MR. SILK: Yes.

MR. LEDUC: Yes, it devoids the necessity for a creditor to garnishee every payment, and it devoids the necessity for all the creditors to issue garnishees.

MR. CONANT: Yes, it is a form of Creditors' Relief.

MR. LEDUC: Thirdly, the employer need not know anything about it?

MR. CONANT: That's right. Well now, answer this for me:

WITNESS: And supposing there is one garnishee in the hands of the employer, and the employer deposits the money into court, all the other creditors, even those who have no judgment, have the right to file their claim in this record. It amounts to the same thing as our Lacombe law, under our general law of the province.

MR. CONANT: Well now, answer this for me, Mr. Juneau: Supposing the defendant, having availed himself of the Lacombe law, and the claimants then seeking to enforce their claims, file their claims, and so on, and the man commences to make his payments, and he continues for some six months, and in six months another claimant comes along.

WITNESS: Yes?

Q. Perhaps the debt has subsequently developed, can he get in the same boat?

A. Exactly.

Q. I see.

A. And this happens: a man, under the Lacombe law—some of them will make other debts, and will continue making debts.

MR. LEDUC: But that is a point you developed a moment ago, a lawyer, befor sueing a man, can go to the court, to the clerk of the district or circuit court where the debtor lives and find out if he is under the Lacombe Act?

WITNESS: Absolutely.

Q. Now a grocer, or a merchant, may also go to the clerk of the court and find out if John Smith is under the Act?

A. Yes.

Q. And if he finds that he is under the Act, he may refuse to give him credit?

A. Exactly, that is the practice, and there are some magazines published giving news from the court, they publish the names of the debtors who have filed their declaration under the Act.

Q. And I suppose Dunn's and Bradstreet's would also publish it in their bulletins?

A. No, I don't think they do, but they have other weekly papers publishing these names.

MR. CONANT: Well now, do the costs mount up, Mr. Juneau? You have quite a lot of machinery here, haven't you?

WITNESS: In Montreal the administration of the Lacombe law costs the government actually over $15,000 a year. Besides the fees they collect.

Q. Yes, but the costs to the defendant, the man from whom they are all trying to recover, don't they mount up, with these filing claims, and contestations?

A. Well, a claim may be increased by $1 or $2 or $3.

MR. LEDUC: Let me put it this way, Mr. Juneau: suppose a claimant files a claim for $500; how much does that cost?

WITNESS: About $2.

MR. CONANT: Including service?

WITNESS: Including service, at least including the mailing to the debtor.

MR. LEDUC: Supposing the judgment is taken against the debtor?

WITNESS: That would be $25 for $100.

Q. And a writ of execution, and the service?

A. About $12.

MR. FROST: Well, that is much higher than our court.

MR. LEDUC: I know, because they have lawyers' fees there.

MR. CONANT: Did I understand you to say that when judgment is taken his costs would be up to $25?

WITNESS: For $100, yes.

MR. LEDUC: How much does the lawyer get out of that?

WITNESS: $16 and something.

Q. As a matter of fact, when the Lacombe law was passed, the lawyers were entitled to a fee even for an action under $25, and they kept on issuing writs of execution and garnishee proceedings practically at every pay day, or every chance they had, so that the debtor was always behind. He made no progress.

A. Yes, he was paying costs all the time.

MR. FROST: Well, Mr. Juneau, just to give you an idea of things here, you take the county of York last year, including the increased jurisdiction, the figures that were given to us here the other day were these: in the county of York, in cases under $10, the average cost was $2.96; now there is no counsel fee, or lawyers' fee in any case under $100; over $100 there is the discretionary power of the judge, in contested cases only. From $10 to $20, the total cost was $4.86; $20 to $60, $6.13; $60 to $100, $7.17; and, according to these figures, included in this statement I have here, out of 10,680 cases in the county of York the average costs, regardless of the size of the case, that is $10, $1 or $400, was $7.15. Now where we run into difficulty is this: that many people have complained of the amount of costs involved.

WITNESS: They would complain if they were in the province of Quebec.

MR. LEDUC: They complain in the province of Quebec also?

WITNESS: Oh yes.

MR. FROST: Of course, one of our difficulties here is that in garnishee proceedings it is necessary to garnishee the salaries time and time again; the one attachment only covers the amount which is on hand at the time that it is served.

WITNESS: Our garnishee can last five years, if necessary.

Q. Yes, and that has meant, in many cases, that there has been a piling up of costs here.

A. Yes.

MR. CONANT: Mr. Juneau, did I understand you to remark that it was necessary to allow solicitors' costs in order to induce invoking the Lacombe law?

WITNESS: No.

Q. That is what I gathered from you.

A. No, what I mentioned was this: supposing a debtor stops making his payment, and the garnishee is taken against his wages; well, sometimes the lawyer, who took the garnishee, will receive settlement of his costs on a garnishee, so as to give the debtor a chance to resume his payments under the Lacombe law.

Q. Well, I gathered from you that unless you allowed the costs to the solicitors, this Lacombe law wasn't very often invoked?

A. No.

MR. LEDUC: Oh no, no, but what Mr. Juneau had in mind was this: the case of a man who quits making his payments; then he is liable to have his wages garnisheed; but very often the person who has had his wages garnisheed will withdraw and let him go ahead making his payments, providing he pays the costs; that is what you had in mind?

WITNESS: Yes.

MR. ARNOTT: With the system of costs that you have down there, Mr. Juneau, it is a great inducement to the debtors to be under the Lacombe law?

WITNESS: Well, I don't know if it is an inducement for the debtor, it prevents many creditors from taking judgments against him. In the end I think the lawyer loses some work. In Ontario the costs are smaller, but the creditors would proceed more often before a court.

MR. CONANT: Well, generally speaking, what is your observation about this question?

WITNESS: About the Lacombe law? I think in the majority of cases it helps both the debtor and the creditor.

Q. It helps both of them?

A. Both of them, because take in Quebec last year, there were 78 debtors who finished paying their debts.

MR. LEDUC: That is in the city of Quebec?

WITNESS: Yes, perhaps they had been paying for three or four or five years.

MR. CONANT: Of course, that is a small percentage of your total, 78 debtors?

WITNESS: Yes, but in some cases, debtors will never pay; in some cases they may have a judgment against them for $10,000, and those who have been selling bonds, for instance, since 1928 or 1929, why ——

MR. LEDUC: They never can hope to finish paying?

WITNESS: No, but at the same time, the seizable portion goes to their creditors.

Q. It doesn't go to the lawyers in payments?

A. No.

Q. Would you mind repeating the figures again? You have given us some figures at the beginning of your evidence, about the amount collected in Montreal and Quebec?

A. In Montreal, in 1939, new depositors, 1,691; depositors who made payments during 1939, 4,500; number of deposits made, 55,000; total of deposits, $307,000; this amount has been paid to creditors, and the amount paid has been paid by 30,000 cheques.

Q. That is for Montreal?

A. Yes.

Q. What about Quebec?

A. In the city of Quebec the amount deposited was, in 1939, $101,909; $98,000 in 1938. The number of depositors, 2,812; and last year about 300 new debtors.

Q. I have here in my notes, in the evidence given by Mr. McDonagh, paid into court, approximately $75,600; would that be payments made by the debtors, or payments made on filing actions?

MR. CONANT: Those would be garnishee payments, would they not?

MR. SILK: We can check that with the statement that you have covering York County.

MR. LEDUC: That looks very much like the amount paid into the court.

Have you anything to show how much money was paid into the Division Courts here following executions or garnishees or anything like that?

MR. SILK: I will see if I can get it from Mr. McDonagh.

MR. LEDUC: I would like to get it to see how it compares with the sums paid in Montreal and Quebec.

MR. CONANT: You remarked that the administration of this law, I think you said in Montreal, costs the government or the province, rather, $15,000 a year?

WITNESS: Yes.

MR. LEDUC: That is Montreal only, or the province?

WITNESS: Only in Montreal, but it costs that amount for many reasons that could be removed. The accounting is too complicated. For instance, you are a creditor, and file a claim for $50 against a man, and three months after you receive a dividend of 2 percent, and will pay you a dividend of $1, and in the next quarter will calculate your dividends on $49, and not on $50, so by some method it could be stated that the dividends would be paid prorated to the amount of the claim at the time of the filing. The result would be ——

Q. At the time of what?

A. At the time of the filing of the claim.

Q. Yes?

A. I understand they have followed this practice because claims would be filed one or two or three years afterwards, and they didn't want the judgment to be paid in full before the claim. As the law stands now, the debtor can continue his payment whether the judgment is paid on that, the moment there are claims.

MR. SILK: The smaller claim would receive less each time, and the larger claim would receive more?

WITNESS: Yes, but I think it would be fair if the original amount was always taken into consideration for further dividends, because the interest of the creditor is always $50, if his original claim was $50. If it was a debt contracted afterwards, his should be the last one to be paid, and it would save a lot of accounting, because the first list of distribution being prepared, if it is kept and if the next one is paid the same dividend, you don't have to do the work over again.

MR. SILK: I see Mr. Juneau has another page or so of proposed amendments to the Lacombe law, does the Committee wish to hear them?

MR. CONANT: Well, he could summarize them, I don't know that we need all the details.

MR. SILK: They are mostly matters of administration.

MR. CONANT: I suggest this, gentlemen, if the Committee are going to recommend the adoption of this principle, there is a lot of detail that would have to be worked out that we couldn't attempt to construct now.

MR. SILK: I think these are mostly matters of detail and administration?

WITNESS: Absolutely.

MR. CONANT: What impresses me, and someone of my colleagues mentioned it, this must develop into a tremendous amount of book-keeping and accounting, doesn't it, Mr. Juneau?

WITNESS: Well, if they were limited to the strict accounting it would be easy. The depositor, for instance, receives a kind of bank book.

Q. A bank book?

A. It looks like a bank book, and when he comes in, the amount he pays is credited in his book. That is his book-keeping, and for the office of the clerk, if a man pays three dollars a week, say, for three months, well these are entered to his credit, and the full amount is divided amongst his creditors, but sometimes every quarter is too often for small claims.

Q. But in the aggregate, as a general observation, doesn't it involve a tremendous amount of detail in book-keeping records?

MR. LEDUC: What about the clerk of the Division Court here, when a man pays so much a week or so much a month, if the man is under garnishee, and there are $4.50 paid in ——

MR. SILK: If they are paid in or paid out, it requires a certain amount of book-keeping.

MR. LEDUC: We have always had that, there would be an increase of it, of course.

WITNESS: The active book-keeping should not be more than the actual book-keeping of a bank.

MR. CONANT: But you have said, Mr. Juneau, dealing with your scale of fees, which is higher than ours, that it costs the province $15,000.

WITNESS: Yes, but on the Lacombe law, practically everything is done without cost, I think, besides the fee for filing.

Q. What is that?

A. Without cost; the fee for filing the claim is about, sometimes, 50 cents or one dollar, but when the amount is paid over the clerk charges 2 percent. But the whole administration should not cost more than 4 percent or 5 percent.

Q. Yes, but you say it costs your province $15,000?

A. Because we accept practically only 2 percent, and because our accounting is too complicated; it should be reduced.

Q. Oh yes.

A. For one of the reasons that I mentioned there.

MR. LEDUC: In your opinion then, Mr. Juneau, with the small fee which you mentioned for filing claims and the 2 percent fee on distribution, the court should be self-supporting?

WITNESS: Not altogether.

Q. What percentage would you require?

A. I would suggest 5 percent, half payable by the debtor and half by the claimant, but I would permit the debtor to file his declaration without charge, and the creditor to file his claims without charge.

Q. That is, you would charge only where there was money available to be charged?

A. Yes, and according to this, if there was, if we had $100,000 in Quebec, it would give us $5,000; we have five employees to work out the administration, and I think they could do it with three, easily.

MR. SILK: I see in your proposed article there, that "the clerk shall not claim the fees provided for certain tariffs."

WITNESS: Yes, this is practically a second Lacombe law; that is one of my suggestions; instead of charging for any declaration and charging for filing any claim, I would suggest that when the debtor has deposited $50, before the distribution of his $50, we would charge $2.50, 5 percent, and in the end $1.25 would be charged to him and the other $1.25 would be charged to the creditor.

MR. CONANT: It would make the province partners in the undertaking of the enterprise.

WITNESS: Yes, I would suggest that the clerk do a little more than he does, actually; according to this draft here, I suggest that the clerk give notice to the creditor for the claim, and when the debtor has delayed his payment for say ten or fifteen days, so that the creditor would not have to come to the court to find out.

MR. LEDUC: You mean to give notice to all the creditors, or only the original one?

WITNESS: To all the creditors who have filed their claim. Of course, this notice could be sent out at the same time as the cheque, you see, and the cost of sending the notice would not be heavy, and it would justify the increase in percentage charge, and moreover, we find debtors who stop making their deposits in one district, and they move to another district, and they file a new declaration

there, because it is the place of their domicile, and the creditors who have already filed their claims, and paid for the filing of the claim, have to go all over that again.

Q. So you would abolish the fee for filing the claim?

A. Yes, in those cases, I would suggest that the clerk be authorized to file one claim in his capacity of clerk in the second record, and he would receive his share, and this share would be paid over to the creditors who have filed their claim in the first place.

Q. Yes?

A. So it would help the creditors. I have seen a case, lately, where a man or a debtor in Montreal stopped paying because he was out of work; he went to Athabasca and, according to the law, he had to file a declaration at his place of domicile, and the clerk of Montreal could not send the claims to Athabasca. So I think that would correct that situation.

Q. You said a moment ago, Mr. Juneau, that there was no obligation on the clerk to have a list of the debtors who were under the Lacombe law; as a matter of fact, they do?

A. They do.

Q. Or a register?

A. Because if the debtor does not make his deposit within three days, it is the only way in which the creditors may find out.

Q. Are these registers kept in alphabetical order?

A. Yes.

Q. So it is quite easy, and it doesn't take very long to find out whether a man has taken advantage of the Act?

A. Oh no, everything is kept in alphabetical order; in Montreal I believe they have two books for just the one letter. It is very easy.

MR. SILK: I was just going to ask you about the time occupied by the officials; for instance, take the Circuit Court of the district of Montreal, would the administration of the Lacombe law take up the full time of one clerk?

WITNESS: Oh yes, we might have ten or twelve employees.

MR. CONANT: Ten clerks?

WITNESS: Yes, there are too many, and there is too much red tape; the amendments and regulations that I suggest will save a lot of this red tape.

MR. LEDUC: You must remember, gentlemen, there is much more litigation

in Quebec than there is in Ontario. You gave us the number of writs issued in the Circuit Court in Montreal as being 30,000; how many writs would be issued in the Superior Court office in Montreal in one year?

WITNESS: About 12,000.

MR. SILK: Well, just to clear up that other point, Mr. Juneau, would those ten clerks all be working full time in connection with the work on the Lacombe law?

WITNESS: Oh yes. Yes, but I don't like their way of proceedings. We have six clerks whose work is to make the entries in the book, always in the same books, and I call them the "six churches"; they manage their small affairs, and my intention is to do away with this, because sometimes one creditor will come to them and ask them to prepare a dividend and he will make it one or two months ahead of time. I would like the clerk himself to have more authority in this question.

Q. I was just going to end by saying there is no doubt a good deal of book-keeping involved in that particular office.

A. We have more book-keeping than in a bank, and it should not be.

MR. LEDUC: It could be simplified?

WITNESS: Very much.

Q. Now, Mr. Juneau, has there been any movement, in Quebec, or demand for the repeal of the law?

A. Oh no, only demands to improve it.

MR. CONANT: But you have, in Quebec you have no peremptory procedure for the collection of debts; there is no order to be made by a court, there is no committal to jail? It all comes down to a matter of seizure or attachment?

WITNESS: Yes, absolutely.

Q. Yes. Has it always been that way?

A. No, many years ago they had imprisonment for debts.

MR. LEDUC: That is over forty years ago?

WITNESS: Yes, because when I studied law, it was done away with.

MR. CONANT: You see, this is rather an exceptional matter; if Mr. Edge or Mr. Gale feel they can add anything by asking Mr. Juneau questions, we shall be glad to have them do so.

MR. EDGE: It is very good of you, sir, but it seems to me Mr. Juneau has cleared any questions that have been asked, and made the operation perfectly

clear as far as I am concerned. I appreciate there are details, but the principle of it seems to me is made perfectly clear by Mr. Juneau. I think we recognize here, that our Division Courts have practically fallen into disuse so far as the profession is concerned. The fact is that it is almost impossible to recover there, and anything that may be done for garnishee purposes to improve our present situation would certainly be very worth while, and the procedure as outlined by Mr. Juneau seems to be very simple, I would think, and very effective. There is just one thing, that a man must have a judgment, as I understand it?

WITNESS: Yes.

Q. If a man is indebted for $100 and he is working for the C.P.R., with the C.P.R. having the rule that they would probably dismiss on a garnishee, the creditor sues for his $100 and takes his judgment, and then, having obtained the judgment, the debtor, as I understand it, immediately files his declaration?

A. Yes.

Q. And the Lacombe law applies?

A. Yes. And he has eight days in which to do it, because the writ of garnishee cannot be issued before eight days after the date of judgment.

Q. After the judgment?

A. Yes, eight days in summary matters and fifteen in others, so he has a delay of eight days or fifteen days in which to file his declaration.

Q. And, therefore, it never comes to the attention of the C.P.R.?

A. No, or his employer, whoever he may be.

MR. CONANT: Yes, that is one advantage, no doubt about that.

MR. EDGE: Very much obliged to you, sir.

MR. CONANT: Mr. Gale?

MR. SOWARD: Soward is my name. I am appearing for Mr. Gale this morning. There is one question; I wondered about this: in our Division Courts, now, a good deal of the work in the case of debtors is done by the debtors themselves; that is, they don't employ a solicitor in either the defence or for the plaintiff; now is this Lacombe law sufficiently simple that it is not necessary for the debtor to employ assistance?

MR. CONANT: You mean the debtor or the creditor?

MR. SOWARD: No, the debtor, I am wondering what change that would make?

WITNESS: Well, many debtors go to a lawyer in order to arrange things for them, you know.

MR. LEDUC: As a rule, don't they go themselves to the clerk of the court?

WITNESS: Oh, about 50 percent, I guess, will go themselves.

MR. SOWARD: The procedure is sufficiently simple that the clerk can assist them, as he does under our procedure?

WITNESS: Oh yes, even now, the clerks of the court, who receive a salary from the government, furnish the forms and fill them in for the debtor. They arrange that for them, in fact, they sometimes help so much that the lawyers complained.

MR. MAGONE: Mr. Leduc was asking about the money paid into the Division Courts in Toronto. Taking the three Division Courts in Toronto, the I, the VIII, and the IX, there is $116,218.

MR. LEDUC: Does that include only garnishee proceedings or also executions?

MR. MAGONE: That is all the money paid in.

MR. FROST: And in the city of Montreal, under the Lacombe proceedings, it is $300,000?

MR. LEDUC: Well, the district of Quebec has a population of roughly one third, we'll say 45 percent, of that of the county of York, and they collected $98,000 under the Lacombe law alone, as against $116,000 altogether in the county of York.

MR. STRACHAN: What about the I Division Court?

MR. MAGONE: It had $75,619; the eighth Division Court, in West Toronto, had $27,595, and the ninth Division Court, in East Toronto, had $12,992.83.

MR. CONANT: Mr. Juneau, are your proposed amendments and regulations sufficiently formulated that they are likely to be considered by your Legislature?

WITNESS: Yes.

MR. LEDUC: At this present session?

WITNESS: Yes; of course, it was not presented to the attorney-general yet. The Legislature is sitting now, but this has not been placed before the attorney-general yet.

MR. CONANT: Will it be before your Legislature this session?

WITNESS: Very likely.

Q. So that, in the course of a month or so, we will know what has evolved out of your recommendations?

A. Oh yes, very likely.

MR. LEDUC: But I notice that in those amendments, you give power to the attorney-general or Lieutenant-Governor in council to make regulations concerning the law, so the implication is that the book-keeping, and fees and so on, would be looked after by regulations?

A. Yes. I think the more simple we make regulations, especially in matters of administration, the better. As I said before, when a debtor goes under the Lacombe law, generally he has only one debt, and I suggest that the clerk accept his declaration free of charge, and if the creditors have to file their claim—well, if they are filed free of charge, they won't complain, they won't turn around and say: "Well, will this man make two or three deposits and then stop, and are we going to pay this money for nothing?" It means a lot of time for the clerks and for the employees; so if we were to accept the claims and declarations free of charge, and have the cost of administration paid by a percentage, say four or five percent, it would cover our costs and eliminate those complaints.

MR. CONANT: It all comes down to this; the government or province becomes a collection agency on a percentage basis.

MR. LEDUC: Yes. Well, free of charge, at no cost.

MR. CONANT: Well, if there is money, they get five percent, if there is no money, they get nothing; so the province then is a collection agency on a collection basis.

WITNESS: Well, we are doing the same thing now and we are losing money on it. At the same time, I don't think the lawyers have lost any business through the Lacombe law.

MR. MAGONE: I wondered, if, while Mr. Juneau is here, we might get some information regarding the working of the grand jury system lacking down in the Province of Quebec.

Probably you would like some time to consider what I am going to ask you, and then come back?

MR. LEDUC: Mr. Magone, if you tell the witness what you want on the subject, then he can prepare himself.

MR. MAGONE: Very well.

Witness excused.

Committee rises for lunch recess.

AFTERNOON SESSION

Parliament Buildings, Toronto,
April 10th, 1940.

MR. CONANT: Before proceeding, Mr. Magone, Mr. Juneau, this morning, developed some figures regarding the amounts paid into the courts, and others having to do with the Magistrates' District Courts. I would like you, while Mr. Juneau is here, to reduce that into memorandum form and let us have it, that we might use it along with these others during our interim discussion, before the notes are extended.

Now, what are we proceeding with, Mr. Magone?

MR. MAGONE: We have invited the benchers of the Law Society and representatives of the Lawyers' Club, and of the Canadian Bar Association to be here. Mr. McCarthy, treasurer of the Law Society, is here with some of the benchers, and I think probably Mr. McCarthy would like to be heard at this time.

D. L. McCARTHY, K.C., Treasurer, Upper Canada Law Society.

WITNESS: Well, I don't know, Mr. Chairman, whether there are any particular subjects on which you would like me to convey the feeling of the Benchers of the Law Society. I may say that we went through Mr. Barlow's report very carefully; not only did the committee go through it, but Convocation as a whole went through it, clause by clause, and we had the benefit of the comments that the judges of the High Court had made, so that we had the memorandum of the judges and Mr. Barlow's report side by side, and we took these different matters up as they appeared, and in the order in which they appeared in Mr. Barlow's report, and if I may take up the different matters which you considered one by one and give your Committee, sir, you may have the benefit of the views of the Benchers on those different subjects.

MR. CONANT: Yes.

WITNESS: The first question that was discussed was the question of abolishing of grand juries. That is the first item in Mr. Barlow's report, and there is a division of opinion among the Benchers of the profession, and here is also a divergence of views among the Benchers of Convocation.

Q. Yes?

A. And I may tell you, sir, that in circumstances of that kind, where the Benchers felt that the profession were divided in their views, we thought it wiser not to make any recommendations at all, and so we have made no recommendations.

Q. Well, before leaving that point, because it is of importance—I, at any rate, and I think I express the views of the Committee, although they may speak otherwise for themselves, have been rather impressed with the situation that necessarily arises from the abolishment of grand juries in the case where an indictment or a charge is laid by the Attorney-General. As you are aware,

of course, from long practice, a right that is sparingly and very seldom used by the Attorney-General, has always been in existence, whereby an Attorney-General can lay a charge; under our present practice, Mr. McCarthy, as you know, that indictment goes before the grand jury, and then, if a bill is found, goes to the county judge, or to the petit jury, and some anxiety has been expressed, and I don't think it was intended as a reflection upon the present Attorney-General, that at some time that situation, or that right, might be abused by the Attorney-General. And the Committee has discussed the possibility of preventing that abuse, or of offering a safeguard by way of having such an indictment placed before a county judge who would function as a grand jury, and from whom a true bill would be necessary before any other proceedings could be taken. Would you care to express any opinion on that?

WITNESS: The opinion the Benchers had is very much in line with what you just now said, sir, and what Convocation recommended is that, if the grand jury is abolished, there should be some method of review of an order of a magistrate committing for trial, and that the Attorney-General should not have power to prefer an indictment except with the consent of a judge presiding at the sitting at which the accused would be arraigned. Now, that is the way we framed our recommendation.

Q. I see.

A. There are other members of Convocation who are opposed to the abolishment of the grand jury because it has other functions to perform.

Q. Well, now, will that view be expressed here, Mr. Magone?

MR. MAGONE: I think so; yes, we have other recommendations here.

MR. CONANT: All right, Mr. McCarthy.

WITNESS: Notably, one of the functions of the grand jury is to see that there are no prisoners in jail awaiting trial. Many of the members of the Bench thought that if for that reason alone, the grand jury should be preserved.

Q. Well, now, just dealing with that; that is a new point; I don't think we had considered that point.

MR. FROST: That is a very important point.

MR. CONANT: Yes, but isn't that more of a theory than an actuality these days? Isn't it the invariable practice that any person who is in jail when an Assize comes along, must be tried and disposed of at that Assizes? Isn't that the practice?

A. I think that is the practice. I think it is the theory of the law, but anyway one of the functions of the grand jury is to visit the jail and see there are no prisoners awaiting trial, and for that purpose they interview the jailer and I suppose they meet and interview the prisoners as to how long they had been there, and to see that they hadn't been kept for an unreasonable time without being properly tried.

MR. FROST: I have heard judges ask grand juries definitely for a report on that.

WITNESS: Yes.

MR. CONANT: Of course there are many factors arise there, and one of them is, of course, that we don't have inspections as a matter of course at every Assize.

WITNESS: No. However, Mr. Attorney-General, the recommendation of Convocation was reduced to writing, and the way we have put it is that:

> "Convocation recommends that if the grand jury is to be abolished, and as to whether it is or not we express no definite opinion because we know the opinions of the profession are not all as one, that there should be some method of review of an order of a magistrate committing for trial, and that the Attorney-General should not have the power to prefer an indictment except with the consent of a judge presiding at the sittings at which the accused should be arraigned."

Now as a matter of fact, you know, sir, even when the Attorney-General has preferred an indictment, as a matter of courtesy, it has always been presented to the trial judge.

Q. Well, I was going to observe, Mr. McCarthy, that I have acted as Crown counsel myself, and have some little knowledge of these matters, and with all respect to the opinion of your Association, the safeguard that I outlined seems to me a far greater safeguard than the one you have proposed for this reason, that, while the concurrences of the trial judge is necessary, that concurrence, I think, I might say, would almost as a matter of course be given if the Attorney-General had signed the indictment, or directed the indictment, and without going into the merits of the case, I cannot think that a trial judge at that stage would enter into an examination to any extent to which a county judge would if he were directed to find whether a man should be put on trial or not.

A. I think, Mr. Attorney, what we had in mind was this: that if this power were in the hands of an unscrupulous Attorney-General, and we hope such a thing will never happen, an indictment might be laid and the man would have no means of protecting himself in any way.

MR. FROST: In other words, he might be put on trial for his life without any preliminary inquiry whatsoever?

WITNESS: Exactly, sir.

Q. Or without any indication of the nature of the evidence against him?

A. Exactly.

MR. CONANT: I make this observation: I would be entirely agreeable to the safeguard that you and your Association set up, but I would go further myself, and I would require that an indictment made by the Attorney-General

should be considered on its merits by the county judge to the extent of seeing whether there was a *prima facie* case.

WITNESS: We are not very far apart, sir.

Q. Not very far apart?

MR. LEDUC: You didn't consider that, Mr. McCarthy?

WITNESS: I think that we did not consider that, Mr. Leduc, but I think perhaps it might be a better safeguard than we suggest. All we had in mind, as Mr. Frost put it, is that there should be some safeguard, that a man should not be thrown into jail and tried without knowing anything of the evidence adduced against him without having a preliminary hearing, and without having any knowledge of the conditions under which he was tried or why he was tried.

MR. CONANT: Yes, well then, dealing with the other aspect, Mr. McCarthy, your Association, or those who formulated this report, at any rate, expressed the view that after committal by magistrate, there should be a further review, and without defining it, perhaps, we might suggest that that would be satisfied by a review by a county judge in a similar way. Did your Convocation give its consideration to this fact, that in practically all the jurisdictions of the British Empire now, and with very few exceptions, of which Ontario is one of the largest and most important, in practically all the jurisdictions of the British Empire they go from magistrates' commital to trial without the intervention that you suggest?

WITNESS: I have no doubt, and I am quite sure that a great many of my fellow-benchers knew more about this practice than I did, and if there are any of them here—I see Mr. McRuer here—perhaps Mr. McRuer would be in a better position to answer your questions. I also see Mr. Peter White here, and they have both had much more experience than I have.

Q. I was asking in passing; am I not right in my statement of facts, Mr. Magone?

MR. MAGONE: Yes, that is the situation, except that when they made the change in the law in England, they provided the safeguard that the Benchers asked for here.

MR. CONANT: In what respect?

MR. MAGONE: That in an indictment preferred by the Attorney-General ——

MR. CONANT: Oh, no, no, we are dealing with committals by magistrates.

MR. LEDUC: Mr. McCarthy, I understand you said, I believe, that there should be some method of reviewing the committal by the magistrate.

WITNESS: Yes.

Q. Is it the opinion of the Benchers that in each case there should be

review of the magistrate's committal, or only at the request of the accused, or at the option of the Attorney-General? I mean would that be compulsory, or would it be optional?

A. Well, to be quite frank, Mr. Leduc, I don't think that question was discussed. I think it was just put down that way because we felt we weren't going to express an opinion as to the abolishment of the grand jury, but all we said is that if it is going to be abolished, we would like to see the necessary safeguards provided, and the safeguard which we suggest either at the instance of the Attorney-General or the accused ——.

MR. PETER WHITE, K.C.: If you will allow me, Mr. Chairman, I would like to say that Mr. McCarthy hasn't in mind the fact that that matter was discussed, and the way in which it was brought up in Convocation, it was regarded as a safeguard for the accused, so that it would be at his request, that a review would take place, but not as a matter of course.

MR. CONANT: Perhaps we should leave it this way, in order to keep our procedure as regular as possible; perhaps some of the other gentlemen present would deal with that more specifically, Mr. McCarthy?

WITNESS: Yes, they are better qualified to do it, Mr. Attorney-General.

Q. Yes.

A. That is all I have to say in regard to the grand jury. Others may have to say more.

Q. I want to ask one question, if I may.

A. Please do.

Q. One of the problems that confronts us, or any jurisdiction that has abolished grand juries, is this question of special juries; as you are aware, the present provision for special juries arises out of the grand juries system, in the sense that a special jury to-day is chosen from the grand jury lists or panel.

A. Yes.

Q. And if the grand jury were abolished, and we were going to continue the special jury provisions, then we would have to set up new machinery, presumably for selecting special juries from the petit jury panel, and I think my colleagues and I would like to hear you express an opinion if you would do so, as to whether you think the special jury provisions should be continued, having in mind this fact, that in the last ten years, in Ontario, we have had how many special juries?

MR. LEDUC: Thirteen.

MR. CONANT: Yes, thirteen special juries, twelve of which arose in Toronto and one in Hamilton, and none in the rest of the province. Would you care to express an opinion on that, Mr. McCarthy?

WITNESS: Well, I can only say this, Mr. Attorney, I have, perhaps, been in three cases in Toronto in which there had been special juries, and I think the result was eminently satisfactory. They were cases in which an effort had been made to get rid of the jury, but the court ruled against it. They were cases in which, obviously, the man of ordinary education, perhaps, wouldn't understand, and I remember on one jury we had the manager of the Dominion Bank, for instance. It was a highly complicated case, and we had men of that caliber on the jury. They were willing to give their services.

Of course, in England they use them a great deal. One looks in the *Times Law Reports*, and you will see hundreds of cases set down every term, for trial by special juries.

Q. I take it you would favour their continuation?

A. I would favour their continuation, sir.

Q. Yes. Well, that is quite proper.

A. But I am only speaking for myself, I am not expressing the opinion of the benchers.

Q. Oh yes.

A. May I go on to the discussion of the next matter in Mr. Barlow's report? That is the petit jury.

Q. Yes.

A. First, as to the qualification of the petit juries, and exemptions from jury duty. Now, the recommendation of convocation, Mr. Attorney, is that the assessors

> "be asked to obtain more complete information as to the qualifications of those whom they assess as qualified for jury service, and Convocation is in favour of getting the best class of juryman possible."

That is as far as we saw fit to go.

Q. Well, arising out of that, may I ask this, Mr. McCarthy, and as to these questions, while we are glad to have your observation, if you don't care to answer them, it's quite all right. That proposal has given myself and my officers some thought, as it probably has others before us. Can you suggest any practical way in which an assessor could, by designations, indicate to the selectors the qualifications of the men he is selecting?

A. You mean any rule that could be laid down?

Q. Well, for instance, would it be practical that an assessor would indicate on his assessment roll, "this man has a public school education, high school education" or "college education", or any formula for his academic attainments?

A. Well, that was discussed, Mr. Attorney, and I think those members of Convocation who had a very vast experience in jury cases, were of the opinion that perhaps the question of education wasn't everything in the selection of a jury.

Q. No, well I quite agree with that.

A. One goes into the country, and you will find a good jury of common sense farmers, that perhaps would be eminently better able to try the average case than perhaps people who had passed certain examinations in high or public schools.

MR. LEDUC: Who spent four years in learning to split hairs.

WITNESS: Yes.

MR. CONANT: Mind you, personally, I am entirely in favour of the principle laid down, but I have never yet been able to formulate any definitely practical scheme for giving effect to it.

A. Well, in Hamilton, I know, Judge Thompson spent a great deal of time in going over the jury lists, and from my own experience, and I think the experience of others, the juries in Hamilton, for many years, have been eminently satisfactory. And I think, in the average county town, from what I have seen of them, although I haven't seen much of them in recent years, but from experience long ago, I would say the average jury in the county town is a mighty fine jury.

Q. Yes.

A. I personally haven't got the same opinion of the juries in Toronto as I have of those in the county towns.

Q. Yes, Toronto is suffering an eclipse in this investigation; we have had so many reflections on Toronto that I feel sorry for it.

A. Well, I think perhaps that arises from the fact that you have the long, long, sittings here, and men coming from the country, and they become almost professional jurymen. There is too much gossiping and too much discussion around the city hall in Toronto in regard to what is done, and what can be done, and what can't be done. And I think it was a good move when, instead of letting them stay here for a month or six weeks, they changed them every two weeks. At one time, I know, it had got almost to be a scandal. The people began to know from the experience of others in other cases who to take on a jury, and who to leave off a jury.

Q. Well, Mr. Magone, I would like you to make a note of it, and, if you can, present us with any evidence or suggestions as to how Mr. McCarthy's submission could be dealt with in a practical way. I think the Committee would be glad to hear it. Is that right, gentlemen?

MR. LEDUC: Yes.

WITNESS: I have no doubt that members of Convocation who have had more experience than I have with juries can be of more assistance.

Then, the next matter is that of the number of jurors in criminal actions.

The recommendation of Convocation is:

"That a jury of twelve men should be retained in criminal cases."

MR. CONANT: Yes.

WITNESS: Then, as to whether juries should be dispensed with in Division Courts, there being a divergence of opinion both in Convocation and among the profession, we decided not to make any recommendation.

The next point, "should juries be dispensed with in county court civil actions?" And Convocation recommends that no action be taken on Mr. Barlow's recommendation. Mr. Barlow's recommendation in regard to county civil court cases was, that the number of jurymen should be reduced to six in all civil actions.

Q. What do you say to that, Mr. McCarthy?

A. Well, Convocation felt that the same reasons for retaining twelve men in high court actions should prevail so far as county court actions are concerned. It is true, the amount involved may not be as great, but the litigants, the persons themselves, are just as much concerned in a litigation for $500, and $500 means just as much to the poor man as $5,000 means to the man who can afford to take a high court action, and we felt that the poor man's rights should be protected just as well as the rich man's rights, and if it is a poor man's court, and he can only afford to go to the County Court, we didn't see that justice should be dispensed differently in his case from any other case. In other words, if the idea of keeping a twelve-man jury is to get a cross-section view of the community, the man who had to sue in the County Court was, in our opinion, as much entitled to it as the man in the higher court.

Q. Well, did Convocation have regard for the fact that in many other jurisdictions, actions are tried by six men?

A. Yes, I made inquiries myself, Mr. Attorney, when I met some members of the Bar from Manitoba, Alberta and Saskatchewan at the mid-winter meeting of the Canadian Bar Association.

Q. Yes?

A. I asked them how the six-man jury worked out. Well, as a matter of fact, I didn't get a satisfactory answer from anyone, because they said, as a matter of fact, the result of introducing the six-man jury has been to almost get rid of the jury system altogether. They said there are very few jury actions tried in Manitoba, Saskatchewan or Alberta to-day; nearly every action is tried by a judge, but, he said, in so far as a criminal trial is concerned, the accused person of course, objects to the six-man jury and wants a twelve-man jury. That is anybody who is on trial, wants to get every possible opportunity of

disagreement he can, and the chance of disagreement is probably better with a jury of twelve than it is with a jury of six.

Q. But I don't think it is improper, Mr. McCarthy, to observe, with reference to the information that you get, that none of the jurisdictions have made any move, apparently, to alter the six-man jury arrangement?

A. No, they have not, but what they told me ——

Q. And we are also aware that in England, quite recently, since the war broke out, they enacted that a jury might consist of not more than seven, was it?

A. I think so.

Q. I don't know why the seven, I can't understand that.

A. Now, I don't want to put their opinion forward as carrying very much weight, because there were only two or three men from each province, and they were probably men who were not familiar with this class of litigation at all.

Q. Yes.

A. And all they said to me is that; as far as we know, the six-man jury has worked out pretty well, but the effect has been that there are very few jury actions tried in these provinces at all.

Q. Well, of course, that might not be an unmitigated evil, you know.

A. No. Then in regard to the next question in Mr. Barlow's report, as to whether juries should be dispensed with in Division Courts, Convocation, under the circumstances, and in view of the divergence of opinion in the profession, decided to make no recommendation of any kind.

Then the next question in Mr. Barlow's report is, as to whether juries should be dispensed with in county court civil actions, and the recommendation of Convocation was that no action be taken on Mr. Barlow's recommendation. Then, as to whether the number of juries should be reduced in civil actions, Convocation recommends that no action be taken on Mr. Barlow's recommendation.

Then, as to whether the private litigant should bear the expenses of a trial by jury, Convocation were very strongly of the opinion that no change should be made as to that.

Then, as to what the right is of a civil litigant to a trial by a jury, Convocation decided to make no recommendation, as there seemed to be a very distinct difference of opinion as to that.

Q. Well, may I ask, that item No. 7, on page B7, starting at the foot of the page, that is a recommendation along the lines of that adopted in several other jurisdictions, including England, itself, is it not, Mr. McCarthy?

A. The right of a civil litigant to a trial by jury?

Q. Yes.

A. I think there have been some changes, but we made no recommendation as to that, because there is a very distinct feeling in the profession, some think that a change should be made, others thinking that a change should not be made.

Q. Well, Mr. Barlow says here, at the middle of page 9, that under the English practice, whether or not the action is to be tried by a jury depends upon the material presented to the court, which of course is the opposite to our practice, is it not?

A. Yes.

Q. Yes, we serve a jury notice, and the opposite party can move to strike it out, the onus being, in our case, upon the man who challenges the right to the jury, and in England, the responsibility being on the man to assert his right to a jury?

A. Yes, well as I say, there are members of the profession who are in favour of Mr. Barlow's recommendation and members opposed, and under those conditions we didn't think Convocation had any authority to make any recommendation whatsoever.

Q. Well, would I be transgressing if I were to ask your own view?

A. Well, having had so little experience, I would rather not express an opinion.

Q. I see. All right, that is quite all right.

A. On that point, Mr. Attorney, you know, I often feel ——

Q. No, Mr. McCarthy, I didn't mean to be at all ——

A. No, no, I don't mind; I think you are entitled to my opinion for what it is worth. I think it is really the abuses of the system that have really called for the change. There is no doubt that I have in mind, and a great many other people have in mind what we would regard as abuses of the system of bringing in juries in some cases. There are also people who think that actions would never be brought if the jury system didn't exist, but as along as the plaintiff has a right to a jury, then he can always say to his client: "Oh, well now, we have a right to a jury in this case, it's worth your while taking a chance, come along, let's go to it." There are a lot of people who think that is wrong; perhaps it is. On the other hand, if a man knows that he hasn't got the right to a jury, but he can only get a jury by asking for it, he is not going to be so liable to plunge his client into litigation. But of course, I have also this in mind, that a great many members of the profession practice before juries, and practice successfully before juries, and if they were deprived of the right to the jury, or the right to the jury notice, it would be regarded as a great wrong as far as they are concerned.

Q. Wrong to whom?

A. To the profession.

Q. The profession?

A. Oh, yes, there is a very strong feeling in that regard.

Q. Oh, but surely, Mr. McCarthy, you don't regard the administration of justice as being entirely and solely for the benefit of the profession?

A. Oh, no, I don't think that by any means, but there are people who think that their clients have a right to have their case tried by a jury, and I don't mean that because they actually make their living out of it, but there is a very strong feeling in the profession that the jury is a right which exists, which the people recognize as a right, and which the profession recognizes as a right.

Q. Well, how do you account for the fact, taking the other position, that in England, in a far larger jurisdiction, with the background for centuries for this sort of thing, they were undoubtedly seized of all these considerations, ——.

A. Oh, I am only telling you, Mr. Attorney, what the feeling is.

Q. Quite.

A. In the profession.

Q. I see.

A. That a great many people feel very, very strongly that there is a right to a jury which should not be taken away from the people.

Q. Well, perhaps we will be able to get some of those expressions.

MR. FROST: Of course there is this to it, Mr. McCarthy, that, aside from what the profession may think, the jury system is a great safety valve for our democratic system, and particularly in these times when we have so many dictators and infringements on the jury system are apt to be looked upon with suspicion by the people generally.

WITNESS: Well, that is quite true, Mr. Frost.

Q. I mean as a matter of public policy.

A. And you have expressed the feeling of some members of Convocation better than I have; they feel that it is perhaps one of the bulwarks of democracy, that the jury system has been in existence for a great many years, and the public have come to recognize it, just as they recognize the Division Courts and to deprive the public of the jury system is, in the opinion of the members of the profession, something that should not be done.

Q. And the man in the street looks upon that as something that guarantees him a square deal?

A. I think there is a great deal in what you say, sir.

Q. Even if it doesn't?

A. Yes.

Q. Even if it is cumbersome and clumsy, and in some ways expensive, it is a matter of public policy to guarantee the man in the street the feeling that he is entitled to a square deal from 12 of his fellow-citizens, something that you can't very lightly interfere with?

A. No, I suppose it is the same in a criminal trial. A man is entitled to have his rights determined by a jury. I suppose it is the same in a civil case; a man feels "Well, I'll get a square deal from 12 of my fellow-citizens." Whether he does or not is another question, but there is that feeling, and as I say, some members of the profession feel very strongly that in a democratic country, a man ought to have the right to have his rights, whether they are civil or criminal, determined by 12 of his fellow men.

MR. CONANT: Well, I think that again, is subject to the observation, and I don't quarrel with that viewpoint, but the same background and the same jealousy of the rights of the individual exists in England, as they do here.

WITNESS: Undoubtedly.

Q. And yet they have taken this very advanced step.

A. They have indeed; I don't know whether it is unanimous. It has been done, I know, but—however, as I say, we make no recommendation.

Q. All right.

A. Then, the next matter is the additional or alternative jurymen in criminal actions. In regard to that Convocation recommends there be no change. That appears on page B11 of Mr. Barlow's report. He says:

> "Every possible provision should be made to avoid interruption and mistrial through the illness or inability of any juryman to fully perform his duty."

And he thinks that some amendment should be made to provide for a change in the procedure, and he suggests that two extra jurymen should sit with the jury throughout the trial, in the event of a juryman being incapacitated, to act in his place. Convocation didn't think that was necessary, to have two extra men sitting around in every criminal trial. To have two extra men sitting there, they thought, was an objectionable feature, and after all, there is no record of any great injustice ever having been done by the fact that any man has had to drop out during a criminal trial, and we thought that might lead to all kinds of complications, if you had two extra men sitting in every trial that came about.

Q. Well, without taking advantage of you, Mr. McCarthy, is it not the practice at the present time in a civil action? The parties may agree to continue with the remaining jury?

A. Oh yes.

Q. Well, where do we stand in the criminal trial?

MR. MAGONE: You would have to commence *de novo*, with a new jury.

MR. CONANT: You can't even continue with consent?

MR. MAGONE: No, it doesn't happen very often; Mr. McCarthy, in your experience, have you ever encountered it?

WITNESS: Yes, I only know of one case where it happened; but there may have been others that I wouldn't know about.

Then, "should the Court of Appeal be given wider powers on appeals from a verdict of a jury in a civil action." Now as to that, Convocation didn't think that they should make any recommendations.

MR. CONANT: That is a rather large question, isn't it?

WITNESS: It is a pretty large question.

MR. MAGONE: It is tied up with the question of abolishing juries except with consent of the judge.

WITNESS: Yes, well, I have always felt myself, if I may express my own opinion in regard to that—we have a rule which gives us the right of appeal.

MR. CONANT: Yes.

WITNESS: And on occasions, when we exercise that right and appeal, we are told by the Appellate Court: "Now, we cannot interfere with the finding of a jury." Well then, the obvious thing is, why not abolish the rule? If the rule says that there is a right of appeal from a jury's verdict, and we get before a Court of Appeal and they simply hold up their hands and say: "Well, the jury have decided." "What right have we to interfere," it seems to me an incongruous state of affairs.

Q. I am not challenging the remark, because you know better than I do, but are you correct when you say, the Court of Appeal says you can't interfere under any circumstances with a jury's verdict?

A. Oh, on a finding of fact.

Q. Oh yes.

A. Of course, then we are complicated by this: the Court of Appeal d'd undertake to interfere with the findings of fact in certain cases, and the injured party went to the Supreme Court in Ottawa, and the Supreme Court in Ottawa promptly restored the jury's verdict. Then you get this situation; you go back to the Court of Appeal, and they say: "Well, we may think the jury is wrong, but the Supreme Court of Ottawa have said to us, 'you have no right to interfere with the jury's verdict,' therefore your appeal is dismissed." I mean, it is an unsatisfactory situation, which I think requires consideration, or a remedy of some kind. It is very much the same with a trial judge in a finding of fact, although the rule is not applied so severely as it is in a jury's finding, but one is

met time and time again by the Appellate Court saying: "Oh well, Mr. Justice so and so saw this witess, he saw his demeanour, and he was in a better position to judge as to his veracity than we are; why should you ask us to interfere?" Well, let us abolish the appeal under those conditions, because people certainly appeal thinking they have a right to appeal, but we are met time and time again with that situation.

MR. FROST: What do you recommend, Mr. McCarthy, to meet that situation?

WITNESS: Well, I am not in a position, sir, to recommend anything. I have heard a great many suggestions. Mr. Barlow has a possible remedy for it, but the profession are not in agreement by any means, as to whether anything should be done, but it has always seemed to me to be an absurd state of affairs, when the rules provide granting you the right of appeal, you exercise that right, and you are told "you might as well not be here".

Q. On a question of fact, you are actually precluded from any appeal.

A. Practically, that is the point.

MR. MAGONE: "If there is a scintilla of evidence, we can interfere; if there is no evidence, we can't interfere."

MR. CONANT: Don't you run into this difficulty or danger, if you enlarge the jurisdiction of the Court of Appeal, that you are more or less nullifying or duplicating the functions of the jury?

WITNESS: Oh, that is the argument, Mr. Chairman.

Q. Yes.

A. Of course, a jury of twelve men are appointed to try the facts, and that being so, what right have we to interfere.

Q. Yes.

MR. MAGONE: It is a jurisdiction, I might say, Mr. McCarthy, that the Court of Appeal constantly exercises in criminal cases?

WITNESS: Oh yes.

Q. By saying there has been a miscarriage of justice, and they interfere with a finding of fact by a jury under their power?

A. Yes.

MR. CONANT: Well, disassociating the problem—because I think this is an important item, they are all important, as a matter of fact—it has taken us some time to get the law settled as to what it is now, has it not?

WITNESS: Oh yes.

Q. That is to say, judicially settled as it is now?

A. Yes.

Q. Taking this from the standpoint of the public alone, as distinguished from the lawyers' and the judges' standpoint, would it be in the best interests of the public, the people, to enlarge those powers, or is it in their best interests to leave it the way it is now, judicially established?

A. Well, the profession are divided in their opinion as to that, Mr. Attorney; that is why Convocation saw fit not to make any recommendation.

Q. Well, that is quite all right.

A. There is a divided opinion, undoubtedly.

Q. I suppose it would encourage appeals if the powers were enlarged, would it, Mr. McCarthy?

A. I suppose it would; there is no doubt if a man—but as Mr. Magone says, I think the rule is that if there is evidence, which, if believed, would justify the verdict or the finding, we wouldn't interfere. Now if that rule were otherwise, then no doubt there would be more appeals.

Q. Yes.

A. Then the next question was the question of pre-trial procedure in civil actions. Convocation is very much opposed to the suggestion.

MR. MAGONE: Were there any reasons advanced for that opposition, Mr. McCarthy?

WITNESS: Well, I can only give you what some members of Convocation have felt in regard to it. In the first place, the only place that it could be made applicable at all, would be practically in Toronto, or perhaps the larger towns. But how are you going to pre-try a case that is going to be tried in Barrie in two months' time? What judge is going to pre-try it? And to what extent is he going to interfere with the rulings of the trial judge who ultimately comes to try that case?

MR. CONANT: Well, of course, may I interrupt with this observation: I think that it is proper to say that such a system would be most useful in the larger jurisdictions, such as Toronto, Hamilton, Windsor, and London.

WITNESS: Well, the only way that I see it could be made useful would be ——

Q. I might say that the usefulness of such a system might apply more to those jurisdictions than the other jurisdictions. However, I am not expressing any opinion.

A. No, quite so. But you see, they did try it to a certain extent in England

some years ago, and those of us who were present at a bar meeting of the Canadian Bar Association in Ottawa, where Lord Roach spoke, will remember that he told us then of a system, that he was very much in favour of then, which was something in the nature of a pre-trial system. But it only applied to what he called commercial cases, and the system which he had in mind, and which they have endeavoured to work out in England was this: they have in England what they call a commercial list, and a judge is appointed a judge of that commercial list. And the idea was that all interlocutory motions in those particular actions, which came before him for trial should be made before that judge, and that all interrogatories, which is the English word for discovery, should be settled by him, and that as many admissions as could properly be made, should be made before him before trial. Well now, the last time I saw Lord Roach was two years ago, and I asked him how that had worked out, and he said it hadn't been satisfactory, and had been practically abandoned; the reason was that, for instance, counsel change, judges change, some judges object to the procedure adopted by other judges in what you might call pre-trial. Then, you might have one counsel who is engaged this Monday, but on the pre-trial procedure, he might not be available when the action came to trial later on, and the feeling was that it really was an impractical thing and could not be worked out.

Q. Well, we are very glad to have your views, I'm sure.

A. Then the next point was the question of assessors and experts. Convocation is opposed to making any change at present, but recommends a further study of the subject.

Now, as you know, Mr. Attorney-General, the present rule in regard to experts is, that a judge has the power to call in an expert to advise the court. But Mr. Barlow's suggestion is, that the whole question of expert evidence be determined by an expert employed by the court. Now I have been in two cases—and I think, perhaps, they are the only two cases I know of—one, quite recently, in which Mr. Magone and I were engaged, and in which Mr. Justice Roach called in an expert on electrical matters which he couldn't understand, but with the assistance of the expert, when the expert evidence was offered by either side, the expert who sat beside the judge was able to tell him exactly what this meant and what that meant, and if he was in any doubt as to what the experts meant, they used to retire to the judge's room so that the judge would understand, with the assistance of the expert, exactly what the two experts meant, and what the application of the expert evidence was. I remember years ago, another case in which Mr. Rowell was on the other side, a case in jury, which was tried in Toronto, too, and I remember Mr. Justice Middleton was presiding, and he got a Mr. McRae, I think his name is, an expert from Montreal, to come and sit in and advise on a question of process patent. Those are the only experiences I have had, but they both worked out extremely well, because each side presented its expert evidence, and the judge, being in doubt as to the evidence, and not being perhaps, able to understand the technicalities, had this man sitting beside him who acted as an assessor does in England, and so was able to keep it straight and was able to understand the evidence as it was put in. But we think it is a subject that might be studied further. I had a little experience once, in England, not as counsel, but sitting in an admiralty case in the privy council, on an appeal from Montreal, in a collision between two boats. And the learned members of the committee not being able to understand nautical

terms, they sent for two assessors from the admiralty, who came over and sat in the privy council, so that when different subjects were discussed which the councillors didn't understand, they would beckon to these gentlemen to come over and would say, "what does this mean, what does that mean," and they were able to advise them and help them in understanding the argument. That is the only experience I have had with assessors, but we thought it was a subject that might well be discussed and studied further.

Q. Mr. McCarthy, doesn't it perhaps, not often but sometimes, happen that litigation goes on interminably, as a battle between experts? Let's see, how many can you call on each side?

A. Only three without permission of the court.

Q. Yes.

A. No, I think the judges have been very loathe to extend the number of experts. Of course, in medical cases, may I say this, I happened, the last time I was there, I happened to go into an English court, a jury court, where they were trying a case, I remember quite well in which a man was taking a trip on the boat to the Isle of Wight, and being in the bar, a bell fell off the top shelf and hit him on the head, and he brought an action against the steamship company; this case was being tried, and I noticed that no medical evidence was given by either side, and apparently the practice was for the court to appoint an assessor or expert, call him what you like. He conferred with the two medical men called by either side, but who didn't give evidence, and then, as a result of the conference between those five men, a report was handed in as to the man's condition, which was accepted as a finding of fact, and that is as far as it went; the judge read it to the jury.

Q. But doesn't our present system here, where you have a right to three experts, doesn't it result in two things: one is the prolongation of trials, and the other one is the very serious disadvantage of the poor man, because, under our present system, is it not the case that the wealthy litigant can employ experts, with his means, that are denied to the poor man?

A. Yes, but it is always a question as to the weight which a judge may attach to the evidence, and if the judge has the advantage of having an expert sit with him, if he thinks it is necessary, that is if he can't fathom the situation himself ——

Q. Oh yes, but the present system does nothing more than to augment the judges' scope; the proposed system would simplify proceedings; I mean, as I understand it, instead of having three experts on each side, an expert would be appointed to hear all the facts and all the scientific formulae, and data, and would advise the judge independently as to the result thereof.

A. Well, try and apply that to an accident case. Would the man, the doctor who had attended the injured man from the time he was injured to the time of the trial, would he not be able to give evidence?

Q. Yes, on the facts, as to what he found.

A. As to what he found, what treatment there was?

Q. What treatment there was, yes.

A. Well, that is what he does.

Q. But, as to whether from those facts, the man would be laid up for a year or ten years or for life—you might have your three experts on each side, and still it might be left to the judge to decide, and to substitute for those three conflicting figures on either side you would have an expert.

A. You are substituting a medical man for the judge?

Q. On those points, yes.

A. On those points. Well, of course, I would think it would be a very dangerous precedent, because, when you find the number of medical men who can't agree on a case, even on a simple case, well ——

Q. Yes, but you have now the situation where you have often three experts on this side and three experts on that side, with diametrically opposed opinions; wouldn't an independent medical man, or a scientific man, no matter whatever the branch might be, wouldn't an independent scientific man advising the judge, arrive at better justice than those conflicting experts?

A. Well, you are substituting the judgment of one medical man, really, for the judge.

Q. On medical points.

A. On medical points. Well, take the jury; after all, the jury are entitled to hear the evidence, both medical evidence and evidence as to facts, and to make up their minds. If you substitute the opinion of one medical man for the opinion of the judge or jury, I think it would lead to a chaotic situation.

Q. Well, you have said that it merits further study, I think?

A. Yes. Then, as to the practice and procedure in mortgage actions, convocation made no recommendation.

Q. Well now, on that point, Mr. McCarthy, it seems to me, and I think it will appear so to the Committee, it comes in the category of a great many of the recommendations here regarding rules of practice.

A. That is what we thought.

Q. Yes, and I think it is the view of the Committee that when the Committee will consider the question of the constitution of the Rules of Practice Committee, the matter of revision of our rules of practice would be a matter for such a reconstituted committee; that is our view, is it not, gentlemen?

MR. LEDUC: Quite.

MR. FROST: Yes.

MR. CONANT: But I think it would be pertinent, Mr. McCarthy, now, or before you leave us, to restate, if you will, either in the same form or in any other form, the views of convocation regarding the Rules of Practice Committee.

WITNESS: The opinion of Convocation, Mr. Attorney, is that the profession should be represented on that committee.

MR. CONANT: Yes.

MR. LEDUC: Well, that is the last item in the report; would it be just as well, Mr. McCarthy, to wait and let you follow your own line there?

WITNESS: Well, as a matter of fact, we make no recommendation in regard to practice and procedure in mortgage actions, or to the final report or to the supplement to the interim report on juries, and we make no recommendation on the question of the coroner's inquest or the coroner's jury. We thought those were matters which, perhaps, we had no right to pass on. Then, we opposed the forming of judicial districts for criminal assizes. We thought, under our system, that that would be almost impossible, and as to poor prisoner's defence we made no recommendation. But then, we also state that we do not know enough about it to take any definite stand, but we recommend the human view, having regard to local conditions as differing from those in England.

MR. FROST: Mr. McCarthy, by that, just what was meant? At the present time, if a prisoner is without defence, the court can appoint some lawyer to look after his defence, is that right?

WITNESS: Well, I think what happens—Mr. Magone will correct me if I am wrong—but I think there is a list, which I think the registrar of the High Court has, in which young men put down their names, or the names of young men are put down, and from time to time, those young men are called to undertake the defence of criminals. In cases of appeals, now, I don't know what happens to the trial. We have felt that on human grounds something should be done, also in regard to the trial, although there are usually a number of applicants for the jobs in trials, but not so much in appeals, but I do know in the Court of Appeal, and the chief justice himself, they take a very live interest in the subject.

But there are a number of young men whose names appear on the list and they are called upon, and some of them, I am told, make very excellent arguments on behalf of criminals, and they are allowed a small amount, are they not, Mr. Magone?

MR. MAGONE: Nothing.

WITNESS: Nothing? I thought perhaps they were allowed a small amount.

MR. MAGONE: I might amplify that a bit; I am glad Mr. McCarthy mentioned this; the young lawyers whose names are on the list, and are appointed by the court, give a great deal of their time, and very often pay out of their own

pocket, fees for transcripts of evidence, or for having transcripts made, and use the time of their stenographers, and they do it all without fee, either from the government or from anyone else. In the trial division, I don't know of any such list as Mr. McCarthy mentions.

WITNESS: I don't think there is any.

MR. MAGONE: But there doesn't seem to be any dearth of applicants; and they do conduct very well the difficult cases in the assizes, in the general session, the County Court Judges' Criminal Court, and I think the system works very well as it is. The young lawyers recognize their duty to defend the prisoner at the request of the judge.

MR. CONANT: Have we not these two angles to reconcile? One is that, under our present system, the accused person who has the means, and can employ what might be called high-powered or high-class counsel, may succeed in having a different result than a person who is without maintenance; as against that, you have this, it seems to me, that any system that you might set up, whereby the state would provide the defence, would be subject to abuse, just as in cases that I could easily mention, where, for instance, the state takes a certain responsibility, in the case of the indigent person; that is not without abuse, as we in the government circles know to our sorrow. I think Mr. Leduc would subscribe to that view, would you not?

MR. LEDUC: Sometimes.

MR. FROST: Well, the circle keeps growing, and it might be amazing the number of poor prisoners that would apply.

WITNESS: Of course, Mr. Pritt, one of the leading counsel in England, advocates the Russian system, that a fee should be regulated by the government, and that no one should be allowed to charge more than a certain amount.

MR. CONANT: That would make the government popular, wouldn't it?

WITNESS: Wouldn't it?

MR. LEDUC: Does Convocation wish to make any recommendation on the Russian system?

WITNESS: Oh no. The next point ——

MR. FROST: Just in connection with that poor prisoner's defence, isn't this the situation, that if a man is accused now of a serious crime, such as murder, that if the Attorney-General feels that he is without defence, the defence is provided? I've known cases of that.

MR. MAGONE: I think probably I can answer that the system has grown up, there is no legislative authority for it, but only in murder cases; if a prisoner writes to the Attorney-General and says that he is without funds to insure his proper defence, the Attorney-General puts him in funds. Does not appoint a lawyer for him, but permits this man to appoint his own lawyer.

MR. LEDUC: Only in murder cases?

MR. MAGONE: Only in murder cases, and only if the prisoner writes first and asks to be put in funds. We don't pay lawyers' uncollectible bills after the defence has been accomplished.

MR. ARNOTT: How many applications of those have you got?

MR. CONANT: Too many of them.

MR. MAGONE: We get far too many, and many applications after the defence is over.

MR. LEDUC: How many would you get in a year, Mr. Magone?

MR. CONANT: We have had quite a few lately.

MR. MAGONE: You see, unfortunately, the persons charged with murder are always impecunious.

MR. CONANT: That is an embarrassing situation for any Attorney-General to be in, because, if representations are made that the man is impecunious, your opportunities for establishing that are not by any means completely satisfactory; at the same time, you don't want to see a man go undefended.

WITNESS: I remember one instance—I can't remember the nature of the case now, when, sitting in Court of Appeal—perhaps you can tell me the nature of the case; years ago, it was, Chief Justice Meredith said: "Well, we have the right to appoint counsel." And I happened to be sitting there, and he said: "We'll appoint Mr. McCarthy." I don't remember the nature of the case, but it was something of a criminal nature, and he fixed the fee afterwards; the account had to be sent in to him and he had to O.K. it, and it was returned to some officer for payment. I can't remember the nature of the case, but I do remember the incident.

MR. CONANT: What about this central place for capital punishment?

WITNESS: Well, we didn't think that is a matter in which we didn't think we should express any opinion.

Q. All right.

A. Now we come down to these final reports, and we dealt with them.

Q. Did we deal with summary convictions, Mr. McCarthy, title No. 6?

A. Well, my note, Mr. Attorney, is that Convocation recommends opposing the proposed change. Now, there may be other members of Convocation who are here, other benchers, who can speak to this matter better than I can, because I am not sufficiently familiar with the procedure.

Then, the next one is appeal from a motion to quash an indictment. We

made no recommendation as to that. That suggestion may, possibly, have emanated from myself, because, in talking to Mr. Barlow, I recently had occasion to go into the question of appeals from indictments, where a motion had been made to quash an indictment which was refused. The trial proceeded and went through all the courts in Ontario, and finally landed in Ottawa, and as the result in Ottawa, the indictment was quashed. It did seem to me that after having a trial and two appeals, to quash the indictment at that stage was rather an expensive way of quashing the indictment, and I wrote to Mr. Barlow; Mr. Magone has just handed me my letter, in which I referred him to the case of Rex and Brody, and another more recent one also, Rex and Brainbridge, also Rex and Goodfellow, and Rex and Buck, all reported cases, in which they all went to the Supreme Court of Canada before the indictment was quashed. Now my thought was, why not allow one appeal from a motion to quash an indictment so that, at least, before going to the expense of a trial and two appeals, we could have the opinion of a Court of Appeal on the question, before all that expense was gone to. But Convocation made no recommendation in regard to it.

MR. MAGONE: It wouldn't have helped in those cases, Mr. McCarthy.

WITNESS: No, there is another case in which it would have helped; it went on to Ottawa and the conviction was quashed.

Q. Oh yes.

A. Now the next one is the designation of judges for commercial causes. We made no recommendation in regard to that. As I pointed out to you, Mr. Attorney, when one looks in the *Law Times*, which comes out every week in England, you will see there is a commercial list in London; of course, there is a commercial list for certain cases here, designated commercial cases are put down on the list and certain judge or judges are designated as the judges for that list. Convocation didn't see fit to make any recommendation, because they thought perhaps it wasn't practical in this country.

MR. CONANT: Of course, there wouldn't be the volume here that there would be there.

WITNESS: No, you would have a lot of trouble in deciding what was a commercial case, and with our non-jury system, where it is hard enough to get a case on anyway, there would be the same jockeying for judges, unless one judge was designated as the commercial judge, and you would have to get some one to say what is a commercial case.

Then the next item, consolidation of the County Court of General Sessions of the Peace and the County Court Judges' Criminal Court and the Surrogate Court. As to that, there being a great difference of opinion, Convocation did not think any recommendation should be made, and the same applies to the county court procedure.

Now that brings me, now, to the Division Courts, and as to that, Convocation recommended that the Division Court be retained. But we thought that the number of Division Courts should be reduced, where practical. We thought that the court and the bailiff fees should be reduced, and made certain in cases under $100, and we thought that the procedure ——

Q. Would you mind just repeating that?

A. Yes.

Q. Retain the Division Courts?

A. Yes, we thought the Division Courts should be retained.

Q. Yes?

A. We thought the number should be reduced where practical.

Q. Yes?

A. And we thought that the court and bailiff fees should be reduced, and made certain in cases under $100.00 And we thought that the procedure should be simplified.

Q. Yes.

A. Now the reason we thought the courts should be retained is, it is a court which has been in existence for over a hundred years; everybody knows that Division Court, and to abolish division courts and set up some new claims court would only mystify people, and we are all in agreement that the costs, the expenses of suing a claim in division court are utterly absurd.

Q. Would you care to express a view on this proposition, Mr. McCarthy; supposing we were to revise The Division Courts Act procedure, simplify it to make the costs certain, perhaps giving it the one horizontal jurisdiction of say, $200, and letting everything else go into the County Court, with perhaps a revision of the county court tariffs so that in cases from $200 to perhaps $500, there would be a different tariff than that otherwise prevailing, would you care to express an opinion as to whether there would be any resultant congestion in the County Court that would present any serious difficulty?

A. I am afraid, sir, I am not in a position to express an opinion, because we haven't really studied the thing from that angle, and we haven't the figures before us in regard to the actions or the number of actions in the County Court, or how that would complicate the county court procedure.

MR. LEDUC: Well, in the First Division Court of the county of York, the number of cases over $200, I mean writs issued, was four percent of the whole.

WITNESS: I see. Then, Mr. Attorney, in regard to the surrogate court appeals, we made no recommendation in regard to that. There is a division of opinion there, and we didn't feel that we could express the feeling of the profession as a whole, and as to the tariff of fees we made no recommendation, but we agreed with Mr. Barlow that if necessary, the whole situation should be clarified.

Q. You mean, the whole surrogate situation?

A. Yes, that is the tariff of fees. We can't make any recommendation as

to tariff of fees, but we thought that the whole matter should be clarified. Then, as to procedure in the sheriff's office, which is divided into sections, that is execution of writs, Creditors' Relief Act, execution and sale of land under a writ of execution, and the seizure and sale of book debts, Convocation respectfully draws attention to the views of the judges on this matter and adopts them.

MR. CONANT: What is that view, Mr. McCarthy?

WITNESS: The view of the judges is this; what the judges said in their report, Mr. Attorney, was this; first, in regard to writs of execution against the goods of judgment debtors, that:

> "we gravely doubt both the practicability of this recommendation, and the practicableness of a suggested change which would involve an amendment of both dominion and provincial statutes. If the changes were made, what would be done as to the great number of registrations heretofore made in the various offices? It would not appear that either the registering or searching public ought to be put to any great inconvenience. Under the present practice, such a multiplicity of searches as the commissioner supposes are rarely if every required, in any one case;"

And then, in dealing with The Creditors' Relief Act, the judges say:

> "It is important ——

MR. CONANT: Just on that point, does Convocation subscribe to that view?

WITNESS: Yes.

Q. Paragraph 1 on page 14 of the judges' memorandum?

A. Well, I don't know the page; it is under the procedure in the sheriff's office.

Q. I see.

A. It is No. 13 in Mr. Barlow's report, under the heading, "Procedure in the Sheriff's Office." And as to The Creditors' Relief Act, we also subscribe to the judges' views as to that, in which they say:

> "It is important that the efficiency of the Act should not be destroyed by adding to the expense of administering it; complaints are now often made that far too large a share of the money to be distributed goes for costs and expenses. As to requiring the division court clerk, who has money realized under execution, to notify the sheriff before distribution, this would seriously impair the process of collecting the debts of modest amounts promptly, with little advantage to anyone. It was no doubt in the exercise of a wise discretion that the Division Courts were not included in the legislation."

Then, I don't think I need read you the judges' recommendation as to the

Execution Act, and as to the sale of land under a writ of execution, and also as to the seizure and sale of company shares.

Q. Revision of exemptions under The Execution Act, do you subscribe to that?

A. The judges say as regards that:

> "This might well receive considerable study, with a view to revising the list of exemptions provided."

Convocation agrees that that should be done.

Q. Do we take it from that, that Convocation feels there should be some revision of exemptions?

A. Yes.

MR. FROST: Of course, the exemptions are out of date.

MR. MAGONE: Oh yes, they are beehives in one hole.

WITNESS: The most serious objection, of course, is as to the seizure and sale of company shares.

MR. CONANT: Well, in that writ of execution against lands, Convocation thinks the time should be cut down?

WITNESS: It says:

> "The year now prescribed by the rule originated in a Statute, and is not considered excessive time; it might be pointed out that the commissioner's comment, namely, foreclosure may be completed in six months, is not quite correct. A period of six months under foreclosure actions is now the period provided for redemption and the interim judgment before the final order of foreclosure. In addition to this, the action requires the time for the issue of the writ, the appearance, the usual pleadings, if any, and the taking of the action."

Q. Well, on that point may I ask, Mr. McCarthy, what is the origin of that one-year period; is there anything on that?

A. I couldn't tell you; I don't know.

Q. It appears to have been there for a long time.

A. Yes, but its origin, I couldn't tell you, sir. Then, the most objectionable feature in the commissioner's recommendation was as to the seizure and sale of company shares, and what the judges said is that this is a matter for legislation, although,

> "The committee felt it should be pointed out that amendments proposed

by the commissioner are very far-reaching indeed, and might have a most injurious effect on existing banking and commercial practice."

"To give one example, share certificates endorsed in blank may be deposited at the bank as security; if the proposed amendment is made, then, unless the bank, which has no information as to the seizure, causes shares to be registered in the bank's name before the notice under section 12 is given to the company, the bank security would be entirely destroyed, or again, if shares are so pledged, the bank could only protect itself by always registering all shares in its name as soon as pledged. This would not be at all desirable from the standpoint of the banks or from the standpoint of the borrowing public. A further example of the undesirability of this change proposed by the commissioner, also would be found in the business of stock exchanges, where business is largely carried on in street certificates."

Now we entirely agreed with what the learned judges suggested then, and for that reason, we adopted the views of the judges, which we thought should prevail.

Then in regard to No. 14, The Evidence Act, Convocation agrees with both Mr. Barlow and the judges.

MR. CONANT: That is splendid.

MR. MAGONE: We are unanimous at last.

WITNESS: The judges say:

"While certain changes may be worth while in the Act, the commissioner suggests that nothing should be done until such time as The Draft Uniform Act has been prepared by the Commissioners on Uniformity of Legislation, at which time the proposed changes can be studied further, and this suggestion might well be followed."

There is, as you know, at the present time, before the Commissioners on Uniformity of Legislation, the question of the new Evidence Act, and we thought that it might well stand in the meantime, until that committee has performed its complete functions.

MR. CONANT: Well, why is that, Mr. McCarthy, a matter particularly of uniformity of the provinces?

WITNESS: Well, it has been a matter under discussion for some very considerable time, by the Commissioners on Uniformity of Legislation, which committee meets either once or twice every year, and it was thought desirable that there should be an Evidence Act which was applicable to all the provinces.

MR. MAGONE: And the Dominion.

WITNESS: And the Dominion, of course.

MR. CONANT: But are we not considerably behind other jurisdictions in our Evidence law?

WITNESS: Yes, but we are trying to bring that up to date, at the present time, as I understand it. We have had the new Evidence Act recently introduced in England, and that is all being considered now by the Committee on Uniformity.

MR. CONANT: Perhaps Mr. Silk can tell us about that; I just don't see that this is in the same category as a great deal of other matters that are dealt with as uniformity legislation.

MR. SILK: Well, it was considered by the Commissioners two or three years ago, sir, to be a proper subject for consideration by that body, and a first draft was prepared by one of the western provinces, I think, and it was referred last year to the Commissioners on Uniformity for the Dominion, because the probability is that when the uniform Act is prepared, it will be adopted by the various provinces and by the Dominion; I think that perhaps, not next year, but in 1941, the Act should be in completed form.

MR. LEDUC: What about the next one, Mr. McCarthy?

WITNESS: No. 15, Expense of Trial, etc. Again Convocation agreed with the views of the judges as to that.

MR. CONANT: And what is that view again?

MR. MAGONE:

> "If there is a demand for this change by the municipality, footing the bill, there would seem to be no apparent objection to the proposed recommendation."

MR. LEDUC: It is a matter of legislation.

MR. MAGONE: Yes.

WITNESS: Then, as to No. 16, that is one text for all the rules of practice and procedure, Convocation agreed with Mr. Barlow.

Then, in the next few items, from 17 to 29, Convocation didn't consider these matters, because they thought that the Rules of Practice and Procedure, etc., should stand for consideration to a later date, when the Committee of the Legislature has made some recommendation as to the constitution of the Rules of Practice Committee, or to a time determined by Convocation, and as I have already said, Convocation advocates that members of the profession should be included on the Rules of Practice Committee, and we went further and thought that the selection of the members of the profession to function on that Committee should be determined by Convocation, both as to who they were and as to the time that they should serve on that committee.

MR. CONANT: And any views as to the numbers, or proportion, Mr. McCarthy?

WITNESS: No, Convocation didn't express any opinion as to that at all, Mr. Attorney, but we thought that we should have representation on the committee.

Q. Yes. You didn't discuss—your recommendation contains no mention of any other representation other than the members of the Bar?

A. Other than members of the Bar.

Q. Have you any opinion to express yourself, as to whether the Attorney-General should be part of that committee? From the standpoint, I call your attention to the fact, that the Executive always must provide the machinery that is required for carrying out the rules?

A. What is the practice in England now? Does Mr. Barlow mention that in his report?

Q. Well, the Lord Chancellor there, is a member of the rule-making body. Of course, we haven't any officer here who corresponds to the Lord Chancellor.

A. Personally, I think the Attorney-General should be represented on that committee.

Q. The Attorney-General's is the office that comes nearest to that of the Lord Chancellor?

A. That would be my own view.

Q. Although, admittedly, it is not by any means the same.

A. No.

Q. What would you think, Mr. McCarthy, of the Master being a member of the committee, who deals with the rules all the time?

A. Well, I hadn't really thought about it.

Q. Well, he is one judicial officer in the province is he not, who probably is more constantly and actively associated with the rules, is he not?

A. I presume he is; as a man in practice, I suppose he is brought into more intimate contact with them than the judges, who only see them in weekly court occasionally. Now there may be some other members of the Bench who would like to speak on these different points. I have only expressed the view of Convocation generally, and my own view only when I have been asked to.

MR. MAGONE: Mr. McCarthy, before we leave it, on page B74, there is a Law Revision Committee; did the bench consider that item?

WITNESS: Well, if they did, I have no note of it.

Q. The recommendation of Mr. Barlow is that:

"The Judicature Act be amended to provide for the establishment of a Law Revision Committee, to be composed of the Chief Justice of Ontario, the Chief Justice of the High Court, together with four Supreme Court judges and four members of the Bar, to be appointed by the Chief Justice of Ontario."

A. Well, I have no note of it, and I have no recollection. Perhaps other members of the Bench may recollect it. I have no note of it. Do you remember, Mr. McRuer?

MR. J. C. MCRUER, K.C.: I was there when they dealt with that. Yes, we dealt with that, and our recommendation was a resolution passed covering that, and that was that the committee should be composed, or there should be representation on the committee, of the Bar, and that they should be appointed by Convocation.

WITNESS: Oh no, that is the Rule Revision Committee.

MR. MCRUER: Oh no, that's right, we didn't deal with the Law Revision Committee.

MR. CONANT: Mr. McCarthy, in England, they have what might be called an unofficial committee, constituted by the Lord Chancellor, to advise regarding points of law which might be the subject of legislation. Are you familiar with that committee?

WITNESS: No, I am not.

Now I notice that the judges, in reference to that, say:

"These matters dealt with in the two sections of the Commissioner's report, have already been under advisement by the Chief Justice of Ontario and the Chief Justice of the High Court, who have been in consultation, and correspondence with the Attorney-General. Thereafter, following a meeting with the Attorney-General and his Deputy, a letter was written, etc. . . . "

That only deals with what the judges did.

MR. MAGONE: Mr. McCarthy, there is just one other matter. In 1937, amendments were made to the County Courts Act, increasing the jurisdiction, to be brought into force by proclamation. Have you anything to say with respect to bringing that into force? I mean, on behalf of the benchers?

WITNESS: Nothing, the matter wasn't dealt with at our recent meeting, but it was the subject of discussion, I think, about two years ago, Mr. Magone, and I only succeeded in obtaining the file to-day, and I have not had an opportunity of going through it. I know that at that time Convocation was opposed to it, and a report was prepared by the then treasurer, and the present Chief Justice, which, I think, was presented to the Attorney-General. There was also a report of Mr. Justice Middleton. He is, unfortunately, away at the present time, and I have not been able to get that report from him, but I know that at the time

Convocation was opposed to it on several grounds, which are all set forth in the report prepared by the then treasurer, and by Mr. Justice Middleton. I can recollect some of the grounds; one, I know, was while we expressed no opinion ourselves, representations which came to us from the outside Bar, intimated that perhaps some of the county judges weren't of the necessary calibre to adjudicate on cases beyond their present jurisdiction, perhaps not up to their present jurisdiction. That necessarily doesn't apply to them all, but I know representations were made to Convocation to that effect, although Convocation themselves expressed no opinion. Then there was the other situation that arose, that some years ago, when litigants or solicitors could agree to try a high court case before a county judge, a good many cases were tried before county judges; that was before the provision was made with regard to their high court fees. In those days, if they tried them before a county judge, they still got the high court fees. The county judges were very proud of that, and said: "Oh, look, they're trying their high court cases before us." But I am told that immediately the rule changed, and they only got county court fees, the cases fell off at once, which rather indicates that the litigants appreciate the cheapness of the litigation rather than the efficiency of the judge. It may be the wrong conclusion that I have reached, but that is my observation. Then there are other suggestions made to us by the outside Bar, because they have more to do with it probably than we have, and they said the county judges have all they can do at the present time to look after their present work, and to increase their work wouldn't increase their efficiency. It hasn't recently been considered, but I know it was at that time.

Q. Does that also apply to the increased jurisdiction of the Division Courts?

A. I don't think that was considered, Mr. Magone.

MR. LEDUC: Mr. McCarthy, you just mentioned a report prepared by Mr. Justice Middleton; have you a copy of that report, Mr. Magone?

MR. MAGONE: No, I haven't.

WITNESS: I went to the Chief Justice, knowing I was coming up here, and he told me he thought Justice Middleton still had a copy of that report, and I will undertake to get it and hand it to Mr. Magone.

Well now, there may be some other members of Convocation that you would like to hear from, that would like to express their views on any particular topic. I have dealt generally with the matters, and very briefly, Mr. Magone.

MR. MAGONE: Yes, thank you very much. We will be glad to hear from them, and I suppose, Mr. McCarthy, that they will be expressing their own views?

WITNESS: Well, some of them may think that I haven't expressed the views of Convocation; otherwise, they may like to express their own views.

MR. MAGONE: Yes, well then they may indicate it to us.

MR. PETER WHITE, K.C.: There are just one or two observations that I would like to make.

MR. MAGONE: Very well, Mr. White.

Witness excused.

MR. PETER WHITE, K.C., Bencher, Law Society.

WITNESS: I am unfortunately one of those persons who have very strong views in regard to juries, and there are one or two things which I would like to point out in connection with the discussion that has taken place in regard to them. Perhaps I had better put it in this way: it may be taken as fairly the view, I think, of the majority of the people of this province, that the grand jury must be abolished. I deprecate that very much, but it seems to me that I am in a pretty hopeless minority on a good many questions these days, particularly public questions. But, however, there is another feature besides the one that Mr. McCarthy has pointed out in regard to why a grand jury should be retained, and that is the educational feature. If, however, the grand jury is to go, then I see no reason why the same class of men can't be selected for our petit jurors as are now selected for our grand jurors. That would solve a great deal of the difficulty, and it is suggested that another way of helping that would be—that is by way of getting a better class of men—would be to have the juries selected by men who know the locality and know the actual men who are going on the jury panel. I remember myself, as a Warden of a county, one of the selectors of the jury, and I found that we got a pretty good class of jurors because the sheriff and myself—the county judge was a new man—but the sheriff and myself knew pretty nearly everybody in the county, and we were able to tell how the men were and what kind of men they were.

MR. CONANT: But just on that point, doesn't really come back to local selectors?

WITNESS: To some extent, and I was going to say, in that connection, that while merely an academic certificate is not necessarily a qualification for a good juror, yet the fact that he has a certain amount of education is one of the elements that helps out. Then we don't want deaf men. A man shouldn't be on the jury if he is blind, if he is a delicate man, a man who is obviously not able to stand up to the duties of a jury, shouldn't have a j behind his name in the voters' list. These things could all be done, and with great effect, I should think to bring out the character of the jury.

Q. Well, don't let's leave that for a minute; specifically how would you improve, if it were thought desirable, the quality of the juries?

A. Well, it is pretty difficult to answer that off hand, but ——

Q. Well, give us the best you can.

A. Well, one thought that occurs to me is this, Mr. Attorney, that the local assessor should be asked to give some kind of indication, in the assessment rolls, as to the qualification of a juror from the standpoint of education, experience, and physical fitness. Instructions could be given as to what constituted these three things, and they could be graded, the jurors that is could be graded so that when he found a certain percentage of qualification, then he could mark the man as a juror.

Q. He might be an "A", "B", or "C" man?

A. Yes, that might not be a very welcome job for the assessor, but that wasn't in my mind; what was in my mind was that if he came up to a certain standard, he should go down as a qualified juror, and that the assessor should receive those instructions; perhaps we ought to get better assessors too. Now that is all I had to say about that.

In regard to the alternative jurymen, it occurs to me, Mr. Attorney, that it might be possible to avoid any such necessity. It has never occurred, I think, in the long criminal court experience that I have had, that a juror failed to be able to sit throughout, and that is a great many cases. Mr. McRuer tells me of one case he had, and in this case counsel for the defence agreed to abide by the jury of eleven jurors. Now I should think that it might be possible to frame an enactment that would cover that situation and allow the jury of eleven to bring in a verdict, if any one juryman should fall out during the proceedings, and be so certified by some physician appointed by the court.

As to having these jurymen sit by as an alternative, obviously, the expense of that is far greater than the expense of a retrial, because it occurs so rarely that they don't seem comparable at all.

Then as to assessors and experts, the real difficulty, as I see it, about leaving the determination of a question of fact—because it gets down to that—to an assessor, is that the litigant would be at the mercy of an expert who might hold to one school of thought, as opposed to an expert who might be just as honestly and just as conscientiously and just as effectively of the other view, so that there must be some referee, and it seems to me that a judge, sitting and listening to experts with an assessor or expert to advise him, where that becomes necessary, as illustrated by my friend Mr. McCarthy, it seems to me that you get a judicial determination.

There is another difficulty there, that I suppose Mr. McRuer won't mind my mentioning—it was his idea—that you run into a nice constitutional question there; that is, here is a man making a judicial determination, who is not appointed by the Governor-General in Council, and he is in fact a judicial officer.

But the real difficulty ——

Q. It is ultimately, if his views are accepted by the Court, it is ultimately the view of the Court.

A. Well, that may be; there may be ways around it, but I am just pointing that out. But the real factual difficulty is that, for instance, take a case that I heard the other day argued in Court of Appeal; a man was said to have, as a result of an accident, contracted an obscure kind of disease; there was an absolute, and apparently, an honest difference of opinion between the experts as to whether he had that or not, and that was the result of two schools of thought in the medical profession. Now, if you had appointed one man of one school of thought, the plaintiff would have won; if you had appointed the man from the other school of thought, the other man would have won.

Q. I don't know whether your thinking and mine is on the same ground; this proposal, as I understand it, of Mr. Barlow, was an optional proposal, a proposal whereby litigants could agree upon the appointment of an expert to take the place of experts on both sides.

A. You could always do that now, Mr. Chairman.

Q. Well, the practice doesn't provide that?

A. Well, it isn't necessary that it should; in a great many cases that I have acted on, where I knew a certain medical man was called by the plaintiff, I said: "All right, we'll take his opinion." I have frequently done that. I mean if it is a case of agreeing, why, you can agree now, without any changes at all.

Then as to this extension of the jurisdiction of the Court of Appeal on questions coming from a trial verdict of a jury, the law is not that the Court of Appeal cannot reverse the finding of fact; the farthest they can go is to say that no twelve reasonable men could come to the conclusion which the jury has come to, and that they must have proceeded on a false principle.

Q. Or perversity.

A. Or perversity, which is a false principle, too.

Q. Well, I think the Court sometimes puts it that way.

A. Yes, perversity. Then on the question of damages the Court, in my personal view, and I am only expressing a personal view, not having seen the injured person, if it is the case of an injured person, and not having been in the position to size the situation up the way a jury can, who had seen the party, is not in as good a position to assess damages as a jury, who did; and there was a case not long ago, a farmer was killed and left a wife and child, and the question was whether the verdict was excessive. There were eleven farmers and one chauffeur on that jury; surely eleven farmers would know more about the amount of money which would compensate a woman for the loss of her farmer husband than any number of judges could possibly do, having regard to the fact that they simply take the dry bones, the skeleton, you might say, of the trial, without any atmosphere or any of the surrounding circumstances and seek to determine, from a cold, typewritten document, what the damages should be?

MR. LEDUC: In this case you mention, the jury was composed of eleven farmers and a chauffeur, and the victim was a farmer; supposing the victim had been a lawyer?

WITNESS: Well, I don't know anything much about lawyers these days; I used to think they were pretty respectable members of society; when I hear what is said about them these days, or what it is attempted to do to them, I begin to wonder.

Q. But you don't think there should be any enlargement of the Court of Appeal jurisdiction?

A. I personally do not. I am only giving you my personal opinion. I had the option, the other day, of having the court fix damages and going back to another jury, and I took the new trial in preference. That is the best illustration of what my personal view is.

There is the further thing, on the question of fact, if the Court of Appeal can, because they disagree with the finding of a jury, where there has been evidence from which twelve reasonable men could come to the conclusion to which the jury came, can reverse that finding of fact, they are doing so without hearing the witnesses, and, as was pointed out in this room this afternoon, a witness can say a thing in a way in which no twelve reasonable men would believe a word he said, and then it is up to the Court of Appeal; and there it is in black and white. That is all I have to say.

Q. Well, just a minute, we have this question of grand juries yet, you know.

A. Well, personally I realize that, as I say, I am a pretty bad minority on that question. Of course minorities are all right, I understand that.

Q. Well, they are entitled to consideration.

MR. LEDUC: Mr. White said he was in favour of retaining them.

MR. CONANT: But I would like you to direct your remarks, if you will, to this particular question, as to the safeguard that has been discussed and mentioned here in connection with indictments preferred by the Attorney-General.

WITNESS: Yes; of course, without going over the ground, it has been brought out this afternoon that the Attorney-General may prefer an indictment, or may direct Crown counsel to prefer an indictment for any offence, and in fact the Crown counsel can himself do it, with the consent of the trial judge, or the presiding judge, I should say, but that, of course, now goes to the grand jury.

Q. Yes.

A. Now, I should think, if I were Attorney-General, which I never expect to be, that I would not want to have the duty cast upon me of saying that a man should or should not be prosecuted for a certain offence. I can see great trouble ahead for the Attorney-General's department if that situation obtains.

Q. Yes, but if you were a little more specific, and if under the present system, if the Attorney-General directs an indictment to be laid, that goes before the grand jury; if the grand jury were abolished, it would be abolished for that purpose as for all others; now wouldn't there be sufficient safeguard against the abuse of that right by the Attorney-General if that indictment, instead of being taken before the grand jury, were taken before the judge? Having in mind, Mr. White, that as you know, and as I do, that very seldom does the Attorney-General exercise that right?

A. That is quite so, but I have frequently done it at the direction of the Attorney-General, but it only means one step backwards, back to the Attorney-General, if he is to do it himself, because he takes the responsibility in any event, whether it is through himself or his counsel.

Q. Did you ever have a no bill returned where you had been directed by the Attorney-General to prefer an indictment?

A. I can't ever recollect that there ever was such a thing.

Q. In your experience as Crown counsel, Mr. White, did you find that you usually got a bill in cases in which you thought a bill should be returned?

A. Yes, and sometimes they have been thrown out when I didn't think they should have been.

Q. Yes.

A. That is sometimes the grand jury found no bill, where I thought there should have been a bill, and sometimes they found bills which I was very doubtful about.

Q. Generally speaking, the result was usually in accordance with your own views?

A. Oh, taking it by and large, yes.

Q. Yes.

A. What I don't like about abolishing the grand jury is that it is an institution that was inaugurated for a specific reason, and for a specific purpose, and while our civilization has advanced to a point where that doesn't appear to be frequently necessary, I can easily see situations where it is entirely necessary.

Q. But Mr. White, are you not in the need of reconciling that view with the practice that has been adopted almost uniformly throughout the British Empire?

A. Quite so, quite so; I realize that, and I still hold it, notwithstanding.

Q. Just one more remark, if I may; I don't want to keep you unnecessarily, but it has been mentioned here; that is the question of special juries. Have you any views on that? Whether they should be retained?

A. Oh, I think, in certain cases, they are a very good institution.

Q. You think they should be continued?

A. Oh yes.

MR. MAGONE: Have you any views on the question of appeals from motions to quash indictment, Mr. White?

WITNESS. Well, I heard what Mr. McCarthy said about that, and what he said would be my view entirely.

Q. Do you think that in practice it might be used?

A. He mentioned the case of Rex and Bainbridge in that letter, and it happened to be my own case, so that is my experience.

Q. Do you not think it would be used unduly in cases for the purpose of delay only?

A. The delay couldn't be very great, because our Court of Appeal now is very well up on its list, and they can hear these things, or the appeal might be to a judge of the Court of Appeal.

Q. Yes, that might be a way out; of course, in Toronto the Assizes and the General Sessions sit for some time.

A. Almost continuously.

Q. But in the counties, the Assizes are usually over in a week?

A. Yes.

Q. So it would mean at least six months' delay in those cases?

A. Yes, well you wouldn't have so many motions to quash indictments if people had to stay in jail for six months.

MR. CONANT: One more observation, because I think it is quite vital to our own system; what is your own view about the onus of a jury?

WITNESS: That is as to whether it should be ——

Q. A matter of course or of application?

A. I would leave as it is, sir. My reason for that is this: when you get charging the litigant substantial fees to start with for the privilege of having his case tried you are getting back to the arbitration point, to which, in my practice, at least, I have been very much opposed; I never have an arbitration if I can avoid it. I never put an arbitration clause in a contract if I can avoid it, because there are courts set up by the country to determine questions arising under contract, and it is to them that I think the dispute, if any, should be handed. They are different in England, where they have the Board of Trade, which is accustomed to handling that sort of thing. They have such institutions. Now once you start having a man make out a case for a jury, then you start a new process of jurisprudence, you start a new series of precedents, what cases should be tried by a jury and what shouldn't, and what cases the jury should be allowed to try, and you get into a pretty hopelessly confused situation there for some time at least, until the matter could be clarified. Then, on top of that, I wonder if it is not so—I think it is—that a great many more cases, proportionately, are tried in England under their present system than are tried in Ontario.

Q. You mean a great many more cases tried by jury?

A. In England, and a great many questions are tried by juries in England

which are not tried by juries here, and in which under the practice, our judges would strike a jury notice out. I think you will find that that is the correct statement of the situation.

Q. I don't wish to challenge your statement, but I would doubt that.

A. Well, I think that is the situation. I know I have been surprised in reading the reports, and so on, to find that certain classes of commercial cases are tried by juries, which you would never think of trying here with a jury.

MR. STRACHAN: Very common practice.

MR. MAGONE: I think Mr. White is speaking of the practice before the recent amendment.

MR. FROST: Another very eminent lawer told me that too in private conversation, that that was the fact. I was very surprised.

MR. MAGONE: Whether or not this Act has been proclaimed or not I don't know; it is to be brought into force by proclamation, and it is to go out of force by Order-in-Council. I understand from Mr. Silk that it is now in force; and the section in question reads:

> "No question arising in any civil proceedings in the High Court or in any inferior court of civil jurisdiction shall be tried with a jury, and not writ of inquiry for the assessment of damages or other claim by a jury shall issue unless the court or a judge is of the opinion that the question ought to be tried with a jury or, as the case may be, the assessment ought to be made by a jury and makes an order to that effect."

So it is only where an order is made.

WITNESS: Quite so, but I say, notwithstanding that practice, and an application of some sort has been heretofore necessary, notwithstanding that, they try many more cases, I am satisfied, than we do.

MR. MAGONE: I think the Committee would like to have further evidence on that point.

WITNESS: Well, I am sorry I cannot give it to you; I am not challenging your statement.

MR. MCCARTHY: If you would let me send you, sir, a copy of *English Weekly Notes*, at the beginning of each it gives a complete list of cases tried by special and common juries and before judges, and I think it will bear Mr. White out.

MR. CONANT: But we are directing our attention, at the moment, to this fact; I understand Mr. White suggests that, with this reversal of the onus they try more cases by jury than before.

WITNESS: I don't say it is because of that, Mr. Attorney, I say it is notwithstanding that.

MR. LEDUC: They try more cases than we try here?

WITNESS: Yes, and a different class of case.

MR. CONANT: Well, that wouldn't get us anywhere; it's a question as to whether they tried more cases than they tried under the previous system.

WITNESS: Well, it is important, it seems to me, Mr. Attorney, for this reason, that under the present disposition of our judges, I don't believe you would get an order for a trial by jury in a lot of cases which are tried by jury in England.

MR. LEDUC: Mr. Magone, this Act was put into force very recently?

MR. MAGONE: Yes.

MR. LEDUC: Well, there is no way of getting any comparison then.

WITNESS: Except there was some such form of procedure before.

MR. MAGONE: Yes.

MR. CONANT: Mr. White, Mr. McCarthy rather suggested, outside of stating definitely, that the present system perhaps increased the litigation to the extent that cases where juries were available as a matter of right were not otherwise instituted or taken to trial.

WITNESS: Well, I suppose a great deal depends, Mr. Chairman, on whose ox is gored.

MR. CONANT: Yes. Well, thank you very much, Mr. White, for your assistance.

Witness excused.

MR. J. C. MCRUER, K.C., Bencher, Law Society.

WITNESS: Well, it is very kind of you to hear me, gentlemen; I shall not be very long. I will just try to take a few minutes. There are some things that I want to endorse, that Mr. White has said.

As you see, the Benchers were not unanimous in regard to some representations, and for that reason, no representations were made.

In regard to doing away with, or cutting down the functions of the jury in civil cases, I feel rather strongly that at this time, when all over the world there are inroads being made on democratic institutions, that we ought to go very slowly in cutting down any functions of the ordinary citizen to perform his duties in the system of government that we have. And, after all, the judicial system is just a part of the government, and at the present time I think it is a good thing for jurors to take part in the administration of justice, and go back to their homes and feel that they have had a part in administering the laws of the country. I think that is a very good thing. I happen to come from the

country, as I think perhaps most of the commissioners here at some time did, and when my father served on a jury, he came back and talked about it for a long time, and he felt that he had been performing a real function, doing his part in that county, and I think to take that away from the citizens would be a very serious thing just now.

As to the number of jurors in certain classes of cases, while the same principle applies to a certain extent, I don't believe that it would be a serious thing to cut down a County Court jury to six men. I can't see that that is going to be any very serious inroad on the democratic rights of the citizens. As to grand juries ——

MR. LEDUC: Before you leave the juries in civil cases, what about Division Courts?

WITNESS: Division Courts? It is not a practical necessity; it's so small, and after all these things have got to be looked at in the proper perspective, and when you sit down and have a jury trying a Division Court case, it's out of proportion altogether.

Q. There would be no harm done in abolishing juries in Division Courts?

A. No, I should think not, Mr. Leduc.

Q. Thank you.

A. Then in regard to the grand juries; again we come to the practical question, and looking at it in its proper perspective, if you have a man committed for trial and sent on, it does seem to be ultimately tried by a jury, that is ultimately tried by the citizens.

MR. CONANT: Or he may have a right to be tried otherwise.

WITNESS: No, he shall be tried by them; he may have a right to elect to be tried otherwise, but the law is that he shall be tried by the citizens.

A. Yes.

A. I can't see that there is any great inroad on fundamental democratic rights, if the grand jury is abolished. On the other hand, in respect to the protection against a vicious Attorney-General who might start out indicting people irresponsibly, I don't believe that is a very practical idea. But an Attorney-General that does that sort of thing probably wouldn't be Attorney-General very long. So that if he has to go to a judge and get a consent, it may be a safeguard, but really, should the Attorney-General have to have safeguards thrown around him that he can't prefer an indictment against a man? As far as I am concerned, if they feel it ought to be done, that there ought to be a judge consent first, why ——

MR. FROST: One point that bothers me just a bit there, is this, Mr. McRuer: in connection with grand jury procedure, there is a disclosure, to an extent, to an accused person, where the witnesses give evidence against him, there are cer-

tain rights that the accused has of calling witnesses or asking that a witness be placed in the box and sworn, and these are usually Crown witnesses, and the rights of cross-examination apply, and so on. It seems to me that, if you abolish grand juries, and you give the Attorney-General the right to prefer, if that is the correct expression, an indictment against an accused, that you may have sent a person to trial on a very serious offence, an offence which may involve the death penalty, without, as it were, any disclosure of the nature of the case against him, the names of the witnesses, or anything of the sort. Now it seems to me that, in our criminal procedure, that that is one place that an accused person is entitled to a certain amount of protection. It seems to me that an accused person is entitled to know the nature of the case against him, and to have rights of cross-examination. For instance, a person may be a Crown witness, and an accused person is really precluded from going to that witness and finding out what the evidence is. I am just a little afraid on that particular point.

WITNESS: Well, Mr. Frost, if we take first the procedure that we have now ——

MR. CONANT: Yes, that's right.

WITNESS: The Attorney-General may prefer a bill of indictment; any person, with the consent of the trial judge, may prefer a bill of indictment; I can go down and, with consent of the trial judge, without being employed by the Attorney-General at all, and prefer an indictment; any person may do so.

Q. That's right.

A. And with the consent of the trial judge, prefer a bill of indictment against a man. Then if a grand jury finds a true bill, that man goes on his trial, and there is no disclosure of any evidence that was given before the grand jury. True, a list of the witnesses heard before the grand jury goes on the indictment, but that doesn't mean that he's got to put all his witnesses on the indictment; he may call any number of people, whose names are never disclosed to anyone, to give evidence at the trial. Now I think the only thing say that an accused must have the right to cross-examine the Crown witnesses, and have the nature of the case, you must do away with the right to the Attorney-General to prefer a true bill.

MR. FROST: Well, that's just the point. I rather think the right of the Attorney-General should be done away with.

MR. CONANT: Oh no.

WITNESS: Oh, well, I think that would be a very serious inroad on the rights of the Attorney-General to administer the law.

MR. FROST: Well, on the other hand ——

WITNESS: If a magistrate refuses to commit the man for trial, is the Attorney-General never to have a right to bring that man to trial? Because he may be a friend of the magistrate's? Why, you would have to start up a new

criminal procedure altogether, because the right of the Attorney-General to prefer an indictment existed long before we had any rights of preliminary hearing, or anything of that sort.

MR. FROST: But let me get this straight; supposing a man is brought up on a preliminary hearing before a magistrate.

WITNESS: Yes?

Q. The magistrate refuses to commit.

A. Yes.

Q. The Attorney-General then exercising his rights, prefers an indictment and it goes before the grand jury.

A. Yes.

Q. And either a true bill is found, and he goes on for trial, or a no bill is found and he is dismissed.

A. Yes.

Q. After all, that accused person has a lot of protection; he knows the nature of the case against him. In the preliminary hearing, witnesses are heard, and so on, and if they are wrong the case is dismissed; if the Attorney-General is wrong in his judgment, the man is in jeopardy, but he goes before the grand jury, a considerable number of witnesses are heard, and all told there is a considerable amount of protection there. One of the great arguments that I hear in connection with the abolishment of grand juries is this: that grand juries have become sort of a fifth wheel on the cart. But take the fact that we have now an elaborate system whereby a man is brought up on preliminary hearing, witnesses are heard, and the magistrate, if sufficient evidence is there, sends him on for trial. But if you permit the Attorney-General to lay the indictment directly, then he doesn't have the protection of a preliminary hearing, and the grand jury is done away with and he may be thrown on trial for his life without anybody going over the matter at all. Now it seems to me that if you are going to do away with grand juries and if you are going to be consistent about it, if you say grand juries have become a fifth wheel on the cart, then the Attorney-General should be put in the same position as everybody else and go back to a preliminary hearing.

WITNESS: Well, I think that, at any rate, would be very dangerous, that the Attorney-General had no immediate right of procedure unless there was a committal for trial.

Committee rises until following morning.

EIGHTH SITTING

Parliament Buildings, Toronto,
April 11th, 1940.

MORNING SESSION

MR. CONANT: All right, Mr. Magone.

J. C. McRUER, K.C. (recalled).

MR. LEDUC: I believe you had reached the stage where you were speaking about grand juries?

WITNESS: Yes, Mr. Frost raised a question at adjournment with respect to grand juries that he asked me to give some thought to.

MR. CONANT: Is there any other aspect that you would like to touch on before Mr. Frost comes?

WITNESS: Yes, I can probably do that later when he's here. In respect to putting the onus on the party that applies for a jury—the civil litigant—to pay the cost of the jury, or putting it as a matter of a cost of the trial by jury, I don't believe that this, again, is the time to put that financial responsibility on a man to pay for the tribunal that tries his case. If it's right that his case should be tried by a jury, it seems to me that the State should provide the jury judges in the same way as it provides the judge, and that, after all, could be and would no doubt be interpreted as class legislation.

The wealthy man or wealthy organization that wants to have a jury can have one, but to ask the litigant to put up a $100 or so to provide for the costs of the jury is a pretty heavy hardship on him. I know that that is the rules in the province of Quebec to a certain extent.

Q. That's the rule, that they do pay in the province of Quebec.

A. That they do pay in the province of Quebec, yes.

Q. Yes, and are there not some other jurisdictions on record, Mr. Magone, that follow that?

MR. LEDUC: Well, there are very few jury trials anyhow.

MR. CONANT: Well, never mind, we have them on record anyhow.

WITNESS: My opinion is that it would be rather unfair to the poor man.

Q. May I make this observation with which you can deal as you see fit: have we not a semblance of that discrimination at the present time when we allow a man with means to have a select jury, a special jury, and the man without means takes the jury as it comes?

A. There is a semblance of it, and if you could have a jury selected with the same wisdom as a special jury is I'd be in favour of pursuing that course and doing away with the special jury. I listened with great interest to the discussion that took place yesterday as to how you could improve the selection of jurors, how you could get a better type of juror.

Q. Well, we'd be glad to have your views on that.

A. Well, I can't say that I can contribute much on that, except to say this: that you do get a better type of juror for the grand jury panel than you do for the petit jury panel.

Q. Let me see, in the statutory provisions re grand jury selections the terms are rather broad.

A. Yes, your special jury is selected from the grand jury panel.

Q. Yes.

A. Now, you get on that panel, as Mr. White said yesterday, or Mr. McCarthy, men who are bank managers, men who are holding very high responsible positions. Why shouldn't they serve on petit jury? After all a petit juror isn't required to serve probably more than two weeks. Here in Toronto they change the panel every two weeks; surely a man occupying any position in the province can give two weeks of his time, probably once in his life time, to take part in the administration of justice.

Q. Well, following the discussion which took place yesterday, Mr. McRuer, I would like to make this observation and have your reaction on it: supposing the grand jury were abolished and that we made part of the petit jury system the qualifications that are now set up, or might be revised to some extent for the petit jury, what would you think of that observation?

A. Well, I presume the qualifications that are now set up for grand jurors ——

Q. Well ——

A. Well, my own view on that would be not to make them as highly restrictive as the qualifications for grand jurors but raise them, at any rate, and you could do away with your special jury. After all, your special jury is used very few times; I have only had one special jury.

Q. I think that the present phrasing to designate who shall constitute special jurors is pretty broad and rather indefinite and is nothing more than a guide to selectors ——

A. Yes.

Q. —— according to the statutory provision.

A. Well, you have even that on your guide to the selectors for petit jurors.

MR. STRACHAN: It may follow that from the occupations that are given for the petit jury you would have a pretty good idea of the calibre of a man, would you not, Mr. McRuer?

WITNESS: Yes, I think so, and there are certain municipalities in which they have greatly improved the selection of the petit jurors by just careful supervision by the county judge.

MR. CONANT: I think we have to bear this in mind, gentlemen, and Mr. McRuer, that unless by statute we are setting out some formula or some yardstick you can't expect any different system to that which we have now. The question is, what is that formula, what is that yardstick, is it a formula now applied to grand juries, or is it some other formula or yardstick?

WITNESS: You make make it something less—the formula applied to grand jurors seems to work fairly satisfactorily, you're getting a pretty fine type of men for grand jurors.

Q. Yes.

A. Now, couldn't you apply a similar formula, but probably not as restrictive, to petit juries?

Q. Well, of course the Legislature is supreme and can apply any formula, but we are still groping for the formula.

A. Well, I don't know that I can help you very much on it.

Q. All right.

A. But if you read strictly the formula applied for petit jurors you'd find that it's not a bad formula if it was carried out. I've forgotten the exact wording, but men who, from their "reputation, integrity and ability", or words of that sort, would make good jurors. Now, I think it comes back to this, that probably the man who selects the juror, in the first instance, isn't as carefully supervised as he might be.

Q. You see, this is evidently not new to me because for years I have given some thought to it and I have been able to discover a formula. In some of the western provinces—I think this is true, Mr. Magone, you have the data on it—they set out definite avocations applying to accountants, bankers, real estate agents and so on, is that not right, Mr. Magone?

MR. MAGONE: Yes.

MR. CONANT: Looking it over myself I doubt very much whether setting out definite avocations of that kind would be a proper formula.

WITNESS: There was a time here in Toronto, a number of years ago, I think, when really the number of unemployed that were on the special juries was out of all proportion to what it should be. You'd pick up a panel and you could hardly choose a jury without getting six or seven unemployed men on it. Well, that could be corrected, surely, because after all ——

Q. Well, do you think it would be proper and feasible for us to apply qualifications, according to their vocations, for jury men?

A. I don't think so without creating an awful lot of dissatisfaction.

Q. I didn't think so.

A. And, also, discrimination and that sort of thing.

MR. FROST: Well, actually, if the present system were really conventionally carried out there isn't very much that we can suggest beyond the fact that perhaps the exceptions are very broad.

WITNESS: Well, as I was saying before, I don't see why you couldn't get the standard of petit jurors almost up to the standard of grand jurors by pursuing the same course you pursue with grand jurors. That is the reason in England ——

MR. CONANT: When you said "pursuing the same course" you meant applying the same formula?

WITNESS: Not exactly the same formula. That is the reason why some of these English involved commercial cases are tried by grand jurors because up to the time they have had a very much higher standard of jurors than we have.

Now, Mr. Frost, I gave some consideration to the question you raised last night and asked me to consider over-night. In respect to the safeguard that might be given to an accused person from prosecution by the Attorney-General on a bill of indictment or on a charge, it would be to supplant the indictment presented by the Attorney-General without any other body intervening. It does seem to me that if the consent of a judge was required, then it would cover that whole situation. Surely a judge is capable of consenting or withholding his consent just as much as a grand jury. The judge has power to try a man and send him to jail for life and so on, if it is necessary to have any such consent, but I don't know ——

Q. I want to interrupt you for a minute. Are you referring to the proper form, a consent as it prevails or a consent along the lines that was discussed; that is to say, after examination by a judge in much the same manner that the grand jury does now?

A. Oh, I would think that there would be no occasion for prescribing by a statute what sort of an examination the judge is to hold.

Q. H'm, h'm.

A. Because, after all, if the judge is required to give his consent he has a judicial authority and he should inform himself properly before he gives a consent. I don't think we need anticipate that judges are going to give their consent in cases like that without giving it in a good case.

MR. FROST: Well, Mr. McRuer, what has bothered me about this thing is

this, that any references to the Attorney-General doesn't mean that we think Mr. Conant is unfair because I don't think that there is a man who would be fairer to an accused person than Mr. Conant, and I think that that is true of past attorneys as well. I think that they have all tried to administer the law well, and I don't think that they have ever had the slightest intention of being unfair—and probably they haven't been. But it seems to me that there is this difficulty that you have to meet.

First of all there are the safeguards to an accused person. Now, Mr. Magone and I just don't see eye to eye in this; he says that perhaps he has the Crown-attorney complex and perhaps I have the other complex. But you have certain safeguards which have been given in the course of law, and these safeguards really amount to what the man on the street calls "British Justice". For instance, he is entitled to know the nature of the charges against him.

WITNESS: That's in the statutes.

Q. Yes, and he should know—I think that it is fair and proper that he should know, despite what the other opinion may be, the nature of the evidence as it were, and have some form of discovery. I fear that we must be careful, particularly in the administration of criminal law, not to allow the man on the street to think that justice is merely limited to judges and lawyers. I will agree with you, I think there are a lot of useless things about grand juries, and I think that if the grand jury system were continued it should be revised entirely; but, nevertheless, there is this to it, that it has the intervention of twelve men who protect a subject against unjust prosecution and give that feeling to the man in the street. That is very important in these days when we are faced with the difficulties that we are and, furthermore, you do give him certain rights that have been in the past important rights.

Now, take the matter of calling—that little matter of his right to take the witnesses who are named in the indictment and put them in the box and make them subject to cross-examination. To a Crown counsel that may not appear important, but to an evidence lawyer and actually from the standpoint of the subject who is being accused that is something of much importance.

First of all I have often thought that in our criminal law we haven't too much discovery at that. Now, Mr. McRuer, you have been a Crown counsel and you have been a very fair one, and I think myself that an accused person should have all the protection possible against, for instance, Crown counsels who take cases as from a personal standpoint.

WITNESS: Well, Mr. Frost, I entirely agree, in principle, with everything you have said in respect to the rights of an accused person, and we ought to, at this time, protect those rights as judicially as we can. In doing so we never want to put the prosecution of criminal cases in this position, that you have thrown out so many things for the accused person that will be counteracted and must necessarily be counteracted by a different attitude in the respect of the Crown, and that the Crown must never be removed from a semi-judicial position.

MR. CONANT: Hear, hear!

WITNESS: That is, that the Crown has the duty to protect the rights of an accused person. Now, if you're going to, by statute, protect those rights as against suggestions that the Crown is going to be capricious and vindictive and go after people as they may do in some other jurisdictions, then you're going to, by statute, recognize that the Crown has no longer ——

Q. Yes.

A. —— a semi-judicial position to fill and in itself has to protect the rights of the accused person. Now, that's the fear I have, of recognizing that an Attorney-General should ever act on any other principle than that he is an authority who must be very careful in protecting the rights of an accused person, because once you do that, then you're going to put the accused person in this position, that he has his rights, the Crown will quote their rights, and they will fight it out each, say, in a civil case. That would be very unfortunate in our administration of British justice.

MR. CONANT. Yes.

MR. FROST: Of course I entirely agree with that; I agree that the Crown has a great function to perform, and I agree that furthermore while we are recognizing the rights of an accused person we shouldn't fail to recognize that the public have rights and the administration of justice is paramount. But do you think that at the present time there are too many safeguards for an accused person?

WITNESS: Oh, no.

Q. Well, the point is this: why abolish it, why do away with it? It may be that grand juries are now the fifth wheel to the cart, but, nevertheless, if there are safeguards there couldn't we, in substituting something for that, protect the accused on that point?

A. Well, the only thing I suggest, if it is necessary, is that you do it by the consent of the judge. But you've got this, that the judges have a different attitude of mind toward a prosecution that is launched by indictment rather than by preliminary hearing.

MR. CONANT: Yes.

WITNESS: If you apply for particulars the judge will order particulars every time where there has been no preliminary hearing, and they will order rather voluminous particulars on that very ground. Any accused has a right to demand particulars, and the whole attitude is that the Crown must be fair to the accused in letting him have full knowledge of what he's standing trial for, but even now the Crown isn't required to disclose all the witnesses to the accused. If you're going to put the Crown in that position you're going to have a demand that the accused is going to have to disclose all his evidence, so you'll have an examination for discovery on both sides. I think that after all the soundest way is to leave it that the Crown is a semi-judicial officer that must seek to do justice fairly and justly and not anticipate by statute that he's not going to do so.

MR. MAGONE: A pure fountain of justice, Mr. McRuer.

WITNESS: He should be, and I think that in this province, in my experience over a number of years in both prosecuting and defending, I have found the Attorney-General to proceed most conscientiously in that way.

MR. FROST: Well, of course other people may say that grand juries have other important functions that are just as important as that one, but that is the one that appeals to me ——

WITNESS: Yes.

Q. —— as being a safeguard. Mr. White, for instance, who was here yesterday, talked about the grand jury and his feelings were that that is something which has been handed down over a great period of time. What I would like to do is this: I would like to see something devised that would save the various protections which have grown up over years and which we do count as being valuable, and which members of our profession count as being valuable, and discard the expense and cumbersome and useless parts of the system.

Now, that's the only reason that I suggested that there should be something to take the place of, something to stand between. There was a suggestion made—I don't know just who made it, perhaps it was Mr. Conant himself—that in cases which are normally grand jury cases if there is, for instance, a preliminary hearing that the accused must have the right, in the case of the abolishment of the grand jury, to ask that there should be a rehearing, say, before a county judge.

MR. CONANT: No, that wasn't my suggestion.

MR. FROST: Well, somebody made that suggestion.

MR. LEDUC: Mr. McCarthy.

MR. FROST: Oh, yes. Well, that should be if he felt that the preliminary hearing was just a matter of form and that the magistrate had committed him on what he felt to be proper evidence, then there should be in effect a form of appeal from that to a county judge or to a Supreme Court judge. Now, I haven't considered that angle in the matter of the ordinary case where there's a preliminary hearing, but I do think this, that in cases where an indictment is preferred directly by the Crown and you're abolishing the grand jury, there should be some intervening person, judge or body of some sort that would review the evidence and give the accused person the benefit of the protection that we now have.

WITNESS: Well, I think I probably have given all the assistance I can from my own view. I know it can be argued from both sides.

MR. CONANT: Mr. McRuer doesn't think that the review of the evidence such as we have discussed might take place before a county judge would be necessary, that a formal order of the court would be sufficient; that is your view?

WITNESS: Oh, yes. Well, I really think that, after all, you wouldn't be gaining anything by abolishing grand juries and then providing any mode of appeal from a committal for trial.

Q. Oh well, personally I have no notion of that.

A. No.

Q. But it does impress me that where the Attorney-General has an indictment it would be, perhaps, a desirable safeguard that those cases, which are very rare, should go before a judge and that he should review them.

A. Well, he should give his consent to the indictment and the charge. After all, I don't think the judges would like ——

Q. Oh no.

A. —— the disregard of the duty under the statute.

MR. FROST: I would like to say this in regard to Mr. Conant. Mr. Conant, the session before last, introduced certain amendments to the Coroner's Act which I thought were very fair and reasonable; I thought they improved the Coroner's Act considerably from a standpoint of fairness. So that any reference I make to that isn't any reflection on his fairness.

MR. CONANT: I think we understand that, Mr. Frost, thank you.

MR. FROST: But five years or ten years might make a big difference.

MR. CONANT: Anything else, Mr. Magone?

MR. MAGONE: I just wanted to ask Mr. McRuer a question arising out of this discussion. If the Attorney-General preferred a charge and that charge had to go before a county judge, then the Attorney-General would be in a different position from that of the ordinary man in the street, wouldn't he?

MR. CONANT: Yes.

WITNESS: Oh, yes.

MR. MAGONE: The ordinary man in the street can prefer a charge before the grand jury with the consent of the judge.

WITNESS: Yes.

MR. FROST: Well, of course that would apply to everybody; I mean any indictment that is preferred that way.

MR. CONANT: We have almost boxed the compass on the discussion of that item. Then you read Section 73 there, Mr. Magone; I think it would throw some light.

MR. MAGONE: Reads Sec. 73:

> "The Attorney-General or anyone by his direction or anyone with a written consent of a judge of any court or with a written consent from

the Attorney-General may prefer a bill of indictment for any offence. Any person may prefer a bill of indictment by order of the Court."

MR. FROST: That goes before a grand jury and then on to the other, the Criminal Court.

MR. MAGONE: Yes. And with respect to, Mr. McRuer, Mr. Frost's inquiry where someone has been committed for trial without sufficient evidence, a motion to quash the committal may now be brought?

WITNESS: Yes, if there's any evidence to support the committal, of course the motion to quash wouldn't be successful.

Q. Yes.

A. But if he just capriciously sent him on to trial without any evidence at all, it may be quashed.

MR. CONANT: Well, just before we leave that—I don't want to prolong that discussion, I'd like to have your view on this angle: supposing grand juries were abolished and, in an entirely different situation from what we discussed, cases are committed, then, by the magistrates and go direct to the petit jury, what would be your views of the provision enabling the Attorney-General, in any case after committal, to direct that the bill should go before a county judge, having in mind this fact, that there are always possibilities of error, always possibilities of situations or evidence developing after committal that might alter the situation?

WITNESS: That is, that the Attorney-General would direct the county judge, we'll say, to review the committal for trial and hear new evidence?

Q. That the Attorney-General would have the right, in cases of committal, to direct the bill of indictment to go before a county judge who would function exactly the same as a grand jury.

A. As a grand jury?

Q. Yes.

A. Well, it might be an additional safeguard to the accused person.

Q. Does it not occur to you, Mr. McRuer, that without that the only way of disposing of a case which the Attorney-General might fear shouldn't go to trial is by *nolle prosequi?*

A. Yes, and that is an unfair position to put the Attorney-General in.

Q. That's a very undesirable position to be in?

A. Yes.

Q. And it's a position, or it's a procedure that is very rarely exercised at the present time.

A. I had thought of an alternative procedure that I just throw out for the consideration of the Committee, and that's all: that grand juries be abolished, except the Attorney-General or an accused person may apply to a judge to convene a grand jury, and if he shows a case why a grand jury should be convened, and the matter should go before a grand jury, then they may subpoena a grand jury and have the grand jury hearing.

Q. I point out this difficulty: the grand jury lists are made years before, there's a tremendous amount of preliminary work.

A. Well, that might be simplified in some way by statute, it's quite true, but then, if that course were followed, it would meet Mr. Frost's criticism, and would still leave it to the Attorney-General to have a grand jury empanelled to hear an indictment preferred by himself. If he wanted to start without a preliminary hearing held apply for a grand jury to be empanelled. It's quite true, that under our present statutory set-up for subpoenaing grand juries and striking panels, that would be very cumbersome, but a simplified method might be devised for subpoenaing men of a certain standing. The sheriff subpeonaed twelve men of certain standing in the community to act as grand jurors at the present time. That's a very loose sort of suggestion, but it's one of compromise, at any rate.

MR. CONANT: Yes.

MR. FROST: Well, I wouldn't want you or the Committee to feel that I'm just raising a point which is a mere technicality, and in which there isn't any force, but I am impressed by this. First of all, in the administration of our criminal laws, and particularly these laws that relate to indictments, in many cases you're dealing with matters of life and death, and a death penalty, once it is imposed, is irrevocable and there's nothing that can be done to make amends for it at all. I do feel, therefore, that as long as we retain the death penalty we ought to, in the criminal matters, exercise the greatest possible care and caution.

I think it is part of our sense of justice that that should be done. In other cases, I agree that it isn't so important. I know of a case, not long ago, in which a man was convicted wrongly, as appeared by evidence that subsequently came out, and in that case my good friend, here, exercised his good offices to obtain the pardon through the Administrator of Justice in Ottawa. Well, in that case the damage may have been something that was of great inconvenience and very unpleasant to the accused, but it wasn't irrevocable.

Now, in the case of a death penalty, that is just the situation.

MR. CONANT: Well, it seems to me we have covered that pretty well with Mr. McRuer.

WITNESS: I think I've done all I can.

Q. All right, Mr. McRuer, have you anything else?

A. In regard to the alternative jurymen in criminal trials, of course, if it's only to be applied occasionally, where there's going to be a long trial, or something

like that, there might be advantages in it. Mr. White said yesterday: "I have only had an occasion once where a juryman took ill, and in that case the defence counsel consented to have the case proceed with eleven jurors." Of course, he had no authority to do it at all, and he stuck by his consent and accepted the verdict of the jury, but I think that a statute might give them the right to consent.

Now, the question of appeals from motions to quash indictments, came up yesterday for discussion. There are one or two cases in our courts, very few go back over the last five years, where a trial has been set aside in the Court of Appeal on the ground of defective indictment, and I think, as time goes on, that there will be less. I think it's rather a pity to provide an entirely new procedure of appeals in criminal cases of one or two cases. We don't want our law to get into a mass of technicality in regard to the administration of the criminal law and, as was pointed out yesterday, having an appeal taken of a motion to quash an indictment at the assizes sitting at Whitby, a motion to quash an indictment and then an appeal from it, and the whole thing is thrown over for another four or five or six months, with the possibility of losing witnesses and parties dying, and so on. That's getting rather to the American procedure of appeals. I don't believe that there's any great need for it at the present time.

As to assessors and experts, I think, is about the only other one that I have any desire to comment on, unless there's something the Committee wishes to speak to me about.

MR. MAGONE: Mr. McRuer, owing to your experience, we'd like to have your view on the question of appeals in summary conviction matters, whether it should be on the record for the magistrate or a trial *de novo* as at present.

WITNESS: Well there, again, your trial *de novo* is a protection to the accused person, but just why there should be that much more protection in a small matter, and why, in a case of murder, there isn't that, is a little hard to justify, I think.

MR. CONANT: Don't you think that substantial justice would be done if the appeal were already on the record?

WITNESS: I would think so.

Q. We do it in liquor cases now.

A. Well, why greater rights on the small cases than you have on the large cases?

Q. Yes, you appeal on a murder trial ——

A. The reason that you have that right is this: years ago, as you well know, there very seldom was a court reporter in the court in summary convictions.

Q. That's all changed.

A. But if the evidence is taken down by a competent court reporter, I think there can be an appeal on your records. If, however, there's a trial, as they do occur yet—take a case of common assault out in the country tried by a Justice

of the Peace; he will take it down in long-hand and probably will only take some parts down and not others.

MR. FROST: The part that impresses him.

WITNESS: Yes. It would be very unfortunate to have an appeal restricted to his notes.

MR. CONANT: But adopting your suggestion, supposing the practice were that where there has been a stenographic report that appeal should be taken on the evidence; would that be sufficient?

WITNESS: Perfectly sufficient.

Q. Yes.

A. Now, in respect to employing experts to sit with the judge on the basis recommended in the Master's report at page B71; there are two or three aspects in connection with this. In the admiralty cases, we know that there is the right to appoint an assessor who is an expert in seamanship and nautical matters, and who sits with the judge and advises the judge. They don't call experts in respect to the matters they deal with.

Mr. Justice Davies, in a judgment, regretted that the Supreme Court had not the right to appoint experts to sit with them. That case is Tordens Kyold vs. T. A. Euphemia, 41 Supreme Court, report page 154. There, of course, the appeal was on the record, they had no expert to advise the court and the judges evidently felt that they ought to have that.

In another case in the English court, the function of the nautical assessors is set out in these words:

> "The English practice as to the effect of evidence, as to matters of nautical skill and practice, and as to the deduction to be drawn from nautical facts, is inadmissible and will not be allowed to be given. The function of the assessors is not to decide questions of facts arising in the case, but to advise the court upon nautical matters. The decision of the case rests entirely with the judge. The reason why expert evidence is not admitted is that the court would be inundated with the opinions of nautical men on the one side and opposite opinions on the other, to the great expense of suitors, and the great delay in the hearing of the case, and with no benefit whatever."

That is Harbour Commissioners of Montreal vs. Universe 1906, 10 Exchequer Court, reports 305. Now, that is layed down in principle, and one obviously says: "Well, why couldn't that same principle be adopted in many of our civil cases?" If the legislation was very carefully worded, it might be that the Rules of Practice as we have them now, might be extended, but I only point out to the Committee that our Canada Evidence Act and our Ontario Evidence Act, which deal with opinion evidence, are broad; they don't deal with expert evidence, it's opinion evidence, and anyone who offers an opinion on any matter, and whose opinion is accepted as evidence, comes within those statutes.

You'll get, in some cases, men who will give expert, or opinion evidence, on four or five different matters. In the ordinary automobile case, you'll have men who qualify as experts to give medical opinion. You'll have, in the same case, an automotive engineer, as they call them now, who qualifies to give an opinion as to how the cars came together; he's an expert, having examined cars for many years. You'll have a police officer who gives an opinion as to in what distance a car was stopped. You'll have, also, the police officer who will give an opinion as to whether the man was drunk or not, qualifying himself from his experience in seeing men who are drunk, and his opinion is accepted.

Well, I was just thinking what you're going to do. If you're going to have experts on the bench, you're going to have experts in drunkenness, experts in automobile cases, and medical experts, a whole row of them. I don't suggest it as an objection to the principle, and that the problem can't be solved. The problem that is desired to be met is this, that you'll have a free medical expert saying one thing and a free medical expert saying another thing, and the judge wondering what to do about it. You get very complicated questions in engineering and electrical matters, and so on.

But in passing any legislation in respect to it, you'll have to be very careful that you don't tie up the court in such a way to make it very difficult to practice in the ordinary way. They won't do it. If you put it past this, that the parties may agree on the appointment of an expert by the judge, who will sit with him, and who will be the expert on any particular subject matter, but not the expert in respect to all matters involving expert evidence ——

MR. CONANT: But I didn't understand that the recommendation went any further than that.

WITNESS: Well, it's not just clear how broad it is.

> "I recommend that the Supeme Court Rules of Practice be so amended, as to provide the necessary procedure for the appointment of assessors or experts to assist the trial judge."

Now, is that to be appointed by him as of right, so that he may appoint a man without the consent of one of the parties, who will just be the expert in the case? After all, you know, even in getting an expert to assist you at a trial, the length of time you'll have to spend with him getting him conversant with the facts.

Q. And yourself conversant with the answers, too.

A. Well, that's more important still.

Q. I wasn't referring to you in that case.

A. No, but you have to train the lawyer, to a certain extent, on what questions to ask.

Q. But Mr. McRuer, it seems to me that on this issue there's considerable confusion; what if we limited it to this: supposing we had a practice, that upon the application of either party, the court could appoint an expert who would sit

with the judge and advise the judge on whatever you like, the branch of scientific or specialized information that is to come out, and that upon the appointment of that man expert testimony would not be abused, that the witness would then deal with their observations and facts, it seems to me that would be tremendously helpful.

MR. FROST: How would you get around Mr. White's suggestion of yesterday? Did you hear, Mr. McRuer, what he said about that? The difficulty was to get the expert who has an open and judicial mind; some experts are convinced that a certain attitude is right, whereas, that may be the very contention in connection with the expert evidence.

WITNESS: Well, that's an obvious objection, but, of course, they do manage to get over it in the admiralty cases.

MR. CONANT: Oh yes.

WITNESS: But, I wonder if it should go further than at the present time, at any rate, to see how it would be tried out, to have the parties agree that that should be done. For instance, we know that in our courts, the judges get to know certain people, and they have fancies for those certain people who are in expert positions—positions to give expert evidence. The judges get to know them pretty well, and if you applied for an expert accountant, I have a pretty good idea who the judges would appoint in nine cases out of ten, and I don't know that to give them the arbitrary power to select anybody they wished would ——

Q. If you take the present Rule 268, "The court may obtain the assistance of merchants . . . " so on and so on, "in such ways that they see fit to better enable them to determine any matter of fact in question in any case of . . . ", etc., etc. Well, that rule is all right so far as it goes, but it doesn't in any way count the amount of expert testimony that is hurled around in the court.

A. Not a bit.

Q. Well now, if you enlarge that to this extent; adopting your suggestion, that instead of both parties the court could appoint an expert, either concurred in by both parties or selected by the court, and that the appointment of that expert would terminate the matter of expert testimony as on that issue ——

A. I think it would be a very fine start in the right direction.

Q. Wouldn't that be a start in the right direction?

A. Yes, I think so.

MR. FROST: We are all agreed no injustice would be done, and we'd see how it would work out.

WITNESS: Yes, and you would get a practice worked out that would meet with the approval of anyone.

MR. CONANT: It couldn't possibly be a hardship if both parties agreed there's

opportunity for unlimited testimony—my man isn't too wealthy, but yours is, so let us agree on one expert to sum up the actual evidence that is given, and tell the judge what the scientific conclusion is. It seems to me that would be a real step.

WITNESS: Yes; of course, I thoroughly feel that in framing any such legislation you must be careful—no doubt Mr. Magone would see that you were—that he would not be a finder of facts.

Q. Oh, no.

A. And that the judge would not be compelled to accept his facts; that he merely be an adviser to the judge, because otherwise you would be making him a Supreme Court judge, and you have no constitutional power to do that. Well, I think I have covered everything I had.

Q. Well, I don't know that you have touched on this—and I think it's important—the question of onus in juries. You didn't discuss that with us, did you?

A. Oh, my suggestion was that that shouldn't be altered; I agreed with what was said, that this should not be altered. At the present time, juries really are restricted to common law actions, and then if they are too involved, they would strike out the jury notice. There's getting to be a greater tendency all along, I think, to take cases without a jury, especially in the criminal courts in Toronto, more elections for trial without a jury than before, and I think that to introduce the British practice, which looks to me like a war measure, at the present time isn't ——

Q. Well, we're at war too, Mr. McRuer, you know.

A. Yes, I know, but I don't think that we have the same call yet for the introduction of that. If it is introduced, it should only be introduced as a war measure. But I think the judge can decide that it's not a proper case to be tried by a jury.

Q. Oh, yes, but the onus is upon the person challenging.

A. Yes. Well, I think it still should be; that's my own view, Mr. Attorney.

Q. I'd like your views on this, because it has been discussed here, and I think that it is important too: at the present time the appeals from Division Courts, say it's $150.00, goes to the Court of Appeal; don't you think substantial justice would be rendered if they went to the single judges of the Supreme Court?

A. Well, personally, I don't see any reason in the world why they shouldn't go to a single judge, the same as the motions to quash convictions and things of that sort go to a single judge.

Q. Even more important.

A. Much more important than an appeal in respect to $150.00.

Q. Doesn't the present system add a lot of procedure and expense? You have to have how many copies of the evidence, five?

MR. MAGONE: Seven copies, and only three of them used.

MR. CONANT: Yes.

MR. FROST: What court is that?

MR. CONANT: Division Court.

WITNESS: I think I'm quite agreed that Division Court procedure should be simplified to the greatest degree, and made as inexpensive as possible; that any means that will simplify Division Court procedure is very, very important.

MR. CONANT: Have you any view as to six-men juries in County Courts?

WITNESS: Yes, I expressed the view that I thought that six men could handle a county court case as well as twelve.

Q. Oh!

MR. LEDUC: I thik you said that it might not be a serious thing if it were done.

WITNESS: No.

MR. MAGONE: That's all I have.

MR. CONANT: Yes. Thank you very much Mr. McRuer.

Witness excused.

G. T. WALSH, K.C.

WITNESS: Mr. Chairman, gentlemen, while I am a bencher of the Law Society, of course, I can only talk as an individual member of that, and not on behalf of the society. Mr. McCarthy, the treasurer, very fully, yesterday, I think, stated, and quite frankly, too, what step the Convocation authorized to be taken, but I wish, as a practising lawyer and as a bencher, and from what I know of the public, to just add a word on behalf of juries. I would say that the public that I know and that I represent believe in juries.

MR. CONANT: What are you referring to, petit or grand juries?

WITNESS: I refer to all juries. My opinion is that this report is an attack upon the fundamental jury system. In my opinion it is an attack upon a man's fundamental rights, the rights that he has had, since the days of Magna Charta, to have his case tried by his fellow men, and as long as he has that right, why should that right be taken away from him, unless there's a real good reason shown? Now, when this matter has come up for discussion—we have had several at Convocation—I have always asked: "Who is asking for this change,

and why? Why is this change asked for?" Mr. McRuer said that he thought a six-man jury would be all right, that was his personal view. Well, if it's a six-man jury, why not a three-man jury? Why do you need a twelve-man jury in a Supreme Court in a criminal jury? If cases are to be tried, in my opinion, they should be tried right; if a case is worth going to court a man is entitled to have his case tried and tried properly.

There are a great number of people in this province who don't want their cases tried by a judge, they want their cased tried by a jury, and I submit that they should still have this right: the right to have that done. There have been a lot of reasons advanced and, as a matter of fact, the reasons go right to the very foundation of the jury system; they may be old reasons, but I submit that every one of them are sound reasons. When a man says: "I want my case decided on that evidence by men of practical experience," why shouldn't he have it tried that way? That's the question. Perhaps I shouldn't be putting the question to you, gentlemen, but that is the question I have always asked, and I have never heard a satisfactory reply to that.

Now, this report, in my opinion, is a direct attack on that fundamental jury system; it is the thin end of the wedge, and just the beginning of an agitation to take away a man's fundamental right to have his case tried by a jury; and that is my objection to the clauses in that report dealing with juries. Before mentioning grand juries, let me say that lawyers may have different views, and I think, Mr. Attorney-General, you quite properly made the remark, yesterday, that the profession is not their view, it's the public's view. I think you're quite right, there may be divided opinion among the lawyers, but what of the public?

MR. CONANT: Well, we'll have to take an open poll, is that what they call it?

WITNESS: Last night as I was talking with a lawyer, we met a man, and I said: "Let's stop this man and ask him a question." I said to this man: "If you were in an accident, who would you want your case tried by?" The man said: "I want justice and I'll have it tried by a jury." Exactly, and as a matter of fact, that's just what the judges say.

Mr. McCarthy, yesterday, referred to the report of the judges of the Supreme Court. Now, I don't know whether you notice they are very, very strong on the question of these juries, and I believe that that is an unanimous report. I don't know whether I'm at liberty to refer to that report at all, but I understand, sir, that a copy was delivered to you, and the reason I mention that at this stage is this: you're all lawyers, you may have your own individual views on the jury, one day you'll have a real victory by a jury and you think they're fine, the next day you may not, and you don't think very much of those juries, but the judge sitting on the bench, who is far removed from one side or the other, who has no financial interest in the matter whatsoever, who knows not only the juries in Toronto, in Ottawa, but in Whitby and Belleville, after having been on the bench for twenty-five years, right down from the senior judge to the judges that have just been appointed, you'll find, from their unanimous report, that they see no reason for the change of that jury system.

Now, I consider that a judge who hears all the evidence hasn't got the same vote that the lawyers got, not at all, and when they, after years of trial of that

system, say that they are in favour, as I am, of the retention of that system, I'd like to know one good reason for the change of it.

MR. CONANT: Well, Mr. Walsh, how do you reconcile that with the fact that in every other substantial jurisdiction of the British Empire, they have reduced the size of juries, and in some of them they have reduced the jury onus? How do you reconcile your observations as to the reference you made for that fact?

WITNESS: Well, for the simple reason that what suits one person may not suit another.

Q. Are we a peculiar part of the British Empire, that what would prevail in South Africa, Australia, England and the western provinces, practically all the provinces, wouldn't prevail here?

A. Let's take some place near home first, Mr. Attorney-General. You mentioned the western provinces; well, how much of their legislation do we want to copy? What do we want to do with Mr. Aberhart's legislation?

Q. Oh, it would be fair to say that that was in existence long before Mr. Aberhart thought of it.

A. Well, perhaps those conditions brought on Aberhart.

Q. They never established grand juries, they never even thought of it.

A. I know, but that may have been the view of those people, they believed in cutting out a lot of the fundamental rights. Look what Mr. Hanson, former Attorney-General of British Columbia, said the other day in a very fine speech he made, warning the public of the rights that have been taken away from them, and, with the assistance of the press, the government passed measures that were taking away the very fundamental rights of the people. Of course, we may have different views on that.

Q. Well, we'll go to England; how do you account for this attitude in English juries?

A. Well, they want to abolish them, and if they want to abolish them that's no reason why we ought to. They may have found, under this system of administration of justice over there, that they didn't want a grand jury. They may feel that way, but simply because somebody else wants to do something, that's no reason why we ought to do it, unless it's needed here. That's my opinion of it.

However, the grand jury question, perhaps, is a different matter from that of the petit juries, but even the grand jury is an institution we have had for years, and if it has, why the agitation, at the present time, to take it away? Is it the expense?

Q. Oh, Mr. Walsh! It would be fair to say, at the present time, that it has been a matter of discussion for years in this province.

A. Oh, yes.

Q. There has been a bill introduced in the Legislature in 1933 for the same reason.

A. Yes, and it didn't pass, it was dropped. What is the real reason for abolishing it now? What good is it going to do to abolish it? I mean, there are both sides of the case counter-balancing this; which is going to do the greatest good to the public? All the public will save will be a certain amount of expense, isn't it? That's all the saving the public will do.

Q. That isn't of any importance, of course?

A. Yes, it's of a very substantial importance; that is, it all depends upon what saving it's going to bring about, and is it going to outweigh, on the other hand, the disadvantages of abolishing it? That's the way I look at it, because it's a question of a man's rights to be determined. The expense, true, is an element to be considered, but it shouldn't be a deciding factor. At the present time under the grand jury system, he has his rights safeguarded, or at least he thinks he has, anyway, and why should that be taken away from him unless he is given a safeguard that is required?

Now, I don't know what the views of the other members may be in regard to the grand jury, but it seems to me that they discharge important duties. Apart from the fact that a judge goes to assize, there's a representative, generally, from each section of the locality represented on the grand jury, and he no doubt talks about this at the centre of the locality from which he comes, and he believes that he has an important part in the administration of justice. I believe that that is a good thing, especially in these days of unrest and uncertainty, when everybody is crying for reform. It would be a good thing if these institutions, which are created for their safeguard, would remain. What right is an accused going to have after there has been a perfunctory committal by a magistrate?

Now, you have all acted for an accused. When he comes before the magistrate, the magistrate only hears certain evidence, and perhaps the Crown counsel submits one or two witnesses on an unimportant point. If you take away the grand jury, what safeguard has that accused person got? I have never had an answer to that. I'd like to know, if you're going to take away a grand jury, mustn't there be a substitution whereby an accused is entitled to have a full investigation before a magistrate, that is, not a perfunctory one, but a full investigation, which is going to get right to the substance of the case that is going to be presented against him?

Q. Are you suggesting that the hearing before a grand jury is always a full investigation?

A. Well, you see, there's a witness on that indictment, and the accused has the benefit of that and, if I understand the law, the grand jury can hear as many of those witnesses as they want.

Q. Quite right.

A. I think I have acted as Crown counsel long enough to know that, and in my experience as Crown counsel, I found that grand juries rendered a very

important service. I know that on one occasion they showed more sense than I did.

MR. CONANT: Mr. Walsh, you do jury practice to a considerable extent?

WITNESS: No, I have a fair amount of each, Mr. Attorney-General.

Q. You do a considerable amount of jury practice don't you?

A. Yes, I would say it's pretty even.

Q. Well, we had an observation from one gentleman who appeared before us, and expressed the thought that the jury system had a tendency to enlarge litigation, that some cases went to trial when the jury was available that wouldn't go to trial when the jury was not available. Any comments to make on that observation?

A. I would say it has the reverse effect. I would say that the jury case settles litigation, that when a finding of a jury is interpreted by the decision of the Court of Appeal and a Supreme Court of Canada, there are less appeals.

Q. It wasn't directed to that, it was directed to cases going to trial.

A. It's the same thing.

Q. Oh, no, it's entirely different.

A. As a matter of fact, I wouldn't bring a case before a jury that I wouldn't think of bringing before a judge. I would say, as far as it's concerned, that I wouldn't bring the case into court at all, unless it has some merit and the client wants his case tried by jury.

MR. STRACHAN: Mr. Walsh, if you were representing a great corporation such as the T.T.C. or the C.P.R., you'd rather have a jury?

WITNESS: I don't know, it just depends on the facts of that particular case and the wishes of my client.

MR. FROST: Mr. Walsh, in connection with this grand jury matter, as you have said, it's a debatable point?

WITNESS: Yes.

Q. There's a good deal of opinion for abolishment of grand jury and a good deal of opinion against it?

A. Yes.

Q. In the event of abolishment of grand juries, what would you recommend by way of safeguards for accused persons?

MR. CONANT: You mean in all cases, Mr. Frost?

MR. LEDUC: Take the committal case first.

MR. FROST: For instance, there are two classes of cases, one of which, where a man has been committed in a normal way before a magistrate. His case comes before the grand jury, and then a true bill is brought in and he goes before the trial jury. The second case is that which Mr. Magone mentioned in that section he read a few minutes ago, of cases which are preferred by the Attorney-General or by an individual with the consent of a judge, in which case the matter goes to a grand jury, and then to the trial jury.

WITNESS: Yes.

Q. There have been certain safeguards discussed, what would you suggest there?

A. Well, I would suggest that before an indictment could be preferred there ought to be a preliminary investigation. There should be the right, on the part of the accused, to demand an investigation, either, as has been suggested by the Attorney-General, by a county judge, or that the assize judge hear a *prima facie* himself. That is not a light matter. I think there ought to be some safeguard in that.

Q. The same assize judge that might try the case, you mean?

A. Well, I suppose there might be occasions when you'd want to have it done that way, and not go over to the next assizes. Either by the judge trying at the assizes or by a county judge; there ought to be some system.

MR. CONANT: Some of the members of the Committee are worried by the situation that arises where the Attorney-General prefers an indictment, as he always had the right to do.

MR. FROST: Well, perhaps, Mr. Conant, it would be fairer to put, in cases where indictment is preferred without preliminary hearing. That is not applying only to you, but it might apply to citizens.

MR. CONANT: Yes, that's broad enough. I think the Committee is concerned with this aspect, that having abolished the grand jury, what safeguards should be interposed to prevent the abuse, whether it should be a judge dealing with it as a grand jury now deals with it, or whether it should be with the consent of a judge, more or less *pro forma*, as it is now in the case of a private individual.

WITNESS: Well, I would say that I would go by a county judge as you suggested, or by a judge himself, but no *pro forma* business, because, why should the Attorney-General or a private person ask the judge to O.K., if I may use that word, an indictment or allow it to be presented without any investigation by an accused? Why shouldn't that accused be notified, so that he or his counsel can be prepared to have an investigation of that charge before he is actually put on trial?

MR. FROST: To see if there's sufficient evidence?

WITNESS: To see if there's sufficient evidence. After all, we may have an

excellent administration of justice in this province, you never know, because any legislation that is passed now is passed for the future; we don't know what changes may come. When you're taking away a man's fundamental right to have his case first investigated by the police magistrate, secondly by the grand jury, there should be some system whereby he got a thorough investigation in the beginning by a magistrate, or in the alternative, he ought to have some system, whereby, if he is indicted without a preliminary investigation, to demand one. I mean, not leave the optional to the judge, to give him one, because the Crown may come down and oppose it. I think it has been suggested that upon application to the judge, an investigation could be made. The accused then, in nearly all cases, would be opposed by the Crown. I don't think I am saying anything wrong, when I say that the Crown would say: "Why, you'll know soon enough what's there."

Why shouldn't that accused person be given the right to demand it? Perhaps I have spoken too long on that, Mr. Attorney-General, but you have asked me about it. I was just going to suggest, also, that at the present time, there is no way for a man to have any appeal, is there, from a committal?

Q. From a what?

A. Committal.

MR. MAGONE: Yes, on a motion to quash.

WITNESS: Well, I mean in an effective way, because on a motion to quash the judge will say: "Well, now, this will be all sifted out by the grand jury; you needn't worry, there will be lots of evidence there, and that grand jury of twelve good men will protect you." You're told that in comforting words. If the trial jury and the grand jury are taken away from them, shouldn't there be some substitution, whereby you can appeal from that committal order to a judge in chambers to have him review the case? We all know that Crown counsel don't put all their case in at a preliminary hearing, and the magistrates, they just use their own discretion, and you know what takes place; an accused hears very little of it, and he hears the most damaging part of it, and the whole meat of the case when he gets to another court.

MR. CONANT: Well, I think perhaps we understand your views, you are against it, whatever it is.

WITNESS: No, I am in favour of what there is, but if we take away what we have, I am in favour of getting something that will protect me. There is no person who believes in reform more than I do, but a man believes in reform without taking away his rights. I think, if you are taking away what a man has, he should have a say about it.

Q. Is there any other angle you wanted to deal with in the matters we were considering?

A. Well, I was just going to say, in connection with the grand jury, that is pretty well covered; in connection with petit juries, I would say that the matter has been covered.

Q. I would be glad to have your remarks on this aspect, if you care to make them; there has been a suggestion here that an effort might be made to improve—although I don't like the word—the quality of the petit jurors; you heard that discussion, did you?

A. Yes.

Q. Have you any observations to make on that aspect?

A. I would just like to say that, from my experience, the little that I have had in this city, Mr. Attorney-General and gentlemen, I have found the juries very satisfactory, and I have found the judges very satisfactory. I have no apology to offer for the administration of justice in this county. Some people, perhaps, have made remarks, and I have read in the newspapers that this county of York, including the city of Toronto, perhaps, haven't as good juries as some other counties. I think they have had excellent juries in this county, and I tell you, I say this after getting some good sound lickings from them, too, those were cases in which I was decidedly wrong, and the juries were absolutely right. There are some lawyers, perhaps, that after an unfavourable verdict, take the view that the jury should be abolished. I don't. The juries are there to take a common sense view, and if you are going to have them, why, a man may not be well educated, but he may have a lot of common sense, he has a good public school education, and quite a lot of experience.

Q. Do you think our jury qualifications, as they work out in practice to-day, are quite all right?

A. Well, I think it could stand improvement.

Q. Well, have you any formula to suggest that might improve it?

A. Well, there could be perhaps on the selection of these jurymen. You can tell by their occupations. At the present time, the jurymen are selected by a board of four, aren't they? The sheriff, the county judge, and so on; couldn't there perhaps, be more—I don't mean pass legislation, but couldn't there be instructions given that in selecting juries, that there be greater care taken in the selection, so that there would be an all-representative jury?

Q. Well now, do you really think it starts, Mr. Walsh, from the local selectors, from the municipalities?

A. Yes.

Q. And the chain of events starts with them, and of course is terminated w th the county selectors. I was wondering if you had any definition or formula that you could suggest, that would accomplish what you apparently had in mind as a desirable improvement of the juries.

A. Well, I would say if the county judge and the sheriff and the other members of the committee gave more time perhaps ——

Q. Well, that is more a matter of machinery, you see.

A. Yes, well I would say if that were done, and if they needed any help, they could call it in. After all, I agree with what you say, to pass a law that certain men should be on a jury would be a bad thing, wouldn't it?

Q. Yes.

A. Because you might keep off the very type of men that show a lot of good common sense, and I would say that if the county judge looking over the lists, along with the sheriff, and if necessary, they could call in advice on the matter ——

Q. Well, that is practically the present machinery.

A. Well, why shouldn't it be carried out?

Q. Well, I have been just asking, groping to find somebody that would suggest a formula, improving what procedure we have. We are generally agreed it is desirable to improve the jury lists; I was wondering if you had any formula.

A. Well, I think the law as laid down there is all that is necessary.

MR. FROST: You mean to say if the jury selection is properly carried out.

MR. CONANT: Well, I would like to clear it up; read out the present passage covering juror's qualifications; have you it handy there? I may say to the gentlemen of the Committee that the law on jury qualifications now is very general, and very sketchy. Have you got it there, Mr. Magone?

MR. FROST: Of course your big difficulty is substituting educational requirements for common sense requirements. Mr. Barlow suggests that there should be certain educational qualifications. The difficulty is to give effect to that.

MR. SILK: Section 211 of the present Jurors' Act says:

> ". . . such persons as, in their opinion, or in the opinion of a majority of them, are, from the integrity of their character, and the soundness of their judgment and the extent of their information, the most discreet and competent for the performance of the duty of jurors."

That is section 16.

Then 211:

> "When the local selectors have completed the selection, they shall, for the purpose of the record thereof, distribute the names of the persons so selected into four divisions, and shall make such distribution according to the best of their judgment with a view to the relative competency of the persons to discharge duties required of them respectively."

MR. CONANT: Well, that is all the law there is to-day, is it not, Mr. Silk?

MR. SILK: Yes.

MR. CONANT: That is all the law there is on the qualification of jurors.

WITNESS: Well, I was impressed not only of the beauty of that language, but by the reference to the criterion used by the selectors; "for their judgment" and "select them for their experience". What better qualifications can you suggest that could ever be had by a juryman than that? I would say that all the law they need is right there. But what they want to do is to carry out the law, in order to improve the juries.

MR. CONANT: Isn't that in the same category as the word "reasonable" that the courts have struggled with?

WITNESS: Yes, but that is a good qualification for a jury; that is a good qualification for anybody that is administering justice.

Q. Well, you can't suggest any improvement?

A. I would suggest that that be carried out. You couldn't get anything better than that.

MR. FROST: Under the present procedure, there are selectors by townships, and that is the measure of the qualification of the men they are to select?

MR. CONANT: Yes.

MR. FROST: Then the various municipalities and townships send their selections to the county officials, and then they make a selection of the ones which the municipalities and townships have made?

MR. CONANT: Of course, with all deference to your very generous endorsement of that legislation, I have sat on boards of selectors, both local and county, and not uncommonly it happens that, well, a man is selected because he isn't working, and he can serve all right, and so on and so on.

MR. CONANT: Of course the selector isn't actually doing his duty if he does that.

WITNESS: That is just it, Mr. Attorney-General.

MR. CONANT: Well, I was never put in jail for it, and I think there are lots of others doing the same thing.

WITNESS: Well now, say you passed a law to improve it in the way that you think it ought to be improved, wouldn't the selectors do the very same thing on that law?

Q. Well, do you realize, in this county of York, there are something like 1,500 names selected every year, 1,500 or 2,000?

MR. SILK: I think, from what Colonel Denison told us, there are two or three thousand names selected each year.

MR. CONANT: Two or three thousand names selected each year, and do you think it is possible to apply as general a formula as that to a selection of two or three thousand names?

WITNESS: Couldn't they, Mr. Attorney, take perhaps a little more time and select the names—they would have to go over the names in not a perfunctory manner, but go over the lists and perhaps get some information on some. Say they are going to select eighty jurymen for the first two weeks and eighty jurymen for the next, couldn't they spend a little more time, and perhaps make inquiries of the jurymen they are going to select? Would not the extra expense involved justify the selection?

MR. CONANT: Well, I don't want to take up the time of the Committee, but I think it is important. You see, you have two or three thousand names, your duty with these two or three thousand names is from the standpoint of their integrity and soundness of judgment, the extent of their information, and if they are discreet and competent of the performance of the duties of jurors; now those are all more or less abstract qualifications, are they not?

A. They are, sir.

Q. I don't know whether abstract is the word, but you know what I mean.

A. Quite, I know.

Q. Well, how can the body of selectors, without any designation on the records, without any indication, tell whether a man came within that formula?

A. Well, the list shows his address, his full name, his age, his occupation, wouldn't it?

Q. Yes.

A. And they look down the list, and they see the word "manager". There, couldn't they perhaps take a little time and perhaps appoint a man that would get a little money for doing it, if it is important, look up in the telephone directory, look up in the city directory what he is a manager of. Another man is down as a clerk; he could be a clerk of anything; couldn't they use a little time and find out what he is a clerk of? I don't see, myself, where they need any more legislation than that. I don't know what fees are provided for doing that work; that may just be part of a lot of duties, and they just say: "Well, that's done." But this is an important matter. They could easily provide a reasonable fee for the selection of a satisfactory jury, and, as I say, they don't need more legislation, but more time. That's all. Because where could you get better words, abstract or not, than those words in the Jurors' Act. The lawyers on both sides go down the jury lists carefully, and note the men's occupations, addresses, and other general data, and if they can do it after the jurors are picked, why can't the selectors do it before the lists are made up. I believe it was in the judges' report, that I heard where there had been a decided improvement in one particular locality when the judge made an investigation of the jurymen. I think possibly Mr. McCarthy referred to it yesterday, also.

MR. FROST: That was in Hamilton, was it not?

MR. LEDUC: It is in the judges' report, page 5.

WITNESS: Anyway, I saw it some place, Mr. Leduc.

MR. LEDUC: Yes, the suggestion is that the county judge, as was stated in evidence here by a witness with regards to a judge in Hamilton, I believe, should very carefully go over the lists of jurors.

WITNESS: That is a very good suggestion.

MR. FROST: I think probably therein lies the crux of the whole situation; I think more co-operation is required from the selectors and there should be some effort made to impress them with the importance of their duty; if you do that with the present machinery, surely we can improve our juries.

MR. CONANT: Very well, Mr. Walsh; is there anything else?

WITNESS: I was just going to mention in connection with the six-man jury.

Q. County Court six-man jury?

A. Six-man jury; I don't see any reason for that change, Mr. Attorney-General.

Q. Well, it is a matter of economy, that's all.

A. Well then, why not make it three? I consider that a man who has a case, whether he is an accused, or it is a civil matter, if he has a case he is entitled to have his case tried properly.

MR. LEDUC: Why couldn't six men try a case as properly as twelve? Is twelve a sacramental number that cannot be changed without changing the fundamental principles?

A. No, I think you are right, I think the answer to that is just what the Commissioner himself said about criminal cases; why can't six-men juries try an ordinary case involving a thousand dollars? The Master says no, they couldn't, because they are a good cross-section of the community in that, and you also run the risk of a jury being tampered with if you only have six. Now, I say that the reason that he gives for one applies equally to the other.

MR. CONANT: Mr. Walsh, haven't we got the anomalous situation that not infrequently we have County Court civil actions tried by the twelve-men juries when the amount is less than the expense of the trial?

WITNESS: Well, that might happen in a $500 case, you might have that happen in a $200 case.

Q. Yes.

A. It's quite conceivable that that may happen, Mr. Attorney-General. But what I look at is this; isn't the man entitled to have his case tried? The remedy lies in shortening up the trial, doesn't it? Some members of the Bench would say: "That case involves $200; we're not going to spend more than a day on that case." You get your evidence in and it hasn't cost anything, for that jury, like the amount involved. I don't think the remedy lies in taking away

the jury, or cutting down the number; I think if there's difficulty in that that's up to the judges directly. I was going to say, also, aren't the expenses, well, I would say, on the present trial system and on the question of having experts, adding to the expense instead of reducing the expense? You get a judge to lay down some rules in advance of what evidence there is, or what course the case is going to take; you're going to have more expense incurred in that than you are in the trial itself. The same with the experts, I think, because, after all, Mr. Attorney-General, aren't the experts paid for by the litigant himself, not by the province or by the court. That litigant, say he's in an accident case, wants his own doctor and, in all probability, the doctor has a surgeon, and he wants the doctor and surgeon to tell the court how his injuries are.

Now, how are you going to cut down expenses by having an independent doctor appointed? That independent doctor has to be paid, and he'll have to come day after day; I don't see where there's going to be cut in expenses that way.

Q. I'm afraid I can't agree with you there.

A. Well, that's only my view, sir.

MR. FROST: We'll take the case of the Workmen's Compensation Board. Their doctor may say that a man has no disability; on the other hand they say: "If you submit to us evidence that there is a disability we'll reconsider your case." Well, the injured man goes and gets his own medical expert, and sometimes, as a result of that, an award is made, so that difficulty is cleared up.

WITNESS: The man is being deprived of his right.

Q. Mr. Walsh, in order to give some opportunity to work this matter out that legislation should be introduced to provide that if the parties agree, then nobody's rights could be interfered with. If they agree that an assessor may be appointed, or the court may appoint one, then nobody's rights could be interfered with. Now, if the parties don't agree, of course that provision won't apply. Do you think it would be doing any harm if that provision were introduced?

A. No, I would say that was just making a rule of what prevails.

MR. CONANT: The present rule doesn't shut out expert testimony.

WITNESS: There's nothing wrong with that; I mean, that's an actual practice, all right.

Q. Yes.

A. That's all right, I would say. Now, the only other matter I wanted to speak about was the question of expense in jury cases. May I say, sir, with deference to the report of the Master, I don't see why litigants should be called upon to pay the expense of the jury. What right has a litigant to be asked to pay any part of the court expenses? Why should he be asked to pay for the jury expense?

MR. CONANT: Do you think the special jury should be continued?

WITNESS: I see no harm in that because they are paid for by the litigant.

Q. I think you can take this as a settled fact, that this Committee is not disposed to recommend the requirement that litigants should pay the costs of juries, so we don't need to spend time on that.

A. I'm sorry; if you had the idea that I was against any reform I can tell you that I'm not.

Q. Oh, no.

A. I'm a conservative reformist, but I'm not against reform.

Witness excused.

G. W. MASON, K.C.

MR. CONANT: All right, Mr. Mason.

WITNESS: Mr. Attorney-General, gentlemen: there are very few things that I desire to add, but first, in my capacity of Chairman of the Special Committee of Convocation, may I mention these matters because I was not able to be here while the treasurer was giving his statement yesterday. First, with regard to the constitution of the Rules of Practice Committee; I understand that that was mentioned by the treasurer, and it is deferred for future consideration. In the second place, with respect to the approval of rules by order-in-council.

Q. Well, you said "for future consideration". I understood Mr. McCarthy to say that Convocation favoured the idea of adding to the committee members of the Bar.

A. Yes.

Q. And your recommendation was that those members should be selected by the Benchers; wasn't that it?

A. I understand that is the opinion of Convocation, which I am bound to adhere to, yes.

Q. Yes, responsible government.

A. I didn't know whether it was desired to have further evidence added to that or not at a later time.

Q. I don't think so.

A. I understood there would be some representation, perhaps, by the judges.

Q. Yes.

A. Then the second matter was as to the approval of rules by order-in-council. I understand that has not been mentioned here yet. It was a matter

that received very careful consideration, I am told, by a committee consisting of the Hon. Mr. Ellsworth and Mr. Tilley some years ago, in 1932, and, I think, again in 1934. There must be a good deal of evidence available with regard to it, and if the matter is to be considered by the Committee, I should ask that we be given permission to deal with that after having had an opportunity to look up that evidence.

MR. MAGONE: What rules are you referring to, Mr. Mason, Rules of Court, of Practice?

WITNESS: Yes, there were certain amendments made in 1934, chapter 54, sec. 3, chapter 54, sec. 19, and in 1932, chapter 53, sec. 19.

Q. To the Judicature Act?

A. No, rules, regulations, and so on, affecting the admission of students at law, and things of that sort.

Q. Oh, this is the Law Society Act?

A. Yes.

Q. I don't know whether that matter was brought up here.

A. Oh, no, no.

MR. LEDUC: Oh, no, it's the Rules of Practice.

MR. CONANT: The specific practice, Mr. Mason, was to whether the Rules of Practice, after being formulated by a Rules of Practice committee, should be made effective by order-in-council or simply by promulgation by the committee.

WITNESS: Yes. Well, that's a matter that has not been considered by our particular committee, and I should like to have the opportunity—we're having the meeting to-morrow—of considering that further with the Committee and making any further suggestion to our committee.

MR. MAGONE: That is, the question may come up, Mr. Mason, of having all rules approved by order-in-council?

WITNESS: Yes. The third matter was mentioned by the treasurer yesterday, and that was the matter of proposals that were made at an earlier time for the increase of County Court jurisdiction, and I understand Mr. McCarthy said there was a good deal of information available on that that could be put before the Committee later. These are the only matters that I wish to speak of in my capacity as chairman.

MR. CONANT: That was in the form of some observations of the Supreme Court Justice, was it not?

WITNESS: There was a great deal of data gathered with respect to trials in County Courts and so on; I can't recall it very closely, but I remember having

seen it and I know it was very valuable. Now, that's all I want to say in my capacity as chairman; anything else I may say I am saying purely as a private member of the Bar and without any authorization or instructions from Convocation. As to the qualifications of petit jurors I am unable to add anything. I have heard the questions that you have addressed, Mr. Attorney, to previous witnesses and I can't add anything new, except to say that one is anxious, indeed, to have the character of the jury increased to the best possible extent. As to the means with which that can be done I'm afraid I can't help you.

Q. Well, could you subscribe to the view that it would be desirable to improve the calibre of juries?

A. Absolutely, if we are going to retain the jury system as to the extent to which it is now used.

MR. MAGONE: I suppose it goes without saying the educational qualifications of jurors have vastly improved in the last few years?

WITNESS: Quite so.

Q. It must be due to our educational system?

A. Quite so. And I can't subcribe to the views that the educational qualification is a matter of no significance. I'm quite ready to subscribe to the views that many of the wisest and sanest men I have met have had very little school education, but they have educated themselves, and I can't subscribe to the views that a man's educational attainment is of no significance as a qualification to act as juror.

MR. FROST: I suppose you would not want to go as far as to say that the man who didn't have the necessary educational qualifications should be barred from being a juror?

WITNESS: By no means. Now, as to the juries being dispensed with in Division Courts. My private opinion is that there's no reason for the maintenance of expense of juries in the limited jurisdiction of Division Courts. As to the reduction of the number of jurors in civil actions ——

MR. CONANT: County Court?

WITNESS: County Court. I have no practical experience, all the information I have is gathered from friends who practice in other jurisdictions where they have a lesser number, and all I can say is, as far as I can ascertain, there's been no complaint. I have had some doubt in my mind as to whether six is the appropriate number, because, after all, a jury of six is not as representative as a larger one, one has to admit that, and I wonder if eight is not a preferable number. But I don't find any great difference between eight and six, except that in the odd case it might be easier to approach a jury of six. I think that's a very rare thing, though.

Q. Isn't there this angle, that you have, perhaps, the same relative proportion. In the twelve-man jury you have a verdict by ten, in a six-man jury

ostensibly you'd have a verdict by five. I don't know how you'd work it out any other way.

MR. FROST: Your observations apply to juries altogether?

WITNESS: I was addressing myself to the question which I thought was mostly on County Courts.

MR. CONANT: In the West they try murder with six-men juries.

WITNESS: I am told the work out West is quite satisfactory with six men in civil cases. As to the trial by jury, I think you have arrived at a conclusion on that; the only thing I would have said is that there are many nuisance actions brought.

MR. CONANT: What's that?

WITNESS: There are many nuisance actions brought.

Q. I don't know that we would know what that means.

A. A man brings an action without any feeling that he has a real cause of action, but if he can bring the action and hold the threat of a trial by jury without all the expense on a defendant who knows he can't recover any damages or any costs from the unsuccessful proof, then it is held over the head of a defendant; that is what I call an action having a nuisance value. A defendant says: "I'd rather pay something than be exposed to the hazard of this litigation." I don't believe in the litigants being assessed with the cost of juries generally speaking, but if you had a small fee of $25 or something of that kind, it would prevent a great many of those actions from ever seeing the light of day.

Q. This is an angle we haven't had, and I think it's worthy of consideration by the Committee. At the present time in sending a jury action to trial the fee is five dollars.

MR. MAGONE: Four.

MR. CONANT: Do you think there would be merit in making that a substantial amount of, say, $25?

WITNESS: Well, I feel that it wouldn't affect the majority of the cases. I couldn't give a concrete answer here, but I could give many cases, from experience, where, I think, that would have satisfactorily solved the situation. Now, as to the right of a civil litigant to a trial by jury. I want to be quite frank with the Committee, Mr. Chairman, because my experience of these matters is that your attitude is governed largely by the class of practice that you have had, and whether you have been acting for a plaintiff or defendant. Certain gentlemen are engaged a great deal in jury actions and are successful with juries, and they believe in the maintenance of that method of trial. In practically all civil cases in our law we have had a great deal of cutting down of the number of civil cases that may be tried with a jury. For instance, actions against a municipal corporation. Why are they not tried with a jury? Because, by experience, a

municipal corporation was found liable, in many cases, where it should not have been, and the Legislature stepped in and said this wouldn't be tolerated. In other branches of cases as well that right has been cut down.

Now, speaking from my own experience, and I can speak only from that, I think every practicing lawyer knows that there are certain difficulties in the ordinary prosecution of civil litigation who don't get a fair chance in the ordinary jury action because they may have a name that indicates that they have wealth behind them, or they may be associated with some corporation that, in the minds of the public, doesn't merit getting the full consideration that others must get. I don't want to particularize. That might happen. If you have the word "Co." or the word "Ltd." after the name of the defendant, too many jurymen think that there's wealth associated with the defendant.

Q. In other words, the word limited means unlimited.

A. Yes. Now, I'm saying what is known, I think, to every practicing lawyer. I don't want to accuse instances, but one could give hundreds of them in the history of this province over the last twenty-five years. That is so. I am told, for instance, that there's one company in this Dominion that has been successful in one action in fifty-five years. I can't conceive that it has been wrong in every case but one, but we know that is a matter of fact.

MR. MAGONE: The same principle, Mr. Mason, if I might interrupt, is involved in not permitting the question of insurance to be mentioned before a jury?

WITNESS: Yes.

MR. STRACHAN: The jury spends the time figuring out which of the parties is insured.

WITNESS: In fact, I know of one case recently, if I might just illustrate the point, where a defendant, who had been found liable to pay $8,000 to a plaintiff, said to the foreman of the jury (they were personal friends before that happened): "Why are you taking this attitude toward me? Why did you do this to me?" And the foreman said: "Weren't you insured? We were sure you were insured." The defendant said: "No, I haven't an insurance." In one case I actually asked this question of a defendant. I said: "Have you any means of getting compensation or indemnity from anyone if you're found liable to pay this plaintiff in this action?" I knew, if I didn't say that, that man, on the view that the jury had that he probably was insured, might be found liable in heavy damages, and although it was a case in which he should have paid damages, the jury found the defendant free from liability.

MR. CONANT: Well, now, Mr. Mason, I think we all agree with those observations. What is the remedy?

WITNESS: We can't get any adequate remedy in our present state, but the real remedy at present, as far as it can be gotten, is to be found in the adoption of the practice which has, I understand, become law in England in September, and that is, to put the onus as to the litigation the other way. Nowadays the

plaintiff gives jury notice and if the defendant thinks it is not a proper case to be tried by a jury he must move and our judges have a practice of referring it to the trial judge, and when he gets before the trial judge, the jury is there, and the man goes up and moves to take it away from the jury, with the jury panel sitting there and his chances are immediately impaired. It is a very unfortunate provision. In these other jurisdictions, what they do is this: you don't proceed in that way, but if you wish to have a jury, you are not going to have a jury unless you apply for it.

Q. That is in force in England now?

A. Yes, since September; if you wish to have a jury, you may make application for your jury to a judge who has enough latitude to determine whether it is the kind of a case that can be better tried with the assistance of a jury than with a judge alone, and I submit that is about as far as we can go now in our practice. Personally, I would be very much prepared to go further, because I think that we ought to get away from the American practice.

MR. STRACHAN: Mr. Mason, the Court of Appeal has very seldom been found to reverse the finding of a jury?

MR. CONANT: In other words, Mr. Barlow's suggestion would have the effect of enlarging the jurisdiction of the Court of Appeal.

WITNESS: But my submission is that that would not take care of the initial trouble. My submission is that there should be, prior to the hearing, a determination as to whether there should or should not be a jury, by the judge.

MR. STRACHAN: Do you think the fact that the defendant was a large corporation would have any weight in determining or making up the judge's mind whether or not there should be a jury? Wouldn't the easiest thing be, say in a negligence case, to say, "Oh well, this is a case that should be tried by a jury." Isn't that what would result?

WITNESS: Well, I should think that in the ordinary negligence case, arising out of a motor vehicle collision, the easiest thing would be to say "yes, we'll try that case with a jury, that is the way most of these cases are tried now."

Q. But don't you think it would help solve the problem of what we call the wealthy defendant if we could enlarge in some way the power of our Court of Appeal in reviewing the finding of fact?

A. Well, I think it would assist, but I should like to get nearer the base of the trouble than that, by having a jury only in what is eminently a proper case to be tried with a jury. It would eliminate all this kind of thing. There are many cases brought now, I have no hesitation in saying, that would not be brought if it were not for the expectation that it could be tried with a jury, and if you go to the judge and say that that is not the kind of case—and I am not speaking of negligence actions now—that should be tried with a jury, it would be cut out immediately and the action would never go on.

MR. FROST: What is going to follow that, Mr. Mason? Do you think that

the judge would be influenced by the fact, for instance, that the defendant was a wealthy corporation?

WITNESS: No, I don't think he should be, I think what should influence him would be the nature of the case, that is whether it is a case in which the jury can make a real contribution.

Q. Well, of course, under the present practice there is the right to make application to strike off the jury notice; that doesn't necessarily have to be done at the trial; I mean, oftentimes, more often it is done before the trial.

A. Quite, but the growing tendency in these cases, and it has been for years, is to shift these cases to the trial judge.

MR. MAGONE: Mr. Mason, what type of case would you suggest shouldn't go to a jury? In negligence cases, you suggest that in cases involving automobiles, that that should go to a jury, and if the defendant was a corporation that it shouldn't?

WITNESS: Well, I am afraid I didn't make myself clear a while ago. I fear that unless there were some regulation, the ordinary judge, on account of the fact that trials for that kind of case have been so often before the juries, would have a tendency to say: "Yes, that should be tried by a jury." Personally, I don't subscribe to that.

MR. CONANT: That gives rise to this: the English rule that is now in operation, I understand, doesn't set out, as I remember reading it, any guidance to the judge in determining that issue at all; you have read the rule, have you?

WITNESS: I haven't read it recently, no.

MR. SILK: It reads:

> "No question arising in any civil proceedings in the High Court or any inferior court of civil jurisdiction shall be tried with a jury and no writ of inquiry for the assessment of damages or other claims by a jury shall issue unless the court or a judge is of the opinion that the question ought to be tried with a jury, or, as the case may be, the assessment ought to be made by a jury, and makes an order to that effect."

MR. CONANT: Well, you see, that is a very broad declaration. I wondered, in considering this, if we were to adopt any such practice, if it would be possible or feasible to lay down any guidance to the court in dealing with such applications; do you think it would be possible?

WITNESS: Well, may I ask, have we got the New Brunswick provision here?

MR. CONANT: The New Brunswick one is a little different, is it not, Mr. Mason?

WITNESS: I think so, I just wanted to refresh my memory on it.

Q. It is on page 39 of Mr. Barlow's report, yes.

A. Well, that is a little better than the other one, to my mind: "If the questions in issue are more fit to be tried by a jury than by a judge." That, at least, affords some indication.

Q. Yes. But more specifically, you have given, very properly, the example of municipalities; does it occur to you that an extension of that principle should be attempted?

A. Well, I fancy there are other corporations who are suffering more than the municipal corporations suffered before.

Q. That is true.

A. As to whether you can legislate specifically for them as you can for municipal corporations, I don't know.

Q. You mean whether we would have a constitutional right to legislate?

A. No, no, whether you should pick and choose. I hadn't considered that aspect of it.

Q. But it's a corporation?

A. Yes.

Q. And now, using that in the broad sense, the corporation, whether it be an insurance corporation or a railway corporation ——

A. Yes.

Q. —— suffers by the present abuse?

A. Undoubtedly.

Q. Now it would be feasible to attack it from that angle?

A. Well, of course, I don't think you can go so far as to say that no action against a corporation should be tried by a jury. The danger, as I see it, is that if your language is too loose, then a judge may try to get rid of the burden cast upon him by an amendment you might make, and say: "Oh well, you might have a jury here." The judge ought to exercise some real discretion, and the New Brunswick provision seems to me to put it very well, that is, that the case is more fitting to be tried by a jury than by a judge. If the judge has the discretion, then we have to depend on the judge. But I would like to give that further consideration, if I might suggest some better form of wording.

MR. STRACHAN: I think that is of very great importance.

MR. CONANT: Oh yes, of the utmost importance.

WITNESS: The next thing is should the Court of Appeal be given wider powers on a verdict of a jury in a civil action? I understand that you have re-

commendations from both Mr. Barlow and the judges on this point, and that they are substantially in agreement to the effect that these powers should be given, and that is what Mr. Strachan was referring to a few moments ago. Well, I hardly subscribe to that. As a matter of experience, I am just going to give one case by way of illustration, without naming it, so that you will see how this thing sometimes may arise. A litigant in a motor action had an undoubted right to recover. Everybody was agreed on that. The first question of the jury is, has the defendant satisfied you that he was not negligent. And further on, there is a question of damages. How much?

Q. Yes.

A. This particular jury had been impanelled, or at least had been in the court room when a man had been convicted of criminal negligence in driving, and they had a good deal of sympathy with him, and when they went out to the jury room to consider the verdict in this particular case, they said to themselves: "If we find this fellow guilty, he is going to get punished"; and they mixed it with a criminal proceedings, so they said: "Well, we'll find for both of them." And in answer to the first question, "has the defendant satisfied you that he was not guilty?" the answer was "Yes." And then the damages, $5,600. They thought they had excused the one from trouble, and gave damages to the plaintiff. Now in the Court of Appeal you want to get that right; what can you do? Seven of these jurymen came into the judge and said: "What can we do? That's not what we intended." And he said: "I can't help it; the rule of the Court of Appeal is that they won't admit the affidavit of jurymen as to what took place." So you are completely helpless.

Q. And it stands?

A. Well, in that case the parties were decent enough to make a settlement of the portion of ————————. But otherwise it would have stood. There is no recourse unless you have some relief of this kind in the Court of Appeal; you're helpless.

Q. How far would you go, Mr. Mason?

MR. FROST: I know of one jury that found a verdict of unavoidable accident and then found certain damages.

WITNESS: Yes.

MR. CONANT: How far would you go, Mr. Mason?

WITNESS: Well, I would be inclined to go the full length that the judges suggest.

Q. The difficulty that comes to my mind, and I am not expressing any views, is as to whether you are really creating and constituting a second jury trial; the jury in the second place being in the Court of Appeal, and the first jury being in the other court.

A. Yes, it is a real difficulty, and no one can shut their eyes to it, as to just

how far you are going to go; if you make your Court of Appeal absolutely predominant, your jury is of no use at all.

Q. Well, we have been asking for formulae this morning; perhaps you will be good enough to let us have a formula along that line.

A. Well, I don't think I will be any wiser than anybody else, but if there is any possibility of helping the Committee on that point, I shall be glad to do so.

Now there is only one other question, and that is the question of assessors.

Q. Yes.

A. I am afraid I haven't been following the matter very closely, but I do remember having had some experience in two trials with assessors; one was a twenty-three day trial, in which we found it absolutely impossible to get along without it, on account of the technical nature of the facts involved. There is already provision in our rules for an assessor, and in these two cases, these two judges of the Supreme Court used the rule, and it worked out very satisfactorily.

Q. Yes.

A. I know that Mr. Justice Middleton used a great deal of such evidence up in Timmins. It doesn't happen very often, and what the trial judge did in each of these cases was to call in the assessor or expert, who sat with him on the bench and advised him as to the technical matters which were brought before him, so that he would have an appreciation of what the evidence was with regard to those matters. Under this practice, the assessor gives a certificate as to the point on which he wants to be informed, but the assessor does a good deal more than just give a certificate, he advises the judge as to the technical matters as the trial proceeds.

Q. But under the present practice you have still the conflict of expert testimony?

A. Well, I'm coming to that. I think if the parties will agree, as has been suggested I think you said by Mr. McRuer, that they will substitute for the practice of calling experts some particular person whom they will agree upon. Well, I don't see how anybody can possibly take exception to that, but, speaking from experience in a few of these trials, I would think it would be absolutely wrong to try to impose upon the litigant that he must agree to somebody else. Because in some of these cases I have found out that, even with the assistance of numerous experts on each side, where the matters are very intricate, it is extremely difficult, on account of the very complex nature of the matter, and the fact that it is so unknown to lawyers and judges, to make much progress.

Q. Yes.

A. And I would say that you must reserve to the litigant the right to call his own experts if he sees fit, limited in number, of course, by the terms of the Evidence Act now.

Q. Unless he consents?

A. Unless there is a consent, if there is a consent, I see no difficulty, but the thing I am so anxious about is that there should never be any legislation that takes away the judicial function from the judge who ought to be, alone, made responsible, and put it in the other officer, and by the way, in the Admiralty practice, it gets pretty close to putting the responsibility in one of the assessors, and that is what shouldn't be.

Q. That is not one of our courts?

A. No.

MR. MAGONE: Mr. Mason, can you help us with designation of judges in commercial cases? Had you given that matter any consideration?

WITNESS: I think if we were in England, I would advocate it, but having in view the number of cases here that might come within the designation of commercial causes, and the fact that our judges have to go all over Ontario, and that these cases arise all over Ontario, I think it is impractical for that point of view.

MR. CONANT: You might have it in Cochrane or Kenora?

WITNESS: Yes, I would like to see it at some time, but I think we are too young for it yet.

Q. Mr. Hanson, have you given any consideration to the question of increasing the County Court jurisdiction? There is an amendment in 1937.

MR. FROST: I think Mr. Mason said he had some information he would submit.

WITNESS: Our committee met with the judges and we considered it and we gathered a great deal of data, and I think I can say to you that at least Convocation would be unanimous in opposing any increase of County Court jurisdiction.

Q. At the present time, by agreement, you can try these cases in County Court, and I think it might be better to leave it right there.

A. Yes, if at a later time you wish our submissions on that, I would be glad to give it, but in the meantime it has been considered with the greatest care and I think the opposition is unanimous.

Witness excused.

MR. K. F. MCKENZIE, Vice-President, Toronto Section, Canadian Bar Association.

WITNESS: I might say at this time that I am not practicing counsel, as others I have heard here, and we represent a little different viewpoint. I might preface my remarks by saying that my viewpoint, as I think it is the viewpoint of every one in the Association who has expressed himself so far, is that it is

not the interests of the profession that this Committee should consider, but solely the interests of the public. What I mean is that anything that is done to expedite, facilitate and simplify and lessen the expense of litigation, in the long run will also be for the benefit of the legal profession, although it may not appear so at the moment.

Now, primarily, what I want to do, Mr. Chairman, is to formulate various resolutions that have been passed at different times by the Association. Now, the Council of the Canadian Bar Association, meeting in February, 1939, passed a resolution with regard to appeals to the Privy Council, which I haven't heard anyone mention here before. The resolution was that:

> "This Council do now go on record as approving the maintenance of appeal to the Privy Council."

And a similar resolution, sir, was passed by the Ontario Section of the Canadian Bar Association.

MR. CONANT: Well, our objective in carrying Supreme Court judgments to the Privy Council would indicate that you are in agreement with us.

WITNESS: Yes, I understand, sir, I understand that your personal views agree with the recommendations of the Council.

Q. Yes, we are appealing a Supreme Court judgment now.

A. Yes, I understand that, sir. It is not necessary for me to read these resolutions, I will file them with the Committee, there is a resolution here to the same effect as that passed by the Ontario Section. That resolution, I think, was passed with only two dissenting voices.

Then there is a resolution which was passed at the same time, against the abolishing of grand juries, which I think was referred to by Mr. Barlow. I wasn't here when Mr. Barlow gave evidence, but I understand he said it was not a representative decision. With due respect, I question that. I think that there was a considerable representation at that meeting, and the majority was in favour of the retention of grand juries. Of course, the question with regard to the substitutions was not brought up and discussed.

Q. Was there any discussion, at that time, on the aspect on which we have dwelled at some great length, that is on the question of safeguards?

A. No, sir.

Q. In connection with indictments preferred by the Attorney-General?

A. No, sir, my recollection is that that was not discussed. I don't think that was suggested at that time; this was a year ago. I think Mr. Armstrong did intend to say something on that, but I think everything he intended to say has been said, and perhaps more, by Mr. Frost than anyone else. I think that expresses the views of the majority of the people at that meeting.

Now I don't want to be understood to say that anything that was passed

was passed unanimously, except the matter to which I have just referred. There is a difference of opinion on nearly every point, and my feeling is that the Bar Association, owing to its constitution, of which you are aware, shouldn't bring forward as its views something that isn't practically the unanimous view of the Association. For that reason we are not constituted to go into the details of these recommendations in the way that the Benchers have done.

Then, sir, there was a resolution regarding the fiat issuing power, which has not been mentioned.

Q. You mean the power to withhold fiats?

A. Power to withold fiats, yes. I think, sir, I will say that there is a general feeling; this matter has been discussed not only by the Ontario Section, but by the Council of the Canadian Bar Association, and I think they are unanimous in the feeling that the present growth of industry and government business, and so on, has made the former practice out of date. To my recollection, Mr. Mr. Lapointe is in favour of abolishing the need for a fiat.

Q. Have they gone any further than we have in any of the other provinces? Do you know, Mr. Magone, has there been any material qualification of a fiat power?

MR. MAGONE: No, I was going to say, Mr. Chairman, I think what Mr. McKenzie means is the abolishing of the fiat, that is the rule that the Crown shall not be sued in tort, is not that what they are referring to?

WITNESS: Well, it comes to practically the same thing, Mr. Magone.

Q. No, it is quite different; we granted a fiat some years ago to sue the T. & N.O. Railway on a tort arising out of the operation of a train, and Mr. Justice McTague raised the issue himself, that the Crown couldn't be sued in tort.

A. Yes, well I think you're right, this is a double-barrelled resolution.

MR. FROST: You mean if the government, generally speaking, is engaging in business, then it should be the same as any other concern, for instance, the Hydro-Electric Power Commission, the T. & N.O. Railway?

WITNESS: Quite. Eactly, and this resolution refers to tortuous action, but as far as the Hydro-Electric Commission goes, its business, like that of any other of these firms, is subject to the decision of the courts, and the Hydro-Electric Act is one of my pet aversions, because its power is more extensive than that of any government department.

MR. MAGONE: Answering your question, Mr. Chairman, I think the only jurisdiction in Canada where they abolished the rule partially is in connection with actions in the Exchequer Court of Canada against government departments for injuries sustained on a government work, or public work, that rule is abolished there.

WITNESS: Yes, that's right. Perhaps, sir, I should have been prepared to

discuss it more fully, as I see you are so interested in it. I haven't studied it with any care, but I am impressed with the general principle.

MR. CONANT: Well, I can quite understand the lawyers sustaining that.

WITNESS: Well, I don't think that is quite fair.

Q. Well, as a lawyer I have the same view, but there is the other angle to it, whether removing that fiat is subjecting these Commissions to innumerable and interminable litigation.

A. They would be submitted to no more litigation than their competitors.

Q. Well, they are assumed to have plenty of means to meet judgments, and we have heard here this morning about the nuisance value of some actions. That is the other side of it.

A. Ah yes, my very great friend, Mr. Mason, but I very definitely disagree with him on that subject. I think you may qualify that, most of the discussion with regard to juries, by the consideration that Mr. Mason mentioned was as to the class of clients that they represent.

Q. Well, those are the two angles, all right.

A. Then, there is a resolution regarding the selection of juries.

Q. Have you a formula ready?

A. I have no formula, but I was impressed with what you said, that if the jurors were selected with more care, it would improve the jury considerably. Then there is a resolution here considering appeals from rulings of governmental boards and commissions. Now, the Bar Association feels very strongly that the administration of justice in our courts is the very rock of our liberties, and it is not only in the public interest, but to our own interest that they should be kept intact for the determination of disputed rights.

Now in saying that, I have in mind not only matters that are now before the courts, but matters which, in the opinion of the Bar Association, should come before the courts. I am referring, of course, to the matters mentioned in the resolution, and the matters mentioned on page B26 of Mr. Barlow's report, and that is, that the right of appeal be granted from boards and commissions established by the government, which are now determining matters which were formerly determined by the courts.

This whole subject is the subject of discussion and investigations by the committee, both of the general association and the Ontario section, and probably more will be heard of that later on, but for the purpose of this committee,—I am not expressing a final opinion—I would suggest there are two classes of administrative bodies, such as, for example, the Workmen's Compensation Board. I would be opposed to allowing wide open appeal from the decisions of the Workmen's Compensation Board; I am using this simply as an example of the class of things I mean. I would limit appeals from such a board to questions of

law and principle, and, if I may depart from my official position and speak from personal knowledge, that Board made rulings which are open to question on the matter of principle; I mean the very rates on which their mortality tables are based; they have changed them, and they are still calculated to rate much above the average returns or investment of the Board; that is a matter that, perhaps, might be subject to consideration, but as to their finding of fact, I would be against opening up anything like that.

I realize, sir, that the function the Workmen's Compensation Board, for instance, exercises, couldn't be as expeditiously exercised by the courts, but when it comes to subjects where prejudicial powers are exercised by the department, or by the officer of the department, who is really interested in asserting the rights of the Crown, the feeling of the Bar Association, with which I entirely agree, is practically unanimous that such matters should be determined by the courts.

Q. Well, there again, haven't you got two angles, on the one hand, you have that undoubtedly very proper, and idealistic situation, and on the other is the difficulty that might result in carrying on government at all, if all your rulings were subject to litigation; isn't that the two sides to the story?

A. I don't think so, sir; the income tax office at Ottawa carries on its affairs very successfully, subject to appeal in most matters.

MR. FROST: Mr. McKenzie, without getting into a controversial question, do you mean an officer of the treasury department making an arbitrary valuation on succession duty matters, without any right of appeal?

WITNESS: Yes, exactly. Now, I don't want to start a controversy about this; we have discussed this privately before, and we don't agree, but what I suggest to this Committee is this; it would be a proper matter for the consideration of this Committee, to see what the simplest and cheapest and most expeditious machinery might be that could deal with that. I mean, try and give the courts a show in the matter.

MR. CONANT: Well now, take—Mr. Frost has given one example, take the rulings of our Securities Commission; do you think those should be always subject to appeal?

WITNESS: Mr. Godfrey himself, sir, recommended they should be subject to appeal.

MR. STRACHAN: When you consider that it might affect a man's livelihood.

WITNESS: Mr. Farris dealt with that, you will remember, pointing out that a man might be black-listed, if I might use the term here, and that black-listing would carry from Vancouver to Halifax, without even a hearing, and a matter of that kind should be, I think, subject to appeal. Really, that is a matter of administration of justice, to a certain extent, but when you come to deal with securities, that is a matter which I would say should be subject to appeal on the matter of principle.

Committee rises for lunch recess.

AFTERNOON SESSION

Parliament Buildings, Toronto,
April 11th, 1940.

MR. JUNEAU, Special Legislation Officer (recalled).

MR. CONANT: Now, Mr. Magone, when Mr. Juneau left off, as I recall it, he was going to honour us with some observations regarding grand juries, or absence of grand juries in Quebec; is that it?

WITNESS: Yes, sir.

MR. MAGONE: Mr. Juneau, you have been in the Attorney-General's department for over twenty years?

WITNESS: Twenty-one years.

Q. And when they had grand juries in the Province of Quebec, of course, you were there?

A. Yes, they had them until 1933.

MR. CONANT: 1933?

WITNESS: Yes.

MR. MAGONE: Do you remember why they were abolished in the Province of Quebec?

WITNESS: I understood that it was to save unnecessary expense, and the unnecessary calling of the witnesses at least three times, once at the preliminary inquiry, once before the grand jury, and once before the petit jury.

Q. Is it the usual thing, in Quebec, to have a preliminary hearing?

A. Yes, it is.

Q. Are there cases in which the Attorney-General directs a charge to be preferred, without a preliminary hearing?

A. In exceptional cases.

Q. Could you tell us in what kind of cases that usually occurs?

A. In conspiracy cases, sometimes, when the preliminary inquiry would be very long, and would not give any more light on the case than the trial itself.

Q. And do you know if that happens often?

A. Oh, no, perhaps five or six times over the whole province during the year.

Q. Five or six times a year?

A. I think so, not more than that.

Q. That would be a higher average than in this province, Mr. Magone.

MR. MAGONE: Yes, I would think so. Well, is there any criticism, Mr. Juneau, of the present system in Quebec?

WITNESS: No, we never heard of any criticism, either from the Bar or from the judges, everybody seems to be satisfied with the present system.

Q. Well, do you know, Mr. Juneau, whether or not, at the time, grand juries were abolished in Quebec, there was any criticism of the action of the government?

A. No, except that, I think, the Chief Justice in opening the court, once made a few remarks, but when he made the remarks the system was just beginning, you know.

MR. LEDUC: Well, that was in 1933 when Sir Franz Royce was on the bench, was it?

WITNESS: I think so, wasn't he?

Q. I don't know.

A. I think he's the one who made the few remarks.

MR. CONANT: Do you remember any particular anxiety on this point, as to the absence of any preliminary hearing where the Attorney-General directed an indictment, having in mind this fact, Mr. Juneau, that under our present system where the Attorney-General directs a charge, it goes to the grand jury; without the grand jury you have no preliminary at all, it goes right to the trial.

WITNESS: No.

Q. Do you remember any anxiety on that score in your province?

A. I know that sometimes a charge is laid after the preliminary inquiry, but when there is some defect in the preliminary inquiry; suppose the preliminary inquiry had been held by the justice of the peace and did not proceed legally. This used to be done before the abolishment of the grand jury, and I think, since the abolishment of the grand jury.

MR. MAGONE: Who are the preliminaries held before in the Province of Quebec?

WITNESS: Mostly before the district magistrate.

MR. CONANT: Mostly lawyers?

WITNESS: Oh yes, they're all lawyers.

MR. MAGONE: Has the justice of the peace any powers to hold preliminaries in Quebec?

WITNESS: Oh, yes.

Q. Do they hold some?

A. Oh, yes, in the outside districts, especially on the north shores or far away from the court house where the district magistrate doesn't go very often.

Q. So, your district magistrates, if I understand it correctly, have the same power as the circuit court judges in Montreal, to hear criminal cases?

A. No, no, to hear civil cases, but they have the same power as the judges of the session, in Quebec and Montreal.

Q. Oh, yes, to hear criminal cases.

A. Yes.

Q. With the consent of the accused?

A. Sometimes with the consent and sometimes without it; it depends, the Criminal Code provides for that.

MR. LEDUC: Isn't that set out in the Criminal Code?

WITNESS: Oh, yes, part 18.

Q. How many district magistrates have you in the province?

A. About fourteen or fifteen.

Q. What salary do they get?

A. Five thousand dollars.

Q. And there is a chief magistrate?

A. Yes.

Q. Or a chief justice of the magistrates' bench, or something?

A. Yes, Mr. Ferdinand Recousive, district magistrate, is the one that directs the district magistrates from one place to another when necessary.

MR. FROST: Well, are there justices, and what not, that take care of minor cases, or do they leave the magistrates to handle all the criminal things?

MR. LEDUC: They have a certain type of an offence ——

WITNESS: Of course, they deal with municipal affairs, but under the Act

they have the power to deal with justice the same as the district magistrates. But generally those cases are transferred to our police courts.

MR. MAGONE: While you're here, Mr. Juneau, is there any provision for the payment by the government for the defence of poor prisoners in Quebec?

WITNESS: No.

MR. CONANT: I'd like you to answer the question I formulated, you got off on something else; I asked you if, when grand juries were abolished in your province, there was any anxiety about the fact that charges laid, or indictments preferred at the direction of the Attorney-General were then not subject to any preliminary.

WITNESS: There was no anxiety about that.

Q. There wasn't?

A. No.

Q. Well, has there been any criticism of that aspect since then?

A. I don't think so, I don't remember of any. Generally, the Attorney-General lays a charge upon the recommendation of the Crown prosecutor, and the matter is submitted, by the Crown prosecutor, to the deputy Attorney-General, and then it is handed over to the Attorney-General for his consent.

MR. MAGONE: I see that there have been, recently, some prosecutions in the Province of Quebec for seditious liability.

WITNESS: Yes, during the last three or four years, there have been quite a few of these cases.

Q. Could you tell the Committee, generally, how those prosecutions were commenced?

A. I think they were commenced by preliminary inquiry.

Q. By preliminary inquiry?

A. In most cases.

Q. I see.

A. I don't think they were commenced on the charge laid by the Attorney-General.

Q. It's only in exceptional cases that that power is used?

A. Yes, I think it would be used, especially when the term of the court is just going to start, and the preliminary inquiry would delay the trial till the next session.

Q. Yes.

A. It saves time for the accused as well as for the Crown.

Q. How many times a year are the assizes held in Quebec?

A. In Montreal we have four criminal terms a year, in Quebec two, and in other districts, one.

Q. I see.

MR. CONANT: Just one?

WITNESS: Just one. This doesn't mean that we call the jurors once a year; the Attorney-General decides whether it is necessary to call the jurors, according to the number of cases and the seriousness of cases on the roll.

MR. MAGONE: Well, are cases ever transferred from one district to another for trial?

WITNESS: Yes, they do that too.

Q. For what reason?

A. Well, mainly when it's an important case, and we are afraid that the jurors in one district would be partial, or it would be hard to find a jury which would be impartial.

Q. Is that done on application to the court?

A. Oh, yes.

MR. CONANT: What has been the general experience from the abolishment of juries, has it retarded the administration of justice, or speeded it up, or what would you say?

WITNESS: Of course, the terms are a little shorter, because it takes three or four or five days at the beginning of each term to submit the cases to the grand jury.

Q. Yes.

A. Those four or five days are saved; it means saving taxation of all the witnesses, calling those jurors, and their expenses and bringing back the witnesses.

Q. A second time?

A. A second time. Sometimes two, three or four times.

Q. I don't suppose you could make any estimate of the saving in dollars and cents?

A. No, it would be pretty hard to arrive at an exact figure, but I think it runs up pretty near to a thousand dollars a day, in some cases.

Q. Is there any demand or discussion for re-establishment of the grand jury in your province?

A. No, not at all.

Q. Nobody advocates it?

A. Oh, no.

Q. All right.

MR. MAGONE: I want to ask Mr. Juneau—I think he can answer this in a syllable—whether there's any provision for the payment of the defence counsel for indigent prisoners in Quebec.

A. No.

Q. Is it ever done?

A. No, in our department it's not, to my knowledge, that we ever authorized the payment of counsel fees for an accused. Of course, the judge chooses, generally, a young lawyer to defend poor prisoners.

Q. Yes, that answers it.

A. And they accept.

MR. LEDUC: The lawyer can't refuse, I understand.

WITNESS: I don't think they can, they're obliged to accept, as far as I know.

MR. CONANT: Doesn't the province help at all in the case of capital offences?

WITNESS: Not to my knowledge.

Q. What about the cost of the evidence, does the province ever pay that in the case of an appeal for capital offence?

A. The cost of the stenographer? Well, of course, they receive salary.

Q. What about in extending the evidence?

MR. LEDUC: The stenographers are paid by salary.

MR. CONANT: So are ours, but we have to pay for extending the evidence.

MR. LEDUC: That covers only services.

WITNESS: Yes.

Q. Taking the depositions and extending the evidence.

A. Yes. I suppose the province pays for it, because they pay the stenographer a salary.

MR. LEDUC: It pays indirectly?

WITNESS: Yes.

MR. CONANT: Thank you, Mr. Juneau.

Witness excused.

HIS HONOUR, JUDGE L. V. O'CONNOR (Cobourg, Ont.).

MR. MAGONE: Judge O'Connor, the Committee have heard certain evidence with respect, particularly, to Division Courts, and it was suggested that the counsel get in touch with you, so that we would have as complete a picture as possible throughout the province. We have had judges from Toronto, and we thought that you might assist the Committee with respect to rural Division Courts.

WITNESS: Yes. I might say, gentlemen, that I received this notice on the fifth of April, and I haven't all the material before me that I would have liked to have had, but I think that I can probably discuss it.

MR. CONANT: Oh yes, I'm sure you can.

WITNESS: I do know that I am the county court judge for the united counties of Northumberland and Durham. I have a territory having a frontage, on Lake Ontario, of sixty-five miles, and a depth varying from twenty to thirty miles north from the lake. As you can see immediately, it's a considerable territory, and, of course, it's mainly rural. We have four towns in the two counties; in Durham, Port Hope and Bowmanville, and in Northumberland, Cobourg and Campbellford. Campbellford is situated a distance of forty-four miles from Cobourg, and Bowmanville, on the west, is distant thirty miles. Now, would you wish to ask me questions, or do you wish me to go on?

MR. CONANT: It's quite all right to go on, judge.

WITNESS: I have before me the Barlow report, and I'm dealing with items on page B32. I understand that the Judges' Association has had a meeting of its executive—I was not a member of it—and that they submitted to the Attorney-General, a certain representation pertaining to the report, and having to do with County Courts, both on the civil and criminal side, and surrogate court assessment, appeals and division courts. I understand that what I am here for is to deal, particularly, with the matter of Division Courts.

Now, in the first place, I agree with the Barlow report, that the juries in Division Courts should be done away with. I have practiced law for thirty-two years before having gone to the bench, and I have been on the bench, now, since January, 1928, and I must say that during all my experience I haven't known

of a case in which the services of a jury has been invoked, except to the detriment of outside litigants. That is found in a particular case and a bad one. Usually, the outside litigant contacts the party residing immediately within the immediate district, invokes the assistance of five gentlemen who reside right around where he does, which can be easily arranged, and it has been my opinion—I have had quite a number of jury cases in my time ——

MR. LEDUC: You mean in Division Courts?

WITNESS: No, I have had them on both courts—I mean, in Division Courts.

Q. In Division Courts?

A. I'm speaking only of Division Courts, yes.

Q. But you have had several jury cases in Division Courts?

A. Not so many.

Q. How many would you say in your thirty-two years' experience?

A. Well, in my thirty-two years' experience I have had three.

Q. That is since ——

A. Since I have been appointed I have had three.

Q. Six in forty-two years.

A. And in every case they have been prejudiced. The judge is nearly always inclined to take the case away from the jury. I remember I had a case, one time, up in Uxbridge in the County of Ontario, there was an expert jury, and I hadn't a ghost of a chance of being tried by the late Judge McIntyre. The judge did everything he could to assist me and my client, feeling we were entitled to a fair deal. We didn't get it because the jury was all of local colour, and the man concerned was a man from around there. I hadn't a chance in the world.

I had a recent case down in Briton, in which a wholesale firm in Toronto sued a merchant down there. There was a jury which I felt very much inclined to take away, but a question of facts came up to a large extent, and I let it go. Well, I charged the jury very strongly on the facts and on the law, and I reminded them of their oath of office, and it was just like water running down a duck's back. I would say, that as far as juries are concerned in Division Courts, that Mr. Barlow is absolutely right, they should be eliminated.

MR. FROST: Well, judge, there's another opinion in connection with Division Court juries. They are chosen from the territory of that particular division which ——

WITNESS: Yes.

Q. Which takes the jury out of a wide category, or wide territory of a county and confines it to a district ——

A. Confines it to the immediate territorial jurisdiction of the Division Court concerned.

Q. That is an angle we haven't considered.

MR. CONANT: No, very pertinent, though.

WITNESS: It isn't a question of administering justice at all, and very often where the case isn't over a $100.00, and not subject to appeal, why, there you simply have to do what these five men say. That's one thing; I didn't know whether you desired anything on it or not.

Q. That's quite all right.

A. In the first place, the trend of this report deals largely with the question of the disposal of cases of more or less minor importance, and that they should be disposed of with a minimum of expense and inconvenience. Now, I'm going to deal with that feature of the case.

Division Courts have to do with cases that are usually not difficult, apart from motor vehicle cases, and, of course, they stir up an awful lot of interest and ardour and all that sort of thing, but as a rule they are not difficult. The pleadings are simple, and even if they are more simple than they should be, the presiding judge has very wide powers, not only of amendment, but to hear the case, in any event, and let it be washed up on the facts. That has largely to do with quests of merchants' accounts, quests of contracts, particularly where the claims are ascertained in the higher jurisdiction, and the jurisdiction extends to $400.00.

There are two main sides: the actions pertaining to claims, like accounts, whether ascertained or otherwise, and actions for damages, called personal actions, in The Division Courts Act, section 54. Now, personal action, actions for divisions, are limited to a matter of $120.00, as you know, which is a comparatively small sum, but you can realize, in a motor vehicle accident case and other actions having to do with claims for damages, that it would be a hardship to have those cases returned in a higher court where pleadings are required, and examination for discovery and all that procedure. That runs into expense, because, after all, the poor unfortunate lawyer has to be paid for his work. So that these courts as at present constituted, in my opinion, are absolutely necessary. Not so much so in a large city like Toronto, but in a community such as I have the honour to preside over, that is very important, for the convenience of the public, and to keep down expenses, cases extending far beyond a $100.00, as suggested by this report, should be determined in a more or less expedite way, with as little expense as possible. In other words, it strikes me that what should be the object of the Act is to have the convenience of the public considered.

Now, it has been suggested here that these courts be cut down to what they call a small "debts" court; just what he means by that I don't know. A small debt is a claim for damages. I don't know what he means.

MR. LEDUC: What would you think, judge, of limiting the jurisdiction of the Division Courts to a sum of, say, $200.00 in all cases now provided for in section 54?

WITNESS: Well, I might say, in answer to that, I felt, a few years ago, that the jurisdiction of that court should be doubled. It was formerly $200.00 for an ordinary account.

Q. But it was only $60.00 in those days for a personal action.

A. Yes, that was increased to $120.00.

Q. Yes.

A. An ordinary claim or account, and so on, was $100.00 a claim. Where the signature of the parties and so on was ascertained, it was extended from two to four.

MR. LEDUC: Pardon me, judge ——

WITNESS: Well, what I was saying, in answer to Mr. Leduc's inquiry, is that the only cases that you have to deal with in matters of $400.00, have to do with claims that are ascertained; where there's a signature of the parties, where there's a guarantee, for instance, or a promissory note. That, as a rule doesn't amount to very much; the defence is very often put in for the case of gaining time.

MR. LEDUC: Right, and in that case, as in the County Court, they don't dare do it.

WITNESS: They don't do it; the solicitor's charges would be out of reach.

Q. You have just given an argument, judge, for cutting down the jurisdiction. You have an action for $400.00 and your court may sit in May ——

A. County Court?

Q. I mean the Division Court. Your court may sit in a certain place in the month of May; the man knows that by putting in a defence he can get an adjournment until the month of October ——

A. If he shows cause.

Q. Yes, but I mean, he'll put in some kind of a defence.

A. Well, there has to be a defence.

Q. Yes.

A. But usually, a solicitor having charge of a crime of $400.00 will look after it, and he'll certainly protest against an adjournment.

Q. Well, didn't you say just now, judge, that some litigants put in a defence just for the purpose of gaining time?

A. Yes, very often.

Q. But in a case like that what would be the ——

A. Take Cobourg, for instance, we have Division Courts eleven months in a year.

Q. Oh, yes, but in your rural courts I suppose you have them about four times a year.

A. We have them more frequently than that, about every other month, because we haven't any, what you might call, strictly rural court.

MR. FROST: Judge, Mr. Leduc's question has raised this point, that if a defence on an amount which is ascertained as a more or less fictitious defence, it provides for the case coming up sooner, but if he is asking for delay, you couldn't bring it up if it were a county court matter.

WITNESS: Oh yes, it's within the jurisdiction of the court to bring it up within eleven days.

Q. Mr. Leduc previously raised the point about the complicate jurisdictional requirements in section 54, and he asked this question: supposing the jurisdiction were raised to $200.00, that would raise damage actions to $200.00; it would leave contract actions the same, but reduce ——

A. Oh, I see, that's the point.

Q. Yes.

MR. LEDUC: Here is section 54, judge. I draw your attention to C and D3. For instance, you can sue for a balance of an account not exceeding $200.00, providing the balance account did not exceed $800.00.

WITNESS: Did not exceed $800.00?

Q. Well, that's the last one. Take C, $200.00.

A. That's an ordinary debt or account.

Q. Yes.

A. If the account did not exceed a $1,000.00?

Q. Yes, and in D it's $400.00 when the debt is ascertained by the signature of the parties, provided that in the case of a balance of $400.00 the total didn't exceed $800.00. That's correct is it?

A. Yes.

Q. Well, wouldn't it be better to have a flat horizontal limit jurisdiction of $200.00?

A. Well, the only thing I can see about that is that it would be a question of personal actions. When a man thinks he's justified in suing for $200.00, he wishes to be able to safeguard his client by examining the opposite side, and all that sort of thing.

MR. CONANT: Supposing, Your Honour, the practice to examine were granted on an order of the court, wouldn't that meet the requirement?

WITNESS: Well, what court would you invoke?

Q. Pardon?

A. An order of the Division Court?

Q. Yes.

A. Well, before whom would it be?

Q. An order of the judge.

MR. FROST: Well then, of course, you're complicating the matter.

WITNESS: Court clerks are not competent on examination, as a rule.

Q. Well, that could be met with in those few cases where examinations seems to be desirable, by the increased jurisdiction or personal action. Doesn't that meet that objection?

A. It would, yes.

MR. MAGONE: Would that be too expensive a procedure?

WITNESS: Well, that's what I was coming at, Mr. Magone. The objection is, that in a Division Court your costs are too high.

MR. CONANT: Well, that might be ——

WITNESS: Very often, Mr. Attorney-General, as you know, a lot of these examinations are made for no purpose at all.

MR. CONANT: But I suggest this, Your Honour, that the observation is not free from this objection, that on a personal action to-day in the County Court, for $2.00 you can have examination.

WITNESS: Oh, yes.

MR. FROST: But the machinery is really there for examination, and in the Division Courts Act it's not.

WITNESS: You have a man who's a trained examiner to take evidence of that kind, and capable of deciding what is evidence and what is not evidence.

MR. CONANT: Yes.

WITNESS: I'm afraid that the extending of that machinery to the Division Court would not work out to the advantage of the immediate public. Take, for instance, a case where the parties all live in Campbellford, a distance of

forty-four miles from the county town, how could it be arranged to have examination for discovery?

Q. Well, they'd have to go to Cobourg if they sue in the County Courts.

A. It would mean a lot of expense.

Q. I can't quite get your point there.

A. It would mean the reporter and all that sort of thing; the expenses would be high.

Q. Your suggestion to Mr. Leduc making a horizontal jurisdiction of $200.00, simply means in cases between $120.00 and $200.00; they'd be subject to division court jurisdiction.

A. I can't see any objection to extending the division court jurisdiction to $200.00 on personal actions, if the Committee feels disposed to do that.

MR. LEDUC: But you'd leave it to $400.00 in the other cases.

WITNESS: Yes.

Q. Well, judge, I notice that here in Toronto Mr. McDonagh, clerk of the First Division Court, gave us figures showing that some 6,600 writ summonses were issued.

A. Yes.

Q. Excluding judgment summonses, and out of those 6,600 summonses, 275 were for more than $200.00.

A. That's a comparatively small amount.

Q. Four percent.

A. You'll find it that way all over the province; claims are seldom over that. But take a case where a man signs a promissory note for $250.00 or $300.00; as a rule there's no defence, except, as you pointed out, that very often it's put in for the purpose of gaining time and to stall it off.

Q. Well, if you put in a defence just a day or so before the last Division Court in May or June, you usually jump to September or October.

A. You wouldn't in my jurisdiction, though you would in some parts of the province, there's no question about that.

Q. If your Division Courts sit every month I understand it wouldn't apply to your case.

MR. FROST: There has been a suggestion with a view of simplifying and lessening division court costs in small claims of a $100.00 and others, I think.

WITNESS: Yes, $200.00.

Q. The divisions that Mr. Barlow has suggested for small claims, should be incorporated in the present Division Courts Act, without otherwise interfering with the jurisdiction of the Division Court, but just simply taking that small claims division and incorporating similar machinery in The Division Courts Act, for instance, providing for service by registered mail and having a block system of fees, for instance, of $2.00 for a case up to $25.00 and so on.

A. $2.00?

Q. Yes.

A. And half of that would be refunded in the event of settlement before a judgment.

Q. Yes. Do you think there's merit in the suggestion?

A. Well, there's this, Mr. Frost. When you're dealing with a large community like the city of Toronto, where the work is very heavy and cases very numerous, the matter of fees might work out, but in outside communities you'll find that the remuneration of the division court clerk and bailiff is so small that it's difficult to get a man that is capable of doing his work.

Q. Well, it appears that the division court fees in these cases are not so unreasonable. The difficulty comes in, for instance, in a case such as your county where the bailiffs' fees are quite heavy for going out and serving a man. The idea is, if that could be cut down ——

A. By registered mail?

Q. Yes.

A. That could be worked out, I think, and it would be quite desirable. A lot depends on him having received notice. I suppose you'd have the party who received it sign a card, or something of that kind.

A. That would be all right.

MR. CONANT: Don't you think, Your Honour, that the block system of fees, where the amount of the fees ultimately payable would be definitely ascertained, or ascertainable, would be preferable to our present system?

WITNESS: Well, the difficulty, Mr. Attorney-General, as far as I can make out, seems to be a question of mileage; a question of the difficulty of serving. If that could be overcome, I think the costs could be cut down very materially.

Q. Well, supposing we had a combination of this block system covering everything up to judgment, we'll say, excepting cost of service, and you allowed service to be made by the bailiff or by the plaintiff on his behalf, or by registered mail, wouldn't that be preferable to our present system?

A. It would provide more service by bailiff.

Q. If the plaintiff wanted five—it's not compulsory.

A. As a rule, if the plaintiff has a fair case, he doesn't care how much it's going to cost the defendant.

Q. Yes.

A. I think you'd have to do one thing or the other. You'd have to eliminate the question of service by bailiff or let it go as it is. I was reading this report with regard to that, Mr. Frost. He says that, for example, a claim not exceeding $20.00 in the Division Court, requires out-of-pocket disbursements including judgment and execution, of $7.04. How that includes the bailiff's fees as well as the division court clerk I'm not able to say, but I figured out from the tariff that the cost of a claim, as far as the division court clerk was concerned, on a claim of $20.00 is $3.95.

MR. MAGONE: I think that must include bailiff's fees and mileage for service.

WITNESS: And on a claim not exceeding $300.00, it says here, the disbursements are $17.24, and I figured it out at $10.00.

MR. CONANT: It seems to be, without going into detail, that everybody that has made the submission here, thought that the division court costs are both too high and to indefinite. I think that is a fair statement.

MR. FROST: Yes.

MR. CONANT: And we're groping for some means of remedy.

WITNESS: Just dealing with that, I'd like to say something that might be of some assistance to you, Mr. Attorney-General. I called on my own division court clerk yesterday, and obtained this information from him: I asked him for his statement as to the year 1939. I might say that the Cobourg Division Court is not the best court in the two counties. Strange to say, I think Port Hope is better, though a smaller community, but probably the country right around there is a little more prosperous and maybe a little more litigious. Campbellford, also, is probably a little better than Cobourg.

It says here, that the number of cases in 1939 were twenty-eight; number of cases tried, twenty-four. It doesn't seem very many, and they were nearly all settled. Number of judgment summonses, fourteen. Now I'm coming to something which, probably, might interest my friends over here. Number of committal orders, one; number of committal warrants, none; persons actually imprisoned, none; division court clerks' fees, $801.28 (that's for the year); and bailiffs' fees, $400.48. Now, that jurisdiction extends from practically Port Hope, on the west, to within three miles of Colborne; that would be a distance of twenty-one miles along the front and extending back to the lake; that is, Hamilton township and about two-thirds of Haldimand township to Rice Lake. Quite a large territory.

MR. CONANT: Can you give us any suggestion as to how we can solve this problem? The only constructive suggestion we have had yet, as I recall it, is to eliminate these costs of service by permitting the plaintiff to serve, if he wants to, or registered mail.

WITNESS: Well, I think that's a very good idea if it can be worked out. I think the Committee can see whether it can be worked out satisfactorily in other districts.

MR. FROST: Take the Surrogate Court proceedings, it's quite the thing, Mr. Judge, to serve appointments.

WITNESS: Oh, yes.

Q. And there doesn't seem to be very much difficulty in that.

A. There are a great many cases like that. Of course there's no litigation, no contention, all parties are anxious to have the estate wound up and get the money. They can easily get the copy of the accounts in advance and as a matter of fact copies of these accounts can be filed with the registrar and obtained on inquiry.

MR. CONANT: If service by the plaintiff would be permitted, or by anybody else, same as a litigant in the Supreme Court, or by registered mail, which had a tendency to let us, say, starve the bailiff, wouldn't a system whereby a bailiff acted as bailiff for several courts meet that situation and perhaps also improve the calibre of the bailiff?

WITNESS: One bailiff for a certain territory?

Q. Yes.

A. Possibly. Mr. Attorney-General, I haven't given your consideration an awful lot of thought, but in a great many of these Division Court districts you might appoint the Division Court clerk as a bailiff.

Q. Yes.

A. And then have your services made by registered mail.

Q. Yes. Well, why couldn't that be done?

A. If you're going to cut this man's fees down to $150 or $200 a year he'll quit, he'd be foolish not to.

Q. What's wrong with that? Why couldn't it be practical, especially in small courts, to make the clearing? Let him run the whole show.

A. They've done that in Port Hope. For many years they've had the bailiff, now the Division Court clerk is a bailiff, and he certainly does the work well.

MR. MAGONE: I notice on this statement that Judge O'Connor has given me, that the average fees are about $2.60.

WITNESS: Yes, and they cover all the cases from a dollar up to $400.

MR. CONANT: Well, another suggestion has been made, Your Honour, that after judgment the jurisdiction of each Division Court should be county wide, and also the jurisdiction of bailiffs county wide. What is your suggestion as to that?

WITNESS: I think that would be a great mistake.

Q. Why?

A. If you're going to do that you're going to clutter up your court at the town, as I see it.

Q. No, no, I don't mean that. What that suggestion involves is this: that if an execution, let us say, is issued by one Division Court, the writ of execution would then run every place in the county, so that a seizure can be placed in that county, so that every bailiff in that county could make the seizure, or whatever it might be.

A. That would be perfectly all right, I think.

Q. Don't you think there's considerable merit in that?

A. I do, yes; that's certainly a matter that would help in cutting down expenses.

Q. Well, it would cut down expenses, wouldn't it?

A. Yes. Well, I thought you were asking me how to eliminate these outside courts and make them all one.

MR. MAGONE: Well, that's another question you might answer, judge; that also has been suggested.

WITNESS: Well, after all, Mr. Magone, I feel this is a matter of public service.

MR. CONANT: What is the point?

MR. FROST: He says it's a matter of public service.

MR. CONANT: What's that?

WITNESS: I mean for the people immediately concerned, not the solicitor.

Q. You are quite right there, it isn't the purpose of Division Court to be of service to the solicitor.

A. You take where I am living, along the lake front, with comparatively

mild winters, but you go back five miles and you're in snow drifts and it's quite impossible for people to come fifty miles to a case, it's quite a ways; whereas they go to Campbellford, the matter being disposed of readily and with little expense. If they can't get in with motor cars, they can get in with sleighs and cut across the fields, and they can get in there conveniently, so I don't think the question of cutting out all these Division Courts in rural communities is practicable at all. Another thing; if they all come down to Cobourg, I suppose it would be better for the solicitors practicing in the county town, but out in the country people fight their own cases to a large extent—I think two-thirds of the cases in minor matters are fought out by the parties themselves. The judge comes in, gets one man, hears his story, and then he gets hold of the other man, hears his evidence, and then he gets the two parties together, and the thing is cleaned up in very short order without expense.

MR. MAGONE: Judge, perhaps—well, perhaps I had better let you finish your submissions before I ask you any questions.

WITNESS: Well yes, if you will. Now there is a lot of talk, in this report and in other places, as to the expense of Division Courts. But it strikes me that the parties who are advocating lower expenses in the Division Court and who would like to have claims of more or less large amounts transferred to the County Court, overlook the thought that in Division Courts, outside of cases over $100, where a counsel fee is allowed, the solicitors' fees are always paid by the litigants themselves. There is no fee for solicitors. You get into a County Court, and there are fees for solicitors and further expenses to people whose difficulties should be ironed out with as little expense as possible. So that those fees would be increased, if not directly, indirectly.

Now on page 233:

> "That procedure be adopted to enable a judge to deal with contested matters in an informal manner."

What he means by that, I don't know, because I have tried to deal with that; already there is a provision in the Division Courts Act that if the pleadings are not sufficiently formal, that the judge make use of his best endeavours to bring the parties together and ascertain what they are really fighting about. The claim is put in and it is not adjourned unless there is something very material and the parties are taken by surprise, where an adjournment could be readily asked for. So at the present time pleadings amount to little, if anything, in Division Court, so long as the judge is able to ascertain what the parties are fighting about he goes ahead and tries the matter. So I don't know what he means by that. If they can make it more simple than it is at the present, well and good.

PARAGRAPH 5, I have already dealt with that. If there is any way of cutting down these fees without injustice to the parties who have the responsibility of carrying on as clerks and bailiffs, and so on, well and good. I might say that there are responsibilities with bailiffs and clerks. Probably the Attorney-General will know something about a case that happened to be in my county, where a seizure was made by a bailiff of the Division Court of certain wood, here a couple of years ago, and since that time some of the parties have gone to the penitentiary

for perjury. One of the parties who had the chattel mortgage brought an action against the bailiff and Mr. Justice Roach threw it out on a non-suit, and it was appealed and the Court of Appeal said it shouldn't have been a non-suit at all, and they gave judgment in favour of the plaintiff on his chattel mortgage, whereas all the material hadn't gone in. Well, there have been costs of over four hundred dollars on that thing.

MR. CONANT: Yes, that brings up this question, the question of confidence of the bailiffs. I am glad you brought that up. I don't know whether you would care to express an opinion, but I would be glad to have you make whatever observation you see fit as to the competence and capabilities of bailiffs generally.

WITNESS: Well, you can't get a man without any confidence at all and cut his field down to nothing.

Q. Doesn't that give rise to the thought that the whole scheme of the Division Court, or Small Claims Court, or whatever you call it, would be better served if you had fewer and better bailiffs?

A. Well, possibly, I think that suggestion of yours of having a bailiff have jurisdiction on an extended area strikes me as a good suggestion. I hadn't thought of that.

MR. FROST: At the present time, Judge, taking Victoria and Haliburton, in some of these small Division Courts, the bailiffs have very little to do, and the job is just one in which they get just a little bit of extra fees, just pickings, and the result is they aren't and never have the opportunity of becoming efficient, and never have the opportunity of really knowing what their job is?

WITNESS: That's right. I think the bailiff I referred to the Attorney-General will hesitate in making seizures again without searching for chattel mortgages.

Q. There is one question I would like to ask you, about the matter of piling up costs; one of the difficulties and one of the complaints has been this: that in garnishee proceedings, that it is necessary to garnishee time and time again, and if a creditor just gets wrong as to which is payday and he gets there a week too soon, and there isn't anything there to attach, and the result is he has to go over it again, and many times the garnishee costs are piled up in this way until they amount to more than the claim. Now that brings up the question of judgment summons proceedings, and so on.

A. Yes.

Q. We had here Judge Barton, and also Judge Morson, both of them, I believe, expressing this view, that the provision should be maintained for jailing debtors, and that the provision, the usual provision for contempt of court, or failing to appear and answer questions, should be maintained, but that the matter of jailing a man for contempt for refusing to pay ——

MR. CONANT: For default?

MR. FROST: —— or for default of payment should be abolished. I think that is what both of them suggested?

MR. CONANT: Yes.

MR. FROST: Now, Your Honour, I noticed in the figures you gave regarding the Cobourg court, there was only one case of committal order, which wasn't executed?

WITNESS: The man paid up.

Q. Either that, or through the leniency of the judge, he didn't go to jail?

A. No.

Q. But the question arises as to whether there should be some system, or whether a system should be introduced in which the garnishee should attach against a proportion of a man's wages, and continuing until the day it is paid, without entering further garnishee proceedings, and without piling up further costs. Now we have had some evidence from Mr. Juneau here, from the Quebec Attorney-General's Department. They have a law down there which goes under the name of the Lacombe Law, in which the judge has the right ——

MR. LEDUC: That is the general law.

MR. FROST: The general law, rather, is that the judge has the right to direct that, say, five dollars a month, or a certain percentage of a man's wages, should be paid into the court during the existence of the debt, to avoid the piling up of garnishee costs, and then there is also the Lacombe law, by which a debtor who owes a number of claims can go to court and make a certain declaration there and make provision for paying in a certain percentage of his wages, to be distributed, rateably, as I recollect, among his creditors.

WITNESS: Avoiding a judgment summons?

Q. Yes. What do you think of that?

A. I think there is merit in that. I might say, gentlemen, that I feel that the matter of working out the collection of claims against debtors is fairly well left in the hands of your judiciary. I have had a number of cases in which parties have been brought up on judgment summonses, not only once, but two or three times, and probably half a dozen times, if the parties were allowed to do it, and I have given instructions to the Division Court clerk that when an order is made against a judgment debtor, that as long as he is paying, no other claims were to be determined or put on the judgment summons list until this was cleaned up. Otherwise a man is strangled with costs.

MR. LEDUC: Well, there is a point, if I may enlarge on what Mr. Frost just said; the Quebec law is this: you can attach a man's wages before they are due.

WITNESS: Before they are due?

Q. Yes, you don't have to wait until they are due before they pay.

A. Yes?

Q. Then the judge can order the seizure, attachment of the salary until the debt is paid. So that avoids issuing a new garnishee on every pay day.

A. Yes, that's a good point.

MR. CONANT: Well, it avoids—the whole thing, Your Honour, is a question of devising ways and means of avoiding the present necessity of garnisheeing each debt as it becomes due. That is what the Committee is concerned with.

MR. LEDUC: And the avoidance of costs every week or every month.

WITNESS: I think that could be worked out very nicely.

MR. CONANT: Mr. Frost has raised a question I would like to have your observation on, section 173 of the Division Courts Act, beginning:

> 'If a party is summonsed and does not attend, or refuses to be sworn, or appears to obtain credit by fraud, or has made or caused to be made any gift or transfer of his property with intent to defraud, etc. . . ."

You know that section?

WITNESS: Yes.

Q. Well, it has been suggested to this Committee, as I take it at any rate, that that should be eliminated.

MR. FROST: Wait now, Mr. Conant, I don't think that, as I recollect it, there was any suggestion that it should be eliminated in so far as parties who failed to attend were concerned.

MR. ARNOTT: I think the Chairman is right, the suggestion was made that it should be entirely eliminated.

MR. FROST: Who made the suggestion?

WITNESS: Would you mind my giving you a couple of instances?

MR. CONANT: Let me formulate my proposal first, please.

WITNESS: All right.

Q. Supposing we take that section, and leave in a and b, that is the two contempt sections, strictly contempt sections, and now, the remaining sections, c, d, and e, are refusals to pay, really because of fraud, or neglect or refusal, that's what they boil down to ——

MR. LEDUC: Oh no, obtaining credit under false pretences, isn't it?

WITNESS: Yes.

MR. CONANT: Well, supposing we eliminated c, d, and e; what would be your view as to the extent, if any, to which it would impair the effectiveness of the functions of the court?

WITNESS: Well, I don't feel that it would impair it very materially. As a rule, when a judgment debtor is placed under examination, the judge inquires into the causes leading up to the debt. Very often he does and with a view to ascertaining whether or not this debtor is acting in good faith, whether or not he desires to pay the debt.

A great many of these judgment debtors come into court and they don't want to pay.

Q. Don't intend to pay?

A. Don't intend to pay, and you've got to have some teeth in your machinery or they'll never pay.

Q. Yes.

A. And the public, the merchant, and other people who are carrying on business in good faith would suffer tremendously if there weren't some teeth in your Act.

Q. But are not c, d, and e, the teeth that you need to have? a, c, d, and e simply refer back to the question of how the debt arose, that is where he obtained credit from the judgment creditor under false pretences, where the debt was incurred, under false pretences, and so on, and it all goes to show that a man who does incur a debt in that way is not trying to assist the court and not trying to help his creditors. I would abolish them. I am rather surprised at these sections being put in there at all. I don't know why they should be, but a man who has obtained credit by false pretences is not the type of man, as a rule, that wants to pay.

MR. LEDUC: Or by means of fraud?

WITNESS: Yes. Now, if you don't mind, I will give you a case which occurred two weeks ago. I don't want to take up the time of your commission, but, after all, there has been a lot of discussion about this judgment summons.

Q. It's all right.

A. I had a young fellow who came up before me last July; I'm not saying who; he had the same name as his father, and he was sued by a wholesale firm here in Toronto for $100 for certain china and other stuff that he purchased. He wrote out an order for this $100 worth of china and he signed his name, which happened to be the same name as his father's. His father was in business also, and the young fellow worked for him. He got the china at a wholesale firm, who thought it was for his father, went through the country and sold the whole business and put the money in his pocket. When he was asked for the

money by a traveller he flatly told the man to go to hell, because he wouldn't collect.

Well, the wholesale firm tried to get it from the father but couldn't; the father said he had nothing to do with it and wouldn't pay. However, the firm sued the fellow. He was a boy of 23 years of age who worked for his father, and a very saucy one; one of these fellows who dressed right up to the minute, drove a car, had a good time, and so on. He came up on judgment summons before me, and when he came in he showed me his hands—he had eczema all over them; they were in a terrible shape. He just hung them out to me like that and said: "I'm not able to do anything." It was a shock to me. I said: "Well, that's too bad, can't you take treatment?" and advised him to take treatment; he said he would. So I said to him: "Can you do anything about this claim?" and he said no, he couldn't do anything. "Well," I said, "the first thing for you to do is to try to get rid of your physical trouble. I'm going to adjourn this inquiry for you to come up on notice, and when you're cured of this trouble you'll be subject to examination. I hope you go to these people and settle the matter in some way, get the matter cleaned up; we don't want a young fellow like you coming into court," and so on. Well, he came up two weeks ago on a show-cause summons; he came walking up to the court as brave as a lion, and he held his two hands out; this hand was completely cured and the other was all right, except on the first and second finger. I said: "Well, I'm very glad to see you're getting along nicely. Are you working now?" "Oh yes," he said. "Whom do you work for?" "I work for my father," he said. "Where did you get treatment?" He said: "I went down south." "Where were you?" He said: "I was in Florida for four and a half months." "Well, now that you're back and working what are you going to do with this claim?" He said: "Well, I'll pay fifty cents a week." "Your claim was about $120. do you realize how long it's going to take you to pay that at fifty cents a week?" "Well," he said, "that's all I'm going to pay." I said: "We'll see about that. How much are you earning?" "$5.50 a week." "Live with your father?" "Yes." "Not married?" "No." "Does your father buy your clothes?', "Well, yes, sometimes." "Do you drive a car?" "Yes, it's my father's." "Well," I said, "I'm going to make an order, now, that you pay a dollar a week, surely you'd be worth $6.00 a week as well as $5.50." He said: "I won't pay it." "All right, then, if that's the attitude you're going to take I'll make an order that you be committed to county jail for fifteen days." He said: "Oh, that's all right." I said: "You're quite welcome to it." He grabbed his hat and out he went, bragging all around the community that he'd never pay a cent.

Now, the way he obtained those goods you'd have difficulty in establishing it was a fraud, he had the same name as his father; but it was a fraud. Now he'll pay because the father is forwarding the money; the father is well off.

Q. Would he pay it without your ability to commit him?

A. Well, the order is there, and ——

Q. Well, if you don't make an order?

A. No, he would not. I'll give you another case. A chap from another court way down east, a farmer who had raised quite a nice family, and all that

sort of thing; he was always looked upon as a pretty sharp person. He turned over all his farm and all his stock to his wife some years ago. One day he went out to a sale, he bought $125 worth of cattle, gave his own note, and when the note fell due he didn't pay it, and the party went to him about it. He said: "You can't collect anything from me, everything is in my wife's name." The matter came up in court, and he simply said that he couldn't pay. Well, then he was brought up on a judgment summons for examination. He came in well dressed—his boys were working on the farm, he was a gentleman around the place; good farm, well stocked. He had everything to show that he shouldn't be here at all. "Well," he said, "you can't collect anything from me." "All right," I said, "I'm going to make an order for you to pay five dollars a month, you're well able to pay it, your wife can pay it, she can help you out." He said: "I won't pay it, I can't pay anything." "Well," I said, "that's up to you." He was brought up on a show-cause summons. He came in as brave as a lion and he refused to pay. As I could see it there was no reason given for not paying according to the order, so I made an order to commit him for fifteen days. About a month afterwards he came into my office and he said: "Well, judge, I came in here to go to jail." I said: "I'm not the jailer." "Well," he said, "you said that I had to go to jail for fifteen days, so here I am, what are you going to do about it?" "Well," I said, "I'm not going to do anything about it. When you come to jail you'll be escorted by the bailiff who will have a warrant to arrest you, and the warrant will be delivered to the jailer and that will be the jailer's authority for taking you in. But I can't do anything with you; you go on back home." He said: "When do you want me to come down?" "I don't want you to come down at all, that's up to the plaintiff."

In about a month's time in walks the bailiff and the old man, he was going to jail. "Well," I said, "that's all right with me if you're satisfied. Haven't you any proposition to make?" He said: "No, I'm not going to pay it." So he was turned over to the jailer, and he spent one night there and the next morning he paid the whole thing.

MR. LEDUC: Did he pay or did his wife pay?

WITNESS: I don't know, but he has been around in that community ever since, living like a gentleman. His wife was able to pay it, it was formerly his farm.

Q. There's one thing I don't like about those instances. In the first place the father will pay to save his son from going to jail, and in the second place the wife will pay to keep the husband out of jail. You see, there's wide machinery in that Act for the protection of the debtor. There's no man that'll go to jail if he can do the right thing to keep himself out.

MR. ARNOTT: Few even give it the slightest thought.

WITNESS: Yes. If a man is arrested by a bailiff and brought in to me and he says: "Here, you take that young fellow." If the young fellow says: "I admit I didn't show the right disposition, but I'll pay that dollar a month," or dollar a week, he won't go to jail.

MR. CONANT: No.

MR. FROST: May I ask you a question arising out of that? You say that the money was his wife's, but the farm was his own and he turned everything over to his wife who had nothing before that?

MR. LEDUC: Well, I'd like to recall a personal instance when I was practicing in Ottawa some years ago. There was a civil servant, there, with a fairly good salary who didn't pay his debts. The father had died leaving not a very large estate, but some estate, anyhow, in which the son had an interest. Well, the procedure was for the creditors to sue that man, bring him up on judgment summons, get a committal order; then the bailiff stalled the matter off so that we could notify the executors of the estate; and they paid to keep him out of jail.

MR. FROST: You mean to say that the threat of sending him to jail made the executors pay?

MR. LEDUC: Although the estate had no legal obligation to pay.

WITNESS: Well, there may be good grounds for that. But, as I say, a debtor acting in good faith should be protected by the judge. Oh well, this man evidently was not acting in good faith, but you see, the executors were assuming a responsible debt that was not their own to save the man, and the creditors were playing on that.

MR. CONANT: I find difficulty, Your Honour, in considering this aspect, whether the effectiveness of the functions of the court would be materially impaired if we took out of the provisions these rather exceptional conditions under which committal can be made.

WITNESS: Yes, I don't think those are really operative at all; they may be a guide to the judge, but ——

MR. FROST: In practice?

WITNESS: As far as I'm concerned, in all my practice and experience I paid absolutely no attention to that; it's a question of a man's ability to pay. Usually, when an order is made against a judgment debtor it's made after a fairly thorough examination; he consents practically every time to the order that is made. I say: "Can you pay five dollars a month?" He says: "Yes, I can."

MR. CONANT: Now, if you remove from this Act, Your Honour, as has been suggested and on which I express no opinion for the moment, the right of the judge, in any and all circumstances, to commit, then the defendant knows it, the debtor knows it, and he's subject to nothing more than the order of the court without anything to follow.

WITNESS: Yes.

Q. How are you going to make it operative?

A. You can't do it if you can't collect by execution; the plaintiff is out in the cold, that's all there is to it.

MR. LEDUC: But if you had a way of garnisheeing wages, don't you think you could get away from the committal provision of the judgment summons?

WITNESS: But there are a lot of men who are not earning wages.

Q. If they don't earn wages how can they pay?

A. Well, you take a man that is, for instance, a carter, or something of that kind, he has a little outfit of his own, there isn't any amount of his kind of people that are not making wages, are smaller merchants, and so on.

MR. ARNOTT: In other words, there should be an expression from the Bench to look after it?

WITNESS: Oh yes, I don't think there could be any harm spread at all about people being incarcerated for debt; there's nothing to it at all, it's all bunk. I say that as a judge, and I have seen a good many cases. I might tell you this, Mr. Attorney-General, I have practiced for a long time up in another county, and for many years we had a judge, up there, who wouldn't commit under any circumstance. We sued and did everything to collect. These people weren't paying their grocery bills or anything else; they were peddling around from store to store to get credit wherever they could and paid nobody. If you haven't got teeth in your Act you might as well shut up shop.

MR. LEDUC: Well, would you suggest bringing that provision into County Courts?

WITNESS: Yes.

Q. Why should a man be committed to jail if he refuses to pay a dollar a week on a $50 claim and be able to get away with a $500 claim?

MR. CONANT: Doesn't it result, from this rather anomalous condition, that in a Division Court, after examination of judgment debtor, the court can make an order?

WITNESS: Yes.

Q. Now, examination of judgment debtor or Supreme Court is not followed by anything.

A. It's an aid of execution.

Q. Now, if this rather extraordinary machinery for assisting in the collection of a Division Court judgment is to remain, should it not be extended to the Superior Courts, the County and Supreme Courts?

A. Well, there's some doubt in my mind ——

MR. FROST: In Division Court, for instance, a man may get a judgment against him for $120, the Division Court judges can follow the procedure which you have outlined. If the judgment is for $125, $5 more in County Court, he's

a free man. Now, it hardly seems fair that that provision should apply in a poor man's court, and yet that court has more wealthy debtors, apparently got claims against them, and you can't do anything.

MR. LEDUC: Take a judgment of $500 in County Court.

WITNESS: You examine a man for judgment debtor in County Court.

Q. But you can't make an order and put him in jail if he refuses to pay?

A. No.

MR. FROST: He may be the same carter that you can put in jail in the other court, yet you can't do anything with him.

WITNESS: No.

Q. Now, the question is this, should it be extended to the other courts, to County and Supreme Court, or should they all be put in the same boat?

A. I don't see any harm in extending it to the other courts if a man is not acting in good faith, if he's trying to perpetrate a fraud hiding under somebody else's skirts, for instance.

Q. I feel that if you're going to continue that in a Division Court or poor man's court, I think we should extend it to the County Court.

A. I don't know about your expression the "poor man's court"; I don't think the Division Court is a poor man's court.

Q. Well, that's the expression that has been used.

MR. LEDUC: That is the argument that has been used to retain that it is a poor man's court. I agree with you that it isn't.

WITNESS: Well, there are claims that can be determined in a summary way and with little expense.

MR. MAGONE: I wanted to ask you, Mr. Chairman, if there's any use in keeping Mr. Gall, of the county's Young Lawyers' Club, and Mr. Fowler, of the county, waiting; it's quite late.

MR. CONANT: No, I don't think so.

MR. MAGONE: Just two or three other things. Is there any need, Judge, for a third party procedure in the Division Court?

WITNESS: Well, I had a case of that type a month ago down in Trenton, but we got over it, my parties consented; if you can't consent it means bringing up another action.

Q. Well, does that happen very often?

A. I have only had it once in my twelve years' experience.

Q. I think that answers it.

MR. FROST: Your Honour, under the section that gives you the right to add parties to an action—I forget just what section it is in the Division Courts Act—do you think it would be well to have a provision that would permit the judge to have the defendant contribute?

WITNESS: Yes.

Q. I mean, without any complicated procedure.

MR. CONANT: As long as they are both before the court.

WITNESS: Yes, I think it would be all right; I think it would be well to introduce that practice.

MR. MAGONE: I think it might happen more often, now, with the advent of the motor car.

WITNESS: Yes. I have another case in which three automobiles were mixed up, but the parties all consented.

MR. CONANT: Shouldn't there be that right in the court?

WITNESS: I think so.

Q. Shouldn't there be that right?

A. I think it would be well to introduce it.

MR. MAGONE: Judge, with respect to execution against lands in Division Courts, do you think that the writ of execution, in the first instance, might go against lands as well as against chattels?

MR. CONANT: At the present time there must be a return *nulla bona*, as you know.

WITNESS: I see no objection to it.

Q. You see no objection to it?

A. No. The only thing I can see about that is that when you first issue execution against chattels you realize your judgment much more quickly and with less expense.

Q. Why does the plaintiff go through that gesture if there's no chance of realizing it, Your Honour?

A. Well, the bailiff has no difficulty in returning *nulle bona*.

Q. Oh yes, but it's only running up the procedure, that is, fees.

A. Well, the procedure requires a dollar, I think, and then there's the mileage. When you make a seizure you have to have a bailiff and provide him with mileage.

Q. But what's disturbing the Committee is this: why should a plaintiff be obliged to go through that motion and involve him to that expense before taking execution against lands if he wants to?

A. That may be true, but here's another way of looking at that; if you have execution issued against lands, in the first instance, as well as chattels, there's going to be added fees, which is what you want the man to be protected from. The sheriff comes in with a fee; I don't know what the clerk would get, a dollar, I think, for issuing an execution, and the sheriff would have a four-dollar fee.

MR. MAGONE: Yes. Would there be objection to the issuing of execution against lands, in the first instance, if the plaintiff filed an affidavit that he knew there were no chattels upon which to realize?

MR. CONANT: I have good reasons to believe ——

WITNESS: Throw the onus on the other side.

MR. MAGONE: Yes.

WITNESS: That could be done.

Q. Have you made any use in your county, Judge, of the arbitration provisions in the Division Court Act, section 156, I think it is?

A. No, I have not.

Q. Another suggestion was made that the Creditors' Relief Act should apply.

A. Yes.

Q. The amount seized in Division Court?

A. Yes.

Q. What is your reaction to that?

A. I think that would be all right.

Q. You think that would work out all right in small claims where a bailiff seizes ten or fifteen dollars to give it to the sheriff?

A. Well, I think I'd limit that to a certain amount.

Q. I see, but ——

A. Because otherwise the costs would be out of proportion.

Q. Yes.

A. To the benefit derived.

MR. CONANT: There's one rather important aspect I'd like the judge to express his views on, that is, summary conviction appeals.

MR. MAGONE: May I deal with conviction appeals to single court, Judge, instead of Court of Appeal?

WITNESS: Yes. Well, I think that it would be preferable to appeal to a single court.

Q. Rather than to Court of Appeal?

A. Less expensive.

Q. Yes. Now, Your Honour, would you answer the Chairman's question regarding appeals on the record in summary conviction cases instead of trial *de novo?*

A. That is, take the evidence.

MR. CONANT: It's the same in liquor control cases.

WITNESS: Yes, it seems to work out all right under the Liquor Control Act; you very seldom get new evidence; it might cut down expenses and at the same time we might shut the door against poor evidence.

MR. LEDUC: I think it was suggested this morning that there could be appeal on the record when the evidence in the court had been taken by a stenographer.

WITNESS: Yes.

Q. Otherwise there'd be a trial *de novo?*

A. Yes.

MR. CONANT: What do you think of that, Your Honour?

WITNESS: I think that would be all right.

Q. Where the stenographic extension of the evidence is an exhibit?

A. It would be quite a saving of time and money.

MR. FROST: Did Your Honour have many such appeals?

WITNESS: In the Division Court?

Q. No, summary convictions.

A. Yes, I have had quite a number; I have two coming up now, breaking and entering.

Q. And now most of the evidence is taken by shorthand writers, anyway, isn't it?

A. Oh yes.

Q. I mean, there are a few cases where the magistrate copies out the evidence by hand.

A. We usually have a reporter, yes.

MR. CONANT: Oh yes, but don't those retrials usually extend out for a long while?

WITNESS: Oh yes, far too long, whereas if you had the evidence itself, the judge would probably read that and the argument is made, and it is closed within half an hour.

Q. Then on your retrial on the appeal, you have interminately this: "on the previous trial you said this, and now you're saying this," and you chew the whole thing over about four times, don't you?

A. I think that is a good suggestion, Mr. Attorney-General.

MR. MAGONE: I think that is all.

WITNESS: There is just one other thing I was going to speak about; I don't know what the Bench has done at all, but in a part of this report I am grieved to see reference made to what is supposed to be the practice of some County Court judges and, amongst other things, on page B34, after referring to a specific case, he asks the question: "How long is this racket going to continue?"

MR. LEDUC: Well, that is not Mr. Barlow's expression.

WITNESS: Yes.

Q. Oh no, that is not Mr. Barlow's expression.

A. No, that was put in the report; I don't know as it is Mr. Barlow's expression.

Q. No?

A. It is put in the report, and it is really a serious matter. I may tell you that my practice is, and it is generally the practice throughout the province, to insist upon all the Division Court clerks sending me a complete list of all cases coming up for trial at certain courts, and the amounts involved, so if there are any cases over $100 that is appealable, I will bring along the reporter, and if there isn't a case over $100 the reporter doesn't go. Now in many counties the reporter is paid by salary. In our county she is not; she is paid eight dollars a

day, and I insist upon that, and what is more, these clerks are instructed that, if the case is settled before the time comes for the judge to leave his home town, that they should either write or, if they haven't time, telephone, and in that way the reporter doesn't go. If all cases are settled, or there are no cases coming up before the court, of course, the judge doesn't go.

MR. CONANT: Yes.

WITNESS: Now it has been said, some place or other, that there are judges who go whether there are any cases or not. Well, I would like to know just who these judges are. If there is such a judge, I think there should be a reprimand given to that particular judge.

Q. By whom?

A. Well, the Inspector of Legal Offices I think makes that reference here some place, and if he finds that, why not report it to the Department of Justice?

Q. But the Inspector of Legal Offices has no jurisdiction.

MR. LEDUC: Report to the Minister of Justice?

WITNESS: Why not take it up with the judge immediately concerned and ascertain whether or not it is true? Now, following along that line, here is a court that I have for the 12th at Millwood, and it says here, and the clerk says here:

> "We will have no court on April the 12th. I got word from Mr. Frost and also from Mr. G. N. Gordon to adjourn the case of Thompson vs. Thompson, and there are no other cases."

That shows you just what the practice is in my jurisdiction, and I think it is common all over the province.

MR. CONANT: Well, I haven't the slightest doubt about your jurisdiction.

WITNESS: And I don't think there is any racket being worked by any judge, just because I feel the judiciary is above reproach in these matters.

Q. Well, I can say to the other members of the Committee, that from my knowledge of Judge O'Connor, there isn't any suggestion that that has ever happened in his jurisdiction.

A. It is really too bad to have this appear in the press. People reading these things think it is great news. Now about the districts, this travelling around ——

MR. FROST: Just on that point, you raised there, Your Honour, I agree that I think, with all the county judges that I know or that I have practiced before, that that is the practice followed; the County Court judges aren't anxious to go to these places if they can avoid it, that is correct.

WITNESS: Well, the inference is we do it for the purpose of that miserable

little six dollars a day and eight cents a mile. Let me tell you about that question of eight cents a mile. Thank God, I am able to drive a car, but, unfortunately, there are judges who can't; take, for instance, the late Judge White of Peterborough; he travelled for a number of years before he died; he always had to take a driver with him, and he paid the driver's expenses and meals and all the rest of it, and it all came out of that six dollars a day.

MR. CONANT: Yes, he wouldn't be anything in.

WITNESS: He wouldn't make anything on that in any kind of a decent car.

MR. MAGONE: Generally, with respect to the continuance of the County Court district, is there any real reason for continuing the present system?

WITNESS: Any reason for continuing it?

Q. Yes.

A. Well, there are many reasons for continuing it; very often a judge is called in because there is a matter comes up that he has had previous dealings with the parties concerned, and it makes it rather awkward for him to determine the matter in question, and he passes that over to a brother judge. I have a case that was to come up last Tuesday in Surrogate Court, a contested claim. There was an aunt, a sister of the deceased party, and a man, a farmer brought a claim for $250 for nursing, and the evidence disclosed that the son, who had lived with his father, was more or less of a rascal, and got married and he moved off the farm and didn't help his father any, and he was fighting the case; he was trying to persuade the executor to fight it. I gave the old lady her $250, which she earned, and he intimated when he was in the witness box that he had a claim he was going to bring, and when he intimated that of course, evidence had come out to show that he was quarrelling with his wife, and wasn't looking after things generally, generally a scamp, and I intimated to him that he'd better forget it, that in the first place he was a son of the deceased, against whose estate he was bringing the action, and he would have difficulties in that way; and what was more, his conduct to date didn't impress me very much. Well, he has turned around and brought a suit for $670 against the father's estate for work done while on the farm, and I, in view of my remarks to him, felt that he would feel that he wouldn't get a square deal.

MR. CONANT: Yes, that's true.

WITNESS: And I have asked Judge Coleman to come down and take the case. There are many cases like that, in which it is very important. You might do away with the districts anyway, and give him the right to call in some other judge. That point that strikes me, gentlemen, is there has been a feeling that the judges are travelling too far. Well, I understand the County Court judges are having a meeting, and they may have made some representations. But it might be considered to cut down the size of the jurisdictions, so that there wouldn't be such long distances to travel.

Q. Just look at that list and see if you have any observations to make on it?

A. Take our district; you know that, Mr. Attorney-General, much more so than any other; but in our jurisdiction, I very seldom go up into Victoria county; it's too far away; Lindsay is sixty-four miles away. The only place that I practically do go to is to Whitby, Ontario county, and sometimes I go up to Peterborough, when there is an important case that the judge there doesn't feel like trying.

Q. Judge, I would like to ask you this: you may answer or you may not, as you see fit; but do you think that the exceptional cases or the incidents in which it is undesirable for the local judge to try his own cases justify that list that you have in your hand there?

A. What is this, travelling allowances?

Q. Does that cover the mileage as well there?

A. Yes. Well, I have no doubt it is abused in a great many cases.

Q. You have no doubt it is abused in a great many cases?

A. I think there is an overdoing it.

Q. Looking at that list judicially, if you like, doesn't that list suggest it is?

MR. FROST: Of course, I think, Mr. Conant ——

MR. LEDUC: This is paid by the Federal Government, of course.

WITNESS: Well, this does not only deal with the district particularly, this covers your own immediate territory as well.

MR. FROST: That's the point. A judge with a big district may necessarily have more mileage than a judge who sits here in the city of Toronto, and doesn't have to go outside the district.

WITNESS: Well now, there is reference to the senior judge of the county of York; he never goes outside of the district of Toronto; why would he have any mileage?

MR. CONANT: That's right.

WITNESS: I notice mine here, $838, to April 16th.

Q. Well, you are one of the modest ones.

A. Well, probably, but I average one court a month outside of my county, and I don't think that is overdoing it. I had more than that up in Peterborough in December, because I was on a case that lasted three days, and the solicitors were never ready; when we get through one day, they weren't ready for the next day; they always had something else on.

Q. Is there anything further, Mr. Magone?

MR. MAGONE: No, that's all from Judge O'Connor.

MR. FROST: Before you leave that question ——

WITNESS: I might suggest, the mileage doesn't seem quite right, and might be cut down.

MR. FROST: There is this suggestion; you mentioned a group of counties, Peterborough, Ontario, Victoria and Durham: it does seem to me that the exchange of judges in the County Court cases in general sessions and County Court Judges' Criminal Courts have really been in the interests of the public. I say that as one who is a resident up there, and knows something about the situation. I think the exchange up there has been in the interests of the public, and I take it, just from my own experience; you take, for instance, Lindsay; we have fifteen lawyers in Lindsay. If the judge, in County Court cases, is confined or restricted to Lindsay only, he gets used to the lawyers that are there, the lawyers get used to his ways, and the result is I don't think there is as good practice in the court there as if Judge Smoke, for instance, came up from Peterborough occasionally, or you came up from Cobourg, and so on. And I really feel this, that the exchange in the district in those larger places has been a matter of public interest.

MR. CONANT: Oh yes, I don't think there is any doubt about it.

WITNESS: There may be something in it, but after all that is more or less picayune, you know; the only question is as to whether or not somebody is running around the country more than he should. There was a statement made here that some judges don't take any courts in their own district; I can't understand that.

Q. It is like a great many other things of human construction or regulation; it isn't the use, it's the abuse.

A. Take your own County Court judge down there in Whitby; he sat on a criminal case there for five days; that doesn't look as though he is running around too much.

Q. No, that's true. Of course we are concerned with it from the standpoint of provincial legislation that has created these districts. Now, if in maintaining that provincial legislation, we are contributing to anything that is wasteful, we have the right to consider it.

A. Oh yes, I think so, if there is any—but I think if there is anybody who has shown that there are judges running around and taking advantage of that sort of thing, the Inspector of Legal Offices ought to speak to him about it.

MR. CONANT: Well, thank you vere much for your assistance, Judge O'Connor.

Witness excused.

MR. G. A. GALE, Lawyers' Club, Toronto.

MR. MAGONE: Mr. Gale, your were appointed chairman of a committee?

WITNESS: Yes, Mr. Magone, chairman of the committee of the Lawyers' Club, to submit to Mr. Barlow, when he commenced his investigation, a brief relating to suggestions that the Lawyers' Club might think advisable to bring to his attention. Following that, a brief was submitted.

Q. Yes.

A. And I believe it has also been submitted to the chairman of this Committee.

Q. Yes.

A. Since that brief was submitted, the lawyers have held various meetings relating to the matters brought before the committee, and it was my understanding that I should perhaps deal with these subjects: First of all, the suggestion regarding the constitution of a rules of practice committee, the grand jury, and the petit jury, and any comments which I might have to make with respects already covered. I may say, sir, that the Lawyers' Club is rather a large body, and it is very difficult to try and get any formulated idea from the Club as a whole, particularly when there has been such a wide scope of subjects covered within the last few days.

Now, the first topic perhaps that I should like to mention is the question of the new rules committee. The Lawyers' Club very strongly recommended to the Master, and authorized me to renew it here, to have the committee reconstituted to include barristers, and in our submission the Master of the Supreme Court of Ontario. We also suggest that a representative of the administrative branch of the judiciary should also be a member, and, of course, by that, we are rather suggesting the Attorney-General himself. I don't know whether you want to hear any arguments that we have.

MR. CONANT: Just to shorten it, because we have had quite a few submissions, I think we would be interested, I at least would, and perhaps my colleagues will concur with me, in any method you have to suggest as to the manner of selecting the barristers to be added to the committee.

WITNESS: Well, it was thought by us, sir.

Q. We have had one concrete proposal, have we not, Mr. Magone, that they be selected by Convocation, that is the Benchers of the Law Society?

MR. MAGONE: Two, sir, and Mr. Barlow's, that they be designated by the Chief Justice.

WITNESS: Well, Mr. Barlow's report is in accord with our recommendation; we felt, with some diffidence, that if this new committee were to be set up, as we suggest that it should, perhaps the control of it should be given or left as nearly as possible, and that perhaps also with respect, that a greater weight would be given to the addition of any barristers if they were selected by the Chief Justice. As I say, there are various reasons which we have to offer for

the reconstitution of the committee. I may just mention one perhaps: that is, in going through the judges' report on Mr. Barlow's report, I notice that there are ten changes suggested by Mr. Barlow which are adopted by the judges. And while I have no statistics on the subject, I believe that ten changes are almost as many changes as have been enacted since the rules were consolidated in 1928, so that, with respect, I submit that a fresh mind, perhaps, does invoke some changes, in which the judges are apparently in agreement.

Now then, sir, as to Division Courts, the recommendation of the Lawyers' Club was simply this: that so far as possible, the procedure relating to Division Courts and the Division Courts be simplified and, secondly, that that simplification be carried further into the question of costs of Division Court actions.

Q. When you say simplification as to costs, you mean certainty?

A. Certainty, yes.

MR. LEDUC: In the costs?

WITNESS: Certainty in the costs, and also simplification of the method of arriving at the cost.

MR. CONANT: Having in mind that, at the present time, Division Court costs are made up of almost innumerable small items?

WITNESS: Exactly, and you never know where you're at, and you can't advise a client where he will be at when he gets through. And I think that is one grave objection which we find with the Division Court at present.

There is another matter which perhaps should be mentioned; we felt that, if the division court clerks could be in some way instructed so that they could advise the litigants or prospective litigants, when they come into their office, not only as to drafting their claims, but advising them generally, so that in small matters the intervention of a solicitor or barrister might be avoided.

Q. It's rather surprising to hear a representative of the barristers say that.

MR. FROST: Of course, that is being done in some of the outside places.

WITNESS: I have no doubt about that.

Q. In Toronto, where they have so many cases, they haven't the time to do it, but in many of the outside jurisdictions the division court clerks do advise them.

A. Yes, sir; there is just one observation, sir, which I would like to make, if I may; the idea of the small debts court was not in existence when we made our submission; it seems like a good idea in one sense, that is it will definitely simplify and reduce the costs in claims under $100; on the other hand, if it is set up in accordance with Mr. Barlow's recommendation, it may have a tendency of increasing the cost for everything over $100. In other words, if you have to come to a central place in each county to try claims of $120 or $150, and bring

all your witnesses, to use Mr. Arnott's county as an example, from Madoc to Belleville to try a claim for $1,250 originally ——

MR. CONANT: That is a modest example; you would have to go a lot farther than that.

MR. ARNOTT: Bancroft.

WITNESS: In that case you are indirectly adding to the costs

MR. LEDUC: Well, in the present County Courts Act there is a provision along those lines.

WITNESS: Exactly, I am just mentioning that some thought should be given to that if the small debts court is established.

MR. CONANT: I don't know whether you are going to deal with it, Mr. Gale, but when you deal with simplification and reduction of costs, that is quite feasible, I think, so far as everything is concerned, excepting the costs of service. Now that is quite apparent, is it not?

WITNESS: Yes.

Q. Now then, when you come to service, that is the imponderable or uncontrollable factor, and if you have any views to express as to how that could be met, I think we would be interested.

A. Well, our view, sir, for whatever it is worth is this: that service might be effected by registered mail, with one of those return card systems, but that judgment should not be signed unless some additional proof—unless the judge were satisfied that apparently service had been effected.

Q. Well, supposing in those cases we provided that where service was effected, the return receipt were provided, and if there was default and nobody showed up, we had something equivalent to a decree *nissi* or judgment *nissi*, and then a notice was sent to the defendant by the same process, to the effect that, for instance, "the judge has committed you to pay $1.50 a week unless you take action as prescribed by law; within fifteen days this judgment may be acted upon." Would that be sufficient to protect him?

A. I would think so.

There is one item in the report with which we do disagree, that is making The Creditors' Relief Act apply to the Division Court, at least, with an unlimited application. Certainly there should be some restriction in the amount.

MR. FROST: That would bring about too many complications?

WITNESS: Certainly; you would collect say, $5 in a small division court action; if that were turned over to the sheriff, I shudder to think what would become of it. I am afraid the plaintiff would never see it.

The suggestion has been made here to-day, sir, about division court appeals going to single judges, and this is purely my own opinion: I would just like to point out that I am quite in agreement with the idea of division court appeals being simplified if they can, but I fear very much that that can be accomplished by sending them to the weekly court of chambers. As you know, sir, we have lists now running anywhere from ten or twelve or fifteen or twenty-five cases set down before single judges, and we are sometimes there till six and seven o'clock in the evening, and if in addition, you had appeals from Division Courts on questions of fact, with evidence again, I don't know when we'd ever get through with them. My own guess would be that there are about one-third of all appeals that come to the court of appeal that are division court appeals.

Q. Oh yes, but Mr. Gale, may I point this out; if we have proper regard for the values and the equities, the courts are constituted to serve the people, and not the people to serve the courts, and if our personnel machinery isn't efficient, then it is a matter of revising our machinery.

A. Yes, all I am pointing out, sir, is the greater time it would require.

MR. LEDUC: I think the suggestion was made that the appeal should be to a single judge.

WITNESS: In other words, some new court?

Q. No, no, to a judge of the Supreme Court or chambers.

MR. CONANT: Yes, a single judge.

MR. LEDUC: I don't believe it was meant that it should go to the court and be on the list with the ordinary cases. That is a matter that could be arranged, and there is some merit in what you say, that it could be held in chambers.

WITNESS: Well, I am suggesting that it would seriously complicate matters to have it go into the ordinary chambers and weekly court list.

Q. Oh, that would complicate it?

A. Oh yes.

Q. Oh, I thought you were asking that it should go there.

A. Oh no. I say, by virtue of the fact that those lists are pretty full at the present time, that it would seriously hamper everybody to have those appeals go to the judge in weekly chambers.

In other words, if that system, or that procedure is set up, I would respectfully submit it would have to go to a separate judge.

MR. MAGONE: Mr. Gale, weekly court, as you probably know, sits in London, Ottawa, Hamilton, Windsor?

WITNESS: Yes.

Q. These appeals might conceivably go to a judge sitting, for the northern district, at Port Arthur or Fort Francis?

A. Exactly.

Q. Don't you think that would eliminate the congestion you suggest in Toronto?

A. Well it might, but if, at the same time, Mr. Magone, you have a great many division court appeals from, in and around Toronto, the county of York, I suppose, contributes the greatest number, and if those appeals went on before the ordinary weekly court judge, or chamber judge, I am afraid that it would hamper things considerably.

MR. CONANT: Oh yes, but Mr. Gale, if that single judge, whether he is chambers or court judge, is an adequate tribunal to hear the appeal, I would be surprised to hear you submit the argument that in order to avoid further work in that court, it should still be heard by an appeal court of three judges, as the case may be. Surely you don't think that is logical?

WITNESS: No, I don't, sir; perhaps I haven't made myself clear.

Q. You see, under the present practice, as you know as well as I do, you go to the Court of Appeal, three judges who, the next minute might be hearing a case involving a million dollars, and on a case involving $150 you've got to have five copies of evidence, and all the rest of it. Now, if that system is not reasonable or common sense, then the machinery for hearing it by a single judge can do it, if it is made available, is that right?

A. Exactly. Of course, I point out, sir, the only difference in evidence and exhibits would be three copies instead of five, and I don't think there would be a great saving in that. I agree with the suggestion that it shouldn't go before the Court of Appeal; all I am saying is that the alternative, in my submission, should be that they do not go before the regular weekly court or chamber judge, but that some separate judge should be designated each month to hear them on a special list.

Q. Well, that may be a good suggestion; is there anything else, Mr. Gale?

A. There was no recommendation, sir, as to the grand juries; as to the petit juries, we didn't feel qualified.

Q. Have you got this formula we are groping for?

A. Regarding petit juries, no sir.

MR. LEDUC: What about juries in Division Courts, Mr. Gale?

WITNESS: We agree with the apparently unanimous opinion.

Q. That they should go?

A. That they are unnecessary, yes. As to the petit juries, sir, with, perhaps the exuberance of youth and inexperience, we recommend that juries be dispensed with in civil proceedings, except those proceedings mentioned specifically in The Judicature Act. I don't think that I could add anything to what Mr. Mason said this morning.

MR. MAGONE: You would dispense with juries in all civil cases?

A. Yes.

Q. Except in those special cases, what is it, libel slander, and ——

A. Malicious prosecution.

Q. Yes.

A. I think there are five of them all told. I think Mr. Mason put it better than we could do it; we discussed the thing seriously and came to that conclusion.

Q. Well, Mr. Mason didn't go as far as that; he went as far as to suggest that there should be some restriction on the right to a jury in all cases, but he didn't go quite as far as you.

MR. FROST: He said the onus should be placed upon the person asking for a jury, to show cause why it should be granted.

MR. CONANT: Yes, I suppose you would subscribe to that view?

WITNESS: We certainly acceded to that view, but our original submission was, that it be done away with entirely for various reasons given by Mr. Mason, which were discussed by us, and which are common knowledge. I may say just one thing, that the Rules 258 and 259, set down that cases which formerly came before the courts of equity shall not be tried with a jury, and cases which came before common law courts shall be tried by a jury, seemed to be entirely arbitrary rules.

MR. CONANT: Yes.

WITNESS: And the fundamental rights of the subject certainly are not any higher in common law courts than they were in equity courts. I think that is all I have, sir.

MR. CONANT: Thank you very much, Mr. Gale.

MR. FROST: Did you make any recommendations regarding grand juries?

WITNESS: No, we didn't make any recommendations along those lines.

Witness excused.

Committee rises until following morning.

NINTH SITTING

Parliament Buildings, Toronto,
April 12th, 1940.

MORNING SESSION

MR. CONANT: Mr. Magone, Mr. McKenzie wishes to add something to what he said yesterday.

MR. MAGONE: Before Mr. Frost starts, Mr. Chairman, I wish to say that I have had some correspondence with Judge Owen, the president of the County and District Judges' Association, following a news item that appeared in the newspapers that the judges took exception to, on the ground that they thought it was a criticism of the amount of their travelling expenses. They asked, at that time, that they be allowed to make representations orally to the Committee, and Mr. Silk immediately wrote back and said that we would hear them at any time. Following that, a meeting of the County Court Judges' Association was held in Toronto, Wednesday of this week, and they were to communicate with me on Wednesday afternoon or Thursday morning, and I was to fix a time for the hearing. Instead of that, I have a communication from Judge Owen which I think proper for me to read into the record. It is dated April 10th. (Reads):

> "At a meeting of the executive committee of the County and District Judges' Association of Ontario, held to-day, the correspondence between our president and Mr. Magone was read, and I was authorized to make representations in writing in regard to the matters which have been discussed by the Committee. The reason for the setting up of the County Court Districts was to cut down the number of junior judges, and to equalize the work between the large and small counties, and also to facilitate the holding of courts and the despatch of business in case of the illness or the absence of the judge. By the provisions of The County Judges' Act, section 20, it is mandatory for the judges of each district to meet at least once a year, to arrange and appoint which of the said courts of the district shall be held by each of the judges throughout the ensuing year, and what other judicial work each shall discharge in the respective courts of the district. In many of the districts, the judges have constituted this enactment to mean that it is their duty to distribute the sittings of the courts so that the judges of one county will hold a number of sittings in counties other than their own. Representations have been made from the Department of the Attorney-General, prior to your incumbency of the office, that it was the desire of the department that the letter of the foregoing provisions of the Act be observed, and that there be a general interchange by the judges throughout the districts. Notwithstanding the reasonably plain provisions of the Act, the best information we have in the matter is that in only one district is there a general interchange of judges for the Division Court sittings. Furthermore, we wish to point out that by reason of the place of residence of some judges, it is less expensive and involves less travelling when a judge of a neighbouring county takes a court, than would be involved if the judge of a county took such a court.

Although the accounts of the travelling allowances of some of the judges may look large, without an enquiry, it is impossible to say that such accounts are unnecessary or have not been incurred in the interests of justice. We are reliably assured that some of the larger accounts have been incurred because of the absence on leave or infirmity of some judge or judges, or by reason of vacancy on the bench in some counties. We are firmly of the opinion that if the judges concerned had been consulted, it would have been ascertained that a number of matters which have been given publicity would have been capable of explanation, and the public would have been placed in possession of the facts. In further reference to the travelling allowances of judges, a number of judges have reported to the department of the Attorney-General, that the number of Division Courts in their counties might be reduced in the public interest, and our association, in a memorandum on file in your office, have made recommendations to the same effect. The number of Division Courts in any county is not in the control of the judge. Our information is that it is the general practice for Division Court clerks to notify the judge that there is no business at the approaching sittings. If that practice is not followed in any county, we will ask our members to see that such custom is adopted. In conclusion, we beg you to be assured that our association is prepared to co-operate with your department and with your Committee, in any manner in which it may appear that justice in the Province of Ontario may be efficiently and economically administered."

MR. CONANT: Yes. Well, now, it is my understanding—or would you confirm it or otherwise, Mr. Magone—that that is all the representation the honourable the County Court Judges care to make on that point.

MR. MAGONE: I think I am safe in saying that that is all.

MR. CONANT: I see. Well, that adds something to the discussion, and it is in a form that will be available and can be considered conveniently by the Committee when we are dealing with that aspect of our enquiry.

MR. MAGONE: Now, Mr. McKenzie, I think you might continue, if you will, where you left off last night.

MR. FROST: There is just one point with Mr. McKenzie—yesterday, we were hurrying him just at a rather bad time. We rushed him. It was just before noon. Mr. McKenzie represents a section of the Canadian Bar Association, and he was dealing with a matter which I think is very important—one which we might look into in an impartial sort of way. He was dealing with the subject of the decisions of certain boards and commissions—and, I suppose, certain government officials who make decisions—and his suggestion is that they should be subject to review. Now, I think that we should hear his argument along that line. That is why I thought, yesterday, it would be too bad to rush Mr. McKenzie.

MR. CONANT: As Mr. Frost says, you started at rather an inopportune time. I thought your discussion was very valuable, and I asked for an adjournment in order that you might have ample time. As far as I am concerned, we'll be glad to hear you to any extent.

WITNESS: Before I go on with that, could I refer to three or four smaller matters that I might forget otherwise? There was a resolution, which I omitted from my list yesterday, passed by the Ontario section meeting in Windsor ——

MR. CONANT: May I interrupt, Mr. McKenzie? I do so because I have had a number of enquiries this morning and late yesterday about the programme of this Committee, and I think we should clear up any misunderstanding at this time, if possible, for the benefit of those who may be interested in the future sittings of the Committee. Mr. Leduc, as you know, a valued member of our Committee (all being valued members), is chairman of another committee, and I had understood from him that that committee wanted to resume its sittings.

MR. LEDUC: At the earliest possible date. Perhaps the week of the 22nd. I think it can be arranged.

MR. CONANT: You won't be sitting next week?

MR. LEDUC: No.

MR. CONANT: So we may be continuing next week.

MR. LEDUC: Well, Mr. Conant, we have been sitting two weeks on this Committee and we have been sitting as long on the other.

MR. FROST: I think there is an advantage in adjourning. Among other things, it would give Mr. Magone and Mr. Silk an opportunity to digest some of the things discussed here.

MR. CONANT: To-night we will adjourn *sine die* to meet again at the call of the chairman. All right, Mr. McKenzie.

MR. FROST: Mr. McKenzie, some of those things you went over yesterday you had to go over in a great hurry. If you want to go back over them, you may.

WITNESS: Well, sir, I might say that Mr. Armstrong was with me yesterday, and Mr. Lang was here before.

MR. CONANT: I think you are quite capable of taking care of yourself.

WITNESS: I just wanted to put on record that the Bar Association was represented. Now, there is a resolution, which I overlooked, dealing with matrimonial cases. I just wanted to leave it with the Committee. I don't want to go into that now, but I would suggest, sir, in regard to the rules, it might be advisable for the Committee to make recommendations. I mean in a general way, without attempting to phrase the rules. Some of the things dealt with in Mr. Barlow's report are rather matters of technical procedure, but there are really matters of principle in which the Rules Committee might hesitate to put into force unless this Committee recommended it.

MR. CONANT: What, particularly, have you in mind?

WITNESS: Well, I don't know whether I can help you there, sir. It would

take too much time to find it. You will, no doubt, in reading those things, see that some of them are matters for more than a casual committee to deal with. Might I suggest, too, in regard to the constitution of that committee. It has occurred to me, since I have come here, that there should be a place on it for a solicitor. Not that there is such a distinction, legally, but I mean an office man on the Rules Committee, rather than simply confine it to counsel. That is a matter of detail, of course, but the office man has often, as you know, a different point of view from a man whose business is purely counsel work. Arising out of that, I was most shocked at the recommendation of the judges, and concurred in by the benchers, in regard to procedure in the sheriff's office. That is on page B36. Evidently, both these bodies have overlooked the fact that nearly all these matters enumerated in paragraph 1 of section 13, as to the searches the sheriff has to make—all those searches have to be made every time a transaction is closed, and it is perfectly ridiculous that you should search for unlimited partnerships in the Registry Office, for limited partnerships in the County Court Clerk's Office, etc. It seems to me that Mr. Barlow's recommendation is eminently sound and would facilitate business a great deal.

MR. CONANT: You mean centering all those searches in one office?

WITNESS: Yes, sir. It seems to me that the Registry Office is more the place for a search than the County Court Clerk's Office.

Q. Have them all there, you mean?

A. I would say so. In the city of Toronto, the County Court Office is not suitable for that. It would be quite impossible to carry on business there.

MR. STRACHAN: Yes, it would be quite impossible.

WITNESS: Certainly. They should be consolidated in one office. Now, sir, there has been some discussion about a commercial judge. I have heard it suggested that the great cause of delay in the city of Toronto, where most of the actions are tried, is a non-jury court, and the loss of time in waiting for cases to be heard is a great inconvenience to counsel and the witnesses, and ultimately redounds to the public.

The judges, if I may say so, are in the service of the public, and cases are not tried for their convenience, but for the convenience of the litigants.

MR. CONANT: Well, generally speaking, don't the judges try to meet the public's convenience?

WITNESS: Oh, yes. But I think the system is bad.

Q. How would you improve it?

A. I would say, as it is set out in England. And if you will look at these *Weekly Notes* which Mr. Silk got yesterday—when the discussion came up—you will see that the short non-jury cases are listed with the probable time, and the dates are fixed accordingly, and in the Commercial Court in London, as I understand it, you are not set down for the week commencing April 9th, you are set

down for April 11th at two p.m. I don't see why it wouldn't be much more convenient to have a similar method in the administration of the Toronto non-jury court.

Q. Well, doesn't that combine more careful examination and planning by the registrar or clerk of the court, and the judge.

A. Yes, sir. In New York, as I understand it, in the equivalent of our non-jury court, all cases are listed once a month, and the counsel are required to appear and state their position, and then dates are arranged for those cases that are ready for trial.

Q. Yes.

A This business of rushing up to the registrar on Friday afternoon to make sure your case doesn't come on next week, and then you find it is on ——

MR. STRACHAN: And if there is a case ahead of you ——

WITNESS: If there is a case ahead of you that takes all week, it costs the public money.

MR. CONANT: Well, Mr. McKenzie, I am very anxious about what you are talking about, but, again, I don't see the formula to remedy it.

WITNESS: Well, sir, I don't think I am at liberty to quote names, but some of the judges think that it can be remedied.

MR. ARNOTT: What is the suggestion?

WITNESS: My suggestion is that dates should be fixed for cases—not a week, but a day. We have now sufficient judges to take care of that situation.

MR. STRACHAN: We have two non-jury courts, I think.

WITNESS: Yes. Suppose a judge is idle for a couple of hours. Is that more important than that the cases should be speedily tried?

MR. CONANT: Well, now, I think that strikes the heart of it. It is a question, as I have seen from my own experience, of the judges loading up the list in the fear that they may have an *inter-regnum* of an hour.

WITNESS: Yes.

Q. And in so doing litigants are on tenterhooks perhaps for days.

WITNESS: Anybody that has had experience with our Ontario courts, knows that you may be on the list and hang around for a couple of weeks before your case comes up.

MR. CONANT: Would you give the registrar or judge the right to put the case on the list without the consent of the parties?

WITNESS: No.

Q. You wouldn't give them that right?

A. Well, I mean, not without the consent of the parties.

Q. Well, isn't there a great difficulty in getting the parties to agree as to the time?

WITNESS: Yes, Mr. Magone, but I didn't say "without the consent". I said "not without the consent of the parties". Not without discussion with the parties. I mean: If I came up and said: "I'm ready to go on with this case. I want it tried. It's pressing." And you said: "I'm not ready to go on." The judge can look at you and see you are just stalling, and say: "Well, we'll put that case on at such and such a time, and you've got to be ready."

MR. LEDUC: In Quebec, they have a system similar to the one they have in the State of New York. I remember in Hull, they used to hold a meeting of the counsel engaged in the cases ready for hearing, and they'd fix all those cases for certain dates during the term, and assign one, two or three cases for each day. It is something of the kind that you have in mind?

WITNESS: Yes. And it would work.

Q. It would work?

WITNESS: I'm sure that three-quarters of the time is lost that way.

MR. CONANT: Personally, I'm glad you brought that up, because, when you talk of facilitating and expediting the administration of justice, there are few matters more important and more relevant.

WITNESS: Well, you see, sir, how I struck a responsive cord in Mr. Strachan, who has suffered in the same way that I have and everybody else has. It is a real grievance, and a sore point in litigations.

MR. MAGONE: What is the reason for it, Mr. McKenzie? Is it because the cases are put on the list without the consent of the parties?

WITNESS: No. I think it is because, to a large extent, the registrar fixes the list, and the registrar has no authority with counsel to enforce—I mean, it's a case of prestige. He hasn't the proper prestige to deal with counsel. And, as a matter of fact, it's largely junior counsel that are sent up to jockey the case around. That is what it amounts to.

Q. You're speaking only of Toronto non-jury?

WITNESS: I'm speaking of Toronto non-jury, which, I think, we are all agreed is the sore spot.

MR. STRACHAN: With regard to the length of time—it might be a case that will take an hour, and it is put immediately behind a case that may last three days, but you're afraid to leave and you sit there with your witnesses ——

WITNESS: Exactly.

MR. CONANT: I suppose, of course, Mr. McKenzie, if the matter were planned, having regard for the convenience of the litigants, it might involve an increase in the number of judges, because you would have to fix a definite list, and it might take more judges in the final analysis. Is that right?

WITNESS: Possibly, sir, the apportionment of the judges between the trial and the Appellate Division is not right at the present time. I don't think there are more than three judges sitting in the Appellate Court for the last six weeks, and there are seven Appellate judges. Isn't that right, Mr. Strachan?

MR. STRACHAN: Yes.

MR. CONANT: You think the disproportion might be levelled off a little better?

WITNESS: I think the Appellate Court might be cut down and the High Court, Supreme Court, and trial courts division added to.

Q. Well, I am glad you brought it up. What is there next, Mr. McKenzie?

A. Well, just following on that, sir, is this matter of The Evidence Act. I haven't seen the draft Act that is under discussion, and I haven't read the new English Act. Evidence has always been a mystery to me, the law of evidence, but I am very much impressed with the idea that if we reform our law of evidence, it would expedite trials and effect justice. After all, the trial of a case isn't a game where you have to play certain rules.

Q. Are you familiar with the changes that have been made in England?

A. I'm not, sir. I am not expressing an opinion on the subject at all, I am simply saying that I think the law of evidence lends itself to reform. I will give you a case. I have a proceedings in Surrogate Court, where the beneficiaries were accusing a Trust Company of negligence running back over a period of fifteen or twenty years, in the case of a mortgage out in one of the western provinces. In order to defend the Trust Company, for whom I was acting, it would have been necessary to prove three or four documents—letters and things of various kinds, showing deals concerning this property over a period of twenty years. That would have involved taking evidence in Los Angeles, England, and Montreal, Calgary, Winnipeg, and so on. There was no method of proving those documents except by the writers and recipients, who were, as it happened, alive.

Now the evidence, in that case, would cost more than the amount involved. It seems to me that that was grossly unnecessary, and there should be some machinery for meeting that kind of a situation.

That, if I may say so, Mr. Frost, is one of the reasons why quasi-judicial appeals are thrown out. My point in bringing all this up is, if we can speed up the courts, we can greatly weaken the arguments for taking things away from the courts.

MR. CONANT: Yes. Just one observation; with regard to that Evidence Act; whether you have any more observations to make, I don't know, but I am not satisfied in my own mind that it is a matter that shouldn't wait upon uniform legislation.

WITNESS: That is exactly what I was about to say, sir.

Q. All right, go ahead.

A. With due respect to the Uniformity Legislation Commissioners, it is largely departmental in the outlook; you don't mind my saying so, Mr. Silk?

MR. SILK: No, go ahead.

WITNESS: You take the draft of the Act which was submitted to the Bar Association by that body; it was a departmental compilation. The practicing solicitors (corporation counsel, they may call themselves) were just completely at odds with the draft of that Act.

MR. SILK: Well, it had been prepared by a special committee: Mr. Jones, from Ontario; Mr. O'Mara, from Ottawa; and Mr. Andrew Smith, from the West; I think it was quite a large committee.

WITNESS: That just emphasizes what I am saying.

MR. CONANT: Yes.

WITNESS: I think, sir, there is something about a Law Revision Committee here. I am the public, as I said yesterday, and I think that the practicing lawyer should be represented on these committees. I am saying I don't know anything about the law of evidence, the Act that is being drafted, but I think, sir, that that is a matter that shouldn't stand. That what they are doing in regard to evidence in Alberta may be quite completely immaterial to what we do here.

MR. CONANT: That is my own feeling, but I note Mr. Barlow's recommendation, and he had evidence here, or submissions, that it should be uniform. I don't see it myself, however. Is there something else?

WITNESS: There might be in regard to the Canada Evidence Act.

MR. FROST: Mr. McKenzie, just on that point; take the matter of changes to The Evidence Act; that, I suppose, Mr. Conant, brings up the question of Law Revision.

WITNESS: Yes.

Q. We had some discussion here about law revision, and one of the points that appealed to me was this: the matter of having those who are dealing with our laws, such as the laws of Evidence, and who know the weaknesses and who know the absurdities in connection with the laws of Evidence, and other laws, bring those weaknesses and those absurdities and those things which are costly

to the attention of a law-making body. Mr. Conant suggested, among other things, that there should be a law revision committee, perhaps of Supreme Court judges. On the other hand, I think Mr. Leduc took the point that the making of laws is purely a matter for the Legislature, and if you go beyond that you may be getting on dangerous ground; on the other hand, it does seem to me that we have this position. Your association, the Canadian Bar Association, is one which is very interested in this subject, and I suppose, considers these subjects at various meetings, and so on, and yet it may be that your findings are not utilized, for the reason that we haven't any method of really bringing these up to the body which has the power to make changes. Now, in the Attorney-General's department, it seems to me that it would be hopeless to ask the Attorney-General, or to ask his officers, who are already, I suppose, overburdened with work and detail, to say that they are the people who have to do it. Would there be anything to this, supposing, for instance—this may be a suggestion which is entirely unworkable, but it is a suggestion—would there be anything to having a committee of the Legislature, each year, sitting while the House is sitting, so that it would be without expense to the public, to have a committee of that sort consider suggestions that might come up, from, say, the Canadian Bar Association, and have them as a committee that would sift things over and pass on suggestions to the Attorney-General's department?

WITNESS: I am very strongly convinced that such a committee would be extremely useful. I have heard judges comment from time to time that they find something in the Statutes that shouldn't be there. They make recommendations, and the recommendations are lost. Certainly, one of the great difficulties of the Canadian Bar Association is that our resolutions are lost. We pass resolutions, and the difficulty is to get any further with them. But I question whether the same could be effected by having a committee sitting during the session; it would very much offset the non-partisan attitude that is required in a committee of this kind, that is not sitting during the session.

MR. CONANT: I don't think that would be serious in matters of that kind; I think you would find quite a non-partisan attitude.

WITNESS: What I mean, Mr. Chairman, is the members of the Legislature would not be quarrelling about this, but they might be quarrelling about something else, and more interested in something else.

Q. But in my opinion, gentlemen, I don't want to labour it, but you come to a point that, in my humble opinion, very much accentuates the question of a law revision committee. The members of the Legislature, while they are the law-making body, are not concerned about the admissability of documents and direct or indirect evidence, the calling of experts, and all that sort of thing. I think that is a fair statement?

MR. FROST: Yes, I think it is.

MR. CONANT: Yes. It becomes, and it is a lawyers' club. Now, if a recommendation for the necessary amendments to just this very Act, The Evidence Act, were properly endorsed or set up or propounded by a proper body, I think the chances are very, very overwhelming that the Legislature would adopt that recommendation, if it were presented by the Attorney-General

to the House. The difficulty is, where is the body, where is the organization to formulate that legislation?

MR. STRACHAN: I might make the suggestion, in connection with this committee, that if such a law revision committee were set up, that perhaps the registrar of the Supreme Court would properly be on the committee. You see, what we lack, is some place where the judges can go to.

MR. CONANT: Some clearing house.

WITNESS: Yes.

MR. CONANT: May we deal one moment with Mr. Frost's suggestion about a committee of the House during sessions. I don't think it would be feasible, for the reason that matters of this kind would require ample time, and I might say, leisure of consideration, and as all the members here know, while the House is sitting, we are pushed hither and thither, and the Attorney-General is supposed to attend four committees at once, and I doubt if it would be feasible.

MR. FROST: Well, of course, that suggestion may be entirely not feasible, but as a new member of the Legislature, I have often wondered as to whether, under our system of things, we really take advantage of the ideas of the private members as much as we perhaps should. Now, after all, in our parliamentary system, there doesn't seem to be as much opportunity for good ideas and capabilities and what not of private members. There isn't the machinery to give effect to, and take advantage of these capabilities, and make them available to the public, and it seems to me that I can't see, myself, why everything in the Legislature should be controversial. I think that there are some things, and there should be some committees, in which controversy isn't the whole thing.

MR. CONANT: Well, it's a big question.

MR. FROST: It is a big question; I know that.

WITNESS: You don't want me to comment on that?

MR. CONANT: About controversial questions?

WITNESS: I might say I agree with Mr. Frost, that is, I don't think the Legislature makes use of its legal talent.

MR. FROST: Not only the legal ability, but the business abilities, also.

WITNESS: Yes, we are talking at the moment about legal problems.

Q. Yes.

A. But I might say, sir, that the Canadian Bar Association, Ontario Section, would be delighted to co-operate with the members to assist in anything of that kind.

MR. CONANT: I think that, from the deliberations of this Committee, a

new day may dawn. We may evolve some system of taking advantage of all the brains of the country.

MR. FROST: Maybe.

WITNESS: Now, referring to the question of quasi-judicial distribution, thinking over what you said, sir, about interfering with the business of departments of government and commissions, I must say that the more I think of it the more I disagree with you.

MR. CONANT: I see.

WITNESS: I don't see any reason why the Hydro-Electric Commission, for instance, wouldn't carry on its business if it were in the same legal position as the C.P.R. or the city of Toronto, which has hundreds of contracts with the public—more than the Hydro-Electric Commission has. It doesn't hamper its business by lawsuits. Anybody can sue the city.

Q. Of course I would like to make this observation at this time because I think it is proper to say that all these are more or less commercial undertakings—like the T.N.O., the Hydro-Electric, etc. Mr. Magone can confirm this, I think, because he often advises on them. There is a very liberal or broad policy adopted, and in every claim that has any semblance of right or reasonableness a fiat is always granted. Isn't that so?

MR. MAGONE: Oh yes. Yes. We don't attempt to advise on the merits between the parties at all if there is a cause of action.

MR. CONANT: Yes.

WITNESS: Well, I strongly disagree with that—with the proposition that a departmental official (and there is no personal reflection, of course) of whatever calibre should sit in the place of a judge, because that is what it amounts to. I mean I strongly feel that we would strengthen our whole system by giving more authority to the courts and not by taking it away from them. After all, sir, dealing with departmental business, if I may say so, I think there is a tendency on the part of people who are engaged in public business to overestimate its comparative importance.

MR. CONANT: Well, Mr. McKenzie, personally I agree with you, in theory. Absolutely. I am just a little bit disturbed by the possibility that if you open the gates these organizations would be flooded with litigations.

WITNESS: But, Mr. Attorney-General, you are not opening the gates. I'm not speaking of you. I'm speaking of the —— But let me make this point before we go on. It isn't this government that started this thing.

Q. Oh, no. I don't understand that your remarks have any political significance at all.

A. It uses the Hydro-Electric Power Commission because that extraordinary power was taken away back in 1910, I think it was. The Hydro—no

doubt you will realize—can go on to your property, take it and erect its towers on it and use it without saying a word to the owner of the property. And I do say that is my impression that the Highway Department, which formerly did not possess that power, has taken it in the last two or three years. Am I right, Mr. Strachan?

MR. STRACHAN: I don't know that, Mr. McKenzie.

WITNESS: I think so.

Q. Under the Highway Improvement Acts?

A. One of the recent Highway Act amendments has given the Highway Department a greater power than they had before.

Q. Well, you can sue the Department of Highways by fiat for certain things under the Highway Improvement Act.

A. The only right a person whose place is taken by the Hydro-Electric Power Commission has is to demand arbitration.

Q. That is the same under the Highway Act.

A. That is the only right they have.

MR. CONANT: Well, isn't that on the principle that the interests of the state are supreme? What would you substitute for it?

WITNESS: That is where we quarrel. Fundamentally, the interests of the citizen are supreme, to my mind. That is to say, the interest of the state is only the aggregate interest of the citizens.

MR. STRACHAN: I suppose that power that was put in the Hydro-Electric was put there originally, when they were pushing their projects through. I suppose they had to act somewhat high-handedly, and perhaps the need for it has now ceased.

WITNESS: It was put in because the Hydro was struggling to establish itself against private power.

MR. CONANT: That was particularly in the case of Sir Adam Beck.

WITNESS: It was Beck that introduced that.

Q. Yes.

A. I can't use words strong enough to disapprove that kind of legislation. Now, sir, I am going to speak of the Succession Duty Act without getting into a controversy about it. The Income tax Administration in Ottawa has been compared to the Succession Duty Act. Now, everybody who gives evidence speaks from a personal bias, and perhaps I have a personal bias, because of the matters that I deal with, largely. There is a right of appeal in practically everything

under the Income Tax Act. It isn't as capable of drastic reform, I might say. This Committee is not interested in that, but the mere fact that there is a right of appeal expedites the business of the Income Tax office.

MR. CONANT: What is that?

WITNESS: The mere fact that there is the right of appeal—now you're going to misunderstand me—what I mean to say is this: That from the point of view of the citizen the fact that there is a right of appeal makes it a great deal easier and more satisfactory to deal with the Income Tax office than it does with the Succession Duty office, where there is no right of appeal. Not that the appeals go on. I realize that there are few reported cases on income tax during the twenty-three years the Act has been in existence. I don't think there are more than twenty or thirty. But the right exists, and the party involved feels that he is safe because the officials deal with the problems knowing that if they are wrong they will be overruled.

Q. Anything further, Mr. McKenzie?

MR. STRACHAN: Could appeals from a ruling of the Compensation Board, I was going to ask you —— Didn't Sir William Meredith particularly design the workings of the Compensation Act to keep the legal profession out of these cases?

WITNESS: I think so, Mr. Strachan, but your office and mine have dealt with matters under the Workmen's Compensation Board within the last few months.

Q. Yes. I might say that there is some sort of machinery set up now in the Department of Labour where they do review the official findings of the Board in what they call "problem cases".

A. Well, what I had in mind, Mr. Strachan, was exactly the matter that I referred to, where Mr. Brown, your partner, and my partner were discussing the matter with the Compensation Board. There appeared this information that I gave yesterday, about the interest rate on which their deposits were calculated being changed. That is a matter that if the Board didn't act according to the feeling that the parties putting up the money —— What I mean is that if they felt that the Board was wrong there should be some right of appeal, some right to redress.

Q. Would you suggest that appeals on findings of Compensation Board would injure the workman at all?

A. No.

MR. CONANT: How far do you suggest going? I don't quite get you, Mr. McKenzie.

WITNESS: Well, sir, here is the case: Compensation, as you know, goes to widows and children if a man is killed. A case came up—in fact it's still pending —in which a woman posed as a widow of a workman who had been killed. It

developed that she had gone through a form of marriage with this man without any divorce, or separation or any dissolution of a previous marriage. The husband had disappeared and no steps had been taken to annul the marriage. Now the law, as I understand it, is that if that man turned up—even if he be declared dead—if he turned up the second marriage would be declared invalid. Now that is a legal question, that if the Board went wrong (they didn't go wrong, but if they had gone wrong) the decision should be capable of rectification. That is the sort of thing I had in mind.

Q. Well, now, Mr. McKenzie, we have two witnesses to be heard. I don't want to cut you off at all, but one of them comes from a long distance. Is there anything further?

A. Not unless Mr. Frost has anything. Oh, yes, I would like to file Mr. Farris' address on this question of quasi-judicial bodies which he delivered at Vancouver. Mr. Farris, Senator Farris, is the president of the Bar Association.

Q. Very well. We'll be glad to have, I am sure. Thank you.

MR. FROST: Do you feel that these bodies have been created, or that these powers have been created—and you mention, for instance, the powers given to the Hydro-Electric Power Commission thirty years ago—do you feel that this was wrong in principle, and that it has been extended, as a matter of convenience, until now it has become a matter?

WITNESS: I think we have only awakened in the last few years as to where this leads. I think it leads straight to what we are fighting against. I am strongly convinced of it.

MR. CONANT: Well, that is a point of view, of course. All right. Thank you, Mr. McKenzie.

MR. MAGONE: Judge Hayward is here. He had some difficulty arranging his court so he could appear before the Committee, but he was able to do so and he is here this morning.

MR. MCKENZIE: Thank you very much, Mr. Chairman. I have great admiration for the inquiries this Commission has been conducting.

MR. CONANT: Thank you.

Witness excused.

JUDGE G. H. HAYWARD, Witness.

MR. MAGONE: Judge Hayward, as I explained in my letter to you, we have had evidence from the judges in Toronto and yesterday from Judge O'Connor. The Committee thought it would be desirable to hear from a representative of the rural section of Ontario, particularly northern Ontario, in regard to what the conditions are there and how the Division Court system is working. Now, probably ——

WITNESS: With special reference to Division Courts?

Q. Yes, with special reference to Division Courts. I'll give you a copy of the report by Mr. Barlow.

A. I brought Mr. Barlow's report with me.

Q. Perhaps, Judge, the best thing would be for you to comment on the recommendations that Mr. Barlow makes and then probably we'll ask you some questions with regard to northern Ontario. It's on page B33.

A. Well, as to Mr. Barlow's submission for the abolishment of Division Courts in the judicial districts, in my opinion it would not be advisable that these courts should be abolished. It might be remembered that in these districts distances are so great as compared to what they are down here, where you jump in your car in the county town and get around to see everybody in the county and back home in the same night with a good paved road.

Q. How big is your district, Temiskaming?

A. Would you like to get a bird's-eye view? I brought a map with me for that purpose. We use the map the Department uses.

Q. Well, if you know the distances I think that would convey as much information as the map.

MR. CONANT: Yes, just tell us roughly. The map couldn't be put into the record very well.

WITNESS: Well, the distance by the roads, travelling from south to north, i.e., to the northern boundary of our district, is about 130 to 135 miles.

MR. MAGONE: Yes.

WITNESS: And from the eastern boundary to our western boundary (that would be at the inter-provincial boundary, where the width is greatest) the distance would be from 108 to 110 miles.

Q. Yes. Well, then, is your district consolidated with other districts?

A. Oh, no.

Q. For the purposes of sittings of the judges?

A. You mean formed into a district?

Q. Formed into a County Court district.

A. Oh, yes. We are formed with Algoma, Sudbury, Manitoulin, Nipissing, Timmins and Cochrane.

Q. Well, then, is there an interchange of judges?

A. No. At our first meeting after the Act came into operation we went into that very thoroughly, and to act for a judge, say in Algoma, the holding of the Division Courts throughout his district would mean that it would take him a month—living in the Sault and going up to former Judge Carson's town of Hearst, where his district's First Court is. He would then start coming down to Kapuskasing, Cochrane, and all the way through and then make the turn at North Bay, through the other districts to Algoma and Manitoulin. It would take well within a month. He would barely do it in that time. And there are other features about it, too. For instance, there is no provision made for travelling expenses other than what the Dominion grants. We have the annual grant for maintenance and travelling, but that wouldn't be a drop in the bucket in the travelling expenses for a man, say, holding these courts for Algoma and going right around.

Q. That is, the judges get five hundred dollars a year for travelling expenses?

A. Yes.

MR. CONANT: In lieu of mileage?

WITNESS: No mileage. That is everything.

Q. Well then, Judge, how many Division Courts have you? Or rather, just a moment—let's get that clear. Then the district judges get a flat, fixed rate of five hundred dollars a year for travelling expenses?

A. Yes.

Q. And you say they don't interchange?

A. No, we found it wasn't practicable at all. As a matter of fact we took it up with the then Attorney-General, and he told us that the Act was not intended to apply, in its provisions, to the districts. Of course, we have no interchange except when a judge happens to be ill.

MR. CONANT: I can't just quite understand that, the need for interchange in the counties, the alleged need or reason. Why is that?

WITNESS: I could leave my home ——

Q. I don't mean that. We have heard laid out before us, here, that the reason for the interchange is the interest of the judge in a litigation, or illness, or, as Mr. Frost, I think, suggested, the desirability of meeting new counsel and new environment, and that sort of thing. All these reasons would apply to the same extent in the districts, wouldn't they? They are now in force. If any judge is ill, he gets relief.

MR. FROST: Well, Your Honour, who is grouped with you? Your district is what? Timmins?

WITNESS: Yes.

Q. And you are grouped with what?

A. As I just said, Algoma, to the west, Manitoulin, Sudbury, Nipissing, Timmins and Cochrane.

Q. Well, do the judges in that district exchange in the matter, for instance, of County Court sittings, or matters of that sort?

A. In what way?

Q. Well, I might just give you an example. In some of the southern districts there will be a group, say, of four or five counties.

A. Yes.

Q. Of course they aren't as far apart as you. I mean, you take west of Toronto—we have various counties that are grouped in with Toronto and are quite closely together. The judges in these districts have exchanged, for instance, the County Court sittings. The judge at Brampton, say, goes to Milton, and so on.

A. Yes.

Q. And we also have that carried out in the General Sessions sittings, and also, to a certain extent, in the County Judges' Criminal Court.

A. Quite so, yes.

Q. Now, do you exchange very much up north, or are the distances so great that it is impossible?

A. It's impossible, for the reason I said before. I could leave my county town, hold my sittings and be back home that night without any trouble at all, with the good roads and motor cars. But that in case the distances are not too great. But, you see, it takes me a day to go from Haileybury to Cochrane or Timmins on the train.

Q. Yes.

MR. CONANT: Uh, hum.

MR. FROST: Your county seat is Haileybury?

WITNESS: Yes.

Q. When you go from there down to Sault Ste. Marie it's quite an excursion?

A. I go to North Bay, stop all night, then spend the whole day out on the train.

MR. CONANT: But the fact emerges, does it not, gentlemen, that in the districts where the disbursements are fixed at a flat rate of five hundred dollars, as His Honour says, there is little or no interchange.

MR. FROST: Well, up there five hundred dollars wouldn't go very far.

MR. ARNOTT: Your Honour, do you think the administration of justice would be more effective if there was interchanging up there?

WITNESS: I can't see it. It's possible, but I can't see it.

Q. You can't see it?

A. But how are you going to get away from that loss of time in travelling?

Q. Maybe you didn't understand my question. As far as the public, the litigants, are concerned, do you think the present system is as effective as if the judges interchanged?

A. Oh, I think so.

Q. You think so?

A. Unless we—well, of course, at the present time if a judge were interested —if I were interested personally, to some extent, I would simply call Judge Plouffe to North Bay and he would come up. Of course, I would pay his expenses, then.

MR. CONANT: What is the next angle, Mr. Magone?

MR. FROST: Of course, Judge, I suppose what you would find workable in southern Ontario might be purely unworkable by the situation that you have in the north, because of the distances.

WITNESS: That is the whole question in a nut-shell.

MR. MAGONE: Judge, what is recommendation number 2?—"That the procedure be simplified." Is it that the procedure in the Division Courts be simplified? What have you to say?

WITNESS: Well, just in what way? What does he mean by that? There is no doubt, I think, it could be simplified and clarified.

MR. CONANT: I would suggest the subject to Mr. Magone because we are a little bit pressed for time to-day. Please correct me if I am wrong, but I think the matter comes down to this, as to whether it would be feasible—this is the districts I am speaking of—to revise the Act so that there would be a horizontal jurisdiction, and that there would be a block system of fees, and some method of economizing on the question of service. My colleagues are agreeable it should be directed to that. What do you think, Mr. Frost?

MR. FROST: Yes.

WITNESS: That is in the Division Courts, cutting down expenses.

MR. FROST: Well, there is this—would this apply as to whether it would be advisable to introduce into the Division Court as it is a block system up to, say, a hundred dollars? In other words, should there be a small claims division

in the Division Court up to, say, a hundred dollars, incorporating in the Division Court system as it is what Mr. Barlow suggests should be substituted for the whole Division Court?

WITNESS: As I understood Mr. Barlow's suggestion, he proposes to bring that part of the Division Court up to a hundred dollars and over a hundred dollars into the County Court.

Q. Well, you may or may not be in favour of that, but the point is this: Supposing you weren't in favour of it, would you be in favour of incorporating such a system in the Division Courts Act as it is, having, that is, a small Claims Court, or where services might be made by registered mail, for instance, or something like that?

A. It's possible.

MR. CONANT: Isn't one large item of the cost in your jurisdiction the cost of serving summonses by the bailiff? Your bailiff does all the service there?

WITNESS: Yes.

Q. Isn't that a large item of the cost?

A. Well, in some cases. For instance, you take a bailiff in the Fourth Division, at Kirkland Lake. If he has to go away to some of the townships, perhaps thirty or forty miles, to get a man, of course his mileage runs up. But from inquiries I have made from the clerk there the fees for a small case of $20 do not run, going back for seven or eight years, more than $4.50 or $4.60, something like that. That would be allowing for mileage service to the bailiff in, say, the Kirkland Lake area at twenty cents a mile.

MR. ARNOTT: That includes the mileage?

WITNESS: Yes.

MR. CONANT: But supposing he were twenty or thirty miles away?

WITNESS: Well, then, it would be $6, say.

Q. Would service by registered mail be feasible in your district?

A. I don't think so, sir.

Q. Why?

A. Well, outside of Kirkland Lake, in the towns of Englehart, Haileybury, Liskeard, and the rest of that whole country, during the fall, or winter or early spring the male portion of the population is largely engaged in lumbering or timbering in some sort of pulpwood or lumber camp, or in some sort of mining operations carried on, so that would get in the way if that method were carried out. The mail man brings the registered letter to the house. The wife signs for it, and there it is, a registered letter. Now, actually, before that debtor

would know he was sued at all, judgment would have entered by the clerk for default.

MR. FROST: You mean the defendant might be away some place in a lumber camp or mining concern and it would not be possible to get him for two or three days?

WITNESS: It would not be possible. And the result would be that we would have a great many convictions because of default. He might possibly not know a thing about it until his employer came up to him and said: "Here, Bill, your wages have been attached." Then he'd have to go down and find out about it at the clerk's office, and then he'd have to get a lawyer and bring it before me. I take those things in a very informal way. I think that is the way it would work out in the districts.

MR. FROST: What would you think of allowing the plaintiff to serve his claim himself instead of the bailiff?

WITNESS: He can serve a writ in the Supreme Court, why couldn't he in the Division Court?

Q. Well, that is the point. We had that argument advanced here. For instance, the judges here in the city of Toronto are rather opposed to that on the grounds that they seem to have a poor opinion of the litigants, that services might not be made. Do you think that that would obtain to your district?

A. No, I don't. Not to the same extent, anyway, as here.

MR. CONANT: It comes down to the question as to whether in your jurisdiction you believe or not that he would effect service, doesn't it?

MR. FROST: Well, after all, it is a very serious matter if people have such poor regard for an affidavit or an oath that they would violate it.

WITNESS: Of course it happens in my court as in any other. There is the affidavit of the bailiff, and on the back of it I accept it.

Q. You mean it might mean a matter of a little more inquiry if the plaintiff served it.

A. Well, if the man defended the action before me and said he wasn't served—you see, up there we've got to be more or less informal. We treat things with a large foreign population, and we try to get at the real merits of the facts. Perhaps I have been a little more lax in that regard than other judges, but I don't see ——

MR. CONANT: Well, Judge, this Committee had before it, I think, a concrete proposal to make a horizontal jurisdiction of the Division Court, say $200, set up a block system of fees within that, a block system so that a man would know exactly what the claim would cost him, or the plaintiff would know exactly the cost incurred. I think we would like to know if you think a block system like that in our system would be advantageous?

WITNESS: Well, Mr. Barlow suggests a lump sum of $2 for amounts up to $50.

Q. Never mind the amount. I think the details of that nature are a matter to be worked out.

A. Well, I'm afraid that you'd find that both clerks and bailiffs would be making so little that you'd have a hard time keeping them. Of course, if that were introduced and the Government were to take over all fees and pay a reasonable salary ——. Outside of the fourth, Kirkland Lake, there isn't a single bailiff, a single clerk, who makes enough fees out of his office to pay his living expenses. He's got to take on another job.

MR. FROST: It's just a part time occupation.

WITNESS: Just a part time occupation. Fortunately we have very good officials, although they make very little out of their Division Court.

MR. CONANT: Approaching it from the standpoint of the public, this question of maintaining the court is entirely a different problem. Approaching it from the standpoint of the public, would it be to public's advantage for a man to go and enter a claim, and the clerk would tell him, "Now, that claim will cost you up to $2" or "up to $3." Exactly that. Not 25 cents for this and 15 cents for that. Do you think that would be to public's advantage?

WITNESS: It might be.

Q. Don't you think it would?

A. I think it might appeal to the public.

Q. Beg your pardon?

A. It might appeal to the public. It's a matter of, as you say, knowing exactly what they would have to pay up to judgment. Of course that would have to be outside of the bailiff's actual travelling mileage.

MR. MAGONE: We heard from Judge O'Connor yesterday that, in so far as his district is concerned, the bailiff and clerk offices might be combined. Would that work in the northern districts?

WITNESS: Well, you see, everything is possible, but I hardly think it possible.

MR. CONANT: Not in the small courts, Your Honour, where they have fifteen or twenty-five cases a year? You don't think it would?

WITNESS: Oh, well, yes, in cases of courts like that.

Q. Well, haven't you courts with less than fifty claims a year in them?

A. No.

MR. MAGONE: How many courts have you in Temiskaming?

WITNESS: Now that Larder Lake has been established, five. As to the taking away from the Division Courts, as now established, jurisdiction and putting it in the County Courts, I am opposed to it for the reason that both the expense to the litigants —— And that brings up the matter of time that he'd be away from his home or office in attending the District Court sitting. I'm not speaking of the County Court, I'm speaking of the District Court at Haileybury.

Of course I think 60 percent of the litigations, perhaps more, come from Kirkland Lake, Township of Teck. That would mean that he would have to come down with his witnesses about 75 miles, be there for the opening day of the court and keep them there until his case was called. Then he's got his lawyers to pay as well, outside of his fee. Now at the present time the way it works out is, in my opinion, much better. Under the increased jurisdiction we are now taking cases which ordinarily would go to the District Court, and it is no uncommon thing, especially in Kirkland Lake, where a suitor will abandon anywhere from fifty, a hundred or a hundred and fifty dollars in order to get in the Division Court to save himself the costs and the loss of time away from the business. He feels that getting his case disposed of speedily by the judge at his home court is worth that to him.

MR. CONANT: Of course I think this observation is pertinent. It has always been in my mind that when you deal with court jurisdiction different considerations apply in the districts than apply in the counties, and it is a nice question as to whether the District Court judge's jurisdiction, particularly, shouldn't be increased because of the comparative infrequency of sitting as a Supreme Court and the distances involved, and the distance to Osgoode Hall. I personally feel that very different considerations should apply in districts than apply in the counties.

WITNESS: That would seem, sir, to be the idea of a former Attorney-General, because you will remember, under part two, Division Courts Act, our jurisdiction calls for $200.

Q. Yes, whereas down here—I practiced here for some time—it's sixty and a hundred and twenty.

A. We always were given jurisdiction up to $200.

Q. Yes.

MR. MAGONE: Judge, what have you to say about fixing the jurisdiction at $200 in all cases?

WITNESS: You mean confining it?

Q. That is, the limit of jurisdiction to $200. We have heard a good deal about that.

A. As it is now?

Q. No. Without the jurisdiction over $200.

MR. CONANT: Limiting the jurisdiction to $200 in all cases.

WITNESS: Well, that is including action on promissory notes and documents where there is no need to call any evidence; the signature is there.

Q. Yes.

MR. FROST: There are frequent instances, I suppose, where there is no defence, because it is more or less admitted.

WITNESS: Yes. Well, I don't quite get the significance of Mr. Magone's question, I'm afraid, but we have now, as we have always had, as I told Mr. Conant, jurisdiction in all personal actions up to $200, and $400 in the others.

Q. Yes. Where the amount is ascertained by signature.

A. Yes.

Q. Well, the suggestion is that that jurisdiction over $200 be thrown in the County Courts and taken away from the Division Courts.

A. Why? What is to be gained by putting it in the County Courts? A man has a promissory note. He applies to the court and says: "I want that man sued." That is a $400 claim ——

Q. I take it, then, you think the present jurisdiction of the Division Courts shouldn't be disturbed?

A. No.

Q. Do you think it might be increased?

A. Well, that has been discussed with the County and District Judges' Association but it wasn't very favourably received by the committee appointed by the Supreme Court to go into the question.

Q. Well, Judge, let us deal with your problems in the north country more particularly.

A. Yes.

Q. Would it facilitate court business if the jurisdiction were increased in northern Ontario?

MR. CONANT: Or facilitate the public's interest.

WITNESS: I think it would. That report which the County and District Judges' Association made, you will remember, went as far as to suggest that many cases which are dealt with in Supreme Court could be dealt with by the district and county judges. In a court as large as the court at Kirkland Lake

it would mean, no doubt, that the judge would have to remain another day or two. I give them two days now. One day for part one, another day for part two. That is in claims over $200, I mean.

MR. MAGONE: What use is made of juries in Division Courts in the north country?

WITNESS: Well, we don't use juries very much up there. It is rather an amusing experience. We have had, in the last four or five years, I would say about no more than nine or ten jury cases.

MR. LEDUC: You mean in Division Court, Judge?

WITNESS: Yes.

MR. FROST: How long have you been there, Judge?

WITNESS: Since 1917, in all about 23 years.

MR. LEDUC: Would you be in favour of abolishing juries in Division Courts?

WITNESS: I don't think they serve any useful purpose.

Q. You don't think so?

A. No. They are just an added expense.

MR. CONANT: What would you think about executions in your Division Court running throughout the district? Would that be any help?

WITNESS: Do you mean that a bailiff from the first could come down and execute in the fourth?

Q. Yes. Well, it simply means that a writ of execution issued out of any Division Court in the district would run throughout the district.

A. I agree with it. It's a matter of saving expenses.

Q. That would save expenses?

A. Yes. I had a case not very long ago and I wasn't able to do it, and the bailiff in one court had to travel way up to a distant part of the county ——

MR. LEDUC: Pardon me, Judge, what are the southern and northern limits of the district—I mean along the T. & N.O. line? How far north does it go?

MR. CONANT: He said it was about 110 miles by 150.

MR. LEDUC: I beg your pardon?

WITNESS: In width?

Q. No. From north to south.

A. 120 or 125 miles.

Q. It goes from where to where? Does it go as far as Matheson?

A. Not quite. Just beyond Birks.

Q. And goes south to Latchford, I suppose?

A. To within twelve miles north of Timagami. For record purposes we go to Timagami, but for jurisdiction purposes we only go to points just north of Nipissing.

Q. Now, you have Matachewan and Elk Lake in your jurisdiction?

A. Oh, yes. The difficulty there is in mileage. They have a resident bailiff in Elk Lake. I don't say he is the best bailiff, but the best available.

Q. Yes, of course. There is a road from Englehart to Elk Lake?

A. Yes.

Q. Through Earlton, isn't it?

A. Yes, and there is also the highway. I think it is 67 or 65 miles from Liskeard, west.

Q. To Elk Lake and Matachewan?

A. Yes.

Q. Oh, yes, I know that. I have travelled over it many times.

A. Yes.

Q. Of course I don't want to suggest to the Attorney-General that there shouldn't be so many courts, but with the exception of courts one and two the others are pretty well scattered.

A. Yes, pretty well by themselves. Number one now takes in the towns of Cobalt and Haileybury.

Q. Yes.

A. Number two the town of New Liskeard and six or seven townships to the north, east and west. Whether those two could be amalgamated I don't know. I don't think it would work out satisfactorily.

Q. What I had in mind was a session at Matachewan, at Elk Lake, which are in a little district by themselves to the northwest of your district. I don't suppose there is much business coming from there.

A. They are in number two now.

Q. Oh.

A. As I said before, we have now a resident bailiff in Elk Lake who takes care of it.

Q. I mentioned Englehart because Elk Lake and Englehart are in together, according to this. That's a mistake. Elk Lake should be with New Liskeard, shouldn't it?

A. Yes, that's right, and McPherson is coupled with number three.

MR. CONANT: You mentioned, Your Honour, making writs of execution district-wide. Would it help if you made the jurisdiction of a bailiff run throughout the district, too?

WITNESS: Well, I think it possibly might tend to increase mileage.

Q. To which?

A. Increase mileage.

MR. FROST: What was that question?

MR. CONANT: I know, but I should have put it this way: If the bailiff's fees would be limited to those which would be chargeable by the bailiff in the jurisdiction in which he was previously operating in.

WITNESS: Well, in that case, why not be made by the local bailiff?

Q. The thought behind the suggestion, I think, arose out of this: Some seem to feel there is a definite competency of bailiffs.

A. Quite true.

Q. And if you allowed the bailiff, subject to the limitation of fees, to operate for a certain plaintiff that wanted to use that particular bailiff, and if the plaintiff could do so, do you think that would be helpful?

A. It might be.

MR. FROST: That would be one difficulty. Down here we have a number of smaller Division Courts in which the cases are so very few that the bailiffs, and in many cases, the division clerks, are not very efficient. The result is there may be in a county one or two good Division Court clerks and one or two good bailiffs. The result is that if the jurisdiction after judgment were made county-wide, the bailiff couldn't pile up fees for running all over the county. If the fees were limited to these the bailiff of that district gets, you might get more efficiency.

A. Well, there is no doubt there is something in that. You would have, in that case, a first class bailiff in number four, for instance. He would get the business. Of course, conditions up there are, to a certain extent, the same as

down here. Where there is a little business to be had, you'd get it. Up there in Kirkland Lake the deputy-bailiff is on his toes. If you want to make an execution at Matachewan you get the bailiff at Elk Lake or down in number two, where, no doubt, you would get better efficiency, but, at the same time, if he is not to get mileage he won't go.

MR. FROST: True. It would appear that there would be, no doubt, a number of cases in which the bailiff would find the trip wouldn't pay at all. Then he won't take it. On the other hand, I suppose there are hundreds of cases where he might take it.

WITNESS: Where the plaintiff would be prepared to pay the extra mileage himself.

Q. Yes.

MR. LEDUC: I don't know that this point has been brought up or not, but do you think it would help if in the north the number of bailiffs was increased? You are familiar, for instance, with the district of Cochrane. I think you have stayed there before. I don't know if you have taken Division Court there.

WITNESS: Oh, well, Cochrane was always in Temiskaming. I had the whole ground. It would take me weeks to go and make my circuit.

Q. You have Division Court at Cochrane, and one at Kapuskasing, about 67 miles?

A. Yes.

Q. And one at Hearst, which is another 60-odd miles west?

A. Yes.

Q. So a man leaving either Cochrane or Kapuskasing to serve a writ half way would have to travel thirty miles in any way to effect his service, and he is entitled to charge mileage for that?

A. Yes.

Q. Would it help to reduce costs if more bailiffs were appointed?

A. Well ——

Q. Suppose you have the bailiff at Fauquier, which is 20-odd miles from Kapuskasing, make service in Fauquier and surrounding places, where the mileage wouldn't be so great, would that help?

A. It would help in the matter of costs to the litigants.

Q. That is what I had in mind.

A. But what are you going to do for this man whom you have as bailiff, and from whom you take the extra mileage?

Q. Well, Judge, I was just thinking of decreasing the cost, because that is a matter that has been very prominently before the Committee—decrease of of cost, of Division Court cost. And the same thing applies to a certain extent to your own district. The bailiff has to travel, for instance, from Elk Lake to Matachewan to effect service. He may go farther. He may go to the mines.

A. That is why I have a resident bailiff at Elk Lake.

Q. I know that, Judge. It's an improvement, but even so he's got to travel some 28 miles to effect service.

A. Yes, and beyond that to Matachewan.

MR. CONANT: Are there any district constables in Temiskaming?

WITNESS: Oh, yes.

Q. Apart from the provincial police?

A. Oh, yes, there is quite a number, owing to the trouble we have had over fees. We have a large foreign population with the mines, there, you know.

Q. Are they appointed in different parts of the district?

A. Oh, yes.

Q. Would you have a constable, for instance, in some places where there is no Division Court bailiff?

A. It is possible.

Q. Would it be possible to use the services of those district constables in the service of process?

A. Well, it is the same as Mr. Leduc suggested we might have for the bailiffs.

Q. Yes. You might appoint these constables bailiffs of a Division Court.

A. Yes. With the co-operation of the local Crown attorney I don't see why it couldn't be carried out.

Q. Or provisions in the Act with respect to the northern districts in which service may be made by constables.

A. Yes.

MR. CONANT: We are groping, Your Honour, for some method of making more definite and minimizing the costs of Division Courts.

WITNESS: Yes.

Q. I think every representation we have had here, if I am not mistaken,

has dwelt upon the desirability of that being achieved. If you can suggest any way, in your district, of minimizing, or making more definite, Division Court costs we'd be glad to have it.

A. Well, that amendment that was made in 1928, under which no wage earner could be sued and garnished at the same time ——

MR. LEDUC: Oh, you mean abolishing the garnishees before the judgment?

WITNESS: Yes. Well, now, I have made inquiries from all our clerks up there and they tell me that there is not five percent who do pay when first sued. When judgment is obtained the other ninety-five percent sit back and hope something will happen for them. The result is a garnishee and an attachment goes on—double the set of costs.

Q. Oh, yes, Judge, but it is a terrible thing to attach a man's wages before you have a judgment against him, because the claim on which his salary is attached may not be good at all. You'd simply force a man to pay by seizing his wages.

A. Well, that is true, but there may be cases, which I will illustrate by my own experience, ——

MR. CONANT: You don't favour the present law of not permitting garnishee before judgment on wages?

WITNESS: For the reason, sir, that I find the costs to the debtor practically double. My clerks tell me that. I don't know except what I have learned from the inquiries I have made.

Q. Have you any observations to make on judgment summonses?

A. Committal orders?

Q. Well, that is tied up with it.

A. There, again, I think the matter can be left to the good sense of the presiding judge. Personally, in the last five years, in number four, Kirkland Lake, I have had to make a number of committals, but during that time only three of them have executed.

Q. Yes.

A. If you deprive the courts of that power—which, by the way, is the same power that the Superior Court has got to order committal for contempt, not obeying the order of the court—I'm afraid it is going to be bad.

MR. LEDUC: But, Judge, the Superior Court or the County Court has the right to order a committal.

WITNESS: For contempt of its order.

Q. Yes, but I mean he can't make an order.

A. Not in regards to the debt.

Q. No, no. There are two steps in the judgment summons. First of all a man is summoned to appear before you to hear the claim examined. In that case if the man does not answer, if he is in contempt of the court, you should have the right of committal.

A. But that is never done.

Q. I mean that is the first step.

A. Judgment summons.

Q. Yes. In that case you have exactly the same right as a judge in the Supreme Court to condemn the man for contempt of court. But once a man has appeared before you and you order him to pay so much a week, or so much a month, and he doesn't, then you can commit him for not obeying your order to pay.

A. If I am satisfied he can pay.

Q. Right. But I mean to say that is a right.

A. In other words, he brings into contempt the order of the court to pay.

Q. Yes. Because you ordered him to pay and he didn't obey the order he is in contempt. He couldn't possibly be in that situation in the County Court or Supreme Court.

A. Quite so, because the rules don't provide for it.

Q. Yes.

MR. CONANT: But it comes down to this. May I frame this question? Supposing there were removed from the Division Courts Act those powers now vested in the court, but sparingly used—as you say, and everybody else agrees with you, I think—supposing those powers were removed, would it interfere with the functions of the court and its ability to recover for the plaintiffs moneys that are due?

WITNESS: I haven't the slightest doubt, sir, but what it would seriously do so because, after all, what are courts for? Now, you must remember that up there we have, as I said before, a large foreign population, and one has really got to understand the situation to understand what I am trying to convey. It is hard to make them understand, and that is why so few committal orders are made to start with. Then, when one is made, you've got to show them, for instance, that it has got to be carried out—that is, the order of the court. Take a case like this: You're making $125 a month. You've got the groceries and the provisions from this man—he carried you and your family all winter, when you didn't have a good job. Now you must pay that—not all at once, but pay

it in one, two, or three or five dollars a month. Well, the average man is not impressed by that argument.

MR. LEDUC: Might I suggest, Judge, that we have evidence from an official of the Attorney-General's office of the province of Quebec, taken yesterday and the day before yesterday. If our laws were amended so that it could be made easier to attach a man's wages—I understand that the practice is now, and it has been for years, that you cannot attach a man's wages before they are due and owing. That is to say, if a man is payable in salary you must serve the garnishee on his salary before the wages are paid.

WITNESS: After the wages are earned.

Q. After they are due. Before they are due, I mean.

A. Yes.

Q. If the laws were amended to make it possible to attach a man's salary or wages after judgment but before the man's wages are actually due, and make the attachment last until such time as the debt is paid, wouldn't that help? For instance, let me put it to you this way: A man works at the Lake Shore. He is paid on the fifteenth of the month, and he is getting twelve days' pay—he is getting some sixty or sixty-five dollars. Now, you have a judgment against him and you serve the garnishee on the Lake Shore Company on the 13th of the month, two days before the man is paid, and that attaches a certain portion of his wages. With the present system it would have to be done on the fifteenth, but under the Quebec system you serve that writ or garnishee on the thirteenth or on the tenth, before the wages are issued, and that attaches until such time as the full debt is paid. Wouldn't that help?

A. Yes. I discussed that with Mr. Legris at one time and I pointed that out to him. Instead of the man being ——

Q. Brought to court over pay-day?

A. —— smothered with garnishees, where he is hopelessly bogged down, in the Quebec system the employer pays so much into the court.

Q. And the proportion is fixed by law?

A. Yes.

MR. CONANT: Out of each pay?

WITNESS: Yes. Until the debt is paid. That prevents one garnishee after another.

MR. LEDUC: You'd be in favour of that?

WITNESS: Yes, absolutely.

Q. Mr. Legris must also have told you about the Lacombe law, which they

have in Quebec, which allows a man who is sued to go to the clerk of the court before execution is issued, or before his wages are garnisheed, make a declaration that he earns so much and is working for so and so, etc. You know the law, don't you?

A. Yes.

Q. Would you be in favour of that also for this province?

A. I rather think it would be well worth trying, anyway.

MR. FROST: It would be something that would avoid a multiplicity of costs, a piling up of costs.

WITNESS: Yes, it would. Your main effort is really to try and reach a cutting down of expenditures. As far as trying it is concerned, I think that that could be experimented also with regard to the abolishing of grand juries. I remember, for instance, that during the last war, the grand juries were abolished in England for the duration of the conflict. Why couldn't we adopt the same thing?

Q. Well, of course, it was re-established in England two years ago.

MR. MAGONE: Why should there be two proceedings—one by way of garnishment and one by way of garnishment in the Division Court after judgment?

WITNESS: You mean a sort of a roving garnishee, as they call it.

Q. Yes.

A. Well, a creditor finds a debtor has other property in other divisions, in other places,—he can only attach property under garnishment against the one garnishee without the order of the court. I strictly enforce that, too. Only one garnishee, unless I know of some special reason why there should be any further garnishment. But how do you distinguish them?

Q. Well, there is provision in the Act for attachment, and, as I understand it, the attachment is against a particular debt, a debt due by a merchant to someone not an employee, and the other is a garnishee proceeding ——

A. Well, they are really the same proceedings.

Q. But in order to get two debts, one from the employer, and one from the merchant, you have a duplication of costs?

A. No, I don't see that.

Q. Don't you have to issue a garnishee and then an attachment, too, with a duplication of costs?

A. No. The attaching order is the garnishee.

MR. FROST: The attaching order is issued after judgment, and I think, Your Honour, it would have this effect—the judge makes an order attaching any debts which are due or may accrue due to the debtor ——

WITNESS: Yes.

Q. On the other hand, if provisions somewhat after the style of the Lacombe provisions—or perhaps I shouldn't say that—but if the provisions were made so that a garnishee would, at the discretion of the judge, attach against the debtor's salary in a certain proportion until the debt was paid, it would probably overcome that, and put them all on the same basis.

A. Yes, I think so.

MR. CONANT: Before judgment it's really garnishee, after judgment it's attachment, isn't it?

WITNESS: No. Garnishee after judgment.

MR. LEDUC: Yes, section 143. You see, "where an attachment order is or is not made," it says.

WITNESS: Yes.

MR. CONANT: There seems to be a duplication.

MR. LEDUC: This needs to be simplified, there is no doubt about it.

MR. CONANT: Yes. Anything further, Mr. Magone?

WITNESS: You know, there are quite a few sections where the Act could be clarified. It's indefinite, there's no doubt about that.

MR. CONANT: That's true. With respect to appeals, judge, the suggestion is made that the appeal from the Division Court should be to a single judge of the Supreme Court rather than to the Court of Appeal. What have you to say about that?

WITNESS: Well, in practically all the cases that are in part two, which were really District or County Court jurisdiction before the increased jurisdiction, I don't see any reason why the judge couldn't dispose of them. It might expedite matters in the Court of Appeal.

Q. I'm thinking of the reduction of costs.

MR. FROST: To save copies of evidence, etc.

WITNESS: Yes. With no further appeal?

MR. MAGONE: Yes.

WITNESS: Of course, the cost now of division appeals to the Court of Appeal are considerable, there is no doubt about it.

MR. MAGONE: I suppose this is a consideration at the present time; there must be seven copies of the evidence; five must be deposited in court, and only three judges sit, only three copies are used? If it were before a single judge, you would need three copies of the evidence, I suppose, one for each counsel and one for the judge, and the cost would be reduced, the transcript cost would be reduced only 5 cents a folio, 15 cents a page?

MR. CONANT: Oh yes. May I ask this question, Your Honour, have you any appeals from summary convictions up there?

WITNESS: Very few.

Q. Have you any view as to whether they should be tried on the record or *de novo?*

A. Well, it strikes me that the main feature there would be, sir, that the evidence that comes before you must be in intelligent shape.

Q. Well, assuming there was a stenographer on the case.

A. Well, we have stenographers, and in some cases, when the evidence comes to you, it is not very well prepared, but if the evidence came to you in a proper way, there is no reason why you couldn't dispose of it on the evidence.

MR. LEDUC: Judge, you are aware of the provision in The County and District Courts Act, giving the right to the Lieutenant-Governor in Council to authorize a district court judge to sit in more than one place in his district as a district court?

WITNESS: Yes.

Q. Have you ever taken advantage of that?

A. No.

Q. You sit in Haileybury?

A. Yes.

Q. Would there be any advantage, any reduction of costs to litigants, witnesses, and so on, if you sat in Kirkland Lake also?

MR. FROST: That is to permit you, in your discretion, to sit there, if you wanted to?

WITNESS: The costs would be materially reduced, because there is the mileage of the witnesses and counsel, and so on. But on a question of costs, generally speaking, I have heard very little dissatisfaction with the costs of clerks and bailiffs, and so on, except in the odd occasion.

MR. CONANT: Of course, that isn't the angle here.

MR. LEDUC: No, what I had in mind here was the cost of lawyers and parties and witnesses travelling from Kirkland Lake to Haileybury.

MR. CONANT: In other words, why isn't there just as much justification for holding district court at Kirkland Lake as at Haileybury, is that it?

MR. LEDUC: Yes.

WITNESS: In other words, move your county town?

MR. LEDUC: No, no.

WITNESS: Well, that would be the effect of it so far as that goes.

MR. FROST: Supposing Your Honour had the right to say: "Now, I think that it would suit the convenience of the litigants in this case if the case were tried at Kirkland Lake; that you wouldn't be bound to have it in Haileybury, and it would be entirely in your discretion to say whether or not it should be tried in Haileybury or Kirkland Lake. I mean, it wouldn't be a matter for the litigants to say, but a matter for the county judge to say. If you were given the power to do that, would that be helpful?

WITNESS: Well, as I said before, it would reduce the expenses to the litigants.

MR. LEDUC: Take for instance, the case of Cochrane and Timmins; well, most of the lawyers are in Timmins.

WITNESS: Yes.

Q. Most of the litigation comes out of Timmins?

A. Yes.

Q. And yet the lawyers and their clients and the witnesses all have to travel to Cochrane.

A. Yes.

Q. Well, suppose the judge could decide, and say, "well, here is a case arising out of something that took place at Schumacher or South Porcupine; why can't we hear that case at Timmins?" "There are two lawyers, two parties, and together with their witnesses, they all would have to go to Cochrane and wait two or three days until their case is called; I'll go to Timmins on that date and hear the case there instead." Would that not save a great deal of money to itigants and parties?

A. Oh yes, there is no doubt about it, but there is no provision for any expenses to the judge, the sheriff, the clerk and the reporter.

MR. FROST: Well, I must admit that I think the lump sum provision that you have up there, due to the size of your territory, and other considerations, is unfair. I mean in southern Ontario ——

MR. CONANT: Which, the $500?

MR. FROST: Yes.

MR. CONANT: Oh, yes.

MR. FROST: I think, when you consider and compare it with that of the other county judges in southern Ontario, it is too low.

MR. CONANT: Oh, yes.

WITNESS: Then there is the $10 per diem allowance they have. Of course, when that was put in there, that was in 1900, and there was very little travelling then.

MR. FROST: Would Your Honour care to say anything about the other matters there?

MR. MAGONE: I wanted to ask Judge Hayward about third-party procedure in the Division Court; do you think it would be an advantage to have third-party procedure in the Division Court?

WITNESS: Oh, I don't know; you're complicating things more or less.

MR. CONANT: Well, Your Honour, just a minute, put it on the basis giving the courts the right to give judgment between the defendants without any elaborate third-party procedure.

WITNESS: Yes.

Q. Supposing we gave you the right, when you get the whole story before you, to give judgment for so much to A, and also give judgment for contribution between B and C, the defendants; would that be helpful?

A. It might be, yes.

Q. You remarked that you thought we could very well get along without grand juries; I think you remarked that, did you not?

A. Yes.

Q. Yes?

A. That has been my own opinion, and as a very eminent English judge said one time, speaking about it, it is an attempt by twelve men, having no experience in judicial matters whatever, and to some extent, in some cases, deliberately, trying to do what an experienced magistrate could have done well.

Q. Well, thank you very much for your help, Your Honour.

A. Of course, there may be cases where a review of the magistrate's committal might be in the interests of justice.

Witnessed excused.

R. M. FOWLER, Representing Management of County of York Law Association.

MR. MAGONE: Yes, Mr. Fowler.

WITNESS: I am representing the Board of Management of the County of York Law Association. The County of York Association has about 750 members, and includes, I think, most of the members of the Bar in active practice in Toronto, and in the County of York. The Board of Management itself comprises about 17 members, and the views that I express are merely the opinions of that Board. We didn't feel it was practical to try and get an opinion from as large a membership. However, we did appoint a special committee, that studied the various questions that were coming up, and that was referred back to the Board and discussed by them, so I can give you the opinion of the Board as such.

The first subject—I will just mention the ones that I have picked out from sitting here for a day or two—the first subject is the question of grand juries. The Board is opposed to the abolishment of grand juries. That is an opposition of some long standing. Back in 1933, I think the matter was up, and it was considered by a committee and by the Board, and they felt it was a valuable element in the administration of justice, and another committee was appointed this year, studied it, and came to the same conclusion, which was agreed to by the Board.

Now, I think the Board recognized that, undoubtedly, at first sight, it seems difficult to say that a magistrate is capable of trying a case when he is not capable of passing on whether or not it is a case to be tried. But I think, if the thing is examined, there are probably great differences in the two processes, the process of deciding whether a man is guilty or not is based upon the evidence, subject to appeal; it is within the regular channels of judicial procedure. But in determining whether a man should stand trial or not, I think the Board felt that there is the possibility of other considerations entering into that decision. Or, what the Board felt was more important, the possibility that the public would think there were other considerations entering into it.

MR. CONANT: The public here are being more censorous than in most other places of the Empire.

WITNESS: It may very well be; I recognize that they have been abolished in other jurisdictions.

MR. FROST: Do you think something might be introduced as a safeguard, I mean to preserve some of these rights, and at the same time get rid of some of the cost and delay, and what not?

WITNESS: Well, I think that the basic opinion of the Board was founded on the idea that justice ought not only to be justice, but ought to have the appearance of being just, and that was the great thing that the grand jury did. It is recognized that there is a necessary and proper tie-up between the Attorney-General's department and the Police Magistrates; that is necessary for their

administration; I don't think the Board was so much concerned that there would be any pressure from the Attorney-General's department, or any improper action from the Magistrates, but, nevertheless, the public, not knowing these facts, may think that there is—may think that somebody who is politically prominent is getting favoured.

MR. CONANT: Getting favoured by being committed for trial, you mean?

WITNESS: No, by being not committed.

Q. If he is not committed for trial the grand jury doesn't help him any.

A. And in the other case, I think it may be that a man is committed for trial through the very process of a magistrate bending over backwards, because he is known to be a politically prominent figure.

Q. Well, of course, speculation of that kind could go on *ad infinitum*.

A. Well, I am only trying to give the Board's opinion, that this was an important, impartial, non-political body interposed between the launching of a charge and the trial of the accused, the placing of the accused on trial.

Q. Are politics much more deep-rooted here than in England, and all the other provinces, and all the other jurisdictions? Does that observation really have force and merit, Mr. Fowler?

A. Well, I wonder if this very moment is the proper time to interfere with what the public have come to believe is one of their safeguards.

Q. Well, they have done it in England within the last few years. However, go ahead.

A. Well, that is the submission, and I think, in answering Mr. Frost, while the Board didn't specifically consider alternatives, it probably would be in favour of it, and is probably more concerned with the problem of providing this type of safeguard, and I think that, in the legislation that was discussed at the last session, there was such a suggestion of a safeguard.

Q. You believe in the *status quo*.

MR. FROST: For instance, we had Mr. White here the other day, and Mr. White said that, while he was opposed to the abolishing of the grand juries, he was conscious of the fact that even in the profession, there was a lot of opinion in favour of it; now, where you have that suggestion, supposing it appeared that the preponderance of opinion was that it should be abolished, what would you think as regards the introduction of safeguards, such as have been suggested here in the last few days?

WITNESS: I think the Board would be in favour of it, if those safeguards were introduced; the Board is not merely interested in an old-fashioned institution, if it has become old-fashioned, it is merely interested in preserving, at this particular time in the country's history, a safeguard.

Q. That is, if there are to be changes, do nothing that will take away the rights of the citizens; substitute them, possibly, but not abolish them?

A. I think the Board would agree with that. I wonder if there is not some constitutional difficulty in the way the thing would have to be brought about? It would be well not to abolish the grand jury until the safeguards were entered.

MR. FROST: Of course, I don't think we can abolish them; that is up to the Dominion Government.

MR. CONANT: Only by representation. On the matter of safeguards, I might make this observation: here is England fighting with everything she's got to maintain democracy, freedom, and liberty, and since the outbreak of the war, she has changed her jury system to the extent of a revolutionary change, putting the onus on the plaintiff, to prove that he should have a jury; now I just can't reconcile those observations and those facts.

WITNESS: Well, I am not opposed, and I don't think the Board would be opposed to a change. I think that the actual jury change that has been made in England, still leaves the existence of a jury there in a proper case.

Q. Oh, yes, but I think you will agree it is a very revolutionary change.

A. Yes, I do.

Q. I think it is more revolutionary than the abolishment of grand juries, myself.

A. I do feel that the Board was most concerned with the idea there should be this impartial body, or some impartial body.

Q. Well, all right, we have that, Mr. Fowler. Thank you.

A. They are not opposed to the change, as a matter of change in itself. Now, on the question of petit juries there is a special problem in Toronto. I think it has been mentioned to you. It is a problem of having personal knowledge of the qualifications of jurors coming before the courts. I think the Board conducted some investigation, and found there had been considerable improvement in the calibre of jurors, at the present time over what there was a few years ago.

Q. Would your Board think that the calibre of the jurors should be improved?

A. Very definitely so.

Q. Have you any formula as to how to do it?

A. The only suggestion I can make, sir, is that it is doubtful if it can be met through the assessments. It seems to me that it can only be met—I don't know whether this has been suggested to your or not—but it can only be met by some study of the jurors' list after it has been made up, if you could have some sort

of a tentative list made, and then have some board or selection committee appointed which would work upon that, and make inquiries to find out as to the capabilities of prospective jurors. I think it is very doubtful, as Mr. McCarthy said the other day, whether this type of information that you could put into the assessment, would give you the type of knowledge that would help you to pass on whether a man was qualified or not, but I think that once you've got a tentative panel of a hundred names, it might be possible to make some inquiries concerning those names, which would enable you to find out who were the better men.

MR. CONANT: Of course, you are confronted with this problem: different considerations apply in rural counties and in Toronto. For instance, here is Toronto with two thousand names, that's a different problem from a county which probably has three or four hundred to select from, you see?

WITNESS: Oh, there's no doubt that the kernel of the difficulty is the inability to have the personal knowledge that the sheriff has in a smaller town. But I do suggest that some type of selecting board might be appointed, or asked to act, in order to try to improve the calibre of the jury list.

MR. FROST: On the other hand, if the present selectors were more careful and took their duties more seriously, they might overcome it.

WITNESS: Well, I was just saying, a moment ago, that our inquiries led us to believe that there has been very considerable improvement made in Toronto in the past few years by that process.

MR. CONANT: This discussion, if nothing else, will help make the selectors more conscious and anxious about their doings.

WITNESS: Well, we're certainly anxious for that on the Board of the York County Association. There are several other matters. The Board agrees with Mr. Barlow that a twelve-man jury should be retained in criminal matters, and is opposed to the reduction of the juries in civil matters. They should keep the twelve men throughout. Now, a moment ago, with Judge Hayward, who was just appearing before you, you were discussing the question of appeals from the Division Court. That matter was mentioned at our meetings, and we felt that it was desirable, in the present situation, that the appeals should go to the Court of Appeal, merely because of the fact that, as far as we could see it, the high court judges were busier than the court of appeal judges at the moment, and that even if the Court of Appeal had one judge sitting it would be preferable than to put it, for instance, into the weekly court list which is, now, a very crowded list.

MR. LEDUC: Have you thought of, Mr. Fowler, a man in Cochrane who wants an appeal from a Division Court, has to go to Toronto.

WITNESS: Yes.

MR. CONANT: Whereas, there might be an Assize there twice a year?

WITNESS: Frequently those assizes are filled right up, though.

Q. Well, frequently they are not.

A. Well, that was in passing, rather a minor matter. As far as the Rules Committee is concerned, the Board is definitely of the view that members of the profession who are in active practice can usefully be made members of that committee.

In their submission to Mr. Barlow, the Board suggested possibly a five-man Board comprised of two judges, two members of the Bar and the master of the Supreme Court, because of his contact with the ——

MR. LEDUC: That is the suggestion of the Board?

WITNESS: Yes.

MR. CONANT: How would you select the barristers?

WITNESS: Well, I think they could be selected either by Convocation or by the Chief Justice. Actually it's merely the fact of having the barristers, so that they could lend a practical knowledge.

MR. CONANT: Yes.

WITNESS: From another point of view—and I might point out that there is nothing new about that—if you look at the rules of 1897 you will see that they were prepared by a special committee.

MR. CONANT: Yes, I think we have had that here.

WITNESS: Yes. And also in 1937, The Judicature Act ——

MR. LEDUC: What do you think of Mr. McKenzie's suggestion, which he made this morning, that we should have an office man, a man who does solicitor's work as a member and one of the legal men.

WITNESS: I think that would be proper. There is a great deal, such as a mortgage practice, etc., which is covered by the rules, and which probably the man that goes into court entirely wouldn't know very much about. Just a word on a Statute Law Revision Committee such as that in existence in England. The Board is in favour of that.

MR. CONANT: You're in favour of it?

WITNESS: Yes. The Board feels that it would be of assistance to the Legislature, and possibly help prevent litigations in the future. Now, as to the pre-trial procedure the Board, after very considerable thought, is very much in favour of the pre-trial system. The consideration that moved them, was the fact that we all recognize that in case after case, a great deal of time was spent on matters of purely formal proof. You gentlemen all know the familiar pleading that the defendant denies each and every allegation, and puts the plaintiff to the strict proof thereof.

Q. Always strict?

A. It's always strict?

Q. Yes.

A. And there are some things—for instance, a garage man's bill, a plan of a street, the execution of a document about which there is no possible doubt, which is coming up all the time in a case, and which probably causes protraction in the hearing, and may even cause actual delay, because some of these formal witnesses may not be available. We feel that all that delay and expense and congestion contributes to a general annoyance of the public in the conduct of the litigation, and we feel that it is all part of the business of maintaining public confidence in the courts if we give a more business-like administration of our courts.

MR. LEDUC: Well, on that question of pre-trial, we have had the evidence of Mr. McCarthy, who states that it might be applicable only in Toronto, and in some of the larger places. Of course, you have all the judges residing in Toronto.

WITNESS: Yes.

Q. Which is quite a different situation from the rest of the province. Would you be in favour of trying it in Toronto?

A. Yes. I see no reason why it couldn't proceed in that way, that it could be tried as an immediate measure in Toronto.

MR CONANT: As a matter of fact, I think I am proper in making this observation: in jurisdictions where pre-trial has been worked out, it has always been worked out in some limited centre; is that not right, Mr. Magone?

MR. MAGONE: I don't know that it was in Michigan.

MR. CONANT: I think so.

MR. MAGONE: In some limited sense.

MR. CONANT: Yes.

MR. MAGONE: Well, it's done there, as I understand it, by the judges themselves; they have the power to make the rules. But I wonder whether Mr. Fowler would know, in respect to that, if in those jurisdictions where they have pre-trial they have examinations for discovery.

MR. LEDUC: Well, I have here in the Barlow report that the pre-trial practice is being used with very great success in the city of Detroit, and in the larger centres of the State of Michigan, in the city of Boston, and in the commonwealth of Massachusetts, in the city of New York, and in the larger centres of the State of California, so that with the exception of Massachusetts, it would be restricted to the larger centres.

WITNESS: I wonder, has the Committee read the summarized recommendations of the American Bar Association? They suggest what they call

"one judge courts". In such courts it would be perhaps well to have an itinerant pre-trial judge to cover these hearings in several jurisdictions, in order to avoid any repetition the council might feel, if they believe that disclosing any offers after settlement made at pre-trial might affect the judge's attitude at the trial, so it could be extended by the method.

MR. CONANT: Yes, but until that system were set up, in order to avoid one judge dealing with it both times, you'd have to limit it to the larger jurisdictions, where two or three judges are available.

WITNESS: But it would be possible, almost, for a pre-trial judge to do a circuit and spend a day in several towns, and do the pre-trial work in that way.

MR. MAGONE: Wouldn't it be possible, in supreme court actions, to *localize* the services of the local supreme court judge?

WITNESS: That is a matter I haven't discussed with the Board.

Witness excused.

AFTERNOON SESSION

Parliament Buildings, Toronto,
April 12, 1940.

MR. FOWLER (recalled).

MR. CONANT: Gentlemen, before resuming, I presume we are through with the pre-trial portion of the discussion. This pre-trial question is important. I am not expressing an opinion, but I would like to say that if it would reduce the expenses of our court five percent or ten percent, it would be well worth while. I would suggest, Mr. Magone, if you could contact some other jurisdiction, for instance, Detroit, and see if you could bring over here for our resumed sitting an official, because I think they have in each jurisdiction a judge that deals principally, if not solely, with pre-trial. If you could bring a judge here to give us some assistance it would be a good thing.

MR. MAGONE: I know the situation pretty well on pre-trial. I read everything Mr. Barlow said on pre-trial. Judge Monahan is the judge who looks after pre-trial in Detroit. And I think, from reading the material he has written about it, that he is responsible for pre-trial, and he has thought about it and has made a lot of speeches about it as well as having written articles on it. My suggestion would be to probably go some place else. He seems to be a man who is attempting to sponsor pre-trial all over the United States of America, he is a real enthusiast.

MR. CONANT: I see. Well, then, we'll leave it this way. I didn't intend to dictate which it should be. I think, subject to what my colleagues say, it would be well worth while to have somebody familiar with the practice in a near-by jurisdiction to come here and tell us about it.

What do you say, Mr. Leduc?

MR. LEDUC: Certainly.

MR. CONANT: Agreeable with that Mr. Arnott?

MR. ARNOTT: Oh, yes.

MR. LEDUC: Is the procedure in Michigan fairly similar to ours?

MR. MAGONE: I don't think so, Mr. Leduc.

MR. LEDUC: Would the procedure in the State of New York—have they got it in New York, by the way?

MR. MAGONE: Yes.

MR. LEDUC: Would there be more resemblance between New York State and our procedure?

MR. MAGONE: I think so.

MR. LEDUC: Perhaps it would be better to get a man from the State of New York. Do you think so?

MR. CONANT: Yes.

WITNESS: Mr. Chairman, it is possible that I can get information from some of the jurisdictions and hand it over to Mr. Magone.

MR. CONANT: That would be very valuable. Naturally, I want to get the man most valuable to us and closest to us.

MR. LEDUC: There is Boston, New York and Michigan.

WITNESS: There is only one other word on the pre-trial matter. I think the consideration is not only the actual saving of time that would be possible by settling the non-contentious issues, but also the possibility of the more orderly conduct of the courts themselves, if you had a better idea in advance, of the probable course that a trial would take.

MR. CONANT: Yes?

WITNESS: That really leads to the next point.

MR. CONANT: Of course, doesn't this observation properly arise out of this? I have been told that it is not uncommon that during the pre-trial proceedings a case is settled or abandoned.

WITNESS: There is that feature of it, certainly.

MR. CONANT: Because sometimes the litigant sees, when he is presented with cold realities, that he has no evidence, or no case, and it winds up there.

WITNESS: It may be, too, that a lot of cases are not settled because the parties never get on to common ground.

Q. Sometimes their clients won't let them.

A. Well, perhaps it's not only the client who stops them.

Q. Yes, all right, Mr. Fowler.

A. The other point that that last remark of mine leads up to is, that it can perhaps best be given by reading the general recommendations which were at the conclusion of the brief that the Board submitted to Mr. Barlow. It reads in this way:

> "In conclusion of its submissions, the Board desires to make a few general comments concerning the administration of justice, and in particular, the conduct of trials. The Board is of the opinion that in a number of ways the public and the members of the legal profession are seriously and unnecessarily inconvenienced, and that, as a result, the administration of the law is subjected to criticism and brought into some measure of contempt. In general, the Board feels that all steps should be taken to assure to the public reasonable, prompt, efficient and business-like service from the courts. In particular, it suggests that immediate steps should be taken to conduct the trial lists in such a way as to prevent unnecessary delay in bringing cases to trial, and lengthy delays between the time a case has been called on the weekly or daily list and the trial actually commences."

Just stopping there, I think that particularly in Toronto, and that is all the Board is qualified to speak about, you may actually get your case on the weekly lists, you may even get it on the daily list, there may be six cases called for next Monday, when you start, and if you are fourth or fifth on the list, the first case may take an hour or it may take three days.

Q. Yes?

A. There is no way of knowing whether you are going to be called Monday or Tuesday or Wednesday. If you have a lot of witnesses, and it is likely that you have, you have to keep those witnesses waiting about in that indefinite fashion. Now, the whole indefiniteness of that trial list is, I think, a very serious matter, not only, and as it doesn't really matter so much from the legal profession's point of view, but more particularly from the attitude of the public viewpoint; a man may be a business man; he is forced to wait perhaps three or four days, right from the time that his case is on the ready list for trial, and anybody who has found himself in the position of being called at 12.40, when he had sent his witnesses away, usually takes the safe method of deciding that his witnesses had better stay right there through the previous cases, and I think this matter often affects the whole attitude of the litigants before the court. Many a man, after going through one of these experiences, will say: "Never again."

Now, in England, they seem to be able to have some idea of the length of time, from the way they make up their lists. You have probably all seen the

lists that appear in the *Weekly Notes* from England, and for instance, in the King's Bench Division, they divide the cases into two lists, entitled "long, non-jury actions" and "short non-jury actions," and then in brackets, after each case, there is some estimate made somehow, of the length of time it is likely to take. For instance, in the short non-jury actions, the first one is five hours, the next five, the next four, two hours, fifteen minutes, and so on. And then on the long non-jury list, they run six hours, one to two days, two days, and so on. So that, with those lists, you get some idea of where you stand, and the short cases are not held up by the longer cases.

Q. I presume the Registrar must make that estimate?

MR. MAGONE: We might inquire about that, sir, and find out how it is done.

MR. CONANT: If we had pre-trial, in the cases that went to pre-trial, perhaps the pre-trial judge could.

WITNESS: Well, as a matter of fact, that is what the Board says in this submission later on. Just one other example. The American Federal Courts are now, I think, subject to a Director of Business of some sort, and it might be possible for you to look into that too. I saw recently a note of the appointment of a Director and Assistant Director of the Federal Courts, who is a Chicago barrister who has been asked to deal with the whole question of business management of the courts, such as their hearings, their lists, if there is congestion in the lists, whether an extra judge should be appointed, and the whole formulation of the business side of the courts, and I don't say this on behalf of the Board or really in any spirit of criticism, but I think the difficulty is that the judges are themselves very busy, busy trying cases, and this requires pretty close and detailed supervision in a long list, particularly such as in Toronto.

MR. CONANT: Who runs the show in Toronto now?

MR. MAGONE: Well, the cases are put on the list without any request of any party. They serve notice of trial and when the trial comes they are put on the list. That is what happens, is it not?

MR. CONANT: By the Registrar?

MR. MAGONE: Yes, and then, as I understand it from the Chief Justice of the High Court, the delays are caused by the barristers or by the parties themselves coming up and asking for delay.

WITNESS: Well, of course, part of the difficulty is that in the present practice notice of trial is served so early in the proceedings, before really, the case is ready for trial and it is placed upon the ready list before it is ready for trial. Frequently, the excuse is made when the case is called, "We haven't had our examination for discovery yet." And it might be possible to make some improvement if the case didn't go on the ready list until there was some sort of certificate from counsel for both sides that the case was ready to proceed. That would at least prevent the collapse of the trial which sometimes happens.

MR. CONANT: Of course, you find a reluctant litigant refusing that co-operation.

A. Well, that is the other side of it. But there is no doubt about the fact that at the present time when you see these long weekly lists at Toronto, that you are absolutely in an impossible position if you are the tenth or twelfth case on that list to know when you are called, and I think that is one of the hardest things for a lawyer to explain to his client, the inability to say when a case is going to be tried.

Q. Well, it is, no doubt, of the utmost importance. The solution may not be quite clear.

A. Just as to how the lists are prepared? I think the ready list is made up at Toronto and it's taken more or less in order and placed upon the list with no segregation of cases whatsoever. The short case and the long case will be mixed side by side, and a man with a fifteen-minute case may be following a case that is going to take two or three or four days.

Q. Isn't it a case though, Mr. Fowler, that with the greatest respect, the judges might improve the situation? Because my experience has been that they are very reluctant to give any time or any commitment as to when it will be called or anything like that.

A. Well, if I may speak just from personal experience rather than on behalf of the Board, I don't see why at the opening of the day's court it wouldn't be possible to get some idea of whether the case that is first on the list is going to take the morning.

Q. Yes?

A. And then assure the people second, third and fourth on the list that they can go until one or two o'clock.

Q. Yes.

A. That is not, I don't think, the general practice.

Q. No.

A. It is quite the contrary.

Q. Yes, it is quite the contrary.

A. As I say, if, by chance, the first case collapses at 12.30 p.m. and you are not ready, then you are subject to censure.

Q. All right, Mr. Fowler.

A. Just completing the submission. "The Board realizes that if the submissions in respect to pre-trial procedure are implemented, the force of each of the present criticisms concerning the conduct of trials will be greatly diminished. But the pre-trial is merely one method towards the desired end of proceeding efficiently with the services to the public by the courts, and whether it is implemented or not, steps should be taken, in the Board's opinion, to provide in our

courts the business-like efficiency which would be achieved by a commercial or industrial organization."

Q. Yes. Have you no observation there on the jurisdiction of the Court of Appeal—the jury appeals?

A. We have not considered that, sir. When I spoke to Mr. Silk I thought that probably it would only be grand jury and jury matters that were coming up at the present time, and some of these other matters we have already dealt with.

Q. Have you any personal views on that Court of Appeal situation?

A. Well, personally, I was here when Mr. McCarthy was talking on the question.

Q. Yes.

A. You mean as to whether—oh, appeal? The Court of Appeal should have power to interfere with the jury finding, and that type of thing.

Q. Yes.

A. I do feel that there is danger in making a very radical change in that. There is, undoubtedly, a law now which permits the Court of Appeal to interfere in cases where the situation is such that no reasonable end could be reached.

Q. Yes.

A. I think that is the way it is put. There is so much difference between the spoken word and printed word. An answer may be given with a smile or with a laugh which doesn't get into the printed record.

Q. Yes.

A. And I think that, probably, is the basis of the rule as to demeanor of witnesses and so on. It does seem to me that you might often have a completely false picture presented as to facts, that is by the printed word.

Q. Is there any middle course between our very restricted jurisdiction of the Court of Appeal and what might be described as a wide open republican view. Is there any middle course?

MR. FROST: Well, there are a lot. Define middle course.

MR. CONANT: Well, I thought Mr. Fowler would define a middle course for us.

WITNESS: Well, I think, possibly, you might have a middle course, that is to say, instead of it being a thing with a result which no reasonable man could have reached. You could say that the preponderant weight of evidence is so great—it doesn't nearly need to be something that almost amounts to fraud on

the part of the jury—if you could say that balancing the evidence, the evidence is so preponderantly against the decision reached by the jury that we are prepared to interfere in that case without stepping in and replacing the function of a jury.

MR. MAGONE: You did have to replace the function of the jury to the extent of credibility at least?

MR. STRACHAN: Don't they do that, Mr. Fowler, on matter of appeals in non-jury cases? Does it shock you very much that the Court of Appeal should take the function of a jury?

WITNESS: Not just merely because they take the function of a jury.

Q. No. I mean it is a narrow minded ——

A. I might say I have never been able, personally, to see the difference between the attitude of the Court of Appeal towards a jury trial and towards a non-jury trial.

Q. Exactly, I never could see where there was such an air of sanctity over a jury trial. Isn't it, perhaps, the same in the fact of a trial by non-jury because you know they so often do?

A. Quite. I do think that any place where you have anything approaching near balance between evidence pro and con, then the finding of fact ought to be supported on the basis that your jury have seen the witness and had the opportunity of seeing the way the questions were answered.

Q. It boils down to this, our Court of Appeal is loath to upset the finding of fact. There is the reason of the seriousness of Supreme Court of Canada decisions.

A. Yes.

MR. MAGONE: Wouldn't you have to amend the charge to the jury and say it must believe everything this witness says; instead the judge says: "Now you can believe part of what he says or none of it or you can believe the whole of it."

WITNESS: Well, I can see that probably the present rule is easier to apply than any middle course rule would be. But, surely, there is some way that the Court of Appeal can add up the evidence on the one side and weigh it against the evidence on the other side and if it is predominantly in favour of the appeal, then the appeal could succeed.

MR. STRACHAN: But Mr. Fowler, don't you agree that there is no suggestion we shouldn't if we were to continue the jury system? Don't you think we are discussing the crux of the whole matter in order to arrive at the satisfactory solution?

WITNESS: I think, perhaps, it is one of great importance.

Q. I would think it is one of the most important things the Committee has to discuss.

MR. CONANT: It seems to me we have two very important angles to this jury system. In my own view one is the qualifications of a jury, capital jury if you like. That is one end of it, and the other is the jurisdiction of the Court of Appeal. Now, I don't know that we have had, as far as my reactions are concerned, any submission yet or any clear definition as to how either of those problems can be met.

WITNESS: Would the Committee permit me to take that problem back to our committee?

Q. Personally I'd be very glad to because in my own view they are the two most important angles of the jury system.

MR. STRACHAN: I do agree with you, Mr. Chairman, I'd be very glad to have any help we could from your committee or any other source.

WITNESS: As I say, I have been speaking more or less on my own because it hasn't been a matter we have discussed and I'd like to take it back and discuss it because we have some active practitioners there who may have some ideas.

MR. STRACHAN: You get the situation we have heard in evidence from somebody yesterday, that one large corporation only had one jury case in fifty years.

MR. CONANT: Something wrong in that.

MR. STRACHAN: Obviously they couldn't be wrong in all those cases.

MR. CONANT: Their batting average couldn't be as bad as that. I think, in connection with that observation, we'll be glad to have Mr. Fowler's further observations formulated from discussions with your colleagues. I think counsel Mr. Silk and Mr. Magone might, during our adjournment, see if there are any jurisdictions where that has been met. About the angles of it, I think they are both very important.

MR. STRACHAN: Another angle, Mr. Chairman, we have so often in our courts—two companies fighting each other. You are not allowed to mention the word "insurance". You have a jury, and the jury then have the problem of deciding which one of the litigants is insured. Couldn't there be some solution to that problem? I mean, shouldn't we consider some amendment to that rule, Mr. Chairman? It is perfectly absurd the way it is now. Tell the jury they are both insured and then you perhaps have the decision on the merits of the case and not on the basis of who the jury thinks is insured or who isn't.

MR. LEDUC: In the case where nothing is said, would they have the presumption that one or the other of the parties is insured?

MR. STRACHAN: Well, it sometimes happens that the solicitor for one of the litigants is not King's counsel, the assumption from the jury is he isn't insured.

MR. CONANT: Of course, the whole problem that always confronts us in the jury system is that admittedly twelve true men are the best to deal with facts if they are not influenced by issues of considerations other than the facts of the case and it must, also, be the effort of the court. The purpose of those who frame laws and those who make rules to prevent considerations other than the facts being the determining factors in juries, and this more or less recent aspect of insurance, is only one particular and special instance of where you can, and the courts have, put their fingers on it and said when that has been disclosed, the court regards the same as improper consideration, therefore, we won't go on.

A. Quite. I'd like, if I may, Mr. Chairman, to take also to the Board's committee this other problem of jury, notices and so on which I think you have discussed. That is the question, whether the onus is on the person asking for the notice.

Q. The onus?

A. The onus should be established because, personally, I think the value of the juries vary from case to case according to its character.

Q. Yes.

A. It may be that the jury is absolutely essential in capital cases and not so essential in other types.

Q. Yes. You are not prepared to express an opinion on jury onus now?

A. Not at the moment; it has not been discussed and I'd rather leave it if I am coming back.

Q. Well, if you care to bring it back we'd be glad to have it.

A. But if I may just in conclusion put it this way that the Board feels, and feels very sincerely, that improvements in the administration of justice in bringing it into line with modern conditions, with modern business methods, are necessary and we feel that the legal profession ought to be behind that, and I believe that the ones for whom we speak would be behind it.

Q. Yes.

A. Now, I don't know beyond that. There are some other things which I am not sure whether you have dealt with or not. Things like the examination for discovery of the officer of a corporation, are you leaving that?

Q. Yes. That is rather a long question. Of course, we are way behind most jurisdictions in that respect, are we not?

A. Well, we feel, and the Board feels, that the examination of a properly selected officer ——

Q. Should be binding?

A. —— should be binding upon the corporation. It is one of the hard

things to explain to a client when you have two defendants, a corporation and an individual, and he reads the discoveries and then you have to tell him this one we can use but this one we can't.

Q. Yes.

A. And it takes it away from the whole sense of reality. Then another face of the matter is certain; difficulties that the Board brought forward in its submission in regard to the Division Court practice in the County of York.

Q. Yes.

A. Now, I don't know whether you are thinking of more elaborate and fundamental changes in Division Court jurisdictions. These practically have little value, but on the other hand, within its present framework there are a number of points which they brought up which they feel should be dealt with. I don't know whether you want me to go into those.

Q. Well, can you summarize them, Mr. Fowler?

A. Well, I'll do my best to summarize them.

Q. I think the Committee would like to hear your summary.

A. This is dealing particularly with the practice in First Division Court of the County of York. We feel that there are a number of undesirable features in it. And there is widespread dissatisfaction in the present practice. One minor preliminary matter is the fact that the office hours of the court are from ten till four. And if you want to, with the clerk frequently sitting from ten until four, you are unable to get in to see the Division Court clerk.

Q. Yes.

A. From nine-thirty to four-thirty is the suggestion we make for the office hours. It's a very minor point. Another point that has happened since the amalgamation of the First and Tenth Division Court in the city is that instead of holding court on four days each week, they hold it on three days each week.

Q. Yes.

A. And this results in long lists, delays and inconvenience, both to the public and to the legal profession.

MR. STRACHAN: Mr. Fowler, on that point isn't it a fact that at the present time sometimes that Division Court sits to seven-thirty or eight o'clock at night?

WITNESS: Well, I can't speak personally, I don't think that has happened recently. Well, that of course is all the more reason why they should sit five days a week instead of three.

Q. Exactly.

MR. MAGONE: Mr. Fowler, if I might interrupt, I think I have already

read to the Committee the summary of the report that you are now giving to them on the practice in the First Division Court in the County of York if that is on pages three, four, five and six of the recommendations.

WITNESS: That is it.

Q. So, if you are covering that ground that has already been covered, and I read this into the record where we were dealing with Division Courts.

A. I want to just, if I may, mention one other element in this matter of long lists. It is the manner in which they round all adjourned cases which are never reached. If the case hasn't reached the first reading, it's an adjourned case and goes to the bottom of the next day's list and the fee is charged for the adjournment.

MR. STRACHAN: You might see it there until five o'clock, and then the next sitting you are still at the bottom of the list.

MR. CONANT: Why wouldn't they come first on the next list?

WITNESS: Precisely. I think the reason is they group two types of adjourned cases, the adjourned cases that are adjourned at the request of the parties and the cases that are forcibly adjourned because the list can't be dealt with.

Q. I see.

A. And all these adjourned cases are grouped together and put at the bottom of next day's list. The result is, if you miss your first train, you may be a long while getting away from the station.

Q. Yes, I see that.

A. I mean, there is another minor point. Mr. Magone has probably mentioned it to you, but I'll just mention it as is. You may have come up there with all your witnesses and found that the case which you thought was on the list isn't on the list ——

MR. STRACHAN: Because of ten cents?

WITNESS: —— because ten cents is missing on the fees.

MR. LEDUC: That has been mentioned.

WITNESS: I see. Well, that is all then.

Q. Mr. Fowler, at this point it has been mentioned by you, there is a proposal in the Barlow report for the establishment of a small claims court, and there has been a proposal discussed here and a suggestion made that the jurisdiction of the Division Court should be cut down to say two hundred dollars. That other cases should go to the County Court with the reduced tariff of fees. What is your opinion of that?

A. I am not able to express the Board's opinion. My personal opinion would be that I think it would be a very good thing.

MR. CONANT: Could you give us your opinion, if you will, about the powers of committal on judgment summons in Division Courts?

WITNESS: Well, I must say I have always personally felt that there was little reason in the rule that you could commit in Division Court and that you can't commit in County and Supreme Court. It seems to be quite unreasonable, and yet, as the judges who have appeared here have told of particular difficult cases that people have just been wilfully not willing to pay a small debt.

MR. FROST: They probably should have been in jail from the start.

MR. CONANT: Then they wouldn't have got into debt, you mean.

MR. LEDUC: Would you be in favour of repealing the powers given to the judges of the Division Courts or extending it to the judges of the other courts or leaving it as it is?

WITNESS: Personally, while I think it would be very nice to use this extraordinary remedy ——

Q. You don't like it?

A. I feel that it is good enough. Otherwise it would be bringing the criminal procedure into civil matters. But that is only my personal opinion.

Q. Oh quite.

A. I feel that is all I can give you.

MR. CONANT: Would you feel disposed to have us call you back at an adjourned sitting, to discuss these matters further?

WITNESS: I not only would do it, but I would appreciate it.

MR. MAGONE: Mr. Chairman, Mr. Cadwell has brought down Mr. Matadall, from Ottawa, who is in charge of Canadian Credit Bureaux, is it, Mr. Cadwell?

MR. CADWELL: Ottawa Credit Exchange, and Secretary to the Canadian Credit Bureaux Association.

MR. MAGONE: With respect to Division Courts, if you want to hear it. I understand he wants to go into some matters which have already been dealt with this week.

MR. CONANT: All right.

MR. F. A. MATADALL, Ottawa, Ontario, Ottawa Credit Exchange.

MR. MAGONE: I understand, Mr. Matadall, you have some suggestions with respect to judgment summons procedure?

WITNESS: Yes, taking it purely upon myself; as far as Ottawa, where I am living, is concerned, it is a city where it is not of much value to pursue the ordinary course of procedure, because of the large number of civil servants living there, and we have to depend almost entirely on the judgment summons, and we find it not very effective, probably for the reason that there are no teeth in the Act and that the debtors are educated to know that if they don't obey an order, they are brought up again and another order is given all of which means the creditor has to put up additional costs each time, and if the creditor keeps this up and the debtor holds off long enough, he will likely get away with it.

I would like to suggest that consideration be given to the discontinuance of the default summons, show cause summons, and that careful examination be made of the debtor on the original summons and that failure to comply with the order would result in automatic committal.

MR. LEDUC: That is, bring back prison for debts.

WITNESS: Well, it's still contempt exactly as it is now.

MR. ARNOTT: Supposing an order was made and a man was away automatically?

WITNESS: Well, of course, provision could be made like that. But at the present time many are committed, but, of course, they may be committed for ten days but they are usually out in twenty-four or forty-eight hours, we usually quit a few.

MR. LEDUC: Usually it's a friend or relative of the family who pays to avoid the man going to jail.

WITNESS: Well, I don't know if he actually pays.

Q. Well, guarantees the debt.

A. But at the present time, mind you, as you will see later, I am favourable to helping the debtor; but at the present time a creditor hasn't much of a chance on a judgment summons order because no payments may be made or several payments may be made, but the debtor has to be brought up time and time again. The costs are high: the creditor pays them.

Q. Your suggestion is that if the judge, for instance, orders a man to pay five dollars a week, and he pays for five weeks, and doesn't pay the sixth week, that they should put him in jail?

A. Yes.

MR. STRACHAN: How long would you put him in for, till the debt is paid?

WITNESS: No. I had in mind a very short committal.

Q. Going back to the days of Dickens and Pickwick.

A. Very well, that is the suggestion. I have another suggestion if you have time to listen to it.

MR. LEDUC: Oh yes, go ahead.

WITNESS: We have in our office at the present time between two and three hundred families whose affairs we administer in a sort of unofficial way. If you like, in many cases they took over an assignment on their salary and we give them a living budget to the best of our ability and distribute the balance of their income over their debts on a *pro rata* basis.

Q. How do these people come to go to you, Mr. Matadall?

A. I don't know how it started, but we have been doing it for years.

MR. CONANT: You mean it's a form of informal voluntary committal?

WITNESS: Yes.

MR. LEDUC: They come in and ask you to do it?

WITNESS: They come in and ask us. Some are involved to the extent of thousands of dollars, some several hundreds.

MR. MAGONE: What fees are charged?

WITNESS: Fifteen percent of the amount distributed.

Q. No, but I am talking now about the fee to the person whose estate you administer.

A. Fifteen percent. They pay us ten dollars when distributing fifty dollars.

MR. CONANT: How does legislation come into that?

WITNESS: Well, I was about to make a suggestion. If it were possible to incorporate in any change of the Division Court something to make this official, if you like.

MR. LEDUC: In the hand of private individuals or private corporations?

WITNESS: Not necessarily.

Q. Or in the Division Courts?

A. In the Division Courts.

Q. Well, that is the Lacombe law.

A. Similar to the Lacombe law we have experienced with in Hull. and it's a little difficult to get information at the time when we found how the distribution is being made; but this plan, as we operate it—an affidavit is made up by the

debtor giving a list of the debts, his total income, the number in his family and its living expenses, and the information as to the total amount he owes, who he owes it to. It's available to any one creditor interested.

We found that the creditors have co-operated splendidly. The result is the debtor is saved the continual additional court costs and is able to reduce his debts.

MR. CONANT: You act as receiver?

WITNESS: Yes. We make the distributions.

Q. Yes. Well now, I just don't quite understand specifically how legislation would help that situation. In the first place, if it's bankruptcy legislation the proof is out of it.

A. Well, not bankruptcy, if a man is paying off his total debts as it stands; now a man can go bankrupt if he wishes. A lot of these people would if they knew enough about it. There is nothing to prevent them doing it.

Q. How would legislation help that?

A. Well, wouldn't it not be possible for legislation to be brought in where a man who is badly involved and who is being continually sued. The most he is doing is paying the costs. Would it not be possible for him to go to Division Court offices, register his intention to pay off his liabilities? If you like, over a period of time, making arrangement for depositing his money.

Q. Isn't that exactly the Quebec law?

A. With this exception, as I understand it: Lacombe law the man has to deposit, under the Lacombe Act, everything over the seizable portion of his wages.

MR. LEDUC: No, he deposits the seizable portion.

WITNESS: Well, that is what I mean. He is allowed to retain whatever —in Ontario at the present time it would be fifteen dollars a week.

MR. CONANT: You meant to say he was keeping it?

WITNESS: Yes, at the present time in Ontario it would be fifteen dollars a week. Well, there are different classes of people who are in difficulties, they live in different ways, they have different numbers of dependants in their families, and they don't think any set amount would be satisfactory.

MR. LEDUC: Well, it's one-fifth up to $3.00 a day, one-fourth from $3.00 to $6.00 a day, and one-third with the daily wage or salary is more than $6.00 a day.

MR. CONANT: Well, I don't see how your system is any better than that, Mr. Matadall, yet.

WITNESS: Well, what I had in mind was a man might be earning a small wage and have a large number of dependants, he'd need to retain more than the present exempt portion of wages.

Q. Well, that goes to the question as to whether our present exemption laws are sufficient.

A. Well, it is in some cases. In some cases it wouldn't.

MR. MAGONE: At present the judge has the discretion.

MR. CONANT: Well, I am only speaking from recollection running over some years now, isn't there a provision in your law that the judge can change the percentage?

WITNESS: I wasn't aware of that.

Q. Oh, yes, if, in a case that you speak of, a man comes and says, Your Honour, I've got fourteen children or even fiftten or ten, this exception is not such, the judge can change that.

A. Well, that is what I had in mind, gentlemen. We have these people coming to us continually.

MR. LEDUC: But don't you think, Mr. Matadall, it's better to have a fixed proportion which can be attached than leave it to the discretion of a judge? I am not contesting the wisdom of the judge there.

WITNESS: Yes.

Q. The point is when a man earns $25.00 a week or $40.00 a week, you know according to the Quebec system that you can attach so much.

A. I think it's much better than to leave it to the discretion of the judge, but I do think these debtors should have some place to go for protection if they are willing to show that they are in earnest and intend to pay up debts, that they wouldn't be bothered as long as they're making the endeavour.

Q. Well, that is the object of the Lacombe law, exactly, and it's been working in Quebec for thirty-six years, and working very well. We got figures here showing that in the district of Quebec, which is slightly larger than the county of Carleton, they have collected $9,000.00 in one year through the operation of that law.

A. Where is that?

Q. In the district of Quebec.

A. Quebec City?

Q. Yes, the city and surroundings.

A. Yes.

Q. It's larger than Carleton. And then in Montreal they collected $300,000.00 in one year.

MR. CONANT: You may find if we go in for legislation of that kind, that would meet the situation and, of course, there is always the possibility we may even improve on the Quebec law.

WITNESS: Of course, I didn't know that you had really considered that.

MR. MAGONE: With the man from Quebec.

WITNESS: I have cases here, sample cases, individual debtors who owe up to $4,500.00, some on account of sickness, some more or less deliberate, some because their wives are not good managers, some girls who are over-buyers. We have a single girl employed in the government owing over a hundred dollars, most of it is clothing, part of the fault lies with the extension of credit in the first place.

MR. CONANT: Well, thank you, Mr. Matadall. That was what you wanted to bring up, wasn't it?

WITNESS: Yes. Thank you very much.

Witness excused.

MR. CONANT: Before going into anything else, I just want to commend to the attention of the members of the Committee an editorial in one of the Toronto papers to-day. It brings out a point that hasn't been considered in this Committee, that is the fact that the grand jury is a secret process, and I thought it was important to bring it to the attention of the Committee, because we have had so much discussion about the safeguards of the grand jury.

MR. FROST: Do you mean, sir, that the grand jury, being a secret procedure, might tend to bury something?

MR. CONANT: Well, I'll just read it. It says:

> "If, as Mr. F. H. Barlow, K.C., has declared, Ontario and the Maritime provinces are the only spots in the British Empire where the grand jury system is retained, it is impossible to understand what ground there can be for the suggestion that our administration of justice will be irreparably maimed if the grand jury is abolished here. Ireland gave up grand juries ten years ago; they had vanished in England in 1923; South Africa has dispensed with them since 1935. Is it possible that the rest of the Empire is out of step with Ontario and the Maritimes?
>
> No one wants to abolish any safeguard the accused person may have. But it has been found possible elsewhere to protect adequately, without the intervention of a grand jury, the person who is confronted by a charge. And in the secret processes of the grand jury there is always room for the suspicion that there is no adequate safeguard for

the interests of society. As was pointed out in the Legislative Committee, persons who have been committed to trial by a magistrate have sometimes been discharged on the 'no bill' of a grand jury. The magistrate, after hearing the evidence in open court, has found a *prima facie* case, and the grand jury, sitting in the seclusion of its own quarters, has said that there isn't any.

This apparent conflict of opinion between the magistrate and grand jury has been attributed to the possibility that magistrates are sometimes not as careful as they might be, knowing that the grand jury will operate as a safeguard in the case of error. But this is not always the case. Where one grand jury has returned no bill, a subsequent jury before whom the case has come has sometimes returned an indictment."

I think it is well worth reading. I would like to add to the record this further observation, that while it has been suggested here that the grand jury is a necessary protection for the accused, it isn't by any means an infallible tribunal. We had a case in Ontario county not long ago where one grand jury found a no bill. A subsequent indictment was laid and the next grand jury found a true bill and the person was convicted by the petit jury, and I think that I would like the Committee to consider that editorial.

Committee adjourned *sine die*.

TENTH SITTING

Parliament Buildings, Toronto,
Sept. 23, 1940, 10.30 a.m.

MR. CONANT: Before proceeding with the work of the Committee, gentlemen, I think I should say that Mr. Magone, who acted as counsel for the Committee, has been assigned by my department almost exclusively to Treasury work, so that he cannot devote his time to this Committee, and, assuming that the Committee would approve of my action, I instructed Mr. Silk some time ago, perhaps a month ago, to prepare himself to act as counsel for the Committee. If that is agreeable, I would like to have a resolution placed on record. Will you move that, Mr. Strachan?

MR. STRACHAN: I move, seconded by Mr. Leduc, that Mr. Silk be appointed counsel to the Committee.

MR. CONANT: The motion is carried.

Then, in connection with our secretary of the Committee—who was on the record as secretary before, Mr. Silk?

MR. SILK: I was acting as both assistant counsel and secretary.

MR. CONANT: Yes, that is right. I thought it would be better to relieve Mr. Silk of some of the secretarial work, although they overlap a good deal. I suggest that Mr. Hicks—Mr. Hicks is in your department, is he not?

MR. SILK: Yes.

MR. CONANT: I suggest that Mr. Hicks act as secretary of the Committee. Is that agreeable, gentlemen? Will you move that?

MR. STRACHAN: I move, seconded by Mr. Leduc, that Mr. Hicks be appointed secretary of the Committee.

MR. CONANT: Carried.

Now, Mr. Silk, what have you ready for us this morning?

MR. SILK: I propose to call Mr. Fowler first, and then Mr. Chitty. Both of these men represent the York County Law Association.

MR. CONANT: Mr. Fowler was with us before, was he not?

MR. LEDUC: Yes.

MR. SILK: Mr. Fowler was practically the last witness. I think one witness followed him. He had to leave to return to the Board of Management of the Association to discuss certain matters.

MR. CONANT: Where did Mr. Fowler leave off?

MR. SILK: His evidence commences at page 901.

MR. CONANT: And it goes to page 932.

(At this point Mr. Frost entered the room).

MR. CONANT: Mr. Frost, in your absence I explained to the Committee that since we were sitting before, Mr. Magone had been assigned almost exclusively to Treasury work and could not very well be spared any longer for Committee work, and I took the liberty about a month ago of instructing Mr. Silk that he would have to carry on; we therefore passed a resolution appointing Mr. Silk counsel to the Committee. Under our previous set-up Mr. Silk was assistant counsel and secretary, and I felt that he should be relieved of some of his secretarial duties and we appointed Mr. Hicks in his department as secretary of the Committee.

Now we resume the taking of the evidence of Mr. Fowler. Before doing that, and now that Mr. Frost is here, I think that we might discuss to some advantage our programme for the next few days. Mr. Frost can speak for himself. As I understand it, he does not want to be here to-morrow; is that so, Mr. Frost.

MR. FROST: I think, Mr. Conant, that I could arrange to be here to-morrow morning and possibly Wednesday morning.

MR. CONANT: That is fine.

MR. SILK: There is a statement of the witnesses on your desk, Mr. Frost.

MR. CONANT: On the agenda we have here, I should like very much to continue till Wednesday night, if possible. Mr. Silk has explained to me that some of these witnesses who are—they are all important, but some witnesses particularly are available to-morrow and Wednesday who will not be available until some time afterwards.

MR. SILK: That is right, sir.

MR. CONANT: I should like very much to continue to-morrow and Wednesday. I regret to hear that Mr. Arnott's partner had an accident, fell down the well of an automobile greasing station, so Mr. Arnott cannot be here, but I am inclined to this view, gentlemen: While of course it is desirable to have everybody here, if we were to try to arrange the Committee and sit only when everybody was here and all the witnesses were available, I do not think we would make much progress. I think we shall have to go on with four members of the Committee present, at any rate. The evidence will be transcribed, and, while a member of the Committee is not present to offer his own questioning, yet we must make progress, particularly if we are going to prepare a report and if any recommendations of that report are to be implemented at the next session. I shall be glad to have the views of the Committee on that, but that is my own view.

MR. SILK: I may say that I have arranged with Mr. Dickson, the reporter, to get the transcript for to-day, to-morrow and Wednesday by next Monday.

MR. CONANT: Then, subject to what may turn up, we will carry on to-day, to-morrow and Wednesday, Mr. Frost, and we can discuss future arrangements then.

R. M. FOWLER, representing Management of County of York Law Association.

MR. CONANT: Now, Mr. Silk, Mr. Fowler was dealing with what last?

MR. SILK: Mr. Fowler was to discuss with his Board of Governors four matters: increased jurisdiction of the Court of Appeal in appeals from jury trials, inproving the calibre of jurors, the onus required for having a jury trial, and pre-trial procedure.

Q. I understand you are going to deal with two of those matters, Mr. Fowler, and Mr. Chitty is going to deal with the other two?

A. Yes. I may have something to say about all of them, but he will implement what I have to say in several respects. Mr. Chairman and gentlemen, Mr. Chitty, of the Board of Management of the York County Law Association, is with me ——

MR. CONANT: I think I might mention that we are honoured in having present with us the gentleman who is the author of the work entitled "A New Charter for Canada." Is that not so?

A. I am afraid it is—"Design for a New Dominion." However, I do not think I can speak on that, or I would keep you all day and all week.

MR. CONANT: I would just like you to know that we appreciate that we have the author of those articles here.

WITNESS: Last time when I was here in the early part of the summer I did discuss pre-trial procedure, and stated the fact that the Board of Management felt that some method should be adopted for getting around some of the technical difficulties of the modern trial, the easy matters of proof which often take time and cause expense, and we had studied the pre-trial procedure. It seemed to us a very interesting matter, that ought to be investigated to see if it would apply to this jurisdiction. I do not think I did mention the fact that there was in England a procedure by way of summons for directions; I think Mr. Chitty knows that procedure quite well, and will speak about that when he follows me. As far as any further matter about pre-trial is concerned, I left it open, but I have found nothing more that I can usefully add to what I said before.

Now, as to the question of improvement of the calibre of jurors, which was another matter I wanted to take back to the Board, we discussed that, and the Board felt unanimously that there needed to be something special done in connection with the larger centres such as Toronto. I think I stated before that the difficulty seemed to be the lack of personal knowledge of the prospective jurors in a large city, such as was supplied often by the county judge and often by the sheriff in a smaller centre. We discussed it, and came to the opinion that any method of questions on the assessment ——

MR. CONANT: Let me interrupt. When you say "we discussed," whom are you referring to?

A. The committee of the Board; and we discussed it with certain members of the Board of Management of York County Law Association. We felt that any method of putting questions on the assessment records would not be sufficient to enable a person to tell whether a man was going to be a good juror or a bad one, and for the larger centres we felt that some board of selection was necessary who would perhaps have a list that would come from the assessment rolls, and the there would be a personal investigation of that list, either by having the prospective people come in and see the board of selection or possibly by some private enquiry that would be made through an investigator or through some other agency.

MR. FROST: Mr. Fowler, in that regard, you remember we discussed that at some length here, I think it was about the closing day last April, and the present method of selecting provides for all that, provided they will do it. Now, if you set up another board to do just what these people are supposed to do, and they are just as—I should not say perhaps careless in their duties as the present boards are, would you improve it any?

A. Well, the only thing is ——

Q. Don't you think that perhaps we ought to suggest that these people be more careful in their selection, and then we would have the remedy, wouldn't we?

A. We find, for instance, in the county of York, I believe, the Senior County Court Judge is on that selecting committee; he is a very busy man,

and it takes a great deal of his time. I am sure Judge Parker has given the very best attention to it that he can commensurate with his other duties. But for a problem as big as the problem is in Toronto, it is not, in our opinion, the sort of thing that the County Court judge ——

Q. Doesn't the present system go back, for instance, to the municipalities, and the original selection and the careful selection should be made by the municipalities, and after that it is not so difficult for the county judges? Isn't that it, Mr. Conant?

MR. CONANT: By the way, there is a gentleman down in one of the city offices here who has been doing this for twenty-five or thirty years.

MR. SILK: Mr. Ogle.

MR. CONANT: That is right. If we had him up here for five or ten minutes, he would explain the system better than you would get by reading the Statutes for a day. The municipalities are asked first of all to send in the names of so many jurymen, as I understand it. Who determines that number?

MR. SILK: I rather think the judge does, but I am not sure.

MR. CONANT: After those names come in they have a board of jury selectors. That consists of the sheriff, the county judge and the clerk of the peace, doesn't it?

MR. SILK: Yes.

MR. CONANT: And that is the present system.

Q. Now, just base upon that your observations, if you will. How do you think that can or should be improved, Mr. Fowler?

A. In a city as large as Toronto, unless there is something added to that system which will enable either a personal investigation, having some of the prospective jurors come and interview the Board and let them see them, or having some investigator who will go and see these prospective jurors—for instance, we have cases occurring all the time of men who are quite unable to hear, getting on a jury panel.

MR. LEDUC: Mr. Fowler, do you honestly believe that the prospective jurors would willingly go forward to be interviewed?

A. They may not, they might not, and that might mean that you would have to have some way of investigating as to the age and the capacity, and perhaps the education and the general physical ability of the various people.

MR. STRACHAN: Of course, you can always do that by a challenge.

WITNESS: You can do it by a challenge. That, of course, is a wasteful way, if he is not going to be a juror. The man is tied up there, and frequently you do not or cannot discover it.

MR. STRACHAN: I do not suppose we want to get into the system they have

in the States, where it takes three or four days to select a jury—really a trial for each juryman.

MR. LEDUC: You mentioned a board of selection; have you given a thought as to the constitution of that board, who should be on it?

A. That was not discussed. I personally think that almost any board made up of people experienced in the courts—probably you could have, perhaps, one of the junior judges, who are not so busy, and one or two barristers, perhaps.

Q. And what machinery would they require to interview prospective jurors?

A. Well, it occurred to me that they might conceivably have a man who would act as investigator, or they might use one of the credit agencies to make a report as to his age and business ability, and what he was doing and so on.

MR. CONANT: We had here, as I recall it, an observation by one counsel who was here; who was that? He said we could get good juries in the country and poor juries in the city, briefly. Who was it said that?

MR. SILK: I think that was Mr. George Walsh.

MR. FROST: No, I think Mr. Walsh said all juries were good.

MR. CONANT: Well, as I recall it—correct me if I am wrong, gentlemen—we have one very unequivocal statement, a very definite statement, that we get good juries in the country and not so good in the city.

WITNESS: I think my Board would agree ——

MR. CONANT: That may be due to this very fact: in the first place, the jury panels in the country are not nearly as large as they are in the city; in the second place, your selectors, both municipal and for the county, or for the entire jurisdiction, know the men better than they do in the city.

WITNESS: We agree completely with that.

MR. CONANT: Now, how can you overcome that?

A. Well, except to give more than a paper check on the people on the jury panel.

MR. STRACHAN: That would involve going around to their houses, because I do not think you could ask these jurymen, unless you paid them, to line up to have a pre-examination before they were selected.

WITNESS: Well, even after the jury list was selected, if there were some investigation, even if there were some personal investigation, even on paper—for instance, you might find that certain men on the list were occupying certain types of position, that they were accountants of a bank, for instance.

MR. STRACHAN: Say you had a jury composed of nothing but accountants and engineers, that might not make them a good jury.

WITNESS: No, I can quite see that.

MR. STRACHAN: The object of having a jury, as I understand it, is to get men who represent an average cross-section of the citizens. We don't want a jury of experts; we have got to have them all in—the unemployed and the professional men, and so on.

WITNESS: Well, we did feel that there ought to be something in the nature of a personal investigation, to replace the personal knowledge of which the chairman is speaking, in the country places. Another factor that came up in Toronto which was of some difficulty, was people who are in receipt of relief serving on juries. We felt that that was a matter that really ought, perhaps, be specifically provided, that someone who was in receipt of relief should not be serving on a jury.

MR. STRACHAN: Well, why, Mr. Fowler? I know lots of very good men who, through no fault of theirs, are on relief.

A. Well, it is precisely a matter of sympathy. We just feel that probably a man in receipt of relief, his whole values and judgment may temporarily be disturbed and upset by the misfortune that has fallen on him, just the same as a man who has recently suffered a severe bereavement might not be a good very juror, because of the distraction of mind he would be suffering from at the time. It is in no sense a criticism of the people.

Q. Or the man who gets a large salary might look on things in a larger way, considering that money is not so much. To a man with a large salary, two thousand dollars might not seem very much; he might be inclined to double it.

A. Well, there has been that in certain cases recently, too, in Toronto. We admit the difficulty of the problem, but we think that Toronto and possibly Hamilton—although we do not know about that, but Toronto is something of a special case, requiring these personal contacts with prospective jurors, if the calibre in larger centres is to be brought up to the calibre of juries in smaller places.

MR. STRACHAN: I would think, Mr. Fowler, that your solution for poor juries, perhaps, is covered in one of the topics you are going to take up, enlarging the rights of appeal in the Court of Appeal from a jury trial. Doesn't it boil down to that? Whatever machinery you are going to set up, you are going to have bad decisions from juries.

MR. CONANT: I have had considerable experience with all sides of the problem; I have sat on boards of selectors as Clerk of the Peace, and it comes down fundamentally to some means of determining the qualifications of the individual. In the country, I have sat on boards of selectors where somebody would know every man that came up—everyone—and you had the benefit of that knowledge. I do not know how you can meet that in the larger centres.

MR. SILK: Mr. Fowler, do you agree that it would be of some assistance, if the assessors were instructed to be more careful in the matter of the occupations that they put down?

A. Well, I think that they ought to be—as much as you can get on paper about the man is helpful, but I still do not think that the occupation, as Mr. Strachan said, is going to be the final test, because a man may be a bad juror, even though his occupation may be a very learned or respectable one.

MR. STRACHAN: When you can put down "Esquire" or "Gentleman" as an occupation, it covers a multitude of things.

MR. SILK: That is my point—or "Manager" or "Director". In some cases, those descriptions of an occupation are absolutely misleading.

WITNESS: Of course, I would think that a board of selection might, in many cases, have some personal knowledge, and be able to pass on a certain part of the list, from that personal knowledge. It would not mean that any investigator or any investigation would have to reach to every one on the list; it would only be the ones of which they did not have some personal knowledge, and that might be an argument in favour of having a reasonably large and representative board of selection to sit in consideration of the list.

MR. LEDUC: It would have to be a pretty large board in Toronto. What is the number of people who might be called upon to serve on a jury?

MR. CONANT: Two or three hundred.

MR. SILK: The list they get in each year is three or four thousand, according to the advice we got from the Clerk of the Peace last spring. That is the total of the lists that are sent in by the local selectors, and then I think they pick about eighteen hundred from that.

MR. CONANT: No, not that much.

MR. LEDUC: But, there are three or four thousand possibles?

MR. SILK: Yes.

MR. LEDUC: Well, in a city like Toronto, you would need a pretty large board to have knowledge of one person.

MR. CONANT: The Honourable Mr. Leduc has raised, I think, a very pertinent point. Would the situation be met if we enlarged that board? Mind you, I do not think that there is dereliction on the part of these boards; it is simply the limitation of their own personal knowledge.

A. We think that too, sir.

Q. But, supposing the boards were enlarged in the larger centres, would that meet it?

A. I personally think it would go part way, at least, toward meeting it, because, instead of selecting a board of say, three or four, you would have, perhaps, a selecting board of fifteen, and out of those fifteen, you might get some personal knowledge as to these people. Then, I would add to that the possibility

that after they had selected from it people that they knew would be acceptable jurors, they should have, in addition, the power to conduct certain moderate enquiries into some of the other names to see who they were, what sort of citizens they were and what sort of capacities they had.

MR. FROST: Mr. Fowler, isn't this the situation? At the present time the municipal authorities--I am not just sure how the selection is made as far as the municipalities are concerned, but the municipal people, as I understand it, are supposed to give a list of suitable names to the County Clerk, I suppose it is, or to the Clerk of the Peace.

MR. CONANT: The Clerk of the Peace.

MR. FROST: And then the board of selectors more or less draw these names out, choosing so many to a municipality, and the idea, I think, is this, to remove the selection of jurors from the local people, but the local people are supposed to give the material to work on. They know the men, they know whether a man is deaf or whether he cannot read or write or whether he is blind, and they are supposed not to put such men on. The municipal people are supposed to choose the men. You speak about your problem here, but I think, in most districts, there is reasonable care taken in sending in names. I should think, Mr. Conant, that in Ontario County generally—say from Reach Township or Brock Township —you get a pretty fair list.

MR. CONANT: Yes.

MR. FROST: Perhaps your difficulty comes in, in carelessness in the large centres, where they do not take just that care, but it seems to me the people who have got to be careful are not the board of selectors, who are supposed to draw names at random, more or less, but it seems to me that the people who should correct the situation are the people who know the men, and who are making the original selection, and are providing the grist for the mill, as it were.

MR. LEDUC: The difficulty is for the local men to know all these people.

MR. FROST: Well, how could Judge Parker, for instance, possibly do it, or anybody else?

WITNESS: I do think, Mr. Frost, that it is not really a charge of carelessness that could be levied against them. I think it is something that is inherent in the problem, the size of what you are dealing with and the difficulty of getting the knowledge. That is why I think that the system, perhaps, ought to be improved, both at the municipal level and at the board of selection level, if it is possible to do it. In other words, the board of selection has its means of winnowing the thing out, and it is particularly necessary in a place where you are dealing with such numbers as you are in Toronto. I would personally like to see whatever can be done to improve the municipal selection, by all means, but go on to improve this board of selection with some more personal knowledge in their considerations than we have at the present time.

MR. FROST: Of course, it is going to be difficult as to how that is to be worked out.

MR. CONANT: There is one thought that emerges from this that is interesting to me. I am not passing on it at all, but I think the Committee might consider it. That is the possibility of enlarging the board of selectors, particularly in the larger centres, like the Ottawa district, Toronto, Hamilton, London and Windsor districts. I think that might be considered.

WITNESS: I think it would be of some help.

MR. SILK: May I read you the appropriate subsection of the Act:

> "The local selectors shall proceed *de die in diem* until the selection is completed, and shall select such persons as in their opinion, or in the opinion of a majority of them, are, from the integrity of their characters, the soundness of their judgment and the extent of their information, the most discreet and competent for the performance of the duties of jurors."

MR. FROST: That is the local selectors.

MR. SILK: That is the local selectors.

MR. FROST: If they do their duty, what better could you have?

MR. SILK: It all boils down to the information of the local selectors.

MR. FROST: They know the men. For instance, in the City of Toronto, with a population of say six or seven hundred thousand, supposing there are five hundred or a thousand names given to a board of selectors, possibly that board might know one or two men in the whole thousand. It would be very difficult for them.

MR. SILK: It is impossible.

MR. LEDUC: Then they have what power they need under the Act. Is it not a matter of providing them with the machinery?

MR. SILK: Machinery for investigation.

MR. LEDUC: Yes.

WITNESS: I think so. I think that is one definite thing.

MR. FROST: You mean the local selectors?

MR. SILK: The local selectors, yes.

WITNESS: Then, passing to the question of jurisdiction of the Court of Appeal on appeals from juries, I only have to report that the Board reached rather a division of opinion on that, and I can only give you the opinion of both, both views that were expressed. First of all, I think they were all unanimous that there was no basic sense in the difference between the powers of the Court of Appeal on an appeal on a question of fact from a judge alone, and from a trial

with judge and jury. In other words, the difference in those two rules did not seem to us to be a well-founded difference. There were people on the Board who felt that it was desirable that a finding of fact by either a judge or a jury should be regarded as final, so that on the basis that I was discussing when I was here before, that the answers change their complexion when they get up to the Court of Appeal on paper, to what they have when you hear them from the witness in the box, that in the general interests of justice the finding of fact ought to be, according to this group's opinion, the final job of the trial court, and that the Court of Appeal should only interfere in cases where there was no evidence to support the finding. Then there was another group—and I confess that this was my opinion—that felt that the appeal from the trial by a jury ——

MR. CONANT: Pardon me: Have you got the present law there?

MR. SILK: It is at pages 157 and 158 of your notebook, sir.

WITNESS: That the appeal from a jury finding ought to be exactly the same as an appeal from a judge on a question of fact, that there was no reason why the Court of Appeal could not undertake that, that their powers should not be expanded by putting those two on exactly the same footing. Beyond reporting those two opinions, I cannot be of any great assistance to you.

MR. CONANT: Are you able to tell us, or have you got a record, Mr. Silk, of the law in other jurisdictions?

MR. SILK: Yes. That follows the pages I refer to, sir. The various provinces are dealt with, commencing at page 161. I have the important portions underlined, if you would like me to read them; I was not able to underline them in your copies. In regard to the Province of Alberta, about halfway down:

> "The court shall have power to draw inferences of fact, and to give any judgment and make any order which ought to have been made, and to make such further or other order as the case may require."

The language is generally the same as ours, although I do not know how it works out; they may have construed it a little differently. The passage from the British Columbia law is not very helpful, because it simply transfers and vests in that court the jurisdiction of a former Court of Appeal.

MR. CONANT: What is the practice in England? Do you know, Mr. Fowler?

A. I think Mr. Chitty could give that to us very quickly, the practice in England on these appeals from a jury trial.

MR. SILK: I have it dealt with here, sir, at page 167, some extracts from Halsbury, commencing at paragraph 370, which deals with jury trials, and at 371, which deals with non-jury trials.

MR. STRACHAN: Perhaps Mr. Chitty could tell us the practice in England.

MR. CONANT: What is your own opinion, Mr. Fowler?

A. My own view on this is, that it ought to be made the same on an appeal from a jury verdict as an appeal from a trial judge without a jury.

Q. Of course, the weakness of that is—it is quite obvious—you are setting up the "super-jury", aren't you?

A. You are taking over some of the functions of a jury.

Q. That is the argument against that, of course.

A. But, I would hope that the Court of Appeal would not interfere except in a case where it was preponderantly clear—that is, that there would still remain all the advantage, in a balanced case, that the judgment would not be interfered with.

MR. STRACHAN: Also, as to the powers of a trial judge, there is the same argument.

WITNESS: I personally cannot see, if a man who is supposed to be expert in sifting evidence reaches a conclusion of fact, and they may interfere with that, why twelve men who are not so experienced cannot be interfered with.

MR. CONANT: This phraseology, this formula, has been juggled back and forth a long while, has it not, Mr. Silk?

MR. SILK: No, there has been no change in Ontario since 1913, and at that time ——

MR. CONANT: Well, but wait a minute. I do not mean, statutory, exactly, but ——

MR. SILK: Oh, by the cases, yes.

MR. STRACHAN: In the Supreme Court of Canada.

MR. CONANT: It is really the Supreme Court of Canada dictum now that determines it, is it not?

MR. STRACHAN: They just won't upset the findings of a jury.

WITNESS: Practically speaking, time and again, even under the restricted rule, the Court of Appeal does interfere, and the Supreme Court of Canada reverses the Court of Appeal.

MR. STRACHAN: And reads them quite a lecture.

WITNESS: Frequently, yes.

MR. CONANT: Personally, I am not satisfied with the present situation, but I rather shudder at the idea of trying to develop a formula to remedy it; that is the difficulty.

WITNESS: One other point, and that is ——

MR. FROST: It is a question whether you can find a suitable formula.

MR. CONANT: Well, I don't know, Mr. Frost, I am sure.

WITNESS: This question as to the onus of requiring ——

MR. SILK: Pardon me, Mr. Fowler. Just before you leave that: did you comment specifically on Mr. Barlow's recommendation? I just cannot find it at the moment.

A. Would you leave that until Mr. Chitty comes on? Mr. Chitty has that definitely in mind to speak about.

MR. CONANT: All right, Mr. Fowler.

WITNESS: One other point: as to the onus as to requiring a jury, as to whether that ought to be changed ——

MR. CONANT: What did you say?

A. The question of the onus of choosing a jury—that is, if a man serves a jury notice, should the onus be upon him to defend the notice, or should the onus be upon the person who is seeking to set it aside? That is one of those things upon which we reached this conclusion, that, while in theory, if you change that onus you would be making a real change, in practice we came to the conclusion that probably the change would be pretty minor or probably of no effect, for this reason ——

Q. Don't let me interrupt, but am I not right in this statement, that the number of jury trials has decreased substantially in jurisdictions where they have changed the onus?

A. It may have done; I do not know that.

MR. CONANT: Do you know the answer to that, Mr. Chitty? Is that not the case, that in jurisdictions where they have changed the onus the number of jury trials has substantially decreased?

MR. CHITTY: I could not say as to that, sir; I do not know.

WITNESS: The real point is this ——

MR. CONANT: Have you any figures on that?

MR. SILK: No, I have not.

MR. CONANT: Well, make a note of that, and get some figures on it.

WITNESS: The point we had in mind was this, that in either case, either to-day or under a changed onus, it comes down to the personal views as to the jury system of the judge who hears the motion. For instance, at the present time you serve a jury notice in a sale of goods case: if you move before certain

judges, or the other side moves before certain judges, to set that notice aside, certain judges believe very definitely in the system of trial by jury, and they will go to the extreme to support that; others are not so much in favour of it, and they will be inclined to strike it out if they can. Now, I think that if you change ——

MR. CONANT: Isn't the present system subject to that hazard, if you want to call it that?

A. Precisely; but my point is, sir, that if you change the onus you will arrive, I believe, at the same result, because in the other situation, where a man serves a jury notice in say, a sale of goods case, then he is required to support the jury notice and to prove why he ought to have a jury. If he gets before a judge who is interested in juries and believes in them, he will discharge his onus fairly simply; if he does not, if he gets before one of the other judges, who do not believe so strongly in the jury system, he won't discharge the onus, and the jury notice will be struck out.

Q. I can quite see that that is—I would not say a pertinent observation; I cannot see that it is a serious argument either way, because any matter that is for judicial discretion is subject to that variation.

A. The net effect of what I am saying, sir, is this, that I think you would have a jury or not have a jury in precisely the same cases at the end of changing the onus as you have to-day.

MR. FROST: That is, it does not make any difference in the end?

A. I do not think it makes any difference whether you change the onus, because I do not think you ever get it so evenly balanced that a person's predelictions will not come in.

MR. CONANT: I am not offering the answer, but I think, if Mr. Silk will obtain the figures, they will indicate that with the change in the onus, the number of jury trials has materially decreased in the various jurisdictions.

WITNESS: I think, Mr. Chairman, that ought to be subject to this investigation further, that if, for instance, you were taking the English records where they have made the change, you would have to add in the possible effect of war conditions and so on, which might easily make people avoid a jury, because of interruptions of business and so on.

MR. CONANT: Well, we will develop that a little further. Before you leave that, may I ask your personal opinion as to this question of onus?

A. I personally think, sir, that there would be very little advantage in making a change. May I then leave it to Mr. Chitty to follow me.

MR. CONANT. Thank you, Mr. Fowler. We are greatly obliged to you for coming back again.

WITNESS. It was a pleasure, sir.

R. M. WILLES CHITTY, K.C., Board of Management of the York County Law Association.

MR. SILK. Mr. Chitty, you are also a member of the Board of Governors of the York County Law Association, are you?

A. Yes.

MR. CONANT. Mr. Chitty, you are also editor of the *Fortnightly Law Review*, aren't you?

A. *Fortnightly Law Journal*, yes.

MR. SILK. Shall we take the various matters, then, in the same order as Mr. Fowler dealt with them? That would bring us to pre-trial first.

A. I have not got very much to add to what Mr. Fowler has said. I have a certain amount of personal experience of what they call the summons for directions, in England. My father was, for twenty-six years, a Master of the Supreme Court there, and the summons for directions comes before the Masters of the King's Bench there. In any discussion I ever had with him on questions of practice here, he always said he never could understand why we did not have the summons for direction here, because he considered that the most useful form of practice in the whole of the English practice; he said that they could not get along without it. Whether you call it pre-trial or whether you call it summons for directions, does not seem to me to make much difference; it is all to the same end, which is to see that by the time a case gets to trial the issues are defined, that unnecessary evidence has not to be called, and that the case is ready to go before the judge, so that the pith and substance of what the parties are fighting about, comes up for decision before the judge. We all know here that you go to trial sometimes, and on the pleadings there are no issues defined at all, and the case may go off on a point that has never been thought of by either party, because the judge, when he hears some of the facts, comes to the conclusion that the real dispute between the parties is something entirely different from what they have put on the pleadings. Pre-trial gets rid of all that; summons for directions the same way.

MR. CONANT. How long have they had that in England, Mr. Chitty?

A. Summons for directions? Since The Judicature Act, sir.

Q. That is, in ——

A. 1873; I think the first rules came out in 1875.

MR. STRACHAN. I was going to ask how it works out; what is the procedure, briefly, Mr. Chitty?

A. Well, the old procedure was that the parties before pleading went before the Master.

MR. CONANT. After they were closed, do you mean?

A. No; before pleadings went in at all, went before the Master, and the plaintiff obtained a summons for directions. They went before the Master; there was a discussion of the issues in the case, and what facts could be admitted and things of that kind.

Q. This is after the record is passed?

A. No.

MR. LEDUC. Just after the issue of the writ?

A. Yes, just after the issue of the writ. That is the former practice. Now, they have changed that to bring it to after the record has been closed, with an option to bring it before, in cases where a motion for summary judgment might be in order, and things of that kind, because in the English system, the specially endorsed writ, the appearance is put in the ordinary way, but the plaintiff is at liberty to move, I think it is under order 14 of their rules, for judgment. Our system is slightly different: the defendant puts in an affidavit of merits to a specially endorsed writ, and then the plaintiff has the option of moving under rule 57, but the decisions under that rule have made that procedure rather ineffective now.

MR. CONANT. In other words, most judges send the case on to trial?

A. Yes, because their hands are tied under that judgment of the Court of Appeal, in Bank of Toronto vs. Stone. But it seems to me that some form of pre-trial ——

Q. Pardon me. I am very much interested. You said that after the record was closed, or in some cases before the record was closed, and then we branched on to something else. Now, I think Mr. Strachan and I would be interested to know the procedure from that on. Is that not right, Mr. Strachan?

MR. STRACHAN. Yes.

MR. CONANT. Somebody serves a notice, does he?

A. In every case the plaintiff serves a notice, a summons or notice for directions; the matter goes before a Master, and of course, you have got to remember that in England the Master has a good deal wider powers, because he has not the constitutional difficulty that we have here, that the Master cannot have judicial powers here. The matter goes before a Master, who has all the powers of a judge in chambers, and he discusses all the various questions that are going to come up, he looks at the pleadings, he decides whether ——

MR. LEDUC. You told us that was done before pleadings?

A. No, it is done now after pleadings; there has been a change.

MR. CONANT. Except in exceptional cases?

A. Except in exceptional cases, where summary judgment is in order. He

discusses the pleadings, and sees that on the pleadings as they stand the issues are defined, and if they are not, he orders amendments to the pleadings so as to define the issues. Then he discusses the questions of fact which ought to be admitted, and eliminates from the trial, facts which ought to be admitted, and which it is simply unnecessary for either party to prove, but which, under the system where you have no summons for directions, would have to be proved, because you might come up to the trial, especially under our rules, in which the silence of a pleading is not an admission of any facts pleaded by the other party, the English rule being exactly the opposite, making the silence of a pleading admission of the facts which are not specifically denied. Then, he discusses also, the question of the extent of discovery, whether a notice to produce documents is necessary, whether the submission of interrogatories, which is what they have in England corresponding to our examination for discovery, is necessary or unnecessary, whether the parties shall be at liberty to do that or not, and then finally, usually, they fix the day of trial at that summons for direction. They have the lists, the Masters have the lists, the judges' lists, and they actually fix the date for trial.

Q. Peremptorily, you mean?

A. Well, they put it on the judge's list for that particular day. They know when the judge has got a free time; they know more or less the length of each case, the length each case is going to take, because they have discussed the matter of summons for directions; they have got a fair estimate of the time it is going to take.

Q. As a more or less general observation—because I know you cannot be specific—do you or do you not, think that that shortens trials or simplifies them?

A. It shortens trials and it simplifies them, because the parties, by the time they get to trial, are only fighting the essential points that matter.

Q. And I suppose on that motion, Mr. Chitty, some cases would blow up, wouldn't they?

A. Oh, undoubtedly, undoubtedly!

Q. I mean, be settled or abandoned or something?

A. Exactly, exactly. A lot of these fishing expeditions that are possible under our practice, could never get to trial under a summons for directions.

MR. FROST: Mr. Chitty, do you think that that system of summons for directions would work in our system as we have it here, in our set-up of courts, our set-up of Masters and Local Masters and what not?

A. I think it would.

MR. CONANT: How would you do in the counties?

MR. FROST: I was just wondering about that.

MR. CONANT: You see, in the counties you have got the county judge and

you have got the registrar, and in very many cases the registrar is not even a lawyer. You could not make the county judge the previewing judge or the judge who would hear the summons for directions, because he might afterwards be sitting on it.

MR. FROST: He would have to hear the case. In the counties, if you had that system, you would almost necessarily have to bring over a judge from a neighbouring county to hear the matter.

WITNESS: That would only apply in county court cases.

MR. CONANT: Yes, that is true.

WITNESS: In supreme court cases the county judge would be sitting as local judge.

MR. FROST: Yes, I should think in supreme court cases that it would work fairly well.

MR. CONANT: May I ask one more question before we leave that, because I am very interested in it. What is the conclusion of that motion? Does the Master draw a report, or an order, or what is it?

A. He gives directions in the form of an order, just in the same way, for instance, as the Master gives directions under rule 169 in third-party cases.

Q. And that, of course, goes to the court as part of the record of the case?

A. Yes. I was just going to say, sir, with regard to the objection in the county court cases, I personally cannot see any objection to the same judge sitting on the summons for direction as the judge who hears the case.

MR. FROST: Of course, that is another point. There may not be any objection to that.

WITNESS: There is no evidence before the judge at that time; he is only eliminating matters which are not essential, providing for admissions of this and that.

MR. CONANT: Of course, there is this other angle to it, that under our present system, if it is continued, there is frequent access to a number of county court judges in a district, and if it was required that the judge hearing the motion for directions could not actually hear the case, you could still meet it by one of your itinerant judges acting.

Gentlemen, I see we are honoured by having with us Sir William Mulock. Mr. Chitty, I understand, is willing to retire for Sir William Mulock.

WITNESS: Certainly.

MR. CONANT: We don't want you to go away, though, Mr. Chitty.

THE HON. SIR WILLIAM MULOCK, K.C.M.G. (formerly Chief Justice of Ontario).

MR. SILK: I understand, Sir William, that there are certain things that you desire to say to the Committee, with regard to improving the administration of justice.

A. Who told you I desired? I was invited here. I am pleased to come, to be of any service. What are the subjects on which you wish my opinion?

Q. I have here a copy of Mr. Barlow's report; we are dealing with a good many of those subjects. The first one is the matter of grand juries, as to whether they should be abolished.

A. I favour the maintenance of the grand jury.

MR. SILK: Shall I go down these various items, Mr. Chairman?

MR. CONANT: Yes.

WITNESS: I prefer leaving the administration of justice to the hands of the jury rather than to some official.

MR. SILK: Then, with regard to the matter of petit juries, it has been suggested that there is some need for improving the calibre of the men who are placed ——

MR. CONANT: Just a moment.

Sir William, you are aware that in England they have largely done away with the grand juries?

A. I don't care what they have done in England. I prefer sending a man to trial to a jury of his people, rather than even at the hands of an Attorney-General or some official.

Q. Well, have you any idea as to what actuated them in England?

A. No, I do not know anything about what they did in England nor the reasons for doing it, but it is not a new question with me. I have had an opportunity of considering the usefulness of grand juries. I think there are many things that are referred to grand juries that ought not to be, unnecessarily. The trial judge tells the jury to go and examine these institutions, and so on; that is all nonsense; they are well examined by other officials. In that way you might curtail the length of time that grand juries are engaged in sitting, but I do not believe in taking the administration of justice out of the hands of the people and vesting it in officials.

Q. Well, of course, my observation about England applies in most jurisdictions in the British Empire, Sir William; you are aware of that, are you?

A. I am not very familiar with the systems in many parts of the Empire, no.

Q. I was saying as a general observation, there are comparatively few jurisdictions in the Empire that have retained the grand jury system; you were aware of that, were you?

A. I have expressed exactly my opinion on the grand jury question, and you could not shake me from it, because I have been for thirty years in touch with them.

MR. CONANT: Well, that is quite all right, Sir William.

MR. SILK: It has been suggested, sir, that there is some need for improving the calibre of the men who form the petit jury panel; have you any observations you would care to make on that?

A. Well, if you tell me what changes you have proposed, how to improve the calibre, I might have an opinion. I haven't with respect to that.

Q. Well, it was suggested this morning that there ought to be a special board formed, in for instance the city of Toronto, which would go down the list of jurors who form the panel, with a view to finding out more about each man before he is placed on the jury panel.

A. Yes, that is very important.

Q. Do you think there is any real necessity for that, Sir William?

A. I think it can be improved; I think you could select from a panel.

Q. It has been suggested also that there should be a more substantial fee paid by a plaintiff who desires to have a trial by jury. The fee now is $4. A fee of $25 has been suggested, I think, and the fee I think in Manitoba is either $50 or $100.

A. Yes.

Q. Do you consider, sir, that our fee should be increased from $4 to a larger amount?

A. I have not considered the question, but I do not like anything to take place that prevents people getting the benefit of a trial by jury if they desire it. If you increase the fee abnormally you make it difficult for many a suitor to get a trial by jury. You have to be careful about that. Four dollars—what are the total disbursements involved in an action tried by jury, up to that time?

Q. It would be about $10, I think.

A. The court fees?

Q. I think so, sir; perhaps not that much.

A. A slight increase might not do any great harm.

MR. CONANT: Of course, I think, Sir William, the thought that is behind

it is that trial by jury undoubtedly involves the state in greater expense than a trial without a jury, and it is a question whether the litigant, the individual, desiring that machinery should contribute more to the cost of it. Of course, if it were increased to $25, or even to $50, that would not bear the cost of it.

A. There are comparatively few cases that are tried by jury; a great many are not tried by jury at all. The trial judge himself exercises his judgment to a large extent. I do not know how many, but a very small proportion of the cases are tried by jury, the civil cases—is that not so?

Q. Oh, yes, there are more tried without juries, that is true.

A. A vast number. I think the amount you would gain—how many cases are tried by jury to-day in this province?

MR. SILK: I am sorry, sir; I do not know.

WITNESS: Well, if you knew that you would see what change it would make in your revenue. How many courts are there in the province? One for each county, isn't there?

MR. SILK: Yes, one for each county, and for each district, sitting twice a year in most cases, I think.

WITNESS: Sixty—a hundred and twenty, would there be?

MR. SILK: Yes, I think approximately that, sir. There are more courts in Toronto; there are four jury courts in Toronto a year, I think.

WITNESS: Well, call it a hundred trial courts ——

MR. SILK: Well, there would no doubt be some increase in the revenue; that was not the entire point, though. Do you consider, sir, that the powers of the Court of Appeal should be extended where an appeal is taken from a jury?

A. What do you mean?

Q. Well, there has been some suggestion that the hands of the Court of Appeal are pretty well tied where the appeal is taken from a jury trial, whereas if the case has been tried by a judge sitting without a jury the Court of Appeal in practice has a good deal more power.

A. It is not power; it is discretion. The court hesitates to disturb the finding of fact by a jury where it would not if it was found by a trial judge. It is not a question of power.

Q. So that you do not consider, sir, that there is any need to extend the power of the Court of Appeal in jury cases?

A. It has the power to disturb the finding of fact either by judge or by the jury—by judge or by jury. It respects the findings in a verdict on a trial of a question of fact by a jury more than it does the finding of a trial judge, but it is all in the discretion of the court; you do not require any change in the law.

Q. Then, Sir William, there is the matter of pre-trial procedure. Are you familiar with the term "pre-trial procedure", which they have in certain states of the Union?

A. Never heard of it.

Q. Well, under this procedure the parties are called before a judge.

MR. CONANT. Or the Master.

MR. SILK. No, they are called before a judge in most of the States, sir.

Q. In a somewhat similar proceedings in England they are called before a Master of the Supreme Court, who has the same powers as a judge. Without hearing any of the witnesses, he endeavours to narrow the issues, and in some cases the case is entirely settled and is dealt with at that hearing. If that procedure were to be followed in Ontario it is suggested that it would substantially shorten many of the trial lists, as, for instance, in the Toronto Non-Jury Court, where for some years the list was excessively lengthy. Do you consider, sir, that there is any need in this province for such a procedure as that—or perhaps you have not considered it and do not wish to express any view on it?

A. I have not considered it, and therefore my opinion would be of no value, little or no value. At the same time, I would hesitate, speaking off-hand, to adopt that change. Once the parties have got to the court, I do not approve of the courts influencing them by persuasion or otherwise; they should proceed according to the law and have the case tried according to law. If the judge sitting there has the suitors before him, he can frown and look at them and suggest this and suggest that; that is for the lawyers to do. I think it is an unwise suggestion. Do not attach any weight to what I say on that, sir.

Q. Very well, sir. In Mr. Barlow's report he suggests that there should be an appeal on matters of law from certain boards, such as the Workmen's Compensation Board.

MR. CONANT. Boards and commissions.

MR. SILK. Boards and commissions.

A. Well, I disapprove of vesting absolute power in any tribunal other than the court.

Q. So I take it, then, sir, that you would be in favour of allowing an appeal from all boards and commissions on matters of law?

A. I would have to go into the details to have a real opinion. The drift of egislation to-day, vesting judicial powers in an irresponsible body unskilled in the law, is the destruction of justice, is highly unwise. It might be reasonable —I think the powers vested by the Legislature nowadays in arbitrary tribunals, men who know nothing about the law, is imperilling the rights of the people, the judicial rights. Don't take the right of a man to appeal to the courts from him; that is a general proposition. You may modify that, make references and

so on, trying the facts, but don't leave the administration of questions of law to people who know nothing of the law. That is what you are doing to-day, in England as well as here. The Lord Chief Justice of England has taken a very decided stand and written some very able articles on it.

MR. CONANT. Well, it is even more so in the United States than in England, is it not, Sir William?

A. I do not know how far they have gone in the United States, but that book written by Lord Chief Justice Heward is very instructive.

MR. SILK. "The New Despotism"?

A. Yes. It is a drift in the wrong direction, that sort of legislation, in my opinion.

Q. Now, Sir William, as to the rules of practice, that is, the rules of court, which are now made by the judges, do you consider that there would be any advantage in having several barristers on that committee?

A. No! Nonsense!

Q. Well, I think that is fairly definite.

A. It is.

MR. CONANT. What about the onus as to jury notices?

WITNESS. Put in a whole sheaf of barristers, and they wouldn't have a word to say in the presence of the judges; you wouldn't get any opinions from them.

MR. SILK. Now if I may return to juries for a minute. At the present time any plaintiff who desires to have a jury simply serves a jury notice; it has been suggested that a plaintiff who desires to have a jury at the trial should be required to prove to the judge that it is a case that can better be tried by a jury than by a judge. Do you wish to express any view on that?

A. Well, that question is determined when the case is called on.

MR. CONANT. Mr. Silk, with all deference.

Q. In many jurisdictions, Sir William, they have shifted the onus so that a person desiring a jury goes to the court and gets an order. As you know, the practice now is that a person moves to strike out a jury notice. In many jurisdictions they have reversed that, so that the person moves for a jury order. Have you any views as to that, Sir William?

A. Well, there might not be any harm in an application and the question being disposed of by the judge before you get to court. I do not see any serious objection to that.

MR. SILK. Now, I think this is the last matter, Sir William. Do you know the Lord Chancellor's Committee as it exists in England?

A. No.

Q. Well, it is a committee of the Bench and of the Bar, which is appointed by the Lord Chancellor to study certain matters of law. There is no statutory authority for the committee. There are about fourteen members, about seven judges, I think, and the same number of lawyers, and from time to time they study various matters of law that are referred to the committee by the Lord Chancellor. They make a report to the Lord Chancellor, and in most cases their report is presented to the House of Commons in the form of draft legislation, and in a good many cases it is passed. Do you see certain advantages in such a committee being appointed in Ontario—for instance, to study matters which might be referred to it by the Attorney-General? It might possibly be a committee of the judges of the Supreme Court, without any barristers.

A. I would see no objection to referring to the judges any question as to amendment or improvement of the law, and their giving their advice to the court. That could do no harm, I should think.

Q. And having the judges as a whole make a report to the Attorney-General or the Government?

A. I would think it very advisable. Speaking off-hand, I think it would be very advisable, very instructive and very helpful to the Legislature if the opinion of the courts was taken before changes were made in the law. Is that what you mean?

Q. Yes, that is what I mean, sir.

A. Well, I think it might be very helpful, if it was the judges, but I do not approve of calling in other than those who are sworn as judges to be advising in regard to the law. Let these lawyers and others who have opinions go and present their views if you like, but why tie the hands of the Legislature, and they would be more or less tied.

MR. CONANT: Of course, Sir William, I do not know whether you understood that in England the commission set up by the Lord Chancellor deals only with what might be called lawyers' law, that is to say, not controversial matters, more or less abstruse points which, by variations in judicial interpretation, have arrived at a condition of uncertainty or sometimes an unsatisfactory condition. Now, in England that is all that is referred to the commission by the Lord Chancellor. He never refers what you might consider controversial matters, and his commission deals with the purely legal aspects of it and makes a recommendation to the Lord Chancellor as to what they think the law ought to be. For instance, I think contributory negligence has been referred to them, and the question of liability between joint tort feasors, as to which the Legislature would be in any event largely guided by legal advice. That is the kind of question with which his commission deals, Sir William.

A. That is a commission to advise the Lord Chancellor?

Q. Yes, sir.

A. Not the Legislature?

Q. Oh, no, Sir William, they report there to the Lord Chancellor. As a matter of practice, however, most of their recommendations have been passed on by the Lord Chancellor and have become legislation.

A. That is how it is worked out in England?

Q. That is the way it is, yes.

A. I see no harm in that. Anything that would help the Lord Chancellor form an opinion must be helpful.

Q. Just one more thing, Sir William. Would you care to make any observations as to the advisability of amendments in connection with what we call expert testimony, expert witnesses? There is a suggestion that we might adopt here somewhat the same practice as they have in the Admiralty Courts and in some other jurisdictions, of the expert testimony being given by an expert either agreed upon by the parties or selected by the court, with the view to avoiding the conflict of expert testimony. It is suggested that sometimes here we have two experts on one side and two experts on the other, and so on. Would you care to make any observation on that?

A. I really do not see what you have in view. I know the difficulty in trying questions where it depends on expert testimony, but as to the qualifications of these experts, that is a point, really—I do not know how you will determine a man's qualifications; do you?

Q. Well, of course, in the Admiralty Courts, the Admiralty Judge has an assessor, and the thought is that we might incorporate in our civil practice something similar to that, so that, instead of having expert testimony on both sides, one person would act as expert adviser to the Court on the technical or expert matters that are involved.

A. I have not thought of that sufficiently for my opinion to be of any value.

Q. Of course, if there was no injustice done it would certainly reduce time and expense, would it not, Sir William?

A. Oh, yes.

Q. There is a lot of time and expense involved in conflicting ——

A. I think there is room there for some improvement, but what it should be I cannot say.

Q. Quite. I did not know whether you had any thought off-hand; I did not presume you had considered it at any length. Well, I am sure we are very much obliged to you, Sir William, for coming before us to-day. Have you any observations you would like to add of your own motion, sir?

A. Oh, no, I would not take the liberty of doing that.

Q. Well, we would be very glad to hear any observations you care to add.

A. I suppose you have considered the question of reducing or increasing the number of jurors?

Q. Yes, we have. We would be glad to have your view on it, sir.

A. The judge has a good deal to say as to the number of jurors to be summoned, hasn't he?

Q. That is, the entire panel?

A. Yes.

Q. Yes, sir. But the trial panel is determined by statute, of course. In some jurisdictions they have reduced them to seven.

Mr. SILK: Eight in one: seven in England, I think.

MR. CONANT: In England they have recently, since the outbreak of the present war—last August—passed legislation reducing them to seven, Sir William, I think.

A. Well, I have often thought there were more jurymen loafing around the courts than were at all necessary. If every judge would use good commonsense he could save money by liberating jurymen. If I had a case that was going to last two or three or four days, why keep fifty jurymen waiting till that case is over? The trial judge, if he would—I think they ought to do it—who would give consideration to the taxpayers, would let the unwanted jurymen go home for a few days. Wouldn't that deduct the pay, except the travelling expenses?

Q. Would you care to express an opinion, Sir William, as to whether a jury—a petit jury I am speaking of at the moment—as to whether a petit jury of seven would answer?

A. There is something very sacred in the old twelve-jury system. I think you might very well—with regard to the grand jury, is that quite an item of expense?

Q. Oh, yes.

A. Well, why shouldn't you limit the grand jury to the question for which they originally came into existence, namely, sending suspected men to trial? Limit it to that, let them hear their cases, and then let them go about their business.

Q. Do you think five would be enough, Sir William, for a grand jury?

A. How many are there now?

Q. Thirteen; and it is a majority now, of course.

A. I would think five enough. They do nothing but send the man to trial; that is all they have to do. Limit their duties to that.

Q. But you are reserving judgment on the question of the seven-man petit jury, are you?

A. I do not think I would put—I would not like to put a finger on the twelve-jury system. It has not worked badly, and on the whole it is not a very great expense. Maybe the expense could be reduced. You may adopt some rule, I think, that would call on the judges to exercise their discretion early in the sitting of the court.

Q. Well, thank you very much, Sir William. I am sure we are greatly obliged to you.

A. You are engaged in very important work indeed.

Q. Thank you, sir.

R. M. WILLES CHITTY, K.C. (recalled).

MR. SILK. Mr. Chitty was just saying that he could not see any objection to the same judge sitting on the summons for directions and sitting at trial.

MR. CONANT. That would hardly be consistent, of course, with a recent ruling put out by my own department, that magistrates who are going to try the case should not take the information.

WITNESS. Well, of course, I think that is an entirely different matter. I mean, in criminal cases you deal with things in an entirely different way from civil cases.

MR. LEDUC. In the case of a pre-trial isn't the judge really sitting on two stages of the same trial?

A. Well, I think so.

MR. SILK. Just before we leave the question of pre-trial. I distributed to the members of the Committee a copy of the Report of the American Bar Association, which included a very excellent report on pre-trial procedure. I have endeavoured to digest that report, and my digest is at page 178.

MR. LEDUC. You have read that report on pre-trial, I suppose, Mr. Chitty?

A. I have read part of it.

Q. I was going to ask you this. they mention the summons for directions in the English courts. There was an amendment in 1938, which would be fairly recent.

MR. SILK. With the possible exception of Mr. Justice McTague, I do not propose to call any further witnesses on pre-trial, and I thought if we went over these various headings we might get Mr. Chitty's observations.

MR. FOWLER. I think the Committee did study that when we were studying this question in the County of York Association.

MR. SILK. May I just take the various headings, then, on page 178. The advantages of the system are.

"(a) It narrows the issues;

"(b) it shortens and speeds trial hearings; and

"(c) it avoids trial in cases where a trial is not useful (as where the defence has been entered for purposes of delay only)."

I do not suppose there is any discussion on any of those three matters; they are the three advantages to pre-trial?

A. Undoubtedly.

Q. "2. Pre-trial hearings must be before a judge. (Hearings before a clerk or master are not satisfactory because the judge must have power to dismiss the case or enter judgment by default if the system is to work). It follows that pre-trial hearings must be compulsory and not voluntary."

I may add that I have also a committee report of the New York Bar, in which it is stated that the system was introduced in San Francisco on a voluntary basis, and it died within a period of two months. That report is at page 96 of the notebook.

MR. FROST. In connection with that paragraph 2, Mr. Silk, as just read by you, do you think that would make any difference to your suggestion of the introduction of the English system here? In the matter of masters hearing these matters, do you think that would make a difference? Do you think if there were to be some sort of pre-trial arrangement here that it should be before a judge?

MR. SILK. Mr. Chitty pointed out that the master has a good deal more power in England.

MR. FROST. In England, yes; but in applying that to our country here, in this province.

WITNESS. I think you could get ninety percent of the advantages that Mr. Silk talks about by summons for directions before a master. I do not think it is essential that the person hearing the summons should have power to dismiss the action.

MR. STRACHAN. Do you think our master could possibly handle the number of hearings on top of his other work, Mr. Chitty? He is a pretty busy man.

A. I think the saving of time in other directions would enable him to handle the work, because there would be a tremendous saving of time.

MR. STRACHAN. There would be a saving in the various interlocutory applications.

WITNESS. Yes.

MR. CONANT. We have already three assistants.

MR. STRACHAN. Well, one is assigned to mechanics' liens.

MR. FOWLER. May I break in at that point? It does seem to me that there may be a constitutional question involved here, that on this pre-trial matter the master may be performing judicial functions in a way as to which there is no question raised in England, whereas here we might find that the procedure inaugurated, if the master were doing it, might be found to be an unconstitutional act. I think that constitutional question ought to be considered with considerable care by the law officers.

MR. SILK. May I read a short extract from the report of the Committee of the American Bar Association, at page 25, column 1:

> "The advisability of having the pre-trial hearing conducted before a judge, with full power (as limited by the rules) to dismiss a case, or enter judgment of default, cannot be disputed. It is only when the pre-trial hearing is held before such a magistrate, for example, that the parties could be expected to reach an agreement as to the reasonableness of a doctor's bill, or of a garage bill, in a tort case. Similarly, unless a judge is in command it would be impossible for the parties to be required to make a binding election as to whether or not a physical examination of the person of an injured tort complainant would be required."

In other words, all these matters would be subject to review by the trial judge, and there would be nothing definite or conclusive about the pre-trial here.

Then number 3:

> "3. The pre-trial judge should preferably not be the trial judge. (Parties might feel prejudiced at trial if a settlement had been made at a pre-trial hearing before the same judge. It follows that the success of the system in a one-judge court would be doubtful.)

With our County Court districts I do not think we have any one-judge courts in the province.

Q. Have you any observations with regard to that, Mr. Chitty?

A. Nothing except what I said before, that I do not see that at all, because there is no evidence before the judge, and there can be no possible prejudice. It is only part of the mechanics of getting the case down to trial. If your pre-trial system is going to develop into a system of endeavouring to force settlements, which it seems to me is the great danger of pre-trial, then I can quite understand this objection, but as long as you confine it to a matter of settling issues, eliminat-

ing evidence, and seeing that the case is in shape to be tried if it has to be tried, then I do not see that there is any objection to your going before the same judge on the summons for directions or the pre-trial as you go before on the trial of the action itself, and all the advantages of summons for directions or pre-trial lie in getting a case ready for the proper trial rather than in bringing cases up which ought to be settled and then making the parties settle, because that is not the procedure, it was never intended for that purpose, and we all know as lawyers the difficulty we have had with some judges; I do not think there are any to-day, but there used to be judges who would take you into their room and make you settle cases; we all know that difficulty.

MR. CONANT: I would not admit the knowledge officially, Mr. Chitty.

WITNESS: No, I don't suppose so, but unofficially I think you could take judicial notice of it.

MR. SILK: It all boils down to this, that when the trial judge has knowledge of any offers of settlement, it makes very little difference, in your opinion?

A. I do not think, with a judge alone, with any judge on the Bench to-day, it would make the slighest difference whether he knew there had been offers of settlement or not.

Q. "4. The system is more adaptable to large centres than elsewhere."

I may add that, according to this 1938 report, rules were to be passed in 1938 which could be made to apply to all the Federal District Courts. I do not know whether those rules were passed or were invoked generally or not. At any rate, it seems to me in the province of Ontario our big difficulty would be to furnish judges who would go out on circuit to take pre-trial hearings.

A. Well, I think you could eliminate that, as I say, by using the local judge and the master ——

MR. CONANT: Mr. Chitty, there does not occur to me to be any reason, but I was wondering if you could think of any difficulty that would arise, supposing we were to make this effective in what you might call the larger jurisdictions, Ottawa, Toronto, Hamilton, London and Windsor, would there be any conflict or any difficulty arise from that? Can you think of any?

A. I cannot think of any, sir.

MR. SILK: In most of the jurisdictions in the United States, sir, where it has been brought into force it has been tried out first of all in the larger centres—the cities of Detroit, Boston, Los Angeles, San Francisco.

MR. STRACHAN: How long a procedure is it? I suppose it is hard to say. Take our non-jury list, for instance; we always have at least four or five hundred cases on it. Isn't the Master's Office at Osgoode Hall going to be pretty congested, even if he put them through averaging ten or fifteen minutes? It would take at least half an hour, sometimes an hour. It seems to me there is not going to be much time for the master to do his other work.

WITNESS: Well, how many of those four or five hundred cases are undefended divorces?

MR. STRACHAN: Quite a few of them.

WITNESS: Well, you would not need any procedure in that case. Once you have got your system working, it seems to me—in the first place, you would not have four or five hundred cases on a non-jury list, because most of them would have disappeared before they got there, or a great many of them would have disappeared before they got there.

MR. SILK: I see a note in the same report to which I referred, of the American Bar Association, to the effect that the pre-trial hearing need not usually last over ten or fifteen minutes, which is a surprisingly short time, I think.

MR. FOWLER: You might easily avoid, too, the business of having another motion in the same case which would take half an hour, if you had your pre-trial procedure.

MR. CONANT: "5. The hearing should follow close of pleadings." We have discussed that, excepting in exceptional cases.

"6. The hearing must be informal with no reporter present." That would appear to be obvious.

"7. Pre-trial procedure should be dealt with in rules of court."

MR. SILK: Rather than by statute; that is a general observation on this report.

MR. CONANT: Of course it can be dealt with by statute; there is no doubt about that. It could be made part of the Judicature Act.

MR. SILK: I think in the United States a good many of the courts have full power to make rules on all matters, so that they can very easily make pre-trial rules without further authority.

WITNESS: That does not make much difference, because your rules have the force of statute anyway.

MR. CONANT: Quite. We can override them by statute.

MR. SILK: "8. The system has usually been invoked where trial lists are very much in arrears." The prime example of that was the original jurisdiction where they had pre-trial, in the city of Detroit, where the lists were forty-five months behind, and in Boston I think the lists were something like two years behind. Just referring to the report, before I conclude the matter of pre-trial; I notice that in Boston out of 10,700 actions 2,700 were settled at pre-trial. that is about twenty-five percent.

MR. CONANT. There would not be anything on record as to the extent to which pre-trial had shortened the trial of cases; there would not be anything on record as to that?

MR. SILK. Except that in the city of Detroit it has brought the list right up to date now, I think, whereas it was almost four years behind. In the city of Boston it has had the same effect.

MR. CONANT. You made an observation there, Mr. Chitty, with which I was rather struck, as to the danger of pre-trial being used to force settlement. I agree with you that there might be a danger there. Is there any way of avoiding that at all?

A. Well, if you give the jurisdiction to the master I do not think there would be any danger whatever, because the master could not force settlement; and you could eliminate your difficulty with regard to the statement that Mr. Silk read from page 25 of this report, about the judge must have power to dismiss the action, by enabling the master to make a report in cases where he felt that the action ought to be dismissed.

Q. That is the way you could meet this question of jurisdiction?

A. And then it could go to the judge.

Q. Just as we do to-day. I have in mind—don't check me too closely—in some cases matters are referred to the master or to a local judge by a Supreme Court judge, and he reports on it back to the court, but it must finally become a judgment of the court.

A. Exactly.

Q. Could not this jurisdiction aspect of it be met in the same way?

A. I think so, I think so.

MR. FROST. What, if any, appeal is there from the finding of a master in connection with these pre-trial matters?

A. I suppose you would have the same appeal that you have from any matter of practice before the master, and in the case of a report by the master of course it must be confirmed, and the rules provide that before a report is confirmed either party may appeal from the report. In the case of a finding of a master, for instance, striking out parts of a statement of claim or something of that kind, there is an appeal to a judge in chambers.

MR. SILK. I think if an appeal is given from a pre-trial hearing the pre-trial is going to lose many of its advantages; it is going to complicate the procedure and add to the cost.

MR. FROST. What if the master makes a finding which is manifestly unfair and has the effect of depriving a plaintiff or a defendant of his rights? Then is there no right of appeal?

MR. SILK. I think the proper place for that to be dealt with, Mr. Frost, would be at the trial, by the trial judge.

MR. FROST. That is in effect, then, really a right of appeal, is it?

MR. SILK. Yes. What I had in mind was, if it was to be an appeal to a judge in chambers or in weekly court it is going to add to the number of hearings.

MR. FROST. Mr. Conant, what was the demand for pre-trial, if there has been any demand? Is it because of situations existing here in Toronto, or is it general?

MR. CONANT. Oh, no, Mr. Frost. It arises from the general desire, for which if you want you can make me responsible, to expedite and reduce the expense of the administration of justice; that is the whole thing.

MR. FROST. I mean, it is directed to all of our courts?

MR. CONANT. Oh, yes.

MR. FROST. It is not just because of difficulties that you are having in some courts, as to getting cases tried?

MR. CONANT. Oh, no.

MR. STRACHAN. You say, Mr. Chitty, that in all the courts pleadings are sometimes drawn so that the judge is at a total loss to know what a case is about —sloppy pleading—and that would obviate it?

A. Exactly. I can tell you of a recent instance of that, where two counsel both got a brief on a case, on the opposite sides of the case, and they did not get it till the morning that the case was coming up for trial; both looked through the pleadings, and both discovered that neither party had seen what the issues were, the solicitors had not seen what the issues were between the parties at all, and, further than that, both discovered that there was no dispute between the parties at all on the law as it stood; they went out and settled the case in ten minutes, before the court opened, because there was not any fight.

MR. STRACHAN. And there are hundreds of instances.

WITNESS. There are cases of that kind.

MR. CONANT. Of course, one of the defects of this pre-trial system is, those counsel could not obtain the fee that they got in such cases.

WITNESS. No, but, on the other hand, they would not be faced with situations like that.

MR. FOWLER. Mr. Chairman, we would probably have more cases, too, because people would be more willing to go to law.

WITNESS. I think that is the whole aspect of this pre-trial or summons for directions, that it puts a certain amount of sort of business aspect into the handling of cases before the courts.

MR. CONANT. What is the next branch, Mr. Silk?

MR. SILK. The next matter with which Mr. Fowler dealt was improving the calibre of jurors.

Q. Have you any observations?

A. I cannot add anything to what Mr. Fowler has said on that point.

Q. Then what about the onus for requiring a jury trial, or where a jury trial is required?

A. I think just as Mr. Fowler says, you can change the onus and find that you would effect no change in the practice.

MR. SILK. Of course, that is not so.

MR. CONANT. Frankly, I find it difficult to subscribe to that view, because the onus is always a very important factor, is it not, Mr. Chitty?

A. Not in a matter like that, which is purely a matter of discretion in the particular judge before whom it comes. If he is in favour of juries you will get a jury every time; if he is not ——

Q. The judicial mind, though, is always impressed with the question as to where the onus lies; you hear long dissertations on that.

A. But on the other hand, sir, I think you will find that if you change the onus you will get a lot more judges sympathetic with people having juries than—I mean, judges who might to-day strike out a jury notice, if you shifted the onus they would be rather inclined to give the jury to the man who wanted it. It depends on the judge.

MR. SILK: I think it was agreed at the spring sittings of the Committee that it would not make much difference unless we laid down a rule as to the type of case which should be tried by a jury.

MR. CONANT: Well, let us strip this thing of some of its surplusage. Don't you think that changing the onus, Mr. Chitty, would have a tendency to discourage those cases, of which there are some no doubt occur, that have been launched with a view to getting to a jury and perhaps getting a brand of justice that would not otherwise prevail?

A. I think you would get those same cases. They might fade out when they failed to get the jury, if they did fail to get the jury.

Q. Yes, but don't you think that if there were in this province any solicitors who were supposed to launch actions with that in view, they would think twice before doing so if at some stage they had to go and get a jury order?

A. I doubt very much whether you would have very much effect there. I think they would start off with the same sort of optimistic point of view, that they would get their jury in the end. As Mr. Fowler says, they would certainly make the effort to get it.

MR. STRACHAN: And they would get it, just the same as ——

WITNESS: They would pick their judge and get their jury just the same.

MR. CONANT: Those questions about picking their judge—I do not like to see them going on the record so freely and so often.

WITNESS: Perhaps I was a little too outspoken on that. My feeling, sir, is that these questions with which we are now dealing are solved by the third point, which is the question of the powers of the Court of Appeal.

MR. STRACHAN: Yes, I think so too. I think that solves your difficulty about the type of jury and everything else.

MR. CONANT: What is the next point, Mr. Silk?

MR. SILK: Extending the powers of the Court of Appeal in appeals from jury actions.

WITNESS: Of course, speaking from the point of view of the York County Law Association, I can only say what Mr. Fowler said, which is that there was a divergence of opinion on that, and the opinion was very markedly divided, and we came to no real conclusion, but my own view coincides with that of Mr. Fowler ——

MR. CONANT: Let us have that view again.

A. Well, my view is that the Court of Appeal should have the same power to deal with the findings of fact of a jury that it now has to deal with the findings of fact of a judge sitting without a jury.

Q. I indicated before that the present rule of law (let us call it) is pretty narrow, but what formula would you develop? How far would you be disposed to go in relaxing the present rule, if that is a correct way of putting it?

A. Well, some years ago I discussed this matter with Mr. Justice Macdonell, and ——

Q. That is, the late Justice Macdonell?

A. That is, the late Mr. Justice Macdonell, yes, Norman Macdonell. We drafted an amendment to what was then section 26 of the Judicature Act, practically in the words that I gave you just now, and that amendment was sent up by Mr. Justice Macdonell to the then Attorney-General as a suggestion as to an amendment which would eliminate this continual fight between the Court of Appeal and the state of the law of the Supreme Court of Canada, whichever way you like to put it.

MR. STRACHAN: Mr. Barlow suggests that subsection 1 of section 26 be amended to read:

> "The Court upon an appeal may give any judgment or verdict which ought to have been pronounced."

WITNESS: Well, my feeling is that that does not achieve the purpose, that it is not specific enough, and that a subsection should be added to that section, simply saying that the Court of Appeal shall have the same power to deal with findings of fact of a jury that it now has to deal with findings of fact of a judge sitting without a jury.

MR. CONANT: And you would not limit it to perverseness or any other qualification?

A. No, I don't think so. My own personal opinion is that if you do that, then you get down to the English system, in which the findings of fact of a trial judge sitting without a jury are treated very much the way that the Supreme Court of Canada now treats the findings of fact of a jury; that is to say, they won't reverse a finding of fact unless they can find that there is a tremendous preponderance of evidence against it, or, for instance, that the oral evidence which the trial judge has accepted does not fit in with the documentary evidence, or something of that kind. The continual fight in the Court of Appeal these days seems to be to reverse the jury's findings if they possibly can, because their hands are tied in that respect and have been tied by decisions in the Supreme Court of Canada, or at least they say they are findings in the Supreme Court of Canada; as a matter of fact, the House of Lords has endorsed all those findings in the Supreme Court of Canada, and the Court of Appeal, while pretending to fight the Supreme Court of Canada, is actually fighting a finding of the House of Lords.

Q. Of course, there are the two aspects, I think, that this Committee has to consider: one is the aspect of the administration of justice and the ample opportunity for review as part of the administration of justice as a more or less abstract theme, but there is also this other important aspect, that if you open the door as wide as you are suggesting, Mr. Chitty, would you not be encouraging appeals in almost every case where a jury had spoken?

A. I do not think so, sir, I do not think so, because I think you will find that your Court of Appeal would come around and adopt a much stronger attitude with regard to findings of fact than they do to-day. That is to say, that they would be much more inclined to accept findings of fact in all the trial courts, whether with or without a jury, than they are to-day, because under the present system, their hands being tied in one respect, they are rather inclined to feel that they must review the facts in every case.

MR. STRACHAN. It would also have the effect of discouraging cases where the plaintiff knows if he can get to the jury and get a verdict that is the end of it.

A. Exactly.

MR. FROST. Generally in appeals from a judgment of a single judge the courts usually take the view that a judge, having seen the witnesses and so on—I mean, it is only in very unusual cases that they do interfere, is it not?

A. Exactly.

Q. Where there is an absolute preponderance of evidence against the judge's finding?

A. That is certainly the case in England, and to a great extent it is the case here.

Q. And you think that if that were extended to juries the courts would obviously take the same attitude, that unless there was such a preponderance of evidence that the jury's decision was ridiculous they would not interfere with it, they would say that the jury, having seen the witnesses, were in a better position?

A. Exactly; I think so. And may I say in this regard at this point that the Court of Appeal made the heaviest complaint recently in a case where the jury was a special jury and you could not possibly question the calibre of the men on that jury, and yet the Court of Appeal were more critical of that jury's findings than they have been of juries' findings for quite a while; yet that, as I say, was a special jury, with men of the best possible calibre that you could get. They actually reversed the finding, and the Supreme Court of Canada restored it. But it seems to me that if you are talking about calibre of juries and things of that kind, the basic trouble at the present moment seems to be the question of the powers of the Court of Appeal, and that once you have solved that problem you have solved the other problems with it.

MR. CONANT. Well, what is the next theme, Mr. Silk?

MR. SILK. That is all Mr. Chitty has. I was going to call Mr. Thompson, and then Mr. Cadwell.

MR. CONANT. Well, wait a minute. Have you any views on this question of expert testimony, Mr. Chitty?

A. It seems to me that the danger of that, sir, is that you may get a sort of class of professional assessor or people to assist judges of that kind who will build up a reputation for themselves without having any too much knowledge. I think it is a little dangerous, perhaps. The courts do not seem to have any great trouble with this question of expert evidence, and I have never been in a case where there has been any tremendous conflict between the experts on the one side and the experts on the other, with skilful cross-examination.

MR. CONANT. Didn't we have a case here recently involving the installation of equipment in the Stock Exchange that went on for days, if not weeks, and it was largely a question of expert testimony, was it not?

MR. SILK. Mr. Justice Roach had an expert on the bench beside him. Mr. D. L. McCarthy told of one ——

MR. CONANT. Yes, but that is not the procedure that we are discussing.

MR. SILK. No. They still had a great number of experts on each side.

MR. CONANT. Would not all parties be just as far ahead—perhaps not in that case; I only brought that to mind—if when you have technical matters to determine an expert were agreed upon by the parties or appointed by the court, and his finding on technical matters would prevail? Wouldn't you be just as far ahead, Mr. Chitty, as you would be after calling—what is it? Is it three you are allowed now?

MR. SILK. Three in some cases and five in some cases.

MR. CONANT. Well, whatever it is, each party calls all the experts he is allowed, and you have a horrible volume and confusion of expert testimony, and the judge has got to try to sort that out; would you not be farther ahead if you had some person to do that?

A. I do not think you would, sir, because fundamentally the judge has got to make the decision. The danger perhaps is not so real as the appearance of the danger, and that is, parties would feel that if they were not allowed to call their own expert witnesses, the man to whom the court referred was biassed against them, or something of that kind. Somebody said it is more important that justice should appear to be done than that it should actually be done, and it is the appearance of the matter that seems to me to be the danger of the thing; besides which, as I say, finally the judge has got to make up his own mind, and it does not seem to me whether he has got to make up his mind on the evidence of one man or on the evidence of half a dozen makes much difference.

Q. Now, one more point, although you may be diffident about answering my question, in view of evidence we have had this morning. Have you any observations to make regarding the rule-making body of the courts?

A. Well, sir, if you look into the history of that matter you find that lawyers, barristers, lawyers not members of the Bench, have been members of committees for a great many years in this province. There were members on the committee that made up the rules in 1897; there was a body consisting of judges and lawyers from 1897 till I think 1910, when Mr. Justice Middleton was appointed a commission of one to revise the rules that came out in 1912. Then it seems to me that even after that there were lawyers on the rule-making committee, and, with all deference to the judicial opinion on the subject, my feeling is that the judges ought to welcome the assistance of men who in a month's practice handle more rules than they perhaps do in five years on the Bench.

MR. SILK. There was a point raised by Mr. Fowler at the last sittings which was not on the agenda; that is, that the answers given by an officer of a corporation on an examination for discovery should be binding on the corporation. Have you had occasion to consider that, Mr. Chitty?

A. I do not think I could add anything to what Mr. Fowler has said. It has always seemed to me to be a very difficult question that is raised there, but I cannot see, if the officer can bind the corporation in every other way, which he can, being the agent for it, why he should not bind it by his answers on examination for discovery.

Q. Mr. Fowler made another suggestion regarding examinations for discovery, if I remember correctly, and that was that a case should not be permitted to go on the trial list until the examinations have been completed, because that is a popular excuse for not being ready to go on.

A. Well, if you adopt the summons for directions or pre-trial, all those points would be eliminated.

Q. That is right.

MR. CONANT. You would see that there was an order.

WITNESS. Exactly. That is another advantage, of course, of pre-trial or summons for directions, that there are a great many cases where your examination for discovery is wholly unnecessary, and yet the parties examine, and just pile up costs, and get nothing on the examination for discovery, and it is never heard of again.

MR. SILK: There is just one more point that was raised by Mr. Leduc the other day; we have not had any expression of opinion on it. That is the fact that to obtain an increased counsel fee it is necessary to come to Toronto; there is no power in a local taxing officer to grant an increased counsel fee. It means a good deal of business for the lawyers in Toronto, but it is very inconvenient for counsel at outside points. Have you ever considered that matter of taxation, Mr. Chitty?

A. I have never been able to see why the local taxing officer, subject to possibly a right of appeal to the taxing officer in Toronto, why the local taxing officer should not have full powers to ——

MR. CONANT: Why should not the trial judge do that in all cases, Mr. Chitty?

A. I do not think they would welcome being handed the power.

Q. That may be the case, but ——

A. Of course, it is done all through the west.

Q. Here is a judge who has heard all the facts and knows the merits and demerits and all the rest of it; now, what better person is there in the world to pass on the merits of an increase in counsel fee?

A. I quite agree. You see all the western judgments coming in, as I did when I was doing the Dominion Law Reports; the counsel fee was always at the bottom of the reasons for judgment. It is done all through the west. I never studied the practice on that point, but I do not see why it should not be done the same way here.

MR. FOWLER: On that point, may I just add—that was not up when I was giving evidence—I don't know whether Mr. Chitty has ever lived in a small Ontario town, but I do think that there is a factor coming into that question of increased fees by the local taxing officer which is of some importance, and that is that you really need to protect the local taxing officer against his friends, who are friends in the profession in that smaller town.

MR. CONANT: That would not apply to the judges.

MR. FOWLER: Oh, no, not to your suggestion, but to the question that Mr. Silk asked.

MR. LEDUC: Of course, that would be subject to appeal, Mr. Fowler, but

I think it is ridiculous for a man in Toronto or Hamilton not to be able to get more than fifty dollars counsel fee unless he instructs an agent in Toronto.

MR. CONANT: Mr. Chitty, one more question. You know something of the law revision committee in England set up by the Lord Chancellor?

A. Yes, sir.

Q. Have you any observations to make on that?

A. I think we undoubtedly should have something of that kind here. One of the things, for instance, that stands out in my mind at the moment is that owing to their efforts the ruling Shelleys case was abolished in England. It ought to be abolished here, I should say, because, as a great many of the judges have said, it defeats the intentions of the testator more often than it carries them out. That would be the sort of thing that could be done if you had a ——

Q. It would be proper for such a committee to consider?

A. Yes. One of the troubles with the law to-day is that it progresses slowly, and the public seem all the time to feel that the law is not up to date. If you had such a committee sitting all the time, and having any little point or large point that comes to the Attorney-General's attention referred to it for report, then there would be a tendency to keep the law far more up to date, far more progressive, than it is now. It was my suggestion which I threw out the other day that in 1873 and through a little later here we had the Judicature Act, which combined the various divisions of the Supreme Court into one Supreme Court, and that very well that principle might be extended to all the courts, a Judicature Act for all the courts, carrying the inferior courts into the superior court and making them simply divisions of the one court and co-ordinating and consolidating the procedure, eliminating the question of County Court jurisdiction and Division Court jurisdiction, because each court would be a division of the one main court, and in that way each case would fall into its own proper sphere and it would not matter whether the County Court had jurisdiction up to $500 or $1,000, because it would be a part of the same court, each case would just fall into its little niche according to the amount claimed or something of that kind, and it seems to me that some sort of procedure—I may be twenty-five years ahead of my time in suggesting this thing, but something like that is going to come.

MR. LEDUC: Is that not somewhat the system they have in Quebec, where one court deals with all cases over $100?

MR. CONANT: The Superior Court, they call it, don't they?

A. Yes.

MR. SILK: There is no division of that court, is there?

A. There are no divisions of that court, and my suggestion is perhaps a little broader than that; but that is a point that even this Committee—and I am not saying anything derogatory of the Committee at all, but it is a point I

do not think this Committee could deal with here, because, while you are all lawyers here, and I think all the Committee are lawyers, if I remember rightly, you have not got the time to go into those things.

MR. CONANT: It is a big question.

WITNESS: It is a very big question. It might very well be dealt with by a law revision committee.

MR. FROST: At the same time, it is a good objective. I mean, supposing it were to be done, for instance, next year, the result would be that the statutes would be all out of line, there has just been a revision, and so on, but if it were made to take place say about 1947, when there is to be in the ordinary course a new revision of statutes and all the rest of it—I mean, taken as a long-range objective it could probably be worked out, and I think myself it is probably the right thing.

MR. SILK: Mr. Frost, if you propose to have all the statutes revised, I think you should appoint the committee at least ten years in advance.

MR. FROST: Well, you are going to meet that situation. For instance, if you consolidate all the courts, take the tremendous number of changes there have been in the statutes ——

MR. SILK: I thought you meant the law revision committee; you mean the court revision. I see.

MR. CONANT: Is there anything else you care to comment on?

A. I don't think so.

MR. SILK: I was just going to ask, Mr. Chitty, in connection with the law revision committee, do you consider all the judges of the Supreme Court would be an appropriate law revision committee, or should there be a representation of the Bar on the committee?

MR. CONANT: Well, may I just revise the question to this extent. In England it is a mixed committee, isn't it?

A. Yes.

Q. Members of the Judiciary and members of the Bar. What would you have to say regarding the constitution of that committee?

A. I would suggest that it should be a mixed committee. Whether that would be acceptable to the judiciary or not I am not sure.

MR. CONANT The question is, would the lawyers be afraid to speak?

We will adjourn until 2.15.

MR. SILK: I have arranged with our witnesses to come at two o'clock every day.

MR. CONANT: Well, adjourn until 2.15.

Adjourned at 12.45 p.m. until 2.15 p.m.

On resuming at 2.15 p.m..

ROBERT JAMES MACLENNAN, K.C., Solicitor for the Sheriffs' Association of Ontario.

MR. SILK: Mr. Maclennan, you are the solicitor for the Sheriffs' Association of Ontario, I think?

A. I have been for a number of years.

Q. And also for the sheriff of York County?

A. Yes.

Q. There are three or four matters affecting sheriffs about which I wanted to ask you. One which you mentioned to me just now was Mr. Barlow's recommendation that there should be a central place of execution in the province?

A. Yes.

Q. Had you something to say about that?

A. Well, that is one to which the sheriffs have given a great deal of attention, and endeavoured to have something done at Ottawa.

Q. That is page B26 of Mr. Barlow's report.

A. But without success there. That is, the sheriffs would like to have an official executioner, so that there would not be this fear in their minds when a sentence has been passed that there is nobody in sight to attend to it, but the authorities say that is a provincial matter.

MR. CONANT: What are the advantages of it? What are suggested as the advantages of it?

A. The chief thing is to have the execution take place in some central prison, not scattered over the province.

MR. STRACHAN: The fear of the sheriffs, Mr. Maclennan, is that if some person who is a professional executioner does not turn up, under the statute the sheriff will have to do it?

A. The sheriff will have to do it himself, or his deputy.

MR. SILK: It is suggested in Mr. Barlow's report that there are four advantages.

> "1. It would save the expense of and obviate embarrassing difficulties of sheriffs in providing a scaffold, death watches, etc., in county jails.
>
> "2. It would prevent the embarrassment and anxiety of a sheriff in obtaining an executioner.
>
> "3. It would prevent the undesirable morbid excitement that is aroused in smaller places when there is to be a hanging.
>
> "4. It would solve the question of appointing an official executioner. A man could be appointed who could have other employment about a provincial prison and who would always be available."

I understand that, as regards number 4, the official executioner is now employed at the Assize Courts every day; isn't that right?

MR. STRACHAN: He used to be outside a door, but I do not think that exists now.

WITNESS. There is another reason that Mr. Barlow did not put in his report, that was in the memorandum that I sent him; that was this, that the moral effect of a hanging would be much greater in the prison, where there are a large number of hardened criminals, than it would in a county gaol, where, if there are any prisoners, they are for minor offences. That was another reason why.

MR. LEDUC: Wouldn't that mean having the executions in a penitentiary?

A. No; then you are getting on Dominion grounds. What they have done in Manitoba—you have had that before you, I suppose?

MR. SILK: No.

WITNESS: The clause in the Code says (sec. 1065):

> "Judgment of death to be executed on any prisoner shall be carried into effect within the walls of the prison in which the offender is confined at the time of execution."

In Manitoba the Attorney-General arranged with the judges to provide that their prison called Headingly, outside of Winnipeg be a central place, so that when a judge in Manitoba at an assize has a sentence of that sort to pass he commits the prisoner to this one prison; they all go there, not in the county gaol, so that is a simple way of getting ——

MR. CONANT: Of course, when you come down to the practical instance of it, it would mean creating a new centre some place or other?

A. Well, what they did in that prison was to just have a set of cells that would not be next the others, and a chamber.

Q. Did they already have a prison there?

A. Yes, like the prison at Guelph, something of that sort, a provincial prison.

MR. SILK: I think that would be very unpopular with the people of Guelph.

WITNESS: Well, it would be, but still ——

MR. CONANT: I more or less casually mentioned this thing to the Provincial Secretary one day; he said it might be a splendid idea, and suggested that they do it in Whitby. I would pass that on, and suggest that we do it in Lindsay; it would be an admirable place for it.

MR. LEDUC: Quite central.

MR. CONANT: Yes, quite central.

WITNESS: Another trouble that is experienced in the county is that they don't want to keep their scaffold and all that all the time, so when the prisoner is sentenced there is probably no apparatus at all, and when they go to get their lumber for it nobody will sell it to them, and no carpenter will take the job of building it.

MR. CONANT: What is the next point?

MR. SILK: Three headings under "Procedure in the Sheriff's Office." The Committee has disposed of some of the headings. Sub-headings numbers 1, 3 and 6 remain. Under sub-heading 1 Mr. Barlow says:

> "If a write of execution against goods is to be enforced by a sheriff with the minimum of delay and expense, all information in connection therewith should be immediately available to the sheriff. At the present time to ascertain the necessary information a search must be made,"

and he states the various offices: the Sheriff's Office, the Land Registry Office, the County Court Clerk's Office, and the Office of the Assistant Receiver-General. Then he says:

> "It would appear most logical to have all these registrations made in the County Court Clerk's Office where one search could be made and one fee paid."
>
> "*I recommend* that the necessary amendments to the various statutes be made to provide for the registration under all these Acts in the County Court Clerk's Office."

Q. Have you any comments as to that proposal?

A. That is the sheriffs' suggestion, that the County Court Clerk's Office—most of them are there now, but to have in the Land Office a registration of the partners in firms, when you want to find out about that, seems to be anything

but a logical place. But there is another thing, where the double jurisdiction comes in there; that is, under section 88 of the Dominion Bank Act, when a man in business wants to get a loan, the bank will make it on his signing a lien of some sort which is registered in one place in the province, that is, in the Receiver-General's Office, so that anyone in any county wanting to know about that has got to communicate with there, and it seems to me that the Attorney-General's Department might persuade the Ottawa authorities to amend the Bank Act in that section and have these liens registered in our County Court Offices. It would be worth trying.

MR. CONANT: Well, is it always possible to determine the local jurisdiction?

A. Where the merchant and his goods are would be the place.

MR. CONANT: Well, of course, that is a simple case, but sometimes the transactions have far greater ramifications than a merchant in one town.

MR. LEDUC: Goods may be transferred from one branch of a company to the other.

WITNESS: I think loans of that sort are mostly on goods in a factory or something of that sort.

MR. CONANT: Well, mostly, but not entirely.

MR. STRACHAN: We would have to enlarge our County Court Clerk's office in Toronto considerably, Mr. Maclennan, wouldn't we?

A. Oh, no; there are quite a number every year of those, of course.

MR. CONANT: I am not sure that some day we won't have to come to the point of central, perhaps duplicate, but included in the registration central registration of all these things—conditional sales agreements and all that sort of thing—because under present conditions the mobility of assets is so great that registration in one county does not mean anything.

WITNESS: You can load on to a large truck everything a man has got, and have it across the border.

MR. SILK: That applies particularly to encumbrances against motor vehicles.

MR. STRACHAN: Yes; you would have to search in every county office in the province.

MR. CONANT: We were dealing with the Bank Act; what section was it?

A. Section 88 of the Bank Act.

Q. Your suggestion is, registration where?

A. In the County Court Clerk's office instead of all with the Receiver-General on Toronto Street.

MR. SILK: So that there would be forty-eight or fifty places where you would have to search in the province instead of one central place?

A. That is where it would be. You would search in that county—I mean, where the merchant was.

MR. SILK: In regard to sub-item number 3, on page B38, Mr. Barlow says:

> "The exemption clauses in the Execution Act were drafted many years ago. Times and conditions have entirely changed and it has been submitted that in the interest of unfortunate debtors and also to make clear the duties of sheriffs, that a complete revision should be made.
>
> "*I recommend* that the list of exemptions be revised and enlarged to meet modern-day conditions."

Those exemptions are contained in section 2 of the Execution Act. I do not know whether I need to refer to some of them.

MR. STRACHAN: One towel, one coat ——

MR. SILK: One cooking stove with pipes, one crane with its appendages ——

WITNESS: One cow, for instance, to a farmer.

MR. SILK: Fifteen hives of bees, so if a man happens to be in the bee business he is protected, but if he happens to be in some other business he is not, because it is drafted in a specific rather than a general way.

MR. CONANT: I have not looked at that for a long while, but I think the total exemptions must come within a certain maximum—$200, I think.

MR. FROST: Well, there is some difficulty about the Act. It has been added to. For instance, some time ago they added in a team of horses. Now, whether that is within a total of $200 or not is doubtful.

MR. CONANT: Yes, that bit of legislation is in bad shape, no doubt about that.

MR. LEDUC: I think we are all agreed on that.

MR. SILK: A bill was prepared and introduced a year or two ago, and did not pass the House.

WITNESS: It went rather too far.

MR. FROST. What was the objection at that time?

MR. SILK: The whole objection, I think—I have a memorandum on it in this book—was that we included one or two items, for instance stock-in-trade, and we had a lot of wholesalers up here who raised very great objection to the inclusion of the words "stock-in-trade," I think, to the vendor of a thousand

dollars; but I think if the Committee had taken more time the bill might have gone through.

WITNESS: It went too far, the other.

MR. LEDUC: Leaving nothing to live on.

MR. SILK: You will find a memorandum on page 95, Mr. Frost, which endeavours to explain why the bill did not pass the House. I prepared this memorandum immediately I came out of the Committee.

MR. LEDUC: When did that bill come before the House?

MR. SILK; 1937. Mr. Clark, the present Speaker, introduced it. I say:

> "I am of the opinion that the chief objection to the bill is the exemption of stock-in-trade to the extent of $1,000 in clause (e). At present there is no exemption with respect to stock-in-trade and it would appear well to omit any reference to stock-in-trade in the provisions of The Execution Act."

I followed the provisions of some of the western Acts where they do exempt stock-in-trade.

MR. CONANT: You mean, make it exempt up to a thousand dollars?

MR. SILK: Yes, they do in some of the western provinces, but apparently that would not be popular in Ontario, with the wholesalers at any rate.

MR. LEDUC: There are some small traders or merchants who would be absolutely exempt from execution.

MR. SILK: The whole thing would be exempt.

MR. CONANT: What is the next point?

MR. SILK: The next one is ——

MR. CONANT: Sale of land under writ of execution?

MR. SILK: No; seizure of book debts. At page B39 Mr. Barlow says.

> "In 1929 the Execution Act was amended to enable the sheriff to seize book debts and other choses in action, but no direction was given as to the mode of seizure.
>
> "*I recommend* that subsec. (2) of sec. 19 of the Execution Act be amended by adding the following:
>
> " 'Such seizure may be made by the sheriff serving a written notice of the execution upon the party liable under the book debt or other chose in action and from the time of such service the book debt or other chose in action shall be bound by the execution.' "

Q. Do you see any objections to that procedure, Mr. Maclennan?

A. No. That statute of 1929 was one that I drafted, and it has been a very, very useful one in the collection by creditors against debtors.

MR. CONANT: Without the necessary procedure having been determined, what have you been doing?

A. The sheriff would go down, he would go to a bank, and he would say, "You have two accounts against this execution debtor of mine; I want the money."

Q. Mr. Barlow says that under the present Act there is no ——

A. But they would work it in that way. The bank might say, "Isn't there more formality than that to it?"

MR. CONANT: Well, this is more or less obvious. Anything else, now?

MR. SILK: I have nothing further, unless Mr. Maclennan has something further.

WITNESS: The question of making better provision when the sheriff seizes shares registered with a company in the name of his debtor, has that been dealt with?

MR. CONANT: Yes, it has.

MR. LEDUC: That is one matter we decided to leave aside for the time being. The matter was discussed, and there were some difficulties in finding the right solution. We had that before. I do not know if it came in the evidence, but we certainly discussed it.

MR. SILK: What matter was that?

MR. LEDUC: Seizure of company shares.

MR. SILK: I have a letter from Mr. Barlow which I received since the sittings of the Commission, in which he wishes to rescind that recommendation.

MR. CONANT: All right; anything else, now?

WITNESS: I was going to remark there—of course, things of this sort happen. The sheriff seizes stock, and it is in the debtor's name, and he sells it and he gets the document that is provided under the Execution Act, and the purchaser of the stock goes down to the company and says, "I want you to give me a certificate," and there is a long harangue back and forward there and nothing done. In the meantime thirty days have gone by, and the sheriff has distributed the money among the debtor's creditors, and the man who bought the stock has got nothing, has not been able to get a title. What I was going to say is this. I do not think we have time to deal with it fully again now, but it should not be overlooked. Those who oppose—that is, people going to the Stock Exchange

and buying stocks for investment always register them in their own names, banks and other do all that, but there is a certain amount that is shoved back and forward, stock sold and ——

MR. CONANT: Street certificates.

WITNESS: And nobody knows where the certificate is. The people who are doing that are the speculators, they are the ones that oppose this, and that is one of the banes, as you know, of a great many citizens, that speculative bee that gets into their bonnets, and they say, "It we have got to register every time we buy, we are buying to-day at this price and we are going to sell in a hurry to-morrow because we see it going up"—pure speculation, not real business.

MR. FROST: Still, it is a very real business that you have to contend with, isn't it?

A. Oh, yes, and a very ——

MR. CONANT: Well, how do you suggest it should be met?

A. In the way that was set out in this report; that is, when the sheriff sells he would advertise before he makes any distribution of the money, before he sells, and then if the person who has that stock certificate, claiming ownership, nobody knows where he is, does not come forward within so many days, then the statute would say the company must give a new certificate to the sheriff's purchaser.

MR. LEDUC: But you realize, Mr. Maclennan, the owner of the street certificate may live in British Columbia or anywhere else out of the jurisdiction?

A. That is his own fault in not registering when he bought.

MR. FROST: Isn't that putting a very great risk in the way of business by doing that? I mean, after all, a great deal of business now is carried on by way of street certificates.

A. A business that is not healthy; it is the speculators entirely who oppose this.

Q. Well, would you really say that?

A. Yes.

Q. That the people who do not register stock certificates are mainly speculators?

A. I would say so. If you were buying for investment you would see it was registered pretty soon.

Q. Well, it is curious the number of share certificates that we run across, with people who have actually bought for investment, that are not registered.

A. I do not think you will find many sane investors not putting it on record that they are now the owners. Then there is another question, that the companies find when they begin to issue their dividends they do not know where these are.

MR. LEDUC: But then they are registered, of course.

MR. CONANT: They always advertise payment of dividends.

Anything else, Mr. Silk?

MR. SILK: No.

WITNESS: Might I speak of this, the question of disposing of the Crier of the Court? I mean, among the sheriffs it would be a sort of *infra dig* to have a constable opening the court and so forth without any gown on.

MR. LEDUC: I beg your pardon?

A. To have a constable—it is suggested that it could be done by one of the sheriff's constables on opening and closing and calling for witnesses and that. The reason apparently is that it is a dollar to the crier in every case, civil case.

MR. FROST: Oft-times policemen in uniforms are more dignified looking than some of the court criers.

MR. LEDUC: I think so.

MR. FROST: Some of them are dressed apparently for the War of 1812.

WITNESS: The fault is in appointing a man who should be superannuated.

MR. SILK: Court criers were abolished in England many years ago.

MR. CONANT: Why shouldn't the clerk or the registrar of the court do it?

A. He could do it, of course.

Q. Well, why not?

A. But most of the clerks are busy with other things just at those moments.

MR. LEDUC: Not at that very moment.

MR. CONANT: I cannot see that. A court crier in the court in my county has been retired at eighty years of age, and we are not going to appoint any more criers.

MR. SILK: It might be done by the sheriff himself, if all the others are busy.

MR. CONANT: We will experiment with it in Ontario.

WITNESS: Would you let me mention another item that I sent to Mr. Barlow but which he has not put in his report? That is, when the sheriff goes out with an execution to make a seizure of a debtor's goods, he cannot break into a debtor's house, but if he has a replevin order or a replevin writ, the Replevin Act provides that in such cases when the sheriff goes he can notify that he is coming to replevin certain goods in that house, just as if you were under a Fi. Fa., if you wanted certain goods to seize, and if the debtor or the man who has the goods to be replevied there won't let him in, then he comes after six hours' notice, and if he is not allowed in within that time he can break in. The people who are subject to replevin know that is the law, and they do not keep the sheriff out, and it makes the machinery there work much better. Well, if something of the same sort were put in the Execution Act, that the sheriff on giving a notice to an execution debtor, where he has a writ against his goods and the house is full of them perhaps, cannot get in, he can never break in, because that is the law.

MR. CONANT: You say there is that distinction between replevin and execution to-day?

A. Yes. In replevin you can do that. Then in replevin he can say to the debtor, "You have got something in your pocket here that I want to replevin; I want you to show them to me."

MR. LEDUC: But in the case of a replevin you deal with certain specific goods?

A. You deal with the goods in that house.

Q. There is a difference. You are dealing with certain specific goods, say with a piano; the piano is there, and the sheriff goes there to replevy the particular instrument. In the case of a writ of execution there may not be one thing in that house that belongs to that debtor that can be attached by the writ of execution, but you see the difference in the two procedures?

A. I see the difference, but I do not think the difference is sufficient not to oil the machinery more.

Q. It makes a good deal of difference there.

A. Then in replevin, as I said ——

MR. SILK: I think that is about all I have.

MR. FROST: Just a minute, please. There was some question raised in connection with the collection of Division Court judgments, as I recollect, that the bailiff system and the sheriffs' organization should be amalgamated in some way or other. Could Mr. Maclennan give us any information on that?

WITNESS: I have made this suggestion: When you place an execution with the sheriff in the County or the High Court, that binds the goods and lands from that moment, but if you have an execution, a judgment in the Division Court, there is nothing bound until the bailiff goes out and seizes something.

MR. CONANT: That is right.

WITNESS: I have made this suggestion, that when the amount of a Division Court judgment is say $25 or more the creditor might issue some sort of execution and file it with the sheriff to bind the debtor's goods; it might also at the same time bind the land, which can be done later, but leaving the execution bailiff to go out and do the seizing.

MR. CONANT: At the present time, as I recall it, you can take an execution against lands and place it in the hands of the sheriff after a return of *nulla bona*, is that not so?

A. Yes.

MR. SILK: As to goods, yes.

MR. CONANT: You have got to exhaust your remedy against the goods—and is it a transcript that goes from the clerk of the Division Court to the sheriff, or does he issue execution?

MR. SILK: He issues execution, I think.

WITNESS: It goes from the County Court to the sheriff.

MR. CONANT: A transcript from the County Court clerk?

A. Yes.

Q. Then he issues execution?

A. Against lands only; but if a creditor were allowed to do that it might greatly assist the Division Court bailiff in his work.

Q. Of course, I have always thought that the present system was pretty cumbersome; it loads it up terribly. By the time you get the execution in the hands of the sheriff, you have to take a *nulla bona*, pay the fees on that, then, as I recall it, a transcript, then you have got to get a Fi. Fa. on that and take it to the sheriff's office?

A. Well, not quite so much, but it is a bit complicated.

MR. SILK: I think the proposal to which Mr. Frost referred was that the sheriff's officers could perform all the work that is now being performed by Division Court bailiffs in the event of Division Court bailiffs being abolished. Have you given any thought to that?

A. I have thought that the bailiffs under the sheriff's direction acting under a Division Court judgment should perhaps be better trained and knowing what they were doing than some of the Division Court ——

MR. CONANT: Why would it not be possible—because we are looking for simplification—why would it not be possible, with a writ of execution, where an

execution is issued out of a Division Court office, for a duplicate of that, or a certified copy if you like, to be filed in the sheriff's office, so that from the time of filing it would hold whatever any ordinary writ of Fi. Fa. would, and the bailiff could go on and operate under the writ that he gets and at the same time preserve the rights of the execution creditor, the one that is filed in the sheriff's office? Wouldn't that be feasible?

A. That is my suggestion.

MR. FROST: It seems to me that there should be some linking together there of judgments which were obtained in Division Court; some of them under the present system are quite substantial, and it seems to me that there should be some method of tieing that in for the protection by filing it with the sheriff.

WITNESS: I think the Chairman has got that idea, and that could be readily done, and I think it would improve the Division Court machinery greatly as far as collecting debts is concerned.

MR. CONANT: Of course, I suppose you would have to go on and if the execution is satisfied by the bailiff's seizure there would have to be some termination of the writ in the sheriff's hands, and then there would also have to be some procedure for a praecipe or something requiring the sheriff to seize or whatever it might be; you would have to set up some machinery to reconcile them, wouldn't you?

A. Well, the Division Court could notify the sheriff when they collected the money under the writ so you could call it off, but we have not been able to collect anything; we proceed under the lands.

MR. CONANT: Well, that is only a consideration.

Anything else?

MR. SILK: Mr. Chairman, in that regard, may I point out that this Committee already has rejected Mr. Barlow's recommendation, that the Creditors' Relief Act should apply to Division Courts, so that I do not think this proposal would be quite consistent with that view.

WITNESS: What was that about the Division Courts and the Creditors' Relief Act?

MR. SILK: Mr. Barlow recommended that moneys collected under the Division Court Act should be distributed under the Creditors' Relief Act.

WITNESS: What the statute says now is that when the Division Court makes money under an execution against goods, it has it on hand, and there is an execution in the sheriff's office, they must pass the money there, but there is no provision saying they should find that out; that is, a Division Court clerk before distributing the money should ask, so as to observe what is already in the law, "Have you any execution against this same debtor?" Then the money should go to the sheriff.

MR. SILK: The Division Court clerk avoids the provision by not making a search?

A. By not making a search.

MR. CONANT: All right, thank you, Mr. Maclennan.

EARL DAWE, Bailiff.

MR. SILK: Mr. Dawe, you are engaged in the business of a bailiff in Toronto; you are with the E. W. Woods Company?

A. Yes, Mr. Silk.

Q. You are the proprietor, are you?

MR. CONANT: What is the name of the company?

A. E. W. Woods & Company Limited.

MR. SILK: On various occasions you and I have discussed the Costs of Distress Act, particularly the schedules of tariffs payable under that Act, and you have told me that because the tariffs are so low there is not a bailiff in the province that pays any attention to them?

A. That is quite right, sir. Pardon me; I should not go that far.

MR. CONANT: Let us understand. So far as necessary, distinguish the kind of bailiff you are talking about, whether it is a Division Court bailiff or a landlord's bailiff or what it is.

MR. SILK: I am referring to all bailiffs that operate under the Costs of Distress Act, which includes all bailiffs in the province except Division Court bailiffs; they are in a separate category entirely. I have the tariffs copied out at pages 155 and 156.

Q. Now, can you give us some examples of the difficulties you have had with the operation of this Act, Mr. Dawe?

A. Well, at the outset, Mr. Silk, the second item—and I think it applies practically all the way through, for the three schedules, although perhaps we should only deal with numbers 1 and 2, though in the final analysis number 3 we are concerned with as much as the others. The charges permitted for keeping a man in possession where the goods are not removed are out of all keeping, of course, to what you can employ men for who are respectable and responsible and able to take care of a position such as ——

MR. CONANT: You mean seventy-five cents a day is not enough?

A. Hardly, sir.

MR. SILK: Seventy-five cents a day where it does not exceed $80, and a dollar a day in schedule 2 where the amount exceeds $80.

MR. FROST: I often wonder why, provided the bailiff locks the stuff up or puts it in such shape that it could not be removed, it is necessary to have a man there.

WITNESS: It is only in exceptional cases, Mr. Frost, I think, perhaps, where in a store there is a sale of merchandise.

MR. CONANT: You usually take an undertaking?

A. Usually a bond to cover it, yes. I would say in nine hundred and ninety-nine cases out of a thousand—I am speaking for ourselves here in the city—a bond is taken which places the custody of the goods in the tenant, and we expect to find those chattels there if we have to realize on them later on; and of course the percentage of cases, as you gentlemen probably appreciate, where anything drastic or extreme has to take place is very, very small. The difficulty, of course, is that these items that are set out, this is a schedule that was drawn some forty or fifty years ago, I am given to understand, and the items that are allowed there for the carrying on of the business are quite inadequate, we feel.

MR. SILK: Mr. Dawe, in section 6 of the Costs of Distress Act there is provision for taxation of costs; subsection 2.

> "The person whose goods are distrained or seized, or the person authorizing the distress or seizure, or any other person interested, upon giving two days' notice in writing, may have the costs and expenses of the bailiff or other person making the distress or seizure taxed by the clerk of the Division Court within whose jurisdiction the same was made."

And then there is provision for an appeal to the County Court judge. Is that section used frequently?

A. Not frequently, but too frequently for our liking, if you can understand what I mean. If anybody does go before the clerk as set out we have not got a chance in the world of justifying a modest cost in connection with it, because the schedule is so ——

MR. CONANT: Are there not consequences from taking excessive costs there? Don't they go to jail or something like that?

MR. SILK: Not in this Act, I think.

WITNESS: I think that some time ago, Mr. Conant, the Act was changed to eliminate the jail end of it, if I am not mistaken. I think there are some penalties now.

MR. CONANT: You have not been in jail lately, then?

A. Not at all, sir. I think there is some two or three times the penalty of the overcharge, isn't there, Mr. Silk? We have never had that, but I understand there is something of that nature. You see, that is usually handled through the clerk of the Division Court, but of course covered under the Costs of Distress Act.

Q. What do you think should be done with the schedule?

A. I think, Mr. Conant, that a fair basis on which to work is that of the Division Court bailiffs' schedule. It is certainly closer to the point than this, because it has been brought fairly well up to date. You take, for instance—there was a suggestion made a moment ago about a bond. Under the Landlord and Tenant Act there is no provision for a bond, but in the Division Court Act it specifically allows for the cost of a bond.

MR. FROST: Do you mean there is no provision for the cost of the bond in landlord and tenant ——

A. I mean there is no provision for the taking of a bond, even.

Q. That is just the point I am coming at. Isn't there some question where a man is not placed in possession that the distress is abandoned?

A. That is right, sir; that is, as the Act exists at the present time.

MR. CONANT: You run the risk of losing your distress rights?

A. Yes, sir, we sure do. We don't like it to become public property, but that is the case.

Q. You run the risk of having to make up the difference between seventy-five cents and whatever you pay for it if you do put him in?

A. That is it, sir; and of course it works out a definite hardship, because there are a lot of people that mean well, and eventually over a period of time we collect the account in instalments, give them an opportunity, and adding the impost of possession charges would just make it out of all proportion.

MR. SILK: Do I understand you to say that if you were put on the same basis as the Division Court bailiffs as to costs and tariffs ——

A. I think in the average case we would be pretty well satisfied, or fairly close to it. There are a couple of items there that are perhaps inadequate, we feel—but may I go just a little farther, Mr. Conant?

MR. CONANT: Yes.

WITNESS: And say that under the Costs of Distress Act there are three schedules, the first and second covering distress warrants, that is, landlord's distress, and the third a seizure under a chattel mortgage, and under that section there is a provision there that practically makes it the same schedule for the Conditional Sales Act. Am I correct in that, Mr. Silk?

MR. SILK: I think that is right, by a fairly recent amendment.

WITNESS: The chattel mortgage and the Conditional Sales Act, in my humble opinion, as far as schedules are concerned, are entirely removed from one another, because schedule 3, covering the chattel mortgages, more or less

falls in line with 1 and 2, whereas schedule, shall we call it 4, which should be the costs of distress under conditional sales contracts, can cover two or three times the amount of expense that there is under others, because of the work entailed in connection with the repossession of motor cars, distances, towing charges and all that sort of thing, and there is no allowance for anything like that in the Act at all.

MR. SILK: But those charges are made just the same, according to the present practice?

A. They have to be made, because people employ us to do these jobs and we have to pay our men.

MR. SILK: I have sent up for a copy of the Division Court tariff, but I don't know that it is necessary ——

WITNESS: I am sorry, I have one here, I think. There is nothing later than April, 1938, is there, Mr. Silk?

MR. SILK: I don't think so. That is bulletin 15.

WITNESS: I have marked with crosses the items that ——

MR. SILK: Well, I don't know whether the Committee wants to go into that much detail.

MR. CONANT: Oh, no. I think they have the observation fairly clear.

MR. SILK: Is there anything else you wanted to say, Mr. Dawe?

A. I would like to say a lot, but these gentlemen's time is valuable.

MR. CONANT: Go ahead, Mr. Dawe.

MR. FROST: Mr. Dawe, what would you think of sometime preparing a schedule showing, for instance, the Division Court costs, showing the landlord and tenant costs, and showing the places where there are inequalities and places where there are no allowances for costs, and so on?

A. I would be only too happy to do that. And you must remember, after all, I only represent one firm, and, while we are perhaps regarded as the largest in the city, yet there are others who have just as much right to express an opinion as us, and I would like to sit in with representatives of those better firms and then submit something of that kind.

Q. Well, why not do that? I think you should do that, Mr. Dawe. Another thing that I think should be done or should be considered is this: if there is not the right in landlord and tenant proceedings to take a bond, I think that that should be made definite, for the reason that we are anxious to save debtors' costs, and if you have to uselessly put a man in charge when you might take a bond it seems to me ——

A. We don't like to have to do it at all, sir. It is only done in extreme cases, where we strike somebody that is stubborn and we feel that the security of the landlord is being jeopardized; but I am quite confident that if Mr. Silk goes through the Act we will find nothing there at all that makes any provision for us taking a bond.

MR. CONANT: Of course, the result of that is that, it not being part of the statutory machinery, there are no rights preserved by the taking of the bond?

A. No, sir. We are placed in a very embarrassing position.

MR. CONANT: It seems to me that is before the courts, Mr. Frost.

MR. FROST: Yes, it has been.

MR. CONANT: What is the decision?

MR. FROST: I am not sure what the decision is, but there is a great deal of doubt existing on this point. If a seizure is made for distress the question arises as to whether you have to actually put a man in charge and saddle the poor debtor with all those costs, or whether you can take a bond from him.

WITNESS: Or take out the physical chattels that you have under seizure.

MR. FROST: Yes. Now, the doubt as to all those things is adding needless cost to the debtor.

WITNESS: That is our contention.

MR. FROST: And if it could be made plain on that point, if it is not plain, I think we should recommend ——

MR. CONANT: We should consider that.

MR. FROST: Yes; we should recommend that a bond be permitted.

MR. CONANT: There is one thing I want to discuss, and I think the Committee might take it into consideration; I am not passing any opinion on it at all. Under our present law, as I recall it, a landlord can appoint any person bailiff; is that right?

A. That is right, sir.

Q. Whether that person is qualified to act as bailiff, or whether he knows anything about the law of landlord and tenant, or how to seize, or how not to seize, if he gets a warrant from the landlord he is duly constituted a bailiff?

A. That is right, sir.

Q. Now, I do not know the experience of my colleagues on this Committee, but I have sad recollections of cases where landlords have run into very serious litigation because of irregularities in the conduct of bailiffs—I am not reflecting on your firm at all.

A. That's all right, sir.

Q. Do you care to make any observations as to whether it would be in the public interest particularly, not particularly in the bailiff's interest but in the public interest, that a bailiff should be subject to some qualifications or restrictions or control?

A. At the present time, Mr. Conant, we are controlled by the city of Toronto; we are licensed by the city of Toronto.

MR. CONANT: I should have added to my observation, I think there is something in the Municipal Act about licensing bailiffs, isn't there?

MR. SILK: Yes, there is.

MR. CONANT: That a municipality may or may not.

WITNESS: "May", yes.

MR. CONANT: There are comparatively few municipalities in the province that have invoked that.

WITNESS: That are large enough perhaps to have a bailiff.

MR. CONANT: Particularly in the townships. I do not think the townships license their bailiffs; do you think so, Mr. Frost?

WITNESS: Around Toronto they do; East York and York Township and those we pay license fees to all of them.

MR. CONANT: Do you care to make any comment?

A. Well, it is very definitely to the advantage of the landlord—we will presume, for instance, that he employs somebody who is a friend of his as a bailiff to go out and make a levy for him against some tenant that he has some animosity towards, and that man may not be a responsible party—I am referring to the party he appoints—and he does something irregular, and afterwards the tenant comes back at him and he finds that he is worthless and he can't recover anything against him, but the damage has already been done. Here in the city of Toronto, as I was going to add, we are licensed by the Police Commissioners, and we have to put up a bond with the city of Toronto. It just so happens that, as you gentlemen know, in connection with the collection of taxes the City employ four or five bailiffs' firms; in that connection, we have to put up bonds which are of an enormous amount in proportion. The other bailiffs, though, have to put up a bond which amounts I think to a thousand or two thousand dollars, and they have to be passed by the License Board as fit to carry on business, and the names of their employees all have to be submitted, and police records, if any, checked on, and so forth, and they won't issue either a license to a bailiff or a bailiff's officer who does not now pass the O.K. of the Police Commissioners. That only has taken place in the last six to eight months.

Q. Taking the public interest, taking the one case of landlord and tenant——

A. It is in everybody's interest.

Q. Is it not more in the interest of the landlord as well as the tenant, that whoever may be employed as bailiff shall be competent to act according to law?

A. Surely.

MR. FROST: Of course, Mr. Conant, that is true, I think, in Toronto.

WITNESS: In large centres.

MR. FROST: In the larger centres; but when you get into sparsely settled districts, and perhaps it is necessary to send a bailiff say from Timmins to some other place in Northern Ontario, or even in Victoria or Haliburton, where you have to send them long distances, then the sending of a bailiff from one of these centres ——

WITNESS: Very costly.

MR. FROST: It is very costly, and sometimes you might use, for instance, a local constable or something of that sort and take a chance on it.

WITNESS: And perhaps get into a peck of trouble over it, too.

MR. FROST: Oh, well, you might.

MR. CONANT: Admittedly, Mr. Frost, that is the other side of the picture, of course that is the other side, but ——

WITNESS: What does happen quite often, Mr. Conant, we will have a solicitor, say in a town perhaps forty or fifty miles outside of Toronto, where the town is not sufficiently large for a bailiff to be carrying on, and the town nearest there is only a Division Court bailiff there, and when he goes to the Division Court bailiff he says, "I am not familiar with landlord and tenant, you better get somebody from Toronto to do it," and we travel forty or fifty miles out there and do that job. I suppose that you might say, if I say to you there is no provisions for that in the Landlord and Tenant Act, "Well, the landlord will have to pay whatever the difference in cost is," but should the landlord be saddled with any costs if he has to take these actions because a tenant doesn't pay his rent?

MR. CONANT: Well, I don't know.

MR. FROST: Well, who should be saddled?

MR. CONANT: I was at it for twenty-five years, and it seemed to be the general idea that a bailiff is an official clothed with peculiar and particular powers and subject to peculiar and particular obligations or limitations, and some of them are very technical, and I have often wondered whether there should be any regulation or requirement for a person to act in the capacity of bailiff.

WITNESS: Yes, even we, with our twenty-five or twenty-seven years' ex-

perience—I would not for a moment expect to be able to go through the Landlord and Tenant Act and give an intelligent interpretation of it in some respects, because the Act was drawn at a time when a lot of things referred to there were popular and they don't even exist to-day. The Landlord and Tenant Act is certainly in need of revision right from A to Z; that is my humble opinion.

MR. CONANT: Yes, no doubt about that.

WITNESS: There are questions arise almost weekly in our office, and, to be perfectly frank with you, we just have to use what we think is common sense in connection with it. You ask a legal interpretation, and you get two or three different opinions in connection with it, and you don't know what to do.

MR. CONANT: Of course, you would not suggest that there is any law or anything done in any courts of law that are not common sense, would you?

No answer.

All right, Mr. Dawe.

STANLEY THOMPSON, Ontario Securities Commission.

MR. SILK: Mr. Thompson, you are attached to the Securities Commission, and I understand you are in charge of the administration of the Collection Agencies Act?

A. Yes, Mr. Silk.

Q. The last witness at the spring sittings of the Commission was a Mr. F. A. Matadell, who is the chief officer of the Ottawa Credit Exchange.

A. Yes.

Q. I think that is what he calls his company. He described to the Committee a system of pooled accounts, whereby he would look after all the creditors for any one debtor, the debtor would pay a proportion of his wages to the Credit Exchange, and the Exchange would distribute the wages among the creditors at a charge of fifteen percent.

A. Yes.

Q. To be paid by the debtor. I understand you have investigated that system?

A. I have investigated the handling of pooled accounts; that is where the debtor makes an arrangement with a collection agency to disburse certain moneys that he pays in to his creditors.

MR. CONANT: Just wait a minute, now. Let us get this in mind. That arrangement of collection agencies is not within the law; that is something aside from the law, isn't it?

A. It has nothing to do with collection agencies; it is purely a voluntary arrangement whereby a person becomes a trustee.

Q. But that is not covered by any statute?

A. No.

MR. SILK: There is no provision in the law of Ontario for it at all.

MR. LEDUC; It is suggested that we should legalize it.

MR. SILK: I wanted to deal first with the Ottawa Credit Exchange.

A. I made a survey, and I have their actual figures here and I have tabulated them, whereby the Ottawa Credit Exchange have 132 debtors owing $100,401.57 to 2,687 creditors.

MR. LEDUC: Mr. Thompson, there must be some duplication there in the number of creditors, surely.

A. No, sir.

Q. You have 132 debtors ——

MR. SILK: Excuse me, Mr. Leduc. May we ask the Press not to quote names at this point.

MR. LEDUC: Yes, I think it would be better.

Q. What I mean is this, Mr. Thompson; you will probably find ——

A. That some of those accounts ——

Q. That some merchants ——

A. Are owed.

Q. —— are owed by several of these debtors?

A. By several of these debtors.

Q. So when you have the total number of creditors at 2,687, it is really a lesser number than that, but there are 2,687 claims?

A. Claims.

MR. FROST: Would you mind giving me those figures again, Mr. Thompson?

A. 132 debtors owe $100,401.57, the number of claims are 2,687, and since the pooled accounts were entered into the debtors have paid $26,498.07. Of those 132 debtors 88 debtors had judgments against them. The debtors are paying to the agency 15 percent service charge for disbursing this money.

MR. SILK: That 15 percent is paid by the debtor?

A. Is paid by the debtor. Now, the situation opens up and goes farther than that. At the time that those debtors entered into this arrangement of pooled accounts 570 creditors had already placed claims for collection.

MR. FROST: What is that again?

A. At the time that these debtors entered into an arrangement with the agency to handle this account 570 creditors had placed their claims there for collection.

MR. SILK: 570 creditors of those debtors?

A. Of the 2,687 previously referred to.

MR. LEDUC: That is about 20 percent.

WITNESS: Those claims amounted to $15,851, and the average charge on that fifteen thousand is 30 percent.

MR. SILK: That is, they charge the creditors a further 30 percent ——

MR. CONANT: No; a further 15 percent.

MR. SILK: A further 30 percent.

WITNESS: A further 30 percent. You take 15 percent off. If a debtor pays in $20, they will take off 15 percent of that for their service charge. Then if all that money was to go to creditors who had previously placed their claim, they would then take 30 percent off after having deducted 15, so on some of that they would get 45 percent.

MR. LEDUC: We will put it this way: the debtor pays $20; he gets credit for really $17?

A. Yes.

Q. The creditors get $17 less 30 percent; that is $11.90?

A. Yes.

Q. And the collection agency gets $8.10?

A. Yes.

MR. LEDUC: A little more than 40 percent on a $20 claim.

MR. SILK: 45 percent.

WITNESS: That is in about 20 percent of the cases.

MR. CONANT: Well, what happens in the rest of them?

A. The rest of the cases, there was no charge to the creditor; there is just 15 percent; he gets his money in full.

MR. FROST: That is, the creditors they are not acting for, they get their money?

A. They get their money.

Q. If they have enough sense to stay away from the collection agency they don't pay the 30 percent?

A. That is right, that is it. I have carried that a little bit farther, which I think is of interest, that the average payment per month per debtor is $23.53.

MR. LEDUC: $23.53?

A. $23.53.

Q. And what is the average earning of the debtor?

A. I haven't got that.

Q. Well, that is important.

A. The earnings, sir, would vary, because some of these people would be out of work at times.

Q. You say the average payment per month?

A. I am taking the average payment per month.

Q. Is $23.53?

A. $23.53.

Q. Well, if the average earning is say $125, that is not out of the way, but if the average earning is $70 it is outrageous.

A. Yes, but I have taken that over 132 debtors, and they have been paying in for approximately one year.

Q. And in one year they paid that, but you do not know what their earnings are?

A. I could not get that.

Q. What I have in mind is the proportion of the amount they pay to the amount they earn.

A. That is on their pooled accounts, and on practically—the agreement entered into, there is an arrangement as to what is necessary for their living allowance, the number in their family, the rent that they are paying, and other charges that they have to be paid.

Q. Who decides that?

A. They list all those; then they come to an agreement as to what that debtor can pay, and that is generally a voluntary arrangement between the debtor and the agency. The debtor has to keep in mind that he is forced with either making a proper payment per month or else this will go back into court and he will have a lot of additional court costs added. That is why most of these pooled accounts come into existence, or, as sometimes happens, when a debtor has been up once or twice before a judge, the judge recommends that he make some arrangement of settlement. Some agencies obtain their work from that, and I know that happens quite frequently in Ottawa and also in Windsor.

MR. CONANT: How much of that is there going on in the province?

A. I have my total figures for the province, as the information came in up to the 12th of September; some has come in since, but it has not changed the averages. On 270 debtors owing $176,000 ——

Q. That is for the whole province?

A. This is not quite for the whole province, sir, because there are about four figures should have been added to this, just came in recently. They owe $176,000; there are 4,667 claims; they have paid $52,000; 183 of those debtors had judgments against them; the average service charge is 12.6 percent; the number of creditors paying commission to the agency are 991, that is, just a fifth.

MR. FROST: They are holding the bag for the 4,600, then?

A. They are holding the bag. And the amount is $33,000 that is owed to those 991. The average monthly payment per debtor is $21.48, and the average amount available for disbursement per creditor is $1.09 per month.

MR. SILK: There is only one matter you have omitted ——

A. I have gone a little farther than that. The number of creditors or claims per debtor is 17.

MR. CONANT: Average?

A. Yes; which would mean that 17 persons could take a debtor to court and get judgment against him, and so on and so forth, and that is what the debtor is faced with, and that is why this situation has arisen where these people are self-appointed trustees.

MR. CONANT: Well, of course, the thought immediately arises there that this is a sort of extra-judicial proceeding, isn't it?

MR. FROST: Well, it is taking the place of our cumbersome bankruptcy proceedings—not only cumbersome bankruptcy proceedings, but cumbersome collection proceedings that we have.

WITNESS: I think what might explain this fairly clearly is, one agency, the

largest agency in London, made comments as to why these pooled accounts were opened; they say they do not solicit them, and they put in here, "This man was sent to us," and they name the employer, "who asked us to try and work out some arrangement to pay off his debts, to prevent him from being garnisheed continually. He is a young man with four children. The arrangement is working very well." That man started on February 27 to pay $512 to 10 creditors: he has paid $69.

MR. LEDUC: That is, this year?

A. This year.

Q. He has paid how much did you say?

A. He owed $512, and has paid $69.

MR. FROST: Mr. Thompson, take that case: there is a man with four children, he owes $512 to 10 creditors, and he has paid $69. Under what circumstances would you say that the charges that were made were exorbitant, or would you say that in view of everything it is not a bad arrangement?

A. I think it is a very good arrangement. It is very much cheaper than paying court costs, and also he does not have to take out time from his work, he is not always receiving letters that he is going to be haled up into court, but he has made the arrangement and as long as he lives up to his end of it he has got peace of mind. Another one which is rather interesting ——

MR. LEDUC. Pardon me. Before we leave this case, what was this man's salary, or what were his earnings over that period?

A. I could find that out, sir, but I haven't got it.

Q. Well, I think it would be interesting to find what proportion he pays of his earnings.

MR. FROST. Of course, I suppose his tendency is, he wants to get this load off his back as soon as he can?

A. As soon as he can.

Q. And he is anxious to pay the $512 and get it done, and then say he is a free nigger.

A. And that apparently is the situation all the way through. They find out as to what a man earns, what he needs to live on—his living expenses vary according to his occupation. A travelling salesman's cost of living is much higher than that of a day labourer; the travelling salesman has to be dressed, look neat and keep up a personal appearance, and he may have to have a car. Those have to be taken into consideration.

MR. LEDUC. What I do not like in this picture is this: the collection agency may tell the man, "You earn so much, therefore you will pay so much, or else."

WITNESS: "We will take court action against you."

MR. LEDUC: Yes.

WITNESS: Yes.

MR. LEDUC: So that it is not a voluntary arrangement.

WITNESS: He can elect to either refuse to do it and then take his chances in the court.

MR. CONANT: The thing that seems rather extraordinary to me is, if there is merit in that it should be done by some court official.

MR. LEDUC: Absolutely.

WITNESS: That is what I am working right up to.

MR. CONANT: But we are up against the constitutional difficulty as to whether this province would have the right to deal with that.

MR. LEDUC: Well, they have been dealing with it in Quebec for thirty-six years.

MR. SILK: And in Manitoba for ten years.

MR. FROST: You have a suggestion there, Mr. Thompson, have you?

A. Yes; the next is rather interesting:

> "This man came to us at the suggestion of Judge Ingram after he had a number of garnishees against him. The judge advised him to come to us and make a regular arrangement to pay his debts."

A lot of the judges are in the same position; they see these men coming up, they know the costs they are adding on to them, and they try to get them to make some arrangement. Now, I have discussed the Lacombe law with a good many of the agencies, and I think every one of the agencies is in favour of something like that coming in, if it can be worked properly. The objections raised to both the Lacombe law and the Manitoba statute for the Orderly Payment of Debts is that the provisions of the Act are sound but they cannot be properly administered. The argument in both cases is that the debtor is protected and the creditor may be protected if the debtor is willing to pay, but if the debtor falls down after the arrangement has been entered into the creditor may wait three months before he finds out that no money was paid in, unless he happens to be in a position where he can walk into the court to find out; and a provision might be made whereby, if the debtor makes a proper assignment and fails to disclose in that assignment his proper earnings, or fails to pay into court what is decided upon by a referee as to what he can pay, then a permanent garnishee be put on his salary, not the way it is now, and if he does not disclose it he should be in contempt of court.

MR. LEDUC: And put in jail?

A. If he is foolish enough to file a false affidavit, and does not disclose it, he should be in contempt of court and jailed.

Q. Well, jailing for debt ——

A. It is not being jailed for debt.

Q. If he didn't owe the money he would not be in the position of being in contempt of court.

A. But he can make full disclosure of his earnings. Both Acts provide more or less that the debtors have the right to dispute every claim. The other thing is that relations are permitted to file, and relations see that they get a greater proportion of it. That is the only two things they have. The debtor is not forced—there is no follow-up system. Collection agencies are successful in their operation; they collect over two million dollars a year in bad accounts, because they follow up every debtor; if he promises to pay on such-and-such a date they follow him up if he doesn't.

Q. Mr. Thompson, I don't think we will go into the way in which some of them follow them up.

A. I know some of them are very bad, but they are not as bad as they used to be, sir.

MR. SILK: I should like to take a moment, Mr. Thompson, on the Orderly Payment of Debts Act of Manitoba. I understand you have made a study of it?

A. I have read it over three or four times. I also have ——

MR. SILK: I sent copies of the Act to the members of the Committee some time ago. At page 177 of the notebook I have endeavoured to make a short comparison of the Lacombe law and the Orderly Payment of Debts Act. In the first place, the Lacombe law applies only to wages, while the Orderly Payment of Debts Act of Manitoba applies to all moneys owing. Secondly, under the Lacombe law the exemptions are fixed by statute, while under the Manitoba Act the amounts payable are agreed upon or fixed by the court. Thirdly, under the Lacombe law the employer is not affected, while under the Manitoba Act the clerk may take an assignment of all moneys owing. Fourthly, the Lacombe law applies to all claims, whereas the Manitoba Act does not apply to large claims—that is, claims over $800, I think—except by consent.

Q. I believe you have discussed the provisions of the Orderly Payment of Debts Act with someone from Manitoba who has had experience with it?

A. I got my information in a roundabout way; I got it through the Toronto Credit Bureau at Toronto. Mr. Suydam, the manager, was attending a convention ——

MR. CONANT: This is the Lacombe law?

A. No, this is the Manitoba Act. He discussed the matter with Mr.

Womersley, manager of the Credit Bureau of Winnipeg, and perhaps I could read three or four extracts from his letter, which I think clearly set out the situation as he could learn it:

> "I understand from him that the Court decides what the debtor should be able to pay and at times too pessimistic a view is taken of his ability. There is also no system in effect whereby there is an automatic follow-up in case of delinquency.
>
> "Distribution is supposed to be made to creditors every three months, which naturally gives a debtor considerable leeway. There is also no publicity in connection with those who have taken advantage of the Act, with the result that claims are often overlooked."

He ends up by saying:

> "There is nothing fundamentally wrong with the Act, and if it were handled by an outside Trustee with similar powers as granted to the Court, it should operate to the advantage of both debtors and creditors."

Q. Mr. Thompson, in connection with that last observation, does he give his reasons why he thinks it should be handled by an outside trustee rather than a clerk of the court?

A. Unless provision is made to follow it up. There would be an incentive if the clerk of the court got a percentage on the amount collected, but if that incentive is not there, then if the debtor doesn't come in to pay, well, he just doesn't come in.

MR. LEDUC: The suggestion was made, I think by Mr. Matadall, that instead of charging fees as at present in Quebec there should be a straight commission of five percent—I believe that is what he suggested.

A. The province would have to pay quite a bit.

Q. Oh, no.

A. I believe there is $15,000; I believe it costs the province of Quebec $15,000.

Q. They have a different system, but he suggested changing that system and charging a straight commission of five percent, and he expressed the opinion that they would be able to pay the whole cost of administration by charging five percent.

A. A collection agency could never operate on five percent.

MR. CONANT: No, but they have got expense that the clerk of the court hasn't.

WITNESS: There is no follow-up system, and if they have a follow-up sys-

tem where the creditor is going to reap the benefit of it, it is going to cost money. I think the creditor ought to also bear part of the cost. I don't see why the creditor shouldn't. They let their claims go for six months, two or three or four years, and if they get the money in many cases it is found money. They should pay the court part of the costs of the operation.

MR. FROST: I suppose your point is that if you just create a department in the Division Court for doing this, and you place no incentive for the Division Court clerk to make these settlements work, then in most cases they just won't work?

A. The debtor is very willing when he first comes in to make his affidavit as to earnings and everything else, and he is willing to make one payment to stop any court action, but the next payment may not come in promptly, and if it is not followed up he may not come in and make a third payment at all.

MR. LEDUC: What has been the experience in Manitoba, Mr. Thompson? Do they find that a man makes one payment and then skips?

A. They find that it is not very satisfactory to the creditor.

MR. SILK: I discussed it with Mr. Wilson McLean; Legislative Counsel, when he was down here some months ago. The Act has been in force since 1932. It is working very well. He said the only possible complaint was that the procedure on default might possibly be improved somewhat. It is a little bit cumbersome. It requires a motion to be made by one of the creditors, I think, before the proceedings on default are put into action, and some little time may possibly go by before the creditors find out that the debtor has fallen behind in his payment. That is the chief complaint.

WITNESS: That is the chief complaint that I have, that there was three months' lapse. Isn't there provision under section 8 of that Act for a permanent garnishee in case of default?

MR. SILK: It is called an assignment of earnings. It really amounts to a voluntary continuing garnishee.

I think that is all I have to ask Mr. Thompson. Mr. Cadwell has something more to say.

MR. CONANT: How many collection agencies are there in the province?

A. 121.

Q. All over the province?

A. Yes.

MR. SILK: Then what number of collection agencies have pooled accounts, Mr. Thompson, of that 121?

A. Eighteen agencies handle pooled accounts.

Q. Make a general practice of pooled accounts?

A. That they will handle them, yes.

MR. CONANT: Those are limited to large cities, of course?

A. Those are in the large cities. The surprising part of it is that there is a tremendous business in Timmins.

Q. Is there an agency up there handling pooled accounts?

A. There are two of them, sir, and one of the average payments per month is $31, and the other is $23—well above the average.

MR. SILK: There is a large working-man population in Timmins.

WITNESS: And better salaries.

MR. LEDUC: Oh, yes, of course.

MR. FROST: Mr. Thompson, before you go, have you any suggestion to get around that Manitoba defect?

A. They have a system of filing fees. The debtor pays, I believe, a dollar when he goes under this Act, he pays twenty-five cents a creditor; otherwise, in the case of the average number of creditors, 17, he would have to pay into court a dollar for the filing and $4.25 for the creditors; that is $5.25 he has to pay into court. Each debtor is supposed to be notified of the arrangement.

MR. CONANT: Each creditor, you mean?

A. Each creditor. Then there should be a follow-up system, that each creditor should be notified of default of payment under the arrangement entered into, not let it go for three months.

Q. And he can move then if he wants to?

A. Then he can move. That then would stop that long three months' delay where disbursement is supposed to be made.

MR. LEDUC: Yes, there is something in that.

WITNESS: And then I feel that after a debtor has once entered into the arrangement, the original cost is the main cost—getting out the letters and getting the creditors together, getting the debtor in and settling on how much he is going to pay. That is the cost of operation. Then if he doesn't live up to it, or fails to disclose his earnings, if you had a section in there whereby it would be contempt of court—a fine does no good on a debtor in a case like that. He has elected first of all to enter that arrangement, and I think it is up to the debtor to be forced to meet it.

MR. FROST: That would be somewhat of a judgment summons proceeding if he failed to ——

MR. CONANT: To show cause.

WITNESS: Yes, immediately.

MR. CONANT: Referring to the collection agency business generally, what is the usual basis of charges for collections?

A. 26.3 percent.

MR. LEDUC: Is the average?

A. Is the average charge on two million dollars a year collected. A lot of those claims are five and six years old.

MR. CONANT: 26.5?

A. 26.5. I worked that out about three months ago, sir.

MR. LEDUC: Mr. Thompson, don't they adhere pretty closely to the Commercial Law League of America rates?

A. No.

Q. They don't?

A. No.

Q. They charge more?

A. No; they scale it. Their fees start at 10 percent. It all depends on the type and the length of time the account has been outstanding. On accounts less than six months old I think the recognized charge is 10 percent, up to 15 percent.

Q. On any amount?

A. On any amount, unless the amount is less than five dollars. On these very small claims, on account of the bookkeeping entries, it would not be worth while to have the 15 percent, or some of them, on instalment payments or payments of less than a certain amount, then their fees go up. They start from there and go up to a maximum of 50 percent, but there is no charge on the basis of which they work.

MR. CONANT: All right, Mr. Thompson, thank you.

JAMES ROY CADWELL, Inspector of Legal offices.

MR. SILK: Mr. Cadwell, you appeared before the Committee last April, and you were requested to go down to Montreal and make a thorough study of the operation and administration of the Lacombe law; I understand you have just returned from Montreal after making such a study?

A. Yes, I was down in Montreal on Saturday of last week.

Q. Just explain to the Committee what you found, please.

A. The first thing that I observed in relation to the actual practice of the Lacombe law there was that it is added to the ordinary type of action. That is the first thing that has to be clearly understood, that it is not really a separate action in itself, but it is ancillary to the ordinary action that is entered into court, and, because of that, the Lacombe law in itself does not reduce the total cost of the action. For example, one claim that I checked was a claim for $60; up to the time of the application of the Lacombe law the court costs, including the attorney's fees, was $23.60.

MR. CONANT: $60, and the costs were what?

A. $23.60.

Q. Yes?

A. $12 of those costs were attorney's fees.

Q. Now, wait a minute. How did they get attorney's fees on that?

MR. LEDUC: The tariff provides for them—any action over $25.

WITNESS: Apparently the solicitors in Quebec are much better protected than they are here as far as their costs are concerned.

MR. SILK: They get about $16 on every claim of $100, I think Mr. Juneau said?

A. Yes.

Q. Collected by the court.

A. The next thing that I was impressed with was the fact ——

MR. LEDUC: Before you go further, Mr. Cadwell, you realize, of course, that in Ontario if the Lacombe law were in force the costs instead of being $23.60 would be about $4.50 or $5?

A. That is what I was going to suggest. The Lacombe law if applied under our present system of costs and multiplication of costs would be not very effective, but if we simplified the procedure in the Division Courts here and then used the advantages of the Lacombe law it should work out very well. Another thing about the practice in Montreal—and this is the practice throughout the province of Quebec—the money that is available for distribution is not on a *pro rata* basis except after the payment of the original court costs.

Q. Of the first judgment?

A. Yes.

MR. FROST: What was that again, Mr. Cadwell?

A. The distribution is not on a *pro rata* basis except after the payment of the original costs.

MR. CONANT: The original costs come out first?

A. Yes, sir. And that is also true on any subsequent costs that may occur by virtue of the Lacombe law. That is, if the original action, as in this case, was $23.60, that amount would have to be paid first before there was any distribution on a *pro rata* basis. If there were two or three creditors and they all filed notices under the Lacombe law set-up, those costs likewise would have to be paid before there was any *pro rata* distribution.

MR. LEDUC: You mean the cost of recovering their judgments?

A. Well, they would not take out a judgment.

MR. CONANT: They would file a claim.

WITNESS: They would file a claim, and for that there is a fee. I think I have the amounts here. The fees chargeable for the Lacombe law only: up to $25—that is, $24.99—the fee is $2 plus a 20-cent stamp.

MR. CONANT: This is the filing fee?

A. Yes. From and including $25 up to $40 the fee is $3, plus a 30-cent stamp. From $40 to $60 the fee is $5, plus a 40-cent stamp. Over $60 the fee is $6, plus a 50-cent stamp, and that is the highest.

Q. Just for filing the claim?

A. That is right, sir.

Q. And putting him in the picture?

A. Yes, sir, putting him in the folder and allowing the benefits of the Lacombe Act to apply.

MR. LEDUC: You remember that Mr. Juneau gave evidence here, and said he was not satisfied with that way of collecting the fees, that he thought that they should charge a straight commission on the amounts paid by the debtor.

WITNESS: Well, that is over and above these.

MR. LEDUC: I don't think so.

WITNESS: If I remember rightly, Mr. Juneau was referring to the 2 percent which is charged on the distribution. I will be coming to that later.

MR. LEDUC: Yes, but he made another suggestion, if my recollection is correct, which was to this effect, that if the province abolished all these fees and

charged a straight 5 percent on the moneys paid in by the debtor that would be sufficient to pay for the cost of that administration of the Act.

WITNESS: Well, I am merely giving the practice as it is.

MR. LEDUC: As it is now?

A. Yes.

MR. CONANT: Go ahead, Mr. Cadwell.

A. The distribution ——

MR. SILK: Excuse me; I think you will find that at page 622 of the evidence.

WITNESS: The distribution according to the law must be made every three months, but the practice in Montreal is to only make a distribution when 10 percent of the original amount is on hand in the court. They are not following the law in relation to that. The costs of distributing it every three months was prohibitive, so they let the amounts accumulate until they are 10 percent of the original amount of the claim.

MR. LEDUC: If I may interrupt, this is what Mr. Juneau said:

> "Instead of charging for any declaration and charging for filing any claim, I would suggest that when the debtor has deposited $50, before the distribution of his $50, we would charge $2.50, 5 percent, and in the end $1.25 would be charged to him and the other $1.25 would be charged to the creditor."

WITNESS: That is what I say of the Lacombe law. I think we must think of it, not as a separate type of action, but as something that is ancillary to the main Division Court set-up, and it is only as you improve your general set-up that the Lacombe law can be made effective as far as the public generally are concerned.

MR. FROST: Mr. Cadwell, have you considered something in the line of the Lacombe law which would be an original type of action something like this Manitoba set-up—in other words, that it would not be necessary for a man to be sued or to have a number of judgments against him before he went to the court and took advantage of this particular law?

A. I must say that was my view, but that is not the practice in Montreal.

Q. I know it is not, but do you think it is feasible to form such an action?

A. That is, prior to judgment?

Q. Yes.

A. Or prior to the issuing of an action ——

Q. Supposing a man finds himself in a tight spot and he says, "Here, I owe $1,000, and I have 15 creditors; I want to start at once on an orderly payment of these creditors." Do you think that there is possibility of an action being formed, or a law being enacted, which would permit that man to go to say, the Division Court clerk and lay his situation before him, and let the Division Court clerk notify these people? In other words, the man would start, as it were, an action himself, to permit him to meet his obligations in an orderly way.

A. Yes, I think it could be done.

MR. SILK: It may be just a coincidence, Mr. Frost, but under both the Lacombe law and the statute in force in Manitoba, they require at least one judgment; they are both the same on that score.

MR. FROST: One judgment is required?

MR. SILK: That is right.

MR. FROST: Well, I suppose, after all, there is not such a world of difference there, is there?

MR. SILK: I think you will usually find one judgment in a case where a debtor would invoke such a statute.

MR. FROST: You could easily get one man to sue him.

WITNESS: Now, on the distribution, a charge of two percent is made; that is, if the defendant pays in for distribution $100, the court takes $2, and $98 is distributed among the creditors.

MR. FROST: And that two percent is taken from the creditors?

A. Yes—from the debtor.

MR. CONANT: The two percent taken from the debtor?

A. Yes.

MR. STRACHAN: It is taken from the creditor, isn't it?

A. No. The $100 is paid in ——

Q. He owes $100; does he pay in $102?

A. No. He pays $100 in; $2 is deducted by the court and $98 is distributed.

MR. FROST: Does that settle his claim then?

A. No; that settles just the $98.

MR. SILK: It is paid by the debtor.

WITNESS: The feeling in the court at Montreal is, and I think rightly so, that this percentage is not great enough to cover the administration costs of the court.

MR. CONANT: I shouldn't think it would be.

WITNESS: And they also feel—the clerk there feels—that a portion at least of this, and he suggests 50 percent, should be paid by the creditors, and he also recommended, in line with Mr. Juneau, that it should be at least 5 percent.

MR. LEDUC: To take care of all fees?

A. Yes.

MR. LEDUC: I have here Mr. Juneau's evidence, and that may answer the objection made by Mr. Thompson a moment ago; at page 622:

> "WITNESS: Yes, I would suggest that the clerk do a little more than he does, actually; according to this draft"—he was referring to a draft bill—"I suggest that the clerk gives notice to the creditor for the claim, and when the debtor has delayed his payment for say ten or fifteen days, so that the creditor would not have to come to the court to find out.
>
> "MR. LEDUC: You mean, give notice to all the creditors, or only the original one?
>
> "WITNESS: To all the creditors who have filed their claim. Of course, this notice could be sent out at the same time as the cheque,"

and so on and so forth.

WITNESS: The other thing about the Lacombe law that was new to me is, that it is a general law that can be applied to any person earning wages, regardless of where the action is instituted. That is, it does not matter whether it is in the Supreme Court, the Superior Court in Quebec, or the Circuit Court, which is equivalent to our Division Court, or in the rural sections, the Magistrate's Court. If a man earns wages, he can receive the benefits of the Lacombe law.

MR. LEDUC: When you say wages, of course, you mean salary?

A. Yes, salary and wages.

MR. CONANT: I suppose up to a certain amount; that would not apply in an unlimited way?

A. There is apparently no limit, sir.

MR. LEDUC: But it applies only to wages or salary; it does not apply to any income derived from mortgages or to anything of the sort.

WITNESS: Whether the defendant takes advantage of the Lacombe law or

not, is entirely up to himself; it is on a purely voluntary basis. If he does take advantage of the law his wages cannot be garnisheed after that time by anyone.

MR. CONANT: As long as he ——

A. Fulfils the conditions. And those conditions are, that within three days after he receives his salary, he pays the money, the pro rate amount into the court, of his salary, and if there is a variation in his wages or if he is out of work, or if he receives only part wages, he must file a declaration indicating the facts. If he does not do this, then he loses the benefit of the Lacombe law.

Q. He is in default then?

A. Yes. The Lacombe law is applied in the rural sections of the province by the Magistrate's Court, which is a court that looks after civil work as well as criminal work.

Q. Do they all have a clerk—that is, magistrates—do you know?

A. Yes, they do, sir.

MR. LEDUC: Oh, yes.

WITNESS: The Circuit Court looks after only civil actions, and that is the court in use in Montreal.

MR. SILK: The Circuit Court exists just in the city of Montreal, doesn't it?

A. No, the Circuit Court exists throughout the province, but ——

MR. LEDUC. In name only.

WITNESS: In name only, because the Magistrate's Court in the rural sections largely replaces the Circuit Court. The Lacombe law does not depend upon money being due and owing, as our garnishees do; it can be made at any time prior to the receipt of money.

MR. CONANT: Let me get that point. That is a material amendment to our law of attachment or garnishee?

A. Yes, sir.

MR. STRACHAN: We cannot garnishee a man who is paid in advance.

MR. LEDUC: Oh, yes, you can.

MR. STRACHAN: Not here.

MR. LEDUC: Here you can't, no.

MR. CONANT: I was not quite clear on that when we were discussing it

before. That, of course, has always been one of the difficulties—a weakness or a strength, according to your viewpoint—of our garnishee law. Strictly speaking, under our law you cannot garnishee a debt until it is due and payable. How far would they depart from that?

A. They do not consider the question of the debt being due and owing in any way, as far as the application of the Lacombe law is concerned.

MR. CONANT: They deal with anticipated earnings; would you put it that way? Is that about the way it would be described—anticipated earnings?

A. A debtor makes a declaration that he is earning such and such, anticipating what they will be, and after the time of that declaration being made, if the conditions are fulfilled, then his wages cannot be garnisheed.

MR. LEDUC: But, in the case of a garnishee, you can garnishee a man's salary before it is paid.

MR. SILK: That is the general garnishee law in the Province of Quebec.

MR. CONANT: Do they have the same exemptions or comparable exemptions there to what we have here as to wages?

A. I do not know, sir.

MR. LEDUC: It is not quite as complicated as our exemption system.

MR. SILK: As to wages, the exemptions in Quebec are fixed very definitely. Do you know off-hand what they are, Mr. Leduc?

MR. LEDUC: I think wages under one dollar a day are exempt.

MR. SILK: I have it here. Wages under $1 per day are not seizable; from $1 to $3, 20 percent is seizable; from $3 to $6, 25 percent is seizable; and over $6, 33⅓ percent is seizable. They fix those amounts definitely. In the Province of Manitoba they do not; the clerk and the debtor endeavour to arrive at some proper amount to be paid into court; if they cannot agree the judge fixes it.

WITNESS: If the original creditor or any of the creditors receiving payments under the Lacombe law set-up, think a false declaration has been made, they can contest the declaration or seize the wages of the debtor by garnishee; then it is up to the debtor to establish his rights to come within the law. If the matter is contested, it comes before the Circuit Judge. As to the application of the law generally ——

MR. SILK: Mr. Cadwell, excuse me. If it is for a large amount, I understand it is referred back to the judge of the appropriate court; I mean, if it was in regard to a claim for $10,000, it would go to the judge of the Superior Court?

A. Yes, that may be so. I was thinking of the Circuit Court here.

MR. LEDUC. The garnishee would follow the original action. He could not garnishee without a judgment. Take the case of a creditor who claims that a debtor is not making the proper payments; he could not garnishee that man's wages unless his claim was based on a judgment?

A. Oh, yes; on the original judgment.

Q. Yes?

A. Yes.

MR. CONANT: So that one of the claimants who filed, if the thing broke down and he wanted to go on, he would have to start at the beginning again, get judgment and go on from there, wouldn't he?

A. Yes.

MR. SILK: I think you will find that if the claim is not contested under the Lacombe law, it automatically becomes a judgment, and I am sure that is the situation in Manitoba, and I think Mr. Juneau said that was the situation in Quebec.

WITNESS: As a matter of fact, some creditors do take out judgment, even after the Lacombe law, for one reason, because of the opportunity of proceeding on their judgment by execution or by examination, because the Lacombe law only applies to wages, it does not free any of the man's other assets, whatever they may be, and if that is done, the costs of course are added to materially, because they have to pay the costs up to judgment. They in turn take precedence.

MR. LEDUC: Are you sure of that last fact, Mr. Cadwell? Suppose a man takes judgment for the purpose of executing against some land or some other assets of the debtor, and accumulates a lot of costs, after the man has taken advantage of The Lacombe Act; is the creditor really entitled to add those costs to his claim?

A. Yes.

Q. If it is already filed?

A. Yes.

MR. CONANT: But only after there has been default?

A. I cannot be clear on that.

Q. Well, a creditor could not come in and sit in on this party and take the benefit of it to a certain point, and then pull out and take proceedings without anything having altered the position of the parties, unless there was default?

A. That is, subsequent to the arrangement being made?

Q. Yes?

A. Yes, I think that is true, sir. But, before that time any number can take out judgment, and those costs are added.

Q. Well, when do they reach the point when there are no more judgments? obtainable?

A. After the debtor has filed his affidavit or declaration.

Q. So then, the debtor has it in his power to stop this getting of judgments?

A. That is right, sir; but if he defaults, then after that time they can proceed.

Q. The gates are open again?

A. Yes. As to the application of the law, approximately 50 percent of the defendants take advantage of the Lacombe law, in the first instance.

Q. Is that so?

A. Yes.

MR. SILK: Mr. Cadwell, would that be of the defendants in the Small Debts Court?

A. I am speaking only of the Circuit Court. I was not contacting the Superior Court at all.

MR. CONANT: You mean to say that 50 percent of the people who are sued in the Quebec courts, which correspond to our Division Courts, take advantage of this Lacombe law?

A. That is, the Montreal court, sir. That figure is not precise, but it is the best judgment that the clerk could give me. Now, the administration of the Lacombe law, which is what I was primarily concerned about, is quite heavy. In Montreal, seven bookkeepers are required, one for each ledger. The money as received is received by a cashier and is deposited in a special bank account, less the 2 percent fee, and a return is required to be made each month to the Provincial Government. As a matter of audit, the return must coincide with the amount on deposit in the bank. The bank account is kept in the name of the court, and cheques are issued on this by the clerk of the Surrogate Court.

Q. Does he sign alone?

A. I believe he has authority to sign, yes, as clerk of the court. In the action itself no money is used, which is different from our system.

Q. No money is what?

A. No money is used; they use stamps. All the documents in the Circuit Court are stamped documents.

MR. LEDUC: I believe all these employees are on a salary?

A. They are paid direct by the Provincial Government.

Q. And all these fees go to the province?

A. Yes.

Q. That is the reason for the stamps?

A. Yes. The amount of 2 percent which is deducted as part of the court fees, is retained by the court and is used to purchase stamps, which in turn are supplied by the Provincial Government. I asked the view of the clerk as to the view of the collection agencies as far as the application of the Lacombe law in Montreal is concerned, and apparently there is not the same supervision of collection agencies in Montreal that there is here. There is considerable antagonism between the court office and the collection agencies. The feeling of the collection agencies is that the Lacombe law is perhaps depriving them of ——

MR. CONANT: Invading their field?

A. Yes.

MR. LEDUC: On the other hand, they are often accused in Quebec of invading the solicitors' field.

MR. CONANT: The collection agencies?

MR. LEDUC: Yes.

WITNESS: There is another curious set-up in relation to the court that impressed me, mentioned I think by Mr. Leduc privately, and that is that there are no court bailiffs. Bailiffs in Montreal are a separate corporation, known as the Corporation of Bailiffs. They do the work of the civil courts on a fee basis, the fees for which depend upon the amount of the claim.

MR. CONANT: And the Government has nothing to do with appointing those bailiffs?

MR. LEDUC: No. They fix the fees, though.

WITNESS: They fix the tariff, and apparently the system works out fairly well.

MR. CONANT: Well, you can't act as bailiff unless you are a member of this institution or organization?

A. That is right.

MR. LEDUC: But there are usually several bailiffs in the same town, so if you are not satisfied with the way Mr. Jones looks after your business, then you can hand it to Mr. Smith.

MR. CONANT: Anything further?

A. I don't know whether you are interested in knowing the officers in charge of the court. I have them listed here. There is a chief clerk, there is an assistant chief clerk, who looks after Circuit Court matters in the court, chief accountant, assistant chief accountant, ledger keeper, cashier and record guardian; so the list of accounts are considerable in the office.

MR. LEDUC: But that is not only for Lacombe law work?

A. Oh, no; that is for the complete office work. The following forms are used ——

Q. You say there is a chief clerk; are you speaking of the Circuit Court or of the Superior Court?

A. No, this is Circuit Court.

MR. LEDUC: You must have more than one assistant clerk; you must have three or four.

MR. SILK: Mr. Juneau said there were at least ten clerks engaged on the Lacombe law in Montreal.

WITNESS: There are seven, one for each ledger. You must realize, too, gentlemen, that most of our conversation was carried on in French, and, although I have some knowledge of the French language, it is perhaps ——

MR. LEDUC: We must not confuse the clerks in the office with the deputy clerks. There is a clerk of the Circuit Court, and he must have three or four deputy clerks.

MR. SILK: Yes, and then there are a lot of assistants.

WITNESS: I procured copies of the forms that they use.

MR. SILK: Those forms have already been filed by Mr. Juneau.

MR. CONANT: I think they should be just filed.

Q. Have you got any figures as to whether this system has paid its way in Quebec?

A. Oh, it has not—I can only speak for the Montreal office. The 2 percent, which is used for purposes of administering the Lacombe law, is not adequate.

Q. You do not know the deficiency?

MR. SILK: It was given to us by Mr. Juneau, $15,000

MR. CONANT: Is he speaking of the province, Mr. Leduc?

MR. SILK: No; he says in Montreal administration of the Lacombe law costs $15,000 over and above fees and the 2 percent.

MR. CONANT: From your examination, Mr. Cadwell, what would you say are the advantages and disadvantages of this system?

A. The advantages, sir, are that the debtor, the honest debtor, can make an arrangement whereby he can pay his debts in an orderly fashion without interference.

Q. Rateably and with the minimum of expense?

A. Yes, with the minimum of expense.

Q. What are the disadvantages?

MR. LEDUC: And without his employer knowing anything about it.

WITNESS: Yes.

MR. CONANT: Yes, that is right; that is important.

WITNESS: The disadvantages are that in the event of there being a dishonest debtor, he may arrange with one of his relatives to file a claim under this *pro rata* set-up, and through a private arrangement may ——

MR. CONANT: By collusion?

A. Yes, by collusion. But outside of that ——

Q. Now, wait a minute. Has any of the other creditors the right to challenge that claim?

A. Yes, they may challenge that.

MR. LEDUC: I was going to ask something else. Are these claims verified by affidavit?

A. I believe so. On the whole, the Lacombe law seems to work out equitably to the debtor and to the creditor, but my impression of the Circuit Court fee set-up in Montreal is, that it is just as cumbersome as our present set-up, and unless we do something about that in the first instance, the application of the Lacombe law would not be very satisfactory here.

MR. CONANT: You mean, by inaugurating a block system?

A. Block system, yes.

MR. LEDUC: Well, even suppose we kept the same system, Mr. Cadwell, you mentioned that claim of $60, and, if my recollection is correct, the cost on a $60 claim would be around $4.50 or thereabouts?

A. $23.60.

Q. That is in Quebec?

A. Yes.

Q. But I mean here. That was in the First Division Court, I believe, of York. The average amount of costs in 100 cases of varying amounts came to $6.79.

MR. CONANT: Up to what amount?

MR. LEDUC: Well, those were 100 cases, but then, the average cost on an action between $60 and $100 amounted to $7.17, so even if the man was given the advantage of getting under the Lacombe law, after he owes that $7.17, it would be much better than it is in Quebec.

WITNESS: Yes, but I think that we should go a step further than that, and give him the opportunity of making his arrangement prior to judgment.

MR. CONANT: Prior to judgment?

A. Yes, or prior to the issuing of an action in court.

Q. You mean, if a man is threatened and is cornered, he could invoke it himself?

A. Yes.

MR. SILK: Mr. Cadwell, have you studied the Act in force in Manitoba?

A. I must confess I have not.

MR. SILK: I have Mr. Ogle here; I see we have about half an hour left.

MR. CONANT: Well, that would be all right.

MR. SILK: Mr. Ogle, from the city sheriff's office.

DAVID J. OGLE (Sheriff's Office, City of Toronto).

MR. SILK: Mr. Ogle, you have been engaged in the office of the sheriff of the city of Toronto and the sheriff of the county of York for a good many years?

A. Yes.

MR. CONANT: How many years?

A. About twenty-six years.

MR. SILK: And you have had a good deal of experience in the matter of selecting jury panels?

A. Yes; that is my work principally.

Q. The Committee desires to devise a scheme whereby the calibre of the jurors might be improved. Have you any observations you might make, which would have the effect of improving the calibre of jurors on the petit jury panel?

MR. CONANT: Let us have first the present system, Mr. Ogle.

A. I might say, Mr. Conant, that just before the opening of the assize, I had a talk with Mr. Justice Hope. This talk originated, of course, from him. He thought that something should be done in regard to raising the standard of these jurymen, also the question of the number of men that are summoned, who are exempt under the statutes. I told him that that commenced very largely with the Clerk of the Peace, and I had an idea that when letters were sent out to these local selectors, that some mention was made of that. I promised go get him a copy of that letter that went out, which I did. Colonel Denison has sent out a rather strong letter just two days ago to these local selectors.

Q. That is getting ready for next year's list?

A. Getting ready for next year's list.

Q. Yes?

A. Pointing out the fact that a number of jurymen have been summoned who are not—well, they are qualified, but they are exempt under the statute—for example, men employed by the T.T.C. and the railways and the Hydro, and so forth—and there has been a lot of expense bringing these men, and of course—well, we don't bring them; they are off.

Q. They just confuse the lists?

A. They just confuse the lists. We summon fifty men, perhaps, and there is twenty-five percent of them are away for such reasons as that. Now, when Colonel Denison sent out that letter, he also pointed out that the calibre, the standing, of these men should be looked into, and that we ought to get a little different men to what have been coming down. What effect that will have I do not know, but that is where it begins; that is where the jury commences.

Q. That is important, yes.

A. Yes.

Q. And if those municipal selectors ——

A. If they do as has been suggested to them, I think we will see a change.

MR. STRACHAN: How do they function, Mr. Ogle? What knowledge have the municipal selectors got except what they get from looking at the list ——

A. The local selectors send in ——

MR. CONANT: Who are the local selectors, first of all? The assessor, the clerk ——

A. The assessor goes around ——

Q. Well, never mind that.

MR. SILK: The local selectors are, under section 15, the head of the council, the clerk, the assessment commissioner and the assessors of every local municipality.

MR. STRACHAN: How many of those in the city of Toronto actually function?

MR. CONANT: Does that apply in Toronto too?

MR. SILK: Any two of whom shall be a quorum.

MR. CONANT: Then your local selectors are the head of the municipality, the assessor and the clerk?

A. Yes.

Q. Who determines the number of names that they shall send in?

A. The clerk of the peace sends them a list instructing them with regard to the number of names that they are to send in.

Q. So that he sends, for instance, to the townships around here, saying, "You will please select a hundred names from your municipality"?

A. Yes.

Q. Who determines that, the clerk of the peace or the judge?

A. Well, no, the judge—you have the selection committee that determines in the first place the number of jurors that will be required for the year.

Q. Who is that committee?

A. You will find that further over, Mr. Silk.

MR. SILK: The number is fixed, though, by the judges, isn't it?

A. In the city of Toronto, the Senior County Court Judge.

MR. CONANT: The sheriff?

A. The sheriff, the treasurer.

Q. The clerk of the peace?

A. And the mayor.

Q. They determine how many are required?

A. Yes.

Q. I am speaking of the county of York now particularly.

A. Yes.

Q. Who determines the number required in the county of York?

A. The county of York and the city of Toronto are the same; it is all one.

MR. FROST: That would be the warden, wouldn't it?

A. The warden only comes into the picture when they are selecting jurors from the county, that is, outside the city.

Q. I know, but who tells the city of Toronto how many jurors are needed from Toronto?

A. The clerk of the peace.

MR. CONANT: Does he determine the number?

A. It would be determined at a meeting that is held in September with regard to the number for the year; then it is built up from that.

Q. Then who determines that number, whether it is a thousand or ten thousand?

A. Well, that is determined by this selection committee.

MR. SILK: That is done by the county selectors, isn't it, Mr. Ogle?

A. Yes, the county selectors.

MY. FROST: Who are they, for instance?

A. Well, the mayor ——

MR. SILK: The county selectors: the mayor of any city situate in the county, the warden, the treasurer of the county, the treasurer of any such city, the sheriff or, in his absence, the deputy sheriff, any three of whom shall be a quorum.

MR. FROST: They decide how many jurors there shall be?

A. Yes.

MR. CONANT: From each municipality?

A. Yes.

Q. Then the clerk of the peace tells them that; that is the letter you have just spoken of now?

A. Yes.

Q. Then when you go the the local municipalities, it is the head of the municipality, the assessor and the clerk that pick out the men to meet that requisition?

A. Yes.

Q. Then that is returned to the clerk of the peace?

A. To the clerk of the peace.

Q. Now, what happens from thereon?

A. Then you have a jury roll.

MR. FROST: Tell me this: Before you get that far, the municipal people, that is, the mayor and the clerk and what not, as was read there—from the city of Toronto you might be asked for how many? A thousand jurors, or would there be that many?

A. There would be more than that on the roll.

Q. I know, but the original list that is sent in, which is the basis?

A. Yes; say from the city of Toronto?

Q. Yes.

A. Oh, there would be all of a thousand, yes.

Q. Well, how do they choose those names? (No answer).

Q. The reason why I ask you that, Mr. Ogle, is this very point: complaint has been made that the calibre of jurors is not good enough—I think I am putting it correctly—and they say that that situation is particularly bad in the city of Toronto. Now, we had one gentleman up here this morning who complained about the calibre of jurors that are on the jury panels in the city of Toronto, and he said that there should be at least some different system for Toronto if the rest of the province was not changed. What I would like to find out is this: how is it that the calibre of jurors is not good? Is there any reason that you can suggest that the calibre is not good? I mean, when the statute provides that those selectors from a municipality are to send in say a thousand good names, why is it that they don't send in a thousand good names?

A. I should say that in the smaller communities these assessors would have a better knowledge of the men; in a small town they would know every person in it.

Q. Is there any suggestion that you could make to remedy that condition in Toronto?

A. I don't see how it could, because the mayor would not ——

MR. CONANT: Suppose you enlarge the board; it is a pretty small group that selects them?

A. It is, yes

Q. Supposing you enlarged that group, would that help?

A. I doubt very much if it would, because in a city like Toronto it is surprising just the very few names of these people that come before you that you would know.

MR. STRACHAN: It would be just luck if you knew any of them.

WITNESS: I have been handling these juries for a great number of years, and it is very seldom that on a panel of say three hundred names I would know any more than two people out of the whole list.

MR. FROST: Well, how do you choose the original names, Mr. Ogle? Do you just take them out of a box?

A. These names come in, the name and the address and the occupation.

MR. CONANT: That is off the assessment roll?

A. Yes, the occupation of the man, but very invariably these men are described just as clerk, manager, and so on; there is nothing to indicate where they work or what the nature of their work is.

MR. FROST: Well, do you just take haphazard say a thousand names from your roll?

A. Well, the roll is three times the number that they require for the list from which the drafting is done. They go through these names, and I suppose they would reject some of them, I have no doubt, but it must be difficult for those ——

MR. CONANT: That is fundamental.

WITNESS: Yes.

MR. CONANT: You are right at the point now that is fundamental on this. I have sat on these boards myself, not in Toronto, and I can quite see that in Oshawa somebody on that board would know practically everybody who comes up.

A. Yes, exactly.

MR. CONANT: But how can we improve the situation, the system, for a city like the city of Toronto? That is what we are concerned with, is it not, gentlemen?

MR. FROST: If your basic list is, generally speaking, good, then your juries are going to be good.

WITNESS: The only suggestion we have to make would be that more of these jurors are drawn from the better residential districts in the city, and their occupations, but there is another thing that happens: as soon as you get a good

man that is a good juror and a strong man, he is a busy man, and there is all kinds of pressure to get that man off.

MR. CONANT: What's that?

A. There is all kinds of pressure put on the judge to let him off. The judge, of course ——

Q. He doesn't want to serve?

A. He doesn't want to serve. Mr. Strachan will come along and say, "Well, I have got a man here; he is a very important man."

MR. CONANT: You are only using Mr. Strachan as an example. He would not do such a thing.

MR. STRACHAN: No.

MR. CONANT: No. I must challenge that statement as to Mr. Strachan. I know Mr. Strachan wouldn't do a thing like that.

WITNESS: Well, I can't remember what he did, you know, but I am just working on it, anyway.

MR. STRACHAN: Do you think that because a man comes from a better district he is going to be a better juror necessarily, Mr. Ogle? I would rather question that.

A. Well, he might not, but it would eliminate perhaps some of the men that come around. It is a very difficult question.

MR. STRACHAN: I would disagree with you right there.

WITNESS: It has been remarked that in Hamilton they do get a better type of juryman. Of course, that district is much smaller than Toronto.

MR. STRACHAN: There has been criticism even of the verdict of a special jury, hand-picked men.

MR. FROST: I suppose you take so many from every ward, do you?

A. Yes, and then they are finally drawn by ballot.

MR. CONANT: That is the final list?

A. That is the final. That is the drafting from the jury list.

Q. Yes, I understand that, but it seems to me that there is the basic problem, to develop if it is possible a better method for the municipal selectors; there is where the trouble starts; isn't that it? Isn't that what you call them, the municipal selectors?

A. The local selectors.

Q. The local selectors?

A. The local selectors.

Q. And you cannot suggest any way of improving that?

A. Well, you see, the assessors go around—that is where it commences—and they place a "J" opposite the man's name ——

Q. Just on that point, the assessor of Toronto—the assessment commissioner is the man who is on the selection board, isn't he?

MR. FROST: Yes, but he has nothing to do with the actual assessing.

MR. CONANT: He doesn't go around. They have in Toronto probably twenty-five men who go around and put the "J" on.

WITNESS: Not the assessor. They have men doing that work.

MR. CONANT: But the man who does that work on the field, he is not the man who sits on the board of selectors?

A. He does not sit on the board of selectors.

MR. STRACHAN: He just marks the "J".

WITNESS: He marks opposite that name, those that are eligible for jury duty.

MR. SILK: Mr. Chairman, it might be interesting to ask Mr. Ogle if he knows whether the head of the council, the clerk or the assessment commissioner actually do sit in on the selection, or is the work left to the two assessors to form a quorum?

WITNESS: Well, I have never been present, so therefore I could not answer that question.

MR. FROST: Tell me, Mr. Ogle, do you think if these jurymen who beg off stayed on the job the juries would be better?

A. Well, I have seen very good men get off, I know, men capable of making decisions.

MR. CONANT: Do you think there is too much latitude that way, in excusing jurymen?

A. Well, that would be criticizing the judges.

MR. STRACHAN: It is pretty hard to get a juryman off a jury; there has to be a very, very good reason.

MR. CONANT: You are not speaking from experience?

MR. STRACHAN: Oh, no! But I am told.

MR. CONANT: It is alleged that it is difficult.

Now, there has been a suggestion here that was not promoted so much to-day, that something might be accomplished by having the assessors indicate by some symbol or symbols the educational attainments of prospective jurymen; wasn't that it?

MR. SILK: That was Mr. Peter White.

MR. STRACHAN: The difficulty about that, Mr. Chairman, is that the assessors very seldom see the man at the house; they simply enquire from whoever comes to the door who lives here and who is the owner and tenant, and so on; the man of the house, the juryman, is generally at work when they come.

WITNESS: That is just exactly what happens, and if they don't get the information there they get it from the neighbour next door, and often it is wrong. We have had men come there—for example, in the last jury we had, we had a K.C., a man who was exempt.

MR. STRACHAN: It is pretty hard to get into a district where there is not at least one of them.

MR. CONANT: Or even to find a street without one.

WITNESS: He never should have been on the list.

MR. SILK: Mr. White's suggestion was to have the local selectors indicate generally the education, experience and physical fitness.

MR. STRACHAN: But they never see them.

MR. SILK: Pretty difficult.

WITNESS: I think that this letter that Colonel Denison sent out will have an effect, because he has gone into it very thoroughly.

MR. CONANT: Well, can you suggest anything that might be done by way of legislation to improve the situation?

MR. FROST: This might be very cumbersome, Mr. Ogle, but supposing you had all your assessors, say twenty-five in the city of Toronto, meet, and each one of them nominate say fifty men, or whatever it might be, from his division, good men, and then make your choice, your original draw of say a thousand, from them?

A. These men should have first-hand information, because they are actually attending at the man's home, and they could form some opinion if they saw him, but of course the man is out to work during the day when they are there.

MR. CONANT: How many of those men have they got in Toronto that pound the streets with the big book under their arm? Fifty?

A. I am sorry, I cannot answer that question.

Q. Well, there would be twenty-five at least?

A. There would be quite a number, yes.

Q. Wouldn't they be the men who should know more about the personnel of the city than anyone?

A. That would be my opinion.

Q. Would it be quite feasible to require that those men should indicate on the roll in a separate column in some way or other, by some formula, the degree of fitness or qualifications for jury duty?

A. Well, the only thing a man would do, I would say, would be just answer the question in his own mind, "Is that man fit for jury duty or is he not?" and if he is, mark him with a "J" as being a man that would be quite suitable for a juryman. Unless he was satisfied with regard to that he wouldn't mark it at all.

MR. STRACHAN: If he was a friend of his he wouldn't mark it.

WITNESS: Well, of course, you couldn't control that.

MR. SILK: I do not think those men have any particular knowledge. I am sure the man who goes along the street I happen to live on doesn't know me, and I don't think they will see one man out of twenty on the street, because they come along in the daytime, when most men are at work.

MR. STRACHAN: I have never seen our assessor.

MR. SILK: They have got me down as an Anglican, and I go to the United Church.

MR. CONANT: Just to carry that a bit further, and get it on the record: After the respective municipalities return their—is it a list or a roll they return?

A. They send in a list to make up the roll.

Q. They send in a list?

A. Yes.

Q. And then the county selectors go to work?

A. And they make up a jury list from the roll from which they draft their jurors.

Q. The various lists?

A. Yes.

Q. The petit jury and the grand jury?

A. Yes.

Q. Supreme Court and all the rest of it?

A. Yes.

Q. And that consists of the warden and in Toronto the mayor of the city and the whole list that was read out?

A. Yes, that is correct.

Q. Now, in a jurisdiction like this county, those men would not have any personal knowledge of many of those on those lists, would they?

A. No, they would not.

Q. It always strikes me, gentlemen, that this system is a relic of—of course, this system, I suppose, has been in force perhaps for fifty years at least, hasn't it?

A. Oh, yes.

Q. More than that?

A. I suppose more than that.

Q. Isn't this a relic of the days when communities were smaller and there was more local and personal knowledge of everybody in the community?

A. You find indications of that in the Jurors Act; you would be reminded of that, yes.

MR. FROST: Actually speaking, Mr. Conant, as you know, there is not very much trouble in outside localities.

MR. CONANT: Which fits into my remark of a minute ago. In the small communities or counties, it is pretty well agreed, or at least opinion is fairly unanimous, that there is no complaint about jurymen; it is when you get into the larger communities.

WITNESS: These men who have been entrusted with making up the list or finally selecting these men would have some personal knowledge of them, whereas that is impossible in Toronto.

MR. FROST: Furthermore, the exemptions are pretty broad.

MR. CONANT: That is true, yes.

MR. FROST: It might be better to cut down on the exemptions.

MR. CONANT: Well, we are letting some of the best fish out of the bag, aren't we, with the present exemptions?

MR. SILK: Mr. Barlow tried to find a way to cut down on the exemptions, but he concluded that it was impossible.

MR. CONANT: Well, that is the problem. It is the problem of the larger cities.

MR. FROST: Exemptions are very, very broad. The truth of the matter is, if the jury system is to be retained and if it is so valuable, then why should broad classes be exempted?

MR. CONANT: I wonder what was the original basis of that exemption. Was it that these exempted persons were vital to the state's ——

MR. FROST: Have you got the exemptions there? For instance, a bank manager ——

WITNESS: A bank manager is exempt.

MR. SILK: Members of the Privy Council and of the Executive Council, the Senate, the House of Commons, the Assembly; every officer and other person in the service of the Governor-General or the Lieutenant-Governor; every judge, police magistrate, sheriff, coroner, gaoler, keeper of a house of correction or lock-up house; every sheriff's officer and constable; every minister, priest, or ecclesiastic, every barrister and every solicitor; every officer of any court of justice; every physician, surgeon, dental surgeon, pharmaceutical chemist and veterinary surgeon qualified to practice.

MR. CONANT: I wonder why that class was exempted.

MR. STRACHAN: Because they might get a hurry-up call.

WITNESS: A pharmaceutical chemist is a man who is compounding prescriptions.

MR. STRACHAN: They had a chemist on the jury in Bardell v. Pickwick.

WITNESS: There is one that is rather old-fashioned now, I think—every miller. Well, that happened away back when a man ——

MR. CONANT: Go ahead and read it.

MR. SILK: The next deals with the army. Then every pilot and seaman engaged in the pursuit of his calling; every head of a municipal council; every municipal treasurer, clerk, collector, assessment commissioner, assessor and officer.

MR. FROST: Well, why so?

MR. SILK: Every editor, reporter and printer of any public newspaper or journal.

MR. FROST: They are the very people who should be in there, editors of newspapers; they know all about everything. They should not be exempted.

MR. SILK: Every professor, master, teacher, officer and servant.

MR. CONANT: We won't go into the professor matter just now.

MR. SILK: That includes every servant of a university or college.

MR. FROST: After all, why should a school teacher be exempted?

WITNESS: Well, that would be very awkward. We had an instance ——

MR. FROST: That may be, but isn't the administration of justice above everything else?

MR. STRACHAN: Why should it be any more awkward to serve on a jury seven days in a man's lifetime than it is for a man to go in the army? It is all awkward.

WITNESS: They might have to leave the ——

MR. STRACHAN: Well, they have occasional teachers.

MR. SILK: Every person engaged in the management, working of a railway or street railway, and every person permanently employed by any public commission, carrying on the business of developing, transmitting or distributing electrical power or energy.

MR. FROST: Well, why?

MR. SILK: That means all employees of Hydro are exempt. Every telegraph and telephone operator; every miller; and the last is, every fireman. There are certain qualifications as to firemen.

MR. CONANT: They are too broad. I think we should consider that. I think particularly we ought to look into the exemption on newspaper editors, reporters, and that kind of thing.

Thank you, Mr. Ogle.

Adjourned at 4.33 p.m. until 10.30 a.m. on Tuesday, September 24, 1940.

ELEVENTH SITTING

Parliament Buildings, Toronto,
September 24th, 1940.

MORNING SESSION

On resuming at 10.30 a.m.:

MR. CONANT: Gentlemen, I have a letter to put on file; perhaps we might do that. It is not on a very cheerful subject. It is a letter that has come to me from Mr. Maclennan, the witness here yesterday, enclosing a letter from the

sheriff of the county of York. It has to do with this question of executioner. Perhaps Mr. Silk will read it out, and then it can go on record. It is a rather morbid subject for a cloudy morning.

MR. SILK: It is on the letterhead of the sheriff of the county of York, addressed to R. J. Maclennan, Secretary-Treasurer, Ontario Sheriffs' Association:

"Dear Mr. Maclennan:

The other day John Ellis, the executioner, was in my office and was discussing the matter of executions from the standpoint that you and I have already discussed it, that is, the engagement of some person to do the executions who should be in our opinion engaged by the Department of Justice, but the Department of Justice do not see the point.

Ellis tells me that he has been discussing this at the request of one of the western sheriffs, and it is their opinion that the Attorney-Generals of Ontario, Manitoba, Alberta, Saskatchewan and British Columbia should together engage the services of some executioner and jointly pay him a salary that would mean a living allowance and which would include the payment of say two understudies.

This man is very efficient and has worked in Alberta, Manitoba, Saskatchewan and also British Columbia.

Let me know what your opinion on this is and how we should go about it. Perhaps it would be well to make this the matter of discussion of the executive of the Sheriffs' Association if you wish and possibly a memorandum to the Attorney-General of Ontario would result.

I am,

Yours sincerely,

(Sgd.) W. H. S. CANE,

Sheriff, County of York."

The letter is dated September 19, 1940.

MR. CONANT: Well, I don't think there is anything arising out of that. Is the witness ready?

MR. SILK: Yes; Judge O'Connell.

HIS HONOUR JUDGE O'CONNELL, Senior Magistrate, county of York. Formerly Senior County Court Judge, county of York.

MR. SILK: Judge, you are at present the Senior Magistrate for the county of York?

A. Yes.

Q. And for a good many years you were a County Court Judge in the county of York?

A. Yes.

Q. And a great part of your work was in criminal court, that is, the Court of the General Sessions of the Peace and the County Court Judge's Criminal Court?

A. That is so.

Q. At that time you had considerable experience in the matter of grand juries?

A. Yes, I have had considerable experience with grand juries during those years.

Q. It has been recommended in Mr. Barlow's report—you have read the Barlow report so far as it has to do with grand juries, have you?

A. Well, you were kind enough to give me a copy this morning; that is the first time I have seen it. I have read it over during the few minutes I have been sitting here.

Q. I am sorry you did not have one earlier. Mr. Barlow has recommended the abolition of grand juries, for the reasons given in his report.

A. Yes.

Q. Do you concur in those reasons, or in the result?

A. Well, I do not concur in the result. For very many years I have been advocating grand juries in my charges to the grand juries, during the years I have been sitting as County Court Judge, Chairman of the Sessions, and I have not seen any reason to change my opinion since then. In the first place, I think one important fact has to be borne in mind, and that is that the grand jury is a very ancient institution, it has come down to us through the centuries, and I think its very antiquity, its age, is to some extent a warrant of the useful part it has played during these centuries in the administration of the law. That very fact of itself, I think, would demand consideration before any radical steps were taken to abolish it. To me it seems to agree with the very spirit and genius of the Anglo-Saxon race. It is essentially a democratic institution.

Q. You know, do you, Judge, that there is virtually no grand jury in England?

A. Oh, yes, I know that.

Q. Nor in South Africa and most of the other parts of the Empire?

A. Yes. Well, it seems to me that the grand jury manifests to some extent the irresistible determination of that race to keep the control of things in its own hands.

MR. CONANT: What always puzzles me, Your Honour, is this, and perhaps you can add something that will resolve my difficulty: granting all you say about the condition of the grand jury and its historical background, why should not that same reason prevail in all the rest of the Empire? They have abolished them largely in England and in every other substantial jurisdiction except Ontario, haven't they?

MR. SILK: And the Maritimes, I think, sir.

MR. CONANT: And the Maritimes.

WITNESS: Well, I do not see any reason why those reasons should not prevail throughout the whole of the Empire.

MR. CONANT: But yet they have abolished them.

WITNESS: That may be so. People may take different opinions about these things.

MR. CONANT: What I meant specifically is, do you know of any different consideration or condition existing in Ontario from those in any of these other jurisdictions, that would make the continuance of the grand jury advisable here and not in the other jurisdictions?

A. I do not know of any condition existing in Ontario which is different from the conditions existing in these other parts of the Empire where they have abolished the grand jury. If there are good reasons for abolishing the grand jury in other parts of the Empire, if the reasons are good and substantial, I suppose they would equally prevail here.

MR. CONANT: Well, of course, one of the best reasons is that they have abolished them in many jurisdictions for many, many years. You see, in England they abolished them during the last war, and then they reinstituted them, and then they abolished them again. Isn't that the history of it, Mr. Silk?

MR. SILK: Yes, that is right, sir.

WITNESS: I do not suppose it is quite a safe process of reasoning to conclude that because some place else they have done something we should do it here. It is well to examine the reasons why it was done there and the reasons why it should be done here. They may have abolished the grand jury and they may have been entirely justified in doing so. The responsibility of abolishing the grand jury rests on the people here; they will have to determine for themselves whether there is good reason for abolishing it, rather than coming to the conclusion that because other people have done it we should do it here.

MR. SILK: Your Honour, I think we are all agreed that the fundamentals of our administration of justice are derived from England, aren't they? Very largely our administration of justice is patterned on the English system, since the beginning of Upper Canada?

A. Does that relieve us from the responsibility of deciding these things for ourselves?

MR. CONANT: Oh, no; but I cannot see the process of reasoning that would justify grand juries here and not justify them in England, or *vice versa*.

A. There is this condition, that might prevail here which did not prevail there at that time, and that is, that the world war has changed things to a very large extent, and it is because people take a different view of things.

Q. May I ask one question, your Honour? Do you not think that if grand juries were abolished there would be a disposition on the part of magistrates to give more careful consideration before making commitments or otherwise?

A. I do not think it would make any difference as far as the magistrate is concerned. I think the magistrate is impressed with one idea when he is trying a case; he tries his case and comes to a conclusion as best he can upon the evidence before him, without considering what the result will be in some higher court, or what will be the result when the case goes before the grand jury.

MR. FROST: Tell me, sir, just with regard to the matter of grand jury investigations, in view of the fact that the custom has arisen that the Crown counsel should lay the evidence which is at his disposal before the grand jury, no other counsel being present, does that affect your opinion as to the value of the grand jury from an investigating standpoint?

A. No, no.

Q. May I make myself clear, sir? Take, for instance, in the preliminary inquiry before the magistrate, where the parties are represented and where both sides have a chance to question and to cross-examine. It does seem to me this way, that the magistrate has a better opportunity of forming a conclusion as to whether there is sufficient evidence to send a man on to trial than a grand jury has, where the one side only is represented, and where the case may get the Crown attorney complex, if I may put it that way. Mr. McFadden will probably disagree with me in that statement, but nevertheless I think that it is true that there is such a thing as a Crown attorney complex, and when a Crown counsel takes a strong view on the case he naturally impresses his view on the grand jury, with the result that the grand jury decision ofttimes just reflects his opinion.

A. Well, if you will pardon me for saying so, I think that is simply viewing the functions of a grand jury from one point of view, where there are various points of view to be taken. You are viewing it now from the mere point of view of it being a safeguard to the liberty of the subject.

Q. Yes.

A. That is only one of the functions of the grand jury, and in my opinion there are several other important functions of the grand jury as well as that that should be considered before grand juries are abolished. That is only one of them. As far as the protection of the subject is concerned, the argument frequently used is that the man has already been on for trial before a magistrate, the case has been investigated, the magistrate has heard the evidence presented by the prosecution, and, if the defence so desire, has heard the evidence presented

by the defence, and therefore is in a better position to decide whether there is a case to be tried by the petit jury than a grand jury would be that hears only one side of the evidence. Generally speaking, that is so, but as long as you are administering the law by human agents you must not expect that in every case magistrates are safe agencies in dealing with the liberty of the subject. They will make mistakes, and they frequently do make mistakes, because every human agent makes mistakes, and sometimes they send men on for trial where subsequent investigation shows they should not have been sent on for trial.

Q. Well, there has been another objection ——

A. Then if this man goes on to trial he may be put to a very considerable amount of expense and the state put to a very considerable amount of expense which might be saved by proper investigation by the grand jury, if a mistake has been made by a magistrate in sending on the case in the first instance; and it is quite evident that there are a number of cases where the grand jury find no bill, indicating that the magistrate has sent some cases on for trial that should not have been sent on for trial. I have never heard the Crown counsel complain that the grand jury made any mistake in rejecting those bills. Take some cases: they may last for days and they may last for weeks; I have had a case last before me for weeks, and a man put to an enormous amount of expense.

Q. I should like to ask Your Honour this other question. Now, sir, I am not suggesting that this point is at all fair, but it has been raised by the press in the province in the last month or two, or at least since this matter has been under investigation here, that because of the fact that the hearings of the grand jury are in private and the fact that the Crown counsel alone is there, in effect the decisions of the grand jury are more or less hole-in-corner sort of affairs, and that if the Crown counsel in his widom takes a very lenient view of the case—and he may be wrong—no bill might be brought in. I believe there was criticism of a case down east here in connection with that very thing, in which I believe the grand jury brought in no bill, and then afterwards it was laid under some other procedure and I believe a conviction was found. There was criticism, I believe, in one of the Toronto papers over the fact that that procedure was not a safeguard to justice but in fact it resulted in more or less of a hole-in-corner procedure which lent itself to just defeating the very ends that we were trying to protect. Now, sir, I say perhaps that may not be fair, but I am just stating that that is what has been in the press.

A. That may occur; it is possible. You will have mistakes made, and corruption, do what you will, but is that any reason for abolishing an efficient institution, because things like that occur? Grand juries may make a mistake, and throw out a bill that should have been a true bill; that may happen; the point or observation is this fact, as far as that aspect of the case is concerned: does it afford any protection to the citizen? If it affords protection to the citizen, in working it out they may occasionally make mistakes. As I said before, that is only one aspect of the grand jury.

Mr. Conant: Well, of course, isn't the state to be considered too, as well as the citizen?

A. Of course the state is to be considered, absolutely. Where is the state's

interest neglected by reason of the fact that you are protecting the interest of the citizen by putting around him the safeguard of the grand jury?

Q. Well, you spoke about the human element, which is very true. I think that that would apply to a "no bill" by a grand jury; the grand jury might make a mistake. Now, since I have been in office I can recall at least three cases in which a grand jury found no bill, and I afterwards, in my right, directed a bill to be laid, and they were tried and convicted; so the grand jury is not infallible.

A. Oh, no, it is not infallible by any means. As I have said more than once, one point that is emphasized is that it is considered a safeguard for the citizen. That, of course, arises a great deal out of its historical development, because there was a period of English history when it was a very important safeguard of the rights of the citizen. It protected citizens against the arbitrary rule of tyrannical kings, and it has developed and protected the liberty of the subject down through the centuries.

Q. That was really its origin, wasn't it?

A. That is all historical. It may be said, well, there is nothing in that now, because tyrannical kings have disappeared with the coming of the democratic form of government. It is not so. Democratic forms of government may become just as arbitrary as kings in the course of time, as the history of Rome and France teaches, and it is well to keep that spirit of freedom living in the hearts and the minds of the people, that they will keep control of those things themselves, and safeguard ourselves against arbitrary rule, either of kings or democracies. It is a spirit that lives in the community that it is well to preserve. I think, when one looks at what is going on in Europe at the present time and sees democracy vanishing from the face of the earth, this of all times seems to be the most inopportune time to talk about abolishing the grand jury or any other democratic institution we have. We should make every effort to keep alive our democratic institutions.

MR. SILK: Your Honour, there is one further proposal with regard to grand juries that has been made, and that is that the work which is now done by the grand juries might very well be done by a judge of the County Court; that is, he would hold the same type of hearing as the grand jury now holds. Do you consider that would be practicable?

A. I have not such a superstitious regard for the ability of judges as to say that in all cases their wisdom and good judgment is better than that of twelve men sitting in the decision and consideration of these cases. You do not always get, by any means, judges that can be depended upon to have sound judgment and good common sense. I think it would be an extremely dangerous thing. Everybody knows that there are inefficient judges; they cannot all have sound judgment and common sense, and to place the liberty of the subject in the hands of such a judge instead of in the hands of the grand jury is absurd.

MR. CONANT: The members of the Bar would never make such a suggestion about the judges.

WITNESS: Well, the members of the judiciary are privileged.

MR. FROST: Of course, sir, I ——

A. There was another feature of it. I think one is apt to make a mistake when one simply takes a concentrated view of just one of the functions of the grand jury. There are several functions of the grand jury. In the next place, the grand jury sits, as it did in ancient times, and they virtually try a number of cases. The petit jury come into court, and their mind is concentrated upon one case, and their mind is concentrated on the determination of the issues of that case, but the grand jury sits there in the room and it takes a cross-section of the whole community in which it is presiding. It takes a view of the social and moral conditions existing in that community, it finds how the law is observed, and very frequently it finds defects, serious defects, existing in the law—for example, traffic cases, various cases. In fact, there is a section of the community whose mind is concentrated upon those social and moral conditions of that community, with a view to bettering them if they possibly can, and they very often discharge important work in doing so and make recommendations that are attended to, and in consequence the law has been improved and amended from time to time as a result of advice of grand juries. That is one important function.

Moreover, consider the grand jury sitting, preserving that spirit I mentioned some time ago, of the determination of our people to keep the control of things in their own hands. They feel their sense of dignity and responsibility in discharging that work. They are participating in the administration of the law; they feel the dignity and responsibility of it. That is a very important feature. It imparts to the individual doing that work a sense of respect, and, in fact, affection, for the law, which is a very important thing in these days, and it may be said, "Well, that is only confined to a few men, the grand jury are only a part of the large community," but that is not so, because these men carry that spirit with them out into the community in which they live, and they emanate that idea amongst the people of respect and affection for the law, which is an important thing in any civilized community. That is one function of the grand jury which should not be overlooked.

Then, as to the safeguarding of the citizen, as I have said before, magistrates will make mistakes, and they will send men on for trial from time to time who should not be sent on for trial, and very often the functions of a grand jury save that man and save the state a very considerable amount of expense by preventing the case from going on to trial.

The saving of expense is said to be one reason why grand juries should be abolished. Are you quite sure that you are saving a large amount of expense by abolishing the grand jury? Take the concrete instance: a case comes before the grand jury and they find no bill; that ends it. If that case came directly from the magistrate to be tried, that case might last for days, it might last for weeks, and during the time that case was going on you would have twelve men trying it and you would be paying them their jury fees, and not only would you have the twelve men trying it and being paid fees, but you would have probably forty or fifty men sitting in the jury room during the days or weeks this case was going on, and you are paying them for sitting in the room idle, waiting till this case is disposed of. When you consider those things, you are not perhaps saving very much expense after all by abolishing the grand jury.

I think there are very many concrete instances of why grand juries should not be abolished. One idea that keeps constantly presenting itself to me is this, that it is a democratic institution, and when we see how democracies are vanishing from the face of the earth, and when we observe that these democratic governments are lost by reason of the fact that one democratic institution after another is abolished, until democracy disappears, it seems to me that the present time, having regard to what is going on in the world at the present day, and the tendency for people to adopt totalitarian forms of government, it seems to me that this of all times is a most inopportune time to talk about abolishing the grand jury.

MR. CONANT: Your Honour, just before leaving that—I think probably we need not pursue it further—do you not think this, that if they are to be continued a grand jury of five or seven would function just as well?

A. Should be continued?

Q. If they are to be continued, would a grand jury of five or seven function just as well?

A. That is an aspect of it I have never considered, whether it would be just as well to have seven as twelve. We had a very much larger number than twelve many years ago. I think we had twenty-six or twenty-seven, didn't we, some years ago?

Q. Well, we had more; I do not remember the exact number.

A. Yes, we had more. That has been abolished. I have never carefully considered whether seven would be just as satisfactory as twelve, but it may be that I am highly prejudiced in my view of the grand jury, for the simple reason that for a long number of years I have been constantly charging a grand jury sitting in court on what I considered the historical and practical importance of grand juries. I should be very sorry indeed if so important a democratic institution should disappear from our civilization.

MR. CONANT: What is the next subject, Mr. Silk?

MR. FROST: Tell me, sir, before you leave that, what do you think of the grand jury's inspection of public buildings and what-not? Do you feel that that is useful or not?

A. That is another function of the grand jury, too, which I think is important. I know that there are some people who advocate the continuance of a grand jury who say that that function might be taken from them. I do not think so. Everybody knows that these public institutions are inspected from time to time by public officers, and are very often pretty perfunctorily inspected, it becomes a mere matter of routine, but the grand jury, as I say, with that spirit of wanting to keep control of things in their own hands, inspect these institutions upon which their money is spent; it is their money that maintains them and keeps them, and they want to know what is being done with the money. They have a perfect right to, and they have a perfect right to know the institutions they are supporting, whether they are well supported and are serving the pur-

poses for which they are created. These men go out into these institutions that are maintained on public money and inspect them, and very often they find a condition existing that should not exist. There is hardly an inspection made by a grand jury in which some comment is not made about the inefficiency of these institutions, notwithstanding the fact that they are being inspected by public officials, and there is no doubt about it that their complaints are well founded, because upon investigation they are found to exist, and they should be removed, and they would not be removed unless the grand jury inspected these institutions. Then, again, it creates a spirit of benevolence—altruism is the word—in the minds of the grand jurors themselves; they lose their selfishness, they take an interest in their fellow men and in the public welfare, by interesting themselves in these public institutions.

MR. CONANT: What is the next subject, Mr. Silk?

MR. SILK: Your Honour, I think you expressed a desire this morning to say something with regard to the procedure in Division Courts, and particularly with regard to judgment summonses?

A. Well, what is it you would like me to say about judgment summonses?

Q. I thought that you had some views with regard to the present judgment summons procedure as it is now in force in the Division Courts, as to whether it is a proper and desirable procedure to be continued?

A. Well, it is subject to very serious abuse. Very many times a man has a large number of judgment summonses issued against him, and then when he makes default in the payment of some of these judgment summonses, a show-cause summons is issued, with the result that a very considerable amount of costs are piled up against the man, sometimes amounting to more than the debt. If something can be done to abolish that fault in the system it should be done. I think you mentioned to me some procedure in the province of Quebec.

Q. The Lacombe law, yes.

A. From the somewhat hasty consideration that I have been able to give it, it seems to be probably the most effective and satisfactory way of dealing with that question.

Q. Do you wish to express any views on any of the other matters before the Committee?

A. I do not know of any other matters before the Committee, except the few that you mentioned to me this morning, and I would ask the Committee to excuse me from expressing any views on them, because I have not given the matters any important consideration. Perhaps I should apologize for taking up so much time now in discussing the question of the grand jury with you.

MR. CONANT: There is one subject, Your Honour: There are quite a few summary conviction appeals come before your court, aren't there?

A. Before the County Court Judge's Court?

Q. Yes.

A. Oh, yes.

Q. Of course, now it is a trial *de novo*, the appeal?

A. These summary conviction appeals are tried *de novo*.

Q. Liquor cases, of course, are tried on the record?

A. Yes; that is a provincial law.

Q. Quite. What do you think of the advisability of trying appeals on the record, the same as we do with the liquor cases?

A. A couple of aspects of that occur to me. In the first place, is it wise to take an appeal from a magistrate to a single judge, County Court judge? Is the County Court judge in any better position to decide the case than the magistrate, under ordinary conditions?

MR. SILK: Do you suggest that the appeal should go to the Court of Appeal?

A. I do not see the logic of appealing from a very sensible, prudent magistrate, a man of good judgment, perhaps to an inferior County Court judge; I do not see the sense of it.

MR. CONANT: Well, of course, if it went to the Court of Appeal it would be on the record, Your Honour.

WITNESS: Well, it may not be necessary to go to the Court of Appeal, but I do not think it should go to one man, and have him reverse the decision of the magistrate. If the County Court judge is going to decide the case on appeal, I think by all means he ought to try it *de novo*.

Q. All the evidence over again?

A. I think so, because you cannot determine—the magistrate tries the case, he sees the witnesses, and he is able to decide the demeanour of the witness and the manner in which he is giving his evidence. You lose all that by reading it off the record, and you place the County Court judge in a position very much inferior to that which the magistrate has, of watching the witness; so if you are going to have the County Court judge decide it, you should have him try it *de novo*. And I question very much whether it is a proper course to pursue, to take appeals from a magistrate ——

Q. That always appeared to me to be a very anomalous thing in our administration of justice—two trials of the same issue. It is contrary to every other branch of our procedure, two trials, isn't it? The law is very jealous under our *autrefois* acquit and *autrefois* convict law that a man should not be put in jeopardy more than once, and yet in our summary appeals we really put him through two trials on the same charge and ostensibly on the same facts. When I was more intimately associated with them it always seemed most ridiculous to me.

A. I do not think, myself, it is a very logical procedure, simply for the reason that it is an appeal to one man. If you would have two County Court judges sitting on the case it might be different.

Q. Well, would it improve it if the appeals were made to a Supreme Court judge?

A. That means expense.

Q. Well, if you are going to constitute an appeal court of say two or three judges—three, it would probably be—it would be equally expensive, Your Honour, would it not?

A. Not necessarily so. You have two or three judges of a district in different parts of the province of Ontario, witnesses come to the county town, and have the cases tried, instead of having to come to Toronto or engaging counsel in Toronto, if you hear it on the record instead of *de novo*.

Q. Supposing we were to set up the system—I am just trying to give practical application to what is in your min l—supposing we were to set up a system and constitute a board of three judges from the district to hear summary conviction appeals, would you then try them on the record, hear the appeal on the record?

A. Yes, I think in that case it might be well to try them on the record. There you have three men sitting.

Q. Well, I agree with you, there is some force to that, some merit to that.

MR. SILK: It has been suggested here—I am not sure whether it is in Mr. Barlow's report—that an appeal from the Division Court should go to a single judge of the Supreme Court instead of, as now, to the full court or a court of three judges.

A. Well, you take a judge, for instance, sitting in the County Court of the county of York, sitting in the Division Court; his Division Court judgment will go to a single judge. That same judge may be sitting in the County Court, and his judgment may be appealed to the Court of Appeal. Why should there be that added restriction?

MR. CONANT: Because the issues are not as large.

WITNESS: That is the only reason, because the amount at issue is not large.

MR. CONANT: But doesn't it strike you, Your Honour, as being illogical that in a Division Court case, involving let us say $75 or $100—say $125, because the right to appeal is in cases of over $100—that it should engage the attention of three judges usually at Osgoode Hall, and all the rest of it, five copies of the evidence, five copies of the exhibits, the appeal book, and all the rest of it? I just want your view, your Honour.

A. Well, I am hesitating about expressing an opinion, because I have never been called to consider that question before, and I do not like expressing opinions

unless I have got some reason for them. I am sorry, I would not be able to give you much light on it.

Q. That's all right, you Honour. These just come up more or less incidentally.

MR. SILK: I think there is just one further matter. It has been suggested before the Committee that there is some need to improve the calibre of the jurors; that observation applies particularly to the county of York. Do you consider that that need exists?

A. Well, since you have mentioned it to me this morning, I have been just wondering how you are going to improve the calibre of the jurors.

MR. CONANT: That is what we are wondering, Your Honour; we want you to tell us.

A. I am sorry, but I have not been able to see just now how you are going to improve the calibre of jurors. The selectors sit down at a table; they have the jury book before them; there are three of them sitting there; the clerk calls off three names; one of the selectors mentions one of those three names—he never heard of him before, knows nothing about the qualifications and that sort of thing—and so on all along the list. How are you going to improve that?

MR. CONANT: The fundamental difficulty, apparently, has arisen from the fact, Your Honour, that in the early days of the jury system, say seventy five years ago, juries were chosen in a jurisdiction where the selectors had reasonable opportunity or likelihood of knowing somebody knowing those jurymen, and that condition still exists in the smaller jurisdictions, in my own county for instance, but where you get to the City of Toronto, where you are dealing with thousands of names, how can we meet that situation in the larger jurisdictions?

A. I don't know; I don't know how it can be done. Do these selectors in these smaller places always exercise care in selecting?

Q. Oh, yes; not only that, but then you have a board of selectors in the smaller places, for instance, in my own district, and somebody around the table will know practically every name that is called; one man won't know them all, but somebody will know something about every name that is called. That does not apply in Toronto, of course, does it?

A. No, it does not. They are selected here without any knowledge of the qualifications of the men whom they are selecting. I do not know how you are going to do it.

Q. It is simply a matter of routine in Toronto, picking out enough men?

A. Just picking out the men without regard to qualifications.

MR. SILK: I think that is all I have for His Honour.

MR. CONANT: Thank you very much, your Honour.

J. W. McFADDEN, K.C. (Crown Attorney, County of York).

MR. SILK: Mr. McFadden, you have been the Crown attorney for the County of York for some years now?

A. That is correct.

MR. CONANT: For how many years, Mr. McFadden?

A. I came in as assistant in 1919; I have been Crown attorney since 1931.

MR. SILK: Twenty-one years in the office. And you have had considerable experience with grand juries?

A. Quite a lot.

Q. During that time, have you read Mr. Barlow's report?

A. Yes.

Q. That pertains to grand juries. And do you agree with his reasons and particularly with his conclusion that grand juries should be abolished?

A. I am not so sure that there is much to be gained by abolishing the grand jury. Of course, one cannot pronounce on that without knowing what, if anything, is going to be set up in its place. The point I want to make is this, that the grand jury in the city of Toronto and county of York, so far as being an expense, it has saved the city thousands.

MR. CONANT: It has what?

A. Saved. There was one sitting of the Supreme Court where I think the saving to the city of Toronto was about $11,000.

MR. SILK: Because of the number of no bills, you mean?

A. They threw out eleven out of twenty-two. Now, take the cost of one trial. We won't average two trials a week in the Supreme Court. We have fifty-two jurors, and this last week they have only tried one, because it lasted until Thursday night and they could not start a new case then, and consequently there was only one. But even take two: that is three and a half days; that would average, I think, about $1,100 to perhaps $1,500, so you can see that if eleven bills are thrown out, the saving in money under the old system is very considerable.

Q. Would a large part of those cases that were thrown out be cases in which automobiles were involved?

A. Yes. As a matter of fact, I have got the bill here. There has not been a time when a grand jury has met in the city of Toronto but they have thrown out bills, with two exceptions—that is since 1935, because I have the figures since then. They have thrown out eleven, and six, and four, and four—all the time.

Now, as to the expense of the grand jury: according to the sheriff, I figure the expense of the grand jury is only $400.

MR. CONANT: You mean for a sitting?

A. For a sitting. So that you see the grand jury costs you—and, of course, I am only talking about Toronto, because I don't know anything about the country. You pay $400 for the grand jury ——

MR. SILK: Excuse me. Does that just include the actual moneys paid to the grand juries, or does it include counsel fees and fees to witnesses?

A. Oh, no; this is the actual money paid to the grand jury.

Q. I understand the other fees amount to about the same?

A. $1,500, I think, in the Sessions, and $1,900 odd in the Assizes. I said to him, "How much of that is taken up by visiting?" "Well," he said, "it would be a thousand at any rate"—$1,000 for visiting, so that leaves the cost of the jury roughly about $400 for each sitting.

MR. LEDUC: You mean, it costs a thousand dollars to have the grand jury visit the institutions?

A. Yes.

MR. FROST: Couldn't that be done by a small jury taken from the petit jury panel, the visiting end of it, or would that be desirable?

A. It might be done; but in my opinion I would do away with visitation altogether.

MR. CONANT: You would do away with what?

A. Visitation by grand juries.

Q. Inspection of institutions?

A. Inspection of institutions, yes.

Q. Visitations, with all deference, does not seem to be a very good word, there.

A. If the jury were confined to passing simply upon bills and simply be dismissed, making it a business institution, I think they would perform good work, as is shown in Toronto by what they have done in the past.

Q. Just while you are on that, Mr. McFadden, do you or do you not think that if grand juries were abolished, magistrates would give more mature consideration to preliminaries before committing them or otherwise?

A. I do not think, Mr. Attorney General, that that is a conclusion you can

draw, because you have to consider human nature. Take these motor accident cases, especially when children are killed. A magistrate, perhaps, considering the law of recklessness as laid down in some of our cases, may thrown it out. What is the consequence? The only consequence of that is that there is a complaint at once, and the magistrate has got to make a report, and he looks upon it as a sort of censure, and he comes to the conclusion that it is easier to send it up to the grand jury. This is one thing I think that you must remember, that is, that the grand jury will satisfy people. They have not the confidence in the Crown attorney, but they have confidence in the grand jury. I don't know why it is, but when they go there before thirteen men, probably coming from the same localities as themselves and asking them questions, they seem to be perfectly satisfied. I have never had a complaint. And very often when a man's child has been killed, and you can understand him being perhaps much irritated about it, and thinking the magistrate was a sort of fool to throw it out, that it should have been sent up, yet if you say to him, "Now, bring all your witnesses and we will put a bill before the grand jury," and if the grand jury return no bill, you will never hear another word. So that I do not think, in answer to your question, that we are going to look for a new heaven and a new earth so far as committing by magistrate is concerned. They are in a more or less awkward position.

MR. SILK: Do you think it is advisable to retain a grand jury of the same size, thirteen men?

A. Well, you know, that matter was considered by your own House here. Five years ago I recommended that we cut it down to eleven or nine, I forget which.

MR. SILK: Nine, was your recommendation.

MR. CONANT: Why wouldn't seven do just as well?

A. Because you don't leave any leeway in your Code. Seven must return a true bill.

MR. CONANT: You would have to arrange the Code, of course.

MR. FROST: If the Code could be amended, would you think seven would be sufficient?

A. I do not see any object would be gained by that, because, after all, the expense of a grand jury is not going to kill the country, and it is a very bad thing having one province with one number of grand jurors and another with another.

MR. CONANT: We have got it now. They are trying cases in the west with seven-man petit jurors, Mr. McFadden.

A. Yes, and in criminal stuff objecting to it, to the small number of jurors.

MR. CONANT: Who is objecting?

A. The Bar of Manitoba had a protest.

Q Yes, but I have not heard any other objections. The people out there are perfectly satisfied with seven-man juries, so far as you can find out.

A. Then they must look for a unanimous jury.

Q. No, they don't.

A. I was not aware that they had amended that. The section reads that where the panel is not less than thirteen, seven instead of twelve may return a true bill.

MR. SILK: I think that is it. It is in the Code, and I haven't a copy here.

MR. FROST: Where you run into some criticism of the expense of grand juries is perhaps in some of the smaller centres, where you have this situation: You have, I suppose, ninety or ninety-five percent of cases tried in a summary manner, and they elect trial before the magistrate or elect speedy trial before the county judge; then you run into a small residue of cases in which there is a jury trial, either at the Sessions, or in the compulsory cases, such as manslaughter or murder before the Assize Court jury. In those cases you find that grand juries are necessary, and the expense to the public of calling and empanelling a grand jury to pass upon what the magistrate has passed upon before, in finding there is sufficient evidence to send the man up for trial, the combination of that and the combination of keeping the petit jury sitting there, usually until the next day, while the matter is being considered, does add a great deal of expense in those cases. Now, that applies, I should say, in most of the counties outside of Toronto. As to your situation here, you have given, of course, very good reasons ——

A. Yes, of course, I prefaced my remarks by saying I know nothing of the country places outside.

Q. In that line, it would be fine to find some way of just getting over that difficulty and that added expense. You can see the situation?

A. Yes.

Q. For instance, some man is brought up for stealing cattle—I know of one such case—and he elects trial by jury; the result is that a grand jury is empanelled, the petit jury is empanelled, or the panel is brought there, and then after a bill is brought in he is put on his trial. Well, the expense of that is really enormous. The result is that grand juries have got into very bad favour with the county officials and with the county councils and what not, and I think that is why we get so many resolutions from county councils asking that they should be abolished. Now, I am very much impressed with the arguments that you and His Honour, Judge O'Connell advanced, but there is the practical difficulty.

A. Well, of course, the real expense is your trial jury; that is your real expense.

Q. Your situation in the city here may be different, where magistrates are handling a great mass of cases and they are being passed through, and perhaps, consideration such as they should have is not given to them. On the other hand,

I am bound to say this—I may be wrong; you may be able to correct me with some of the records here—I cannot tell you of a case in recent years in central Ontario, for instance, where a no bill has been returned. In every case it seems—of course, it may be that the magistrates are very good, are infallible, but that is the situation. The result is that many people have got to say, "Well, this is just a reflection of the Crown counsel's opinion on this thing." Again, that may be unfair, but that is what is causing the agitation from the other side of it.

A. I cannot see why your Crown counsel would want to get a true bill in a case where he knows, after labouring a couple of days before a jury, he is going to get a verdict of not guilty. If a case cannot carry itself through a grand jury, it certainly won't carry itself through during the trial; that is obvious.

MR. CONANT: When you spoke of expense, Mr. McFadden, I did not question you then; you referred only to the direct expense, that is, the fees of the jurymen and that?

A. Yes. I am not allowing anything for counsel ——

Q. Of course, are there not a lot of expenses that are difficult to estimate, such as officials and counsel, and, particularly in country Asiszes, very often I have seen the petit jury held up and kept waiting around until the grand jury makes its presentment. That is pretty difficult to estimate, isn't it?

A. Yes. Well, of course, that can't happen here, because we usually are going on with both at the same time.

Q. But it does happen in the country.

A. As I say, I don't know anything about that.

MR. STRACHAN: Not if a civil case goes on.

MR. CONANT: Oh, no, they won't start in on a civil case ——

MR. FROST: Well, here is your difficulty, for instance: In country places the criminal list is usually small, and the grand jury can take that, probably, in one day. Well, the judge will hesitate to call a petit jury in a civil case; he usually sets over all jury cases until next day, or perhaps for two days.

MR. CONANT: That is right.

MR. FROST: And he takes non-jury cases.

MR. CONANT: And the petit jury panel are waiting around.

MR. FROST: That is the point. Sir William Mulock mentioned the fact that judges could let the panel go. On the other hand, some of these people have to travel considerable distance, some of them a hundred miles, and you can't send them back; it would be cheaper to keep them.

WITNESS: What would the objection be to having your grand jury called

the week before, so that you know exactly what bills you are going to refer to them?

MR. FROST: What is that again?

A. What would be the objection to calling your grand jury the week before you call the petit jury?

MR. CONANT: Of course, that would not work in the Supreme Court, Mr. McFadden, because the judge has to come from Toronto to Whitby; he couldn't come down this week and again next week. He has that assignment, and he has got to clean the whole thing up.

MR. SILK: I think we made provision for that in the Statutes of 1937, so that the petit jury can be told not to come until a day or so after the court opens, or even a week.

MR. MCFADDEN: There is a provision for that in there?

MR. SILK: Yes, it is there.

MR. CONANT: What is the next, Mr. Silk?

WITNESS: Pardon me, Mr. Chairman. Talking about that small grand jury, you have this difficulty: you may get a couple of cranks.

MR. CONANT: What, on juries?

A. On a grand jury. Sometimes you just happen to strike one man, and he is "against the Government" all through.

Q. I thought that grand juries were impeccable, without reproach, Mr. McFadden.

A. Well, there is just the odd case that you may strike. Generally, they are very good and give very great consideration.

MR. SILK: The provision in the Code that you refer to is section 921 (2):

> "Seven grand jurors, instead of twelve, may find a true bill in any province where the panel of grand jurors is not more than thirteen."

And you say that if we reduce the grand jury to nine, the difference between seven and nine is ——

MR. CONANT: You would have to amend the Code throughout. There is no use taking time on that. You would have to set up a new provision for finding a bill. You could not do it under the present framework.

WITNESS: Of course, the advantages of the grand jury are simply these, that you have got an independent body that, so to speak, will carry the responsibility of certain cases which you may not want yourself to press. To give you

an example of what I mean, there have been occasions where men have wanted a bill laid against a man say for arson; there is no doubt it is an incendiary fire, but it is very doubtful, and at the same time, perhaps, suspicious, that the owner of that building has set fire to it. Sometimes they wanted a warrant. Well, I hesitated to ask for a warrant, and I have often said to them, "I'll tell you what I'll do: I'll put all the facts before the grand jury. If they say, 'Yes, we think that man should be put on his trial,' all right," and that has worked very satisfactorily. Another time where the grand jury works satisfactorily is where you have a public inquiry, perhaps lasting for weeks, perhaps months, and there is no sense going through all the paraphernalia of a committal for trial there; the defendant knows all about what the facts are; put the bill before the grand jury straight off.

MR. CONANT: Do you think that is a fair substitute for a preliminary by a magistrate in open court, with cross-examination and all the rest of it?

A. I think so.

MR. FROST: Is that not somewhat after the American style? I am not at all familiar with their style, other than what I get from newspaper accounts. For instance, you see lots of accounts where grand jury investigations are conducted in certain places in the States, and they bring in bills and what-not, and apparently their proceedings are in public; do you know anything about that?

A. No, I do not, but I know that in Scotland they consider a committal for trial very unfair.

MR. SILK: Thomas Dewey had two or three grand juries sitting at once, for a year or two.

MR. FROST: Yes. How was that carried out?

MR. SILK: Well, apparently, as soon as he started an investigation he would have a grand jury empanelled, and then he would bring all his witnesses before the grand jury, and the grand jury would instruct that proceedings be taken.

MR. CONANT: They have an entirely different set-up.

MR. SILK: Oh, of course they have. The grand jury serves a different purpose there.

Q. Mr. McFadden, there is just one angle you have not discussed; that is the matter of substituting a County Court judge for a grand jury, to hear a *prima facie* case.

A. If you are going to change—the next thing is, what is the advantage of that?

MR. CONANT: That arose, Mr. McFadden, out of this situation: As you know, the Attorney-General can direct an indictment to be laid against anybody. Then the objection was raised that he could put a person upon his trial, if there was no grand jury, without any intervention, without any intervening protection, and the suggestion was made that in the case where the Attorney-General directed

an indictment to be laid, those cases would have to be dealt with by a judge before they went to trial, and in those cases, only he would function in the same way as a grand jury would. It is just a protection to the subject, Mr. McFadden.

WITNESS: I don't know that there is a great deal of protection. Take the Crown attorney to-day, preparing a bill; he has to get the sanction of a judge; he gets the sanction of a judge, but he doesn't waste half an hour or an hour even, going over the case with a judge.

MR. CONANT: Oh, yes, but that is hardly sufficient protection, Mr. McFadden. That sanction is usually given on the assurance of the Crown attorney that it is a proper case. I say that with all deference. I do not think even the present practice is quite sufficient.

WITNESS: No, but I am pointing out to you just how that thing in actual practice works. He has reliance, undoubtedly, on the Crown that he is putting a proper bill before him. Now, there are cases where we should observe the depositions are laid before the county judge, and he gives the sanction whether he will allow a bill to be prepared or not. As a matter of fact, I have an Act here, I think it is in Northern Ireland, where that is done; they did it in the Sessions, but not in the High Courts. But that, of course, is going to take time too; it means, if the judge is going into it ——

MR. CONANT: Oh, yes, but that does not arise very often. Their view was, that where that extraordinary remedy is taken of the Crown preferring a bill, there is no grand jury to put them before, we would interpose a judge who would function as a grand jury in finding no bill or a true bill before the person was put on trial. That would be a very considerable protection, wouldn't it?

A. I think that would be a wise thing to do.

Q. I think it would be better even than the present practice?

A. It might be all right.

Q. I have always thought the present practice was a little bit drastic.

A. Of course, the abolition of the grand jury would speed up your administration of justice.

Q. The abolition of the grand jury would speed up the administration of justice?

A. Oh, yes.

Q. And I put this to you, Mr. McFadden: Isn't it difficult, if not impossible, to accurately estimate what that would mean in the saving all round—witnesses waiting, jurymen waiting, officials, judges, counsel—if you once concede that it would speed up the administration of justice, mustn't you at the same time, concede that it would mean a very considerable saving, more than the $400 you refer to?

A. It would save, of course, all the fees you pay to witnesses that you bring before a grand jury.

Q. Oh, well, the waiting, the time of all parties waiting ——

A. I do not see that you are going to alter your actual trial, but you would save the public coming down and save perhaps, complainants and their witnesses being brought from work, and subjected to cross-examination two or three times.

Q. One of our greatest difficulties, particularly in criminal trials, is to reconcile our witnesses to the fact that they have to wait around, isn't it, Mr. McFadden?

A. Oh, yes; and a lot of men ——

Q. There is a very great difficulty there.

A. Some men lose their jobs over it, undoubtedly.

Q. That is right. Doesn't it occur to you that anything we could do to better meet the convenience of witnesses—in criminal cases particularly, because most people have no personal interest in a criminal trial—is very well worth consideration?

A. Oh, that is certainly one point that pulls on that side, so to speak, because these witnesses are down sometimes at the preliminary, they are hanging around, then at the grand jury ——

Q. Before we amended the law they used to go to an inquest, a preliminary, a grand jury and a petit jury.

A. Yes. An independent citizen that was not interested in the thing at all ——

Q. By the time he was through with it he was pretty nearly ready to say, "Well, I'll never get mixed up in one of these again," wasn't he?

A. He was not only ready to say it; he did say it.

MR. FROST: I was wondering as to whether, before His Honour Judge O'Connell goes, and before Mr. McFadden leaves the box, you wanted to raise that question about improving the ordinary petit jurors.

MR. CONANT: Oh, yes.

MR. STRACHAN: His Honour Judge O'Connell said he did not know any way of doing it.

MR. CONANT: May I ask you, Mr. McFadden: Your office handles, I presume, appeals from summary convictions?

A. Yes.

Q. What do you think of the present practice, *de novo* trials?

A. Oh, I would think it should be retained. The difference between The Liquor Control Act and the ordinary trial was, in The Liquor Control Act they were trying to enforce an unpopular measure, and the reason they gave an appeal on the record was, that the judge was supposed to look over the record, and if the magistrate was not wrong he was to affirm it; that was the principle. In other words, *prima facie*, the magistrate is right. But in a trial *de novo* it is a new trial before a judge, and he can take his own view.

Q. Isn't it illogical, taking the whole scope of all our administration of justice, really putting a man on trial twice, Mr. McFadden? That is the way it always seemed to me, because that is what it means.

A. It is open to that construction.

Q. Doesn't our law all through guard against that most jealously, putting a man on trial twice? *Autrefois* acquit and *autrefois* convict—there are volumes of law on that. Yet, in this instance, we deliberately put a man on trial twice for the same offence and ostensibly on the same facts.

A. That is quite true; but then look at it in practice. A lot of your summary convictions appeals would be taken from decisions of justices and ——

Q. Oh, not nowadays; they are all lawyers now, practically all our magistrates are lawyers now.

A. Well, magistrates, let us say, then. They have got a lot of cases to go through; on the afternoon list in Toronto, there are sometimes a hundred.

MR. STRACHAN: About a hundred thousand a year in Toronto.

WITNESS: Oh, it is tremendous. Take, for instance, a man is prosecuted for speeding. The magistrate reads out the name, and the man picks up the card and says, "Doesn't appear," looks at the information, "Speed so-and-so," and he fines him five dollars. There is no justification for that, but the magistrate is quite safe in doing it, because if there is an appeal he can start *de novo* and bring down the officer. But if you were going to bring down the officer to prove all those offences, the city of Toronto would need to double the police force of Toronto. If every officer had to come down and swear that that was the car and the speed the man was going at, so as to make the *prima facie* case for the magistrate, you would need another staff of police officers. So it is very useful in this respect, that where things are going through fast, and perhaps some little technicality is missed out, you can, up in the other court, put the formal proof in, although it is left out in the court below, and in actual practice it works out very well.

Q. What was the other point? About juries, whether you can formulate any formula for improving the jury panels.

A. I personally, haven't any objection to our jurors in Toronto. I think we get a good jury in the criminal court. Of course, once or twice we may hit

or we may miss, but generally speaking we get a very good jury trial. Of course, some of our best men are sometimes released, and some of our best men are very often challenged, especially in criminal courts where there is such a big challenge, but, taking it all in all, I do not see that anyone has any reason to quarrel with the jurors whom we get; at least, I would not quarrel with them.

Q. What do you think about the exemptions? Do you think they are too wide for modern conditions?

A. I am afraid you have asked me there something that I haven't much studied. I don't know that I want to express any opinion on that at all.

MR. CONANT: Anything else you want Mr. McFadden to discuss?

MR. SILK: No.

MR. CONANT: Thank you, Mr. McFadden.

WITNESS: Here are these figures.

MR. FROST: This is very interesting. Have you anything further?

A. No—unless the visitations of the grand jury; I can give you those if you want them.

MR. CONANT: This item of eleven no bills and eleven true bills at one assize, is that correct?

A. That is correct.

MR. SILK: It might be helpful to file that with the Committee, if a copy is available.

MR. CONANT: Yes. Put some heading on it when you do so, to indicate what it is.

WITNESS: You are quite aware that they cut down the visitations of grand juries in 1936?

MR. CONANT: Oh, yes.

WITNESS: But the arrangement then thought to work out was that there would be one visitation in the fall and one in the spring, the Supreme Court jury visiting in the fall and the Sessions in the spring.

MR. CONANT: There must be six months intervene; isn't that it?

A. Yes; but then, unfortunately there was a clause put in, that where the judge directs ——

Q. Otherwise directs.

A. Well, as a matter of fact, it is not working at all, because, as you will see from that schedule, there have been three years where there should have been six visitations; there have been thirteen of the City Hall and the Toronto Gaol.

Q. How many?

A. Thirteen.

Q. In what period?

A. Between October, 1936, and October, 1939.

Q. That is over four a year.

A. Practically every—you see, the judges direct that practically every one ——

Q. Just while you are there, why would the judges do that?

A. Well, you will excuse me.

Q. Is it your view that that should be eliminated, and make it six months definite, without any discretion in the judge to vary it?

A. The reason the discretion was left in was, we thought that perhaps some peculiar—the reason I say "we" is because I had something to do with the amendment—was, we thought some peculiar condition might arise, some sudden complaint about some hospital or something, and we thought it would be a wise thing to leave a discretion to a judge.

Q. Has any peculiar condition ever arisen that really necessitated it?

A. No.

MR. FROST: Mr. McFadden, there is something to be said for having members of the public chosen—for instance, a grand jury will be chosen—to have them inspect homes for the aged, jails and what not; I think it is in many ways a good thing, but do you think that perhaps that situation might be met by taking say, five or six, perhaps seven, men from the petit jury panel and delegating them to do that, that that might save the expense of dragging around thirteen men?

MR. CONANT: There is no reason why you could not strike an inspecting jury from your petit jury panel, is there?

A. Oh, none in the world, no.

Q. And they would be just as competent to do it?

A. You talk about—it is not a very great source of education to educate five men out of the community. Of course, it is all very good. Where the grand jurors are impressed most of all is when they are in the grand jury room passing on bills; that is where they get their eyes opened as to what is going on.

MR. FROST: Of course, I was only referring to the inspection angle of it.

WITNESS: Yes, I understood.

MR. FROST: For instance, Sir William Mulock said yesterday that he thought the inspection end of it might be done away with. You take that angle also. His Honour Judge O'Connell took the view that it was an important function. Now, it occurred to me that perhaps if inspection by jurymen is desirable, perhaps it might be done by petit jurymen, who would be waiting in any event there, perhaps, on the jury panel, and that they might be given that duty of making these inspections.

WITNESS: Yes, that could be done; there is no reason why that could not be done.

MR. CONANT: Thank you, Mr. McFadden.

J. G. HUNGERFORD, Estates Officer, National Trust Company.

MR. SILK: Mr. Hungerford, you are an estates officer with the National Trust Company?

A. That is right.

Q. I refer to Mr. Barlow's report, item number 12, appeals from the Surrogate Court, and there is also a statement of this matter on pages 175 and 176 of the Committee notebook. Referring to section 29 of The Surrogate Courts Act, subsection 3, the words that cause the difficulty are the final words of the subsection:

> . . . if the amount involved exceeds $200" (an appeal shall be) "in like manner as from the report of a Master under a reference directed by the Supreme Court."

That refers to Rule 507 of The Consolidated Rules of Practice, the rule that governs an appeal from the Master, which reads:

> "An appeal from the report or certificate of a Master or Referee shall be made to the court upon seven clear days' notice, and shall be returnable within one month from the date of service of notice of filing of the report or certificate."

Mr. Hungerford, I think you will agree with me that the difficulty is that, while it is the practice to serve a notice of filing from a report of the Master, that is not the practice in the Surrogate Court?

A. That is correct.

Q. You will also agree that it is not a practice that could easily be adopted in the Surrogate Court, having regard to the number of interested parties in many estates?

A. Exactly so.

Q. Now, will you tell us some of the difficulties that have arisen in the practice of your company, with regard to not being able to close off appeals under this section?

MR. CONANT: Where is that?

MR. SILK: Number 12 in Mr. Barlow's report, at page B35.

WITNESS: Mr. Silk has outlined the situation. Practically speaking—I think I can speak for the Trust Companies in this—no Trust Company files the report, nor does it serve notice on beneficiaries, because of the fact that that would be expensive, especially in small estates, where you have got a large number of beneficiaries who might have vested or contingent interests. It is simply the practice to send a copy of the judge's order to the other counsel who are represented on the passing. As a result of that, it would seem to leave it open almost indefinitely, if the judge's order is not filed and notice of the filing sent to the interested beneficiaries, for them to open up proceedings.

MR. CONANT: At any time?

A. At any time, sir, yes. In other words, the passing of the accounts could not be considered filing of the release to the executors at all. Of course ——

Q. There is case law on that too, isn't there? Isn't there some case law on the effect of the judge's order on the passing of accounts?

A. I don't know, sir, but it seems to be amply clear from this, that if the procedure set out in section 29 is not followed, it does leave it open to a person who is beneficially interested in the estate to attack the passing of accounts, and it could not be considered a final release. Now, actually, we have not had any cases—I have checked it with the other Trust Companies—we have not had any cases where that has actually been done, but it is something which we think is most unsatisfactory that this should be left open for any number of years, and it is something which could be very easily remedied.

MR. SILK: That is, under the existing law and the existing practice in the courts, there is no time limit for the taking of an appeal?

A. I am not speaking for Trust Companies alone; that applies to any executor, of course. It is just that we feel that ——

Q. You said it was the practice of the Trust Companies, but I believe it is the general practice in the court?

A. I am quite sure, yes. There was a suggested wording ——

MR. CONANT: How would this amendment take care of it?

A. The amendment would take care of it in this way, sir: There was a submission, I might mention, to Mr. Barlow be ore he made his report, by the Trust Companies Association, it was submitted by Mr. Leonard, after consultation with some of the other officers of the Association, and his suggestion is

that that reference, "in like manner as from the report of a Master under a reference directed by the Supreme Court," that those words be deleted and such words as these substituted, "Provided that every such appeal shall be returnable within one month from the date of service, by prepaid registered post or in such manner and upon such persons as the judge of a Surrogate Court may direct of a copy of such order, decision or determination."

MR. SILK: That is practically Mr. Barlow's recommendation, isn't it?

A. Yes.

Q. That is his proviso at the top of page B36?

A. Yes.

Q. In substance.

A. It is something that is unsatisfactory to go over the same ground again, and feel that you are never released by the passing of accounts, since someone can open this up at a later date.

MR. SILK: Well, I don't think I have anything further to ask Mr. Hungerford.

MR. CONANT: What is Mr. Barlow referring to on page B36, tariff of fees, when he speaks of lack of uniformity?

MR. LEDUC: He probably refers to some estates that were open before the tariff was put in force and have not been settled yet.

MR. CONANT: Have you anything else you wish to submit?

A. That is all sir.

MR. CONANT: All right, thank you.

Witness retires.

MR. SILK: That is simply a matter of amending the Order-in-Council to clarify the date upon which the new tariff comes into force.

MR. CONANT: What else have you, Mr. Silk?

MR. SILK: I have nothing more this morning—I understand Mr. Frost wants to get away—unless some matters to be read into the record, which will have to be done at some time.

MR. CONANT: Mr. Coulter, did you want to get on?

MR. COULTER: No, not until this afternoon.

MR. SILK: Mr. Coulter is going to be called this afternoon after Mr. Manning and Mr. Kent have made their observations on the same matter.

MR. CONANT: Well, what do you want to proceed with now, Mr. Silk?

MR. SILK: There is a letter on the matter of taxation of counsel fees, from Mr. Harold E. Fuller, K.C., of Sarnia, addressed to Mr. Barlow, dated January 6, 1939.

MR. CONANT: You are dealing with increased counsel fee now, are you?

MR. SILK: Yes.

MR. LEDUC: And other fees too.

MR. SILK: He deals also with the whole matter of taxation. The portion of the letter referring to that is about one page:

> "I suggest that Tariff A of the Rules of Practice be amended to provide that a local taxing officer shall have equal jurisdiction with the taxing officer at Toronto. Such an amendment would be not only of great convenience to all solicitors practising outside of Toronto but would also save clients' expense.
>
> At the present time if any increases are desired under the tariff it is necessary to apply in Toronto which not only takes time but costs money, which of course the client eventually pays. Not only this, but under item 18, where there is an originating motion made, a local taxing officer has no power at all to fix a counsel fee. This matter has been before the Ontario Section of the Canadian Bar Association on two occasions and both times a resolution favouring the change was passed. It seems to me that now when local taxing officers are for the most part taken from the ranks of practising solicitors and particularly when one considers the fact that they have the right to tax a solicitor and client bill, that they are well qualified to tax a party and party bill. This is particularly so when one considers that on a party and party taxation the other side are almost invariably represented by a solicitor, whereas on the solicitor and client taxation often the client is not represented by a solicitor.
>
> I am informed that one objection which has been raised to the suggested change is that it is desirable to have more or less of a uniformity of fees throughout the province. I suggest, however, that the present system gives no uniformity and if one were to examine a few of the bills taxed by the senior taxing officer it would be apparent that the present system does not give uniformity in the matter of fees. In the majority of cases the local taxing officer has much better and greater knowledge of the work done by the solicitor and is much better qualified to tax the bill than the senior taxing officer. For example, just recently I appeared on a motion before the court at Sarnia. The motion took about an hour. The senior taxing officer taxed my bill on the motion and allowed me a counsel fee of $250.00. There was an appeal from the motion and on the appeal I spent two days at Toronto with a junior counsel and argued the appeal. The taxing officer at Toronto taxed my bill and allowed me a counsel fee of $260.00 and refused to allow

any fee to the junior counsel because, he said, that the matter was one involving a question of law only and a junior counsel was not required. Had the local taxing officer taxed my bill on the motion I am sure he would not have allowed me over a $100.00, although he would probably have allowed a larger fee on the appeal.

The present system is cumbersome, expensive and unsatisfactory and I would urge as strongly as I can that this amendment be made. If you think it necessary or desirable, I would be pleased to make further representations in connection with this proposed change."

MR. CONANT: Well, that is of value; that should go on the record.

MR. SILK: Now, as to the work this afternoon, we are going to take up the matter of assessment appeals, with Mr. Manning, Mr. Kent and Mr. Coulter. Mr. Coulter is also going to say something about appeals from boards and commissions.

I have some matters here that I might usefully read into the record, if the Committee so desires. I may explain that when the Committee rose last spirng I wrote to Mr. Coulter, the chairman of the Municipal Board; Mr. Whitehead, the Securities Commissioner; the Hon. Mr. St. Clair Gordon, chairman of the Liquor Board; Mr. Young, of the Labour and Industry Board; and Mr. Harold, the chairman of the Workmen's Compensation Board. The replies for the most part were brief, except that from Mr. Harold, which is very useful. I asked them to reply, stating:

(a) What powers are exercised by your Board;

(b) What, if any, appeal exists from rulings of the Board; and

(c) Any views or observations you may care to make as to the advisability of an appeal.

I received a reply from Mr. Young, of the Industry and Labour Board, which comes under the Department of Labour. I will read the relevant part of his letter, which is short. He says: (April 19, 1940)—

"The Industry and Labour Board does not exercise any powers that have hitherto been exercised by the courts."

I might just add this, that Mr. Barlow's recommendation does not apply.

"The Board administers the Industrial Standards Act, the Minimum Wage Act and the Apprenticeship Act, and makes certain decisions in the administration of these Acts. We have no way of enforcing our decisions, however, except through the courts.

For instance, if a barber is found cutting hair for less than the schedule price, or if an employer is found violating a minimum wage order or an Industrial Standards schedule, the only way we can enforce observance is by taking the offending party to court."

Mr. Whitehead, of the Securities Commission, writes a longer letter; I think I will omit his answers to (a) and (b), and simply read his observations. He says, under date of April 19, 1940:

> "I, personally, would be glad to see a right of appeal from the rulings of the Commission where such rulings involve the refusal to grant a broker's or salesman's licence or the suspension or cancellation of a broker's or salesman's licence, particularly because such action might deprive a broker or salesman of his means of livelihood; but even in such cases where the decision arrived at is based on the Commission's records and other information obtained as to the honesty and integrity of the party concerned, the decision is a discretionary act and a right to appeal from such decision would likewise require the exercise of discretion by the court to which his appeal is taken and would not be an appeal on a question of fact or law. The measuring stick in the mind of the Commission in making such decisions is whether or not the broker or salesman concerned, in view of the information which the Commission has on its files as to his method of doing business in the past, can reasonably be expected to deal honestly with the public in connection with the sale of securities, and the decision on such a point clearly involves the exercise of discretion.
>
> Any order made by the Commission under ss. (b) of paragraph (1) above is clearly a matter of discretion and in my opinion there should be no appeal to the courts from such decision.
>
> Where the Commission exercises its power to compel funds and securities to be held as referred to in ss. (c) of section (1) above, until the Commission has revoked such direction, it might be advisable to provide for an appeal from such order, but such appeal should not go further than to enable the party concerned to have the Commission appear before the courts to show cause why such direction should not be revoked. The present power of the Commission to order funds and securities to be held is very useful in preventing the fraudulent removal of such securities, but the 'Stop Order' should be revoked as soon as the Commission is satisfied that the danger of the removal or dissipation of such securities has disappeared. Such revocation, however, should not be arbitrarily withheld."

MR. CONANT: Before you leave that, Mr. Silk, if you have not got it available, I would like you to get and place before the Committee the present system in England on appeals from the board which corresponds to our Securities Commission. I do not think that has been placed on record, has it?

MR. STRACHAN: No, I don't think so.

MR. CONANT: Gentlemen, don't you think that would be of value to this Committee, to have that?

MR. SILK: I think I have that in my files, and will locate it.

The letter from Mr. St. Clair Gordon is dated May 1, 1940, and he says in his observations:

"1. It must first be remembered that the Liquor Control Board is a licensing and control board and is not a law-enforcement agency. The only penalties which may be imposed by the Board alone are the cancellation or suspension of licenses, authorities, and liquor privileges. All fines and, or, jail sentences are determined by the courts and the Liquor Control Board, in no manner, assumes jurisdiction over criminal breaches of the Act."

Then, skipping to number 3:

"3. From the very nature of the powers ——"

MR. CONANT: Just a minute, Mr. Silk. Mr. Frost, in order to meet his convenience, is asking: if we continue until to-morrow night that would about exhaust the available evidence you have for this week?

MR. SILK: Yes, it will.

MR. CONANT: And we would resume, presumably, on Monday morning.

MR. SILK: And for next week, Monday and possibly Tuesday; I am not sure.

Mr. Gordon's letter continues:

"From the very nature of the powers granted to, and the obligations imposed on, the Liquor Control Board, it must be apparent that there can be no satisfactory appeal to the courts. In having general supervision throughout the whole province, the Board are in a better position to determine the needs of various municipalities than any tribunal dealing with a single, isolated case."

The one remaining reply I have is somewhat lengthy. It is from Mr. Harold, of the Workmen's Compensation Board. There has been a great deal of work put into it. I think it should be read into the record. Shall I proceed?

MR. CONANT: Well, if you can finish that before the adjournment. Take out the important part.

MR. SILK: I will just give his observations. He first of all tells the functions of the Board, which are well understood by this Committee, I think.

"On the question of appeal I may refer you to the material which was furnished the Department of the Attorney-General in January of 1935, and again in February, 1940. . . .

The original Act drafted by Sir William Meredith, then Chief Justice of the province, after extensive investigation in Canada, United States and Europe, contained no right of appeal. In his final report to the Government, extracts from which are appended hereto on a separate sheet, he expressed himself in part as follows:

Page 509. 'I think it would be a blot on the Act to have a right to appeal unless it can be shown there is danger in making the Board final.'

Page 511. 'One of the justifications for this law is to get rid of the nuisance of litigation, and I think even if injustice is done in a few cases it is better to have it done and have swift justice meted out to the great body of the men.'

Page 14. 'In my opinion it is most undesirable that there should be the appeal for which the draft bill provides. A compensation law should, in my opinion, render it impossible for a wealthy employer to harass an employee by compelling him to litigate his claim in a court of law after he has established it to the satisfaction of a board such as that which is to be constituted, and which will be probably quite as competent to reach a proper conclusion as to the matters involved, whether of fact or law, as a court of law.' . . . 'In my judgment the furthest the Legislature should go in allowing the intervention of the courts should be to provide that the Lieutenant-Governor in Council may state a case for the opinion of a Divisional Court of the Appellate Division of the Supreme Court of Ontario, if any question of law of general importance arises and he deems it expedient it should be settled by a decision of a Divisional Court. Although I say this my judgment is against the introduction of any such provision, as it is probable that if any form of appeal to an appellate court is allowed, a defeated litigant will have the right to take his case to the Judicial Committee of His Majesty's Privy Council.' "

Then Mr. Harold continues:

"In 1919 the first concrete suggestion for an appeal was made. A bill was drafted, providing for a limited appeal on questions of law in matters of general importance, with a safeguard providing that the Lieutenant-Governor in Council should deal with the necessity or appropriateness of taking the appeal after first making an application to the Board for reconsideration of the matter in question. This proposal met with the opposition of both workmen and employers, and was abandoned.

In 1924 a modified form of appeal or review was suggested. A bill was drafted and introduced providing for the creation of a Review Board which would review the decisions of the Board. The bill was strongly opposed from the outset by organized Labour, whose views were set out in the letter to the then Premier, Honourable Howard Ferguson, in a letter of March 20, 1924. They expressed themselves as 'viewing with alarm the intention of the Government to press the bill' and were 'compelled to enter a more emphatic protest and more in keeping with the seriousness of the changes contemplated.' They further expressed themselves as follows:

'It is the opinion of the representatives of labour that the results of the proposed legislation will only cause contention, uncertainty, delay, and dissatisfaction, and increased expenditure in the administration of such legislation.'

'The outstanding features of the present Workmen's Compensation

Act have been precision in dealing with claims, stability of procedure, definiteness of the administration, and the general satisfaction experienced by those who are the beneficiaries of such legislation.'

'The present Act has been inexpensive and of great advantage to the parties concerned, we are thoroughly convinced, and we therefore appeal to your Government to withdraw Bill 167, as such legislation is inimical to the best interests of the workers of the province, and can only create dissatisfaction,' "

and so on.

"In 1927 the question of appeal again arose. In that year a Report of a Special Committee on the Workmen's Compensation Act was made to the Forty-third Annual convention of the Trades and Labour Congress of Canada, at Edmonton, Alberta, on August 22-27. The findings of the committee have an important bearing on the matter of appeal. In its report the committee expressed itself as follows:

Page 6. 'The prompt and satisfactory adjustment of all claims for compensation within the scope of the Act, is the ideal set for injured workmen and the dependents of those who are killed. That this is most desirable will be readily conceded by all concerned. The fact that there are between 50,000 and 60,000 accidents reported to the Board annually and that about 99 percent of all claims for compensation are being satisfactorily adjusted without any difficulty, is complimentary not only to the administration of the Act but also to the measure of co-operation of employers, workmen and medical men generally throughout the province. Moreover, it is a practical demonstration of the effectiveness and merit of the present system of providing compensation to injured workmen as against the old law with its intolerable delays and uncertainties due to the nuisances of litigation.'

Page 17. 'That over 97 percent of claims for compensation are being adjusted without any difficulty; and that less than 3 percent are regarded as "problem" cases. This statement seems to be substantially supported by the limited number of complaints received from the trades unions of Ontario in reply to the committee's questionnaire.'

No recommendation was made for an appeal.

In 1931 the Honourable Mr. Justice Middleton was appointed a Commissioner to inquire into, report upon, and make recommendations regarding the advisability or otherwise of making amendments to The Workmen's Compensation Act. In the submission of organized Labour to the Commissioner they expressed themselves as

'strongly opposed to the creation of appeal boards set up for the purpose of making final decisions on claims, because this would allow the reintroduction of many of the objectionable features associated with the litigation in which injured workmen were so often involved prior to the enactment of the present measure. Moreover, the power of such

an appeal board to make final decisions would close the door to any further review of claims.'

A suggestion was made that difficult medical questions might be referred to a committee composed of three medical practitioners. While these might make recommendations to the Board, the decision of the Board was to be final.

The Report of the Commissioner, dated February 11, 1932, copy of which is enclosed herewith, should be referred to. The working of the Act is referred to on page 4 in part as follows:

'This scheme of compensation in the place of legal liability based upon negligence has worked well and has given complete satisfaction to all those concerned. It has been a great advantage to the general public for it has avoided the expense incident to the litigation which prevailed under the former system. To the workmen it has brought compensation without the burden of establishing negligence.' "

And it goes on in the same vein:

"Reference should also be made to the remarks and findings of the Commissioner on pages 12 and 13 of his report. He finally concludes that:

'There is almost unanimous agreement on the part of all concerned that the introduction of any right of appeal would be disastrous. I am satisfied that the workmen should be the last to complain of the existing condition.' . . .

'I do not recommend any change looking to either an appellate tribunal or to any of the various schemes for boards of review.'

Since 1932 some suggestions have been made for a limited type of appeal or review, but have been dropped. As stated in the memorandum forwarded to Mr. E. H. Silk, Assistant Law Clerk, on January 25, 1935:

'One of the difficulties about an appeal in Ontario and the other provinces of Canada where the same plan of workmen's compensation applies is that while the claimant workman is a definite party the compensation is payable out of a general accident fund to which all contribute and no one is individually liable.'

In the provinces of Nova Scotia and New Brunswick a limited form of appeal is provided, but so far as my information goes very little actual use has been made of these provisions. It might be noted that no costs are paid under any Workmen's Compensation Act in Canada, whether as to compensation, medical aid, assessment, or any case stated, or any appeal.

Summing up, therefore, I think it may fairly be said that the present

plan of recompensing injured workmen and their dependants for industrial accidents is one of social insurance rather than recourse to law, and the functions of the Board are largely administrative, with powers to decide certain questions which may by analogy be called adjudicative. This insurance feature of the system has many times been commented on by the higher courts."

And he cites a number of cases:

"Walsh, J., said:

'It will be seen that by a process of evolution, a legal question has become a social one of insurance.'

Viscount Haldane in . . . (1919) . . . said:

'The right of the workman does not . . . depend on negligence on the part of the employer, as in ordinary employers' liability . . . but arises from an insurance by the Board against fortuitous injury.'

Lord Blanesburgh in . . . (1927) . . . calls it:

'A compulsory system of mutual insurance throughout an industry at risk under it.'

Iddington, J., in the Supreme court of Canada, in . . . (1923) . . . said:

'The aim of the whole Act is to eliminate the litigious struggle and strife and judicial peculiarities in mode of thought and applying the law.'

and Duff, J., said at page 54:

'The autonomy of the Board is, I think, one of the central features of the system set up by The Workmen's Compensation Act. One at least of the more obvious advantages of this very practical method of dealing with the subject of compensation for industrial accidents is that the waste of energy and expense of legal proceedings and a canon of interpretation, governed in its application by refinement upon refinement, leading to uncertainty and perplexity in the application of the Act, are avoided.'

After reconsideration of all the reasons which may be advanced for or against the granting of a right of appeal, if asked to express an opinion, I am forced to accept the conclusion of Mr. Justice Middleton, the Commissioner appointed to review the whole subject," ——

MR. CONANT: Have you that report available?

MR. SILK: Yes, I believe I have, sir. No, I am sorry, I have not.

MR. CONANT: Well, get one and put it with the records, will you?

MR. SILK: Yes.

Mr. Harold then quotes Mr. Justice Middleton:

> " 'There is almost unanimous agreement on the part of all concerned that the introduction of any right of appeal would be disastrous.'

and I agree with him when he said:

> 'I do not recommend any change looking to either an appellate tribunal or to any of the various schemes for boards of review.' "

I think that is very comprehensive on the whole history of proposed appeals.

MR. CONANT: Is that all you have at the moment?

MR. SILK: Mr. Coulter is going to speak verbally this afternoon on the subject.

MR. CONANT: Then we will adjourn until 2.15.

Adjourned at 12.25 p.m. until 2.15 p.m.

Tuesday, September 24, 1940.

AFTERNOON SESSION

On resuming at 2.15 p.m.:

HAROLD E. MANNING, K.C.

MR. SILK: Mr. Manning, you are a practising barrister in Toronto, and you have had a good deal of experience in connection with assessment work; you are the author of a text, I think, on assessments?

A. That is correct, yes.

And I understand you are also the president of the Property Owners' Association of Ontario?

A. That is correct also.

MR. SILK: Mr. Chairman and gentlemen, it is my intention to call two or three other witnesses with regard to assessment appeals this afternoon. The present assessment practice is explained on pages 169 and 170 of the Committee notebook. I don't know whether it would be a good idea for me to read that over before we commence.

MR. CONANT: You don't need to for me; I have been through it all.

MR. SILK: Then, Mr. Manning, you have certain observations you want to make with regard to assessment appeals; I will just let you go ahead.

A. Thank you, sir. Mr. Chairman and gentlemen: I am very much obliged to you for giving me this opportunity of appearing before you, and perhaps before I go on it might be pertinent to say a few words as to the capacities in which I think perhaps I am justified in coming. The Ontario Property Owners' Association is a corporation without share capital. It represents an aggregation of local property owners' associations in a variety of places, places like Windsor, Hamilton, Oshawa, Ottawa, and a number of other places of that sort, and the Toronto Association itself has the adherence of quite a large number of people, some 3,000-odd are on our list, and the values of the properties which are represented directly and indirectly through individual memberships would reach a very large percentage of Toronto's assessment roll. That is my excuse for coming to you here.

Now, of course there has been, and we are all of us familiar with the fact that there is a notorious decline in the value of real estate, including buildings, and for the purposes of this discussion I do not make any distinction at all between land and buildings. That is commonly attributed mostly to excessive taxation which results from assessments of land and buildings at more than their realizable value, more than any realizable value that has been apparent to most of us for well over ten years, and, secondly, to tax rates, which since 1929 have been very much above pre-existing levels. I do not need to elaborate that.

A brief scrutiny of the Report of the Royal Commission on Dominion Provincial Relations, the second book, and at page 144, indicates that the Royal Commission thought that there should be certain withdrawals from the shoulders of municipal corporations of responsibility for some kinds of expenditure. Then they observed that there was practical unanimity in all the representations that were made to the Royal Commission right across Canada on the subject of the weight of real property taxation. They only name one ——

MR. CONANT: I do not want to shut anything off, Mr. Manning, and I hesitate to say it, because my remarks may be construed that way. We are concerned more with practice than we are with fundamental ——

WITNESS: I appreciate that, Mr. Chairman, and I am merely using that as an introduction, because I do not want to take up your time unduly.

What they said was, in passing on, the solution of the problem, they thought, lay rather in some more responsive method of readjusting assessments to actual facts than that which existed, and that submission of the Royal Commission can be found somewhere about page 144 of the second volume. Now, I am here, with great respect, to submit that that is not altogether the case, but to draw attention to certain things in connection with assessment appeals which make readjustment practically impossible, in our submission.

You will recall Mr. Barlow's report dealt in a rather short fashion with appeals under the Assessment Act; it is Part XXIV, and in my copy is at page 371. I shall read only the recommendation:

"*I recommend* that the Assessment Act be amended to provide:

1. For an appeal from the county judge on the evidence and proceedings before him to the Court of Appeal.

2. For an appeal at the option of the appellant in lieu of an appeal to the Court of Appeal on the question of *quantum* only from the County judge . . ."

And then he deals with the question of costs, to which I did not propose to direct any attention. I took the liberty of speaking to Mr. Barlow about ——

MR. CONANT: Is that broad enough? An appeal from the county judge in all cases ——

A. That is what I was getting at. I do not read it so, and yet I do not read it as excluding that, Mr. Chairman. Strictly speaking, if one were to take the language literally, an appeal from the county judge on the evidence and proceedings before him would be a variation of the present practice, which, as you know, enables appeals to the Court of Appeal only on a stated case, in which the Court of Appeal declines to consider the evidence at all.

Now, the difficulty as we see it in assessment appeals is that it is impossible to get to the Court of Appeal on any matter which really affects the *quantum* of assessment. My friend Mr. Coulter will recall some proceedings we have had before the Municipal Board, in which I am still obstinate enough to think that we could have had a different decision from the Court of Appeal. But I wanted to make this clear: Prior to 1910 the principles upon which values should be determined in courts of assessment appeal were discussed not infrequently in the Court of Appeal. Since 1910 all the research I have been able to give to the matter indicates that there have been only five decisions in the Ontario Court of Appeal represented in the regular law reports which deal with assessments at all. A brief run over them might indicate just what the nature of them was.

There was Ontario Jockey Club v. Toronto, which had to do with the valuation of buildings and the question of whether that value should be added to the value of land for an alternative purpose; the case of Re Canada Co. and Colchester South, some valuations of oil-well properties; the case of Re Toronto and McPhedran, which had to do with the values of leasehold properties let by the city of Toronto around this vicinity; the case of Dreifus v. Royds, which has been discussed not infrequently, and which led to some inconclusive results, but as far as it goes indicates that the assessment appeal court should have regard not only to the values of adjacent property ——

MR. CONANT: There are some very valuable observations in that case.

WITNESS: If they were adhered to, but we think they are not adhered to. And, finally, the case of Re Ontario & Minnesota Power and Fort Frances, which introduces the so-called expropriation rule, which has been cut down by subsequent observations in the Supreme Court of Canada, I think, to the place where practically the expropriation rule could not be considered to exist. That was a rule put forward by Sir William Meredith to suggest that not only should property owners be assessed for present realizable values of their property, but for

such values as might with perhaps some confidence be predicted as inherent in the properties if they were utilized for those purposes for which they were most advantageously suited; for example, potential water power development sites, for which there might be no immediate market.

In my submission, that has been one of the most unfortunate decisions in its effect upon property values that could possibly have been made, because on the basis of that decision it has been customary, when evidence was brought forward before assessment appeal courts to indicate that the present value of a property was definitely shown to be limited to a certain sum of money, to put forward a hypothetical solution which would indicate that the value was very much greater.

We have, for example, in Toronto a large number of vacant properties in the downtown area, and the persistent and recurring type of evidence that is offered on assessment appeals is that these properties, which are now only usable for car parking and possess only negligible value to their owners, are potential sites of vast buildings, and that if the property were adequately used a large building would be put up and it would produce such-and-such result to the owner. It is overlooked completely that there is not any demand in the city for large buildings, and that existing office space shows rather a weakening than a firming ——

MR. CONANT: Does that reconcile with our Assessment Act, that basis of computation?

A. Well, in my submission, no, but there is some justification for it in the *dicta* used by the courts in such cases as the Ontario & Minnesota Power case. And we get back to this, whether there is in the Assessment Act a realistic and categorical statement that only the present sale price is the proper value of property. Repeatedly—and I say this with great deference—I am told that the ——

Q. Have you got the Assessment Act there?

A. I have a copy here. Section 39 in the new revision, I have underlined some words in subsection 3 that I think indicate that selling value is the proper value to apply. Repeatedly the suggestion is offered that what you could realize for the property now, or what you can say you could have realized for it at any time in the last eight or ten years, is not indicative of the value, that there is some other kind of value which can be arrived at in some kind of rough process, by what I should call inspired guesswork, because I do not know any way of determining what a value is except by the acid test of whether you are or are not able to sell it.

I wanted to say this, and I shall probably at a little later time refer in greater detail to the decision: What we have in effect arrived at at the present time is that no decision of an assessment appeal court can effectively be carried beyond those assessment appeal courts where the question is the amount of the assessment. If there is any figment of evidence, however much most of us might question its propriety, or any intelligent foundation for that evidence, opinion evidence, then the decision of the assessment appeal court is beyond review, even

though you show a categorical fact such as an actual sale, with all the safeguards that the courts have laid down as proper; and the judgment of the Court of Revision in confirming an assessment roll, of of the county judge sitting in review of the Court of Revision, and the Ontario Municipal Board sitting in large cases in review of the county judge, is in effect final and irrevocable. It is also in effect a judgment awarding to the municipality ——

Q. Are you referring to all cases?

A. All cases, yes; I would not qualify that.

Q. There is an appeal, of course, to the Municipal Board in the larger cases?

A. Yes, I said that. Perhaps I did not make myself clear. In the larger cases the appeal to the Municipal Board does exist; it is ten thousand in certain municipalities, and forty thousand in the bulk of them.

Q. Let us divide your submission, for the purpose of clarity, or in the hope of clarity. You are addressing your remarks now to cases appealable to the Municipal Board?

A. To all cases, Mr. Chairman. I was merely indicating this, that the judgment of an assessment appeal court is in effect a judgment awarding to the municipality such sum of money as by the rating by-law may be imposed upon a property by virtue of the confirmation of the assessment roll.

Q. In the larger cases are you not content with the appeal to the Municipal Board?

A. No, Mr. Chairman, I am not. What I wanted to draw attention to was some rather remarkable figures. The annual amount levied on assessment rolls which are confirmed in Ontario is something in excess of $115,000,000, or approximately that. In 1935 in Ontario it was $117,000,000-odd. Now, that is a sum of money which in effect is adjudged either by default in not appealing from an assessment or after an appeal to be payable by the taxpayers to the municipalities in that year. It is questionable if all the County and District Courts and the Supreme Court of Ontario, in all kinds of jurisdictional activities they have, pass upon sums anything like approaching that amount. I had some conversations with Mr. Cadwell to see if it were possible to make exact statements about the annual amount of judgments, and found there were no statistics compiled which would indicate it, but there were some matters of knowledge which would give one an approximate idea. Mr. Cadwell's idea was that very nearly one-half of the monetary amount of all judgments pronounced by the Trial Division of the Supreme Court and by the County and District Courts in any year in Ontario was pronounced in Toronto and in the county of York, and, assuming that forty percent was a fair figure, multiplying the Toronto and York figures by two and a half, I arrive at these things on conversations with Mr. Winchester, the county clerk here, and Mr. Smyth, the registrar of the Supreme Court. In the County Court in 1935 there were 885 judgments, both after default and at trials, and Mr. Winchester was firmly of opinion, though he could not have determined it without several days' research, that

the average of those judgments would not exceed $500. If one took that as the basis, there are only $442,500 worth of claims adjudicated upon in the year in the county of York, and, multiplying by two and half, you would come to something a little over $1,000,000—$1,100,000, I think—for all the County and District Courts in Ontario. If you go to the central office you will find that there were in that year $7,606,000 reported through the central office as the aggregate amount of judgments and taxed costs. I was not able to get any figures which would indicate the amount of property which passed on other types of judgments, such as bankruptcy and mortgage foreclosure and the rest of it, but if you take that figure of $1,604,000, it gives you a total adjudication of all the Trial Division of the Supreme Court of Ontario as something between eighteen and nineteen million dollars, and you could say the sum total of all the judgments for the recovery of money pronounced by those courts in regard to every kind of transaction giving rise to an obligation was about twenty million dollars a year, and yet the assessment appeal courts annually deal with something close to six times that amount of money.

MR. LEDUC: That sum of one hundred and seventeen million dollars represents the tax paid on real estate?

A. Yes, Mr. Leduc.

Q. Well, surely you did not mean that; the largest part of that sum of one hundred and seventeen million dollars is not in dispute.

A. It is not in dispute ——

Q. Unless you deny the right of the municipality to levy any kind of taxation.

A. I do not deny the right of the municipality to levy any kind of taxation. I am only drawing attention, if I may, to the importance of the matters pronounced upon, and I would say this ——

Q. Let us put it in another way. I think the total value of assessable real estate in the province is something like three billion dollars, isn't it?

A. Well, it is over two, I think; I am not sure of the exact value.

Q. I figured that out from the one-mill subsidy that we paid.

A. Well, you are very much more likely to be right than I.

Q. What proportion of that three billion dollars would be appealed in any year?

A. That I could not say; I haven't any statistical information.

Q. Would it be five percent?

A. It might be; it might be more than that.

Q. Ten percent?

A. I couldn't tell you; I do not know of any statistics ——

Q. If you took ten percent, that would represent about eleven million dollars a year tax?

A. If you were going, though, to find out how many properties the owners would say were assessed at more than their fair market value, you would find a a very much larger proportion, sir, I think.

Q. Perhaps; but I am not impressed by your figure of one hundred and seventeen million dollars.

A. Might I say this: I think you would find that a very large body of opinion believes that the vast amount of property is assessed for more than it would realize. Now, there are many people who do not appeal from their assessments who think their assessments are over the realizable value. I could name you a number, for instance, of my own personal knowledge—because, they say, there is no use.

Q. All right, but suppose your property is really worth $10,000, in your opinion it is worth $10,000, and it is assessed at $12,500, and you appeal the assessment; the amount involved in the appeal is really $2,500, that is all.

A. Maybe.

Q. So don't stick too closely to that figure of one hundred and seventeen million dollars.

A. I think I could come back at you in another way. About two-thirds of the judgments that are pronounced in the courts are default judgments, and that the people who are adjudged to be responsible to pay do not deny liability.

MR. CONANT: I think we can take it as a settled fact that assessment is a very important subject.

MR. LEDUC: Yes, it is very important.

WITNESS: I am trying to get only that thing out; I do not want to press the argument beyond that.

MR. CONANT: Well, we are with you there, Mr. Manning; it is very, very important, and affects a very large group of people.

WITNESS: In my submission, it is the most important single thing that has to do with the transfer of money in a year's work in the province. I am very far from suggesting that the courts do not have many other functions, of course, of great importance, which are not recognized in any such statistical illustration as I am attempting to give on this.

MR. CONANT: I would go this far with you; I would say comparatively few people are affected by court judgments, whereas a large number of people are affected by assessments.

WITNESS: I think that is true. I would go one step further. The actual bulk of money transfers in a year affected by matters of that sort, in my submission, is much larger than the bulk of money transfers on the other judgments of the courts, and if we can get to an appreciation of that fact perhaps I will have done all that I intended to do on this branch.

MR. CONANT: What is wrong with our practice? Tell us about that.

A. In my submission, the present practice is wrong, because it permits of the giving of opinion evidence as a decisive factor in assessment appeals, and it furnishes no standard ——

Q. Say that again?

A. It permits of the giving of opinion evidence as the decisive standard in assessment appeals. Now, I recognize there is an inherent ——

Q. I do not just get what you mean.

A. Let me put it this way: In my own personal experience, which perhaps is not very large in the mere number of appeals, but does involve taking a good many fairly heavy appeals, almost inevitably what one meets with is this: On the one side a narrative of what has been done in the way of sales in the last ten years in some approximately comparable property, and a narrative of what the rentals actually derived are and what the earning experience has been, *de facto*, and showing from those two things that there is no reasonable expectation that the property as it is could ever be worth more than so many dollars; I mean, it becomes a mere matter of logical arithmetic; and one is met on the other side by this sort of criticism, that in the judgment of the witness who is called by the municipality the property is worth three times that, it is worth fifty percent more than the assessment. We cross-examine that witness to ask whether he has got anything to do with property which shows any such value, and he says, no, but in his opinion the property is going to come back. You ask him why the figures that are quoted are not satisfactory, and he says, "Oh, well, you should do this, you should do that, you should do the other thing to your property, you should put up a building, and if you did in my opinion you would be able to rent for so much money." You suggest to him that there is not any demand for buildings of that sort, and he says, "It is my opinion you could do it," and on the footing of that your appeal is unsuccessful.

Now, perhaps I might become a little more categorical, and give you an illustration in which I carried an appeal to the Municipal Board and subsequently to the Court of Appeal. There was the old Home Bank property near the corner of King and Yonge Streets. It was assessed some years ago—it is on a 42-foot frontage by a 90-foot depth—it was assessed some years ago at some $6,400 or $6,600 a foot frontage, and the building assessed at around $20,000 or $25,000. That assessment on successive appeals to the Municipal Board has been reduced, and I think it now stands at around $4,000 a foot frontage, and the aggregate assessment is something in excess of $150,000. Now, that property remained vacant for a period of six or seven years from 1930 on. Persistent efforts were made to rent it or to sell it. The weight of taxation, business assessments and the rest of it, and the nature of the building, made it

impossible to find a tenant for more than very temporary purposes—perhaps a month or so for a charitable campaign—and finally, after six or seven years of effort and liberal advertising, it was sold for cash by a solvent company that was under no pressure to sell except such pressure as common sense dictates to another solvent company, the Halifax Fire Insurance Company, for $75,000.

MR. CONANT: How much assessment had it been carrying?

A. It had been carrying over $190,000 at the time of the sale; it is now assessed in excess of $150,000. I carried those appeals forward to the Municipal Board. These things I think I may say fairly were proved: the whole of the experience and the caretaking and the effort to find the sale, the fact that the city's witness who came to testify to a wholly different value had known about the property being available, that he knew there was a bargain to be picked up if he could pick it up, that he made no efforts to find a purchaser because he did not know where to find a purchaser, that he could not say where any purchaser could be found, and he could not indicate how anybody could have sold the property for more money, but still in his opinion it was worth something more than the amount of the assessment.

Q. What do you mean by "worth" in that connection?

A. I don't know either, Mr. Chairman. I only know of one standard of worth: that is what I can get out of a property. But, in spite of the evidence, that that was the actual experience with the property, and the proof of the advertising and all the rest of it, the finding of the Board was that it was unable to find that the value was less than the amount of the assessment. Now, in my submission ——

Q. Did you take that to the Court of Appeal?

A. I took that to the Court of Appeal, and what I submitted to the Court of Appeal—I think I can recall the argument reasonably well—was this: We have shown all the circumstances which are laid down by the Supreme Court of Canada as the test of value in our long effort to sell, and in showing that there was not any pressure, any hardship on the owner, which compelled him to take less than a real price, and the city has not shown anything to the contrary. All they have brought in is opinion evidence that the property is worth more, and that opinion evidence carried one step further: In order to meet the situation which arises on the Ontario & Minnesota decision, the expropriation, evidence was offered on behalf of the appellant to show that the property was of such a configuration and character that used by itself it would not be possible to demolish the existing building and put up an alternative building and show a better return. Now, those figures were not criticized by the city's witness except in regard to one factor, and that was, what should be the proper sinking fund, and there was no evidence to indicate that anybody would have financed such a building on the terms that the city's own witness thought should have been proper.

Q. How could we help that situation?

A. I think the way that situation could be helped, Mr. Chairman, is this ——

Q. So far as the matter of practice is concerned; you got to the Court of Appeal all right.

A. Yes, but here is where I failed in the Court of Appeal: The Court of Appeal says, "Are you driven, Mr. Manning, to show not only that the court below came to the wrong decision, but that there was no evidence on which they could come to the decision to which they did come—no evidence"? and I say, "Yes, I think I am driven to that."

Q. Now, wait a minute.

A. That is because the Court of Appeal has no jurisdiction in matters of fact. You will find it, I think, at about section 83 or somewhere thereabouts.

Q. Do you mean 85 (1)?

A. I have forgotten the exact number.

Q. The ground upon which an appeal lies to the Court of Appeal—question of law, construction of statute?

A. That is it.

Q. Municipal by-law, agreement in writing?

A. Yes.

Q. Just let us examine that. I am interested in that, and that is germane to our investigation.

A. That is the real thing I am talking about.

Q. Your contention is that that is too narrow a basis both for getting to the Court of Appeal and for the Court of Appeal to adjudicate?

A. Exactly so, Mr. Chairman; that it is impossible—impossible—to find any standard on which you can get to the Court of Appeal and can get an assessment reopened unless you throw it open on questions of fact. May I put it this way: The courts, if one were to look over the current peremptory lists ——

Q. We have already been discussing a related subject, Mr. Manning, the question as to whether the jurisdiction of the Court of Appeal in appeals from juries should be broadened.

A. Yes, I am aware of that discussion.

Q. You know the extent to which it has been narrowed?

A. Yes, I appreciate, and I think, with great deference, that it should be broadened. But may I say this: There is growing a very powerful feeling among the people, the type I go out and talk to—and, frankly, I talk to them as an agitator, and I don't apologize for that.

Q. Not a red?

A. Not a red agitator, but a blue one, if you like, a very pessimistic one. Every person accused of the vilest kind of offence against a woman, or any other kind of crime, under the Criminal Code, or under the penal laws of the Province of Ontario, can have every kind of question, both of law and fact—there may be a question of leave, but it is never refused—raised to try to find some way for him to escape conviction and punishment, if it is open to him. Every man who is guilty of a breach of trust, or of negligence in the administration of a motor vehicle, or of improper conduct in respect of any one of a dozen relationships of which one could think casually, or in respect of a contractual obligation, is entitled to have every question of law and fact which goes to determine his liability reopened, and discussed from start to finish in the Court of Appeal.

Q. Yes, but, Mr. Manning, isn't it the scheme of this Act that on those matters, or on matters other than the ones that are reserved to the Court of Appeal, the Municipal Board would take care of them?

A. I appreciate that, Mr. Chairman, and I have given you a case in which I think, with the greatest respect to the Chairman and other Members of the Board—and I am not impeaching their sincerity at all ——

Q. I only pointed that out, because in the cases you are referring to, there is no other tribunal like the Municipal Board that is interposed in these cases.

A. I fancy, though, we are perhaps a little at cross purposes, because, in my submission, there is a very real question of the principle of law to be adopted, and perhaps I won't be regarded as having said anything that is either improper or reflecting upon the independence of the tribunal before which I appear, but I have had this sort of thing put to me, that in regard to one property where, in my submission, it was demonstrated that the value was non-existent to the owner, I am told that the value is undoubtedly there, and I say, "Yes, but you can't tax the owner, who has not got the benefit of it," and the answer is, "The assessment is confirmed."

I take another case, shall I say—one omits to mention names, because it is not a matter of personal invidiousness at all—"How is the city going to finance if we allow your appeal?" and I say, with the greatest of respect, that is not a question open for consideration under this Act.

Q. And the Supreme Court of Canada has said that.

A. But I cannot get to the Court of Appeal on that basis.

Q. Doesn't the Supreme Court lay down in one of those cases that the need of the municipality is not the ——

A. That is true; but, notwithstanding that, I should be willing to pledge my utmost belief that it is a very decisive factor in most assessment appeal courts.

Q. Wasn't that the Port Arthur case?

A. The Dreifus case?

Q. In which the Court of Appeal dealt with the evidence that had been adduced as to the need of the municipality; they laid down there, that the need of the municipality was not the test.

A. That is possibly so; I am not familiar with it. But I should say, beyond all doubt, it has played a very large part in the thinking of county judges, and a very natural part, because they are on the spot. Now, in my submission, Mr. Chairman, the only way that this could ever possibly be improved upon would be to open the channel of appeals. We have got to such a constriction of the basis ——

Q. What could be the purpose of the Municipal Board if that were done, Mr. Manning?

A. Well, I should say this: it might very well be that the Municipal Board's usefulness in the matter of assessment appeals would disappear. It might also be that the Municipal Board sitting in review of county judges, might discharge very useful functions, if its orders were subject to review in cases where you are dealing with opinion evidence. Let me get back to this ——

Q. Say that again?

A. In cases where the decision was based upon opinion evidence, an appeal to the Court of Appeal might be an extremely useful thing. Let me, perhaps, go back to this Halifax Fire case, and examine it as it seemed to me. I was personally satisfied that the expert evidence, which was the only evidence given on behalf of the city, could be disregarded, and might, as a matter of law, be considered not to be cogent, for this reason, that it was not related to any known facts or any experience in regard to comparable properties, it was a mere *ipse dixit*, if you may put it that way, and there was some authority in the Supreme Court of Canada, which indicated that in certain other classes of cases, opinion evidence of that character would not be given credence. The Court of Appeal differed from me, and I am here largely telling my sad story, because they did not agree with that proposition at all; they said that did not apply in assessement matters.

Now, there is another class of thing that has been very important and decisive in assessment appeals, and that is the regard that is paid to the assessments of adjacent properties. They are considered to indicate very much what the value ought to be. Well, one can reduce the thing to an absurdity, and say that if you don't get a starting point to break the chain somewhere, you will never be able to break it at all, and some adjacent property must tumble from its pinnacle before you can reduce the level, if there is to be a standard of writing down or writing up assessments from some nodal point. Now, how serious that is in Toronto I think might be illustrated from some figures on properties which were examined ——

Q. With all deference, Mr. Manning—I am profoundly interested in your discussion, but I am not sure that it is directed to the purpose of our enquiry. As I said, we are dealing with procedure. When you speak of broadening the

grounds of appeal to the Court of Appeal I am interested, because it is germane, it is relevant to our inquiry; and I come back to the question I propounded: if you broadened the grounds of appeal to the Court of Appeal, you would be largely circumventing the Municipal Board, wouldn't you?

A. I think you probably would, I think you probably would; but there is no reason why the jurisdiction of the Municipal Board, as I see it, should not be retained in large appeals.

Q. On questions of fact—and that is what it really resolves itself to—on questions of fact, the Municipal Board now is the last court?

A. That is true.

Q. On questions of law, the Court of Appeal is the last court. Why isn't the Municipal Board just as capable of dealing with questions of fact as the Court of Appeal?

A. Well, I have tried to show a case in which, with the greatest respect for the Board, the Municipal Board did not find on the facts, and I submit that ——

Q. But they have jurisdiction to find on the facts?

A. They have jurisdiction, and they found on the facts—let me put it that way—but they did not find where the facts ought to have taken them, and it is very much the same problem you have with regard to the reopening of the finding of fact of juries. My submission is that the Municipal Board erred in regarding any principle of law as justifying an assessment at $150,000-odd, when the actual experience of the people who dealt with that property revealed that the value was only $75,000, and the only possible way you can get that corrected is to give an appeal from that adjudication. I do not want to take up your time indefinitely ——

Q. But these questions of values and opinions as to values will always be matters of opinion when you get all through, no matter whether it is the home-town Court of Revision or the Municipal Board or the county judge; it is always a matter of opinion.

A. Well, but isn't it also a matter of experience, and mustn't opinion be tied to experience, or else it is utterly undependable and likely to produce very startling results. I can say this, that there is a very great and growing feeling, that it is just precisely because these things are decided on the basis of opinion evidence and without regard to experience, that we have got a shocking situation developing, and I was going to illustrate only this: There were some 29 sales of downtown properties took place in Toronto between 1936 and 1938 inclusive; I have got a list of them here, and some other sales. The average of all those sale prices to all the assessments was only about 65 percent, the assessments exceeded $2,800,000, and the sale prices were slightly in excess of $1,800,000. Only 8 out of the whole 29 properties sold for prices in excess of the average, and the remaining 21 sold for prices below the average, and if you exclude the two properties which sold at the top end of the bracket, the old Mail and Empire property and the T. G. Bright property at the end of Albert Street, you get an

average of 56 percent. That is to say, the sales were about 56 percent of the assessments. I did some other juggling with the figures: only 4 of the properties sold for more than 10 percent above the average, 16 of them sold for more than 10 percent below the average, and those, so far as I have been able to find out, were all the sales of downtown properties in those years. It is true, a large number of them were sales by estates, but that is not quite so indicative of low prices as one would imagine, because, when the time comes that practically the only properties sold are properties sold by estates, then there is something wrong with the fluidity of your transfer of real property.

MR. STRACHAN: But, Mr. Manning, aren't we up against the same thing every time the court gives a judgment? Take, for instance, a claim under The Fatal Accidents Act, and try to figure the pecuniary benefits that might have accrued; it is impossible to lay down a rule of thumb—or in any damage action.

A. I would say no, Mr. Strachan, because you never sell a claim under The Fatal Accidents Act, and you do sell real property.

Q. Well, but as to pecuniary benefits, it is guesswork, after all.

A. I would submit that there ought to be a much more realistic standard. Let us come back to the Halifax Fire again; here you have got an actual categorial experience.

MR. CONANT: I don't want to interrupt, Mr. Manning, but it does seem to me that your submission is directed to or takes the form more of a criticism of the Municipal Board than it does of the procedure.

WITNESS: No, Mr. Chairman, I don't want it to appear so.

MR. CONANT: Well, at the monent it is ——

WITNESS: It is leading up to what I wanted to say were the ideas that led us here, because I felt before I laid the foundation, there wasn't any use expressing the idea. Those ideas are twofold: on one side of them they are matters really beyond the purview of this Committee, as I understand it, namely, the question of the definition of what value is in The Assessment Act.

MR. CONANT: The fundamentals of value.

WITNESS: It is necessary to bear that in mind in considering this submission, because, unless we make a very hard standard of value, I don't know where we are going to be in finding a basis for starting off to review assessment practice, and I should like to take the liberty of reading two resolutions which have commended themselves to the Property Owners' Convention for some time; they have been passed more or less like hardy annuals at the conventions. The first of them is this:

> "RESOLVED THAT it should be made compulsory that real property which has been sold by taxpayers" ——

And notice the word "taxpayers"; I deliberately draw attention to that, because it is not intended to contemplate sales by municipalities of tax-sale lands.

—— "be assessed at not more than the actual bona fide sale price, and that no assessment should be permitted in respect of any real property for any sum of money other than its present value, for the purpose for which it is held and utilized," ——

and I make that very sharply, because we get into the realm of prophecy and crystal-gazing when we try to find some alternative use for property that has not yet been found, and no one is wise enough to prophesy what will happen to any property, in my submission.

—— "and that in determining the assessable value of properties, revenue production shall be a governing element to which effect must be given."

Now, one cannot say that it must be the only element, but a governing element. That, in other words, is the objective focus on which your judicial system, as we submit, should be based.

The second one, then, comes to this:

"RESOLVED THAT The Assessment Act should be amended to provide that, in addition to all rights of appeal now existing, an appeal shall lie as of right to the Court of Appeal on all questions of valuation within the jurisdiction of that court, as to the amount involved, and that it shall be the duty of the court to reject opinion evidence not based on demonstrated facts of recent occurrence, and to dispose of valuations accordingly, so that the persistent scandal of excessive valuations confirmed by assessment appeal courts shall be removed."

Now, Mr. Chairman, I think I have said imperfectly, but still with a fairly complete survey of it, all that I propose to say, and, if I may come back to it, just as it has been considered necessary to provide a forum for appeal of all questions of fact in regard to all the ordinary litigious matters, in order that errors, either of interpretation of the law or of dealing with particular facts shall be corrected, in all kinds of matters which are of vastly less moral weight, at any rate, than the matters which concern the well-being of people in their own homes, so, in my submission, it is neither a reflection upon the assessment appeal courts as such, nor an unreasonable thing to ask, but on the contrary, a very reasonable thing to ask, that the same rights of appeal on questions both of fact and law shall be open to people who own property, as are open to people who are of very much less merit in this community.

MR. SILK: Mr. Manning—go ahead if you have something further.

A. Well, I was not going to say any more than that in effect, Mr. Silk.

Q. I was going to suggest, Mr. Manning, it might be a matter of convenience to the Committee, if you could state your submissions in a concise form, such as Mr. Barlow has. In conclusion, Mr. Barlow says:

"*I recommend* that The Assessment Act be amended to provide:

"1. For an appeal" ——

and so on.

A. You would like them as shortly as that?

Q. If we could get it down to that form it would be better.

MR. CONANT: Just before you leave, Mr. Manning, just repeat this, because it is a problem that disturbs me. If you broaden the grounds of appeal to the Court of Appeal, what is the function of the Municipal Board in the assessment structure?

A. I would expect this, that the Municipal Board would be like every intermediate Court of Appeal, a very strong filter.

Q. Well, would it be necessary? Would you make that part of the progress to the Court of Appeal, or make it optional, like our Privy Council?

A. I think I would be tempted to make it optional.

Q. That is to say, you could either go to the Municipal Board or go direct to the Court of Appeal?

A. Yes.

Q. Or you could go to the Municipal Board and then to the Court of Appeal, as in some cases we can go from our Court of Appeal to the Supreme Court and then to the Privy Council, or we can go direct to the Privy Council. What have you in mind, there?

A. I have not given that phase of it very much thought, Mr. Chairman, because I have been more concerned in my own thinking to see whether it was not possible to get these questions of principle once more before the courts, shall I say.

Q. Have you traced the history of this legislation? Has the Court of Appeal ever had any broader grounds? Have there ever been broader grounds?

A. Not technically on questions of fact, Mr. Chairman, but it has actually considered questions as if it had the right. And I might say this in passing: in England there is somewhat similar legislation, which stops appeals on questions of fact to the courts of law, but it is a curious thing ——

Q. Where does it stop at there?

A. It stops, I think, with a County Board of Valuation, or something of the sort; I have forgotten the exact name; it may be the Justices in Quarter Sessions Assembled; I think, perhaps, that is it. But there was a recent decision I noticed in the *All England Law Reports*, in which—as you know, their principle of assessment is different from ours; they only assess on the net annual rental value, and questions frequently arise as to what are the component ingredients, whether, for example, if your rent includes heated apartments, you must make a deduction for the cost of heating and janitor service, and that sort of thing. Now, in the view that our Court of Appeal takes of such a matter, that would be exclusively a question of fact, and therefore not a matter open to review, but in the view of

the English Court of Appeal that was a question of law, and they very definitely expressed their opinions as to items A, B, C and D, as matters which must be dealt with in this or that or the other way by the court below. Now, no such appeal would be possible in this country. We have, for example, the kinds of cases that have come up in recent years on that very difficult branch of The Assessment Act, the assessment of incomes of corporations not derived from the business in respect of which a business assessment is imposed. That has given rise to all kinds of curious decisions, I mean conflicting decisions, on fact—the Famous Players type of case and the International Metal Industries type of case. Sometimes the court has said it is taxable, sometimes not; sometimes they have said the income was derived from the business, sometimes they have said not. Now, as far as an observer like myself would be concerned with the matter, it would seem as if every one of those questions involved the consideration of what, from the legal point of view is a business, and whether as a matter of law certain uses of money could be considered an integral part of the business, but both the Court of Appeal and the Supreme Court of Canada have held in categorical terms that once a matter has been considered by the appropriate assessment appeal court, either the county judge or the Municipal Board, and a decision has been arrived, the process by which that decision was arrived at, the distinction between the business of the company for which it is assessed for business assessment and other business, is not open to review. In my submission, it ought to be open to review if the law is to be certain and not capricious.

Q. Would you care to make any observation on this, Mr. Manning—the place of the county judges in these appeals? Have you any observations to make as to that?

A. Well, of course, the county judge is the natural person to whom any matter of judicial decision would be referred, because he is on the spot.

Q. No, but I had this in mind: since I have occupied my present office I have had several complaints reach me, with which I have nothing to do—I have no jurisdiction—to the effect that the county judges did not seriously consider and really adjudicate upon such appeals, that they, as a matter of fact, confirmed them. I am not stating that as a fact; I am stating that as representations that have been made to me.

A. I understand.

Q. I was wondering if you ——

A. I should be very tempted to make similar representations, Mr. Chairman. My experience, which has gone to a fair number of outside counties as well as Toronto, leads me to feel this—and again, I do not want to be thought to reflect on the personnel or integrity of judges, but it leads me to feel that you have got as many types of decision on this sort of appeal as you have men. Some judges, for example, would be rather hostile to the municipal point of view, and some judges would be, as I think, excessively friendly to them, because they are impressed with the needs of the local community, or they are impressed with certain things that have been in their experience.

Q. Of course, there is nothing we could do by way of procedure, if there is an evasion of what you might call duty there; there is nothing we can do.

A. In my submission, the contrary. I think this is not getting beyond the bounds of proper observation. Again I am harking back to the Halifax Fire. I can recall the pronouncements of at least one of the judges in the Court of Appeal—it was a bench of five judges—to the effect that if there were anything at all they could do for me, they felt it ought to be done at once. Now, naturally, when the court has come to the conclusion that it is without power to deal with it, one does not get very many academic pronouncements of that sort, but, in my submission, unless you open up the bottle-neck, you will never get that confidence in the administration of justice amongst people who have to pay land taxes which I think there should be, and I feel it is a very serious political problem, if you like, in the background, because you are demoralizing—I mean this in the generic sense; we are all demoralizing, if you like, because we are all carrying responsibility to the law—the class of persons in this country who I believe have been the backbone of its economy, and certainly the backbone of its moral fibre. I speak of the people who own homes. I could tell you all kinds of pathetic stories of people who come into my office, who hoped twenty years ago to buy their own homes and be secure in their old age, and by virtue of their taxes having been doubled—they were not very large amounts, $250 or $275 a year—they had just missed out, and they were behind for just about the amount of the taxes over and above the amount of their calculations, and they were losing their homes.

Q. Well, of course, that is a very large question.

A. It is not the only answer, of course, there are other things that have to do with it, but it is a very serious thing when you find this dwindling in the proportion of home ownership, when you find an increase in the amount of mortgage foreclosures and ——

Q. Now, I should be glad if you could help us on this procedure question; I don't know whether there is anything more to be said about procedure, Mr. Manning?

A. I would not think so, Mr. Chairman; but it does seem to me important that there should be the opening of that view. I thank you for your courtesy.

MR. SILK: Mr. Manning, there is just that one other point—I don't know whether you care to do it or not—to express your conclusions very briefly, one, two and three?

A. I can do that.

MR. CONANT: Perhaps we could have a written summary of them.

WITNESS: I should be glad to do that, yes, and I will send it in to you in the next two or three days.

C. M. COLQUHOUN, K.C., City Solicitor, City of Toronto.

MR. CONANT: I suppose, Mr. Colquhoun, you will convince us that the Court of Appeal is not vested or clothed with all the merits that Mr. Manning attributed to it.

WITNESS: I think, Mr. Chairman, that the Court of Appeal should not be interested in assessment appeals except on questions of law and interpretation of statutes; but my main purpose in asking——.

MR. CONANT: Well, I am not surprised at your view.

Go ahead, Mr. Silk.

MR. SILK: Q. By way of introduction, Mr. Colquhoun; you have been the City Solicitor for the city of Toronto for how many years?

A. About fifteen years or more.

Q. Restricting ourselves, if we may, to the practice on assessment appeals, have you any observations to make either as to the practice or as to Mr. Manning's recommendation?

A. Mr. Chairman, I have not considered this as Mr. Manning has. I just had the pleasure of hearing his observations. My purpose in writing to the Secretary of the Committee—and I want here to express my gratification at being allowed to say something. I am perfectly willing to do anything I can to assist the Committee. I do not know whether I will be popular or not, because my main purpose is to suggest that this Committee should not be dealing with assessment appeals at all.

MR. CONANT: Only as a matter of procedure?

A. That it does not come in the question of administration of justice.

Q. Well, I don't know that I could go that far.

A. I am reading now from a copy of the Ontario *Weekly Notes*, where there is a notice signed by Mr. Magone, counsel to the Committee, inviting submissions. He says:

> "At the recent Session of the Legislature a Select Committee was appointed for the following purpose:
>
> " 'To inquire into the administration of justice in the Province, including the constitution, maintenance and organization of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts'."

Now, if you leave out the first three words, the rest of that, starting "the administration of justice in the province, including," etc., is exactly the wording, word for word, of clause 14 of Section 92 of the British North America Act.

Q. That is true.

A. Clause 8, which is an entirely different clause, similarly gives the province jurisdiction over municipal affairs in the province, and that is the section

under which municipal assessments come, not under the administration of justice clause. If there is any doubt about that, I could refer the Committee to one or two cases where something to that effect has been said.

Q. You are directing your observations to ousting our jurisdiction on this, or what is it?

A. No, Mr. Chairman, I have no doubt that the Legislature, if you went back to them, would increase your jurisdiction to inquire into municipal institutions.

MR. LEDUC: I think so.

MR. CONANT: I think so.

WITNESS: But at present you are dealing with the administration of justice only, not with municipal institutions.

MR. CONANT: But Mr. Manning comes here, quite properly I think, and says that the administration of justice so far as it affects assessment appeals is not what it should be. I think we are quite competent to deal with it.

WITNESS: I am not doubting your competence.

MR. CONANT: Not only competent, but our commission is broad enough to enable us to deal with it.

WITNESS: I submit the commission is not broad enough; that is my submission.

MR. SILK: Mr. Chairman, may I point out that the terms to which Mr. Colquhoun has referred are the terms of Mr. Barlow's commission.

WITNESS: No; I am reading from the *Weekly Notes*.

MR. SILK: Oh, yes, you are quite right. I beg your pardon.

MR. CONANT: Well, we are glad to hear you if you have any observations to make on this question.

WITNESS: If you are going to deal with assessment appeals it seems to me those matters should be considered with matters such as who should exercise municipal franchise, voters' lists, and matters like that. There has been agitation as to those. Those are all municipal matters. You won't find very much law telling you what assessment appeal courts are, presumably because it is so clear that nobody need ever say very much about it, but there are one or two cases I can give the Committee if they think they would help. There is a case of In re North of Scotland Canadian Mortgage Company, in 31 Upper Canada Common Pleas; that is a case back in 1881, involving assessment of personal property and the constitutionality of the statute authorizing the assessment. Mr. Justice Galt, in giving the judgment of the Court, says, at page 559:

"By section 92 of The British North America Act, 1867, in each province the Legislature may exclusively make laws in relation to matters within the classes of subjects next hereinafter enumerated, that is to say,

8. Municipal Institutions in the province.

It is manifest, it was the intention of the Act, that all matters relating to municipal institutions should be within the exclusive jurisdiction of the Provincial Legislature, and" ——

and this is the part to which I refer ——

"as it is essential to the existence of such institutions, they should have power to make assessments for municipal purposes . . . "

MR. CONANT: I do not think that is in issue here, Mr. Colquhoun. The only issue there is, if it might be called an issue, or the concrete submission, is that with regard to the jurisdiction of the Court of Appeal, the grounds of appeal to the Court of Appeal should be broadened. What do you think as to that?

A. If this Committee is going to deal with assessment appeals at all, yes. No, I do not think they should. The Courts of Justice as such—I do not call the Court of Revision or the County Court judge hearing assessment appeals or the Municipal Board hearing assessment appeals, they are not courts of justice; they are merely assessment appeal courts or assessment courts set up, to determine what portion of the public expense for the year each ratepayer should bear; that is all.

MR. SILK: I presume, Mr. Colquhoun, you have read Mr. Barlow's report where it relates to appeals under The Assessment Act?

A. Yes, I have.

Q. And his conclusions?

A. Yes, I have.

Q. Do you agree with the conclusions?

A. Can you tell me particularly which conclusion?

Q. He makes three recommendations; if, for the reasons you have already given, you would prefer not to make any observations, all you need do is say so.

A. No, I can only give you my off-hand reaction to it. I have not given it the consideration Mr. Manning appears to have given it, but I have had certain experience, and some of it has probably stuck, or I may be biased because I have been acting for the municipality so long; but one conclusion, one of his recommendations particularly, the last one, that on appeals to the county judge, the Ontario Municipal Board and the Court of Appeal, discretionary power be given to award costs to the successful party, I disagree with entirely.

MR. CONANT: Well, I do not think we need take up time with that; that is not very fundamental; but I would like if you care to offer any elaboration as to why you think that the grounds of appeal to the Court of Appeal should not be broadened.

WITNESS: Because I think that the Court of Revision, the first court to which you go in assessment—may I preface my remarks by saying this: I gathered, after hearing Mr. Manning, that his attitude is first and foremost a Toronto attitude, and I think you should try to get away from that in dealing with assessment appeals. Toronto is only one municipality out of several hundred municipalities. There are only twenty-eight cities in Ontario, unless there have been some recently of which I have not heard; there are several hundred, seven or eight hundred, towns, villages, townships, where the Court of Revision is to all practical purposes the Council, five members appointed by the Council, and the members of the Council may act. In all those municipalities the Council, who are compelled to strike a tax rate and levy enough to pay their debts, are saying what every individual should pay, what his assessment should be, and it is taxable.

MR. CONANT: I am not sure that that system, of making the members of the Council the Court of Revision, is a proper system, but we won't stop for that at the moment.

WITNESS: That is the system.

MR. CONANT: I know it is.

WITNESS: I am merely saying, this is more than Toronto. We are dealing with an Act which affects the whole province.

MR. CONANT: Yes, but then of course when you are dealing with the jurisdiction of the Court of Appeal, that is a problem that is common to the whole province, too.

WITNESS: All I want to say with regard to that, Mr. Chairman, is, the members of the Court of Appeal cannot be expected to know as much about values of local property as the local men on the job. I am speaking to a committee of lawyers, and I think you will all agree with me. A lawyer does not know as much about the values of property as a man dealing with real estate, and, anyway, the local man on the job knows what the property is worth, more than the member of the Court of Appeal does.

MR. CONANT: When you speak of the man on the job, to whom do you refer?

A. I mean the member of Council who is a member of the Court of Revision.

MR. CONANT: Yes, but when you come to that, I repeat that the system—and that is the system in towns and townships, that the members of the Council are the Court of Revision—I am not sure that that is a proper system, because you have got a court constituted from the taxing body; it is not an impartial tribunal.

WITNESS: I rather agree; it cannot be an impartial tribunal, because they are saying what portion an individual must pay of the rate that they are going to levy; but they are the men that should know best the values of that property, more than a man sitting in Toronto in the Court of Appeal.

MR. CONANT: Didn't we amend that, Mr. Silk?

MR. SILK: Yes, that was amended about three years ago, Mr. Chairman, I think; it used to be the Council itself.

MR. CONANT: That was the only one that could function?

A. That could function.

Q. Now they can appoint ——

A. Now they can appoint any five members, but members of the Council may be members of the Court of Revision.

Q. But they can go outside if they want to?

A. As far as I know, the Court of Revision is still the Council.

MR. SILK: Have you any suggestions to make as to appeals to the Municipal Board and the powers of the Municipal Board in assessment appeals?

A. No. Much that I have said about the qualifications of a member of the Court of Appeal to deal in values of property in any particular locality might apply to a member of the Municipal Board, but there is one difference, because the Municipal Board do go around and look at properties and are a little closer to it than a member of the Court of Appeal; but I think there is much to be said for the county judge being the final arbiter of the *quantum* of an assessment. There is no reason why it should be the county judge except that he is the chief judicial officer in the county, and he is a man of intelligence and should know values. You might reasonably well have a postmaster or something like that, but he is the chief judicial officer.

MR. LEDUC: Yes, but in the case of a County Court judge who is brought in from an outside district ——

A. He won't know as much about it.

Q. He won't know as much about it for a while, till he gets to know his district?

A. No, but I cannot think of any man better qualified to act as an appeal judge than a County Court judge.

MR. CONANT: Well, have you any further submission?

A. My main submission is as to that, Mr. Chairman. You might be kind enough to think I was trying to help you out and ease your labours by showing

that this was not administration of justice at all, that appeal courts or assessment appeal courts are municipal matters.

Q. Well, a Court of Appeal which has its grounds and its jurisdiction so definitely defined as this has ——

A. Well, you might want to ease your labours a bit by keeping away from things with which you do not have to deal.

MR. CONANT: Thank you, Mr. Colquhoun.

MR. SILK: Mr. Gray of the Municipal Affairs Department will be here in just a moment, and then Mr. Coulter will follow.

ALFRED J. B. GRAY, Chief Supervisor, Department of Municipal Affairs.

MR. SILK: Mr. Gray, you are the Chief Supervisor of the Department of Municipal Affairs?

A. Yes.

Q. You have had long experience with assessmens and assessment appeals, Mr. Gray?

A. Yes.

Q. And you know the present practice as to assessment appeals?

A. Yes.

Q. The County Judge and the Municipal Board and so forth?

MR. CONANT: When you speak of experience, not in your present department?

A. No; both as being head of a municipality and also in the department, and also when I was engaged in real estate and financial work I used to also give evidence as to values and so forth.

MR. SILK: You were at one time Reeve of York Township, were you not?

A. Yes, I was.

Q. And you have been with the department for how long?

A. Since 1934.

Q. Supervising municipalities?

A. Yes. I am also chairman of committee appointed by the Bureau of Statistics to study assessment law and procedure.

Q. I understand you also gave some assistance to a commission that was set up in the Province of Manitoba a year or so ago on assessment matters in Winnipeg?

A. Yes.

Q. Now, Mr. Gray, have you some suggestions which you would like to make as to the mode of assessment appeals?

A. Well, any more than limiting—what we find in dealing with assessment appeals, and the criticism which is passed by many of the municipalities in the province, is that the county judge does not seem to have the knowledge to deal with the matter when it is brought before him. That is the feeling of ——

MR. CONANT: Is it a question of knowledge?

A. Well, it is the question of his being acquainted with changing conditions, as would enable him from the time at his disposal, to deal properly with the evidence which is brought before him by experts and so forth. The feeling has been in the past few years that the county judge has been too apt to confirm the assessment rather than to recommend any changes, in view of the changing conditions. It has been felt that where we have sat in independent Courts of Revision, which were free of council members, and with the appeal in large assessments to the Board, a more favourable decision has been brought about, and has resulted in municipalities changing their method of assessment with a view to bringing about their equity.

MR. SILK: You say, then, that the Ontario Municipal Board is a more appropriate appeal tribunal than the county judge?

A. I think so. The only difficulty there is that the Ontario Municipal Board is limited in dealing with assessment appeals by the amount of the assessment.

MR. CONANT: Do you think that amount should be lowered?

A. I think so.

Q. To what?

A. Well, to an amount which would be reasonable; where property say, is assessed at ten thousand or more.

MR. SILK: Do you suggest the appeal should be from the Court of Revision direct to the ——

A. There should be an alternative appeal; if you are going to retain the county judge, there should be an alternative appeal direct to the Ontario Municipal Board. Even though in large appeals, the Ontario Municipal Board has had the power to deal with assessment appeals, I feel that the law should permit a person to choose where he will go. It has not been the habit of the Ontario Municipal Board to deal with appeals direct; they have more or less

forced them to go to the county judge first, and then only deal with the matter as an appeal from the county judge which I think has in many cases, brought about additional expense which was unjustified.

MR. CONANT: You think there should be the right to go straight to the Municipal Board?

A. I think it is there now in the Act, my own opinion is, but the Board has not adopted that procedure, and also in most cases the municipalities have been forcing the appellant to go to the county judge first.

MR. SILK: Would you still give the appeal to the county judge in cases under $10,000?

A. My own personal opinion is this, that much more could be gained if, instead of having local Courts of Revision, there was appointed by the Provincial Department, district Courts of Revision, and then give an appeal direct to the Ontario Municipal Board, and delete the county judge entirely from it. I feel that, even to have a Court of Revision appointed by the Council, the Court of Revision is too apt to look upon what effect it might have upon the revenue of the corporation rather than from the standpoint of equity.

MR. CONANT: Because it is a creature of the Council?

A. Because it is a creature of the Council. But I feel if Courts of Revision were created as district Courts of Revision, with proper men qualified to deal with the matter, as appointed by our own department, for instance, that we would have more and better consideration given to assessment appeals, and in cases of appeals other than law, it could go direct to the Ontario Municipal Board.

MR. SILK: Do you wish to say anything in regard to the powers of the Court of Appeal?

A. Then I think the powers of the Court of Appeal should be limited to only increase or decrease, in keeping with the values of the similar property which they are considering. I think it is unfair ——

MR. CONANT: That is a rather general statement. Can't you define more clearly what you mean?

A. Well, in this way: An appeal will go at the present moment to the county judge or to the Ontario Municipal Board, and they will listen to that appeal on the basis of evidence, they will reduce that piece of property even although by doing so a person of similar property is having to pay taxes on a higher assessed amount. In other words, you force a person then, if he wants to get redress, to appeal against every piece of property in the municipality. In other provinces they are limiting, and in the States they are limiting the courts to only being able to decrease or increase, in so far as it will not change the value in keeping with other similar properties. The whole purpose of assessments is to bring about equity in taxation, and if you are going to allow one man do be reduced because he appeals and another man not, because he feels there has been

equity, then the other individual is being called upon to pay higher taxes. We had a case of that in Fort Frances. You heard Mr. Manning speaking of the Fort Frances situation. Here was a pair of semi-detached houses built at the same time and all of the same condition, yet one member who had owned this property was considered to have been a member of the Council who had been dealing with assessment appeals in the past. The one property had been reduced. Well, there was an appeal brought forward, and the assessor felt that after an investigation into values and all that should be taken into consideration, the higher assessed property was the fairer value, and he increased that asesssment. When the matter came before the county judge he reduced that assessment, on the ground that there had been no change in the values in 1939 over that of 1938. So here, although you had two pieces of property of a similar condition and similar type, one by action of the judge was permitted to have reduced assessment over that of the other, so there was no equity in taxation by reason of his action.

Q. Turn up that section which sets out the grounds of appeal to the Court of Appeal.

A. Section 85. That is purely on a question of law.

Q. Now, what do you say as to that?

A. I feel that that is all that should be allowed, is a question of appeal on law, that the Ontario Municipal Board and the Court of Revision, if it is properly appointed, should be quite able to deal with the value end of it, of the appeal.

Q. You heard Mr. Manning's statement?

A. Yes, I heard Mr. Manning's statement. I quite appreciate, Mr. Manning's information is based on the knowledge end of it, but what I feel is this, that if we are desirous of making an assessment, it is for none other than to provide equity in taxation and to share the cost of municipal service between all citizens; therefore what we should endeavour to do from our Act is to bring about an equitable equalized assessment, so if the judge is limited to its review or the Court of Revision is limited to its review, to see that people are equalized properly, then there can be no injustice done to anyone.

Q. Well, of course, that is quite obvious, but that doesn't get you anywhere. It is a question as to what procedure is the best to bring that about.

A. Well, the best—I do not think that the matter of appeals will solve that problem. I think in the first place it is the matter of instructions and control over the assessor's duties will give you a better equalized assessment. There are a number of people throughout Ontario to-day that from a nuisance value will endeavour to continue appealing assessments, and sometimes Courts of Revision will reduce that assessment rather than face the municipality being caused the cost of going through lengthy appeals to a Supreme Court, if it was a Supreme Court, or to a county judge or to the Ontario Municipal Board. I feel that if we want to bring equity in assessment it will be a matter of the procedure followed in making the valuation, and this whole difficulty has been created by this argument over sales value, and the greatest amount of criticism that we

have in the assessment field to-day is the criticism against taxation, not necessarily the method of assessment.

Q. Well, I don't know about that, Mr. Gray.

A. Well, that is my experience, that you will find most people are complaining about the taxation which property has to bear.

Q. Well, of course, assessment is one of the incidents attached to that.

A. Well, assessment only controls the basis of levying, but will not limit the expenditure by which taxation is increased. If you were to reduce all the property to a dollar, you would have to raise that amount of money, and taxation could still be heavy and excessive.

Q. What do you say as to the respective functions or merits of the Municipal Board as compared with the Court of Appeal as a final court?

A. My experience with the municipalities, and generally speaking with people who have large assessments, is that they are more desirous of having the Ontario Municipal Board deal with the appeal than they are of the county judge.

Q. I was asking you to compare the Municipal Board and the Court of Appeal.

A. Well, all I can say is this, that I have had no experience with the Court of Appeal other than through the judge, and we always find in large assessments we want to come back to the Board. But in Manitoba, for instance, they have the appeal direct from the Court of Revision to the Supreme Court judge, and when I was studying ——

Q. A single judge, you mean?

A. Instead of having an appeal to the District judge, which would be our County Court judge, they appeal right to the Supreme Court judge.

Q. In all cases?

A. Yes. And I find from my study of the Manitoba system, and the members of my committee, that they are still having the same problem of appeals as they ever had, and it has now come to be the thought of everyone that you will not solve this problem of inequity by appeals, because the average small person who wants to appeal is going to think of the cost, and I think they find in Manitoba that it is more costly to go to the higher court than it is to the lower court.

MR. CONANT: All right, thank you. Anything else, Mr. Silk?

MR. SILK: No, not from Mr. Gray. Thank you, Mr. Gray.

There is a representative of the Real Estate Brokers Association.

MR. LEDUC: Mr. Kent?

MR. SILK: No, Mr. Kent is not going to speak.

CHARLES FURNELL, Ontario Association of Real Estate Brokers.

MR. SILK: You represent, I understand, the Ontario Real Estate Brokers?

A. The Ontario Association of Real Estate Brokers. Our Association, Mr. Chairman, has associations in Windsor, London, Kitchener, Hamilton, Toronto, Ottawa, and individual members in other municipalities, and the parent body is the Ontario Association. We have had a committee that we have called an assessment committee working for a few months, and there is one submission we have to make, and that is in connection with appeals. The situation to me seems to be this, that some of the proceedings can be made and are being made farcical, both before the Courts of Revision and the county judge and the Municipal Board.

MR. CONANT: Being made what?

A. Somewhat of a farce. I will explain what I mean. If an appellant puts in an appeal to the Court of Revision and the appeal is not allowed, he can then of course go to the county judge, and if it is not allowed there, if the property is of sufficient assessment, he can go on to the Municipal Board, and if, having gone through those steps, he is turned down and gets no reduction, he must accept that with as much good grace as he can muster, the decision that his assessment cannot be reduced; but not so with the assessor. If, on the other hand, this man appeals and gets a reduction from the Court of Revision, the assessor may appeal to the County judge or the Municipal Board, and those boards, the judge and the Municipal Board, may uphold the reduction given by the Court of Revision, but there is nothing to stop the assessor the following year from placing that assessment right back to where it was before the reduction was made.

MR. CONANT: With the similar right of the person assesed to appeal again.

MR. SILK: And the cost of an appeal year after year.

WITNESS: Yes; that is what I am coming to. I can cite cases, but unless you compel me I would rather not give names, although you could read these letters.

MR. CONANT: No, we don't care about that.

WITNESS: We have one case here, where in the city of St. Catharines an appeal was made last year, in which I appeared as an expert witness, together with another expert. I did not go down to the Court of Revision; the lawyer who was handling the case for the property owner appeared at the Court of Revision, and I presume that, having travelled from Hamilton, he was paid for that. Later we appealed, and I appeared before His Honour Judge Stanbury, and a reduction was made of $5,000. Now, to my knowledge, Mr. Chairman, those proceedings cost $350, and a reduction was made of $5,000. Assuming

that the tax rate in St. Catharines is 40 mills, that man saved $200 a year, but this year we have to go through the same procedure, because that assessment is placed right back. Now, I had another ——

MR. CONANT: Now, just stop at that point. What could we do to remedy that? What do you suggest could be done to remedy that?

A. I suggest, Mr. Chairman, that when an assessment is set, either in favour of the municipality or the appellant, by the Court of Revision or the county judge or upon appeal, say, that that assessment should stand for three years; in other words, it should not be upset by the assessor. The appellant cannot upset it, but the assessor can. Now, I am not suggesting that the assessor cannot upset it upon appeal. I think if, the following year, having received a reversed judgment, the assessor wishes to appeal again, that may be all right, but not to be able on his own volition to change that appeal and put it right back.

MR. LEDUC: This is, of course, subject to the fact that there has been no change in the property?

A. Yes; and there was no change in the property that I mention.

Q. But I mean, the suggestion you make, there should be no change for three years, provided there is no change in the property itself?

A. That is right. Now, one of the men who preceded me, brought up the matter of Courts of Revision consisting of councils and township councils. I had such an experience where I appeared as an expert before a township council, and the township council formed the Court of Revision. The mayor of that township, upon hearing that my principal was going to appeal to the county judge, told me frankly there and then, that if his assessment were reduced by the county judge, it would most certainly go back the following year. If you wish me to give you these cases, I can tell you where they are.

Q. No, it is all right.

A. Another one, where we got a reduction of $8,500, in the town of Simcoe, at quite a cost. Upon leaving the court I happened to mention to the assessor, who had been a little bit bitter right through the proceedings, "Well, I suppose that assessment will stay now." "Oh, not necessarily," says he, "it will very likely go back next year." Now, in the case in St. Catharines it did go back, and I have another case in Hamilton, a letter here from a firm of lawyers, who wrote me reminding me that a reduction had been made last year in an assessment, and tellimg me that he was surprised to see that the assessment was now back to where it was before the assessment was reduced. He says:

> "We took the matter up with the assessor of the ward in which this property was situated, and he advised us that he did not agree with the Court of Revision, and that he accordingly exercised his prerogative and increased the assessment."

I submit, gentlemen, that that is entirely wrong, and I think that is as strong a case as I can give you now.

MR. CONANT: Supposing there is a material change in the value of that property within that three years?

A. I suggest then, that the assessor most certainly would have the right to make a change.

Q. Well, how would you define that by statute?

A. Well, I don't know how you would define it by statute—I am not a lawyer, Mr. Conant—but I think the mechanics of the thing would be this, that the assessor may go down to the property and find it demolished or an addition made, and that he can make his assessment accordingly, and the owner surely should be ——

Q. I did not mean a change in value from alteration in the property, but from conditions in the municipality, which might change very radically in two or three years.

A. I suggest that in three years they are not changes that would materially affect the matter, and he would have the right of appeal in any case.

Q. Who would?

A. Either party, the assessor or the owner.

Q. In other words, you would have it assessed in the original assessment the same, with the right of either party to appeal against that assessment?

A. I think so.

Q. You would have a fixed assessment for three years at the amount decided in the last assessment appeal, subject to the right of appeal?

A. Yes.

Q. Do you care to discuss this question of the jurisdiction of the Court of Appeal in these matters?

A. No, I do not feel qualified to go that far, sir.

Q. All right, thank you.

R. S. COULTER, K.C., Chairman, Ontario Municipal Board.

MR. SILK: Mr. Coulter, you are chairman of the Ontario Municipal Board, about which we have heard something this afternoon. In your experience, has the present assessment appeal practice given a good degree of satisfaction?

A. Well, naturally, as chairman of the Board I feel that it has. I have felt, coming from a small town, and having a good deal of municipal practice before I came to the Board, that if there was one appeal to the Court of Revision by any person, the Court of Revision in smaller places, composed of the members

of the Council, who represent the different wards in the municipality, who know the values in those wards, after the Court of Revision has dealt with a matter, they deal with it pretty fairly in most cases. Then there is the further appeal to the county judge. In my practice, I realized that you could not get very far in an appeal to the county judge from the Court of Revision in most cases.

MR. CONANT: Why?

A. He seemed to take the valuation of the Court of Revision and the assessor.

Q. As a matter of course?

A. As a matter of course. Then the suggestion made of an appeal on a question of fact to the Court of Appeal: that would necessitate in every appeal to the judge that there should be a reporter present who would take down all the evidence, in every case, and in case of a further appeal to the Court of Appeal that evidence would have to be transcribed, and the expense in every municipality would be great; I do not know whether it is warranted or not. In the present practice there is an appeal to the judge, and in the smaller places the judge does not have a reporter. In Toronto he has a reporter, and the evidence is transcribed when the appeal comes up before the Municipal Board. Then the Municipal Board hears the evidence *de novo*, and generally have a reporter. And in that way there are three appeals; whether three appeals are necessary I do not know.

MR. SILK: What about the powers of the Court of Appeal, Mr. Coulter?

A. The powers of the Court of Appeal? They deal practically only on a question of law. An appeal from the Board to the ——

MR. CONANT: How is your Board constituted at the moment? Who are the members?

A. I am chairman.

Q. You are a lawyer?

A. Yes. Mr. Near is an engineer, and has had a great deal of municipal and engineering experience; he was an engineer in Toronto, an engineer in St. Catherines, also in London, and has had a very wide experience. Mr. Van Every is now a member of the Board, and he has had a very wide municipal experience.

MR. SILK: Then I wonder, gentlemen, if we might revert back to the matter of appeals from boards and commissions, which we discussed just before lunch this morning.

MR. CONANT: Just before leaving that: you have heard Mr. Manning's submission, that the grounds of appeal and the jurisdiction of the Court of Appeal should be broadened, I think he intimated, practically, to cover everything that is in issue in an assessment appeal; what do you say as to that?

A. Well, of course, I would not object at all, if this Committee would relieve the Municipal Board of all assessment appeals, as far as that is concerned, but in

appeals to the Court of Appeal you must remember that the Board hears and sees the witnesses, it sees the property, knows something about valuations in the municipality, and I don't know; as a practicing lawyer I would say no, that there should be no appeals except on questions of fact under the circumstances, but as a member of the Board ——

MR. LEDUC: You mean, there should be no appeal except on questions of law?

A. Questions of law.

Q. You said fact.

A. I beg your pardon; I am sorry.

MR. CONANT: Then, there has been the question as to whether the ——

A. May I interrupt just there?

Q. Yes.

A. Mr. Manning spoke about an appeal to the Court of Appeal, where opinion evidence has been given. Who would be better able to judge the value of opinion evidence than those who have heard the men who were giving that opinion evidence?

Q. Then, there is the question of the amount. There is only an appeal to your Board where the amount involves a minimum of $40,000?

A. Yes.

Q. In the organized counties. What do you say as to that?

A. It is very difficult to say whether the Board could handle all of the appeals on smaller amounts, and yet I feel that there should be an appeal on smaller amounts to some board or commission.

Q. A man with a $10,000 property, it may mean just as much to him ——

A. It generally means more to him.

Q. —— as a $40,000 man?

A. Yes; it generally means more to him. As to assessment at bona fide sale value, I do not think it could be managed at all by a judge or board.

Q. What?

A. An assessment on bona fide sale value. You would never have any equalization of assessment in any municipality, and that is, after all, what is supposed to be gotten at, that each man should pay his fair share of the debts of that municipality. It would be a very nice question as to what is a bona fide

sale value. A sale under mortgage, would that be? A sale from one relative to another, would that be?—and so forth.

Q. Of course, it is actual value.

A. It is actual value, that is what it is. It is not the question of sale value at all; it is what is the actual value of that property.

MR. STRACHAN: But isn't that the complaint Mr. Manning was making, Mr. Coulter, that that was not the way they were doing, that they were looking into the future and saying it had potential value?

A. Not necessarily. What is the value of that property compared with ——

Q. What you can get for it—isn't that the actual value?

A. No, I would say not by any means.

MR. SILK: In some cases you can't get anything.

WITNESS: You take for the past few years, it has been almost impossible to sell properties. I was talking to a real estate agent the other day about a certain house in town here, as to whether he wanted to sell it. He said, "No," he said, "I don't want to sell. There is no chance of selling," he said, "except to a certain few people who will buy at forty percent of the value to-day. That is the only chance you have to sell."

MR. STRACHAN: You take houses up in the Annex, up on St. George Street and in that district, assessed at $30,000 and $40,000; you couldn't possibly get more than $12,000 or $15,000, for a boarding house, and yet they are assessed at those figures. What would you say the actual value was there?

A. Well, whatever is the value ——

Q. Just what you could get for them?

A. No, I wouldn't say that at all, because some people have to sell, some people don't have to sell. It is a very nice question as to what is the actual value of a property; it is a very difficult question for any board or any judge to decide.

MR. CONANT: I think that word "value" is one of the imponderable words in the English language, isn't it?

A. Yes, it certainly is.

MR. CONANT: Economists have discussed and argued, and always will, as to what it means.

Well, Mr. Silk?

MR. SILK: Then, may we refer to the other matter, of appeals from other

boards and commissions having quasi-judicial powers. It is Mr. Barlow's item number 26, on page B72.

Q. Mr. Coulter, would you describe to us in a general way, the powers of the Municipal Board under the various statutes which govern its work and jurisdiction, with a view to describing in what cases there is an appeal from the Board and in what cases there is not?

A. Well, it would be very difficult for me to tell all of the matters with which the Board deals to-day.

Q. I think we need only pay attention to the more important ones, under which you are working almost from day to day.

A. We have, I suppose, from forty to seventy assessment appeals.

MR. CONANT: A year?

A. A year. We have, perhaps, twenty to twenty-five arbitrations.

MR. SILK: Under what Act would that be?

A. Under the ——

Q. The Arbitration Act?

A. No, it is not under The Arbitration Act. The Public Works Act; under The Public Works Act.

Q. The Grand River Act also ties in there, does it not, in the matter of arbitrations?

A. Yes, it ties in there with arbitrations. We sat for over a week on that arbitration. But that was altogether a question of valuation, values, hearing witnesses and placing the values; and so it is with the arbitrations. Whether it would be better to have an appeal to the Court of Appeal from the amount of our valuations is a question, but we see all the witnesses and see the property usually, in nearly all cases.

Q. Do I understand, that in no case is there an appeal from the Board on a matter of fact or amount?

A. No.

Q. And that in all cases there is an appeal from the Board on matters of law?

A. Yes.

Q. Then, I think that is pretty much in accordance with Mr. Barlow's recommendation, so far as the Municipal Board is concerned. He says:

"*I recommend* that a careful inquiry be made, and that a right of appeal

be granted from decisions, determinations and orders made by Boards and Commissions established by the Government, which are now determining matters which were formerly determined by the courts."

He does not restrict that to matters of law. Apparently, Mr. Barlow would give an appeal as to matters of fact ——

A. Yes.

Q. —— and amount as well. Do you see any objection to that, Mr. Coulter?

A. No, I see no objection to it at all.

MR. CONANT: The purpose of the Municipal Board, Mr. Coulter—it goes back quite a few years; it was originally the Municipal and Railway Board, wasn't it?

A. Yes.

Q. The purpose of that—you can correct me if I am wrong—was to provide an expeditious, inexpensive machinery or tribunal for settling matters that were largely, if not entirely questions of fact and detail of subjects related to municipal affairs, was it not?

A. Yes—altogether.

Q. Now, isn't there this further observation, that the procedure for getting to the Municipal Board, pleadings and all the rest of it, is much simpler than it is in the case of proceedings through the courts of law?

A. Oh, yes. You see, all we require is a notice of application or of appeal to the Board, and we generally ask that they file something to show what their application is for or what their appeal is about, and very seldom are costs allowed by the Municipal Board. And not only that: lawyers are ——

Q. The preliminaries are not at all extensive?

A. Not at all.

Q. It is an informal tribunal; you are pretty liberal and ——

A. Not necessary to have counsel.

Q. If you think anybody has been prejudiced by this or that, you allow pretty freely opportunities of setting things right, don't you?

A. Absolutely, in nearly all cases. And I think that is why the Municipal Board was established, to give the people a place to go, so far as municipal matters are concerned, especially, at the least expense possible. For that reason I did feel that it might be wise, in some cases, especially, to determine—depending on the amount of the assessment, that the appeal should go directly from the

Court of Revision to the Municipal Board, rather than go from the Court of Revision to the county judge and then to the ——

Q. What hardship would there be, Mr. Coulter, if an appellant had the option of going either to the county judge or directly to the Municipal Board? What hardship would result from that?

A. I do not think there would be any hardship, except to the Municipal Board.

MR. LEDUC: Well, we are not concerned with that.

WITNESS: No, I think it would be a wise thing to give them a chance to go there.

MR. CONANT: There seems to be, I wouldn't say a general impression, but at least, it is suggested that a great many of the county judges are not too alert in meeting their duties and responsibilities on these Courts of Revision, Mr. Coulter; so that if that is the case and when it is the case, if there is a situation in a county where a judge is known to be disposed to simply confirm assessments, why compel the people to go before him and go through that machinery, that procedure?

A. Well, I have heard that expressed, I have heard that feeling expressed.

Q. Of course, there might be one feature of it, that if that were established as the alternative practice the county judges might easily evade all assessment appeals.

A. I do not think it would be possible for them to if there was an assessment appeal directed to ——

MR. CONANT: I say if the people got that impression the appeals might be directed to the Municipal Board.

Now, Mr. Silk?

MR. SILK: Mr. Colquhoun points out a provision of the Municipal Board Act which is rather unusual, because it is a power which the courts have not got:

> "The Department or the Board may at any time of its own initiative or upon application made to it review any order, direction or decision made by it and confirm, amend, vary or revoke the same."

So that there is really an appeal to the Board from any of its own decisions; it never becomes *functus*.

I think that is all. I have a request ——

WITNESS: I might say the Board has power—the question of costs was mentioned. The Board has power to allow costs in any matter before it.

MR. SILK: I have a request from Mr. Bosley that he be permitted to make certain representations. I do not think he will be long. I do not know what the nature of his representations will be.

MR. CONANT: Very well.

WILLIAM H. BOSLEY, Real Estate Broker.

MR. SILK: Mr. Bosley, you are engaged as a real estate broker in Toronto, are you?

A. Yes, I have been engaged in the real estate business for twenty-seven years, and have appeared before many Courts of Revision in Toronto and elsewhere, many times before my friend Mr. Coulter. I think Mr. Coulter gave you the clue to the situation pretty much when he said that he could not take sale prices as indicative of value, that you had to look for an equalization, and that, gentlemen, is the attitude of the courts all the way through, commencing with the Court of Revision, the county judge and the Railway Board or the Municipal Board. I think the fault lies primarily with the assessors. In Toronto the assessor has to cover the entire city, with a corps of assessors, every year. It always seems to me to be a very great waste of time and effort, and a more competent job could be done if an assessment was made once every three years. That is the practice in Great Britain, where rates are levied on income-producing properties based upon the ability to produce, and I think that if the assessor say did one quarter of a city the size of Toronto this year, and that was left over for the next two years, you would get a very much better job. Those assessments are reviewed largely by members of council, who in effect sit in judgment upon their own work.

MR. LEDUC: Do you mean here in Toronto?

A. No, not in the city of Toronto. I am speaking now by and large. That is the case, and I think that is very bad practice, because I have found many times over ——

MR. CONANT: I think I would agree with you.

MR. LEDUC: Members of council should not be members of the court?

A. No, sir. I think those who sit on review on assessments should be men skilled in the art of appraising.

MR. CONANT: And disinterested.

WITNESS: And disinterested men. And in that way I think you would get what we are all seeking to find, that is, the truth. If that were done I do not think you would have very many appeals beyond that first Court of Revision. But the fact is that very little justice is done by and large by Courts of Revision. I do not say that is true in the city of Toronto, but it necessitates an appeal to the county judge, and in Toronto the county judges are said to be overworked, and the time which is given for a hearing is exceedingly limited; in other words, justice is rushed through. I would much prefer if I had to appeal from the

court of revision to go direct to the Ontario Municipal Board, where you have an impartial body of three men, not interested in any municipality, and I think if that were done, the right of appeal either to a county judge or to the Municipal Board, you would simplify the mechanics of the Act and get greater justice. I do know that the Government—Mr. Gray as chairman of the committee was considering the revision of the Assessment Act, and I know you gentlemen are not concerned immediately with that, you are concerned with the mechanics of the administration of the present Act, but the revision of the present Assessment Act I suggest is long overdue; and if appointees, assessors in the first place, were men skilled in arriving at value instead of being copybook writers who go around, look at a building and copy what the man who was there last year did, you would not have half the trouble you have to-day. Now, the art of appraising is very skilled, interesting, and calls for a good deal of common sense and education. That is all I have to say, gentlemen.

MR. CONANT: Have you any observations on the question of the jurisdiction of the Court of Appeal?

A. No. That is a legal matter, Mr. Conant, that I am not competent to speak about.

Q. You are satisfied with the Municipal Board?

A. By and large, yes, but I was discouraged to find Mr. Coulter saying that the primary motive was the equalization, not the determining, of real value, because I was informing Mr. Coulter, I was seeking to impress him with the necessity of reducing an assessment from $54,000, I told him I could sell for $25,000, I have sold for $16,000, all cash, a willing buyer not obliged to buy—you know the old formula. Another case, an assessment of $54,000, in the city of Toronto, the old Union Trust building at the corner of Victoria and Richmond, appealed that, no relief, we sold it for $25,000 The analysis which Mr. Manning gave you was prepared in my own office, and I think it was accurate, and that can be repeated many times Mind you, I am one of these men who believe that a carbon appraisal of the assessable value of the city of Toronto would not result in any reduction in the total assessment, but on the contrary would mean an increase and therefore a lower tax rate. Assessors have not either the time or the skill to recognize changing conditions. I do not think conditions change sufficiently in three years, no harm would be done, if a new building were built assessment could be made at any time, but to try to go over an entire city year after year is a useless waste of effort, and I would suggest that cities over fifty thousand, if assessment was made once in three years, a better job would be done. You know The Railway Act calls for that, Mr. Chairman.

MR. CONANT: Is that all, Mr. Silk?

MR. SILK: That is all.

MR. CONANT: Then we will adjourn until the morning, gentlemen.

Adjourned at 4.20 p.m. until 10.30 a.m., Wednesday, September 25, 1940.

TWELFTH SITTING

Parliament Buildings, Toronto.
September 25, 1940.

MORNING SESSION

On resuming at 10.30 a.m.:

C. F. NEELANDS, Deputy Provincial Secretary.

MR. SILK: Mr. Neelands, you are the Deputy Provincial Secretary?

A. Yes.

Q. In charge of the branch of the Government which supervises prisons and reformatories?

A. Yes.

Q. And you have held that position for how long?

A. Nine years.

Q. And what position did you occupy prior to that?

A. Superintendent of Ontario Reformatory, Guelph.

Q. And before that you were Superintendent of Burwash, were you?

A. Yes.

Q. I understand you opened up and established the Jail Farm at Burwash?

A. Yes.

Q. You have read the portion of Mr. Barlow's report which deals with a central place for capital punishment?

A. Yes.

Q. Do you agree with Mr. Barlow in his recommendations? That is on page B26.

A. In general, no.

MR. CONANT: In general what?

A. No.

MR. SILK: Will you tell us why you do not think that there should be a central place of execution in the province?

A. In the first place, the responsibility of the business of carrying out an execution is something no one wants, and that is just as true of prison officers at a reformatory or a jail as it is of the prisoners in the jail; none of them want to have anything to do with it or be near it. In the second place, it is my opinion that the fact that there is capital punishment and that it is carried out should be brought home to the people of the province. There is a third reason that I can think of just now, and that is the difficulty of near relatives of the prisoner being near him prior to execution. For instance, if a person from Kenora is to be executed and the place of capital punishment was Toronto, it would be extremely difficult for those relatives to come down here and stay two or three months or even a portion of that time. The sheriffs, of course, are inexperienced, to begin with, they don't want to have anything to do with it, but they are charged by the law with doing it at present, and the statutes would have to be changed by the Government at Ottawa. Even if there was a central place the sheriff would still be responsible for it.

MR. STRACHAN: Do you ever have any trouble with the executioner not turning up and the sheriff being ——

A. Never heard of it.

Q. That is what they seem to be fearful about, the sheriffs, that they will be left to do it themselves.

A. I have never known of such a case. A good many years ago there was a man who acted as executioner; he always turned up, but the sheriffs I believe at times had to send an officer along with him to make sure that he didn't have too much to drink, just had the right amount.

Q. He is now deceased?

A. Yes. The man who carried out these executions for seven or eight years until about a year ago appeared to give entire satisfaction, and the man who has carried out the last few executions I believe has been quite satisfactory.

MR. CONANT: Satisfactory to whom?

WITNESS: I should say, to begin with, I have never been present at an execution, and my knowledge of the matter is academic. I have talked to a great number of men through the last twenty-five years who have been present at executions; I unwillingly talked to two of the hangmen.

MR. CONANT: Would there be much economy involved if they had a central place? About how many do we have in a year?

A. I don't think so, sir.

Q. What do we have in a year in the province? Four or five a year?

A. In 1936 there were three executions—each of these years is the year ending March 31, the year I am stating.

Q. The execution year corresponds with the fiscal year?

A. Yes. In 1937 there were three. In 1938 there were five. In 1939 there were three. In 1940 there were four.

Q. Not a very serious item, then?

A. No.

MR. SILK: Mr. Neelands, on the matter of expense, I think I think I have the original of the memorandum from which you are reading, and I see that you state in each case the cost of a scaffold varies from a minimum of $30 to a maximum of approximately $100?

A. I obtained that figure in discussion with the Auditor of Criminal Justice accounts. That is the cost of equipment.

MR. CONANT: What is the executioner paid?

A. I understand it is $100 for the execution, plus expenses and if there is a reprieve just before the date of execution he is paid $50 and expenses.

MR. FROST: I suppose we should not get involved in constitutional questions, but I suggest to Mr. Neelands that he get the report of the Select Committee of the House of Commons in England. I think in 1930 there was recommended the abolition of capital punishment altogether.

MR. LEDUC: The cost of an execution, then, would be altogether around $250?

A. I believe so.

Q. And if all executions took place in the same jail, all we would save would be the cost of the scaffold?

A. Correct.

Q. Because the executioner would still be paid his fee?

A. Correct.

Q. And his expenses. So we would save perhaps three or four hundred dollars a year?

A. Correct.

MR. CONANT: Of course there is always the fear that was spoken about, that the sheriff, who is responsible for the execution, may have to do it himself.

MR. SILK: There is only one reason Mr. Barlow speaks of that has not been dealt with. That is number 4:

> "I would solve the question of appointing an official executioner. A man could be appointed who could have other employment about a provincial prison and who would always be available."

I think that same situation exists to-day; a hangman could be given employment in some provincial institution?

A. I do not agree with Mr. Barlow there. I do not think it would solve the question of appointing an official.

MR. LEDUC: May I ask this question: would it be good for the morale of the jail to have the executioner employed there?

A. Absolutely not. We have got an example of that. This executioner who acted for six or seven years until recently was a quiet and unassuming man; he could not live on the amount of money he got for executions in this province, even supplemented by what he was paid for executions in western Canada and the Maritimes, and so he would be available still for executions he was given a temporary job as a guard outside the Toronto jail, walking around the grounds there at night keeping people from approaching too close to the jail. They did have him on work temporarily inside the jail, and the effect was so bad they immediately moved him out, so we have had practical experience on that point.

MR. CONANT: All right; I do not think we need any more on that point, Mr. Silk.

Thank you, Mr. Neelands.

WITNESS: I might just add this, that through the years—I believe the expenses are paid by the Attorney-General's Department.

MR. CONANT: Yes.

WITNESS: The Provincial Secretary's Department has the custody of the prisoner, but there is no official responsibility in respect to carrying out the execution, but during these years, probably because no one else wanted to do it, we were a sort of clearinghouse for information on the theory of hanging or executions, to the sheriffs, advising the sheriffs and giving them all the assistance we could. The sheriff's office in Toronto—I might put it this way—has been the employment bureau, having the name and address of the executioner, and that is the situation to-day. I do not know the name or the address of the present man who does this, but I know it is in the sheriff's office in Toronto, and it is only a matter of—two weeks ago I referred a sheriff to the sheriff in Toronto for the information.

MR. CONANT: All right, Mr. Silk. Thank you, Mr. Neelands.

Witness retires.

MR. SILK: I had arranged with Mr. Slaght and Mr. Greer to be here this morning. Mr. Slaght will be here at about eleven o'clock; he is unavoidably detained. Mr. Greer has sent me a letter which I should like to read into the record, dated September 24:

"Dear Mr. Silk:

I think that it will be impossible for me to attend your Committee

to-morrow because of the fact that I am trying a case in the Assizes, and the court sits from ten until five except for lunch time.

My position as to the abolition of grand juries is that it would be a great mistake for many reasons, and to send cases to trial solely on committal by a magistrate would eventually be much more costly in the administration of justice than to have the grand jury pass on the facts. The question of expense of administration of justice within reasonable limits is no argument it seems to me for having the public satisfied that men who are accused of crime are protected by the standard methods that have prevailed for centuries in British law, and to relieve the grand jury from the responsibility and pass it on to government officials eventually would cause a certain amount of distrust in the minds of the public. Magistrates cannot get away from the fact that they are government employees, and if they feel that the Attorney-General's department has a policy in regard to certain types of crime, such as careless driving or automobile accidents, the difficulty of having a fair trial is very possible, and constantly county judges have protested against the weakness of Crown evidence as a basis of committals where elections take place before a county judge without a grand jury, and have stated that cases should never have been allowed to go from Magistrates' Courts in a preliminary hearing. This in itself is some justification for the retention of a grand jury system, and there are many reasons that might be advanced against such a drastic removal of an ancient safeguard.

Yours sincerely,

(Sgd.) R. H. GREER."

Then I have submissions on grand juries from Crown attorneys, county law associations, and others.

MR. CONANT: Were they not put in when we were sitting before?

MR. SILK: No

MR. CONANT: Well, can you summarize them as you put them in?

MR. SILK: I will be as short as possible. Most of them are quite short.

The first one is a joint submission of the Crown attorneys of Welland, Grey, Halton, Ontario, Wentworth, Dufferin, Peel, Northumberland and Durham, Wellington, Norfolk, and York.

MR. LEDUC: Is that an association?

MR. SILK: It does not seem to be an association; it seems to have been an informal meeting of some kind.

MR. LEDUC: What do you call them? Crown attorneys ——

MR. SILK: From eleven counties.

MR. LEDUC: That is in southern Ontario, is it?

MR. SILK: In the southern part of Ontario.

MR. CONANT: Do they join in one observation?

MR. SILK: Yes, and it is just a short one.

MR. CONANT: Well, read it.

MR. SILK: "The meeting approved the grand jury system but suggested a reduction in the number of jurors. Two Crown attorneys were in favour of abolishing grand juries."

MR. CONANT: They are in favour of reducing the number?

MR. SILK: Yes, they are all in favour of reducing the number.

MR. CONANT: Do they mention the number?

MR. SILK: No.

MR. LEDUC: Two only favour abolition.

MR. SILK: Two only favour abolition.

From Raoul Mercier, K.C., Crown attorney in Ottawa:

"I would believe in doing away altogether with the grand jury. In the city of Ottawa we are blessed in Mr. Strike and Mr. Clayton with two very efficient magistrates and I do believe that when they commit an accused, it is loss of time and money to recall witnesses and go over the same matter before a grand jury."

From Mr. Lancaster in St. Catharines:

"I believe that the grand jury system should be retained. A grand jury has two main functions, that of considering indictments, and that of inspecting public institutions supported in whole or in part by public funds. It is no doubt true that most criminal charges are now fully passed upon by police magistrates and given full scrutiny by Crown authorities before reaching the grand jury room, but there is at present certain procedure provided whereby an indictment may be preferred to a grand jury direct in the first instance, and this, in my opinion, should not be disturbed. The inspection of public institutions might perhaps be dispensed with due to the extensive system of public inspectors that we have, but this duty as well as the consideration of indictments gives to a body of men representative of the best element of the community a chance to have contact with the administration of justice and to be actually an interested and integral part of it."

MR. LEDUC: I was going to ask you if the eleven Crown attorneys make any suggestions as to these inspections by the grand jury?

MR. SILK: No, they do not here.

From Mr. Annis, at Oshawa:

"I am of the opinion that whereas the grand jury probably serves no useful function at the present time, but as it would appear that public opinion may not be willing to see it go, that the number of cases to be referred to a grand jury should be limited to cases of a more serious sort involving a substantial maximum penalty and where there is only one criminal case coming before a session, the presiding judge and local officials should have some discretion in dispensing with the calling of a grand jury."

MR. LEDUC: Might give the presiding judge some discretion in dispensing with the calling of a grand jury.

MR. SILK: That is, in cases where there is only one criminal case coming before the session.

Then from Mr. Kelly, Norfolk County:

"Some of the reasons, I think, for a grand jury investigation in a criminal case are (1) a safer trial and better protection of the accused or innocent. In larger cities where there are many criminal trials the grand jury no doubt works out all right. There is not so great a necessity for a grand jury in the country or rural districts, perhaps. If there are no criminal trials to be heard, under the present practice, grand jurors and petit jurors do not attend for criminal trials and are notified accordingly."

Mr. Kearns, at Guelph, simply says:

"While retaining the grand jury, why couldn't the number be reduced to, say, seven?"

Mr. Ballard, of Hamilton:

"It is suggested that the grand jury serves no useful purpose, and that it might be abolished in Ontario as in other provinces.

The grand jury has cost this county about $600.00 for the past year

As a means of inspection of institutions it is more a form than a reality. The inspection is always more or less cursory, and rarely, if ever, shows any thorough investigation or insight into the actual working conditions and conduct of the institution investigated. If these investigations are necessary and are to be of value, they would be much better carried on by some qualified government inspector.

As a protection to a person on trial the jury would appear to be very much a fifth wheel. A qualified magistrate who commits for trial and an experienced Crown counsel who weighs the evidence and pre-

pares an indictment are infinitely more qualified to judge of the merits of a prosecution than are twelve men with no experience in law. Further, it is usually the experience of Crown counsel that a grand jury will do very much what Crown counsel wishes to be done in finding a 'true bill' or 'no bill.' "

MR. CONANT: He favours abolition, then; isn't that the sum and substance of it?

MR. SILK: Yes, definitely.

Then we have submissions from county law associations. There are just two of them, I think.

From Lindsay, Mr. Jordan writes on behalf of the Lindsay Law Association and says he encloses a resolution favouring the abolition of the grand jury. The resolution is formal.

Mr. Spereman, of Owen Sound, writes on behalf of the Grey Law Association:

"Be it resolved that the Attorney-General be asked to amend the provisions of the Jurors Act, to provide that a grand jury shall consist of seven jurors instead of thirteen, and that grand jurors be drawn from a panel of petit jurors."

There are two or three submissions from the profession generally.

MR. CONANT: We have not had any submissions on the feasibility of drawing a grand jury from the petit jury panel.

MR. SILK: That is the first time it has been suggested, I think, sir.

MR. FROST: Just why wouldn't that be feasible?

MR. CONANT: Well, Mr. Frost, it is largely the mechanics of the thing. I could not express an opinion on it at the moment.

MR. STRACHAN: I should think the danger would be, the petit jurors might be also serving on the trial.

MR. FROST: Of course, if they were called first of all for the grand jury, then they would be out of that.

MR. STRACHAN: You might get one case, though, in which they would get a preconceived idea, without hearing the defence.

MR. CONANT: We might look into that; make a note of that. I think that is a thing we should perhaps consider.

MR. SILK: Then a submission from Mr. J. N. Lindsay, a lawyer practising in St. Thomas:

"I feel that the grand jury can be dispensed with in regard to the inspection of the public buildings as this can be allocated to the county engineer."

Then this is from Mr. F. W. Griffiths, K.C., of Niagara Falls. Mr. Griffiths says:

"A competent coroner" ——

I think he must mean "A competent Magistrate." It is quite a lengthy letter, and an error may have crept in.

"A competent coroner is better qualified, after hearing all the evidence, than is a grand jury of laymen who hear only one side, and in many cases not all of that."

Those are all the submissions I have on grand juries.

While we are waiting for Mr. Slaght, I do not know what the pleasure of the Committee is, but I have several other extracts in these same files marked, pertaining to pre-trial and certain other matters that have been studied.

MR. CONANT: I think you can put them in now We can keep them segregated in our minds.

MR. SILK: I am going to cover several matters. I have two extracts ——

MR. LEDUC: Well, here is Mr. Slaght.

ARTHUR G. SLAGHT, K.C.

MR. SILK: Mr. Slaght, you have indicated your desire to attend before the Committee and express your views on the proposed abolition of grand juries?

A. Well, perhaps, Mr. Silk, that is not quite accurate. Some months ago I wrote the Committee expressing my view, and I think I said that if they should desire me to attend in person I would be glad to do so, but otherwise I was putting my view before the Committee on paper for what it was worth. However, I am glad to come.

MR. CONANT: As with all tribunals, we would rather have first-hand evidence, if possible.

WITNESS: Well, I can put my views very briefly. I am strongly opposed to the abolition of the grand jury system. If, as I gather, the proposal would be to substitute the judgment of the Attorney-General for that of the grand jury as to whether ——

MR. CONANT: The judgment of whom?

A. The Attorney-General.

MR. CONANT: Oh, no.

WITNESS: Well, let me get straight on that, then. Take in Alberta, for instance, who performs the function that has heretofore been performed by the grand jury?

MR. CONANT: Well, they have the preliminary in the same way, and then the indictment goes directly to the petit jury.

WITNESS: But it can only go if the Attorney-General approves of its going and endorses it to go.

MR. SILK: The Attorney-General's agent.

MR. CONANT: Or his agent.

WITNESS: Or his agent.

MR. SILK: Which would correspond to the Crown attorney.

MR. CONANT: In practice, yes.

WITNESS: Perhaps it would be more correct to say that if the system is changed and the present jury abolished, the Attorney-General or his agent would have their judgment substituted for the judgment now brought to bear by a grand jury—I think that is clear—and as Attorney-General for this province you will understand that I have the highest regard not only for our Attorney-General personally but for the conduct of his office since he has exercised that important position, but my view is this, that the function of the grand jury at present is a judicial function purely; they are judges of the problem as to whether or not on the evidence presented to them a man should be placed in jeopardy on trial before a petit jury. I do not approve of shifting to prosecuting officers any further judicial functions than are borne by them at the present time.

MR. CONANT: I don't want to interrupt your statement, but you have regard to the fact that there is a preliminary before the magistrate, Mr. Slaght?

A. Sometimes, and sometimes not. Under 873 the Attorney-General may short-circuit an accused and deprive him of any preliminary hearing. I have been in many cases where that has happened, and the first that an accused learns of the fact that he is indicted may be, under the present system, after the Attorney-General has preferred an indictment against him behind his back, submitted it to a grand jury, in secret of course, and secured an indictment, and he might then be arrested that night and placed upon his trial the next day or such convenient time as may be.

Q. Taking that situation, Mr. Slaght, frankly, that is the only incident that occurs to me to require further protection. Wouldn't there be ample protection in those cases in which the Attorney-General does prefer an indictment if the bill were to go before a judge, who would then function in the same way as a grand jury?

A. Well, in my view, no. Under our present system, as you know, the consent of a judge is frequently sought and obtained for the preferment of a bill

before a grand jury, particularly in a case where there has been no preliminary hearing, and, without any disrespect to the Bench, my experience tells me that if a crown prosecutor of standing appears before a judge with a bill of indictment and steps up to the Bench and says, "I would like your consent endorsed to submit it to the grand jury," the learned judge frequently will endorse the consent without any more enquiry as to the facts of the case.

Q. Oh, I agree with that.

A. Then he says to the Crown Prosecutor, "Is this a case you think should be presented?" and the learned judge takes a substituted view, he sanctifies the indictment with his approval, which to my mind is a practice which does not make for the best administration of justice.

Q. I agree with that; but, you see, Mr. Slaght, the procedure before the grand jury is set out in considerable detail. For instance, a grand jury may not reject a bill until they have heard all the witnesses, and so-and-so; they can find a true bill after hearing two witnesses or whatever they see fit. Supposing the submission to the judge in the case of an indictment preferred by the Attorney-General were surrounded with the same detail and machinery, wouldn't that be ——

A. I do not think that is feasible, sir, because work it out in a given case. The representative of the Attorney-General wants to give the judge the facts that he would give to a grand jury. The judge has got to take half a day and hear under oath *ex parte* without cross-examination the very witnesses to detail the facts, as they do before a grand jury, with none of the safeguards of cross-examination, and the judge's mind, the very judge who next morning sits on trial of the case ——

Q. Oh, no.

A. You would appoint a special one?

Q. That would contemplate an entirely different ——

MR. FROST: Mr. Slaght, I think there was the suggestion here that in cases where the indictment was preferred—I don't know whether the proper expression is "preferred"—by the Attorney-General, at least submitted by the Attorney-General, in those cases there should be some amendment to the procedure whereby that matter would go before a magistrate in the ordinary course for preliminary hearing, so that the magistrate would have the opportunity of passing upon as to whether there was sufficient evidence to send the man up for trial, and, furthermore—which I think is very, very important—to provide an accused person with some notice and idea of what the charges are against him. I agree with you, I think that that is a tremendous defect, if it were simply that a man might have an indictment preferred against him and be arraigned on a charge of murder for the next day without any opportunity of knowing what the nature of the evidence against him was.

WITNESS: Well, dealing with the provinces where the Code or where the practice has dispensed with grand juries—take Alberta, for instance: there is no

such practice there, as I understand it, as is suggested by the Attorney-General to me or as is indicated by you.

MR. FROST: Correct; I think that is correct.

WITNESS: And you have got to rewrite the Code on all that practice, and you might find a good deal of difference of opinion about making it compulsory to go back for a preliminary hearing. I am rather assuming that if in this province we should abolish grand juries we would adopt somewhat the practice of Alberta or the other provinces that are working along without grand juries, and I have not seen any such scheme as you indicate, which would to some extent do away with the evil I have in mind.

MR. FROST: I do not think there is any such scheme, Mr. Slaght, at the moment.

WITNESS: Then if you come to work that out with the other sections of the Code in that respect you will find you would have to make very revolutionary changes in the whole criminal practice, I think.

MR. SILK: I think what you are looking for, Mr. Chairman, is on page B3 of the Barlow report; there is an extract from the Code. It refers to section 873 of the Code.

WITNESS: You see, my view is this: There is a heavy responsibility on the shoulders of our Attorney-General under the present law, in many respects, such as the responsibility under that section where he may compel a jury trial where the offence is punishable with more than five years, and as an administrative officer he has grave responsibilities; and I for one would not be in favour of adding to his responsibilities the substitution of his judgment for the present judicial judgment of a grand jury. Was there something else, Mr. Attorney-General, before I leave this point? I have got other reasons why I think the grand jury should not be ——

MR. FROST: Of course, that is a very important point you are on right now.

MR. CONANT: I don't want to interrupt ——

WITNESS: I am glad to discuss it.

MR. CONANT: But I am frank to say that in my consideration of this whole thing—and with all deference to the views expressed by yourself and other gentlemen—the only point that has bothered me is the safeguard against what you might call a vindictive or arbitrary Attorney-General, and I am dealing with it personally when I say that. I am just turning up 873; it outlines the practice there. Frankly, I do not see any real difficulty where there has been a preliminary in our province, which is largely manned now with lawyer magistrates—the calibre of our magistrates has improved, I think, in the last ten or fifteen years—but I am conscious of the fact that a vindictive, imprudent Attorney-General ——

WITNESS: Or a politically-minded Attorney-General, one who might be subconsciously influenced.

MR. CONANT: That is right; to put it broadly, an Attorney-General who for any improper reason or on any improper motive might lay an indictment, that there should be protection against that. But I have thought, Mr. Slaght, that, while I think that provision must prevail, because there are cases where it is found during the course of a trial or in a peculiar situation that you should bring somebody else in to have the case before the court—you have seen those situations; that is what they are intended for, those special powers. I had thought that in those cases where the Attorney-General prefers an indictment, if that indictment and the witnesses endorsed on it—in fact, the same machinery as applies to the grand jury—were taken before a county judge or any judge other than the one who is going to try it, that would be a safeguard against an official's animosity or prejudice.

WITNESS: Did you ever know that to be done? That is, you find a fresh judge, who is going to sit for a day and hear witnesses as a grand jury does, and then a second judge to try it? Are you going to let a County Court judge sit first on the *ex parte* evidence as a grand jury would, and then have the Supreme Court judge step on the bench next morning and try it? I have never known that sort of machinery ——

MR. CONANT: I don't think we have any of that machinery, but we could constitute such machinery, and it is a matter of opinion, Mr. Slaght, whether that judge would not be as competent to pass upon the bill as a grand jury, in those exceptional cases.

WITNESS: Well, in law he would, but I think one of the virtues of a grand jury is that it is composed of a cross-section of the community; it has got a merchant, a blacksmith, a farmer or several farmers, and you are reaching back to a body of men who know something about human nature, possibly in a greater sense—perhaps the gentlemen of the press will be a little wary here—than some of our judges after many years upon the bench. Our system isolates them to some extent from participation in all those human activities which the average citizen enjoys, and therefore he becomes a storehouse of knowledge as to what motivates men and women in the various activities of life, and whether they are likely innocent or whether they are likely to be criminal; and I would not at all approve of substituting either a County Court judge or a Supreme Court judge for the grand jury to perform the functions that the grand jury now performs. That is without the slightest disrespect to the Bench.

MR. CONANT: You of course have in mind that that is only suggested for the comparatively few and exceptional cases where an indictment is laid by the Attorney-General. The practice would still remain, Mr. Slaght, that in most cases, in fact ninety-nine per cent. of the cases they would go through the preliminary before a magistrate, as they do now.

WITNESS: Well, my experience the last few years has not been that high. I have defended a good many cases where the Attorney-General has given a direction and there has been no preliminary hearing.

MR. CONANT: But you defend exceptional cases, Mr. Slaght.

MR. SLAGHT: Well, I don't know about that. But the point is this: An Attorney-General may have representations made to him by parties interested

in prosecuting somebody; they may be activated by the highest motives, but they may be partisan and they may be misled, and he can, if representations are made to him sufficiently strongly, short-circuit a man away from any preliminary before a magistrate whatever, and he can prefer a bill of indictment against him and that is the first inkling the man has, after the bill goes before the grand jury, and if a bill is found, then he can be arrested. Now, that in itself to my mind is a dangerous practice, but, as you pointed out, there are occasions when perhaps the best interests of the administration of justice make it desirable that that should be exercised; I think very sparingly exercised.

MR. CONANT: And I think you will agree that it is sparingly exercised.

WITNESS: But unless you are going to take that right away from the Attorney-General to deprive a man of a preliminary hearing, then you have, by doing away with the grand jury, I think, taken a retrograde step, and I have heard of no proposal to take away from the Attorney-General that right of preferring an indictment without a preliminary. My friend Mr. Frost made a suggestion of that, but that is a pretty radical change in the present law.

MR. CONANT: Oh, yes.

MR. FROST: Well, of course, Mr. Slaght, there is some merit in the suggestion from this standpoint: You mentioned, for instance, the case in which the Attorney-General prefers an indictment against an individual and that goes before a grand jury. He may know nothing about it; he is not represented there or anything of the sort. There is this to it, that in going before a magistrate on a preliminary hearing he at least has the advantage of being represented, being able to cross-examine witnesses, and to find out something of the nature of the charge against him. Now, I have just a recollection; it seems to me that in the Home Bank cases—I may be wrong about this, but it seems to me that in the Home Bank cases something of that sort applied, and in that case there were endless demands for particulars and what-not, and it would really have been much better in the first place if the matter had gone before a magistrate and there had been a preliminary and these people had had the right to find out what the nature of the charges against them was, and had had cross-examination and so on. That is the other side of the picture, I think.

WITNESS: I agree with you, that a preliminary has two chief purposes: one, to have it determined whether the man should be further subjected to any prosecution or not, whether there is enough to send him on for trial; secondly, to enable him through his counsel to cross-examine, as you put it, and obtain particulars of the charge that he has got to meet at a trial later on. That last function is sometimes overlooked in the speed with which preliminary hearings are forced through; I do not think very often, but sometimes, where there is a great grist of work, preliminary hearings, unless counsel arrange in congested city areas for an afternoon or something, are pretty perfunctory affairs, and after a witness or two the man goes on. But I have heard of no concrete proposal to force a preliminary hearing in any case where the Attorney-General does not want it, and unless and until there is that forced preliminary, the protection of the accused, I think it is a dangerous thing to dispense with the grand jury and put that judicial function on the shoulders of the Attorney-General in addition to the very serious duties he already performs.

MR. CONANT: You are hardly accurate, Mr. Slaght, in that summary; if you couple with that the suggestion that where the Attorney-General does prefer an indictment it should go before a judge who would function as a grand jury.

WITNESS: Well, I have expressed myself on that, sir. I do not think that would be a satisfactory substitute. You indicate to me that in no case would you have the judge who is to try the man perform that preliminary function.

MR. CONANT: Oh, of course not.

WITNESS: That would be a vicious thing to do.

MR. CONANT: Yes, impossible!

WITNESS: Then have you given thought to working it out, as to where you will find another judge in an assize town—say in Kenora, the county judge, perhaps—who will sit and hold an enquiry like the grand jury would hold, and then he finds a true bill and passes it on. What are you going to do in the case in the County Court, with a County Court indictment? Who is going to ——

MR. CONANT: Under our present system, Mr. Slaght, that would not present much difficulty, because throughout the province our County Courts are included in districts, and the judges move from county to county all the time.

WITNESS: I understand that. But our sessions, trying the criminal cases, occur, with some variations in some counties, on the same dates in 92 counties in the province. I should think 70 of them open on the same day, the criminal sessions, in the spring and the fall. Isn't that so?

MR. LEDUC: I think your number of counties is slightly high, Mr. Slaght.

WITNESS: I think it is only York and London and Ottawa where there are special dates for sessions. I think it is low, sir, with great respect. If there are 92 County Courts, then ——

MR. SILK: There are only about 50, sir.

WITNESS: Well, is it not so that the bulk of them all sit at present on the same date?

MR. LEDUC: Oh, yes, that is right.

MR. SLAGHT: Then the county judges in their respective counties, or the man who is transferred from one county or exchanged with another, they are all sitting there to go on with the work of the court.

MR. CONANT: Oh, yes, Mr. Slaght, but there is nothing to prevent that bill being dealt with at any time before the opening of the court.

MR. SLAGHT: Just the fact that you might have nineteen witnesses that you are going to have the expense of sitting around two days beforehand and sitting around afterwards. Our grand jury system obviates that in great meas-

ure, because they come for the grand jury and they remain for the trial. That is a factor by which you will add expense.

MR. CONANT: Perhaps we are getting away from the fact that this class of cases is comparatively rare. With all deference to your recollection, I do not think there are half a dozen a year in the whole province in which the Attorney-General prefers an indictment; I do not think there are that many.

WITNESS: Well, I just concluded a twenty-eight-day trial in which there was no preliminary. The Attorney-General preferred an indictment in that. Then I have had a series of cases in London for the past four years, five trials, no preliminary in four of those, indictment preferred. Perhaps my experience has been out of the ordinary, I grant that.

MR. CONANT: I am quite sure that it has.

WITNESS: Well, apart from that—then I have other reasons.

MR. CONANT: All right, go ahead.

MR. FROST: Mr. Slaght, just before you leave that point: what would you think of the suggestion of reducing the number of grand jurors to say nine or seven? There have been quite a large number of representations along that line.

WITNESS: Well, I will deal with that in my third point, If I may, because it is more relevant there.

MR. CONANT: Go ahead, Mr. Slaght.

WITNESS: My second point is that the grand jury system as at present is of real use to the Crown under these circumstances, in perhaps more serious cases. I think there was a murder trial recently in this city which I might outline as a possible case; one's mind might go to that. Take a charge of murder or of burglary, or hold-up cases: The Crown sometimes have to use men who have criminal records, and perhaps one of four, the least guilty, will turn state's evidence, so to speak, and the Crown's case in some links in the chain is practically dependent upon the oath of such a witness. If you do away with the grand jury the prosecuting counsel may bring such a witness prior to the trial to his office and endeavour to find out what he is really going to say in the witness box at the trial, but he has no way to make him talk if he refuses to talk, and he has not any sanctity of an oath hanging over such a reluctant witness, who has been a criminal himself; and if the grand jury system is perpetuated he can take that man before the grand jury, have him sworn, and there develop him in the quiet of the grand jury room, where he is not overshadowed with any fear of retribution by the friends of the men being prosecuted in the criminal world, and you are likely to get the truth from him in that way, and then he is not likely to go back on what he has sworn to there when he goes into open court at the petit jury trial. Now, I think—I have never discussed it with Crown prosecutors—that in a case of that kind the grand jury preliminary, with a witness of that type, is of assistance to the Crown in administering justice. That is a minor point compared to my other objection.

Then the third point is that I believe that it is a healthy thing for the community that men of the type of grand jurors—and there is a special panel selected; my experience is, perhaps they are of a little higher type, if one may say so, than the panel for the petit jury; they try to get rather outstanding men in various counties to sit on the grand jury panel. I would not see any grave objection to making them nine instead of thirteen; I would not go below nine, I think. But they are known to be on the grand jury, and they go in and get their eyes opened, so to speak, in the grand jury room in connection with the administration of criminal justice, and they also learn something, and they create a feeling of security in the community that criminal justice is administered quite as much by the people of that district as by the judges that hurry down from Toronto to conduct the trial and the Crown prosecutor that hurries in. In other words, it builds up a knowledge of and respect for the administration of criminal justice throughout the community.

Now, I think that states my views, but let me put this to you: As I understand it, the great argument for dispensing with them is the saving of dollars, the saving of expense. It is not thought that it will hasten the administration of justice any. I think grand juries throw out bills sometimes that would have cost the province a great deal of money to have gone on with a trial; there is that to balance. Then, as I understand it, our system costs us about $90,000 a year; you will correct me if I am wrong.

MR. CONANT: Well, of course, it is difficult or impossible to get an accurate figure, because of all the incidentals and the effect it has on an assize, to what extent it speeds up the assize, and all that sort of thing. It is almost impossible to get a figure.

WITNESS: Of course, there is the factor of their examination of public buildings. I am afraid that gets to be pretty perfunctory; I fancy when they go to examine a jail, the floors are pretty well scrubbed, because the fact that they are going to visit is known and anticipated; and perhaps an inspector who popped into town unexpectedly would get a better inspection of a jail than a grand jury.

MR. FROST: Do you think that angle might be dispensed with?

A. Well, perhaps so, but they are there, and unless they abuse it it doesn't take very long to go to these places. The old saying, that it is ——

Q. They have the right to do it?

A. Yes, they have the right to do it; they are told that by a judge, and they are not compelled to do it. But there is a good deal in the old saying that not only must we administer criminal justice effectively, but we must have the people believe that it is effectively administered and create confidence in it, because in these days, with subversive activities, communistic theories, the proper, speedy and efficient administration of criminal justice is a national bulwark of the utmost importance.

MR. CONANT: Oh, there is no doubt about that.

There is one observation I want to make. This is another angle to it that has disturbed me. With the greatest respect to your views and those of the others, when you analyze the whole of the British Empire you find that we are perhaps the largest jurisdiction left which has retained the grand jury. Now, take their experience in England: At the outbreak of the last Great War they put through legislation abolishing them for the duration of the war, so that they automatically came into effect again at some period about 1919. Then I think it was last August they re-enacted similar legislation abolishing them in most of England. Then, of course, as you know, they haven't them in Quebec, Manitoba, Saskatchewan, Alberta, British Columbia, South Africa and Australia. I cannot reconcile the view of eminent gentlemen like yourself with the experience of these other jurisdictions, Mr. Slaght.

WITNESS: Well, take England alone: I don't know anything about how it works in Quebec, but I think you will find the resumption of the abolition of the grand jury last August was largely due to the shadow of war hanging over.

MR. CONANT: Oh, yes, no doubt about that.

WITNESS: And so that quick, speedy action could be taken by the Attorney-General and his officers.

MR. CONANT: Well, supposing we were to abolish them during the duration of the present war?

A. Well, I don't see any need to, with the Defence of Canada Regulations as they are.

Q. I beg your pardon?

A. I don't see any need to, with the Defence of Canada Regulations as they are. We have gone in the Defence of Canada Regulations away outside the ordinary everyday regulations you throw around people in wartime. Very drastic measures are on the statute books now by way of those regulations, where we can move most rapidly against any supposed enemies. And what have you before you—I have not followed this—whose opinion have you as to the highly efficient working of the substitute systems? Have you any opinion from Alberta juries and ——

MR. CONANT: Oh, yes, we have an expression from all of them, and they all express the view that it has been very satisfactory. Here is one from Saskatchewan ——

MR. SILK: I do not think those letters have been placed before the Committee yet.

MR. CONANT: Here is one of October, 1938; it is not very fresh, but it is good enough. This is from the Department of the Attorney-General ——

WITNESS: Well, of course, the Departments of the Attorney-General like to get rid of the grand jury, because they are a nuisance to them.

MR. FROST: You mean they have the Crown-cttorney complex sometimes.

MR. CONANT: It says:

> "The system of administering justice without a grand jury existing in this province has worked out very satisfactorily, and I have never been informed of any desire having been expressed at any time that the grand jury system should be substituted."

WITNESS: Well, I would sooner have the view of a judge who was active in the carrying out of criminal justice.

MR. CONANT: What disturbs me is this: What different conditions exist here that make the grand jury so particularly necessary that do not exist in England or these other provinces or these other jurisdictions? That is what I can't see.

WITNESS: Well, you could ask yourself the question the other way round if you were in England: What different conditions exist in England that justify our dispensing with it when Canada finds it so satisfactory in the main, or when Ontario finds it so satisfactory? That, sir, does not impress me unless you have got something from judges in these jurisdictions where they say that the system works well without the grand jury. I do not speak for them, and I may be subject to correction, but I think unanimously the Supreme Court judges of this province would hesitate to see the grand jury system abolished. You may have something from the judges or you may not.

Now, here is a suggestion, a halfway suggestion of which I do not approve, but I have heard it put: abolish grand juries for sessions and you save half of the $90,000 and cut it down to $46,000, but maintain grand juries for assizes, and in that way you get your inspection twice a year of public buildings, and you get what I referred to, the contact of the county with the administration of criminal justice to at least fifty percent of its present contact, and you do not do away with them altogether. Have you considered that at all?

MR. CONANT: That has never been suggested; at least, I have never heard it.

WITNESS: If this is just a money-saving device, there is where you could save half the cost in a year—I mean, a money-saving suggestion. You could save half the cost, and you would still maintain more than half the virtue of it.

MR. FROST: That would have this benefit too, that it would mean that always, for instance, in murder cases, where if there is a conviction there is a verdict which will never be changed once it is carried out, in all murder cases you would have the intervention of a jury.

WITNESS: In more serious crimes, which have to come before the assizes, yes. Now, if you cut it in two, that is $46,000 a year; that is a pretty small sum to preserve if one believes that it does go to preserve the efficient administration of criminal justice, when you realize that in Canada we are spending three and a half million dollars every day now, a million and a half for peacetime services under our regular budget, and two million dollars a day for war services—three and a half million dollars every day we spend in Canada. Are we to lop off $46,000 or $90,000 a year in this province? We pay I think probably forty percent in Ontario of that three and a half millions a day.

MR. CONANT: Rather more than that.

WITNESS: Well, say forty percent of three and a half millions; that is what? Practically a million and a half this province is spending every day.

MR. CONANT: On war.

WITNESS: No; two-thirds of it on war; a million on war and half a million on other services.

MR. CONANT: You are taking the total Federal budget?

A. I am taking the total Federal expenditures. We budgeted for about $450 million peacetime normal governmental administrative services in Canada this year.

MR. FROST: Mr. Slaght, the way this is working out now is just roughly this, that every accused person who elects trial by jury automatically gets the intervention of a grand jury. If your suggestion—it is not your suggestion, for the reason that you hardly agree with it, but you have voiced the proposal that if it were confined to Supreme Court or Assize Court cases, then that intervention would really only come in murder cases, generally speaking, because they are the principal class of criminal cases, I suppose, that are tried by Supreme Courts.

WITNESS: And rape.

MR. FROST: And rape. Of course, there are other cases, but I think they are comparatively few. But you would be in that case, retaining the grand jury in the very serious cases, and particularly in those where, once the penalty is imposed, it cannot be called back. That is one of the difficulties about capital punishment. There are some curious angles to the grand jury business ——

WITNESS: Well, that halfway measure is not my proposal, but I have heard it discussed, in fact I have discussed it with some pretty high authorities, and I think in some quarters it would be thought that rather than take it all away, you should not go further than that. My view is, you should not interfere with it at all.

MR. CONANT: It is a new thought to me. I had not heard the thought before. It is a very acceptable suggestion or thought, and I am greatly obliged to you, I am sure.

MR. SILK: I think the only proposal of that kind comes from Mr. Kelly, the Crown attorney of Norfolk County; I read it this morning.

May I pass on, sir, to other subjects?

MR. CONANT: Yes.

MR. SILK: In connection with petit juries, Mr. Slaght, it is suggested in Mr. Barlow's report that there is some need to improve the calibre of the men who are on the petit jury panels.

A. Well, I don't know how you are going to do it. The method of selection of the petit jury is by statute, as I recall it; the county judge, the sheriff of the county and the Crown attorney, go through the voters' lists and they select a lot of possibles, and then that is boiled down, and so on. You don't want university professors on the grand jury. Lawyers are barred from the grand jury, doctors as a rule—I mean from petit juries—doctors as a rule are not exempt, but they like to be exempted and usually try to get off, because their duties are such that it is difficult for them to be locked up for a week on a murder case, for instance. I have no criticism to make of the standard of the personnel of petit jurors, after forty years of talking to them.

MR. SILK: Then there is a further recommendation of Mr. Barlow. He recommends that all civil actions where a jury is now optional, be tried by a judge without a jury, except where upon an application to the court or a judge, it is found that the questions in issue are more fit to be tried by a jury than by a judge.

MR. CONANT: It is shifting the burden for a jury ——

WITNESS: Is that in civil cases?

MR. SILK: In civil cases.

MR. CONANT: Shifting the burden as to whether you have a jury or not.

MR. SILK: Where a party requires a trial by jury, there would be a certain onus on him to prove that the case is more fit to be tried by a jury than by a judge sitting alone.

WITNESS. I would not approve of that. We have built up a long line of cases on the question of when a jury notice should be struck out; we have rules that compel ——

MR. CONANT: They have done that in a great many other jurisdictions, Mr. Slaght.

WITNESS: Have they?

MR. CONANT: In England, you move for an order that a case be tried by a jury, and the onus is upon the person seeking the jury to establish its fitness.

WITNESS: Well, personally, I would not be in favour of shifting any onus as it now stands. Equitable cases, cases of taking accounts and all that, as a rule, are tried without a jury here, and under our practice, a party who is complaining of being forced on with a jury trial may apply prior to the trial to a judge in chambers to strike out the jury notice. He may succeed, or that judge frequently refers it to the trial judge, and the trial judge himself, who has read the record and knows something about the case as a rule, may exercise his discretion, except in certain cases that the rules compel him to try with a jury: for instance, libel must be tried by a jury; the judge has no discretion. I would not tinker with the present rules or jurisprudence in that respect, by starting off on a new line of cases and arguments, because you have shifted the onus somewhat.

MR. SILK: That is a special war measure in England, although it is now the permanent law of New Brunswick.

With regard to appeals from jury trials, also in civil cases, Mr. Barlow recommends that upon an appeal from the findings of a jury, the Court of Appeal be given jurisdiction to give any verdict which in their opinion ought to have been pronounced.

MR. CONANT: Yes; I would like to have your views on that, Mr. Slaght—the widening of the powers of the Court of Appeal on appeals from jury trials.

WITNESS: Well, I would be opposed to carrying out that finding.

MR. CONANT: I beg your pardon?

A. I would be opposed to carrying out the finding that has just been read to me. You are widening the powers of the Court of Appeal, but at the same time you are depriving litigants of their rights to jury trials, because, if that power is given and a jury trial is had and an appeal taken by the unsuccessful party, the Court of Appeal think a miscarriage occurred by reason of a wrong direction or misdirection or the wrongful admissibility of evidence, if you let them render the verdict that they think the jury ought to have rendered—they have not seen the witnesses, they are not in as good a position to determine what the true verdict is, and you deprive that litigant of his right to a new trial before a jury by such an amendment, and you substitute these gentlemen sitting here at Osgoode Hall for a jury as against him. I would not approve of that.

MR. CONANT: Well, it is pretty narrow at the present time, isn't it, Mr. Slaght?

A. Well, at the present time they may grant a new trial, or they may allow an appeal or they may dismiss an appeal. I think that is all they should be asked to do.

Q. Yes, but I mean to say, on the question of facts, they do not go very far that way, do they?

MR. STRACHAN: Under the Supreme Court of Canada decision, Mr. Slaght, the Court of Appeal must accept the findings of fact of the jury; that is the effect of the decisions.

WITNESS: I think that is a healthy situation.

MR. CONANT: You do?

A. Yes, I do. What does a jury trial mean? I mean, what does the right to try your case by jury mean to a man if, after trying it there, and without any misdirection to the jury, without their having heard any evidence wrongfully, that should have been rejected, they pass upon the facts, and you come along to a Court of Appeal, a corporation appeals or a wealthy person appeals to the Court of Appeal if they have got the money, and they have got a second chance before a jury of three or five judges, up there substituting their view of the

evidence on questions of fact, for the views of twelve men who saw every witness, and heard the inflections of their voices and followed the trial? I think that is a very dangerous step.

MR. CONANT: Well, of course, that is one view of it, there is no doubt about that.

MR. SILK: Mr. Slaght, a complaint has been made to the Committee that it is well-nigh impossible for an incorporated company to get a fair trial before a jury, because, where the jury finds the word "Limited" or some similar word, such as "Limited", the members of the jury seem to get the impression that that company has unlimited means, and usually render a large verdict against it. Have you had that experience?

A. No, I couldn't say that I had. I think that is putting it too vigorously altogether. There may be cases involving a corporation like the Canadian Pacific or the old Grand Trunk or the T. Eaton Company, known to be a company of great wealth, in which there may have crept in some prejudice in the minds of a jury, but if that prejudice goes to the assessment of damages too high, we know that our Court of Appeal now has full jurisdiction to reduce damages in a given case, and say that those damages are excessive. They frequently have to exercise that in negligence cases involving a corporation, when young children of tender years, three or five or seven years old, are killed. Well, a jury is sympathetic, and they give sympathetic damages to the parents, perhaps five or eight thousand dollars, whereas, our law as it stands, makes it improper to consider other than the expectation of support from the child which the parent has, and that usually fritters it down to a very small amount, a relatively small amount, because a child for a time is a burden rather than an asset. Whether that law ought to be looked at or not is another matter. I think that is put too strongly.

MR. CONANT: Of course we have gone some distance along that road. Isn't it so that there is no jury in actions against municipal corporations?

A. No.

Q. I sometimes find it difficult to reconcile that with the fact that we have a jury in actions against any corporation. What is the theory behind the elimination of juries from actions against municipal corporations?

A. Well, I have never traced it back. It is pretty well established. It comes from the English theory, I fancy, the practice. Snow and ice cases, falls on sidewalks and that, they must be tried without a jury. I think, in some of these public service corporations, such as tramways and street railways and those ——

MR. CONANT: They are tried with a jury.

WITNESS: They are tried now with a jury. I am not sure but what it might be proper to take them away from jury trials, on the ground that in those cases it is pretty difficult to eliminate some prejudice as against corporations of that type.

MR. STRACHAN: It always seems strange to me that municipalities could have a trial without a jury, and a creature of the municipality like our Toronto Transportation Commission is forced to go before a jury; and their experience is pretty bad with juries.

WITNESS: Well, I think our law could, perhaps, be safely changed, with regard to a limited type of corporations who are rendering a quasi-public service.

MR. CONANT: I am inclined to agree with you there. Mr. Slaght, would you care to express any opinion on the constitution of our rule-making body in the province? As you know, at the present time it is limited entirely to the judges. There has been some thought and discussion of enlarging that to embrace members of the Bar.

A. I would be favourable to that. I fancy the judges themselves would welcome an addition, or some advisory assistance at least, possibly legislative assistance, I mean, power to sit on rule and regulation making committee. A small quota from the benchers would, I think—men in active practice on the other side of it, I mean at the Bar, could at times make useful suggestions about rules.

MR. SILK: Would you suggest that members of the Bar be appointed by the benchers, or perhaps by the Chief Justice, or by the Attorney-General?

A. Well, any of those methods would, I think, be reasonably safe.

Q. The barristers would presumably hold office for terms of two or three years.

A. Yes.

Q. It would not be a permanent appontment.

A. I would think the Bench themselves would welcome assistance of that kind.

Q. I don't know whether you are familiar with the system of pre-trial procedure as it exists in some of the States. Mr. Barlow makes a recommendation as to pre-trial procedure in this way:

> "That in any action set down for trial at Toronto, Ottawa, Hamilton, London or Windsor, in the Supreme Court or in the County Court of the County of York, the court may, in its discretion, direct counsel for the parties to appear before it for a conference for the purpose of preparing the action for trial, in order that the same may be ready to proceed when called, and thus save the time of the trial judge as well as counsel engaged."

A. Is that practice in vogue in other jurisdictions? I am not familiar with it.

MR. CONANT: In England they have a system—what did Mr. Chitty call it?—motion for directions; in England they have a universal system, evidently,

corresponding with the limited system in our province, as in a third-party action you go for directions. In England apparently, in all civil actions, they must go before a judge previous to trial, and the case is gone over to eliminate those things which appear to be not necessary to prove, and boil it down to the real issue.

WITNESS: What tribunal do they go before?

MR. CONANT: They do it before the Master in England.

MR. SILK: The Master over there has the same powers as a Supreme Court judge.

WITNESS: Well, I have not given any thought to it. Off-hand, I would not be favourable towards a change of that kind, because I think our rules, after practically—I suppose in twenty-five years, there haven't been any very radical changes in our rules of practice in this province.

MR. CONANT: No.

WITNESS: And I think they have been worked out so that actions are promptly brought to trial, with the safeguards of production and discovery, and preliminary motions to strike out pleadings. I think they compel the narrowing of the issue pretty well under the present practice. I would want to study as to how it worked in other jurisdictions, before I would express approval of it.

MR. SILK: In the matter of production and discovery, have you any view as to whether the examination for discovery of an officer of a corporation should be binding upon the corporation—which is not the case now, of course?

A. I do not think it should.

MR. CONANT: Mr. Slaght, this is rather a departure from the subject, but in England they have a committee, the exact name of which I forget—I think it is called a law revision committee; the Lord Chancellor appoints certain members of the Bench and certain members of the Bar, and from time to time, he submits to them what might be called lawyers' law, joint tort feasors and contributory negligence problems, and that sort of thing, for study and report to him, not controversial law, but abstruse points of law that become involved by, perhaps, conflicting decisions and uncertainties and that sort of thing. Apparently it has been found very beneficial there.

WITNESS: Is it a paid job?

MR. CONANT: No.

WITNESS: Or is it an honorary job?

MR. CONANT: Purely honorary. I think the government there provides a secretary or something. Do you or do you not, think that there would be a real use for an organization like that in this province?

A. Your statement of it to me is the first I have heard of it; I was not aware of that practice over there. It might be useful; I could not see much harm arising from it. They do not have powers to change the jurisprudence?

MR. CONANT: Oh, no.

WITNESS: They only study and recommend changes?

MR. CONANT: They report back to the Lord Chancellor there—it would be the Attorney-General here—and he, in his wisdom or otherwise, advances that in the form of legislation; then it comes to Parliament or the Legislature and it is threshed out, of course, admittedly with the background of having been recommended by this committee.

MR. SILK: Mr. Slaght, are you familiar with the practice in the Admiralty Court, of having an assessor sit on the Bench with the judge, and in that way doing away with experts

A. No, I am not familiar with that practice. I have not practised in the Admiralty Court for thirty years, and then only two or three cases were all I ever had.

Q. Well, the practice in that court is that the judge sits on the Bench with an expert, who is known under that practice as an assessor, and that eliminates the necessity of the parties calling experts; there is in theory one impartial expert engaged in the case, whose function is to advise the judge.

A. Well, off-hand, I would think it was useful, because Admiralty law is a branch of law all to itself, and there are so many practices in Admiralty that only an expert could describe; the average layman doesn't know anything about the way vessels pass one another and enter harbours, and all those things that are involved in collisions and that sort of thing. I should think that was a useful and proper practice.

Q. Mr. Slaght, under that practice, you appreciate that the parties do not have any right to call their own experts?

A. Well, I ——

MR. CONANT: The practice is, where it has been adopted, Mr. Slaght, this, that where there are technical matters that would have to be determined, in arriving at a decision, the parties themselves may agree upon one man who will determine the technical aspects of it from the facts as presented in evidence, or if they cannot agree, a judge appoints a technical man to give the evidence to the court, as to what the speed of light is, or of sound, or whatever the technical aspects are. Then, instead of having two or three experts on each side, sometimes giving very directly opposed evidence, his evidence would prevail.

WITNESS: Well, anything that tends to take away from litigants the right to present credible expert witnesses, whose views might differ from those of an expert appointed by the court, I would be opposed to.

MR. FROST: Getting on dangerous ground.

WITNESS: Yes. If you carry that to an extreme, then, perhaps, counsel should go before a judge and they could agree on a set of facts and so on, and let the judge decide everything; for instance, in an injury case, let him say without any medical evidence, whether an injury is permanent or not. I think you are getting on dangerous ground. You should not deprive litigants of the right—with the proscriptions there are against abusing it; you can only call, I think, three experts in any case, without the leave of the court to call more. I would not be in favour of taking that right away from a litigant.

MR. CONANT: Its only purpose was to avoid the expense and the delay. Some persons have made a rather disparaging remark about experts in litigation; you have heard that, no doubt?

A. Yes. There is a sliding scale, I believe.

Q. And to avoid three witnesses on one side and three witnesses on the other, swearing to an opinion on something.

A. Three cheques passed one way and the other three cheques passed the other way, I suppose, for the opinions and services. That sometimes looks as though it was abused; but is this proposal that you are now discussing one made to apply generally, or just in the Admiralty Court?

Q. In all civil actions.

A. In all civil actions?

Q. In all civil actions, yes.

A. That is, do away with the right to call expert evidence by substituting this?

Q. Yes.

A. Oh, I would be opposed to that.

MR. CONANT: I think they have done that in England, haven't they?

MR. SILK: I don't think so, sir. I think it is strictly an Admiralty practice. It is on B17. It has been in the Admiralty Courts of England since 1855, and also in the Admiralty Courts of Canada.

MR. STRACHAN: It has been adopted in New Brunswick.

MR. SILK: Yes, it has been adopted in New Brunswick under their new rules.

MR. CONANT: Yes, that is right.

MR. SILK: Mr. Barlow has taken the view ——

MR. CONANT: He says:

"This practice has recently been adopted in the Supreme Court of New Brunswick and, as I have already mentioned, has, for a very long time, been used in the English Admiralty Court, and for a shorter length of time in the Supreme Court of England" ——

Yes, they have it in England, not for so long a period as in the Admiralty Court.

WITNESS: They have gone so far over there, in an automobile injury case, as to deprive the plaintiff from calling doctors to show the character of the injury?

MR. CONANT: They can call witnesses as to the character of the injury, but when you come to opinion as to whether that would be a permanent injury or so-and-so, and so-and-so, that would be the function of the ——

WITNESS: They won't permit the witnesses called to express themselves on that?

MR. CONANT: No. The doctor will be called, and he says, "I found this condition, and it developed into this condition, and so-and-so," he would describe the medical aspects, but the conclusion, the medical and scientific conclusion as to the effect of that, would be opinion, and it would be the function of the one person.

WITNESS: I would not be in favour of it.

MR. STRACHAN: Just the opinion of one man; he might be wrong.

WITNESS: I would not be in favour of that change. You will recall that under our practice here, we have the right to a defendant to ask the Master to appoint a supposedly independent medical practitioner to whom the plaintiff must submit for medical examination, and that supposedly independent medical practitioner, who is selected by the Master or a judge in chambers, and not by either of the parties, then examines the plaintiff, and then must make a report in writing to the court, which report must be made available to both plaintiff and defendant. Now, that practice goes along the road part way to what they are doing more radically, and, with that safeguard, I would not be inclined to make the opinion of that person final, and exclude the court from giving effect to the judgment of a reputable doctor who was called, and who differed from that doctor.

MR. CONANT: Well, even in that case, that man does not express an opinion; he simply reports conditions that he finds.

WITNESS: Oh, no, he expresses his opinion as to whether the injury is permanent, or whether there is permanent disability or not, and he expresses all kinds of opinions, if I may say so with respect, in his report.

MR. CONANT: Is there anything else you want Mr. Slaght to discuss?

MR. SILK: Yes.

Q. They have a practice in England, as Mr. Barlow says, to facilitate the

trial of commercial cases, that a special judge should be designated for the trial of those cases, as has been the practice in England for many years, and along the same line, Mr. Barlow also suggests that one judge might be assigned to try matrimonial causes exclusively. Would you be in favour of assigning special judges for special types of work in the Supreme Court?

A. Well, I think it worked out well in our Bankruptcy practice. I have not considered how far you could extend it. Do they define "commercial cases" in that?

Q. No, that is not defined here.

A. What would you take to be meant by "commercial cases"?

MR. LEDUC: The suggestion is for matrimonial cases.

MR. SILK: No, excuse me, Mr. Leduc, there are the two. The one suggestion is for commercial cases, and the Master goes farther than that.

WITNESS: Well, I would not be in favour of a judge being assigned to matrimonial cases only. He would have to have a very strong stomach not to break down.

MR. CONANT: You say you would not be in favour of it in matrimonial cases?

A. No. I think it would be more healthy to let the trial Bench diversify, and hear such cases as come before them.

Q. Would you care to discuss the subject ——

MR. LEDUC: You would be against assigning a special judge to matrimonial cases?

A. I would be against it.

MR. CONANT: Would you care to discuss the rather large question of the jurisdictions of boards and commissions, as to whether there would be appeals from them to the Court of Appeal, Mr. Slaght?

A. Off-hand, I would say there should; I think there should. They sometimes deal with matters, so far as amount is concerned, which involve tremendous sums of money. Somebody showed me a schedule, I don't remember when or where, with regard to some board or commission, showing that the amounts involved in their judgments far exceeded the amounts involved in the judgments of three judges of the Supreme Court of Ontario, for instance.

Q. But in most of these cases, these boards and commissions constituted over the years—because we have been constituting them for the last quarter of a century; one of the earliest of them was the Workmen's Compensation Board; they were undoubtedly designed to avoid expense and delay and the uncertainties of litigation, and they are almost entirely limited to matters of fact and discretion, aren't they?

A. Pardon me, sir; let me interrupt you to say, I did not have the Workmen's Compensation Board in mind when I was speaking, because ——

Q. Well, I did not intend to pin you down to that, either.

A. In think in the main, that Board works fairly well without any right of appeal from it. There may creep in the odd individual case of injustice. I have been asked in my practice, and quite frequently am still, because of connection with the mining world in earlier practice, to try and have review made of judgments rendered by the present Workmen's Compensation Board, over a long period of years, and I always find them courteous to receive any representations, although they do not hear counsel; they keep lawyers away. I have asked them to review cases and they have done so; I do not recall any particular results in such cases. I would hesitate to recommend an appeal being granted from that Board, but I am not very well able to express an opinion on that; I would not like to. But in the main, with boards and commissions that ——

MR. STRACHAN: Take the Securities Commission, Mr. Slaght, where a man's livelihood might be taken away.

WITNESS: The Securities Commission? Well, I don't know: that is an administrative duty; if you get that into the courts, you will make a fine field of litigation for the lawyers, but whether it would have other good results, I don't know. In fact, I have had very little practice before the Securities Commission. I read sometimes of complaints of disappointed people ——

MR. LEDUC: You do not believe there should be an appeal from that commission?

A. Well, I have never given it any thought. I prefer not to express myself on that; I would have to study it.

MR. CONANT: Would you care to express an opinion regarding the Ontario Municipal Board?

A. Yes, I think there should be appeals from the Municipal Board.

Q. Would you care to say how far you would go in that? If you don't care to, it is quite all right.

A. Well, perhaps in trifling amounts you should curtail appeals, but I think you could fix a dollar basis, so that amounts involving perhaps more than a thousand dollars—that is just an arbitrary guess of mine now—would have to be looked at. But I think the Municipal Board deals with matters of tremendous money import, and there should be an appeal to the courts from them.

Q. Isn't there this angle to that, Mr. Slaght—I am not expressing any opinion on your view, but isn't there this angle—that the Municipal Board undoubtedly has matters which involve private individuals as well as larger interests, corporations and so on, or municipalities particularly; are you not putting the private individual at a very distinct disadvantage when you give the other parties the right to appeal?

A. No more than you are in our entire system of the administration of justice by way of appeal. That criticism could be made of every appeal that is possible, under the present system of jurisprudence.

MR. LEDUC: Mr. Slaght, the Municipal Board here has a multiplicity of applications of different kinds; in which particular cases would you give a right of appeal to the courts?

MR. CONANT: What was your question, Mr. Leduc?

MR. LEDUC: I say the Municipal Board hears a multiplicity of applications of different kinds; in which category or categories of cases would Mr. Slaght give a right to appeal?

WITNESS: I have not studied it enough, sir, to have my opinion of much value on that, but I would think in matters of importance. They deal with little applications which are discretionary, about whether you could do this ——

MR. STRACHAN: P.C.V. licenses.

MR. LEDUC: I had that in mind, for instance. I do not believe that is a case in which you should give a right of appeal to the Court of Appeal, where the Board refuse or grant an application for a P.C.V. license.

WITNESS: Oh, no, I wouldn't. That is administration, departmental, and the courts should not be brought in on those.

MR. CONANT: Of course, there are cases in which, under our municipal law, assessments are imposed or levies are made under by-laws which are approved by the Municipal Board; I think that is correct, is it not, in many cases? Do you think that in those cases there should be a right of appeal?

A. Well, again, I think there should, in important cases. After all, the money standard is about all you can apply as to the importance of cases, unless you are closing up a man's property or expropriating it, or something of that kind. I think there should be an appeal in important cases, that is, where the pocket of the litigant is severely hit by the judgment, he should have a right of appeal, or where the other litigant thinks that the amount is inadequate, and that he has been hurt. What the standard of money value should be as a test, I am not in a position to say.

MR. SILK: The Board is required to give its approval to certain municipal debenture issues; that is strictly administrative, and discretionary. Well, I think I have nothing more to ask Mr. Slaght.

MR. CONANT: Well, thank you, Mr. Slaght, for coming up.

WITNESS: I am glad to have been here. Any opinions I have expressed are not arbitrary.

MR. CONANT: Oh, no.

WITNESS: They are expressed with the full knowledge that there is the other side to be presented. I have given you my real views on the matters we have discussed.

MR. CONANT: We all have the common purpose of what is best for the administration of justice, I am sure.

WITNESS: Yes, I am sure of that.

(Witness retires.)

MR. SILK: I have some material on the matter of the service of summonses by mail. I read first from page 41 of a pamphlet entitled, "Growth of Legal-Aid Work in the United States," which is published by the Federal Government at Washington.

MR. CONANT: This has to do with service ——

MR. SILK: Of summonses by mail.

"This notice is sent by registered mail," —

speaking of service of a summons in a small claims court in this particular case.

MR. LEDUC: In which jurisdiction is that, Mr. Silk? Where does that take place? In the States?

MR. SILK: Yes, it is in the States. I am not just sure which state this particular one refers to, but it goes on and explains.

> "This notice is sent by registered mail, return receipt requested. If the postman (who knows most of the persons in this district) cannot make delivery, then the court may order other process. In the Boston district in 1931, only 3 notices were refused and only 72 were returned because the defendant could not be located. In fact, service by mail works so well that the Cleveland court, which has used it longest, has discarded registered mail and uses the ordinary mail, not merely in small cases, but as the regular method of service in all municipal court cases. A series of cases holding that it is perfectly legal to have service of process by mail, are collected in a comment in the May, 1934, issue of the *Columbia Law Review* . . . ."

However, that article is not very helpful.

The Windsor Chamber of Commerce have this to say:

> "That service of all summons in Police Court, with reference to prosecutions under The Highway Traffic Act or under municipal by-laws, be made by registered mail, thus eliminating the cost of personal service."

I have a letter from Magistrate Jones here; it is expressed in general terms, but the late magistrate used to stress the necessity for service by prepaid registered mail.

MR. CONANT: He thought what?

MR. SILK: He was a great exponent for service of all Police Court process by registered mail.

MR. CONANT: Did we ever develop any figures as to how large a factor cost of service is in a Police Court or Division Court? I am just trying to recall; do you recall?

MR. FROST: No, we didn't; we didn't touch Police Court at all, I think.

MR. LEDUC: No Police Court. In the Division Court, we had the evidence of Mr. McDonald, that in 100 cases the total cost amounted to $6.79, out of which the clerk got $3.83 and the bailiff $2.48. Well, a large part of that, I suppose, would be for service; most of it would be for service of papers.

MR. SILK: The Chief of Police for the city of Toronto, as well as Mr. McFadden, the Crown attorney, have together made a study of service by mail, and they think that they would save nothing in the city of Toronto by service by registered mail.

Appeals from boards and commissions: You asked me yesterday to find the provision in the English Act, which provides for an appeal from the body which in England corresponds to our Securities Commission.

MR. CONANT: Yes, I would like to hear that. I assume you gentlemen would, would you not, Mr. Leduc?

MR. LEDUC: Yes.

MR. SILK: I read from The Prevention of Fraud (Investments) Act, 1939, an Imperial statute; it is a new Act at that time. Section 5 reads:

> "5. Subject to the provisions of this section, the Board of Trade may refuse to grant an application for a license or, where a license has been granted, may revoke the license,"

if certain conditions exist, which I do not think I need to read.

Section 6 says:—

> "6. (1) Where the Board of Trade propose, in pursuance of paragraph (2) of the last preceding section, either to refuse to grant an application for a license or to revoke a license, the Board—
>
> (a) shall serve on the applicant or the holder of the license, as the case may be, a written notice of their intention, specifying the particular matter upon the consideration of which their decision would be based, and inviting him to notify in writing to the Board, within fourteen days from the date of the service of the notice, whether he desires his case to be referred to the tribunal of inquiry constituted under this section."

MR. CONANT: "Tribunal of inquiry," they call it.

MR. SILK: Tribunal of inquiry. It goes on a little further down to explain how that Board is established:

> "(b) if he so notifies the Board that he desires his case to be so referred, shall refer the case to the said tribunal and direct the tribunal to investigate the case, and report thereon to the Board, shall not make a final decision in the matter until they have received and considered the report of the tribunal, and shall not either refuse to grant the application or revoke the license, if the said report contains a recommendation by the tribunal that the license should be granted or remain in force, as the case may be."

MR. LEDUC: That is not an appeal, really; it is a reference for investigation.

MR. CONANT: It is a review.

MR. SILK: It is a review, yes.

MR. CONANT: By another tribunal.

MR. SILK: By another tribunal; and the tribunal makes a recommendation which apparently is binding, even though it is only a recommendation.

MR. CONANT: Who constitutes that tribunal? The board that you are referring to corresponds to our Securities Commission.

MR. SILK: The Board of Trade. It is really a department of the Government in England, I think. It performs the same functions as our Securities Commission.

Subsection 2:

> "(2) For the purposes of this section, there shall be a tribunal of inquiry (hereinafter referred to as 'the tribunal') consisting of a chairman, and one other person appointed by the Lord Chancellor, being members of the legal profession, and one person appointed by the Treasury, being a person who appears to the Treasury to be experienced in matters of finance or accountancy and not being a person in His Majesty's service."

MR. CONANT: Is that board paid? Are they compensated?

MR. SILK: "A person appointed to the tribunal shall be appointed to be a member thereof for a specified period not being less than three years, subject to such conditions with respect to the vacation of his office as may be imposed before the time of his appointment."

MR. LEDUC: Would you read the preceding section again, Mr. Silk, giving the procedure? The matter is referred to the tribunal of inquiry, and then what happens?

MR. SILK: " . . . the Board . . . shall refer the case to the said tribunal and direct the tribunal to investigate the case and report thereon to the Board, shall not make a final decision in the matter until they have

received and considered the report of the tribunal, and shall not either refuse to grant the application or revoke the licence if the said report contains a recommendation by the tribunal that the licence should be granted or remain in force, as the case may be."

I do not see anything regarding payment here, but I think surely they must be paid.

MR. CONANT: That is limited, apparently to the licensing powers of the Board. Of course, we have not got it here, but our commission exercises far more powers than that, purely licensing.

MR. SILK: As Mr. Whitehead pointed out yesterday, all of such powers are very much discretionary.

MR. CONANT: Are you calling Mr. Whitehead?

MR. SILK: I did not think it was necessary.

MR. CONANT: I think it would be well to hear Mr. Whitehead on that point. What do you think, Mr. Leduc?

MR. LEDUC: Well, he gave his opinion in a letter which Mr. Silk read for us yesterday.

MR. SILK: I discussed it with him this morning on my way up to the office, and he assured me that there was absolutely nothing he could add, that he takes the view that his powers are entirely discretionary and could not possibly be subject to appeal, although they might be subject to review by some type of tribunal such as they have in England.

MR. CONANT: Of course, I am in substantial agreement with that, but there is the observation that has been made twice by two eminent men that there should not only be justice but the appearance of justice, and the latter aspect is the important aspect in that, is it not?

Is there anything else you want to put in now?

MR. SILK: On the matter of the exemptions under the Execution Act, I think the Hon. Mr. Clark, Speaker of the House, intends to appear before the Committee next week. He introduced a bill at one time on this matter.

I wrote to four or five of the sheriffs of the province—I have got their names from Mr. Cadwell; Mr. Cadwell recommended them—sending them a copy of Mr. Clark's draft bill, which is in the Committee books, and I have here the observations of the sheriffs. Most of them are brief.

MR. LEDUC: They agree with the Act?

MR. SILK: With the proposed bill. The four that I have written to ——

MR. CONANT: Where is it here?

MR. SILK: It is on page 91 of the Committee book.

Sheriff Graves of St. Catharines has this to say, referring to the draft bill:

"In the matter I would suggest that clauses A, B, C, D and F of section 2 be amended as suggested.

The amount in clause E is too high and I would suggest that the amount be $500.00.

I would leave out the word 'verbal' in section A of the proposed amendment to the Act.

The amount of $1,000.00, the proposed change of section 3 of the Act is too high and I would suggest that the amount be $500.00.

The proposed changes in sections 4 and 7 of the Act are reasonable and should be enacted."

Sheriff Harstone of Peterborough says, re section 2:

"(a) If the present list of household furniture exemptions were altered and brought up to date, I think that would be sufficient. The clause suggested would enable the debtor to retain a number of luxuries which, in my opinion, should be liable to seizure for debt.

(b), (c) and (d) I agree with.

In section (e) my experience is that the present exemptions of $400 should be sufficient, as a further exemption would be abused to a very great extent.

(f) seems to be quite reasonable."

Sheriff Rutherford of Owen Sound says:

"As I have only been sheriff since the offices were amalgamated less than two years ago and as during that time the work in the sheriff's office has been light, I do not feel that my experience is such that I am fully competent to make recommendations to the Committee regarding exemptions.

However, for what they are worth, I would submit the following recommendations to exemptions in the case of a farmer, in respect to whose circumstance I am quite familiar.

No farmer can work and pay his debts unless he has sufficient stock and implements. The minimum for a small farm would be:

Implements to value of	$300.00
Two horses to value of (with harness)	200.00
Eight cows, value	500.00

With privilege to substitute for these 1 sow for 1 cow, or 5 sheep for 1 cow.

25 hens, value	$25.00
Household furniture, value	300.00

Feed for above stock.

While the above exemptions would amount to about $1,500.00 they are the minimum with which a farmer could get along and leave him any hope of ultimately paying his debts, and with these exemptions to farmers, credit would be refused except where security was ample, which would be a blessing rather than a handicap in the majority of cases, as over-expansion by farmers lacking capital is responsible for most failures."

Sheriff Graham of London gave a great deal of consideration to the matter. He says:

"I would imagine that this Bill had been copied from legislation in one of the western provinces as very few farmers in Ontario sow 160 acres in grain."

I may say that this bill was drawn as the result of a study of all the Acts in the Dominion, all nine of them.

"While I feel that the exemptions should be fairly liberal I do not believe legislation should be enacted making them too liberal as, in my opinion, this would have a tendency to destroy the credit the defendants otherwise might have.

On the other hand I am going to make some proposals that I trust will be helpful ——"

MR. LEDUC: Mr. Silk, you have read this bill of Mr. Clark's?

MR. SILK: Yes.

MR. LEDUC: In how many cases out of a hundred would the bailiff or the sheriff be able to seize anything?

MR. FROST: Very few.

MR. SILK: I don't know.

MR. LEDUC: I know the first exemption is the household furniture, utensils and equipment which shall be found in and form part of the permanent home of the debtor. He might have very valuable paintings or all kinds of things, and nothing could be seized.

MR. SILK: Mr. Clark's intention, so far as the home is concerned, is to leave it intact, and I would like him to explain that particular section.

MR. LEDUC: I see, for instance, in this morning's paper there is some dis-

cussion in court about the Flavelle estate. I do not believe Sir Joseph was ever threatened with execution, but in such a case would the bill protect every stick of furniture in a very rich man's home?

MR. SILK: Unless it had been bought on a conditional sales agreement, I suppose.

MR. FROST: Well, that is too wide. I think myself that the present exemption as regards household goods and furniture is pretty sparse, but, at the same time, the difficulty with these things is that if you go ahead with very wide exemptions you destroy people's credit. The Farmers Creditors Arrangement Act had that effect.

MR. LEDUC: Well, perhaps we had better wait until Mr. Clark comes in.

MR. SILK: May I read the observations of Sheriff Graham? He has given it a good deal of consideration.

> "Section 2, subsection (a). I would have this read, the beds, bedding and bedsteads (including cradles), dressers, in ordinary use by the debtor and his family."

He gives his proposed changes, and then explains them down below.

> "Subsection (b). No change.
>
> Subsection (c). In place of one washtub I would insert one washing machine and I would further insert one radio and musical instrument, also living room furniture, and the total value of all combined not to exceed $350.00.
>
> Subsection (d). No change.
>
> Subsection (e). I would change this to read 2 cows, 6 sheep, 4 hogs, 36 hens, 1 dog and 1 team of horses and harness necessary for the same, in all not exceeding the value of $500, and food therefor until the next harvest."

MR. FROST: Well, that is reasonable, too. The present exemption is pretty skimpy and unsatisfactory.

MR. SILK: Then he would insert a new subsection.

> "New subsection. In the case of a person engaged solely in farming and operating a 100-acre farm, sufficient grain for seeding to the extent of 60 bushels of oats and barley to seed 30 acres and 40 bushels to seed 20 acres of wheat or approximate amounts necessary for the planting of corn, beans, etc.; and 12 bushels of potatoes. (Example on basis of 100-acre farm).
>
> No change recommended in further subsections.

I will endeavour to give the reasons for some of my suggestions by way of increasing exemptions.

In the first instance, in changing a wash tub to a washing machine, I may say that I have had rather distressing experiences wherein a delicate woman, being the wife of the defendant and the mother of several children, needed the electric washing machine in the home more than anything else, but under the present Act it was subject to seizure and sale.

I think it is reasonable that dressers should be added to the bedroom suites.

I also think that in keeping with the times that a living-room suite should be allowed as the defendants and their families cannot enjoy much home comfort sitting on dining-room chairs.

I also think that a cheap radio and a cheap musical instrument should be allowed, as it has been my experience in driving on the streets in this city where the poorer families live, that practically all have a radio, and I presume they depend on it for local and world news as well as entertainment, as I know that many of them do not get the daily papers. Music is being taught in the schools and it is an advantage for the children to have the benefit of a radio and a cheap piano or some other musical instrument.

In order to cover allowances for these extra articles I am recommending that $150 be added to the $200 which is now allowed, making it $350.00. I believe this amount would cover all these articles, the same being in the cheap category.

I have suggested two cows instead of one as one cow is not sufficient to keep a family in butter and milk. I have also suggested 36 hens instead of 12 and increased the value of the chattels from $400 to $500.

I have made the suggestion in regard to the new section covering seed grain, etc., which I think is important, as no defendant can go very far towards paying his creditors if he is not allowed seed grain, etc."

Sheriff Graham adds in a further letter that he is of opinion that under the Landlord and Tenant Act the exemptions should be the same as they are at the present time.

MR. CONANT: Have you some evidence to go one with this afternoon

MR. SILK: Yes, sir.

MR. CONANT: Adjourn till 2.15.

Adjourned at 12.30 p.m. until 2.15 p.m.

Wednesday, September 25, 1940.

AFTERNOON SESSION

On resuming at 2.15 p.m.:

J. FINKELMAN, Associate Professor of Administrative and Industrial Law, Department of Law, University of Toronto.

MR. SILK: In connection with Professor Finkelman's observations, I may point out that in the Committee notebooks there are exgracts from the statutes giving powers to make rules and regulations at pages 18B to 46. I have copied out a great many of the provisions in the statutes which provide for the making of rules and regulations. Also at pages 47 and 48 there are some observations expressed. And in the Committee notebook the last three pages which were distributed comprise a memorandum prepared by Professor Finkelman.

Q. Professor Finkelman, you are a Professor in the Law Department at the University; you are Professor of Administrative Law?

A. That is right.

Q. How long have you occupied that position?

A. Ten years.

Q. A few years ago you and Dr. Kennedy, who I understand is the head of that Department, endeavoured to collect all the rules and regulations passed under Ontario statutes?

A. That is right.

Q. Would you care to tell the Committee some of the difficulties that you encountered in endeavouring to collect all the rules and regulations into one volume?

A. Well, I don't know whether I am entitled to disclose the difficulties we encountered, because we received instructions to gather them—it was in the form of a letter from the Attorney-General, I believe. If I am permitted to deal with that subject I am quite prepared to do so.

MR. CONANT: I do not see where the disability arises.

WITNESS: I am just asking; I don't know whether that was a confidential matter or not.

MR. CONANT: Oh, no, I don't think so. It is a public matter.

WITNESS: Well, the first step we took was to interview Mr. Bulmer, because we gathered that he would probably have on file all the regulations and the simplest procedure would be to get them from his files and then consolidate them in that way. Mr. Bulmer told us that although they were available in his files

it would be almost impossible to dig them out. His suggestion was that we ought to visit each department and obtain the regulations from them. I thereupon saw the Deputy Minister of each of the administrative departments of Government and showed them a copy of the authority which we had received from the Attorney-General's Department and explained the nature of our task. I asked each department to supply me with a list of all the regulations they had under the various statutes. Unfortunately, we only got a very, very small proportion of the regulations that were available. Very few of the departments were able to give us anything like their regulations.

MR. CONANT: Just on that point—I do not want this discussion to be at all personal; nobody does—was it because the regulations had not been conveniently compiled or retained, or why?

A. In the majority of cases I would say that the reason was that they were not conveniently compiled in the department. In one or two departments I believe that they were rather reluctant to have their regulations handed over. That is just a personal opinion. I was never told by any department that they could not co-operate. Afterwards, since we could not get anything from the departments, I sat down and read through every Act and made a note of every section in which there was power to make regulations, and wrote a letter to the department concerned and asked them for the regulations under that Act.

MR. SILK: Would you give us the number of Acts which provide for regulations?

A. In the Revised Statutes of Ontario for 1937 there are 399 Acts consolidated, and there are 271 statutes with the power to make regulations. Some of the powers are very narrow, some of them are extremely wide.

MR. CONANT: Give me those figures again. How many Acts?

A. 399 statutes in the R.S.O. 1937, 271 confer power to make regulations, and in addition to that there is of course the section of the Interpretation Act — I think I have it here somewhere.

MR. SILK: It is copied into the notes at page 19. It is a general provision.

WITNESS: Section 24 of The Interpretation Act says:

> "The Lieutenant-Governor in Council may make regulations for the due enforcement and carrying into effect of any Act of this Legislature, and may prescribe forms, and may, where there is no provision in the Act, fix fees to be charged by all officers and persons by whom anything is required to be done."

I may say that I only found one Act in which the power to make a regulation —let me put it this way: I only found one Act in which there was no express power to make a regulation and where the administrative authority had to resort to the Interpretation Act to implement the Act.

MR. CONANT: That is why it is put in the Interpretation Act, likely.

WITNESS: Probably.

MR. CONANT: To take care of any obvious omission.

WITNESS: We wrote to each department under each Act, and in many cases we got no reply. Where that happened I always wrote to Mr. Magone and pointed out to him that there was such-and-such a power to make regulations, and that I was unable to obtain copies of the regulations, and, through him, I always got a reply to each letter, either setting out that there were regulations and telling me where I could get them and sending me copies of them, or else that no regulations had been made. I may say that there were 55 Acts out of the 271 in which there was power to make regulations under which no regulations had ever been made.

MR. FROST: Pardon me just a moment. Mr. Silk, on pages 18B and 18c there is a short statement as to what bodies have rule-making authority. That apparently only covers ——

MR. SILK: In connection with the courts.

MR. FROST: There is the point. I was just wondering how far Mr. Finkelman is dealing with here. Are we considering the rule-making powers, or are we considering regulations under such Acts as the Highway Traffic Act?

MR. CONANT: The scope of our enquiry really goes only to the making of rules as it affects the administration of justice.

Q. Have you any observations to make, Mr. Finkelman, as to rules so far as they affect the administration of justice?

MR. STRACHAN: I was just going to observe, isn't this the point: A lawyer is asked to give an opinion on a statute, and he finds it impossible to make sure he is correct unless he reads the regulations. That difficulty has occurred in my practice, and no doubt it has in yours, Mr. Frost, and that is what we are going to ——

WITNESS: That is right; that is what I understood I was to give evidence in connection with.

MR. CONANT: Well, I have no objection; that is all right.

MR. FROST: Of course, after all, I can see that the regulations under these various Acts—for instance, the regulations under say a marketing Act affecting farm products would be very different from regulations under the Highway Traffic Act.

MR. CONANT: Or the Gasoline Tax Act.

MR. FROST: Or the Gasoline Tax Act, or something like that.

MR. STRACHAN: It may make a decided difference in a legal opinion.

MR. SILK: They are really a part of the statute law of this province, Mr. Frost, having the same force as a statute.

WITNESS: They have the force of law, and I would say roughly from the regulations we gathered that if they were all compiled they would run well over five thousand pages.

MR. SILK: There would be as much bulk as there is to the Revised Statutes, including the index.

WITNESS: If not more.

MR. FROST: Then the question is as to whether there should be some method of having these published?

MR. CONANT: I was just going to ask: of course, in a great many cases the regulations have been compiled and published, haven't they?

A. In quite a few cases, but I would not say in the majority of them; and if they are published they are only published after a long period of time.

Q. I wonder how that practice has grown up, because it is probably the heritage of many, many years, isn't it?

A. That is true.

Q. I mean, the making of regulations is more characteristic of the last twenty-five years than of any period before, wouldn't you say, Professor Finkelman?

A. It goes back about a hundred years, I would say. In the Consolidated Statutes of Upper Canada for 1859, I had occasion to check them about a month ago, and I find that out of 128 Acts which were consolidated there, 42 authorized subordinate legislation.

Q. Yes, but we have been doing more by way of making regulations in the last twenty-five years, haven't we, than we did before?

A. That is right.

Q. It arises from the fact that with the complexities of modern business and life it is difficult to set out and to anticipate in a statute all the situations that may arise, and so it is left to the regulations; isn't that the answer to it?

A. That is correct. There have been two committees in the British Empire who have investigated this question. One was a committee on Ministers' Powers, appointed by the Lord High Chancellor in 1932, sometimes known as Lord Donoughmore's Committee. They investigate this whole question and came to the conclusion that we can't get along without regulations, that it would be impossible to put everything in the Act. The other is the report of an Honorary Committee on Subordinate Legislation in South Australia in 1935.

MR. FROST: They found much the same?

A. They found the same situation, and came to the conclusion that it is absolutely necessary to provide for regulations if you are going to carry out social legislation to-day. If I might be permitted to read a short excerpt ——

MR. SILK: Is that the Report on Ministers' Powers?

A. That is the Report on Ministers' Powers. This is what they have to say in one connection:

> "It is customary to-day for Parliament to delegate minor legislative powers to subordinate authorities and bodies. . . . Some people hold the view that this practice of delegating legislative powers is unwise, and might be dispensed with altogether. . . . It has even been suggested that the practice of passing such legislation is wholly bad, and should be forthwith abandoned. We do not think that this is the considered view of most of those who have investigated the problem, but many of them would like the practice curtailed as much as possible. It may be convenient if on the threshhold of our report we state our general conclusions on the whole matter. We do not agree with those critics who think the practice is wholly bad. We see in it definite advantages, provided that the statutory powers are exercised and the statutory functions performed in the right way. But risks of abuse are incidental to it, and we believe that safeguards are required, if the country is to continue to enjoy the advantages of the practice without suffering from its inherent dangers.
>
> But in truth whether good or bad the development is inevitable. It is a natural reflection, in the sphere of constitutional law, of changes in our ideas of government which have resulted from changes in political, social and economic ideas, and of changes in the circumstances of our lives which have resulted from scientific discoveries."

That was the committee in England—in Great Britain, rather—and the same conclusion is to be found in this report of the committee in South Australia.

MR. CONANT: Tell me, in the other jurisdictions are the regulations compiled and published with any more certainty or regularity than you say is the case here?

A. They are in Great Britain. The vast majority of them—I would like to qualify that. A great many of them are published in what is the equivalent of our *Gazette*, at the end of each year there is a volume consolidated of the regulations for that year, and every so often there is a major consolidation. I believe there are about fifteen or sixteen volumes in the legislative library upstairs, containing the regulations of Great Britain—of England, rather, because Scotland does not come under the Act. In the United States they passed the Federal Register Act in 1935, and they provide for what is called the Federal Register, and every regulation there which is indicated by the President as coming within the Act must be published there. It is a daily thing, they are consolidated every year, and there are seventeen volumes of a complete consolidation already published, to be consolidated every five years under the Act.

MR. FROST: Professor Finkelman, after your investigation of this matter, do you think there should be some similar plan carried out here?

A. I am convinced that there should be. I was convinced of it at the time when I undertook the task, because I found, in teaching administrative law, that time after time I was coming up against the problem of a statute with regulations under it, and there was no way of ascertaining what the regulations were.

MR. STRACHAN: As I say, that is what the practitioner is up against every time he gives an opinion on a statute.

WITNESS: Exactly.

MR. CONANT: Surely, professor, each department which has passed or whose operations are affected by regulations would have and be familiar with the regulations, wouldn't it?

A. I regret to say that that is not the case.

MR. SILK: Did you not find one case, professor, where the department was carrying on under a set of regulations which had been passed under an Act now repealed?

A. Well, where the regulations have been passed under an Act which is subsequently repealed, under the Interpretation Act the regulations would still operate under the amended Act, if there is an Act substituted for it.

MR. FROST: Strangely enough, I ran across a case, I believe, not so long ago—it has just slipped my mind what the case was—in which the court said they were acting under regulations under an Act that had been repealed some years before. I will remember it shortly.

WITNESS: If I might just interject, Mr. Attorney-General, I remember an incident about two years ago when a lawyer downtown called me up and asked me—I think is was under the Foreign Judgments Enforcement Act—whether a certain province had been included under that Act or not by proclamation. He told me that he had no way of ascertaining whether it had been included or not.

MR. SILK: Except to 'phone the Law Clerk's office?

A. Except to 'phone the Law Clerk's office.

Q. You have prepared a memorandum for the use of the Commitee ——

MR. CONANT: Let us pursue that for a minute. What would be the practical way of compiling them? Are you sufficiently familiar with departmental routine here to suggest how it might be overcome?

A. Well, the scheme that we undertook a few years ago was a costly way in so far as time was concerned, and I am afraid it is useless. I learned by bitter experience, and I think we can also draw on the experience of the United States. When the Federal Register Act was passed in the United States they contem-

plated a consolidation by some central authority of all the regulations. Well, they dropped that, and in 1937 they passed an amending Act requiring each department by a certain day to compile these regulations and file them with a division of the Archives Department, which was charged with the duty of consolidating them, and an administrative committee was set up to consolidate all of them with a report on the ones which should be consolidated. I can read the provision of the amending Act:

> "On July 1, 1938, and on the same date of every fifth year thereafter, each agency of the Government shall have prepared and shall file with the Administrative Committee a complete codification of all documents which, in the opinion of the agency, have general applicability and legal effects and which have been issued or promulgated by such agency and are in force and effect and relied upon by the agency as authority for, or invoked or used by it in the discharge of, any of its functions or activities on June 1, 1938. The Committee shall, within ninety days thereafter, report thereon to the President, who may authorize and direct the publication of such codification in special or supplemental editions of the Federal Register."

Now, I think we can learn from the experience they have had in the United States. Professor Yutema, of the Michigan Law School, was in Toronto this spring, and I spent a couple of hours with him discussing this very point. He was the chairman of this committee, and he told me that the conclusion they came to was that each department should be charged with the responsibility of preparing its own consolidations.

Q. Would legislation be necessary to accomplish that?

A. No, I do not think legislation would be necessary, if the administrative heads of the various departments insisted that it be done; but if there were no legislation, then a department might omit or some subordinate in a department might omit to forward a regulation to the central agency for consolidation, and the work would be lost.

MR. SILK: Professor, are you confining your observations to a general scheme of consolidating all existing regulations?

A. Quite.

Q. Which would be a very large order. Now, if we should confine ourselves to a consideration of the rules and regulations that might be passed in the future, would it take care of the situation properly if two things were required: firstly, that all delegated legislation require the approval of the Lieutenant-Governor in Council, and secondly, that all delegated legislation be published in *The Ontario Gazette?* Would that afford a proper record of all delegated legislation?

A. As far as the question of publicity is concerned, I would say that publication in *The Ontario Gazette* is highly desirable.

MR. FROST: It would not be in a handy, usable form, though.

WITNESS: You would have to consolidate them in some fashion. After all, there are some regulations that have been in force now for twenty-five—I would go beyond that—fifty years, and they are still in their original form, and publication in the *Gazette*, unless you provided some sort of handy index, would make it rather inconvenient for consultation; but it would give publicity, where you have no publicity to-day.

MR. SILK: At the present time there are some sets of regulations which can only be found in typewritten form in a departmental office?

A. That is very true.

Q. And no copies are available?

A. No copies are available.

MR. FROST: Take, for instance, the Game and Fisheries regulations; they are published and amended—or they are published, in any event—every year, my recollection is; and that is also true of the Highway Traffic Act?

A. Yes.

Q. Would it be so difficult, for instance, if the Highways Department published all its regulations, all the regulations that that department has control over, has power to make, if they published in their little pamphlet book each year their regulations? If every department did it, then you would have met the situation, wouldn't you?

A. It would serve some purpose; you would have the regulations in a more convenient form than you find them to-day. But, at the same time, the remark of Mr. Strachan is to be considered, that the lawyer has not got all these things on his shelf, and the lawyer is not going to write 271 times to the Government asking for copies of these regulations.

Q. Well, perhaps you misunderstand me. Supposing, for instance—you say there are 271 Acts in which there are regulations?

A. That is right.

Q. Supposing, for instance, the Department of Mines had the administration of say fifteen Acts and had made regulations of various kinds under the fifteen Acts, supposing the Department of Mines each year published a little booklet after the fashion, for instance, of the regulations that are published now by the Game and Fisheries Department, and in that little booklet the Department of Mines had the regulations that were made under those fifteen various Acts; now, if each of the departments did that, then it would be only a matter of writing to each department and asking for the regulations for that year or that were published that year. Wouldn't that pretty well meet the situation?

A. That would certainly be an improvement, but then I would ask you the other question: why not go the one step farther, and consolidate all of them, if you are going to consolidate ——

MR. LEDUC: What about the question of expense, professor?

A. That is something about which I know nothing.

MR. LEDUC: But it is the all-important point. Mr. Frost mentioned powers just a moment ago: I have power to make regulations, that is, the Lieutenant-Governor in Council has power to make regulations; I don't believe that more than fifty or sixty people are interested in those regulations. We have them either printed or mimeographed and ready for anyone who asks for them, but if we have to print them, together with other regulations, of all the other departments, it would be a tremendous expenditure of money for nothing. It would mean this, that if you wanted the regulations concerning the Department of Game and Fisheries, and didn't care a hoot about the regulations made by the Department of Mines, yet you would have to purchase the whole volume and get all the other regulations in which you might not be interested at all.

MR. STRACHAN: The same thing would apply, Mr. Leduc—I as a practising lawyer may not want to consult the Ditches and Watercourses Act more than once in a lifetime, but when I want to I want to know that I have all the regulations with it; it may be very important. You may not have twenty people in the province who want them.

MR. CONANT: Have the regulations ever been compiled in this province?

MR. SILK: No.

WITNESS: They were compiled but not published.

MR. CONANT: How long ago?

A. Three years ago.

MR. SILK: Two or three years ago. It was when Professor Finkelman and Dr. Kennedy worked on it.

MR. LEDUC: I think it was in 1935 or 1936.

MR. SILK: Yes.

MR. STRACHAN: Do you run into this situation, professor, that in some departments they may be working under regulations that were published under an Act which has been repealed or amended so much that they are not applicable to the present Act? Wouldn't that be possible?

A. Well, that raises an entirely different problem, with which I should like to deal separately; that is the question as to whether the regulations are always *intra vires*. I would not care to say off-hand. I did not sit as a court on the regulations when I was examining them, but I drew the attention of Mr. Silk to some of them, and I have doubts as to whether the regulations are all valid, not only under the Acts which have been amended but under the original Act itself. I have great doubts as to that, and I would strongly suggest that all regulations should at some time before they come into effect be submitted to

the Legislative Counsel for review. That, as a matter of fact, was raised in the Report on Ministers' Powers in Great Britain, that very point was brought up, and in the minutes of evidence you will find a good deal of time was devoted to that problem. If I may just read their conclusions, what they say is:

> "As things stand, under the existing procedure of leaving the drafting of regulations to the departments, the work is uneven—some is good and some is bad. Regulations on the whole tend to be somewhat less well drafted than Government bills as originally presented to Parliament, which are all drawn in the office of parliamentary counsel. . . . The present practice does not mean that there is a risk of regulations being less thoroughly drafted and less clearly expressed than bills as originally presented to Parliament, but thus there is an absence of the safeguards afforded by the special skill, training and position of the parliamentary counsel, with the inevitable consequence, for instance, of an increased risk of the Minister, on whom the power of making regulation is conferred, assuming to himself, in the terms of the regulations which he makes, powers more extensive than those conferred by the Act under which the regulations are made, and it is said by some critics that this result is not infrequent."

Now, I am not qualified to say anything on that point; I am merely reading you the report of the committee in Great Britain on that.

MR. SILK: Then, professor, there is a certain type of regulation which applies only to a very limited class of people, as, for instance, regulations passed under some of the professional Acts—the Law Society Act, the Medical Act, the Optometry Act, and so forth; do the same observations as to publication apply to those regulations which govern the internal workings of these organizations?

A. Well, that would be determined by experience. I don't know whether I would be prepared to make a general statement on that, but I would say this, that all regulations, whether made by professional associations or not, in my opinion should be submitted to the Lieutenant-Governor. They should either be ma deby the Lieutenant-Governor in Council or subject to the approval of the Lieutenant-Governor, because that is the only way in which you can preserve parliamentary control. Otherwise you get this situation, that someone, a member, gets up in the House and asks a question about the workings of some of these bodies that you have mentioned, and the Minister can only rise and say, "We don't know anything about that, and we can't compel them to make any statement; they are an independent body." But if the regulations—after all, the regulations are law, they are akin to legislation, and they should be made in some such way that Parliament has control over them. I might say that in Ontario there are only about two or three cases at the most where there is not parliamentary control in that fashion.

MR. CONANT: By means of Orders-in-Council?

A. Yes; all the regulations even of professional bodies have to pass through the Lieutenant-Governor in Council at some stage. I might also say that Ontario is peculiar in that respect; it is about the only jurisdiction which has done that so thoroughly.

MR. CONANT: I think Ontario is right in that respect.

WITNESS: I agree with you, sir.

MR. CONANT: They should not create bodies and let them run off at will.

WITNESS: I have the figures on that here somewhere.

MR. SILK: The Ontario Veterinary Association Board may make its own regulations for supervision.

WITNESS: In an analysis I made of 213 Acts, leaving out those which deal with rules of procedure giving power to the judges, and so on, I found only 13 which delegated power to an administration or body without expressly requiring the consent or approval in some form of the Lieutenant-Governor in Council. Of these 13 acts 3 delegated powers to various ministers, who would of course be responsible directly, 5 to departments of the Government, and thus responsible directly, and 3 to senior civil servants. The only independent boards which enjoyed authority which was not subject to control were the old Minimum Wage Board and the Ontario Municipal Board. The Minimum Wage Board, of course, makes orders which are in a sense legislative and in a sense judicial, so I doubt whether you could change the procedure there; it would mean that every order, every wage order of the Minimum Wage Board would have to be submitted to the Lieutenant-Governor in Council and be approved. I doubt whether that is advisable. The second is the Municipal Board, and of course it is really occupying the position of a court in many respects.

MR. SILK: Well, we have got a good many boards that make that type of order. There is the Milk Control Board.

MR. CONANT: The Industry and Labour Board.

WITNESS: Yes, the Industry and Labour Board; but those are —this may be academic, but I regard those as being more of a judicial nature than the rules made by others. It may be a purely ——

MR. STRACHAN: The Milk Control Board?

MR. SILK: You referred, I think, to the Industry and Labour Board?

A. The Industry and Labour Board, yes.

Q. Which does not exercise any functions that were at any time exercised by a court?

A. As I say, that is —that may be an academic distinction, but the information I have here is in an article I prepared for compilation of essays, and I made a distinction on that score.

MR. CONANT: What is the next, Mr. Silk?

MR. SILK: Professor Finkelman has prepared a short memorandum; I don't know whether the Committee wishes him to elaborate on it or not. That is the last three pages of the notebook, which should be numbered 180, 181 and 182.

WITNESS: May I, with the consent of the Committee, refer to clause 3 (c), the question of parliamentary control—or preferably number 4. I would like to draw your attention to the recommendations made by the Committee on Ministers' powers as to the safeguards which should be employed when a bill which confers delegated legislative power, the power to make regulations, is brought before the House. This committee recommended that

> "(a) A memorandum should accompany each bill delegating legislative power to explain the need for the power, the manner of its exercise and the safeguards to be employed.
>
> (b) A standing Committee of the House to consider and report upon every bill containing such a feature in order to ascertain whether the power is in any way unusual."

To explain a little more fully what they mean by "unusual", they stated that the committee should enquire

> "(1) whether the precise limits of the power were clearly defined;
>
> (2) whether any power to legislate on any matter of principle or to impose a tax was involved in the proposal;
>
> (3) whether any power to modify the provisions of the bill itself or any existing statute was involved in the proposal;
>
> (4) whether there was any express proposal to confer immunity from challenge on any regulation which might be made in exercise of the power and, if so, whether a period of challengeability was proposed and, if so, how long a period;
>
> (5) whether, if there was no such express proposal, there appeared to be any doubt that any such regulation or rule would be open to challenge in the courts on the ground that it was *ultra vires;*
>
> (6) whether the proposals in fact contained in the bill were consistent with and sufficiently explained by the memorandum of the Minister attached to the bill;
>
> (7) whether there appeared to be anything otherwise exceptional about the proposal."

Those were the recommendations of the committee with regard to the introduction of legislation. They also suggested that once the regulations had been made they should also be submitted to either this same committee or to a similar committee, which would carry on investigation into the following matters —this is as to the regulation itself, not as to the bill.

> "(1) Whether any matter of principle was involved;
>
> (2) whether the regulation or rule imposed a tax;
>
> (3) whether the regulation or rule was (a) permanently challenge-

able; or (b) never challengeable, i.e., unchallengeable from the commencement; or (c) challengeable for a specified period of time and thereafter unchallengeable and, if so, what was the specified period;

(4) whether it consisted wholly or partly of consolidation;

(5) whether there was any special feature of the regulation or rule meriting the attention of the House;

(6) whether there were any circumstances connected with the making of the regulation or rule meriting such attention;

(7) whether the regulation or rule should be starred, on the grounds that it was exceptional, and subjected to the procedure described below."

And certain special procedure is described. Now, those were the recommendations of that committee.

MR. LEDUC. When were those recommendations made?

A. 1932.

Q. Have they been adopted by the House of Commons?

A. I could not tell you.

The recommendations of the committee in South Australia dealing with the same point were that the joint committee of both Houses should investigate with respect to every regulation, should inquire with respect to every regulation into the following matters.

"(a) That they are in accord with the general objects of the statute;

(b) That they do not trespass unduly on personal rights and liberties;

(c) That they do not unduly make the rights and liberties of citizens dependent upon administrative and not upon judicial decisions;

(d) That they are concerned with administrative detail, and do not amount to substantive legislation which should be a matter for parliamentary enactment."

MR. CONANT. Don't we in many cases require that regulations must be tabled in the House?

A. Yes, there are a few cases in which that is true. I will give you the figures in just a moment.

Q. Well, I don't know that it is important to know the exact figures.

A. I am afraid that is of very little use. Yes, there are seventeen Acts in

which the regulations have to be tabled. The evidence before the Committee on Ministers' Powers was pretty clear that that was for all practical purposes useless, because no member went into the question, no member examined. That was in Parliament in Great Britain; I do not know what the situation is here.

Q. Was it suggested by that that a regulation would not become effective until it had been considered?

A. Oh, no; that would destroy the value of delegating legislative power at all.

Q. Then upon a review by a committee in that way what would be the procedure if the regulations were not found proper?

A. It would be reported to the House and the House would take action.

MR. SILK. Professor, could you tell us something about some of the recent bills in the States?

A. If you would just pardon me one moment, I would like to draw the attention of the Committee to one other point. In a few cases, only two or three cases, the House here reserves the right to disallow a regulation after it has been made. Now, to my mind, the value of that is great, because it permits the House to disallow a regulation without touching the Act itself.

MR. LEDUC. You mean two or three provincial statutes?

A. Two or three provincial statutes.

Q. Which are they?

A. The Mining Act is one.

Q. The Mining Act?

A. Yes, sir, the Mining Act. I could give you the exact provision of the Mining Act in a moment.

MR. SILK. Chapter 47; it will probably be section 182.

MR. LEDUC. We have got to table the regulations.

WITNESS: Yes, and there is a provision there that they may be disallowed.

MR. LEDUC: Yes, it is section 182.

WITNESS: Yes, I think it is section 182. They can be disallowed, and there are several of the Acts administered by the Department of Education. I think the Department of Education Act, section 12, contains a similar power to disallow, and that covers several other Acts.

MR. CONANT: What is the machinery for that disallowance?

A. I should imagine that the ——

MR. SILK. Resolution of the House, would it not be?

A. Resolution of the House.

MR. SILK. I should think it would be in the form of a resolution of the House.

MR. CONANT. It would have to be more than that.

WITNESS. In South Australia the regulations are subject to disallowance by resolution of either House on motion moved within fourteen sitting days after the tabling.

MR. LEDUC. This section says that the regulations are laid on the table of the House, and if the Assembly disapproves by resolution of such rule or regulation either wholly or in part the rule or regulation shall have no effect from the time such resolution is passed.

WITNESS. Well, I am not suggesting that the regulations shall have no effect until Parliament has acted; I am suggesting ——

MR. LEDUC. But isn't that the case? Even the statute doesn't say so, that in any case where the regulations have to be tabled—you said there were seventeen Acts—the resolution is always to declare that these shall have no force and effect.

MR. FROST. It would require a bill to do that.

WITNESS. It would require a bill to do that, surely.

MR. LEDUC. But the Legislature can act; whether it is by bill or by resolution, the Legislature can act.

WITNESS. But the resolution of the Legislature would not destroy the validity of the regulation if the department insisted on retaining it. I suppose we are getting academic on that point, because ——

MR. LEDUC. But I mean as long as the regulations are laid upon the table of the House and the House has cognizance of them, the House then may proceed to declare whatever procedure they adopt for that, but the House certainly has the right to declare that these resolutions shall have no more force and effect.

WITNESS. With all due respect, sir, I beg to differ.

MR. LEDUC. Well, what is the limit of the powers of the Legislature?

MR. CONANT. It can't change a man into a woman.

MR. LEDUC. Well, I think that is about all.

MR. FROST. Perhaps Professor Finkelman means, Mr. Leduc, that the

Legislature undoubtedly has power, but they could not do it by resolution, they would have to pass a law to do it.

WITNESS. I quite agree that if they passed an Act repealing the legislation, that is correct.

MR. LEDUC. I say whatever means they adopt, they have the right to do it.

WITNESS. I grant you that, sir.

MR. CONANT. But in those special cases where the statute provides, that can be accomplished by resolution.

WITNESS. By resolution.

MR. CONANT. Well, we have settled that. Now, what is the next point?

MR. SILK. I was going to ask the professor if he would care to describe in a general way some of the recent bills that have been before Congress where they have endeavoured to give an appeal to a person who feels that he has been offended under a Federal regulation. I am referring particularly to the Logan Walters bill, which has been before Congress twice.

WITNESS. I would not like to discuss that into the record, because I have not had enough time to go into it; I would just have to discuss it generally. If it would be off the record I would be willing to talk about it.

MR. SILK. Well, we could ask the reporters or the press not to take it down, and the stenographic reporter not to take it down. I think it would be very helpful.

MR. CONANT. What is the point that turns on it?

MR. SILK. The Logan Walters bill purports to give an appeal from a ruling under any Federal regulation in the States.

MR. CONANT. An appeal to whom?

MR. SILK. To any person who feels he has been offended.

MR. CONANT. But an appeal to what tribunal?

MR. SILK. It requires each board to set up a board of three persons, and the appeal goes to that board of three persons, but the board cannot hand down its decision until it has been approved by the chairman of the commission—rather, the board, speaking in the wider term of the word "board"—or commission, such as here for instance if it were the Workmen's Compensation Board, the Workmen's Compensation Board would be required to set up a smaller board of three members, and if a person felt that he had been offended ——

MR. CONANT. Does that apply to all regulations?

MR. SILK. It applies to all rules and regulations passed under any Federal

statutes of the United States. As I say, the bill has been before Congress twice, but it has not been passed. It is a scheme that is worthy of some study, although it is not in force. The appeal goes eventually to the courts.

MR. CONANT. Well, what is the next point, Mr. Silk?

MR. SILK. I have nothing further, sir.

MR. FROST. Could Professor Finkelman give us any opinion upon the feasibility of consolidating the rules that are mentioned in those some 26 statutes?

MR. SILK. The rules that apply to court?

MR. FROST. Yes.

MR. SILK. Have you given any thought to that, Professor Finkelman? That is, the rules applicable to the Supreme Court, the County Court, and under several statutes such as the Controverted Elections Act, the Devolution of Estates Act—all rules that pertain to procedure in the courts, and a great many of them are found in different volumes and texts; have you given any thought to that?

MR. FROST. For instance, here is a list, or a partial list.

MR. SILK. On pages 18 B and 18C.

MR. FROST. The point is this: it may be a County Court matter, and there may be something, for instance, under The Devolution of Estates Act or something of that sort; would it be possible to consolidate those rules in one volume?

MR. SILK. And may I point out, Mr. Frost, that a good many of those rules are made by different bodies. For instance, under The Estreats Act, the judges of the Supreme Court make the rules, under The Charities Accounting Act, the Lieutenant-Governor in Council makes the rules, and there are one or two other bodies and combination of bodies; under one Act it is the judges of the District Courts or a majority of them.

Q. In the first place, we would have to have a uniform rule-making body, I take it?

A. I am afraid that is rather out of my field. It is not properly part of the administrative law, and I have not given it much thought. I think, though, upon the other divisions of administrative law, that a uniform law-making body is certainly a sound suggestion.

Q. Well, I think I have nothing further, unless you have something further to add, Professor Finkelman.

A. I might just add this, that sometimes in drafting a bill providing for the making of regulations, phrases are introduced which may have the effect of preventing the courts from reviewing the regulations. Where that is done deliberately I have no quarrel, but sometimes it is done inadvertently. For

example, in 1894 there was the case of Institute of Patent Agents vs. Lockwood, which decided that where an Act had in it the phrase that the regulations shall have the same force and effect as if contained in this Act, they said the courts cannot review it, because the regulation for all practical purposes becomes part of the statute, and the court cannot review that regulation to determine whether it is ultra vires or not. About 1930, a similar statute came before the courts again ——

MR. CONANT. In what country?

A. In England. They are both English cases. The Lockwood case went to the House of Lords, and in the case I am referring to, Rex vs. Minister of Health, Ex parte Yaffe, 1930 or 1931, they held that they would review, despite those words. Now, there is some doubt as to the validity of that decision—I am expressing no opinion on it at the present time—but another problem came up in that case which does affect us directly here. In the Lockwood case in 1894, the court had also said that regulations which are placed on the table of Parliament become effective and judicial review is gone; so that there were the two features in the 1894 case. Then in 1931, the court in the Yaffe case, in trying to distinguish the Lockwood case, said—this is *obiter*, but nevertheless, the House of Lords did say this—that where regulations are placed on the table of Parliament, the courts are prevented from reviewing them. Now, with all due respect, I submit that that *obiter* is wrong, because the purpose of placing them before Parliament is not to determine whether they are ultra vires or intra vires, but to determine whether they follow the policy of the legislation, whether they are wise. That is a question which ought to be considered, because, if laying on the table of Parliament prevents the courts from reviewing them, it may be necessary to introduce some provision into The Interpretation Act which would prevent that result following.

Q. Just before you leave, and as a matter of information as to your work as far as it has progressed, would it involve much further work to finally get all the regulations together?

A. The work that was done is now out of date completely. In order to do the thing, you would have to start from the very beginning again, because there would be no way of ascertaining—let me amend that. I suppose it would be much easier to determine, find out, what regulations had been made between that date and the present, but, on the other hand—that would not be very difficult, but I would suggest that the scheme we employed at that time, namely, of ourselves collecting and consolidating and revising regulations, should be dropped, and that the scheme adopted in The Federal Register Act in the United States should be adopted, namely, that each department should be made responsible for supplying its own regulations, in any way it sees fit and in its own language.

Q. Well, supposing—I do not think this is entirely academic—supposing we had an official, call him a registrar, like a Registrar of Deeds—and in some respects he would correspond with that—and provided that every regulation passed by any department of government must, before it becomes valid, be filed with him and stamped, let us say, wouldn't that in the process of time, overcome a great deal of this difficulty?

MR. LEDUC. Could you sublet the authority of the Lieutenant-Governor in Council to the standard of an employee?

MR. CONANT. It would be simply for the purpose of filing. That would not in itself give any validity, excepting that it would be a central compilation.

MR. SILK. It could be in the office of the clerk of the Executive Council, where a good many of them are now filed.

MR. FROST. Mr. Bulmer told me things were so complicated in connection with these filings that he couldn't find anything.

WITNESS. His system of filing is such that you cannot turn up the regulations under any Act. He said it would be necessary to take each file and go through it right from the beginning, because everything that has been done under each Act is filed in that fashion. There would be a great deal of material there that would be confidential, and no one would be admitted to those files, and I would not ask for permission to go through those files.

MR. CONANT. Yes, but the regulations that we are discussing divide themselves into how many categories? First, there is the ordinary regulation that has the approval of the Lieutenant-Governor in Council; then there is the regulation that has the approval of the Minister; is that another category?

MR. LEDUC. Yes.

MR. CONANT. And what other category?

A. Regulations made by the department.

Q. Isn't that the Minister?

A. Well, the Act says the department.

Q. I always question that wording.

A. Mr. Attorney-General, I may agree with you on that, but the Act says that. I am merely referring to what the Act actually says.

MR. CONANT. That is a custom that has grown up in this province in the last twenty-five years, that this and that must be done "by the Department of So-and-so." I think it is awfully bad draftsmanship and legislation. What is a Department? It is not a body corporate; it is not an individual.

MR. LEDUC. They are established by statute, I believe, some of them.

MR. CONANT. Pardon me; may I finish that?

Q. Whatever other category there may be, at least we have mentioned two or three of them?

A. You have boards and commissions.

Q. Boards and commissions; supposing there was a provision that all regulations should not only have the same sanction that is now required, removing none of those sanctions, but they must also be filed with whatever the proper official would be, and they would be effective from the date of filing?

A. That is right, that is the provision that now applied in the United States, and I think that would cover the situation, for publicity for each regulation as it comes into effect.

MR. LEDUC. Professor, you may have given the information before; however, I noted this, that out of 213 Acts, 13 give the right to make regulations without the Lieutenant-Governor in Council's approval?

A. They do not specifically mention the Lieutenant-Governor, that is right.

Q. But in those 13 cases is the authority given to the Minister —or to the Department, which comes to the same thing—or is it given to some boards or commissions?

A. No, it is given in such a way that Parliament —it is given to the Minister or to the Department or to a senior civil servant, except in the case of the Municipal Board; the Municipal Board is the only example there.

Q. Out of those 13?

A. Out of those 13.

Q. But in the other cases it is either the Minister or the Department?

A. That is right.

Q. Or some official of the Department?

A. That is right. As I said before, Ontario is peculiar in that respect, and certainly has the best form of control in that respect, of any common-law jurisdiction that I know.

Q. But in nearly 94 percent of the cases, the Lieutenant-Governor in Council must make regulations or approve of them?

A. Yes, I would say in 99 percent of the cases.

Q. Well, 13 out of 213?

A. Yes, but those 13, when you break them down they disappear, with possibly one exception.

MR. SILK. The Board of the Ontario Veterinary Association has that power, and it does not come under the classifications you mentioned; it is an independent board. However, that is a small matter.

MR. LEDUC. But the making of regulations without the concurrence of the Lieutenant-Governor in Council is the exception?

A. That is right.

MR. CONANT. Oh, yes, I would expect that to be the case.

MR. LEDUC. Now, are there any important regulations that may be made without the Lieutenant-Governor's concurrence?

A. Not that I know of. I might just point out in connection with judicial review, something I came across here.

> "The Colonization Roads Act declares, that a by-law of a municipal council with respect to colonization roads 'passed with the approval of the Minister, shall not be open to question in any court upon any ground whatever'."

And, with regard to The Ontario Municipal Board Act, may I just read this section, because this is the widest power that I know of. (Sec. 67)

> "(1) Every by-law of a municipality approved by the Board, and every debenture issued thereunder bearing the seal and certificate of the Board, shall for all purposes be valid and binding upon the corporation of such municipality and the ratepayers thereof, and upon the property liable for any rate imposed by or under the authority of the by-law, and its validity may not be contested or questioned for any cause whatsoever, nor shall it be necessary to its validity, that the judgment or opinion of any court or person be requisite or obtained.
>
> (2) Where the Board is satisfied that any by-law or other proceeding of a municipality is not entirely beyond its jurisdiction and powers or void *ab initio*, and the validity thereof has not been questioned in any court, in any litigation which is pending or the by-law has not been set aside or quashed, or the proceeding declared to be invalid by any court, the Board may, notwithstanding any invalidity in the by-law or proceeding, approve the same, and in such case, the provisions of subsection 1 shall apply to the by-law, and to every debenture issued thereunder, bearing the seal and certificate of the Board."

Now, I am not questioning the wisdom of entrusting powers of that sort to the Municipal Board, but I just want to point out that there is probably the widest power to make regulations that has even been conferred.

MR. CONANT. When you say "to make regulations," you mean in the exercise of its discretion?

A. Yes; it is a purely discretionary power.

MR. LEDUC. Is what you read part of the regulations or part of the Act?

A. That is part of The Municipal Board Act. I am just referring to that example. It is section 67 of The Municipal Board Act. I am just drawing attention to that, as a case in which the jurisdiction of the courts is ousted completely; we have taken away the jurisdiction of the courts.

Q. Oh, yes, but by an Act of the Legislature.

A. Oh, true. I am not suggesting that that ——

Q. Excuse me, but I do not see where the question of regulations comes in there.

A. In this way, that the by-law of a municipality is a legislative power. Now, that by-law approved by the Board, the approval in itself to my mind is also an exercise of the legislative power.

MR. SILK. It is more in the nature of an order than of a regulation.

MR. FROST. It brings a law into effect.

WITNESS. Yes.

MR. SILK. I do not think that could be called a regulation.

MR. CONANT. I would call that an order of the Board. You are discussing it as a regulation, are you?

A. Well, it is pretty hard to draw the line between an order and a regulation. That is another point that the Committee ——

MR. LEDUC. I was going to add to what the Attorney-General said, it seems to be more in the nature of a judicial order than an administrative regulation.

MR. CONANT. A regulation I would construe as something of general application, an order as of particular or specific application.

WITNESS. Well, you are going to run into difficulties there. What about a regulation saying that there may be hunting in a certain district at a certain time?

MR. LEDUC. But for a number of people, of general application in that district.

WITNESS. Your by-law, although it applies to the municipality, imposes taxation of general application in the City of Toronto.

MR. LEDUC. No, no; it is an order validating the by-law passed by one municipal body, representing if you like, six hundred thousand people, but one municipal body.

WITNESS. Well, I am not prepared to argue that point. I do not think it is of great importance; I just gave it as an example.

MR. CONANT. Is there anything else, Mr. Silk?

MR. SILK. I don't think so, sir.

MR. CONANT. Do I understand you to say, professor—I ask you again,

because I am rather impressed with the point that it raises—from your examination you think that it would help, over the future years at any rate, if there were provision made for the filing of all regulations, in addition to the sanctions at present required, with some central bureau or clerk in connection with our legislative machinery?

A. I think it would be of definite assistance.

Q. You think it would be of definite assistance?

A. Definite assistance. It would certainly enable anyone who wanted to find the regulations, if the authority with whom the regulations are to be filed keeps any sort of index, it would certainly help.

MR. FROST. There is the point; an index would have to be kept, and, furthermore, to make it really available to the public, you should be able to procure copies of those.

WITNESS. I am afraid we are talking about two things now. There is, first of all, the question of having them available some place—that is a condition precedent to publication—and then there is the additional question—I agree with you entirely, that there should be publication, but there is the first step; you should first have some central registry for it.

MR. CONANT. Quite. Then, if at any future time, the Government or any Government wanted to publish them in any form, they are ready and available for them.

WITNESS. Yes; you would not have to go through the process I had to go through in digging them up.

MR. FROST. Professor, Mr. Leduc just mentioned a moment ago, that in his Department there are regulations passed under many Acts, which have no real general application at all; they may affect perhaps, fifty or a hundred people or concerns in the province, and the publication of those might be very voluminous and might cost a lot of money. Now, is there any way of reaching some compromise on that situation, and getting over that? Supposing the Department of Mines were to publish and make available to the public in pamphlet form, regulations which in their opinion are of general application, so that if you wrote to the Department of Mines for a copy of their regulations, they would send you the regulations which are generally applicable to everything, and if you wanted anything additional over and above that, you would have to write for it directly; would that help?

A. You have raised two questions. Dealing with them separately. Any compilation by any Department of its general regulations which would be available to the public, is certainly a step in the right direction. My personal opinion is, that it does not go far enough. I think you have to have consolidation of all the regulations in an annual volume like the statutes, if you are going to cover the thing thoroughly, and do what you are now doing with statutes. You regard the statutes as so essential that every lawyer buys them, must have them on his desk if he is going to interpret the law and is going to advise his clients. If instead of ——

MR. LEDUC. But pardon me; these are the Statutes of Ontario, and the annual volumes only contain new legislation or amendments to existing legislation.

WITNESS. I am not suggesting an annual consolidation; I am merely suggesting that annually there would be a volume containing the amendments of that year.

MR. LEDUC. In that case it might be incorporated in the statutes?

A. Quite. The technical side of it I am not discussing at the moment, but, going back to my example, if you were to take that volume of statutes and tear it in half and send half to the lawyer and leave out the other half, you would be in exactly the same position as you are to-day, by giving him statutes and not giving him the other half of the statutes. That is from one point of view. The other question which you raise, namely, whether it would be possible to compromise. Both in England and in the United States, they have worked out a compromise. A board is appointed. Certain members of the Legislature are appointed to determine that certain regulations are not to be published, because they are not of general interest and so forth; for instance, you might decide that regulations affecting the civil service should not be published because they are not of general application; you might decide that regulations of certain professional bodies should not be published because they are not of general application; you might decide any number of things with regard to that—regulations which are merely of a temporary nature—all those things could be left out. It would not be necessary to publish everything. That would be a matter for the Committee to work out.

Q. What I have in mind is this, professor: I am not opposed to the publication of the regulations, I think you are right in saying that they should be published, but I cannot agree with you, as to the inclusion of all the regulations under the same cover. Let me give you an example I have in my own Department. Here is The Mining Act, and in The Mining Act there are fifty-four pages of mining regulations. Well, we have them printed separately, and if a man wants The Mining Act he gets the whole Act, but a lot of people are interested only in the mining regulations, and we save money by having them printed separately.

A. But, sir, there is nothing to prevent you printing that separately and distributing it. This scheme I am suggesting, would not prevent you from distributing to those who are interested in only a portion of the regulations, the regulations in which they are interested and nothing more, or that portion in which they are interested of certain regulations.

Q. To tell you the honest truth, I can't imagine one man in the province being interested in all the regulations; they are mostly interested in one or the other.

A. Well, sir, could you tell me how many people are interested in those regulations, as to the conduct of mines? In the statute it is the conduct of mines, and I have them on my desk, I don't suppose I have read them, but they are on my shelves, and every lawyer in Ontario has them.

MR. LEDUC. But they are part of the statutes; that is why they are on your shelves.

MR. FROST. Mr. Finkelman, you would suggest this; for instance, in 1947, when there is a revision of statutes, that at that time there should be a revision of regulations, and that every subsequent year there should be published with the statutes, a copy of all of the regulations that are passed in that year, and so on for the next ten years, until there is another revision—that is about what you suggest—so that a lawyer, for instance, ordering the statutes, would order the statutes plus the regulations?

A. I would agree with you, only I would qualify it in one respect, that I do not like to see this thing hanging fire until 1947, seven years hence, and there is going to be a good deal of law made by way of regulations before then.

MR. CONANT. If we took this in easy stages, which we like to do, if we were to start with the central filing of all regulations, we would at least, make a very constructive start in that direction, wouldn't we, professor?

A. Definitely.

Q. Then if, in a year or two years or five years from now, we wanted to publish a compilation, we would have the raw material ready?

A. That is right. You would have nearly all the raw material ready; and I would suggest in addition, that when you set up your central registry, you require each Department over a period say of a year, within a year from the date of the establishment, to file all its effective regulations.

Q. You would have to provide that on or before a certain date all regulations must be filed, and thereafter they must be filed on a certain basis of time schedule, or something of that nature, and in the course of time you should have them all together then.

A. That is true. There would be one provision with regard to such a registry that I would suggest. I think it would be necessary to require that the regulations shall be filed within a certain time after they are made; otherwise you would get into this situation. The Securities Act provides that regulations shall become effective in all respects, as if enacted in this Act upon the publication thereof in *The Ontario Gazette;* that is section 35 of The Securities Act. Now, regulations were made under this Act on May 20, 1936; November 24, 1936, and May 29, 1937; they were not published in *The Gazette* until May 6, 1939.

MR. SILK. Three years later.

Q. Would you make the filing a condition precedent to the coming into force of the regulations?

A. I think so.

MR. SILK. I think it is the only way to enforce the filing.

WITNESS. You would have to have some provision of that sort; otherwise filing would be meaningless.

MR. CONANT. Yes, that is true. All right, Mr. Finkelman, thank you.

MR. SILK. I have some matters I should like to read into the record; I do not think it would take more than fifteen minutes altogether. The first matter is in regard to assessment appeals.

MR. CONANT. Are there more submissions about assessment appeals?

MR. SILK. There is just one, a letter from Mr. Harold Fuller, K.C., of Sarnia. He says.

> "There is one other matter regarding which I have forgotten whether I spoke to you about before, and that is the matter of the appeals under The Assessment Act. Under the present Assessment Act, section 73 gives a right of appeal from an assessment to a Court of Revision. Section 84 provides for an appeal to the Ontario Municipal Board in certain cases, and section 85 provides for an appeal to the Court of Appeal. Except in the case of the Court of Appeal, there are no costs provided for, in spite of the fact that after you get past the county judge, the amounts involved must be more or less substantial. It seems to me that the right of appeal to the Municipal Board might well be dispensed with, except possibly, where the appeal is solely confined to the *quantum* of the assessment. There certainly can be no advantage in having an appeal from a county judge on a matter of law to the Municipal Board, when there is a provision in The Municipal Board Act which provides that on matters of law, the chairman of the Board shall rule. The sole effect of this section is to put Municipalities to needless expense, because I suggest, in the great majority of cases coming before the Municipal Board, in which a question of law is involved, there is in any event, an appeal to the Court of Appeal. The fact that under the Act the hearing before the judge as well as the hearing before the Municipal Board is a trial *de novo*, results in a great waste of time and money.
>
> Under subsection 2 of section 85, it is provided that any party who desires to appeal to the Court of Appeal from the decision of a judge, may make application to the judge, but it appears that the application must be made to the judge during the hearing, and before he has given a decision. I do not see what possible use this section is as it now appears. One does not know what the judge's decision is going to be, and therefore can not know whether or not he desires to appeal during the hearing. It seems to me that this section could very properly be amended."

That is all I have on assessment appeals.

On the matter of pre-trial procedure, the Windsor Chamber of Commerce has this to say:

"That the Chamber particularly endorses the recommendations made by Mr. Barlow, in part 3 of his report, with respect to pre-trial procedure in civil actions."

Mr. H. R. S. Ryan of Port Hope, a practising barrister, has this to say, with regard to pre-trial.

"The trial of actions could be simplified, and made quicker and cheaper, if directions for trial were given in each case by the local Registrar or local Master. All documents could be brought in before the Registrar or Master, and those which were admitted could be taken as Exhibits, and abstracts could be arranged. Admissions of fact could be made, and a statement of facts so far as agreed on could be prepared. With such a statement, a *precis* or brief could be prepared and presented to the judge, which should expedite the trial and make his task easier. Many cases which are now put on the list, and settled on the day of the trial, thus upsetting the preparations of counsel and witnesses in subsequent cases, might be settled on such a motion, and the lists would not be so cluttered up with actions which it is never the intention of either party to bring to trial. Formal proof of such documents as were admitted could be dispensed with, and time could be saved in this way also. Possibly, appointments for trial could be made, and much jostling in settling the weekly list could be avoided."

Mr. MacGregor, the magistrate at Pembroke, has this to say.

"It is suggested that in Summary Conviction cases, it be sufficient if the magistrate took notes of evidence rather than the evidence in full.

Of course, this could only apply to cases of offences against Ontario statutes, but there might be a recommendation to the Department of Justice at Ottawa, that this be enacted in the Code. If this procedure were in effect, it would save considerable expense, especially when the magistrate has to go to small places, and there is a stenographer available where court is held."

I think that is meant for, "there is no stenographer available."

"It would seem to me to work no hardship on the accused, because, in the case of an appeal, all the evidence is again heard.

The procedure in appeals from Liquor Control cases, to be the same as in appeals from Summary Conviction cases, and not on the Record as it is now."

Of course, that is consistent with his previous submission, that magistrates' notes should be used.

Mr. W. B. Common, of the Attorney-General's Department—this is a memorandum to yourself, sir, which you sent to Mr. Barlow:

"Re—Ontario Summary Convictions Act, R.S.O. 1937, Chapter 136.

The above Act provides the machinery for the prosecution of charges, the recovery of penalties, and appeals in all prosecutions under Provincial Statutes.

Section 3 of this Act provides that part 15 of the Criminal Code, excepting certain sections, shall apply *mutatis mutandis* to every prosecution under Provincial Statutes. As you know, the appeal sections under part 15 of the Criminal Code provide for a trial *de novo*.

This is really, in my opinion, an archaic procedure, and dates back to the time when there was no record kept of the trial, and it was necessary that a trial *de novo* on appeal be had.

It has always seemed to me to be an anomalous situation, where either the Crown or the accused should have 'two bites of the cherry'. In other words, if the prosecution fails, it has another chance to bolster up its case on an appeal *de novo*, and by the same token, the accused has another chance to defeat the cause of justice by bolstering up his case in a trial *de novo*.

These conditions obviously lead to indifferent prosecutions, and indifferent defences, with resulting expense by way of appeals *de novo*. I have always been strongly of the opinion that in appeals in summary conviction matters under Ontario Statutes, the appealing party should be confined to the record of the proceedings before the magistrate. This will tend to a more careful prosecution of the offences, and in the same manner, more careful defences. I might point out as a good example, the appeal provisions of The Liquor Control Act, in which the appealing party is confined to the record before the magistrate."

MR. CONANT. There is this thought occurred to me in regard to summary convictions. if that were done, it would have to be limited to cases in which there was a stenographic report taken, would it not?

MR. SILK. I think that was agreed the other day, sir.

The Nipissing Law Association state:

"That in all cases in which a magistrate delivers judgment, the appeal from his judgment to be to the local judge.

That all appeals be heard on the evidence originally given, and that there be no trials *de novo*."

The Windsor Chamber of Commerce, on the matter of assessors and experts, particularly endorses the recommendations of Mr. Barlow.

That is all I have, with the exception of one matter which has not yet been before the Committee. I think Judge Mott discussed it with you last spring, and it was suggested that it be placed before the Committee at the resumed

sittings. It is in regard to the procedure under The Deserted Wives' and Children's Maintenance Act.

MR. CONANT. That has been more or less renewed by discussion in one of the near-by municipalities. Didn't the Council of East York have a discussion of that?

MR. SILK. Yes, I believe that is right, sir—or was it York Township?

The proposal, briefly, is to give the magistrate some jurisdiction over the children and the parents of the husband and wife with whom he happens to be dealing. Judge Mott says:

> "Section 1 of *The Deserted Wives' and Children's Maintenance Act*, gives magistrates the power to summons and hear summarily cases of desertion of a wife by her husband, and to order the payment by the husband, of such weekly sum as he may deem proper for the maintenance of the wife and child.
>
> This section does not give the magistrate any power to make provision for the custody of the children or the conduct of the parents. The magistrates are constantly being confronted with cases where the husband interferes with the wife's parents, with whom she may be living, and where the child is shuffled back and forth between the parents, and he has no power to deal with such situations. The parties could obtain some relief in the Supreme Court, but since most of the cases dealt with are poor people, many of them bordering on ——"

MR. FROST. Didn't he have power under The Children's Protection Act? I thought there was a provision there ——

MR. SILK. That is under a different act, sir.

MR. CONANT. The only power now is to make them wards, isn't it?

MR. SILK. Yes; under The Children's Protection Act they are committed to an institution and they become wards.

> "The parties could obtain some relief in the Supreme Court, but since most of the cases dealt with are poor people, many of them bordering on the mentally unbalanced, the cost of a Supreme Court action is prohibitive. The same difficulty arises under section 2 of the Act, which gives the magistrate power to order a father who has deserted his child, such sum not exceeding $20.00 weekly, as the magistrate may consider proper. Magistrates are constantly being confronted with cases where the father obeys the order, but molests the wife, by complaining to her employers, confronting her on the street at all times of the day, or where the parents fight among themselves or with the parents.
>
> The courts of summary jurisdiction in England, have power to order that the parties be no longer bound to cohabit with each other, that the

legal custody of the children, where they are under sixteen years of age, be given to the wife or husband, and order the payment by the husband, such sums as are reasonable for the maintenance of the wife and children.

It is proposed that the amendments to section 1 and 2 of The Deserted Wives' and Children's Maintenance Act, give only judges of the four family courts, when a wife or child has been deserted by her husband, power to make an order regarding the custody of any child of the parties, the right of access thereto of any person or either parent having regard to the child's welfare, the conduct of the parents or persons, and the conduct of the parents towards each other."

And he has a draft section. You will note from that last paragraph, that Judge Mott would make a test of the proposed legislation in the four family courts in the province; there is one in Toronto, one in Ottawa, and I am not sure where the other two are.

MR. CONANT. That boils down to extending the powers in those deserted wives' cases to determining who shall have the custody of the child.

MR. SILK. And also restraining the parents of the child's father and mother—that is, restraining the grandparents.

MR. CONANT. It seems to me that one of the neighbouring municipalities was anxious that the magistrates should have fuller powers to send the husband to jail.

MR. SILK. York Township.

MR. CONANT. Yes; they wanted the magistrate to have power to send him to jail; wasn't that it?

MR. SILK. I think they wanted the magistrate to have power to have a deserting husband whipped, if I remember correctly.

MR. CONANT. Well, whipped and sent to jail.

Is that all for the present, Mr. Silk?

MR. SILK. Yes, that is all for the present.

MR. CONANT. And what about Monday?

MR. SILK. On Monday we have Chief Justice Robertson, Chief Justice Rose, Mr. Justice Middleton, probably Mr. Justice McTague, Mr. Fairty of the Toronto Transportation Commission, and to-day at noon I invited Mr. Hellmuth.

MR. CONANT. That ought to be enough for one day.

MR. SILK. Mr. D. L. McCarthy and Mr. Mason wish to make representations on behalf of the Benchers with regard to pre-trial and increased County Court jurisdiction.

MR. CONANT. Can we finish these submissions early next week?

MR. SILK. I think we ought to allow Monday and Tuesday.

MR. CONANT. Is that agreeable, gentlemen? All right, thank you.

(Adjourned at 3.50 p.m., Wednesday, September 25, 1940, until 10.30 a.m., Monday, September 30, 1940.

THIRTEENTH SITTINGS

Parliament Buildings, Toronto.
September 30, 1940, 10.30 a.m.

MR. CONANT. Gentlemen, I am sure we all regret that since we adjourned we have lost one of the members of our Committee, fortunately not by reason of what might be called a sad occurrence, but by reason of a choice that he has made to leave the field of political controversy and ascend to the heights of the judicial realm, as one might say. We certainly cannot augment the Committee at this stage; this Committee was appointed by the Legislature, and it can only function under that appointment until the Legislature meets again. I do not think there is any question that we should go on and finish our work, much as we regret the absence of Mr. Leduc, which still leaves four members of the Committee. While it is an unfortunate number, the matters with which we are dealing are not, after all, controversial in the sense of being likely to raise any acrimony or anything of that nature; if we differ as a Committee we undoubtedly will differ honestly on matters of opinion and our own views of things. When we come to make our report we will simply have to work out the best we can with the members that are available. So I think, and I believe the Committee will agree with me, that we will have to proceed.

It is always convenient to have a Vice-Chairman, although one may not be necessary at this stage, if the Committee care to suggest a Vice-Chairman; perhaps it should be put on record. Mr. Strachan might care to undertake that duty; he is here in the City all the time. and there should be somebody here all the time. Is that agreeable Mr. Frost?

MR. FROST. Yes.

MR. CONANT. Then there will be a resolution of the Committee that Mr. Strachan be the Vice-Chairman; he is available at all times. On that understanding, gentlemen, we will proceed.

I might call you attention to the fact that since we adjourned on the 25th the evidence of the proceedings for those three days, September 23, 24 and 25, has been extended and is now available. That indicates a considerable improvement in the mechanics of the Committee, and when we conclude our hearings the evidence and proceedings will no doubt be soon available again.

Now, Mr. Silk.

MR. SILK. Mr. Chairman, I may explain at this point that last week I discussed with the Chief Justice of Ontario and Mr. Justice Middleton the form in which the judges might best express their views on the various subject, and I furnished to each of the judges a copy of pages 3A and 3B of our Committee notebooks, so that they might know the various matters upon which the Committee has not yet made a final decision. It has been decided that the best way in which we should proceed would be for the Chief Justice to go down a list of subjects which he has prepared and discuss each one as he proceeds.

THE HONOURABLE R. S. ROBERTSON, Chief Justice of Ontario.

MR. SILK. The first matter, sir, is the proposed abolition of the grand jury system in Ontario.

MR. CONANT. I should like to interject that, so far as I am concerned—and I know I speak for the Committee—we are not only pleased but honoured by having the Chief Justice here, also Chief Justice Rose and Mr. Justice Middleton. We have had a lot of submissions on these various points from members of the Bar and from citizens generally; I think these are the first submissions we have had from members of the Supreme Court, are they not, Mr. Silk?

MR. SILK. I think that is so, sir, yes.

MR. CONANT. And I just want to say, sir, we are very grateful to you for coming here and giving us the benefit of your views.

WITNESS. I think I am speaking fairly for the members of the Bench generally when I say that we all regard the matter, any matter affecting the administration of justice, as a matter of our concern, upon which we ought to give any assistance that we can. The judges at the beginning of this year had an elaborate report prepared, copies of which I think are in the hands of the members of the Committee. I should just like to say this about that, so that you may understand how it was prepared. What we call the rules committee—that is a committee of five or six judges, of which Chief Justice Rose is the chairman—took in hand the consideration of Mr. Barlow's interim and final reports during the Christmas vacation at the end of 1939 and spent a good many days, I think perhaps most of their vacation, in that work, in preparing the report. The report was then submitted to the whole council of judges, and we spent pretty much the whole of two days and part of a third day in going over the report and making changes in it, additions to it, adding reasons here and there that came within the experience of some judge, perhaps, who had not been on the committee. So you have in the judges' report, I think, a pretty full and fair representation of the opinion of all the judges. I should not want you to think that we were all unanimous on every point, but on every point of importance—I recall only one as to which there was a divided vote; that was on a matter affecting some matter of practice in matrimonial cases, and not of any great importance, perhaps.

My remarks would be very much abbreviated by my referring to that report without reading it, and suggesting that you will find there what is more valuable than the opinion of any one judge; you have the opinion of the council of judges.

On the matter of grand juries I just want to say a word or two. A statement was made by Chief Justice Rose somewhat over a year ago in, I think, addressing the grand jury in Toronto. He made a careful statement of his views upon the matter. I do not know whether the Committee members have that. I have a copy which he was good enough to give me, and I thoroughly endorse, so far as my poor opinion is worth anything on the matter, all that he said. If it is of any value to the Committee, I have that here.

I just want to add a word or two, more by way of emphasizing one aspect of what he said. The matter is often discussed—let me say this first. I should like to speak of grand juries and juries together in this particular aspect of it. A good deal is said by way of criticism of the work of both grand juries and petit juries, to the effect that they are influenced by things that perhaps a wise judge would not allow to affect him. I do not suppose opinions will ever agree as to the merits of that criticism. There are those who say that the views that the jury adopt, and that they are criticized for adopting, are all that ought to enter a wide consideration of the merits, particularly of a criminal matter. They err, if they err at all, usually on the side of mercy or leniency towards the accused; that is the general trend and the general object of criticism. In civil matters the jury is apt to lean towards the poor man rather than the corporation or the rich man. Again, some people think that is an error on the right side. You will never get unanimity or anything like it on that question.

But it seems to me that that is not the most important view. Every citizen, in my mind, has the right and the duty to take part in the administration of justice, and whatever our practices have in the past afforded in the way of opportunity for that participation, in my view, should not be curtailed. The administration of justice is a function of government, and the people generally should have a hand in it. No mistake is more common to-day than to think that, because some benevolent and wise dictator, perhaps in the nature of an autocratic commission, can do a better job, the right of the people to run their own affairs should be curtailed. To be a free and self-governing people is an end in itself; it produces the best men and women, even if someone else could be found who would do a more efficient job; and, in my view, any curtailment of these rights, any curtailment of the activities and the rights of the people to govern themselves, even in the administration of justice, should be avoided.

As to grand juries, there is one observation I want to make in addition to that. We have had them, of course, for hundreds of years. I know that in some of our provinces, I know that in England, they dispensed with grand juries, but the period in which they have been so dispensed with has been so short that it is impossible to tell anything of the operation of it. The grand jury is hundreds of years old. Now, if the grand jury has become in any way antiquated, let us modernize it, let us correct its deficiencies, rather than get rid of it.

In that connection one observation I should like to make is this. We all know that it is common practice for grand juries to make presentments at the end of their work, and they make recommendations, and the presiding judge thanks them for it and says that he will see that a copy of their recommendation is sent to the proper quarters; and that is the last you ever hear of it. I think something could be done to make an improvement in that respect, and I am making this suggestion, not having considered the matter, but rather as some-

thing to show that something could be done. It would be possible, for example, to require that any institution or officer who is made the subject of criticism or recommendation in the grand jury's report should report back to the next grand jury what has been done about it, or, if nothing, why, giving an explanation, so that the matter may be carried on and not pigeon-holed, as I am afraid is what generally happens.

Then it has been said, I understand, before this Committee that it is important that the grand jury should have a say in who should be prosecuted, who should be tried before a petit jury. It is also important, I think, that the grand jury should have the right to see who is out on bail and not being brought to trial. I know they have the broad right to indict people themselves, but in practice in this country that is not done. Everyone knows that by some procedure in the State of New York the grand jury is a very active body in bringing before the courts people who have not been brought there otherwise. As to that function, while I should think it would be very seldom exercised, it would be well to see that the grand jury have it before them as one of their duties.

MR. CONANT. You are referring, of course, there to the general gaol delivery that the court ——

A. Well, I was getting a little beyond the gaol delivery. In one aspect, I am thinking of the man who is out on bail, who has been charged with some offence, and whose trial for some reason or other is postponed and postponed. That happens at times, so far as I know always for a good reason, but I also know, and everybody knows, that the public sometimes asks questions. Well, let the grand jury settle the matter. There is nothing like satisfying people by an enqiry by their own representatives, so that there will be no criticism. The courts are criticized ——

MR. FROST. Tell me, sir, just in that regard. You mentioned the situation in New York, and some mention was made of that here a few days ago. Apparently, as I understand it, according to newspaper reports, the proceedings are in public. Now, there has been some criticism in connection with grand juries due to the fact that the hearings and the evidence are not in public. Do you think that there should be any improvement or there could be any improvement along that line, or is that desirable?

A. I would think it ought not to be in public. In a preliminary enquiry of the kind that they make, they ought to be privileged, they ought to have the freest hand to make it and feel that they are not injuring anybody by doing so. I have often wondered just what the difference was in New York, and I thought perhaps it was more due to the very great enterprise of the newspaper reporters, who manage to get out of the jurymen things that they were supposed to keep secret.

As to both grand juries and petit juries, I should like to suggest that the exemptions from service are far too many, and I am not speaking particularly or chiefly of statutory exemptions. There are a great many what one might call unauthorized exemptions. There are a lot of persons who would make admirable jurymen, I should think, as they make admirable men in their own affairs, who never serve on a jury; I don't know what they would think about it

if a constable were to turn up with a jury summons for them; they have never heard of such a thing; but I think they ought to. I would think that if you had the general manager of a bank and a mechanic and a farmer all on the one jury it would do them all good, and they probably all would understand each other much better in their affairs afterwards. One is tempted to think sometimes that the only men who are called to serve on a jury are men who will be glad to get the jurymen's pay, that anybody above that standard is left off.

MR. CONANT. Well, your Lordship, there you raise a question that is of very great interest to this Committee; that is the question, first, of course, whether it is desirable, and secondly whether there is any means of improving the calibre or status of jurymen.

WITNESS. Well, my suggestion is, the way to improve their calibre and status is to call everybody.

MR. FROST. I agree; I think that is right.

MR. STRACHAN. I agree.

MR. FROST. Particularly at a time like this, when we have military service, when everybody is called upon to serve; why shouldn't everybody be called upon to serve on a jury?

WITNESS. And let me add another practical suggestion. I am quite aware, but not as fully aware as Chief Justice Rose, that at every assize, and I suppose at almost every place, there is someone who comes and asks to be excused, and has perhaps a valid case. A man in large business would have his affairs arranged, his appointments, perhaps a trip to England or a trip to some other part of Canada, that would make it impossible for him to serve a week or two weeks for which he is called. I do not suggest that the court should not exercise a wise discretion in relieving him, but I would suggest that this should be done, that he should only be relieved upon terms that he serve again at the earliest date possible, and, of course, for that there is no machinery under our present practice.

MR. CONANT. No. May I propound this, your Lordship? There are twenty-six categories of exemptions, from A to Z. Supposing those were eliminated, all or substantially, and we set up some machinery or procedure for dealing with such cases as might require attention; do you think that would meet the situation?

A. Well, I do not think you could—I would not think you wisely would abolish all exemptions. For example, there is no use putting lawyers on a jury; they would be the worst jurymen in the world.

Q. Well, I said all or substantially all.

A. I have not read the list of late, but I think it includes persons ——

MR. FROST. For instance, Hydro employees and street railway employees.

WITNESS. I don't know why they should be left off—or every editor, reporter or printer of a public newspaper or journal; why, who would make a better juryman than a reporter? They know everything.

MR. CONANT. What I am coming at is this, your Lordship. I am in full agreement with you, that this list of exemptions should be very radically revised. Then the difficulty occurs, it seems to me, as a matter of practical working out, as to whether any other procedure would be necessary than what we have now to take care of any who might feel that they should be exempted. You see, as I recall it, your Lordship, to-day the only one who can exempt a man is the trial judge; is that not so?

A. Yes.

Q. Now, that might not meet the situation, if you were eliminating a large number of the categories of exemptions, because you might have to know beforehand, some time in advance of the trial, whether your panel was going to stand or whether there were going to be exemptions, a hole shot in it, as it were. Would it not be possible to have that done previous to the trial?

A. I think the method of selecting jurors to put on the panel for the court, the system, perhaps ought to be reconsidered. In my early days in practice, my senior, the late Mr. Justice Idington, happened to be Crown Attorney, and he used to have me attend the meetings of the selectors at times, and I saw something of the way the work was done. It was not done very much as one would suppose it would be done who had not seen it. In part that gave me the idea, which I have always had since, that the question whether the man would want to be bothered rather entered into it, particularly for the petit jury. But there is this also. the selectors had a fair knowledge of the county, and if a man for example was incapacitated for some reason they were apt to know it, one of them would likely know something about it. They left people off, and did a lot of the work that would eliminate people that I think perhaps you were in part suggesting would not be useful.

MR. CONANT. It seems to come down to this, as far as we have analyzed it, your Lordship, that in the counties—for instance, I have sat on boards of selectors in Ontario County. Now, somebody on that board knew practically every man that came up. But when you get to a city like Toronto, and I imagine Hamilton, and the larger centres, where you are dealing with literally hundreds if not thousands of names, that does not apply; the old-fashioned system—because this is a relic of years ago—where the selectors were presumed to have personal knowledge, does not apply in the case of the city of Toronto. We had here one gentleman, Mr. Ogle, who has been engaged in this work for, I think he said, twenty-five years, and he gave us the distinct impression that in Toronto it is purely a matter of mathematics, or mechanics if you like. Now, is there any way of overcoming that in the larger centres? That seems to be the difficulty.

CHIEF JUSTICE ROSE. Has Judge Parker been asked about that?

MR. SILK. No.

MR. CONANT. No, he has not. We might hear from him.

CHIEF JUSTICE ROSE. He can probably answer that question better than we can, can't he?

WITNESS. Yes. My actual experience of it, of course, is pretty old, pretty ancient.

CHIEF JUSTICE ROSE. I know that he is much concerned in it; he has talked to me about it.

MR. CONANT. Well, we will hear Judge Parker, possibly, before we adjourn. Pardon me for interrupting, your Lordship.

WITNESS. Well, I don't know that I can add anything now to what I have said on the point. I merely desired to call attention to it.

MR. CONANT. May I mention this, your Lordship just before you leave the question of grand juries. There are one or two things that have bothered me particularly in that connection. Granting all you say about grand juries, and all that others say, I find it difficult to understand or to appreciate why those considerations have not applied in so many other jurisdictions—all the western provinces, England, and I think South Africa and Australia. In fact, we are the only large jurisdiction in the British Empire, substantially large jurisdiction in the British Empire, that is left with the grand jury. And let me point this out to your Lordship. As I recall it, in England at the outbreak of the first Great War they abolished grand juries for the duration of the war, so that they automatically came into effect again I think in the year 1919; then last August they substantially abolished them again. I instance that as indicating that they have had the experience of about five years, from 1914 I think until 1919, and yet they revert to the same system last August, with some minor exception; I think there are two counties in which they still have them. That is one of the things that has perplexed me in this matter.

WITNESS. Well, I have thought of that at times. I do not know how much of what one might call "follow your leader" there is in that. As a matter of fact, the present suggestion that you make, Mr. Attorney-General, is rather of the same order, to do it because somebody else did it. But, more seriously, I think there is this to be said. To any observing person there has been what, in my judgment and in the judgment of many people, is a most undesirable trend in democratic countries. We have been rather looking somewhat enviously at what we call the efficiency of the dictators; we have come rather to distrust the democracy that at the present time we are fighting to preserve; we have been rather doubtful of the people's ability to do this, that and the other thing. It is evident in many things besides the administration of justice. The general tendency has been attacked vigorously in England by the Lord Chief Justice. I am not suggesting that he has said anything about grand juries—so far as I know he has not—but the tendency attacked by him is that, instead of letting elected bodies govern matters and control them, keeping the people in direct touch, we have all sorts of commissions and boards set up that, rather autocratically sometimes, deal with these matters. In the United States, of course, everyone knows that in the impending election one of the issues is the question whether the people should any longer permit that sort of thing to the extent to which it has gone on. That is my answer to the ——

MR. CONANT. Of course, I am still perplexed, and, with the greatest deference, it does seem to me that England is the home or the genesis of our parliamentary institutions and our administration of justice, and I cannot relieve my mind of the thought that their regard for democratic institutions should be as great as ours, and yet in the face of that they have reverted to the system of doing away with grand juries after their previous experience.

WITNESS. I do not know at all, of course, to what extent there is unanimity in England on the matter, and the fact that they had a short trial of it during the last war is, to my mind, proof of very little. Wartime is not the time to test these things, nor is a short period of four years of much value. When you have had an institution that has existed for over seven hundred years, to give it a brief trial for three or four years in exceptional times, a trial of doing without it, I would not think would form any safe guide to anybody. I think there is a definite trend among certain classes of minds to curtail democratic institutions ——

MR. CONANT. What they call reactionaries?

A. —— which are of vital importance.

Q. They call them reactionaries, don't they?

A. Some people call them that, yes.

Q. Rightists or reactionaries. There is one more observation I should like to make to your Lordship; that is a matter that has concerned me, and if you care to comment I would be very glad to have your comment. The question has been raised as to whether, if grand juries are abolished, there should not be some protection set up against the present power of the Attorney-General to prefer an indictment, which at the present time goes before the grand jury and which, if the grand jury were abolished, would go directly to the trial tribunal, the trial jury. It has been suggested that to meet that situation, where the Attorney-General prefers an indictment, a judge would function in place of the grand jury to find out or to pass upon whether there was a bill that should be tried or not, only in cases where the Attorney-General lays an indictment. They are not very frequent—I do not know how many there would be in a year, but there are very few—but it has been suggested that there should be that protection against an arbitrary or dogmatic Attorney-General's placing a man upon his trial without any intermediate procedure. Would that occur to you as offering a safeguard, your Lordship?

A. Well, let me deal with it this way, will you? In the first place, as to the practice as it has existed and as it exists to-day, I have not heard any criticism, nor am I aware that there is the slightest ground for criticism, of any action taken by any Attorney-General.

Q. No, I haven't either.

A. I think there has been no criticism. As to whether, in the event of there being no grand jury before whom the bill may be first laid, the trial judge ——

Q. No, I don't mean the trial judge, your Lordship. What I have in mind is this. Take in my own county, for instance, and suppose an indictment is directed there. The procedure that is contemplated is that the Crown Attorney could take an appointment from any judge, county judge or any judge that is available, and that judge would function in exactly the same way as a grand jury, subject to the same rules about calling witnesses and so on. That judge would not be the trial judge, your Lordship. Then, if he found no bill, that would end it; the Attorney-General's dictum or direction would be washed out. If he found a true bill on that indictment, then it would go on to trial as at present.

A. Well, I would think that first of all the proposition would have to be much more definitely laid out and the exact procedure better defined before one could speak very definitely about it; but, speaking of it as you put it to me, I would say that, in my opinion, it does not at all supply the gap that would be created by dispensing with the grand jury. I would think that the extent and value of the enquiry would vary tremendously with the person of the judge who made the enquiry—the question, for example, of who is to direct what witnesses shall be brought or whether witnesses shall be brought at all. There would always be pressure on the judge—I do not mean improper pressure brought by any person else, but what he would have in his own mind would be that he should not delay and that he should not cause unnecessary expense. In the case of the grand jury, the witnesses are there; they are brought there for the purpose of the trial if there is going to be one, and they are put before the grand jury first.

Q. Of course, what I had in mind was this, that in all respects the procedure would be exactly the same as it would be with the grand jury; the witnesses would be endorsed on the indictment, they would be present, and before "no bill" was found all the witnesses would have to be called—that is the rule, I think—but with the right to find a bill at any stage.

A. I know, but I may be wrong in taking this from you; it would involve a great deal of unnecessary expense if the witnesses were all brought for two occasions—on one occasion to appear before the grand jury and on a separate occasion to appear at the trial. As we have it now in the ordinary case the witnesses come to the Assizes and they are through at the Assizes.

Q. Of course, but I again call your Lordship's attention to the fact that these cases are comparatively rare. In the whole province I am quite sure there would not be half a dozen in a year.

A. I thought you were putting to me the circumstance of there being no grand jury at all.

Q. Yes, that is right.

A. So that every man who went on trial at the Assizes or the Sessions ——

Q. Oh, no.

A. Well, how does he get to trial?

Q. What I mean is where an indictment is laid by the grand jury— I should have added this—without any preliminary investigation having been held. I should have added that.

A. By the grand jury?

Q. No, no; by the magistrate, without any committal. The Attorney-General to-day, as you are all better aware than I am, can lay an indictment without any preliminary, without any committal by a magistrate. I am suggesting that in that case, if there were no grand jury, no committal by a magistrate, and the Attorney-General exercises his prerogative, which he has always had in this province, I think, to lay an indictment, instead of the grand jury there be substituted the safeguard of having a judge passing on that bill in exactly the same way as a grand jury.

A. Well, I fail to see why the observations I have been making do not exactly apply to the situation of which you are speaking. That is, you will have no grand jury, but at some time before the trial commences before a petit jury you will go before some judge, and you take with you the proposed indictment and the list of witnesses on the back of it. As I say, the judge as got to hear it. That is not at the Assizes, but presumably at some other time, and you have to bring your witnesses there to appear before him, unless you do make it the trial judge, and the trial judge has no time for that sort of thing, preliminary enquiries of that sort. I do not know whether you intend to have that proposal continue the secrecy of the grand jury hearing, but in the second place you are taking away two things. You are taking away from the grand jury, who represent the people, their right to say, is this man a man that should be put on his trial? Everyone knows that grand juries are not always governed by the exact terms of the Criminal Code in deciding that; they sometimes say, and I think properly say, "It is all very well, this man may technically have committed an offence, but it is not an offence for which he ought to be tried."

Q. Oh, yes, that is true too.

A. Then in the second place you take away from the prisoner himself, the accused person, the protection that he has of having his peers pass upon it rather than some judicial officer.

Q. Of course, we have had instances to indicate that grand juries even are not infallible, your Lordship.

A. None of us is infallible, and we never will be.

MR. FROST. Tell me, sir, do you think there is any merit in the suggestion that grand juries should be limited to the more serious class of cases, such as are tried, for instance, in the Supreme Court?

A. Well, of course, we all know that there has been, by amendments to the Criminal Code as to procedure, a great limitation in the cases that—a man can get a very long term now without the grand jury ever having heard of his case.

MR. FROST. Well, that was the point, sir.

MR. CONANT. We had the suggestion, by Mr. Slaght, I think it was ——

A. I remember the suggestion. As a matter of fact, Mr. Slaght and I had discussed it.

MR. FROST. I think the point is this. There are such a large number of cases now in which the accused has the right, for instance, to elect trial before a magistrate or speedy trial before a county judge, and so on, that it does seem in the great run of cases that it is rather a curious situation, that just because he elects trial by jury and would come up before say a Sessions jury there should be a grand jury intervene. On the other hand, cases which are normally tried in the Supreme Court are of such a serious nature, for instance murder, where the penalty is one which cannot be recalled if it is ever imposed, and perhaps there is some merit in the proposal that grand juries should be limited to Supreme Court cases. Now, sir, I do not know what your opinion on that is, but ——

A. Well, I don't know that I should offer one. Some little time ago Mr. Slaght and I were discussing it, and the question of expense came up, and I think it was I who said, "Well, if the expense is found to be too burdensome, in any event let us keep half a loaf if we can't have the whole one."

MR. CONANT. These are not days of appeasement, though, any longer.

MR. FROST. You have to appease the taxpayer.

WITNESS. You will observe, of course, that it is only the accused who has the right to say, "Well, I will have a summary trial before the magistrate," or "I will take a speedy trial before the county judge." The accused has been most carefully preserved in his rights. I don't know that I can add anything useful.

MR. FROST. In connection with that same matter, sir, would you care to offer any opinion as to whether grand juries should be reduced from thirteen to nine or to some other number?

A. Well, I cannot say I have any considered view upon the matter, but grand juries used to be a great deal larger than they are now, in my time in any event; I don't remember offhand when the revision was made. But I think you take away somewhat of its representative character if you reduce it and make it too small. There is this lingering always in the idea of the grand jury, that they may know something about it, they may know the circumstances of the people concerned or something of that kind that may incline them one way or the other. I do not suggest that in our modern ideas they should try the case on their own knowledge, but I don't know that there is any way of excluding their own views.

MR. CONANT. I don't want to be offensive, your Lordship, but, returning to that subject regarding the indictment by the Attorney-General. I take it from the Code and the practice as I understand it—for instance, in Quebec, Manitoba, Saskatchewan, Alberta and British Columbia, where they have no grand jury, the Attorney-General can prefer an indictment, and it goes directly to the petit jury. Personally, I am rather inclined to feel that that is a very

drastic removal of all safeguards in those few cases in which the Attorney-General does function, and that the intervention of a judge acting as a grand jury in those cases—where there has been no preliminary, of course, no committal by a magistrate—might be some safeguard against some bureaucratic or arbitrary official putting a person on his trial.

WITNESS. Well, I certainly think they went twice too far; that is, I think they were wrong in abolishing the grand jury in the first place, and I think they were next wrong in omitting to put anything in its place. I would stop at the first. I think the grand jury ought to be maintained, and I do not think we have any substitute for it that is adequate, nothing that fills the same place, of giving a free people the right to have an important say in the administration of justice.

MR. CONANT. Just one more matter, your Lordship. In the amendment that was made to the Jurors Act, I think it was in 1936, it provides for inspections at intervals of not less than six months, but there is a qualification added, that no inspection shall be made without a specific consent of the judge. We had submissions here that indicated that that specific consent had been given in many cases and had apparently run up the number of inspections inordinately. Do you suggest any reason why that qualification should not be removed, the specific consent of the judge?

A. I really must say I cannot add anything of value on that. I have no real knowledge of the subject.

MR. CONANT. Perhaps his Lordship Chief Justice Rose will give us an observation on that when the time comes.

CHIEF JUSTICE ROSE. Yes, I know something about that.

MR. CONANT. Yes, Mr. Silk?

MR. SILK. Then, going on to some other matters pertaining to trial by jury, the next matter dealt with in Mr. Barlow's report with which we are concerned is the matter of increasing the fee where a litigant requires a trial by jury. The fee now is $4; it has been suggested that it should be a substantial fee, of perhaps $25 or $50. In the province of Manitoba it is $50 in some parts, and I think it is $100 in the city of Winnipeg.

WITNESS. I don't know that I can add anything to what is said in the memorandum of the judges that you already have, and you will that on page ——

MR. SILK. It is on page 5, sir, under heading 2, sub-heading 6.

WITNESS. "Costs of trial by jury should remain as at present and not be saddled upon the private litigant. Fundamentally, in our system all people should have equal rights in the courts. The commissioner's suggestion in this matter would discriminate in favour of the rich as against the poor."

That is very briefly stating the view. A jury is much more commonly

asked for by the person with limited means than by the person with ample means, and I think that costs of litigation are already too high, I think so high that they to some extent form an obstruction to the obtaining of justice by people of very limited means. I would sooner see people made to pay for something else rather than pay in this way for a jury.

MR. CONANT. Of course, there is this angle to it—I am not expressing any opinion—that the jury, while it is a part of our administration of justice, is an expensive form of adjudication. Should the taxpayer, should the state, provide that rather elaborate machinery for, after all, the comparatively few among our whole population that invoke it?

A. I do not know—I do not know whether anyone knows—what proportion of the cost of the administration of justice is made up of jurors' fees, but in principle I do not know any reason why a litigant should pay for the jury any more than he pays for the judge. I think there are places where the judge gets fees—I am not suggesting in any British possession, but I think there are places where the judge gets paid so much for the cases he tries, at least some judges, and magistrates perhaps do among us; I do not mean police magistrates, but they used to; a justice of the peace got paid.

Q. Your Lordship observes that the cost of litigation is high; I think you would probably agree that it is not the costs that are collected by the state that constitute those high costs; it is items entirely beyond the control of the state, because the fees payable to the state ——

A. I quite agree that the ——

Q. May I suggest that the fees payable to the state on most litigation would not exceed perhaps $10 or $20 or something of that nature. It is the parties' own expenses that make the costs so high, is it not, your Lordship?

A. It is expense none the less that he has to pay.

Q. Oh, yes, quite.

A. And as a general principle I should say that a man should no more have to pay for the services of a court to try his rights and wrongs than he has to pay the fireman for coming to put the fire out in his house if there is one, or the policeman for arresting the man who robs him.

Q. Oh, quite, I agree with you. I only made the observation because I did not want to have the impression go out, and I did not think you meant to give the impression, that the high costs involved are imposed by the state

A. Oh, no.

Q. That is not the case.

A. No, I was thinking of the matter broadly, that litigation is an expsenive venture; but I quite agree that the disbursements that in any way find their way into government channels of any sort, or any officer or examiner or anything of that sort, are quite small.

Q. Nominal.

A. And they have not greatly increased with the expense of providing them.

MR. CONANT. Then your next item, Mr. Silk?

MR. SILK. The next is as to the right of a trial by jury. Mr. Barlow recommends:

> "That all civil actions where a jury is now optional be tried by a judge without a jury except where upon an application to the court or a judge it is found that the questions in issue are more fit to be tried by a jury than by a judge."

That rule was recently adopted in the province of New Brunswick, I understand.

MR. CONANT. In England, too, haven't they that rule now?

MR. SILK. Yes, I believe they have, quite recently. We looked that up the other day.

WITNESS. Well, I do not approve of the suggestion. I think our present practice affords ample opportunity to the court to winnow out the cases that a jury should not try. Many persons think that we have perhaps gone too far, and I think in that instance we have gone farther than they have in England. There are many cases tried in England with juries that we do not try that way.

MR. CONANT. You mean by statute?

A. No. The practice is different. The judges do not dispense with juries as freely as they do here. One reading the law reports is rather impressed with the questions there that go to juries, that we would not think of presenting to a jury.

MR. SILK. Then the matter of increasing the powers of the Court of Appeal where an appeal has been taken from a jury trial; I see that the judges, on page 6 of their memorandum, not only approve of that, but also suggest the manner in which section 26 of the Judicature Act should be amended.

WITNESS. Well, we deal with that on page 6, and we make a recommendation. I only wish that I could feel that the recommendation was going to meet the whole difficulty, but I have an idea that fifty percent of it will still remain. There is a real difficulty, owing to the different viewpoints of different judges. Every lawyer in this province knows that there have been in recent years numerous cases in which the Court of Appeal of the province has set aside the verdict of the jury, holding that it was not reasonably supported by any evidence, and on appeal the Supreme Court has taken a different view. Now, that difference in viewpoint is not entirely based upon their views of the powers of the Court of Appeal; in some cases it is quite obvious that it is a different view of the facts, a different view of the inferences to be drawn from the facts. One only gets that idea well in his mind by having to deal with some of the cases. Perhaps nothing emphasizes it so much to one as to have his own judgment reversed; he

then begins to enquire why. But I think there is no question that this suggested amendment, the one suggested by the judges on page 6 of their memorandum, will not entirely remove the difficulty that exists and is rather regrettable; but I do not know any way to avoid it.

MR. CONANT. Of course, I suppose the fundamental argument on this whole question is as to whether the Court of Appeal should be placed in the position of acting as a reviewing jury, a super-jury, because by the extent to which you increase the powers of the Court of Appeal to interfere with juries' verdicts you are more or less nullifying or reviewing their findings; isn't that it?

A. Yes.

Q. I am not stating that as my opinion; that is the argument on the other side. Personally, I have an entirely open mind on this subject, but I think it is of the utmost importance, your Lordship; I think you perhaps will agree with that?

A. Well, I should hope that, even if you were to go the full distance of the recommendation that has been made on page 6 of the judges' report, the Court of Appeal would exercise their increased powers with great moderation.

Q. That is what it all comes down to, isn't it, your Lordship?

A. Yes.

Q. It all comes down to that, that if the ——

A. Not all, no. You still have the other element of which I speak. It is astonishing, and since I have been on the Bench I have been much impressed with astonishment at the different views that different minds will take of the same evidence. I do not know any way to account for it, or any way to cure it; they simply do, that is all, and that is very marked as between the Court of Appeal and the Supreme Court. And let me say this, that it has not always trended the same way; I think that one could go back over a reasonably long period of years and find a time when it was almost the reverse, that the Court of Appeal was more disposed to take the view that the jury should rule, and the Supreme Court the other way.

Q. Your Lordship, this is the angle of it that concerns me particularly; aside from the excellence of the jury or of the Court of Appeal, what concerns me primarily is as to the effect upon litigants or our people. What is the final result, if the powers are enlarged, upon the people who are availing themselves of the machinery for the administration of justice? That is what concerns me particularly.

A. Well, speaking entirely for myself, I am democratic enough to not shed any tears over leaving it the way it is, and if the Court of Appeal goes wrong and upsets the jury without good grounds, then they ought to be set right; but I do not like the idea of curtailing the proper functions of a jury.

Q. Well, haven't you got two angles, rather, to look at? You have got

the angle of let us say the wealthy litigant, who when he meets a reverse before a jury will almost certainly go to the Court of Appeal if the jurisdiction of the Court of Appeal is enlarged, and haven't you also got the category of the action, the type of litigation, that has been brought forward solely because or largely because of the hope of getting a compassionate jury or something of that nature to give a favourable verdict? It seems to me there are the two angles to it.

A. Yes.

Q. Would you care to discuss those two angles, your Lordship?

A. Well, of course, there is not perfect agreement among judges or among courts as to just what power the Court of Appeal has now to review the finding of a jury. As I have said, that is one of the matters upon which, either in the interpretation of the rule or its application, the Supreme Court at Ottawa as at present constituted seems to frequently disagree with the Court of Appeal. That has been for a matter of some years; cases have been frequent. One must recognize that there is some difference of opinion between the two courts as to just what the rule is. The judges of the Court of Appeal think they are following rules well established by the Privy Council. Whether the Legislature should go so far as to say that the finding of the jury shall have just as much and no more respect paid to it than the finding of fact of a trail judge, I do not know; that is a matter for opinion.

Q. Your wording here is, "may pronounce any judgment which upon the evidence ought to have been pronounced." Now, that, I take it, would leave it open to the Court of Appeal, practically to occupy the same position, and exercise the function in the same way as the jury, would it not?

A. I am afraid that unless the Court of Appeal interprets those words very mildly, that is the effect of it, and I should hope that the Court of Appeal would do so. I would not like to see the Court of Appeal usurp the functions of a jury.

MR. FROST: This, sir, might lead to that, if the Court of Appeal were not disposed to interpert that very mildly?

A. Well, I am afraid that that may be so, and therefore, I think perhaps, more consideration ought to be given to it. It is a difficult question.

MR. CONANT: Well, it is. We are all in agreement on that, and I am sure ——

WITNESS: And it becomes more difficult when we try to reconcile the pronouncements of some of the courts. I think that there have been *dicta* in the Supreme Court of Canada that it would be difficult to reconcile with some statements made by the Privy Council.

MR. CONANT: Well, are we right in assuming, your Lordship, that your inclination would be to leave matters as they are?

A. Rather than adopt ——

Q. That may be a leading question.

A. I would leave it as it is until I found a quite satisfactory solution.

MR. CONANT: What was the wording Mr. Barlow suggested there? Has he got a wording suggested?

MR. STRACHAN: At page B12.

> WITNESS: "The court, upon an appeal, may give any judgment which ought to have been pronounced, and may make such further and other order as may be deemed just."

The judges thought that that, while meaning substantially what the recommendation they make means, was not specific enough in stating that they might reverse findings of fact. Mr. Barlow's text preceding his suggestion, really leads to an amendment such as the judges suggest, and the view was merely that he did not carry out his own suggestion adequately.

MR. CONANT: May I ask this, your Lordship, because this to my mind is very fundamental to the consideration: would you be disposed to express any opinion as to whether litigation to any considerable extent is carried forward with the hope and expectation that the jury under our present practice, may be induced to give a verdict, and that the same practice might not prevail if it were subject to wider review?

A. I have no doubt that there are cases that are brought to trial before a jury, that probably would never be taken to trial if there were no jury. That happens, and, while it does not happen every Assize or anything of that kind, it happens commonly enough, I think, to be a practice that we must all recognize as one that exists.

Q. What you might call adventure in litigation?

A. Oh, well, I don't know. There are men who do excellently before a jury, and who do the very opposite before a judge, and they always feel that if they can have a jury, then they have got a chance. If you ask those men, of course, they think the jury has got far more sense than the judge has, for that particular type of thing.

Q. I think our minds are directed to the same class of action; but are there not actions, is there not considerable litigation that is carried forward, realizing that ultimately it will find itself before a jury, and that the verdict may depend upon considerations other than the strict merits of the case?

A. Oh, there are cases of that kind. I would not say considerable; I would not like to state the percentage; it would be very small; but there are such cases, I have no doubt.

Q. If the powers of the Court of Appeal were widened, that class of case would probably be discouraged, would it not?

A. Possibly so. I think that perhaps, is the main purpose, or one of the main purposes, of the suggestion. The trouble is, you might pull out some good plants while you were pulling out the weeds.

MR. FROST: All those uncertainties go to make up British justice, after all.

WITNESS: Oh, quite.

MR. FROST: And if you try to cure some uncertainties, perhaps you will do more harm in another direction.

WITNESS: There is no such certainty that the judge will be right. There is nothing infallible about the court that I know of.

MR. SILK: Then, sir, on the matter of pre-trial procedure, Mr. Barlow discusses that practice at some length, which is in force in some of the states of the Union, and concludes that the rules of practice should be amended to provide for pre-trial procedure in certain of the larger centres of the province.

WITNESS: That is dealt with in the judges' report at page 12, and the judges were unanimously opposed to it; and I, for my part, heartily concur in their view.

MR. CONANT: Since both of these reports were set up, we had one submission here, your Lordship, I think it was from Mr. Chitty.

MR. SILK: It was Mr. Chitty, yes.

MR. CONANT: He outlined to us the practice in England, where they have what they call order for directions. He stated to us here, that in England they have a practice similar to our practice in third-party proceedings here, where you have to go for directions, and he was telling us that in England at the present time, they have a motion for directions in all litigation before it goes to trial. I was just wondering if you were familiar with that practice there, your Lordship?

A. Only in a general way. Of course, they also have the pre-trial practice, which I take to be something quite apart from that. That is, this motion for directions is made, as I understand it, quite early in the litigation.

MR. CONANT: Yes.

MR. SILK: I think, sir, as Mr. Chitty explained, that practice has been changed within the last two years, and the motion does not now take place until the pleadings have been closed.

WITNESS: Whether something in the way of certain selected classes should be done, to avoid going through all the procedure of pleadings and discovery and production of documents and notices to admit and produce, whether that should be permitted in every case, I think, is a matter for consideration. However, that is not Mr. Barlow's suggestion. Mr. Barlow's suggestion does not operate at that stage at all. Pre-trial procedure is something that comes along after the case is ready for trial; they then appear before a judge and discuss the issues as stated on the pleadings, and if the pleadings need some amendment, they amend them then; the judge tries to get the issues narrowed if he can, get admissions of facts that are not really controverted, and principally tries to see if the case cannot be settled. Mr. Barlow refers particularly to the State of Michigan, with one or two other states. It so happened that early this year,

Chief Justice Bushnall of Michigan was at Osgoode Hall, he had come to observe the operation of the Court of Appeal, and he sat with us throughout practically a whole day, and during the day I had an opportunity of discussing pre-trial procedure with him. The discussion was an interesting and informing one, and, so that I should not forget about it, I made a memorandum immediately afterwards of some of the things he said. From that, it appeared that the immediate occasion for adopting pre-trial procedure there, lay in the very deplorable state of their trial lists; as I have it here, the situation was such that one could not count on his case being reached on the trial list in anything short of three years.

MR. CONANT: Is that in the State of Michigan?

A. In the County of Wayne only; it is only in the one county, the County of Wayne, in which county Detroit is; that is the only county in which they have pre-trial procedure, or in which they had it some months ago, and I have not heard of any change. A man would set his case down on the list, and he could count on three years from that time for the trial. The improvement that has resulted since, mainly in any event, through pre-trial procedure, is that a man can get down to trial now, in from ten and a half to eleven months after getting his case on the list. We would not think there was anything very wonderful in that. I do not know what number of cases they have, nor just what the limits of jurisdiction are, but I take it that the jurisdiction extends downwards considerably more than that of the Supreme Court of Ontario, and that for some reason, they have a vast number of cases; that is, they will have thousands where we would have hundreds of cases here. He said that the main purpose served by the procedure, was in getting cases settled. The pre-trial judge makes a definite effort to bring about settlement. The pre-trial judge is never the trial judge, one reason being that his efforts at bringing about a settlement are thought to make it improper that he should try the case. The pre-trial judge makes an effort to get admissions when possible, as to matters that are really not controversial, and to have the real issues between the parties so definitely framed, that the trial will be directed to the real matter in controversy. No amendment of pleadings is allowed at the trial. Chief Justice Bushnall says their system of pleading is not very satisfactory, and that it tends to obscure the real issues rather than to state them; that is, if a man has an action arising out of an accident, he will plead every possible sort of defence, whether it has any application to the facts of that particular accident or not, so that by reading the pleadings the judge is no wiser; he tries to get them amended. Now, in order that pre-trial procedure should operate, he said, it was essential that they should not allow them to amend at the trial, and they do not let them amend. That, we would think here, was rather barbarous; with the very flexible procedure we have here, it is not at all uncommon to amend the pleadings at the trial, and it is often necessary, in order to do any sort of justice between the parties. Something comes up during the course of the trial that is a great surprise to everybody—perhaps, no great surprise, in view of what the parties themselves know—and the pleadings are amended, constantly amended. They are amended sometimes in the Court of Appeal to fit the case. That is not possible under pre-trial procedure.

I understand, in addition, that one of the judges in England, who had a good deal to do with this pre-trial procedure as adopted there, has discussed the matter somewhat with Mr. Justice Middleton, and he, perhaps, will have

something to say about that first-hand, but I understand they do not look on it with much favour. Chief Justice Rose will also have something to say about the matter, as to the practicability of it, but there is no occasion for it here. And let me say this further: nobody can say what we need in the way of something to expedite the disposition of cases on the list, without some figures as to what is the state of the lists.

MR. CONANT: Well, so far as that is concerned, it strikes me it is not only the question of the state of the lists, your Lordship, but it is the question of the time occupied by trial that has to be considered. I do not think it could be complained, that in our province there is any serious piling up of cases, but there is the question as to whether the trial would be expedited.

WITNESS: Let me say a word or two on that. This does not pertain precisely to this point, or perhaps to any point on your agenda, but it is something that I think ought to be considered. Cases do nowadays, take a long time to try, sometimes. I happened to be reading a book written by an English barrister during the summer, and he commented on what he said was a very notable fact there, that they were having a great many long cases—things that were almost unheard of years ago, cases lasting a week, two weeks, perhaps a month. Well, it is noticeable that we have the same thing, and I was very much interested in what he had to say about it, and the causes of it. Without making a long story of it, he ended up his summary or his enquiry by the observation that he thought that these long cases were to be attributed largely to the great complexity of human affairs; matters of business had now become so involved, dealings between people were of an entirely different character from what they were even fifty years ago; that was his conclusion. Now, that is one thing that one has to keep in mind.

The other matter is, it is very noticeable that there are many more practising lawyers taking their own briefs than prevailed even perhaps twenty-five or thirty years ago. I was aware somewhat of the trend in practice, but since going on the Court of Appeal I have been amazed at the small proportion of cases that are argued by what one might call senior counsel. The practice is not altogether a trend in the right way, I think. Everybody, I would think, would agree that the young man just through ought to try his hand, when it is not too risky for his client, at handling his own case; he is not going to be able to find out whether that is what he is cut out for unless he tries, and to stop the first time is no good; he has got to get some experience, and he has got to find out by experience and trial and error, whether he is making a mistake in handling his own cases. One has all sorts of patience and sympathy with the young man who is appearing to try to get ahead as counsel, but many cases are argued by counsel who are no longer young, and who can have very little hope of developing a practice as counsel. Years ago, men in their position found it more profitable, I think, to stay in their offices, and much more pleasant, and they got counsel of experience to handle their briefs. It has something to do with the expedition of the trial. The man who is inexperienced is afraid he will leave something out, he takes an interminable time to examine a witness, and it is like hunting for a needle in a haystack, perhaps, to find out just what he has got that is relevant after he is through.

That has also its effect on examinations for discovery. Both as counsel

and as a judge, I have been struck with the length of the examinations for discovery, that are almost useless. They examine about everything, the things they know and that are not in dispute, as well as everything else, with no particular purpose. They are not conducted by people who are skilled in doing it. Now, I do not want to enlarge upon that, but it is a trend that is marked.

MR. CONANT: I do not think we can remedy that situation, your Lordship.

WITNESS: I don't know; I don't know that you can do it by legislation, but it is a thing that ——

MR. CONANT: Perhaps the Law Society could meet that.

WITNESS: —— one must not ignore. Let me put it this way: It is hopeless to think that you can get very far in expediting litigation by rules, when tendencies of that kind overrun the law. These men don't know anything about rules; they don't care much about rules; that is one of the troubles. It is a marked tendency. I am not sure that something cannot be done about it somewhere else, but my point is that you cannot cure that by speeding up the rules, shortening times.

MR. CONANT: Perhaps your observations might indicate that the English system would be better here, your Lordship.

WITNESS: Oh, well, it is hopeless to think of its being adopted. Whether it would be better or worse I do not know. Let me give you another illustration ——

MR. CONANT: Well, the English system does eliminate a great deal of what you are referring to.

WITNESS: Oh, undoubtedly so, undoubtedly so; but then it has its other difficulties.

MR. CONANT: Oh, quite.

WITNESS: The other matter I want to mention is this: In the Court of Appeal, we clean up each month's list that month. That has been the practice for some years. Every month we clean up that month's list, unless there is some extraordinary reason that has not anything to do with the court. A man is given ordinarily, fifteen days to appeal and thirty days to conplete his appeal, and yet if you take any month's list, you will find cases there in which judgment was given many months before. For example, in our list for September, we had I think, five cases on our list, five or six, in which judgment was given last year. One of them, the oldest of the lot, judgment was given in August, 1939. The case got on the list ready for hearing in September of 1940. Well, that has nothing to do with the Rules of Practice. There may be some good reason for it, such as the difficulty of getting copies of evidence, but that won't countenance such a delay as that. The parties may be discussing settlement; the appellant may not have come along with the money to pay for the evidence; it may be all ready and he can't pay for it; there may be adjournments to suit the convenience of counsel, to keep the evidence out till counsel is ready to argue, and

that sort of thing; there are a lot of reasons, but it all goes to show that it is futile to think that just by shortening times in the rules or the statutes, you are going to remove all delay in litigation, and they are, I think, the main causes of the slow progress.

MR. SILK: Your Lordship, there is a recommendation that the Rules of Practice should be amended to permit a trial judge to sit with assessors, as is now done in the Admiralty Court. The judges reply to that recommendation on page 8, but I think I should explain; I think it was Mr. Barlow's intention that if a judge does elect to sit with an assessor, there should be no expert witnesses called, so that Rule 268 of the Rules of Practice does not entirely take care of the situation as is suggested by the judges.

WITNESS: The judges were quite, I think, seized of that, as perhaps their statement really shows. We thought, in the first place, that our report made it plain—that is on page 8—that it was unthinkable that the parties should not be permitted to call expert witnesses. Anyone who has had any sort of experience in the trial of serious cases, where expert witnesses were needed, would know how utterly impossible it would be, it would be a denial of justice, denial of a fair trial, to institute any such practice. Take the common sort of case, in which you have an accident and the patient goes into a hospital, and perhaps is examined first by an interne, gets in a public ward. The judge is going to call one doctor; the patient perhaps, has been under the treatment of several doctors. I had a case of the kind once myself, several years ago, in which the two doctors on the ward—and they were well-known doctors—had the most bitter disagreement; I understand that it started in the hospital, but it certainly was carried into court. The doctors were more prominent in the trial than the lawyers were, because one very well-known doctor, at that time on the staff of the University, was so angry that in court he shouted out an observation to the other equally eminent doctor, who was giving evidence. They utterly disagreed as to what was the cause of the trouble. That was a case tried by a jury. The matter, as far as the jury was concerned, was settled by an old gentleman, who was not on any hospital staff or any University staff either, but who knew how to talk plain English, and got up and told the jurymen what he thought was wrong in a way they could understand. But you get that kind of thing in any sort of case where you have expert testimony—a different point of view, different training, different experience.

MR. CONANT: But, would not the court itself be in a better position if, instead of having opinion evidence on one side and opinion evidence on the other, you had one established expert to make the deductions?

A. Well, that is really making the expert the trial judge.

MR. FROST: You would have to get an infallible expert, I suppose.

WITNESS: Yes. They say the law officers in England at one time, got an enquiry from a magistrate as to whether it was necessary to hear the evidence for the defence, because, he said, it always bothered him. Of course, it is one of the things with which the judges have to do the best they can. The judge is there to decide the case; he is not to be overruled, surely, by the dictum of some doctor. These questions are not always simple questions of medical opinion;

they involve more or less symptoms, questions of fact. But I do not think that you could find any lawyer who had any considerable experience with that kind of case—and I am talking now from a much longer experience as a lawyer than as a judge, but with a considerable experience of this kind of case, and it is simply unthinkable that some one expert should give his say-so. I have never seen that type of case where there was not room for difference of opinion, honest difference of opinion.

MR. CONANT: I was rather surprised. I would have thought the judiciary would have welcomed that. I could understand the lawyers not welcoming it, but I should have thought the judiciary would have welcomed that. I should think the members of the Bench would be bewildered sometimes at the conflict of expert testimony they get.

WITNESS: It would no doubt make the judge's task very much easier, but I think the judges are all seized with the idea that they would like to administer justice, and it cannot be done that way. I have no hesitation in saying that the thing is, as I have said, simply unthinkable, that people should be deprived of their right to call experts. And I do not understand that in Admiralty they are called experts; the man simply sits there in an advisory capacity, and that can be done, and is done in our own courts. Mr. Justice Roach had a case that was giving him some difficulty not long ago, a question of some very intricate electrical apparatus in the Stock Exchange, a question of patent infringement or something of that sort; after finding himself becoming submerged with the technical evidence he was getting, he appointed an expert to sit with him. That is already provided for in the rules, and in my judgment is as far as it is safe to go.

MR. SILK: I understand the Committee does not wish to hear anything further, on a central place for capital punishment.

MR. CONANT: No.

WITNESS: May I say, Mr. Silk, I wanted to skip on, if I might, and speak for just a moment on County Court jurisdiction and Division Courts, and I would like to speak of them together. County Court jurisdiction is not in Mr. Barlow's report, as I recall it; I have no memorandum of it.

MR. SILK: No, I do not believe it is, sir.

WITNESS: But you had it on the agenda that you showed me.

MR. SILK: Yes, I have it on the agenda.

WITNESS: The only reason I want to speak of that is this, that in 1935, the judges made a report to the Government upon somewhat similar proposals, which no doubt is in the possession of the Government somewhere. I was chairman of a committee of the Benchers at that time, who waited upon the judges, the Law Society having been asked to submit anything that they desired to submit; I was on the committee. We collected a good deal of information of one sort and another, which I am sorry to say I have lost, and I have only a general recollection of it. Mr. McCarthy was good enough to see me the other day about this, thinking that perhaps I had still the information that we collected

at that time, but I have not got it and it cannot be found in the files of the secretary's office, so it is not available.

One trend of the report was this, that in the Division Court there are an enormous number of cases, far more cases than all our other courts put together. The Division Court is an important court, in that it does deal with the troubles of an enormous lot of people. The County Court itself, so far as the number of cases is concerned, is not an important court. There are not many. Some of the judges have very few cases in a whole year—I am speaking now of outside of Toronto, because, in Toronto it is an important court; the judges here are kept busy trying County Court cases. The suggestion was that the Government should increase the County Court jurisdiction by perhaps doubling it. The figures that we had went to indicate this, that to double the County Court jurisdiction meant very little. If they had cases that went up to $1,600 or $2,000, whichever it might be, added to what they now have, outside of Toronto, they would have very little more to do, and the Supreme Court lists would be saved very little. That is, you have a mass of litigation dealt with in the Division Court; you have a lot of important cases that take up a good deal of time to try, that are dealt with in the Supreme Court; in between there is a field that is pretty nearly vacant. If you were to take the number of cases—and this is the sort of thing we collected—if you took the number of cases say, where the amount involved was between two and three thousand dollars, the cases that went to trial, in the Province of Ontario, you would not get many, and if you distribute them over the province it means nothing. In other words, it came down to this, that the average County Court judge might have perhaps. a couple more cases to try in a year if you doubled the County Court jurisdiction, but it would not mean much more than that. I am sorry I haven't the figures; I know we got some figures by going to the Inspector of Legal Offices, not printed reports, but something that was not printed, and from one or two other sources we got some information.

MR. FROST: So many of those cases can be tried in the County Court on consent now, if the parties agree, I think.

WITNESS: Well, just there, there is a strange change in the last, perhaps, three or four years. That practice seems to have almost fallen into disuse. There used to be cases not uncommonly, particularly perhaps in Toronto, where the parties, by not raising objection, had given the County Court jurisdiction. That seems to have much fallen into disuse. I think, perhaps, that the provision allowing Supreme Court costs to be awarded is what put an end to it; that is, the parties say, "Well, if we are going to pay Supreme Court costs, we might as well have it tried in the Supreme Court; why try it in the County Court?" One party or the other is very likely to say that.

MR. CONANT: Your Lordship is aware that there is the amendment of 1937, which has never been proclaimed ——

A. Oh, yes, I know all about it—at least, I knew all about it.

Q. Well, specifically, would your Lordship care to make any observation as to whether you think it would accomplish anything worth while by proclaiming that amendment?

A. Well, I think I had something to do with having the clause put in The General Statute Amendment Act of that year that required the proclamation, and the Act itself did not require any, but I think the Benchers—I was then the treasurer of the Benchers—I thought it should not be done, and I still think it should not be done. It is no reflection upon the County Court judges. The important work of the County Court judges, except in Toronto, is not trying County Court cases. The County Court judge has a multiplicity of important duties to perform, and his judicial functions are much more called into requisition in the Division Court than in the County Court.

Q. I think that the only reason for increasing the jurisdiction—at least, the only one that has ever occurred to me; let me put it that way—is as to whether it would result in a better distribution of the work. Now, let me pursue that for just a minute. I think that we pretty generally agree that the Supreme Court, particularly the Trial Division, or referring only to the Trial Division for the moment, is pretty well loaded up all the time. On the other hand, we have jurisdictions in the province—I think I had a record showing where one County Court judge tried three cases in one year; I think that is correct. Now, would it level up or work any better, your Lordship? That is the only thing that would affect me.

A. That was the purpose of my first observation. That is why we got the figures together, and they went to indicate that it did not mean anything—nothing worth while. Where the judge tries two cases now, he might perhaps, have a third; the judge that has four cases now, might perhaps, have five or six. The addition is nothing, and the reduction—it is striking, when one gets the figures of that sort of thing, that the number of cases between one and two thousand dollars are not many when you spread them over the province. I don't suppose there are a hundred of them that go to trial; I don't suppose there is anything like a hundred of them in a year outside of Toronto. Toronto is another situation. I do not think I can add anything more on that. That disposes of 8 and 11.

MR. SILK: Yes, that is 8 and 11 dealt with. Now as to number 14.

WITNESS: Number 9—I wanted to speak of appeals from interlocutory orders in the County Court.

MR. SILK: That is number 9 on the agenda; it is number 10 in Mr. Barlow's report, I think.

WITNESS: Page B31 of Mr. Barlow's report?

MR. SILK: Yes, that is right.

WITNESS: That is the question of whether there should be appeals from interlocutory orders in County Courts, the suggestion being that they might go to a Supreme Court judge. The judges deal with the recommendation on page 12; at the foot of page 12 of their report they recommend against it, on the general ground that it adds undesirably to the cost of litigation. There is no great harm done by it. I confess, I have seen cases in which a County Court judge had made an order—that was in practice, not on the Bench—that I thought,

did injustice and was hard to defend, but whether for one case in a thousand you ought to grant a right of appeal, is very doubtful. Speaking broadly, I would say it would be distinctly undesirable, as tending to add to the cost of litigation over matters that are comparatively trifling. As things are now, the bill of costs that is ordinarily taxed in a County Court case that goes to trial, is pretty high for the amount ——

MR. JUSTICE MIDDLETON: It often amounts to more than the amount in dispute, on each side.

WITNESS: Rather commonly so. And to add the possibility of appeals on interlocutory orders—the whole trend has been in the High Court, to prevent appeals in interlocutory matters. One looking back over practice the length of time I practised is very much struck with the change there has been, the way appeals on practice matters have been eliminated, and without any great harm to anybody.

Then, may I go to 12?

MR. CONANT: Before leaving that, I don't know whether you have a note there, your Lordship; were you going to discuss appeals from Division Court judgments?

A. I hadn't it in mind, no.

Q. Well, may I ask you this: would you care to make any comment as to the advisability of amending the practice so that Division Court appeals would go to a single judge instead of the Court of Appeal?

A. Well, I really do not think it would do any harm to make the change. I had not given any special consideration to it.

Q. What is in mind is this, your Lordship: at the present time—you will correct me if I am not right—an appeal from a Division Court requires five copies of the evidence and of the exhibits and the whole thing?

A. And the attendance of somebody to argue it.

Q. That is true, yes.

A. He gets $15 as a maximum.

Q. Would not substantial justice be met, your Lordship, if Division Court appeals were to a single Supreme Court judge?

A. As I say, I cannot see any objection to the change.

Q. Well, from the standpoint of the public, the people at large?

A. I am afraid it is the legal profession that feel the pinch the most. It is not worth anybody's while for $15 to go through all the preliminary proceedings and then argue the case for $15 in the Court of Appeal—to get, as you say, five copies of evidence and an appeal book and set the case down and all that sort

of thing. A simpler procedure would, I think, be desirable. Whether you would want to make an exception in cases over $200 ——

Q. Well, that might be considered, too.

A. There are cases that do arise in the Division Court that sometimes by making the matter *res judicata* become important. I remember a case of that kind between landlord and tenant, in which the settlement of the question of one month's rent governed the whole term of a long lease. There might be some provision made for going further by leave.

CHIEF JUSTICE ROSE: There was a time when they were heard by one judge of the Court of Appeal, was there not?

WITNESS: I don't remember.

MR. JUSTICE MIDDLETON: That produced a great deal of dissatisfaction, if I remember it rightly.

MR. CONANT: Which?

MR. JUSTICE MIDDLETON: Division Court appeals being heard by one judge of the Court of Appeal. You picked your judge and got your judgment accordingly, and there was a desire to appeal from him to the full court.

MR. CONANT: I would not dare to say that myself, your Lordship.

WITNESS: It is a matter upon which I have made no enquiry.

Then, if I may refer to the matter of Surrogate Court appeals, that is on page 35 of Mr. Barlow's report, and page 13 of the judges' report. I only want to refer to the matter in one aspect; that is, appeals on passing accounts. Mr. Barlow's recommendation is that these appeals should all go direct to the Court of Appeal, and not, as they do now and have for many years, direct to a single judge. In the time I have been on the Court of Appeal I have not seen any appeal on passing accounts; there has not been any. I had in the course of a good many years' practice a not inconsiderable number of matters of that kind; I never took one to the Court of Appeal, so far as I remember, or was taken there. Now, it would be a great injustice to say to people who ordinarily, ninety-nine times out of a hundred, are content with the judgment of a single judge, obtained without expense, "Well, you have got to go to the Court of Appeal, and you have got to get copies of the evidence, you have got to get appeal books, you have got to pay counsel to argue in the Court of Appeal," when people don't want to go to the Court of Appeal. I think the recommendation was made without knowledge of the fact that these cases do not go to the Court of Appeal, and I think for the very obvious reason that is stated in the judges' comment, that is, they are matters that are very difficult to deal with in the Court of Appeal. A lot of small items where you have got to dig into a lot of papers and accounts and that sort of thing—it does not lend itself to being very adequately considered in a court with a number of judges.

MR. JUSTICE MIDDLETON: There is only one appeal of that kind that I can

recollect; that came before Sir William Mulock, and after struggling with it for all of a day he couldn't get anywhere. I think that is the suggestion of a man who is not at all familiar with the way the thing works out in practice.

MR. CONANT: Now, just let me present this to you, your Lordship. I am in substantial agreement with you, but would not substantial justice be met if those appeals were taken to a single judge on very much the same basis as we were discussing Division Court appeals a few minutes ago?

A. Well, that is where they are taken now.

Q. Yes, but there is an appeal to the Court of Appeal.

A. Oh, you mean and stop there? Why not, in the event of an important case coming along that ought to be heard by the Court of Appeal, say that it cannot go any further except by leave?

Q. That is what I am coming at. Supposing you make it uniform for both the Division and the Surrogate Court, the right of appeal to a single judge and then by leave to the Court of Appeal?

A. Yes.

Q. Both in Division Court and Surrogate Court?

A. That is precisely what I noted on here.

Q. Wouldn't that do?

A. I think your suggestion is the right one.

MR. SILK: Then, sir, there is a second phase to Mr. Barlow's recommendation, which relates only to subsection 3 of section 29. He says:

> "Under the practice as provided in the last two lines of the present subsec. (3) the order, determination or judgment requires to be filed and notice of filing given to every interested party, otherwise the same does not become confirmed and the time for appealing extends indefinitely."

WITNESS: Well, I hadn't anything to say on that.

The next item, I may say—I am largely blank now until you come on to number 24, I think, of Mr. Barlow's assessment appeals. I wanted to say just a word or two about that. That is number 18 on your shorter list.

MR. SILK: I had intended to ask you, sir—I don't know whether you were going to say anything—about expenses of trial where the venue has been changed, which is item number 14.

WITNESS: Well, I think Mr. Justice Middleton is going to say something about that. Perhaps it is not necessary for me to comment on it.

MR. CONANT: We have had considerable observations on these assessment appeals, your Lordship; we will be very glad to have yours. This is in more or less the same category as enlarging the grounds for appeals in jury cases.

WITNESS: I had a good deal of practice at the Bar in this respect; I took a good many to the Municipal Board, I used to be there quite frequently, and went as far as the Supreme Court with this sort of thing. The great difficulty that is complained of, I think, comes down to this, that the appeals are usually or frequently on the question of value. They are not always; often it is a matter of exemption or some special provision of the statute as to the basis of assessment; but the great complaint is that you have a value fixed by the assessor or by the county judge, it may go to the Railway Board or it may come straight to the Court of Appeal on a stated case, and the Court of Appeal's jurisdiction is distinctly limited to questions of law and construction of statutes and agreements and so on. That does not give the Court of Appeal any right to interfere in the ordinary case of what is complained of as over-valuation. Now, the value of a piece of property is primarily a question of fact; that has been decided by the House of Lords not so very long ago, it has been decided by the Supreme Court, and frequently decided by the Court of Appeal; that is primarily a question of fact. Of course, if you find that in deciding that question of fact the judicial body appealed from has misconstrued the law or the statute, the Court of Appeal can take some action; but where it is the ordinary case of each party calling the limited number of witnesses and each swearing stoutly to a set of figures, and the judicial body having determined somewhere between them, the Court of Appeal cannot do anything about it. Now, we run into that constantly, there is always somebody trying to get around it and trying to get in, and we have to simply say, "Well, whatever sympathy we have for you, we can do nothing for you."

MR. CONANT: Well, do you think it should be enlarged, your Lordship?

A. I know, but I don't think that you can enlarge that with the Assessment Act in its present form and get anywhere. You are getting farther and farther away as you come on with your series of appeals from any actual knowledge of the situation. The Court of Appeal would simply hear the evidence that the Municipal Board or the county judge had acted upon, and I don't know that they are in any better position to form an opinion upon the question of value than these bodies are. Mr. Manning had one of these cases before the Court of Appeal not long ago; he had a very ingenious and interesting argument, and he thought that he might persuade the Court of Appeal to climb the fence, but we were not able to agree with him. As a matter of fact, most of us, or some of us in any event, ourselves looked around pretty carefully at one time or another for a way around, and were not able to find it. Definitely, it was not the intention of the Legislature in enacting the present provisions that there should be any way around that.

Q. Doesn't it come down to this, your Lordship: if those grounds were substantially broadened you would be circumventing the Municipal Board, which is different from your tribunal, sir, in this respect, that it does hear the evidence and sees the witnesses?

A. Well, it is like any cases of appeal from a trial judge; you should not interfere unless you see something has gone wrong in principle somewhere. I

think the Municipal Board is usually in a definitely better position than the Court of Appeal. The Municipal Board, for example, if it is an outside place, will go and see it, and, as you say, they have the witnesses there, and they can make a much more satisfactory sort of enquiry than the Court of Appeal could. I would say this, that I would think that any change should only be made in connection with some revision of the Assessment Act. Perhaps the Assessment Act in some respects is due for revision; opinions differ on that, of course.

MR. SILK: I am not sure what the next item is of which your Lordship has a note.

WITNESS: Just a word on the next item, that is, appeals from boards and commissions, item number 26. All I want to say about that is that care must be taken in any provision for appeals; that is, I do not think the matter could be covered at all by a general provision, an omnibus provision, that there should be an appeal from the board or any board or commission to the Court of Appeal on all questions of law and interpretation of statute and that sort of thing. I think each board must be dealt with by itself, and there are some of them from which I should think it would be unwise to grant an appeal. There are boards that deal with matters that ought to be dealt with as practical questions, the solution of which is required speedily, and to permit the delay of an appeal to discuss questions of law is in some circumstances not wise. Just to give an illustration, I would think that anyone would hesitate a long time before allowing appeals from the Workmen's Compensation Board. There are other boards that deal with property rights and that sort of thing at times, and perhaps some sort of appeal might be allowed from them. But, as I say, I think the whole matter is one for consideration in each case.

MR. CONANT: Yes, each one would have to stand on its own circumstances and merits.

WITNESS: Yes; sometimes you would say no, sometimes you might give it.

The next item—and just a word on that—is number 28, the law revision committee. That matter had already been discussed by Chief Justice Rose and myself with the Attorney-General, and substantial agreement I think had been reached, that some committee of that kind was quite desirable and would no doubt be useful.

MR. SILK: Have you any views as to the constitution of such a committee, sir?

A. Oh, no, I would not say anything about that.

Q. Whether it should include members of the Bar or whether the judges as a body should ——

A. I should think so. I think that one might for the law revision committee follow somewhat the practice that is adopted in England by the Lord Chancellor's committee, where they do not confine it strictly to the judges. It is perhaps desirable to have for certain subjects men in practice who are especially familiar with the subject.

Q. Would you suggest that the matters to be taken under consideration should be matters referred to the committee by the Attorney-General?

A. Whether they should be confined to that I do not know. It might be well to bear in mind in that connection the provisions of 107 of the Judicature Act, which provides for the judges' holding an annual meeting at which they might suggest changes in the law; perhaps it might be well to let them also refer questions to this committee.

MR. JUSTICE MIDDLETON: There are a good many things as to which it is better to let sleeping dogs lie, I think. Some of these questions might be brought up and debated; the experience of centuries has been embodied in the law as it is to-day, and there seems to be no reason why the law should be as it is, but it has been so for generations.

WITNESS: I have in mind, for example, questions such as were dealt with in England as to the law of evidence. They have considered that matter. It has been considered a good deal in the United States by important bodies as to whether one cannot by some change in the law of evidence eliminate a good deal of expense that is now incurred over matters that are purely formal. Then there have been questions as to both the Statute of Frauds and the Statute of Limitations. There was a matter—I have a note of it somewhere; I haven't it here—about the Trustee Act, something which came up recently, which brought it to my attention that in England they have in quite recent years, the last two or three years, I think, enacted some provisions in substitution for some provisions which still appear in our statute. Well, I do not say they ought to be adopted, but I think they might well be considered.

MR. CONANT: Would not a law revision committee be a valuable means of considering many or all of these what you might call lawyers' law questions that come up, as distinct from controversial issues?

A. Well, I don't know. I would hope that the Attorney-General would be discreet in what he would refer, and not send too many controversial matters, but rather matters that looked as if the law had become a little antiquated. There are, particularly in these days, too many people who seem disposed to tear up anything that happens to be old and start new on everything. There is a definite trend that way. I think it is not to be encouraged, and I do not think that a committee of this kind ought to be made the safety valve for the discussion. These people will never be satisfied; they would not be on the committee, I hope, and they perhaps would never be asked to be heard. A committee of this kind would have to be composed of some lawyers.

MR. CONANT: Oh, yes; its value would largely depend upon the constitution of the committee.

WITNESS: Quite. Oh, I would not make it a clearing house for crank notions.

MR. SILK: I think the last matter, sir, is the matter of a reconstitution of the Rules of Practice committee.

WITNESS: Well, on that, with deference to those who think otherwise, I think the Rules of Practice committee ought to be left as it is. I notice in the reports of the American Bar Association dealing with these things they are making suggestions of one kind or another, but apparently without exception their recommendation has always been that the judges of whatever court is being considered should make their rules. Now, the rules are not, as has sometimes been suggested, rules for the judges, they are rules for the people who practice in the court, and it does seem to me that it is somewhat detracting from the dignity of a court, from its proper functioning, to say that the people who practise in the court should join with those whose duty it is to conduct the court in saying how it will be conducted. It is allowing somebody else to interfere with the business which is peculiarly the business of the judges and of which they ought to be the persons most competent to determine. I speak freely about it, because in my time on the Bench I have not been much engaged in making any rules; I must say I never drew up any. I practised a long time, and I never saw any reason for thinking that the rules would be bettered by allowing some voice in it, some authoritative voice, on the part of members of the Bar. The judges are in touch with the Bar; they soon hear of any desires for change, and give consideration to them. But the Benchers of the Law Society usually hear of any dissatisfaction that prevails to any extent among the profession, and, while a Bencher for some considerable time, I never heard of any complaint by the profession in that regard. I think the rules ought to be made by the judges and would be best made by the judges.

MR. SILK: Since 1925 they have had members of the Bar on that committee in England.

WITNESS: Yes, I am aware of the fact that they have had. I have not heard anybody say the rules were any better. And one must remember, differences in the attitude, the connection that exists between the members of the Bar and the Bench in England. The men who are appointed, you will observe, are always the head of some body—that is, the Solicitors' Society, or the Inner Temple, or some place of that kind, the treasurer or something of that kind—I have forgotten exactly who the officers are, but it is always somebody who has attained some office of responsibility, like the treasurer of our Law Society, for example.

MR. SILK: Well, I don't believe I have anything further to discuss, sir, unless you have something noted.

WITNESS: I have nothing more on my list. I am sorry to have talked so much.

MR. CONANT: We are greatly obliged to you, your Lordship, for your coming up.

We will adjourn till 2.15.

Adjourned at 12.55 p.m. until 2.15 p.m.

Monday, September 30, 1940.

AFTERNOON SESSION

On resuming at 2.15 p.m.:

THE HON. H. E. ROSE, Chief Justice of the High Court.

MR. SILK: Mr. Chief Justice, I presume we will start again with the matter of grand juries, and I don't know whether you desire to express yourself on that matter or express concurrence, or what form your remarks will take.

WITNESS: I might almost, Mr. Chairman, confine my remarks on all the matters that have been discussed this morning to a statement that I am in entire agreement with the Chief Justice of Ontario, but perhaps you do desire a little elaboration.

The question as to grand juries is one on which I feel rather strongly. My idea is that there is a tendency in the discussion to lose sight of what is really the most important question of all. As long as the faculty of humanity to err exists you cannot devise a system which always will produce the correct result in any case, but you can devise a system which gives the public confidence in the administration of justice in the sense that the public is satisfied that a real endeavour is being made—sometimes unsuccessful, of course, but is being made—to arrive at the right conclusion in every case. That confidence in the administration of justice is something that I think we ought to endeavour to secure, at whatever cost, and I think that you go a long way towards securing it when you teach as many of the public as you can what the courts are and what they are trying to do; and I know of no better way of teaching them than the present method of making as many of them as you can take an active part in the administration of that justice.

The Chief Justice of Ontario was good enough to refer to a charge that I delivered to the grand jury. It is longer ago than he mentioned; I think it is more like two or three years ago than one. It was before the matter had got into anything like the controversial state, and I thought I was perfectly free to talk to them; I have not felt so free of late, and I have kept quiet. But I tried to put that idea before that particular grand jury, and there was some publicity given to the address and there was some favourable comment in newspapers; some were sent to me, some country papers, in which it was quite approved. I do not know that I put it very scientifically; I was trying to put it in a way that the grand jury would be sure to understand. If you would let me, I should like to read a passage or two from what I said. Contrary to the usual practice, I had written this part of my charge out in advance, and written it fairly carefully. I said:

> "One of the great duties of the State is, of course, to safeguard its own institutions and the persons and property of those who are under its protection. The criminal law is a body of rules made in the performance of that duty. The punishments prescribed for the breach of those rules have as their principal object the deterring of potential offenders and, to the extent that is possible, the reformation of actual offenders."

Then, passing over some of those things:

> ". . . when a charge of crime is laid the enquiry is whether a wrong has been done to the State—that is to the whole body of the public—by the infraction of one of those rules that make up the criminal law. Now the person accused is himself one of those who are under the protection of the State and for whose benefit the laws are made; and so it is the duty of the public at large to see to it that he is not humiliated and put to expense by being called upon to defend himself against a frivolous or vexatious charge. The public at large cannot perform that duty for itself; and so, under our present system, the duty is performed by a committee of the public known as the grand jury."

Whether that is an accurate expression does not matter.

> "That committee's business is to conduct a perfectly dispassionate enquiry as to whether there is reasonable evidence in support of the charge—evidence, that is to say, which, if not explained or displaced by other evidence, would warrant a conviction. If the evidence heard by them is of that character, their plain duty to the whole public is to put the accused man upon his trial; if the evidence is not of that character, their equally plain duty to the public in general and to the accused in particular is to stop the prosecution. Now it may be that this function of the grand jury would, in most instances, be performed just as efficiently by a single, trained individual. I have said to you that, in my opinion, the grand jury is peculiarly well qualified to perform it in cases of certain types; but I suggest to you that the question is not so much whether the individual or the committee will be the more efficient as whether, in the public interest, it is better that the work be done by the committee.
>
> What I have said about the reason for having criminal law and about the part taken by the grand jury in its administration is, of course, well known. But there seems to be, nowadays, a tendency to forget it and to regard with a certain hostility the courts in which that law is administered, as if they were in some sense an institution imposed upon a subservient public by some autocratic power, rather than to know them for what they really are—the machinery set up by the public through its delegates, Parliament and the Legislature, for the performance of a special part of the public duty. This tendency is deplorable. Democracy, as a system, is being challenged. If it is not to give place to a system in which power is concentrated in the hands of an individual or of a group, democratic institutions, such as our courts must be known for what in truth they are, and must be prized."

And so I went on to say that it was desirable that as many as possible of the public should take part in the administration of justice, and that the educative effect is really great. I think I know. I have had many sheriffs throughout the country tell me that after an Assize Court in which the jury were kept in attendance for some little time—this applies partly to the grand jury, partly to jurors in general—jurors would tell them that their whole idea of what the courts were and were trying to do had been changed by their attendance at the

Assizes, and would express themselves as most satisfied with what they had seen and learned. We had a very pleasing instance of it in Toronto. When the jury in the last case that was being tried had rendered their verdict the foreman asked my permission to make some remarks, and he proceeded to read a little address that had been prepared by the jury as a whole. He had a nice sort of vote of thanks to all and sundry, and then he went on to speak just in that same strain and to tell what an eye-opener and education their attendance in the court had been. I always tell grand juries in charging them something of that sort of thing, and tell them that they ought to remember that the laws that are being administered are their laws, made by their representatives, and that if, owing to the increased familiarity with those laws which they have gained by their attendance in court, they have formed the opinion that some law is wrong and ought to be changed, or something is wrong with the procedure and ought to be remedied, it is their duty to make their opinions known, if not in their presentment if they are a grand jury, to their representative in Parliament or the Legislature, or to the Attorney-General or to the person competent to deal with the grievance that they think they have discovered. I attach tremendous importance to the retention both of the grand jury and the petit jury for that reason.

Now, the grand jury, we know, throw out cases in which magistrates have committed for trial, and, so far as I have been able to judge, they are usually right in what they do; but there are cases in which a lawyer, from his training, is bound to come to the conclusion that an offence has been committed—he may come to it very reluctantly, because he may not think that there ought to be a prosecution, but he is driven to that opinion—and his conscience would not let him do anything other than prefer a charge. A grand jury is not troubled with that same kind of legally educated conscience, and—the Chief Justice of Ontario adverted to this—if a grand jury comes to the conclusion that, while perhaps an offence was committed, in all fairness this man ought not to be prosecuted, no matter how much you talk to them about what the law is they won't cause him to be prosecuted; and, just as it has been said to be the function of a trustee to commit wise breaches of trust, I think that there is a considerable advantage in leaving to the common sense of an intelligent jury and a conscientious jury—and I think most of them are conscientious and try to do their duty when their duty is properly explained to them—I think there is a great advantage in leaving these practical matters, like the matter whether in a particular case there ought really to be a prosecution, to them. I should like to see them retained, just as they are at present, improving the personnel if you can but not abandoning the institution because sometimes the personnel is not what it ought to be.

That indicates what my answer would be to the Attorney-General's question as to whether, supposing the grand jury were abolished, review of the Attorney-General's decision to prosecute in some instances might be in the hands of a judge. At first blush—I have not had much time to think about it—at first blush, I do not like the suggestion. I can see possibilities, perhaps in very rare instances but still possibilities, of arousing something like political controversy by the suggestion in a case in which the judge reverses the Attorney-General's decision—a suggestion of conflict between the administration and the courts. It is most desirable that there should be no possibility of such a suggestion at any time about anything. Take it that the Attorney-General's decision is reversed in some cause celebre of some sort; are not some of his political opponents likely to

try to make capital out of the fact that the judge did not view the matter in the way in which the Attorney-General did? If the Attorney-General is upheld, are not his political friends likely to try to make capital out of the fact that his decision was sustained? Perhaps I am not putting it too clearly, but don't you think that there is the possibility of that, dragging the court away from its independent and isolated position into a sphere in which there may be the kind of talk that I have suggested?

MR. CONANT: Well, it is rather novel, it is a new thought, that had never occurred to me, but my reaction, your Lordship, is this: at the present time an indictment preferred by the Attorney-General goes before the grand jury, and I have never heard of a reaction of that nature in any indictment before.

WITNESS: With the grand jury; no, I do not think you ——

MR. CONANT: That would be most undesirable, I agree with that—most undesirable.

WITNESS: Any idea of controversy between ——

MR. CONANT: Oh, yes; but I do not know why it would be more apt to occur if a judge were finding a bill or no bill than would be the case if a grand jury were finding.

WITNESS: There may be nothing in it, but it was a danger that—perhaps after more reflection I might not have said what I have said, but, as you say, the topic is just as new to me as the suggestion is to you.

MR. CONANT: Of course, that suggestion arose, your Lordship—because I am frank to say that I think that in these other jurisdictions which have provided no safeguard they have gone a long way, and I think that in this province if we were abolishing the grand jury there should be some safeguard against a dogmatic, vindictive or capricious Attorney-General, and I do not know of any other safeguard that you could employ.

WITNESS: If you abolish the grand jury and retain the Attorney-General's power to prefer indictments—I have not looked at the Criminal Code recently on the subject, but, as I remember it, it is absolute.

MR. CONANT: Yes.

WITNESS: What are you going to do with the other case that is provided for in the Code, of an individual with the consent of the presiding judge preferring an indictment? The Attorney-General has the power without anybody's consent; the individual has it with consent.

MR. CONANT: Well, I think that they would have to go to a judge in the same way. I do not think that the individual should be in any higher position than the Attorney-General.

WITNESS: The individual would go to the judge, and then the judge would make himself a grand jury and hear the ——

MR. CONANT: No, not the trial judge, your Lordship; it would have to go before another judge to find a true bill. But again, your Lordship, you are dealing with cases that very infrequently happen.

WITNESS: Oh, I know. I think we are probably dealing with cases that may never arise, and perhaps it is not worth while to discuss that aspect of it; but the other aspect of it is the one that has struck me as the strong, strong reason for keeping the grand jury where it is.

MR. FROST: Of course, there is the point, sir, that if grand juries were abolished a man might conceivably be put on trial for his life without having the intervention of a preliminary hearing or a grand jury; that might possibly happen, and he would simply be forced to go to trial without any other body passing on the question as to whether there was sufficient evidence to send him up for trial or not.

WITNESS: Well, only if the Attorney-General directed an indictment.

MR. FROST: Yes.

WITNESS: But you can hardly conceive of the Attorney-General doing that kind of thing.

MR. FROST: Of course, that may be, but ——

MR. CONANT: You see, on that angle, we are dealing with a very exceptional situation. Those indictments by the Attorney-General happen only in rare cases, and usually in cases in which, in conspiracy or something like that, you get before the court and you find you should have had John Brown in, he is part of this gang; now, rather than hold up the whole trial and adjourn it to another assize or something of that sort, in order to get on with it we prefer an indictment, it goes into the grand jury room, and he is before the court with the rest of them. Now, I cannot recall ever preferring an indictment, ever signing the direction, other than in those exceptional cases—or a retrial of some kind or something of that nature.

WITNESS: I cannot remember more than two or three, in my twenty-odd years' experience, of indictments preferred in that way.

MR. CONANT: Well, I agree with your Lordship that there should be some safeguard, because we are dealing with the situation for the future as well as for the present, this is an entirely impersonal discussion.

WITNESS: Oh, of course.

MR. CONANT: And we don't know who may be Attorney-General a year from now or ten years from now or twenty-five years from now. I don't know whether your Lordship would care to make any observation regarding the fact that the grand jury has been abolished in so many other jurisdictions.

WITNESS: I cannot add anything to what the Chief Justice of Ontario said about that. It has been abolished, we know, but we do not know what the—

anyway, it is an old institution, and what is going to be gained by the abolition of it? The only thing that I have ever heard is the saving of expense. Is there going to be much of that? If you get a long Assize Court and the grand jury reject a bill, you are going to save all the expense of keeping a large panel of petit jurors waiting—and witnesses and counsel and so on—until that particular case is reached.

MR. JUSTICE MIDDLETON: Saving of witness fees as well.

WITNESS: Yes, I said witnesses and counsel and so on, and jurors. Don't you think that they probably, by the rejection of the small number of bills that they do reject, save pretty nearly the amount of their fees?

MR. CONANT: Well, of course, your Lordship, I think that it is practically impossible to set down a column of figures and add them up.

WITNESS: No, you couldn't do it.

MR. CONANT: You can't do it, because, as one witness here remarked, the abolition of the grand jury would undoubtedly speed up the administration of justice, no doubt about that.

WITNESS: Speed up to what extent?

MR. CONANT: Well, in a great many assizes your work is delayed until the grand jury is ready.

WITNESS: I should not say so, Mr. Attorney-General. The practice at the Assizes, as I know it, is to open with the judge's charge to the grand jury and the grand jury retiring to deliberate, and as soon as they retire the first civil case on the list is called and proceeds while they are out; and as soon as the Crown Counsel has got his bills and is ready to proceed, then the civil business stops and on you go with the criminal business.

MR. CONANT: Your experience has been much wider than mine, but I would say that without the grand jury there would be a material speeding up of the administration of justice.

WITNESS: Well, you would save the judge's charge to the grand jury, which takes half an hour or an hour at the opening of the court.

Would it be your experience that you would save much other time?

MR. JUSTICE MIDDLETON: No, I don't believe so.

MR. FROST: It is rather surprising; I would not have imagined that this would have been the case, but apparently in the city of Toronto in thirteen percent. of the cases no bill is brought in.

WITNESS: Is it as large as that?

MR. FROST: I see on the 5th of February, 1937, of 22 cases there were 11

true bills and 11 no bills; that is rather amazing. Of course, that is not the case all the way through. That is an extreme case.

WITNESS: That must have been very exceptional.

MR. FROST: There is one here, for instance, January, 1940, it is 6 to 1; September, 1939, is 7 to 2; April, 1939, is 7 to 0—in that instance there was no case in which no bill was brought in; January, 1939, 10 to 6.

MR. JUSTICE MIDDLETON: Is that at the Sessions?

MR. FROST: No, sir; those are Supreme Court cases.

MR. CONANT: Assizes.

MR. FROST: Assizes.

WITNESS: Without knowing, I could make a guess that the cases in which there were so many no bills were cases of ——

MR. CONANT: Motor cars. Motor car cases.

MR. STRACHAN: Running-down cases.

WITNESS: In which they probably thought that if there was any bill it ought to be a bill for negligent driving and it ought to be in the Sessions; but I don't know.

MR. CONANT: Of course, I must say I am not very much impressed with those figures, because you have this situation there: Those decisions of the jury in cases of bills which they reject are not subject to review at all; that ends it. Now, in my own experience, I think I have had three cases, certainly two, in which I afterwards directed an indictment to be laid and there were convictions in both cases. What I mean by that is this, that there is the state as well as the individual to protect, and whether in all those cases of no bill the grand jury is right it is impossible to say.

WITNESS: Oh, of course it is impossible.

MR. FROST: Of course, I only brought that up from the standpoint of expense, that there is apparently ——

MR. STRACHAN: Isn't it the practice, your Lordship, in the city of Toronto, for instance, at the Assizes, that first there is the address to the grand jury, and then the court proceeds immediately with the first case on the civil list, and in fact usually the first week is taken up ——

A. Sometimes the first fortnight.

MR. STRACHAN: Sometimes the first fortnight, so that the saving in time in Toronto, as his Lordship says, is half an hour.

MR. CONANT: Yes, I think that is true in Toronto, but I do not ——

WITNESS: I am speaking of my own practice throughout the country. I think all judges follow the same practice; they must, because they know that their time for the court is limited, and they have got to get on with something.

MR. CONANT: There is one more matter, your Lordship, before we leave that. In the Jurors' Act, you recall it was amended in 1936 limiting the inspections to not less than six months intervals, and then there was a qualification added, "without the specific consent of the judge." Do you think there would be any injustice if that qualification were removed, "without the specific consent of the judge"? Do you think that is necessary?

A. I have used that power, I can remember twice, I think, where the grand jury told me that for some reason or other they wanted to go and see some particular place and they satisfied me that there was good reason why they should go to that one institution. I cannot remember what the circumstances were—I dare say if you were to ask Mr. Dickson he could—but the leave was not granted until what I thought was a real case for the granting of it had been made out, and, as I remember it, they had something or other to say afterwards in their presentment that was quite useful.

Now, Chief Justice Robertson suggests that the presentment never gets very far. I think you will remember of instances of having had presentments sent up by me upon which you have taken some action. They are not all valuable, but some of them are. I had another one which was dealt with by the Liquor Commission; there were some remarks they had to make about some particular hotel or something of that sort; I communicated with the chairman, and he investigated and did something.

Q. But don't you think it would be sufficient, your Lordship, for all practical purposes if the statute were left with the six months definite?

A. I haven't thought very much about it. As I say, since the statute was passed I have only known of, I think I am right in saying, two instances in which they were allowed to make their ——

Q. I think we had figures to show that in Toronto here there were eleven inspections in three years; wasn't that it?

A. Oh, yes, but we have changed all that by your statute.

Q. Well, no; these were within the period, and it was explained that it was due to the special direction of the judge, the increased number. We have the figures, eleven in three years, whoever submitted the figures—I think it was Mr. McFadden ——

MR. SILK: It was Mr. McFadden, yes.

MR. CONANT: He was asked why there were so many, and he said the judges had given specific instructions or permissions.

WITNESS: To go to particular institutions or institutions in general?

MR. CONANT: Well, I do not recall that. Was it eleven, Mr. Silk, in three years?

MR. SILK: I don't see the number; it was a very large number, though.

WITNESS: The figures astonish me.

MR. CONANT: Well, we have it here in the evidence of Mr. McFadden.

MR. SILK: I have a chart here supplied by Mr. McFadden, but it is not clear what years it applies to.

MR. CONANT: Well, we were only discussing it in relation to this qualification in the section; it did not have any meaning before that.

MR. SILK: It looks as though the number of inspections was something like thirteen, from the chart which I have before me, in three years.

WITNESS: I can't understand it, because Judge Parker and I have tried to work out a system by which we are complying as nearly as possible with that Act. We have a general inspection once a year by an assize jury and a general inspection once a year by a sessions jury.

MR. CONANT: Here was the question; I asked the question (at page 1140):

"Q. There must be six months intervene; isn't that it?

A. Yes; but then unfortunately there was a clause put in, that where the judge directs ——

Q. Otherwise directs.

A. Well, as a matter of fact, it is not working at all, because, as you will see from that schedule, there have been three years where there should have been six visitations; there have been thirteen of the City Hall and the Toronto Gaol."

WITNESS: Oh, well, is that what he means? Of the City Hall and Toronto Gaol—I can understand that.

MR. CONANT: "Between October 1936 and October 1939."

WITNESS: Because, as I understood the section—I always tell them to inspect the Toronto Gaol and the City Hall every time, because I thought that is what the section meant. That may be my fault; I may have misread that section. What is the number of it?

MR. CONANT: Section 44.

WITNESS: I wonder if I have been using the Act in the form in which it was before it got into the Revised Statutes.

MR. SILK: I do not think there was any change at the time it was incorporated in the Revised Statutes, sir.

WITNESS: If this is the only section that governs, I have been wrong.

MR. SILK: It is just the same, I think.

MR. CONANT: It seems to me that the only qualification is the judge's direction.

WITNESS: I think I have been giving them a wrong direction.

MR. CONANT: Well, it is not important.

WITNESS: You had better change me rather than the statute.

MR. CONANT: Doesn't it occur to you that if we cut out the limitation at the end ——

A. I never saw much reason for sending them more frequently to the gaol and the court house. We always get the same presentment about the court house, that it is inadequate, which is true. I wonder if it is in the Jurors' Act—oh, this is the Jurors' Act.

MR. SILK: There was no provision at all before 1936 for inspections. Prior to 1936 there was no provision in any statute.

WITNESS: Well, I don't know where I got it into my head that they ought always to look at those two institutions. If that is what Mr. McFadden means, I am sorry to admit it, but the fault is mine, not that of the statutes.

MR. CONANT: Well, it's all right, it's all right.

What do you want to pass on to, Mr. Silk?

MR. SILK: I think we have pretty thoroughly covered grand juries. There are three or four aspects of petit jury trials.

Q. The first one, sir, is as to improving the calibre of the men who make up the petit jury panel. In the first place, do you agree that there is some need for improvement?

A. Yes.

MR. CONANT: Do you think the exemptions are too wide, your Lordship?

A. Yes, I think as absolute exemptions they are too wide, but you have got in individual cases to exempt. To exempt a man, for instance, who says, "I have got a one-man business, I have been having hard times, and just now I have got a contract on hand," you have got as a matter of humanity to let him go. Somebody else is really the foreman directing a number of men who are at work on something that is of importance, there is nobody available to take his

place for a fortnight, and if he is away the work stops and the other men are out of a job for the time being.

Q. It seems to me one of the difficulties that arises there, that if you cut down the exemptions you would have to set up some machinery in advance of the trial to determine who is to be exempted or who is to be excused, because otherwise, sir, you might have your panel substantially impaired by the trial judge without an opportunity of meeting the deficiency.

A. I think that question would arise more often in Toronto than elsewhere, wouldn't it? In Toronto what happens is that the juror who thinks he has some reason for being excused writes a letter to the sheriff and the sheriff lays it before the judge, ordinarily on the day of the opening of the Assizes, but in special cases, very special cases, earlier. As far as I can make out, I think that works pretty well. The sheriff is able to tell the judge a little time in advance that if many exemptions are granted there is going to be too great an inroad into the panel. I have not found practical difficulty in the way it works.

Q. Have you any suggestions as to how to improve the calibre of jurymen, your Lordship?

A. No, because I have never seen a jury struck; I do not know how they do it. The judges make a suggestion that it might be desirable to see that the county judge takes part always in the selection. Beyond that I do not think I have got practical experience that would be very valuable.

MR. SILK: The next matter pertaining to petit juries is Mr. Barlow's suggestion that where a petit jury is required the person requiring it should be charged a more substantial fee; he suggests a fee, I think, of $25.

WITNESS: The Chief Justice of Ontario has discussed that. The judges were, as I remember it, quite unanimous in the recommendation that they made—first the committee made to the judges, and then the judges passed on. I look on it just in the same way that the Chief Justice does.

MR. CONANT: All right, Mr. Silk.

MR. SILK: Then there is the proposal that all cases should be tried without a jury except where the judge finds that the questions in issue are more fit to be tried by a judge.

MR. CONANT: It is a question of shifting the onus for jury trials.

WITNESS: I think it is where it ought to be now.

MR. SILK: And have you any views, sir, as to extending the powers of the Court of Appeal in an appeal from a jury?

A. I should rather not talk about that. I took part in the framing of that proposed rule, but ——

MR. CONANT: His Lordship the Chief Justice rather recedes from that

recommendation, your Lordship. Would you care to express any personal preference?

A. Do you remember Lord Darling, at one of the Bar Association dinners when he was out here, saying that he was always telling them in England that it didn't matter much what law they had as long as they had a wise man like him to administer it? If you gave a wise Court of Appeal great power it would use it pretty sparingly.

Q. I think I may be pardoned for propounding to you, sir, the more or less hypothetical question—let us regard it as hypothetical: do you not think, sir, that there are actions carried through and brought to trial with the original intention that they shall go to a jury, that are dependent upon a jury for their very existence?

A. I don't know; there may be; I don't know.

Q. You have not sensed that?

A. I think I can remember one or two where I had some such idea—that some appeal to sympathy might succeed, where an appeal to reason would not; that is the kind of thing you mean, is it?

Q. Yes, of course—or any consideration other than the merits, whether it is sympathy or anytlng else—any consideration other than merits.

A. When we were working at that draft amendment of ours, my idea was, that the finding of a jury ought not to be very much more sacred than the finding—that is, the finding of fact of a jury, ought not to be very much more sacred than the finding of fact of a judge, who had seen the witnesses and heard them; and I do not think that it was in our minds that the Court of Appeal, no matter how wide its powers, was going to ignore findings of fact, whether made by a judge or by a jury, and start over again on the evidence, and just consider the evidence as if nobody had made a finding of fact on it.

Q. There are the two aspects, it seems to me, your Lordship. Of course, there is the more or less fundamental criticism that broad powers in the Court of Appeal in a measure, set it up as a super-jury, and also in a measure, usurp the functions of the jury; but, so far as the public are concerned, it comes down to a question as to whether there is better justice administered by the Court of Appeal having wide powers of review. That is the fundamental consideration. With the narrow powers to-day, a jury might go very wrong, and there is no way to right them, is there?

A. They can order new trials, when they think the verdict is against the weight of evidence.

CHIEF JUSTICE ROBERTSON: You have no reasons for judgment from the jury.

WITNESS: That is true, yes. As the Chief Justice of Ontario points out,

the court is not helped by having the reasons for judgment in the case of a jury, and does not know what did lead the jury to the result achieved.

MR. CONANT: Reasons by the jury, you mean?

A. Yes. I mean, that is one reason for treating the jury's finding rather differently from the finding of a judge, because the judge has given his reasons, and perhaps has shown where he went wrong.

Q. Yes; I was not aware that juries did give their reasons.

A. No, they don't.

Q. Well, it is an important question, that, it seems to me—a very important question.

A. I think that perhaps what influenced me in concurring in that suggestion that is in our report was, very considerable confidence in the wisdom of the Court of Appeal, and its fitness to be trusted with very, very wide powers, which I did not expect to see exercised too freely.

MR. SILK: Then, sir, there is the matter of pre-trial procedure, which you heard this morning discussed, both as it exists in the United States and in England.

WITNESS: I cannot make out what in the world is supposed to be gained by it in this jurisdiction. The issues do get defined before the cases come to trial here. May I ask Chief Justice Robertson whether I am right in saying that the Chief Justice of Michigan—I forget his name.

CHIEF JUSTICE ROBERTSON: Bushnall.

WITNESS: Yes, to whom you referred this morning. —— told us that, while they had some procedure for examination for discovery, they had no practice of examination for discovery such as we have?

CHIEF JUSTICE ROBERTSON: Yes; he said they had some provision for it in their rules or statutes, but nobody ever held one; it was an unknown thing.

WITNESS: That examination for discovery, while it is sometimes too long, as the Chief Justice has said, does define the issues. I think, when you get down to trial here, both sides know, in pretty nearly every case, what they have come to try, and the court knows. I think you are going to make another step in the cause, and an expensive step. If the case is an important case, in which senior counsel have been or ought to be or will be retained, the settling of issues and the deciding as to what admissions are to be made and so on, can, I should think, hardly with safety, be entrusted to the junior. Are you going to make the senior go through all that procedure? Supposing at the time that pre-trial comes on, he has not yet been briefed or has not yet got up his case; supposing the man originally contemplated is changed before the trial, and does not look at the case quite in the same way as his predecessor; you have got some kind of cut-and-dried issue presented to the court, and the court has no power to amend or change as the case develops. We pride ourselves upon the elasticity of our

practice, the technicalities of the American practice have no place in our procedure, and we, in a way that would shock them, which is sometimes pretty rough and ready, do at the trial, get down to the real issue, and make such amendments as are necessary to get that real issue disposed of. I think you are going to tie the hands of the judge, make it difficult for counsel, and are going to increase the expense unduly—and all for I don't know what. I don't know what the Commissioner is trying to improve or what grievance he is trying to remove; I have never been able to grasp it.

MR. CONANT: What is the next, Mr. Silk?

MR. SILK: The next is the matter of assessors and experts. It has been recommended that the trial judge be permitted to sit with assessors, as is now done in the Admiralty Court, which would do away with the calling of expert witnesses.

WITNESS: In something more than twenty years' experience, I have never thought that I wanted one.

MR. CONANT: No, but this would be, of course, replacing expert testimony on each side.

WITNESS: But how can you? How is the court going to select the supremely wise expert who, without hearing the opinions of other experts, is going to tell the court all about it? I have done this: in one of these cases in which you do have conflict of expert testimony—they do not arise so often, but arise occasionally; for instance, boundary disputes, where surveyors are in difficulty—I have, using the powers that we have at present, appointed a surveyor, not as a judge, but to go, with the other surveyors if they choose to come along, and go over the ground, hearing what is said, and to make a report of his conclusion, upon which I was free to act or not, as I thought best after hearing argument. I think, usually when that kind of thing is done, his report is pretty well accepted by both sides. I have done something to the same effect in the case of a contest, as to competency to make a will or something of that kind—no, it couldn't be competency to make a will; it was competency to do something in the case of a living person. But I should have been very sorry to be called upon to select the man who, without hearing expert evidence on the one side or the other, was to ——

MR. CONANT: Why would he need to hear expert evidence if he was an expert himself? I don't just get the significance of that.

A. Because perfectly honest experts will differ; medical experts perfectly honest will differ.

Q. Yes, but supposing you have a case, let us take the case of a person who has been injured in any kind of situation that you like, personal injury.

A. Yes.

Q. At the present time, you call doctors and whoever can give evidence, as to the conditions that have existed, and the course of the treatments and that

sort of thing; then you have two or three doctors on each side, as to the probability of the future effect of these injuries. Now, why wouldn't the court be just as far ahead if they had one expert to advise the court as to the probable effect of those injuries?

A. What, by going and looking at the man?

Q. No; from hearing the evidence in court.

A. Oh, from hearing the evidence?

Q. Yes, of course.

MR. FROST: You might get the wrong expert.

WITNESS: Without hearing any opinions, do you mean?

MR. CONANT: He would just hear the evidence of facts, the medical data that is built up, as to the injury that has been caused to the person. Now, the question may arise as a matter of opinion, as to what is the permanent or future effect on the person. Now, why wouldn't one expert, either agreed to by both parties or selected by the court, be just as effective as two or three on each side, as to what that is?

A. Because, the two or three on each side have their reasons for their opinions, and they put forward those reasons.

Q. They are usually exactly opposite, according to the side that has retained them.

A. Oh, I don't think so. There may be some such cases as that, but I do not think there are very many. They put forward the reasons that lead them to their conclusions, and the tribunal then must weigh these reasons.

Q. Yes, that is right.

A. If you want to substitute for the judge, a man of the particular profession, whether it is engineering or medicine or surgery or what you like, to hear those reasons and perform the function of a judge, well and good, but I doubt very much if he can do it a great deal better than a judge or jury can.

Q. That would only be a duplication; that would not accomplish anything.

MR. SILK: Now, sir, if you will refer to the list you have before you, you will see that the next group of subjects pertains to practice in the County Court, and in other courts which are presided over by judges of the County Court. I don't know whether you have prepared yourself to make any comment or not.

A. Do you want to hear me about those matters? Or are they sufficiently covered by what the Chief Justice of Ontario has said?

MR. CONANT: Well, if you have anything to add, your Lordship.

WITNESS: I have not.

MR. SILK: I understand Mr. Justice Middleton is going to deal with item number 14, expenses of trial, where the venue has been changed. Have you any view to express there?

A. I haven't any.

Q. That takes us down pretty well to the Law Revision Committee.

A. I think that might be a very useful committee. I think I mentioned to you, Mr. Attorney-General, that until a few years ago, it was the practice during almost each Session of the Legislature to send down—this is perhaps, not exactly the same thing, but to send down to the judges, some, or a good many bills for consideration and report to the Attorney-General, and the judges used to meet and report. I think the reports were private reports to the Attorney-General.

MR. CONANT: How long ago was that practice, your Lordship?

A. Well, it continued all through Sir William Meredith's time as Chief Justice, and it seemed gradually to drop into disuse, we never knew why. The judges were always very glad, indeed, to be of any help that they could be in that regard. How long ago is that, that the ——

MR. JUSTICE MIDDLETON: I don't remember.

WITNESS: Did it continue while Sir William Mulock was Chief Justice?

MR. JUSTICE MIDDLETON: Sometimes; not much.

WITNESS: Mr. Justice Middleton tells me he does not think ——

MR. JUSTICE MIDDLETON: I think Sir William killed it off.

WITNESS: He does not think that there was very much during the time of Sir William Mulock as Chief Justice of Ontario. I do not think it stopped like that (a snap of the fingers) at any point, but I think it gradually faded away, why, I do not know.

MR. CONANT: It has seemed to me—and I am again dealing with it in an entirely impersonal manner, that the system they have set up in England certainly has a lot to commend it.

WITNESS: I think so, too.

MR. CONANT: On what I might call lawyers' law; I do not mean controversial matters. There are a lot of more or less abstruse points of law, as to which, perhaps, by conflicting decisions or just a combination of circumstances, nobody is exactly sure what the law is or what it ought to be. If those points were submitted to a committee of that kind, you would get the views of men who were dealing with the problems, and it might be of very great value, because

on those questions, from my experience—and I think one of the members of the Committee will bear me out—on questions of that kind, the Legislature is actuated by a desire to do what is right; they do not become controversial in the Legislature.

WITNESS: I should not think so.

MR. CONANT: Isn't that right, Mr. Frost?

MR. FROST: Yes.

WITNESS: I should think that would be so. I quite agree with that, and perhaps what I said about the practice, as to specific bills was irrelevant, but the fact remains, that the judges are at your disposal for that purpose without any legislation, if their services are desired.

MR. SILK: Just while we are on the matter of committees, sir, there is the Rules of Practice Committee. Since 1925, the practice in England has been to have members of the Bar on the Rules of Practice Committee. —— (At this point Mr. Arnott entered the room.)

MR. CONANT: I am sure we are glad to have Mr. Arnott with us again.

WITNESS: Haven't we got pretty good Rules of Practice now, and don't they get amended as often as they need to be amended, and does anybody complain that the judges won't listen to suggestions that are made to them by any Bar Associations or other persons? As a matter of fact, don't most bodies that have to administer laws lay down their own procedure? And isn't that all that these rules amount to, a laying down of procedure for administering such statute or other law as we are sworn to administer?

MR. SILK: Mr. Barlow takes the view that the practising barrister in a good many instances, sees the matter from the standpoint of the litigant perhaps, more clearly than the judge does.

WITNESS: Yes, but the practising barrister is entirely free to make representations to the judges, and I think the judges consider all the representations made to them. Somebody has got to decide in the last instance, what the procedure is going to be.

MR. CONANT: Of course—I think we had that the other day with Professor Finkelman—with few exceptions, and they are not important, when the right to make rules is delegated by the Legislature, there is the requirement that they shall be ratified by Order-in-Council. Wasn't that his observation, Mr. Frost? There were some minor exceptions; I think the Veterinary College or something like that did not require it.

WITNESS: As a matter of fact, all our rules have validated by statute.

MR. STRACHAN: He was talking about rules under statutes.

MR. FROST: I think he was talking about rules in connection with the regulations—for instance, Highway Traffic Act regulations, about how many red lights, and so on.

MR. SILK: Administrative law.

WITNESS: You are making laws there, aren't you?

MR. CONANT: Yes, but the same observation applies, with all deference to my colleague here, that when the Legislature delegates the power to make rules, they are delegating the power to affect rights and relationships of individuals.

MR. FROST: That is particularly true, for instance, in mortgage actions.

MR. CONANT: I do not know of the rules of any body or commission or jurisdiction, that affect the rights of people any more than the rules of the Supreme Court.

MR. FROST: Just let me get this straight: are the rules of Supreme Court not confirmed or brought into effect by Order-in-Council?

A. No, no; by statute. They are confirmed periodically.

MR. JUSTICE MIDDLETON: 1913, and from then on, I think they have been three times confirmed since 1913.

MR. CONANT: They are effective, nevertheless, your Lordship.

WITNESS: Oh, yes.

MR. CONANT: As a matter of—what would you call it?—convenience or precaution, in the past they have been periodically ratified.

WITNESS: That is true.

MR. CONANT: But your committee, if I am not mistaken, can pass a rule to-morrow and promulgate it and it is in effect.

WITNESS: We haven't any committee that can do that; the judges can.

MR. CONANT: The judges can, yes.

WITNESS: We have a committe which reports to the judges, but it is the judges who act.

MR. SILK: It is under section 106 of the Judicature Act, subsection 2, which says:

> "The judges of the Supreme Court may at any time amend or repeal any of the rules and may make any further or additional rules for carrying this Act into effect, and in particular for",

and it goes on, and the only rules which require to be approved by Order in Council are under clause (h):

> "Subject to the approval of the Lieutenant-Governor in Council for

making rules from time to time regulating all fees payable to the Crown in respect of proceedings in any court."

MR. FROST: Your point was as to whether the rules should be confirmed by Order-in-Council, for instance, before they do come into effect.

MR. CONANT: Well, yes.

MR. JUSTICE MIDDLETON: I think the rules can be confirmed without an Order in-Council.

MR. CONANT: Oh, I think so. I do not think, as the law stands at present——

MR. JUSTICE MIDDLETON: At any rate, they have always been submitted for confirmation from time to time.

MR. CONANT: Well, that was as a matter of convenience or precaution, I think, in order to remove any question as to their force and effect and validity; but on the reading of the Judicature Act, excepting those rules affecting the Crown's revenues, I do not think any order is necessary at all.

MR. SILK: I do not think there has been any Order-in-Council since 1928, when the last general revision took place.

MR. CONANT: However, your Lordship, you feel that it should be left with the judges?

A. I am not able to speak for the judges as a body about this, but personally I do not see any great reason why there should not be provision for confirmation by Order-in-Council, provided you do not interfere with the necessity that arises from time to time of passing rules for some emergency, which are not expected to have practical effect for very long; but whether, like the by-laws of directors, they should be valid until the next annual meeting or until next something, I do not ——

MR. FROST: Of course, I can see that that is the difficulty.

WITNESS: If you can devise some scheme for making them subject to confirmation without preventing their temporary use during the time when the question of confirmation or no confirmation is under consideration.

MR. CONANT: What detriment or disadvantage would there be, your Lordship, if a committee were constituted, consisting of course of the judges, but adding to it outstanding members of the Bar, let us say ——

MR. JUSTICE MIDDLETON: Outstanding members of the Bar won't know anything about the details of the rules.

MR. CONANT: The Treasurer of the Law Society, and men who from their official positions would be regarded as representing the attitude of the Bar.

WITNESS: I think I was rather approaching it from the other direction; I was asking myself, wherein has the present procedure proved inadequate? What is wrong with the present body?

MR. CONANT: Well, of course, we have had ——

WITNESS: I think I approach most questions of change that way: what is wrong with the present thing?

MR. CONANT: As I understand it, we have had both systems here. When the rules were revised—was it in 1897?

MR. SILK: Yes, sir.

MR. CONANT: That was by a joint committee, was it not?

MR. SILK: That is right, yes.

MR. CONANT: Are the names here?

MR. SILK: They are not in that volume, sir, I think.

WITNESS: In 1897?

MR. CONANT: Yes. There was a very substantial revision in 1897, as I recall; that was done by a joint committee of the judges and counsel, was it not?

MR. SILK: Yes, sir.

MR. CONANT: We had those names here. What were they in? I saw them here.

MR. FROST: They are given in the evidence.

MR. SILK: The Attorney-General was also on the committee, I think, and his Deputy.

MR. FROST: I believe Mr. Barlow gave that evidence.

MR. SILK: I have sent out for them, sir.

MR. CONANT: Well, is there anything else, your Lordship, any other observations?

A. I do not see anything.

Q. There was one other point I had in mind, and I would like your opinion, as a trial judge, Chief of the Trial Division, if you would care to express any opinion, because I think it is an important matter. We had up here the question as to whether the present provision of the law doing away with juries in the case of actions against municipalities should be extended to organizations or bodies of a similar nature, creatures of municipalities if you like to call them

that, public utilities commissions, railway boards, and matters of that kind. Would you care to express any opinion on that, your Lordship?

A. I do not see any reason why they should be abolished in those instances. I do not think the same consideration applies to them as applies to the municipality. Mr. Justice Middleton might be able to ——

Q. What do you regard as the consideration that did move the Legislature to do that?

How many years ago was that, Mr. Silk?

MR. SILK: 1896, I understand.

WITNESS: I may be wrong, but my recollection of that—perhaps Mr. Justice Middleton could check me—was that the theory put forward at the time the jury were dispensed with in the actions against municipalities, was that these actions were against local municipalities in which the jurors were ratepayers, and the jurors were being asked when they awarded damages to decide that they might have to add a couple of mills to their own tax rates, and that the individual was not getting justice. In other words, I thought the agitation came from the plaintiffs' side rather than from the municipalities' side. Now, if there is any agitation in the case of these commissions you mention, it comes from their side, not the general public's, I should suppose. Can you check that?

MR. JUSTICE MIDDLETON: I think that is right.

WITNESS: Mr. Justice Middleton tells me that my recollection is right.

MR. CONANT: I cannot dispute it; I don't know. I have often wondered what the fundamental reason was, whether it was that or whether it was the impression that juries were very liberal in their awards against municipalities.

WITNESS: No, I think they thought they were not a bit liberal when it came to an icy sidewalk in their own village or something of that sort.

MR. CONANT: Even if that is the case, your Lordship, these commissions or creatures of municipalities are, after all, in the final result, the burden of the taxpayer in the same way.

A. Yes, but then what juror thinks about that in considering an action against one of them?

Q. Well, thank you very much.

A. I am one of those, as you may have gathered, who like juries, and I find working with them extremely interesting, and I think that generally speaking they are anxious to do their duty.

Q. Oh, yes, no doubt about that.

A. They are not as quick as a judge would be, but it is very rarely indeed

that I have thought that I knew that the verdict of a jury was wrong—very rarely. I have sometimes thought that they were not very wise in their assessments of damages, for instance, that they might go too high or too low, that their calculation was not as accurate as an individual's might be; but on their findings of fact I like them.

Q. It is a question as to whether the Court of Appeal should be allowed to disturb those findings of fact.

A. Well, I know a case where I should like them very much, and where they are not used, and that is in the contested divorce case. I believe they could size up situations ——

Q. You think you ought to have juries in divorce cases?

A. In a good many contested divorce cases that I have seen I have had a feeling that a jury might understand the persons concerned somewhat better than I could, and might draw more accurate inferences from proved facts.

Q. That raises a point, your Lordship. I don't want to take up time, but do you think that any further precaution is necessary, other than what we have now, in divorce cases, so far as the intervention of the Attorney-General's Department is concerned? What I have in mind is this, sir, so as to more or less narrow the discussion: a considerable number of divorce cases are undefended, aren't they?

A. Nearly all of them.

Q. And in those cases the judge has no assistance or little assistance to meet the more or less *prima facie* case that is presented; that is correct, isn't it?

A. True.

Q. Would you care to make any observation on this aspect of it: at the present time the state does not come into it until after the trial and the proceedings are on their way for a decree absolute; that is right, isn't it? Would you care to make any observation as to whether you think it would help to prevent collusion or any of the other undesirable aspects of it, if, before the original trial, the Attorney-General's Department, representing the State in this case, were served with a copy of the record and with the notice of trial, so that the Attorney-General could intervene if he saw fit?

A. I think every judge would welcome most heartily any intervention of that sort.

Q. You think they would; do you think it would be helpful, your Lordship?

A. Time after time the judge has a kind of suspicion ——

Q. A hunch, I think they call it colloquially.

A. —— that what he is hearing is very far from being the truth, the whole

truth and nothing but the truth. He tries a little bit of cross-examination himself, but he cannot cross-examine effectively, because he hasn't anything much to go on.

Q. No background.

A. He is uninstructed about the case altogether. We did work out at one time, when Mr. Bayly was Deputy Attorney-General, a draft—perhaps we didn't exactly draft the rules, but we drafted suggestions, and we were going to pass rules if the Attorney-General approved of the scheme that we had. The scheme was roughly this, that if a judge during the trial was dissatisfied he could halt the proceedings and direct a report of the evidence so far taken to be forwarded to the Attorney-General, who then would or would not, as he saw fit, come in at the resumption of the trial. That was the general outline of the scheme. I think the Attorney-General then in office—I forget who he was—was pretty well satisfied that it might be a good plan. Then there was a general election coming on, and we thought it better not to pass the rules until we saw what the attitude of the next Attorney-General was. There was a change of Attorney-General at the time, and—well, a few times during his tenure of office I wrote to ask whether he had yet considered the scheme, and he had not, and so we took no such action. You ask whether the record in each case ought to be sent to the Attorney-General: that would mean sending him no more than he has got now, because now, as I understand it, he gets the writ and statement of claim, doesn't he?

Q. Yes, but he doesn't get it until after the trial.

A. I thought he got that at the time originally.

Q. I don't think so.

A. I thought you got it at the same time as the service. I thought we provided that in the rules. But, at any rate, he would have only that bald paper, and unless he was—it was said to us at the time that I speak of that it would involve the setting up of a large staff, probably, and a great deal of expense, if the Attorney-General were to undertake to investigate each of these cases before it came to trial.

Q. In England they do it by means of what they call a King's Proctor, don't they?

A. Yes, but I do not know when he comes in exactly, or in what circumstances.

MR. JUSTICE MIDDLETON: Before the trial.

WITNESS: He may, but does he in all cases?

MR. JUSTICE MIDDLETON: I think so. He may not desire to appear.

WITNESS: We know that tricks are played on us about service of papers and that sort of thing. We know, for instance, that there are cases of persons posing as co-respondents and being served with papers who are not real co-

respondents at all, and even respondents posing as respondents and being served when there was no real service of papers. But I thought that the statement of claim went to the—perhaps not. If the Attorney-General did see the statement of claim I don't think he would be very much farther on unless he undertook forthwith an investigation of the case, and what we were trying to evolve was some scheme by which we could sort out, we could select the cases in which we thought we should be glad of the assistance of somebody.

MR. CONANT: You see, Rule 17 says a copy of the judgment *nisi* shall be served upon the Attorney-General within one month from its date, and so on. He is only aware of the proceedings when he gets a copy of the judgment *nist.* I am just asking whether it would help any, whether it would likely to guard against possible abuses, if before the trial, say at least ten days before the trial, we were served with a copy of the notice of trial and of the record up to date?

A. It would help tremendously if upon being served with those papers he would investigate.

MR. FROST: That would be a big job, and an expensive one.

WITNESS: But it was thought at that time that that meant too much work for the Department and too much expense, and so, as I say, we were trying to compromise by finding some means of referring to the Attorney-General the cases in which we had suspicions.

MR. CONANT: Of course, your Lordship is aware of a case not long ago where it became very apparent, and as the result of our Departmental intervention it was found there was something wrong.

A. That was at Ottawa?

Q. Yes.

A. Yes.

Q. That was very obviously an abuse of the process of the court.

A. Absolutely.

Q. Now, if there is any way to prevent that ——

MR. FROST: Do you think, sir, that it would be an improvement to amend the rules to provide that the judge might suspend the hearing if he became suspicious of the evidence and the way it was given and so on, and then report the matter to the Attorney-General?

A. That was the scheme that we had in mind, but we did not want to adopt that until we knew that the Attorney-General would approve. I suppose that eight out of ten of the cases, or nine out of ten probably, perhaps a larger percentage, are perfectly genuine cases. It is the odd crooked case, if I may use that expression, that all this machinery is designed to meet. The more intervention there is by the Attorney-General the better the judges will be pleased,

but the Attorney-General, I take it, has got to be protected against the necessity ——

MR. CONANT: Being overwhelmed.

A. —— of intervention in every case.

Q. It occurs to me that both schemes have this merit, that if the party to an improper action realizes that this may come under the surveillance or review of the Attorney-General, either at the trial or by postponement of the trial, it is going to rather make him cautious about entering upon the project; wouldn't it have that effect?

A. We thought so, we thought so. That does not need legislation at all.

Q. No; it would be a matter of rules.

A. But that is our general attitude, that we are not satisfied that at present we are able to prevent the obtaining of decrees in cases in which they ought not to be obtained, and that we should welcome very much the assistance of the Attorney-General in those cases, while, as I say, he ought not to be burdened with the ordinary, perfectly honest case, about which no suspicion arises at all.

Q. Well, I am sure I am very interested; I will certainly discuss it further.

A. I should be glad to pursue that—perhaps we need not take up the time of the Commiteee with that, but I should be glad to pursue it with you at any time at all.

Q. Thank you very much, sir.

MR. SILK: Mr. Justice Middleton.

THE HON. MR. JUSTICE MIDDLETON.

MR. SILK: Mr. Justice Middleton, have you anything to add to what the two Chief Justices have said with regard to grand juries?

A. I agree in all that has been said both by the Chief Justice of Ontario and Chief Justice Rose with regard to grand juries. I should like to emphasize just one point, that is the educational value to the grand jury, and also the point that the time may come, and come unexpectedly and suddenly, without any warning, when the suspicion will arise that there is not fairness in the way in which a matter is brought to trial. I do not know when the temptation may come, or whether the temptation will ever come, but the suspicion is bound to come sooner or later that there is unfairness, and the only way we can succeed in preventing that kind of feeling from growing up in the minds of the public, in the minds of the public who are accused rightly or wrongly of crime, is before the actual occurrence. The educational value to the grand jury goes without saying; it is the greatest possible advantage to have a grand jury educated and trained.

I remember one time charging a grand jury very carefully and particularly in a murder case, and the same charge stood for the petit jury. The man was directed to be hanged, and afterwards was hanged. Some time later I had a man who had been on the jury painting a house up in Muskoka, and he said, "Do you remember me?" I said, "I can't place you, but I am sure I have seen you." "Oh," he said, "I was on that jury. It's a good thing you charged that jury as you did, that no matter what sympathy and so forth we might have for him we should not allow sympathy to prevail, because when the jury were considering it there was one man said, 'I am not going to send that man to the gallows.' I said, 'How do you dare to say that, with the judge's words still ringing in your ears?' That man is an unworthy citizen, unworthy to be on the jury.

MR. FROST: Sir, this may be rather a curious question, in view of the fact that you have spoken about the value to the public from an educational standpoint, but, just in view of the other angle, the matter of expense and so on, do you think there would be much lost if the number were reduced somewhat, say from thirteen to nine or something of that sort?

A. It has been in process of reduction for a good many years; it was twenty-three, and now it is down to thirteen. I think that is about as far as we can afford to go. The expense is not very much.

Q. Well, sir, with the situation in Toronto, I think that that is quite correct. I think, in view of the number of cases, and the number of cases in which no bills are brought in, that that is apparent, that the grand jury in Toronto must in fact save the people money. On the other hand, sir, in the outlying districts, in the ordinary county towns, where perhaps there is one criminal case, the proportionate cost in those cases of the grand jury goes up, and I think that that is where the grand juries have got their bad name from, is the fact that the county council committees, on looking over the administration of justic accounts, think that the cost of the grand jury is out of all proportion to the good they perform; and it was just to meet that situation that I wondered whether it was possible to make some reduction in cost there by reducing, perhaps, the number.

A. If the cases coming before the grand jury are not important criminal cases, then there is no doubt in the world that a large grand jury is unnecessary.

Q. Well, sir, you find that, for instance, in the cases coming up before the General Sessions. Now, Mr. A may be accused, for instance, of some theft; he has the right to elect trial before a magistrate, he has the right to elect speedy trial before the county judge, or he has a right to elect trial by jury, and in the cases of trial by jury automatically the grand jury comes in, and it is an expensive matter for the public. On the other hand, in the matter of Supreme Court cases, where, for instance, matters of life and death are decided, it seems to me that every safeguard should be kept there. On the other hand, it does seem curious that, just because a man elects trial by jury, there should be the intervention of something else which does run up the cost of the trial as far as the public is concerned.

A. In the Sessions they get through these cases very, very rapidly. A case doesn't last half an hour sometimes.

Q. Well, of course, I know that is true.

A. They hear a witness and the story that he stole something: true bill.

MR. SILK: Then, sir, the next matter we have before us is the matter of petit juries, which has been discussed in three or four aspects. The first of those is as to improving the qualifications of petit jurors.

MR. CONANT: Before you proceed to that—there may be some repetition in this question, your Lordship—don't you think that we would be providing ample safeguards if we maintained the grand jury only in the Supreme Court Assizes, which, after all ——

A. There is something in that.

Q. Which, after all, deals with the more serious cases?

A. Yes.

Q. and recognizing the fact—your Lordship may not be quite as familiar with this observation as I am, because I have acted for the Crown—that in a great many of the Sessions cases which go through a grand jury and a petit jury the issue is not very large.

A. I think there might well be a distinction between the Supreme Court and the Sessions cases.

MR. CONANT: All right, Mr. Silk.

MR. SILK: Then I was asking you, sir, about the matter of improving the qualifications of the men who go on the petit jury panel.

A. I would like to see some method of excluding people who are on relief from the petit jury. I do not think they are desirable petit jurors. There are a great many men that are on relief who are on the petit jury. They don't ask to be excused.

MR. CONANT: They don't ask to be excused?

A. They don't ask to be excused, because it is the easiest way they know of getting five dollars or whatever the fee is.

Q. Of course, you are bringing up a big question there, as to whether a person forfeits his rights as a citizen because he is in the unfortunate position of having to be subject to the State's benefactions for the time being.

A. It would have to be carefully considered, of course. But the people that are hanging around the court expecting to be called and sometimes getting called are not the most reputable citizens and not the kind of people that you would expect to pass as between A and B.

MR. FROST: Do you think, sir, that the exemptions might be narrowed?

A. I think the exemptions should be narrowed in one sense, and perhaps made wider. The man who has the misfortune to be poor ought not to be on the petit jury. The trouble is that the poor men getting on the jury outnumber the rich, and they are ten to one anyway.

MR. CONANT: I cannot avoid this observation again: I can see that the twenty-six classes of exemptions that we have now are too wide. We have millers on there, and tradesmen who fifty years ago occupied a vastly different position from what they do now, and I can also see the force of Chief Justice Rose's observation, that outside of those exemptions there may be people engaged in war contracts or other important operations; but it does seem to me that if we are going to adopt both a more restricted and a more liberal exemption there would have to be some machinery for determining those excuses or exemptions in advance of the court, because otherwise, if you leave it until the court day, your panel might be—well, shot, I guess is the word; it might be disrupted; so that if you had those exemptions determined far enough in advance that your panel could be filled out, if there were a sufficient number of them, it seems to me that is what would have to be done. Would you not think so, your Lordship?

A. I do not think it applies very radically except in Toronto, and in Toronto the panel is only for two weeks, and at the end of the two weeks the panel is dissolved and a new batch of jurors called.

Q. Yes, but take, for instance—I think this is important, or I would not labour it—take the county of Ontario, where I come from; I think our usual panel is forty-eight. Now, if by reason of let us say discretion you are going to excuse a sufficient number from that panel on the court day, then your panel might be impaired and you could not handle the work?

A. How many would be excused?

Q. Well, we can't tell.

A. I don't think there are ever more than half a dozen excused.

Q. Well, why couldn't those exemptions or those excuses be determined by the local judge in advance of the Assize or the Sessions?

A. I don't see any reason why not.

Q. Do you see any reason why that could not be done, your Lordship?

A. I do not see any reason why it should not be done.

CHIEF JUSTICE ROSE: No, unless—I don't suppose he would like the job.

MR. CONANT: Well, your Lordship, take Whitby, for instance; he would have a better local knowledge than your Lordship would.

CHIEF JUSTICE ROSE: Oh, yes, of course he would. That is the reason why I thought he might not like it.

MR. FROST: If the requirements for an excuse were placed sufficiently high there would not be very many excused; I mean, just suppose you left it where it was now, and made it that only very, very exceptional circumstances would permit being excused.

WITNESS: All the High Court judges require the circumstances to be quite exceptional.

MR. CONANT: There is this other angle to it: When I was Crown Attorney I have had lots of men come to me in advance of both Sessions and Assizes, perhaps a week or ten days ahead, men who had important business engagements and commitments and who wanted to arrange their affairs; I couldn't give them any undertaking; I had no means of determining in advance of the opening of the court what would be the disposition of their applications to be excused. And it always struck me that there should be some machinery by which a man with a genuine case could determine, if necessary, a week ahead of the time of the court.

CHIEF JUSTICE ROSE: I don't know what your difficulty was. I have done it many times.

MR. CONANT: You are referring to Toronto, sir; I am referring to the outside points.

CHIEF JUSTICE ROSE: I have done it in outside places, too, on letters from the sheriff saying that such-and-such a person for such-and-such a reason could not come.

MR. CONANT: Well, it is not a matter of first importance. All right, Mr. Silk.

MR. SILK: Then, sir, it has been suggested that the powers of the Court of Appeal should be made wider where an appeal is taken from a jury trial.

WITNESS: I think the powers of the Court of Appeal should be made wider.

MR. CONANT: You think they should?

A. At the present time if there is any evidence whatsoever the Supreme Court holds that the verdict of the jury should not be interfered with.

Q. Do you approve of the proposal of the judges contained in their report on the Barlow report?

A. Yes, I think, generally speaking, I do.

Q. Do you wish to express any views on pre-trial procedure as it has been discussed?

A. I think the pre-trial procedure is one of these myths. When Mr. Justice Roach was out here a few years ago, he was one of the champions of pre-trial procedure in England, and I discussed the matter with him here to find out what his view was, because he and another judge—I am not sure who the other

judge was—were taking charge, took all the pre-trial cases in England. He listened very sympathetically to what I had to say about the business, and he said, "Don't adopt it, don't adopt it in Ontario. It is not adapted for Ontario." It is one little court in London where there is a vast amount of important business, and the other judge and himself took charge of it all, and they had the pre-trial procedure adopted there. He said, "It is not adapted for the ordinary court," he said, "it is only something that would be peculiarly adapted to the situation in London." And I don't think the pre-trial procedure is at the present time carried on in London. Mr. Justice Roach is not now presiding. He said it was really a child of his own, and "Don't adopt it in Ontario, because you will come to grief."

One of the great difficulties about it is, it requires the senior counsel to be present. He can't trust the making of the arrangements to the junior, because the junior doesn't know enough, and so nothing is ever accomplished. It becomes like the summons for directions in England; they are parodied by an imaginary interview between counsel. Counsel goes in. "Mr. Counsel, are you appearing on this motion?" "Yes." "What is the case about?" "I don't know." "Do you?" "No, I don't. "Well, let's go in, we'll make an order," so the judge goes in, suggests the ordinary process. "Yes, that will satisfy me," so the order is then made saying statement of claim will be put in, and statement of defence ten days thereafter, reply if any within ten days thereafter, and then notice of trial to be given, examinations to be had, production to be made, and so forth. All the dates are fixed in the Consolidated Rules without any order. So the process is practically obsolete there, because it never resulted in anything. The judges couldn't do anything, because the judge will say, "Well, what is the case about?" "I don't know, my Lord. I was just told to come here." So the judge gets nothing and does nothing. That is the result of nearly all these experiments.

MR. SILK: Then, sir, you have heard the proposal that the judges be permitted to sit at trial with assessors, as in the Admiralty Court?

A. I think that is—I don't like to say it, because I don't know who is the champion of that, but I think it was somebody who has never tried a case, either with or without assessors, or there would not be such a suggestion made. It is essential that the parties should be at liberty to give evidence of experts whom nobody else would believe in; otherwise they won't be satisfied. If he should by any chance be chosen to be the assessor to assist the judge, then there is nothing but disaster ahead.

MR. SILK: Then there is one matter about which I particularly want to ask Mr. Justice Middleton, because I know he has some definite views. That is Mr. Barlow's recommendation number XV:

> "That the Judicature Act be amended to provide in civil actions for the payment of any additional expenses incurred by a county by reason of a change of place of trial."

That is at page B40 of the Barlow report.

WITNESS: The venue is never changed unless it has been unreasonably laid

in the first place. Then the change that is made is in accordance with the balance of convenience. And I cannot see why the change being made from an unreasonable place to a place that is found more reasonable should have any effect upon the costs of the trial.

MR. CONANT: Of course, I might say this: we do get complaints from counties—I mean our department does—as part of the criminal justice accounts business.

WITNESS: Well, that arises from another circumstance.

MR. CONANT: I was going to say, I think that most of those are the result of a change of venue in criminal trials. For instance, there was a case tried at I think it was at Brampton, a murder case, that arose down at Niagara, and that very often happens.

WITNESS: That is to get a fair jury, and in that exceptional case I would quite agree that the expense of the trial should be saddled on the place to which the venue naturally belonged, not upon the place where the trial is held. There is the chance that this county has been fortunate and got off without having any serious criminal trials and therefore has a virgin assize, and because we send a case down to be tried at that virgin assize should not saddle a peaceable county with the expense.

MR. CONANT: Do you think it is feasible to adjust it in civil matters, your Lordship?

A. It is perfectly simple in civil matters, because I don't think any case was ever tried. The only case I have had of that kind was the Oshawa graft case, where the venue was changed from Woodstock to St. Thomas, and then the man pleaded guilty.

Q. You mean Oxford, don't you?

A. I went up there to spend six weeks' time trying the case. I don't think that is really a serious matter at all.

MR. SILK: Have you any views, sir, on the necessity of permitting appeals from boards and commissions, particularly on matters of law?

A. I agree with what was said by the Chief Justice, that that must be met by special legislation in each case. Some commissions may be dealing with matters of law, but they are trivial matters of law, and it would be a farce to have an appeal. The same thing applies to the suggestion that there should be interlocutory appeals in the County Court. I should like to say something about the County Court and the Division Courts. The amount of business that is transacted in the Division Court, the number of cases, is exceedingly large; it runs up into fifteen thousand or something of that sort. The suggestion was made a few years ago that there should be a conjoint Division and County Court, and that the Division Court cases should be tried at the County Court sittings, and an alternative suggestion that the Division Court should be given an increased jurisdiction. Well, I agree with the idea that there should be a fairly

large jurisdiction in the Division Court; that would make an inroad on the County Court. I disagree with the idea that there should be any corresponding increase in the jurisdiction of the County Court. I think there should be a fixed sum, a liberal sum, but in fixing that liberal sum in the County Court it should be accompanied by a simplified procedure. In High court cases the procedure has to be very wide and thorough and searching. The High Court procedure is well adapted to the High Court actions, but it is not adapted to the County Court actions, in which the matters involved are really little more than in the Division Court. The Division Court jurisdiction and procedure will not apply to those cases, because one of the objects of preliminary proceedings is to enable what is to be tried to be sorted out from the chaos of facts so that the judge may know and counsel may know what it is that is to be tried. If a man goes down and finds there is no pleading in the County Court, and he is told, "Oh, the defence is this or that," something quite foreign to what he had understood, well, he has got to apply for an adjournment, the adjournment is made, the expenses of witnesses are incurred, and the expenses of solicitor and counsel attending the court, and all that expense is thrown away, and has to be borne by one side or the other, but, because it is a benevolent idea, the judge says no costs, that nobody has to pay the costs. Well, the clients sooner or later find out that the statement "No costs" does not mean at all the idea that there are no costs. So there must be in the County Court a sufficiently elaborate proceeding, preliminary proceeding, to enable the facts to be brought out and to be understood; but when once the facts are brought out and are understood in that sense, it is idle to have the elaborate machinery of examinations for discovery and interlocutory motions piled up in these cases, so that there are bills that they say are not adequate, the solicitors say, "Oh, these things don't pay," but which are two or three times the amount involved in the suit.

MR. CONANT: Yes, that is one of the injustices of our present practice. You can get a County Court action for two or three hundred dollars, and ——

A. And you get a bill on each side of $250.

Q. How can we overcome that?

A. You can overcome it by having a simpler procedure adapted to the County Court instead of letting the County Court shield themselves by saying, "Oh, well, the High Court rules apply." At the present time, in all things that are not provided otherwise, the High Court rules apply. There should be a simpler procedure in the County Court.

MR. FROST: For instance, an in-between set of rules, in between Division Court and High Court?

A. Yes; and I would have no interrogative proceedings in the County Court unless there was special leave for it.

MR. CONANT: Would you eliminate discovery?

A. I don't know whether I would eliminate discovery or not; that is a matter that requires some discretion, because discovery is a means that reduces the expense of proving facts that the man is ready and willing to admit. I

would let discovery only be at the approval of the judge, or let the costs of it be borne by the party seeking discovery—do something to discourage it.

Q. Have the judges ever given consideration to a simplified practice for the County Courts?

A. Never.

MR. FROST: How could that be done, sir?

A. The High Court judges are making rules for the High Court, for the Supreme Court, not for the County Court.

MR. CONANT: Yes, but you do make the rules for the County Court?

A. Well, we do, in the sense that—that idea that I put forward has never been considered in my time by the judges of the Supreme Court.

MR. FROST: Would you suggest, sir, then, that County Court judges should make the rules for the County Court and start ——

A. Oh, let the High Court judges make the rules. I do not think the County Court judges have enough opportunity for discussion to ——

Q. Well, sir, the point is this: how would this simpler procedure be arrived at? How could it be brought about?

A. By instructions of the High Court judges; that would be the way I would do it. Until recently the Surrogate Court rules required the rules of practice to be made by the Surrogate judges and submitted to the High Court judges for approval; four or five Surrogate judges got together and drafted rules of practice and submitted them to the High Court judges. We had practically to redraft them all and send them down to the County Court judges. They said they were glad to get them, because, they said, "We don't know how to do it."

Q. I think, sir, that is the first suggestion we have had of a different set of simpler rules for County Court, and it rather appeals to me.

A. I think it is—it is intended to be a suggestion of some merit.

MR. CONANT: Well, undoubtedly it is.

WITNESS: When County Court cases cannot be tried, and well tried, for less than a hundred dollars' costs, it has grown out of proportion.

MR. FROST: I think that is true, sir, and there is a tremendous difference. For instance, a case of $200 in Division Court, and a case of a dollar or two more in County Court—it is absurd and out of all proportion.

MR. CONANT: You find that to your sorrow if you ever get in the wrong court. Did you ever do that?

MR. FROST: Yes.

WITNESS: In the High Court there are cases vastly more complicated than cases in the County Court. I don't mean to say that—some County Court judge may say, "Oh, I had a case last year that would puzzle anybody," and he will trot out the terrible example, but that is not the average case in the County Court. The average case in the County Court can be tried in an hour or so, and is simple, just a mere matter of whether you believe one man or believe the other. In the High Court they get very complicated.

MR. CONANT: The rules have always been common to both courts, haven't they?

A. I think they have. I have put it up to the County Court judges individually; I have said, "Why should you have as much power to investigate complicated affairs as the High Court cases require?" "Oh," they say, "we think they are just as important, just as difficult to try," but they are not, as a matter of fact.

MR. CONANT: Well, what is the next, Mr. Silk?

MR. SILK: The next one is the law revision committee. They have in England, sir, what is known as the Lord Chancellor's committee.

WITNESS: The law revision committee; I agree with what is said by the Chief Justices.

MR. SILK: Then what about the Rules of Practice Committee? The proposal is ——

A. The Rules of Practice; I agree with what was said by the Chief Justices. I would say that in my opinion they ought to be arranged by the Supreme Court—for the Supreme Court by the Supreme Court judges. They are experts in the matter, I do not think anyone questions their honesty of purpose, and I do not see how anyone can question their capacity in preparing these rules. They are not complicated, they are not difficult, but they do require a little consistent imagination running through the whole of them to see that they do not clash, the different parts, with the others. I speak with some knowledge and experience about that.

MR. CONANT: Oh, yes, there is no doubt about that.

WITNESS: Because in 1913 I was asked to prepare the rules. I then found that there were 1,200 rules then in force, and I boiled them down to about 700 or 750, and I provided for innumerable things that were not provided for in the other rules. I could never have arrived at that result if I had had a committee either of judges or anybody else sitting on my shoulders, because no judge other than myself could have considered himself charged with the whole thing. I did it, having taken a circumspect view of the whole.

MR. CONANT: Anything else?

MR. SILK: I have nothing further, no.

MR. CONANT: Is there any further observation you would like to make, your Lordship?

A. I don't think so.

MR. CONANT: Then we will adjourn at this time.

MR. SILK: Sir, may I discuss the programme for the next day or so?

MR. CONANT: Well, what have you available for to-morrow?

MR. SILK: Judge Parker is coming at eleven o'clock to-morrow, and Mr. D. W. Laing is coming too, on behalf of the bailiffs. Then possibly Mr. Hellmuth may come; I have not heard from him yet. Then Mr. Justice McTague, the Hon. Mr. Clark, the Speaker of the House, and one of the Benchers, I don't know which one it will be.

MR. CONANT: Well, will you be ready at 10.30 in the morning?

MR. SILK: Yes. I have arranged with Mr. Fairty, who wants to be sure of a full hour, to have him come on Wednesday morning, if that suits the Committee.

MR. CONANT: That is all right.

Adjourned at 4.35 p.m. until 10.30 a.m., Tuesday, October 1, 1940.

FOURTEENTH SITTING

Parliament Buildings, Toronto.
October 1, 1940.

MORNING SESSION

On resuming at 10.30 a.m.:

MR. CONANT: Gentlemen, Mr. Silk has discussed with me our programme, and has indicated that at the moment, for to-day and perhaps for to-morrow, we have only two witnesses available. I don't know how it suits the convenience of the gentlemen of the Committee, but it is very difficult for me to be kept dangling in mid-air, as to whether we are to go on to-day and to-morrow or not, and I make the suggestion that we hear this morning, whatever witnesses are available, and that we adjourn until next Monday.

MR. SILK: Mr. Chairman, I expect to have a report from Mr. Walsh in a few minutes, as to whether or not he will be available at 2.15 this afternoon. He is in the Court of Appeal, and right now he is trying to have his case put at the top of the list, and if he succeeds he can be here at 2.15.

MR. CONANT: What more does he want to discuss with us? He has been here once.

MR. SILK: He would be here on behalf of the Benchers. Mr. D. L. McCarthy had intended to be here, and in his absence Mr. Mason, but they are both in court to-day, and they have asked Mr. Walsh to come here on behalf of the Benchers, to express further views on pre-trial procedure and increased jurisdiction in the County Courts. He would be speaking, not personally, but on behalf of the Benchers of the Law Society.

MR. CONANT: Well, what do you expect this morning?

MR. SILK: Judge Parker will be here at eleven o'clock, and Mr. Fairty of the Toronto Transportation Commission will be here at eleven-thirty, and will take the balance of the morning. I do not know what Mr. Fairty is going to say; he wants to express his views, which will occupy about an hour.

MR. CONANT: Then, you have this uncertain arrangement with Mr. Walsh, and what else have you?

MR. SILK: That finishes everything. I may say, that Mr. Justice McTague advised me last night, that he had discussed the situation with Chief Justice Robertson, and thinks it is unnecessary for him to come. I was talking this morning to Mr. Hellmuth, whom I invited to attend last week, and he says it is absolutely impossible for him to be here to-day, and asks me to express his apologies, and to say that the views of the Benchers had already been well stated, and he has nothing to add.

MR. CONANT: Then, you can finish everything to-day?

MR. SILK: I think so. There is only one further witness, and that is the Hon. Mr. Clark; I have not heard from him, so I don't know whether he intends to come or not.

MR. CONANT: Then, shall we continue on and finish to-day? Is that the probability?

MR. SILK: Yes, that is right.

MR. CONANT: Have you anything to read in until your first witness comes?

MR. SILK: Only one very small item. The County Judges' Association, with regard to appeals from interlocutory motions, have this to say, as the Committee has already been advised; they said:

> "We fully endorse the recommendation for appeals from interlocutory applications in the County Court; and also the recommendation with respect to the practice of issuing orders, which should be signed by the County Court clerk. But it is felt that all appeals, except in interlocutory matters, should be direct to the Court of Appeal."

They wish to have that struck out of their report and this substituted:

"There shall be an appeal from an interlocutory application in the County Court to the Court of Appeal in the Province of Ontario, but only upon leave of the judge making the order or of a judge of the Supreme Court of Ontario; we further endorse the recommendation, with respect to the practice of issuing orders which should be signed by the County Court clerk."

The change is that, while they still consider there should be an appeal from an interlocutory order, it should only be upon leave.

MR. CONANT: Why should an appeal there go to the Court of Appeal?

MR. SILK: I think that is Mr. Barlow's view, is it not?—or does he say that the appeal should go to a single judge? Mr. Barlow's recommendation is that provision be made for an appeal from an interlocutory application in the County Court, to a judge of the Supreme Court in Chambers, upon giving security for costs by depositing the sum of $15.

MR. CONANT: Well, Mr. Barlow is sensible. Why would you want to take a motion in the County Court up to the Court of Appeal?

MR. SILK: Judge Parker is here now.

HIS HONOUR, JUDGE PARKER, County of York.

MR. SILK: Your Honour, there are certain matters with respect to the jury, system with regard to which the Committee is anxious to have your views; particularly, first of all, is it your view that there is some desirability for improving the calibre of the men who make up the petit jury panel in the County of York?

A. Well, with reference to the Act itself, the material we get to choose from we cannot alter; we are restricted to that.

MR. CONANT: Your Honour, I don't want to delay you or burden you ——

A. I have plenty of time this morning.

Q. —— but I think it would be helpful to the Committee; we are all pretty lazy; we could read it all up in the statute, although it is a pretty well mixed-up statute.

A. It is not the only one.

Q. Would you mind outlining, for the benefit of the Committee, the procedure from the beginning, that finally results in a Sessions or a Supreme Court jury panel?

A. Yes, I could do that.

MR. CONANT: Would the gentlemen like to hear that?

MR. STRACHAN: Yes, I would.

WITNESS: First of all, the local selectors from the various municipalities are required to choose from the voters' list, a certain number of men; the number we indicate when we send notice to them.

MR. CONANT: Whom do you mean by "we", in that case? Is it yourself, the senior judge?

A. It is the selectors of jurors, the county selectors, of which I am chairman. We meet in September, to determine the number of petit jurors for the following year for the Assizes and the Civil Courts, High Court, and the number of petit jurors that may be required in the County Court and the Sessions. This year, we are requesting 1,200 names for the High Court for the petit jury.

Q. 1,200 names?

A. Yes; and 1,000 for the County Court and Sessions; that is for the year.

Q. That is, you are requesting that as a total from all municipalities?

A. Yes.

Q. In this judicial jurisdiction?

A. Yes. Then for the grand jury of the High Court 75, and for the Sessions grand jury 100. Now, if you glance at this table, which I will leave with you, we send notice to Aurora, for instance; for the grand jury ——

Q. Pardon me, before you go on: your board of selectors consists of yourself, the sheriff, the clerk of the peace ——

A. The warden, and the treasurer for the county.

Q. The treasurer, the warden, the clerk of the peace, the sheriff and the senior judge?

A. Yes. Then there is the other division for the choosing for the city of Toronto, and that is the senior of the junior judges, the mayor, the deputy sheriff of Toronto, and the treasurer of the city. We meet, and then from past experience, we determine the number of men we want for the petit juries of both courts and for the grand juries. Those names are available to us—at least, that number are available to us to choose from, because we notify each municipality how many we require for the grand jury of the High Court, how many for the grand jury of the inferior court, how many for the petit jury and grand jury in the High Court, and how many for the petit jury in the County Court.

MR. SILK: Your Honour, may I ask a question there? There is a rather odd provision in section 39 of the Act:

> "The number to be selected from the jurors' rolls"—this is by the local selectors—"for a jury list shall be the number of grand jurors that the

county selectors have determined to be requisite for the year, and of petit jurors for the Supreme Court and inferior courts respectively, the number theretofore determined by the county selectors to be requisite as the panels for the year, with one-fourth the number thereof added thereto."

Do you know the purpose of the one-fourth added thereto?

A. I could not tell you the history of that at all.

MR. CONANT: Does that mean, that if the county selectors direct municipality A to send in 100 names, they send in 125?

MR. SILK: That is right.

WITNESS: No, they don't do that. We add a sufficient number to the total list to provide for contingencies such as people moving away, people who are incapacitated, deaf for instance, over age, and for some other reason objectionable.

MR. CONANT: But you, in making your requisition, take care of that contingency, do you?

A. Yes, we do.

Q. And you increase or pad your numbers to take care of that?

A. Yes.

Q. There is no difficulty about that made by the local selectors, then?

A. No.

Q. Then, is that a nullity; is that an obsolete provision there?

A. We send out this notice, with which you are familiar, designating the number, and to my knowledge, only that number of names are sent. But then, while we require so many from each division, we treble the number of names, so that if we require say, 100 from Aurora, we will ask for 300 names, because you then have a choice of names.

Q. Then when your requisition meets the local municipality—or request, or direction, or whatever you want to call it—the local board consists of the head of the municipality, the clerk and the assessor, does it?

A. No, not the assessor. There are two boards. I think they are outlined in section 16. In the County of York, the judge of the County Court, the sheriff for the County of York, or in his absence his deputy, and the warden and treasurer of the county only shall attend when the selection is being made.

Q. That is the County of York; I am referring to the municipal board.

A. Oh, the local selectors?

Q. Yes.

A. They consist of ——

MR. SILK: Section 15.

WITNESS: The head of the council, the clerk, the assessment commissioner, and the assessors of every local municipality. It is from them we depend for the material we choose from. We send this requisition out, and they send in to the clerk of the peace the required number of names. Those are copied in a book, certified and checked, and signed by myself and the clerk of the peace. It is from that list only that we can choose jurors for the coming year, and we generally average choosing one of every three. There are certain localities in the County of York that it would be very unwise to choose from at all.

MR. CONANT: That is a discretion you exercise?

A. Oh, yes. You see, the local selectors are governed by section 16, which in short says, "shall select such persons as in their opinion are, from the integrity of their character, the soundness of their judgment, and the extent of their information, the most discreet and competent for the performance of the duties of jurors." We are dependent entirely on their discretion in the first instance, and I am sorry to say that almost every year we find the names of men who are deaf, over age ——

Q. Sent in by the local selectors?

A. Yes. You see, we are restricted by them entirely. Then the next movement is, that we are supposed to exercise some discretion in choosing from the list they send in.

Q. What is your formula? Have you got a formula for your choice?

A. It is outlined in practically the same words. Then we meet every morning during the period required by the statute, and go through these lists very carefully. Take in the county, it is comparatively easy, because the old county names you know, the sheriff or the other person in the county knows.

Q. You are speaking of outside counties?

A. Yes. It is comparatively easy to choose good names from there, if the good names have been sent to us, and we try to choose a variety of callings. For instance, we don't restrict them to farmers entirely. Take from Markham and Stouffville, there are plenty of good men there who are artisans, for instance. Those names are very, very carefully chosen from the list that we get.

Q. Now, when you say carefully chosen, Your Honour, you have got, as I recall it, about 2,000 names.

MR. FROST: More than that, isn't it?

A. We have 7,152 names.

Q. Usually your requirements multiplied by three?

A. Yes. Yes, on the average, we choose one name out of three. We don't take one out of every three, but we go down to where more desirable names are.

Q. But you ask for three times as many, so that you have a reasonable choice?

A. We have a choice, yes. You hear some criticism about the grand juries, the men composing them. The local selectors allocate certain names for the grand jury from which we have to choose and are restricted, and certain names for the petit jury.

MR. CONANT: How many names are you dealing with there in making your selections?

A. 7,152 this last year.

Q. Beg pardon?

A. 7,152.

Q. Now, how is it possible, or is it possible, for your board to bring to bear on that selection, any personal knowledge of the personnel with which you are dealing, Your Honour?

A. In many cases in the county, yes. The warden probably will know the families; the sheriff may know them. I haven't much knowledge of the outside persons, except their family names. For instance, we always get a lot of Reesor on, because they have a good reputation, and families like that, that we know. They are carefully considered from the locality where they live, and their occupation, of course, their occupation is sometimes very misleading; they use the term "clerk"; that might mean anything. Then, the same care is taken in choosing the ones from the city, but it is more difficult to choose from the city, because you haven't personal knowledge of many of these people. But, if I could suggest any improvement, it would be that the local selectors carry out the request that always goes from the clerk of the peace, and which sometimes has been followed by personal letters from myself, where they have sent in names that were not ——

Q. You think that the local selectors could be more careful?

A. Oh, yes.

Q. Well, how could we deal with that by statute? Could the definition be tightened, do you think?

A. If they would carry out section 16, but frequently—we require as a rule, every three months for the Sessions, and the Jury Court from 60 to 80 petit jurors; we can safely count on twenty percent not being available.

Q. Twenty percent not being available?

A. Yes.

Q. You mean they have moved or ——

A. Moved, or on relief, or something like that. I think the municipalities, the local selectors, do put reliefees on the list in some cases.

Q. You would not suggest there was any ulterior motive there?

A. Oh, except to relieve the municipality. Then the Act provides for the selection by the Sheriff from this list that is copied in the book, and I, in my court, since I have been senior judge, have always—we only summon thirteen for the grand jury, as provided by the Act, and you can always count on some of those not turning up. I have always insisted that the vacancies on the grand jury be filled from the petit juries. That is not always followed, but only in one case I have observed in the seven years I have been senior judge, where the presiding judge slipped up on that, but it has not occurred since and never will occur, because we don't want these professional jurors around that are loafing around the Hall or brought in for that occasion, and for that reason I carefully avoid it.

Q. You think that fundamentally, the chain of events starts with the local selectors?

A. If it is bad timber we can't improve it.

MR. CONANT: What is that formula, Mr. Silk?

MR. SILK: For the local selectors it is, "from the integrity of their character, the soundness of their judgment, and the extent of their information the most discreet and competent for the performance of the duties of jurors." That is section 16, subsection 2. The formula for the county selectors is, in section 21, subsection 1, "and shall make such distribution according to the best of their judgment, with a view to the relative competency of the persons to discharge the duties required of them respectively." They are slightly different.

MR. CONANT: Could anything be accomplished by having the assessors indicate more than—well, there is no indication now, excepting that he is eligible for jury duty?

A. That is all.

Q. Would it be possible for the assessors to indicate the suitability or the qualifications of the men, do you think?

A. Well, in the small municipalities, the persons who do select the list should know them as well as anybody. In the city of Toronto, I think that would be a very wise suggestion, because, as I understand it, the assessment is made in zones, and the assessors are more or less familiar with the names. The other officials, like the mayor and the treasurer, wouldn't know anything about it.

MR. STRACHAN: Except that they don't see them, Your Honour.

WITNESS: Oh, no.

MR. STRACHAN: They go around in the daytime and speak to whoever is in the house; probably they don't see the man of the house at all.

WITNESS: But I think the assessment department is rather familiar with the people in their respective localities.

MR. CONANT: I am only groping. This is not a suggestion, even, but would it be possible for these men entered on the assessment roll to be indicated, not only as eligible for jury duty, but to have any further designation, either by grades or by educational attainments or anything else? Would you have a grade A, B and C, or ——

A. That would be very desirable from our standpoint.

Q. For instance, you have got a column in the assessment roll, as I understand it, in which you put the letter "J", and that means he is eligible for jury duty. Would it be feasible to put another column in which you might mark A, B, C, D, or whatever it might be, more or less in the way that they grade soldiers after their medical examination.

Don't they come out with grade A or B, Mr. Strachan?

WITNESS: It would be very desirable. I don't know whether it is feasible in the city of Toronto or not.

MR. FROST: The difficulty about that is, that a man who was put in grade D might take strong objection to it, and have the assessor fired. Do you mean to put that on the voters' list?

MR. CONANT: On the assessment roll.

MR. STRACHAN: I don't see how the assessor could find it out, Mr. Chairman.

WITNESS: Outside of Toronto, it would be a very simple matter for the clerk to mark his column when he sends it in.

MR. CONANT: But the problem does not arise, it seems to me, outside of the large centres. I have sat on county boards of selectors when I was county clerk of the peace, and on that board there was always somebody who knew every name that came up. I think that problem is more acute, and perhaps, limited to jurisdictions like Ottawa, Toronto, Hamilton, and perhaps, London and Windsor; that is where I think the problem arises; don't you yourself, sir?

A. Oh, that is where it is, yes. How to take care of it I don't know. You see—I don't want to be quoted, please; may I speak in confidence now?

Q. The gentlemen of the press will regard your confidence, certainly.

A. The old system of choosing the jurors by the county board, was running down the column and taking every third name; I am speaking of past days, long past days. The system now that we have, as I said, is carefully choosing, not every third name, but on the average, one for every three on the list. We may

take three in succession and skip over the next, depending on say, the locality they live in, because we know from past experience that from at least two localities in the County of York, we daren't choose a jury, because they have openly said, "We will not convict," and there you are deadlocked, so that as far as we are concerned, we eschew those districts. Then what follows after that, as I say, is that the sheriff goes to the clerk of the peace's office, and from this book picks out the number required by the precept that we issue.

Q. For the particular panel?

A. Yes; and that is again copied in the clerk of the peace's book, a certified copy given to the sheriff, and he is restricted to those names to summons for jury duty for that particular court. There is only one loophole or one place that is not checked: after the sheriff gets the list from the clerk of the peace we assume, and have reason to assume, that only those names are summoned, and none others substituted. I only learned that yesterday. I think I can correct that, at least satisfy myself on that.

Q. To make sure that other names are not ——

A. Yes. You know, there are a lot of people in the county clamouring to get on a jury.

Q. Clamouring to get on a jury?

A. Yes; every opening of every court, they are sitting around the court-room hoping to be called in, and that is the reason I put my foot down and said the vacancies in the grand jury can only be filled from the petit jury; otherwise, I would not know whether they were eligible. So that, while it has been said on certain occasions that professional jurors are brought in, that is absolutely in the past as far as our courts are concerned.

Q. Well, have you any suggestions for improving the system, Your Honour? You have had a large experience in it.

A. If the local assessors in the city of Toronto were to attend at these meetings when we are choosing, they would have personal knowledge of their own district, like Ward 4, Ward 3, or whatever it is; when we were dealing with Ward 4, we would have them come in. I suppose we could do that without legislation, if they would do it.

Q. You are referring to the men who go around with the big book under their arm and rap on the door?

A. Yes.

Q. You mean to say, that if they were present when you were making your selections, they might add some personal knowledge to the names?

A. Yes, because they are going around year after year, I think, Mr. Strachan, in the same district, aren't they?

MR. STRACHAN: The same district.

WITNESS: We could request that, I think, without legislation. I think the assessment commissioner would give effect to it.

MR. SILK: There is a proposal made on behalf of the County of York Law Association; I quote Mr. Fowler:

> "For the larger centres we felt that some board of selection was necessary who would perhaps have a list that would come from the assessment rolls, and then there would be a personal investigation of that list, either by having the prospective people come in and see the board of selection or possibly by some private enquiry that would be made through an investigator or through some other agency."

MR. FROST: With 7,000 names that would be a big job.

WITNESS: It would not be feasible.

MR. SILK: That would scarcely be practicable in Toronto.

WITNESS: No. I think the suggestion I made would be feasible and would work out all right. You could soon tell after one or two choosings. But if we had to interview some 4,000 names from the city of Toronto it would take a long time.

MR. FROST: Tell me, sir, that 7,000 you mentioned, is that 3,000 from the county of York generally and 4,000 from Toronto?

A. No. For division number 3, that is the High Court petit jury, 1,445 are listed from the townships and 2,155 from the city; and for the ——

Q. Is that your three to one proportion?

A. Yes. And for the County Court and Sessions, 1,200 from the county and 1,800 from the city; so it works out about one from the county and two from the city, according to population.

Q. What was that again, sir, for the Supreme Court?

A. 1,445 from the county and 2,155 from the city; that is for the High Court. And for the County Court and Sessions, 1,200 from the county and 1,800 from the city. That has been the proportion adopted over a period of years, based to some extent upon the population, and then having all the places represented.

MR. CONANT: When you take your local selectors here in Toronto, what is the yardstick there?

A. I am afraid I could not answer that.

MR. FROST: Sir, I don't want to ask you to repeat, but in connection with

the city of Toronto, the board of selectors there is composed of the head of the municipality, the clerk and the assessment commissioner; is that it?

A. The head of the council—that is the mayor—the clerk, the assessment commissioner and the assessors of every local municipality. The assessors are there, should be there.

Q. Then in the county board of selectors you have the same board for both county and the city?

A. No; separate boards.

MR. CONANT: They have one board which is the county selectors, then they have another board which is the board of local selectors?

A. In the county of York only.

MR. FROST: In the county of York there is the senior judge, the sheriff, the warden and the treasurer; that would be the county of York?

A. Yes.

Q. Now, in the city of Toronto it would be ——

A. The senior of the junior judges, the sheriff of Toronto. By the way, there is no sheriff of the county of York now.

MR. CONANT: No, they are all one; they are merged.

WITNESS: The mayor and the treasurer.

MR. SILK: A very small number constitute a quorum, though, do they not, sir?

A. Well, we have never been without all of them there to my knowledge. You are thinking of the quorum of the local selectors, aren't you?

MR. SILK: Yes; there is a quorum of two there, so that two assessors could sit without any other assistance.

MR. CONANT: Your local selectors, for example, Your Honour, don't take many out of Rosedale in Toronto, do you?

A. Oh, yes; Rosedale and Forest Hill Village get their share.

Q. Perhaps I should go further: do they serve, do many out of Rosedale serve, on juries?

A. Oh, yes. We excuse those where it is a one-man business.

Q. Beg pardon?

A. Where it is a one-man business, for instance, we always try to excuse that man.

Q. Well, there are not many of those in Rosedale?

A. Well, no, not in Rosedale. Insurance men—we always have some insurance men on. One grand jury that some objection was taken to, the foreman of that grand jury was the general manager of an insurance company.

MR. FROST: Sir, do you think that the exemptions are too broad?

A. I don't think so.

MR. CONANT: There are twenty-six classes of exemptions.

A. Yes.

Q. Right from A to Z.

A. You probably might delete the exemption of newspaper men.

Q. They should serve, you think?

A. I don't see any reason why they shouldn't.

MR. FROST: For instance, Hydro employees: is there any reason why Hydro employees should not serve?

A. Well, he might be a technical man; I don't know.

MR. CONANT: I think that the observation of the Chief Justice was that the statutory exemptions should be narrowed and left more in the discretion of the court as to who should be excused; that would be a question of being excused then?

A. Yes; possibly; I have not considered that.

Q. What would you think of that?

A. Well, that would accomplish the same end, would it not, and be more flexible.

Q. Of course, as I remarked at the time, I still think that there is some necessity for a little better machinery than we have for dealing with applications to be excused in advance of the opening of the court.

A. Well, for instance, take the case of a man who is representing a Toronto or Montreal concern, who is going on his annual trip to the Maritimes or the Pacific coast; you can't hold that man very well, unless he is required. I take a reasonable viewpoint always and consider the matter, and also have in mind the number of jurors I have.

Q. What I meant was this, Your Honour: if the statutory exemptions were narrowed, leaving it as a matter of discretion, it might be necessary to provide machinery for dealing with those in advance of the Sessions or the Assizes, because otherwise your list might be seriously impaired?

A. Yes.

Q. And have to be implemented?

A. Yes. Well, I think in both the High Court and our court names are considered in advance.

Q. Are considered in advance?

A. Yes. We consider them and then put them in a folder, and then just before the court is opened we can notify them whether they will be excused or not, save their attendance and save the money ——

Q. And if you think your list is going to be impaired you can bring in more jurymen?

A. Yes. There is one thing I would like to suggest in connection with juries. We lose the value of our petit juries for Sessions for one week. I have made a request before ——

Q. Which?

A. I have made a request before, I think before your time, that we be given power to summon the grand jury one week before the Sessions opens; then the grand jury have found their bills and the petit jury are ready to go on. As it is now, you see, they are sitting around for a week with nothing to do, oftentimes a week. When you have eighty or sixty men, $240 a day is a lot of money.

Q. The petit jury often has to wait until the grand jury has made its findings?

A. Yes.

MR. SILK: Well, Judge, in 1937 we did amend the statute to permit the sheriff to advise the members of the petit jury not to come on the first day of court, to come on the third day or the second week, which I think pretty much serves the same purpose, doesn't it?

A. Well, yes and no. If we had the grand jury in a week ahead of time, then we have work for the Sessions and for the County Jury Court. You see, we have got to keep that in mind. Of course, it is a move for economy; that is about all it is.

MR. CONANT: Yes. Well, I think it is well worth considering.

MR. SILK: Judge Parker has had wide experience in the Court of General Sessions; perhaps you would like to have his views on the grand jury situation.

MR. CONANT: Yes, very glad to have them.

MR. SILK: There is a proposal before the Committee to abolish the grand jury; you probably read Mr. Barlow's report on that?

A. Yes. I have carefully refrained from ever expressing an opinion, because I do not think an opinion should come from one of our judges, but it seems to me that to abolish the grand jury, leaving the rest of the machinery as it is, is like mending an old garment with new cloth. Who is going to take that tremendous responsibility that now rests with the grand jury, to determine whether a man shall be placed on trial or not?

MR. SILK: It has been suggested that that function might be performed by a judge.

MR. CONANT: Oh, no, no.

WITNESS: That would be nonsense.

MR. CONANT: No; with all deference, that has not been suggested. The suggestion was that in those rare cases in which the Attorney-General lays an indictment a judge would function in the place of the grand jury. In other cases there would be the preliminary.

WITNESS: I do not think that would be feasible, for this reason: the very judge who passes on whether the man should be placed on trial may be hearing the trial.

MR. CONANT: Well, of course, the suggestion was because in the other jurisdictions—Quebec, Manitoba, Saskatchewan, Alberta and British Columbia—not only have they no grand juries, but they have no safeguard against the Attorney-General's indictment, and it was suggested that the intervention of a judge who would function in the same way as a grand jury would be a very considerable safeguard against a vindictive or capricious Attorney-General laying indictments.

A. I wouldn't want to be the judge.

Q. I don't see that, Your Honour; why not?

A. A man on the Bench gets a frame of mind—or should, and I think does—that places him apart from all personalities or public questions. He has got to keep his mind free. You are introducing something there where he might be open to approachment. I do not think a judge should be placed in that position.

Q. Well, why would there be anything more invidious in that, Your Honour, than in trying a case as a judge sitting alone in County Court Judge's Criminal Court? You are constantly trying those cases.

A. Well, it is always the duty of the Crown to prove its case beyond reasonable doubt, but to determine whether a man should be placed on trial—I mean, it might expose the judge to a lot of outside influence. He would be exposed to requests, I suppose, such as Crown attorneys are exposed to now, but their task is a different one.

MR. FROST: Sir, there has been some suggestion that grand juries be abolished as far as the Sessions are concerned. Now, the underlying reason for that was this, that it was felt that in the Sessions, while of course there are very important cases tried, and very important criminal cases tried, those cases do not involve murder and the penalty which arises from murder, and that in the ordinary mill run of cases an accused has the right to be tried on his own election by a magistrate, by a county judge in a summary manner or by a Sessions jury, or if he elects trial by a court above a magistrate's court there is the intervention of the magistrate by way of preliminary hearing, and just in view of the fact that in the Sessions there are a large number of cases which are perhaps not of the really serious nature—of course, I suppose all criminal cases are serious, but of the really serious nature—that in the Sessions the grand jury might be abolished, but that it be left in the Supreme Court cases, particularly in view of the fact that they are dealing with murder cases, where there is a penalty that cannot be recalled once it is imposed. What would your reaction be to that?

A. I would have to know what the substitute for it was. There are in the Sessions in Toronto a great many what we might call picayune cases, particularly noticeable in the Sessions of last month. That is unusual. Then there are—I should say the most important cases are heard by a judge without a jury.

Q. That is the point, sir. You asked what the substitute would be. Well, I suppose actually there would not be any substitute. A man accused, for instance, of theft, and coming before a Sessions jury, would go through the ordinary preliminary hearing; his case would be heard by the magistrate, who would then decide as to whether there was sufficient evidence to commit him for trial, and then he would go directly to the petit jury who would try his case.

A. Then how would you deal with the person charged with having committed an illegal operation, which is a very serious thing? Or take conspiracy, which is a serious thing. I don't know how you can segregate them.

Q. You mean to say that, while you do get a number of more or less petty cases, nevertheless you have a residue of very important cases?

A. Oh, yes; and then I think I am safe in saying that fully fifty percent of those who elect trial by jury subsequently re-elect to be tried by a judge without a jury.

MR. CONANT: Isn't there also this angle to it, Your Honour, that it is, I wouldn't say common, but it does happen, that a person accused of an offence, not the most serious offences but the lesser ——

A. Housebreaking and that sort of thing?

Q. Well, yes, and even less serious than that; that they will try to trade on the fact that if the sentence is not to be so-and-so they will go to the jury, the grand jury and petit jury?

MR. FROST: Perhaps His Honour wouldn't know that. Sometimes there is a certain amount of horse-trading with Crown attorneys.

WITNESS: I wouldn't know anything about that. As I said the other day, I am not a bargaining judge.

MR. FROST: There is a matter here, sir, that seems to me to be rather remarkable. For instance, take the Supreme Court sittings of January, 1939. In that sittings there were sixteen criminal cases. The grand jury returned true bills in ten of them, and in six of them returned no bill. Now, how was it that those six got by the committing magistrate? Is there real care taken, or is it more or less of a perfunctory sort of thing?

A. I am not familiar with it.

Q. Well, it hardly seems to me, sir, that it just adds up, that a magistrate, who is presumed to have the general ability to tell as to whether there is sufficient evidence to send a man up for trial or not, would send up sixteen cases, and then a grand jury, hearing only the Crown side of it in camera, would turn down six of those. It seems to me that perhaps the committals for trial here in the city are rather perfunctory, that the magistrates are really not ——

A. You must remember that the grand jury have more time to deliberate.

MR. FROST: Well, after all, it is a very important matter; why shouldn't the magistrate take time to deliberate? Now, sir, I may be wrong about this, but I hardly think that that situation exists outside of the city of Toronto.

MR. CONANT: No, I don't think it does.

MR. FROST: To be frank with you, sir, I don't know, but, taking for instance the courts in Whitby, Lindsay, Peterborough, Cobourg—I am not so familiar with Belleville, but Mr. Arnott would know—the fact is, I cannot say off-hand that I know of one case in which no bill was brought in after it had been sifted through by the magistrate. I know in the magistrate's court that it is not a perfunctory matter, that they go into it with a great deal of care. Now, with this list it is rather remarkable. For instance, here is one case in the Supreme Court in 1937, where it was eleven to eleven. It would almost indicate the magistrates are not taking that angle of it very seriously, and are pushing over these cases with the idea that a grand jury may intervene.

WITNESS: You take in our Sessions in March, 1938, twelve true bills and six no bills. I do not think I ever sat in the Sessions where the grand jury failed to bring in a no bill.

MR. CONANT: Of course, that gives rise to this thought, doesn't it, Your Honour, that if there were no grand juries the magistrates would be more careful, they would deliberate more? I do not think it is unknown for a magistrate to remark, "Well, let the grand jury sift this out."

MR. FROST: On the other hand, there is this angle also to it: These are cases which go to juries and no bill is brought in, but this does not deal with the great mill run of cases in which there is a committal for trial and they come up before you or some other judge. Now, if the magistrates are not sifting over these cases apparently any more carefully than this, the county judges then

must be getting a great number of cases that should never have come before them at all?

A. There is no question about that.

Q. I mean, if that is the case there is the saving the grand jury is making here, but how about the expense to the public of cases that come up on speedy trial before the county judge, in which there is not the intervention of the grand jury, and in which on this basis there must be a tremendous number of them that should never come before the judge at all?

A. The ones we have in mind are generally those where there is a private prosecutor. The Crown attorney, of course, handles the case, but the charge is laid by an individual, oftentimes with the object of procuring a settlement. It is quite obvious when you hear the evidence.

MR. CONANT: Do you think our magistrates are not as careful as they might be, Your Honour?

A. I haven't had a bit of experience with them, Mr. Conant; I do not know at what speed they work.

Q. I thought you remarked a moment ago that there were a considerable number of cases that came up that should not come to the County Court Judge's Criminal Court?

A. Principally where there is a private prosecutor, a private complainant.

Q. Where the Crown of its own initiative institutes, that does not happen so often?

A. No, no; there the evidence is carefully considered, and they are not importuned so much as they are by the private prosecutor. I have had the Crown attorney admit when the Crown's case was in that no case was made out, that the evidence was not there. They take the affidavit or the sworn statement of the private complainant, but his affidavit is not supported by any evidence they can bring forward.

MR. FROST: Well, it is curious that the magistrate would not catch that in going through; why shouldn't he? Instead of his sending that case on for trial, why wouldn't he find that there is not sufficient evidence?

A. Well, I suppose the magistrates in the city of Toronto have such a tremendous amount of work to do that things are sometimes done hurriedly; I don't know, but that may be so.

Q. Of course, in the city of Toronto there isn't any question, there are certain peculiar circumstances that apply.

A. Yes, and everything they can squeeze in in the county of York they do.

MR. CONANT: There is another subject, Your Honour, on which I would

like your comment; that is the question of appeal in summary conviction matters; it has come before you. As you know, at the present time it is a trial *de novo*.

A. In some cases, yes.

Q. Do you think that it would be sufficient if it was tried on the record, those appeals?

A. Take the cases of reckless driving: I think it would be rather impossible to rely upon the evidence that has been taken in the Police Court. In serious cases—there are a lot of other cases, such as breaches of by-laws and that sort of thing, picayune cases, that might just as well be determined without going to the expense of hearing evidence.

Q. Doesn't it strike you as rather anomalous having two trials of the same issue, Your Honour?

A. Yes.

Q. It always did me, and I always felt that substantial justice would be done if there was an appeal on the record. There is also this other angle to it, that if all parties, including counsel, know that an appeal is on the record, they might be a little more careful in putting in the case; don't you think so?

A. Yes.

MR. SILK: Just as they are in the Supreme Court and the Court of General Sessions.

WITNESS: Yes.

MR. CONANT: Isn't there a sub-conscious feeling by counsel in some of these summary matters, "Well, if I lose here I can go through it all over again with the judge"?

A. Yes, I think that is quite true; I don't think it is sub-conscious, though.

MR. CONANT: Well, I was trying to be charitable, Your Honour.

MR. SILK: Would you say that in most cases an appeal on the record would occupy less time?

A. As a rule they don't take very long. We probably have criminal appeals say for a day and a half in the month—a small item; they don't take much time. I think last month we were just a day and a half, and I think that would be a fair average, because the number of appeals that come to us are very few—generally when the municipality passes some new by-law, like these automobile trailers down on the corner of University and that cross street there.

Q. Gerrard, down behind the hospital?

A. Yes. There were appeals up on prosecutions there—something new.

MR. CONANT: Are there any other observations you would care to make, Your Honour, on any matter?

A. I am very unpopular in the City Hall because of the economies I try to effect in our courts. One thing I was just discussing with the Audit Board this morning—I don't know whether it should be brought to the attention of some official here. It is a trifling matter in the individual case, but it amounts to a good deal in the course of a year. Under the administration of justice schedule of fees the crier gets twenty-five cents for every witness that is sworn, and the clerk of the peace gets twenty cents for every witness that is sworn, a duplication just because it is in the schedule. As a matter of fact, the clerk of the peace always swears the witness, and the maximum that the crier does is hand the Bible to the witness, for which he charges twenty-five cents. I think the Audit Board probably could delete those charges.

Q. Couldn't we dispense with the crier, under modern conditions, Your Honour?

A. Well, you would rob him of a lot of sleep, because he generally opens the court and he has a snooze.

Q. Couldn't we provide other places for him to sleep even more economically?

A. Why couldn't the sheriff's officer open the court? You see, you are really paying in duplicate for certain services all the way through, and the administration of justice in the county of York is a terribly expensive thing.

Q. And isn't it rather annoying to counsel and clients, these little bills that the crier makes out at the conclusion of every trial? He wants $1.60 or something like that.

A. Oh, yes; there is no reason for it. I don't think there is any provision for it.

MR. SILK: Except in the schedule; I think that is the only place.

WITNESS: Well, he gets paid by the municipality. First of all, the criers in Toronto get a fixed salary, and then they get fees in addition to that. But his maximum duty is to take the judges books up to the court room and then open court and disappear if he wants to. I have always been of the impression, Mr. Conant, that the position of crier is obsolete.

MR. CONANT: Obsolete, yes.

MR. SILK: Mr. Fairty has pointed out that there is also a practice of requiring the parties to buy the lunch for the jury in some cases; do you know about that, sir?

A. If they manage the case so that the jury are out and out for a long time, one of the parties has to buy the lunch for the jury, there is no other provision for it, but I think as far as our courts are concerned we try to dispense with that

by probably holding the judge's charge to the jury over until after lunch. I think it is a rarity when they do actually buy the lunch. Of course, in the Criminal Court the Crown buys them, and they always let the jury go at eleven o'clock to make sure they won't bring in their verdict till after lunch; I learned that the other day. There is another thing that bothered me a good deal in connection with the administration of justice accounts, and that is the terrific number of constables on the courts.

MR. CONANT: Constables?

A. Oh, yes. I spoke to the Chief Justice one day, asking how many constables he thought he had in his court, and he said, "I don't know; I don't even see them." I said, "You just have sixteen."

Q. Sixteen constables?

A. Yes.

Q. Do you mean as court attendants?

A. Yes, at the door and sitting around the courtroom to keep order.

MR. SILK: I understand that is a matter that is entirely in the discretion of the sheriff.

WITNESS: Yes, it is now, but I have arranged with the sheriff that in certain courts he has four men there, in the Sessions we have six, and in the discretion of the—if there are dangerous characters I leave it up to him to put in more. I can't tell how many are on till I audit the accounts afterwards. I was surprised to find that that number had been increased last month. Of course, the sheriff is responsible for order of the court and the protection of the court; if his discretion is poorly applied, of course, we get too many of them.

MR. CONANT: You think we could get along with fewer constables, though?

A. Oh, yes; they are in the way now, frequently in the way.

Q. Well, that is worthy of consideration, too.

A. Well, constables must cost the city of Toronto upwards of $10,000 in three months.

Q. Your Honour, in the Jurors' Act there was an amendment in 1936 limiting the inspections to six months.

A. Yes.

Q. And then there was a qualification put at the end of the section, "unless specifically ordered by the judge." Do you see any necessity for that qualification at the end?

A. No.

Q. Wouldn't the six months peremptory be sufficient?

A. Yes. Once a year would be plenty now, because that visitation is obsolete. We have newspapers now; we hadn't when the jurors were to make these visitations, but now it is restricted to the High Court grand jury visiting in the spring and the Sessions jury visiting in the fall, and they don't visit many places. But those last words might very well be deleted.

Q. We had evidence here that under that provision which allows the judge to order the inspection there had been I think eleven inspections in Toronto in three years, and the Crown attorney explained it by the fact that the judge had ordered the inspection, thus overriding the statute.

A. Well, speaking for the last three years, I do know that the Chief Justice has disparaged the visiting, and I have done the same thing. It is a nuisance. You see, there are five Assizes and four Sessions in Toronto every year; not infrequently the grand jury of the High Court will be entering a building when the grand jury of the Sessions are coming out; that has actually occurred.

MR. FROST: Do you think, sir, that the visitation of grand juries to public buildings is desirable, or do you think it might be dispensed with?

A. I think it is obsolete. That was started when we didn't have publicity and government inspectors and all that sort of thing, but these are all covered by government inspectors, and if anything is wrong anywhere the newspapers soon tell us about it. I think it is obsolete, myself.

MR. CONANT: Well, thank you, Your Honour. I am sure we are greatly obliged to you for coming up this morning.

MR. SILK: Mr. Fairty is the next witness.

IRVING S. FAIRTY, K.C., Toronto Transportation Commission.

MR. SILK: Mr. Chairman, you remember when Mr. Dawe was here the other day he promised to put in a memorandum. I have just received it.

Q. Mr. Fairty, you have been general counsel, or, rather, Chief Legal Adviser, to the Toronto Transportation Commission since 1920?

A. Since 1920, yes.

Q. And you have indicated to me that you want to make certain representations to the Committee on the matter of juries?

A. Yes, and a number of things, if the Committee will permit it. May I, in opening, because I have not been in politics for thirty years, express my congratulations to the Government and to the Legislature of this province in appointing this Committee. I think it was an excellent thing to do, it was much needed, and I appreciate very much, from what I have seen of the Committee, the open-minded manner in which they have accepted opinions from everybody and refused to accept those necessarily because they came from exalted sources.

I may say further that, although I am general counsel of the Toronto Transportation Commission and president of the Canadian Transit Association, I had deliberately refrained from seeking instructions from either body before coming to you. I come to you as a lawyer of some thirty-three years' experience. I cannot get away from my affiliations, of course, and I shall refer to them later, but I come to you as a man who has had as much to do, possibly, with civil litigation, civil negligence litigation, in this city as any other man, with the possible exception of Mr. Thomas Phelan. I also have in my office, I think it is fair to say, much to my dislike, as much litigation, possibly, as any other office in the province of Ontario, so I think I have some qualifications for appearing before this Committee.

I want to say, first of all, in opening, that I am going to throw a discordant note into the chorus of harmony which I have heard all the times I have been up here. I have not heard all the evidence, like the members of the Committee have, but what I have heard would rather lead me to believe that the Benchers and the members of the Bench that have appeared before you consider this juridically the best of all possible worlds. I don't. I think there is a great opening for judicial reform along some of the lines that have been suggested to this Committee.

I stand with Lord Buckmaster in what he said when he addressed the Canadian Bar Association some years ago. He made the whole theme of his address judicial reform. He pointed out, for example, that in the nineteenth century the Registrar of the Court of Chancery in England was the Duke of St. Albans; that was a hereditary office, and the reason that was so was that in a fit of whimsy Charles II had appointed Nell Gwynne to that exalted office, and the Dukes of St. Albans were her descendants. I suppose the junior Bar would welcome such an appointment. However, he said, why did those things continue till almost the middle of the nineteenth century, and other things just as bad? Well, he said, because we never see the things that lie closest to us. He said, if we look carefully there is room for reform of our judicial system even yet, and that is the attitude I take, and that is the attitude that Mr. Kenneth Mackenzie, the Vice-President of the Canadian Bar Association, took, as I understand it, before this Committee. I heard him, and he said the profession should not look at these things from their own selfish attitude, they should look at it from the standpoint of the public and what is best for the public, and that is the attitude in which I approach this Committee. I am blunt about the thing: I do not think lawyers should be judged in their attitude to the public in any other way than garagemen or plumbers. It is how best they can serve society, and if they don't serve society some change should be made. I do not think our civil negligence sustem is efficient, and I intend to say so.

Now, I want to clear some more ground. We hear a lot of loose talk even from exalted sources in this connection. I was present the other day at the opening of the Assizes in Toronto, and the judge, whom I admire and respect very much, told the grand jury that in his judgment the grand jury was the foundation stone of our civil liberties. Now, I don't know anything about the grand jury, never had a criminal case in my life, and my opinions are of no value whatever, but I thought if that is so England, Ireland, Scotland, five provinces of Canada and South Africa have lost the foundation stone of their civil liberties. I mean, that is loose talking, from whatever source it comes, and the same sort

of loose talk is all the time being adopted and used in connection with petit juries, and I think it is about time we looked at these things on their merits and demerits; and because somebody says—which is not true—that the petit jury was an advantage in the seven bishops' case, is no reason why it should be continued in the city of Toronto between Jones and Smith in the year 1940. Let us look at these things with the idea of seeing whether they really do serve the public.

First of all, we have it on record here, and we have Benchers coming up and telling you, that our petit jury system was guaranteed to us by Magna Charta. Magna Charta was passed in 1215, and there was not anything like the petit jury system in force at that date; in fact, it was not till the reign of Queen Anne that the petit jury became anything like the institution it is at present. So let us get away from that kind of loose talk.

I am not dealing with it in regard to its efficiency in criminal cases; it may protect the liberty of the subject in criminal cases; I don't know anything about it. I don't imagine Mr. Comba of Renfrew thinks it did. There was a man, a young boy practically, who was sentenced to be hanged for a terrible murder, and the Court of Appeal and the Supreme Court of Canada said there was not one tittle of evidence to justify that conviction. It did not protect him from the local situation in Renfrew, and I don't know whether it does protect the liberty of the subject, but, anyway, it has nothing to do with civil matters.

I have always had the habit, and I like the study of constitional law and history, and I have never in my reading of the situation ever seen where and when the jury system has protected the liberty of the subject, and I would challenge those who say it does to give me illustrations of when and where it has done so. I want to read from the latest book on the subject, a book which, if it had not been for the war, would have received far more attention than it has. It is written by Professor Jackson of Cambridge University. He has not gone against the jury system, he leaves his whole chapter with an open mind on the matter, but he examines into the question of whether in the past it is true that the jury system has protected the liberty of the subject, and I should like to read this to you. This gentleman is a practising solicitor himself. He says:

> "Modern writers are singularly chary of committing themselves to any opinion about juries. The eulogies of Blackstone are definitely unfashionable. The current opinion is perhaps on these lines: jury trial in civil cases is sometimes satisfactory and sometimes most unsatisfactory, and hence the restriction of jury trial has been a wise development; however, there is much to be said for jury trial in criminal cases and (in the past at least) in cases where the liberty of the subject is concerned. If juries have in the past protected persons against political oppression, and if the conditions under which they did so are still existing or reasonably possible, then we have a point of such importance that it should receive priority in discussion.
>
> In the late eighteenth century we get many professions of enthusiasm for trial by jury. Lord Camden said: 'Trial by jury is indeed the foundation of our free constitution; take that away, and the whole fabric will soon moulder into dust. These are the sentiments of my

youth,—inculcated by precept, improved by experience, and warranted by example.' When Erskine was made Lord Chancellor in 1806 he took 'Trial by Jury' as his motto, although it was said that 'by Bill in Equity' would be more suitable for the Woolsack. Erskine was so enthusiastic about juries that Lord Byron, after sitting next to Erskine at dinner and hearing about little else, felt that juries ought to be abolished. Lord Loughborough, before his appointment as Lord Chancellor, declared that: 'Judges may err, judges may be corrupt. Their minds may be warped by interest, passion and prejudice. But a jury is not liable to the same misleading influences.' "

MR. FROST: How could you get away, Mr. Fairty, from the fact that juries themselves bring the people in touch with the administration of justice, and give the man on the street the feeling that he is part and parcel of it, and that he is going to get a square deal when he goes to court? How can you get around that?

A. I am coming to that. I am trying to clear the ground. I am saying first, that is a point in favour of juries, and I admit it, and I am coming to that.

Q. Isn't it the important point? How can you get away from that?

A. I think so. Then the other, as I suggest, is not the important point, and it is not proved, that they have been the protectors of the liberty of the subject. Could you let me finish this? This is not bad. He goes on:

"Even Lord Eldon, when he was Solicitor-General and found that for political reasons he could not oppose Fox's Libel Bill, began his speech 'by professing a most religious regard for the institution of juries, which he considered the greatest blessing which the British Constitution had secured to the subject.' The old constitutional law books are in the same tradition. In two more recent works, intended for a wider range of readers, we get stress on the past value of juries. Modern books on constitutional law, such as Wade and Phillips, make no comments upon jury trial.

The assertions that have been made can be tested against decided cases. If all the cases cited in Wade and Phillips, Constitutional Law, in the section on the Citizen and the State, are examined, it will be found that juries played an insignificant part. First, the divisional court of the King's Bench Division seems the most important court, whether for prerogative writs, appeals by case stated from summary courts, appeals from Quarter Sessions, or (until recently) appeals from County Courts. These functions have always been exercised without juries. Secondly, where a jury was used, the jury either (a) answered questions so put that the jury cannot have known in whose favour they were finding, or (b) followed the judge's opinion.

Cases reported for their legal interest are not a fair sample of the cases that come before the courts. Pleasant chatty reports like Howell's State Trials give us a better indication, for we get all the political trials worth noting, irrespective of their legal interest. Many of these were sedition trials. Dr. Jenks points out that the vagueness

of sedition is 'a danger to the liberty of the subject . . . Happily, in the days when this danger was greatest, the sturdy independence of juries was a real safeguard against oppression, and a strong justification of the jury system.' I have examined many of the late eighteenth-century trials for seditious libel, and failed to find any justification for this view. In reading these cases I found it quite impossible to predict what the jury was going to do; for every acquittal there was a conviction to balance it. In 1792 Paine was convicted for publishing the Rights of Man, whilst in 1793 his publisher Eaton was virtually acquitted. The jury found Eaton 'guilty of publishing'; the judge pressed the jury to alter their verdict, but all the jury would agree to do was to alter it from 'Guilty of publishing' to 'Guilty of publishing that book'. As Fox's Libel Act had been passed, the effect was an acquittal. Poor Daniel Holt was convicted in 1793, and completely ruined, for publishing suggestions for mild reform of the franchise and parliamentary constituencies," ——

and the poor fellow was deported ——

"whilst the case of John Reeve in 1796 is a standing warning of the danger of knowing too much legal history. The list could be continued. The only cure for admiration of these juries is to read the State Trials, and ponder over the possibility that if the printer put 'guilty' when he meant 'not guilty' and *vice versa*, you would not have noticed anything odd."

Now, that is what the latest commentator on our constitutional history says. I shall come afterwards to its effect, to the arguments in favour of the jury system, but before doing so might I go over with the Committee, if you will permit me, the cases in which juries are permitted by civil practice—I suppose the members of the Committee are all familiar with it, but I should like to enumerate them.

MR. CONANT: You mean the statutory cases?

A. All the cases in which they are permitted and not permitted. If I am not boring the Committee, I would like to. In the first place ——

Q. Well, you refer to the statutory requirements?

A. I will summarize them. First of all, there are equitable issues, many of which are questions of fact, which are not allowed to be decided by juries.

Q. But outside of the statutory cases it is always in the discretion of the court, isn't it?

A. Well, of course, they can always strike out a jury notice, but in practice they never do it. In practice it is just as strong as any written law in that regard. Let me mention the case of Davies v. Nelson (61 O.L.R. 457), the trial of an equitable issue. That was an action brought against executors for alleged breach of trust in selling lands at an under value. The trial judge did not recognize the case as one involving an equitable issue and refused to strike out the jury

notice. The jury found in favour of the plaintiff and awarded damages against the executors. The Appellate Division held that as the issue to be tried was an equitable one, the jury notice should have been struck out but instead of granting a new trial, it reviewed the evidence and found there was no evidence whatever of any negligence on the part of the executors and dismissed the action with costs. That goes to show that it was on just more or less a technicality that that man escaped a wrong verdict against him.

Our courts have gone further, as Chief Justice Rose pointed out yesterday, in striking out jury notices than the English courts. For example, I could suggest to you such cases as Banbury v. Bank of Montreal, which is almost the same type of case as Wise v. Canadian Bank of Commerce. The Banbury case was tried by a jury, and in the Wise case the jury notice was struck out, and why I do not know. Why should banks be protected against unjust verdicts when other people are not? It is hard for me to see.

Q. That word "protected" you use is rather ——

A. Well, I do use the word "protected". I will go further than that, and I am going to be pretty strong about this matter; I am going to be quite blunt.

Here are some of the matters in which the courts have ruled that they will not allow jury notice in Ontario: Actions against physicians, surgeons and dentists for malpractice,—they do in Manitoba, though—to determine fraud on an insurance policy, issues involving complicated facts or law, actions against banks or financial institutions involving allegations of fraud, and actions involving intricate or specialized knowledge such as actions on a patent.

Q. Those are derived from practice, you mean?

A. Yes, that is all it is. There are other cases: it was not allowed in an action to determine the proper fees for medical attendance, an action against a college by a master for wrongful dismissal, an action against a police officer for alleged assault and battery, and of course we know the rule in the case of malicious prosecution.

Why—may I ask any defender of the jury system *in toto* to answer me this — why is it that it is not allowable to disclose to a jury the fact that a defendant is insured? There is no statute to justify that; that is completely judge-made law. If they have the complete confidence in the jury that the Bench claim they have, why have they made such a rule? Is there any reason why a jury should know that they can go after the C.N.R., the C.P.R. or the T.T.C., but they must not know that when they are going after Mr. Jones they are going after the Employers' Liability Company or some other company? Is there any reason for it?

Q. What do you suggest is the reason for it?

A. The reason for it is disclosed in the decided cases, because they say that juries would be prejudiced against the defendant if they knew he was insured; and that is the same Bench that say they are all in favour of the jury system.

MR. FROST: Well, of course, I admit this, that I think perhaps there is a good deal in what you say about keeping back from the court the fact that there is insurance, but, on the other hand, on the merits of the case, what difference does it make to the merits of the case whether the man is insured or not?

A. It doesn't make any, but that is the whole thing.

Q. Why then bring something into the case that has nothing to do with the merits of the case at all?

A. The answer is this: because if insurance is disclosed the case will not be decided by the jury on its merits.

MR. FROST: Of course, mark you, there are a lot of people who fail to understand what insurance is for, and they think because there is insurance and because an accident takes place the insurance company inevitably should pay; it is curious what a misunderstanding there is among the ordinary mill run of people.

MR. STRACHAN: They think that the insurance companies have to pay.

MR. FROST: Well, not necessarily, but you run across people who say, "Well, the other man has public liability and property damage on his car, and I have had an accident and I haven't any insurance; why shouldn't he pay? He has got insurance." That is not what insurance is for.

WITNESS: Well, it is not what it is for, but may I give you a perfect illustration of the matter? I happen to know. I meet every year a good many men in the same class of work as mine in the United States, and I have discussed this very point with the people from Boston, which is in the only state, the only jurisdiction, that I know that has compulsory insurance. They say that there is never, practically, a verdict for the defendant in the jury courts at common law.

MR. CONANT: Never a jury verdict for the defendant?

A. Yes. Now, why is that? The defendant must be right sometimes. Of course that is why, because the jury don't care, they think they are taking out of a big pocket, and that is all they are looking at. Will the defenders of the jury system *in toto* come out and tell me why they should not be allowed to disclose insurance, if they have complete confidence in the jury?

MR. STRACHAN: Often both parties are insured, and the jury spends its time figuring out which one of the two is insured.

WITNESS: Well, why should they look into those things at all? Let me be fair; I want to be fair on this thing. Juries vary. I have seen some excellent juries, and I have admired some of the decisions they have given in many cases. And juries vary, I am going to say, in Toronto and the outside points, according to my experience. Juries in the outside points are for better than the juries in Toronto, for some reason. That is a matter I intend to take up later.

In 1896 the Legislature decreed that municipalities should not be sued in

actions for non-repair of a highway with the aid of a jury. I was amazed to hear Chief Justice Rose suggest yesterday that that legislation was instigated by plaintiffs. I should think it would be the defendants. However, no matter by whom it was instigated, isn't the answer the same—a lack of confidence in the jury which inspired that legislation?

MR. CONANT: One of the Justices here yesterday, I forget which one ——

A. Chief Justice Rose dealt with it.

Q. I asked him if he knew the genesis of that, the reason back of it. I was surprised at his observation; I never thought it was that way.

A. I don't think it was.

Q. What is your observation?

A. My belief is that it was inspired by the municipalities. However, I am trying to check it up, and if I find anything I will certainly bring it before this Committee. But, as I say, no matter which it was, it was inspired by a lack of confidence in the jury verdicts.

Q. I always thought that that originated from the thought that where the municipality is concerned, and the defendant is really ten thousand people or six hundred thousand people, there would be a tendency for the jury to mulct the defendant.

A. To dip into the big pocket.

Q. His Lordship takes exactly the opposite view.

A. Takes the opposite view. But may I ask the Chairman to test it? If there is any doubt upon the matter, I suggest, let us hew to the line and be completely logical, and introduce an amendment to the Judicature Act at the next session of the Legislature, that these actions shall be tried by juries, and see what the attitude of the municipalities is. If Chief Justice Rose is right we will soon find out.

Finally, in 1930 the Legislature passed a special Act with relation to the Sandwich, Windsor and Amherstburg Railway; that is the institution that runs all the transportation systems down at Windsor. I don't know whether it got through without knowledge of anybody or not, but they took away in the case of that company all rights to trial by jury.

Q. Why?

A. I don't know.

Q. You should have the answers to these, Mr. Fairty.

A. I don't know. I think it was probably—probably the Government had something to do with it; I imagine that is the answer. Wasn't it the Hydro?

I think so. So I say in regard to that, the Legislature has in respect of that municipal enterprise adopted the suggestion that has been made by several members of the Appellate Division several times, that in the case of municipal institutions they should be protected against trial by jury in just the same way as the municipality is protected in cases of non-repair of a highway.

Q. You use that word "protected" quite frequently, Mr. Fairty.

A. Well, I am speaking from our own experience. I am saying this, that I feel that I represent the workers of Toronto far more directly than anybody else can possibly do, because every cent that comes out of our revenue is directly taken from their pockets, and I am telling you that it is ——

Q. You mean by that that your deficits go on the taxpayer?

A. Not a cent on the taxpayer, but it comes directly out of the car riders—or the service, because the carfares have not been changed.

Q. Well, if there were a deficit it would go on that?

A. It would go against the car riders; they would have to have either worse service or higher fares.

MR. FROST: What is your experience?

A. My experience is definitely this, that in a great number of cases juries have rendered unjust verdicts against us—a great number of cases; I will go so far as to say I will put it seventy percent—I will even make it fifty percent, to be absolutely conservative; I do not believe that fifty percent of the litigation brought against us to-day would be brought at all if they had a trial by judge without a jury and they knew that justice would prevail.

MR. CONANT: Well, would it remedy the situation if the jurisdiction of the Court of Appeal were enlarged?

A. Yes, I think so. May I come to this in logical sequence? I am going to deal with all the suggestions that have been made for reform, but I want to point out one thing that possibly this Committee did not consider, not sitting in the position I am sitting in. It is not the verdicts against us that count so much; it is the fact that we have to settle all claims on the basis that we may have to go before a jury who will give an unjust decision, and that costs us far more than any verdicts that are given against us. I have had a lawyer come into my office and say, "I haven't any case here to speak of, but I have got a woman plaintiff, and that is all I need"—and it is the truth.

Q. Of course, if you were here you would recall, I think it was Chief Justice Rose—I asked a rather guarded question along that line, and he did not indicate that he was aware that such actions were prosecuted.

A. May I ——

MR. FROST: Chief Justice Rose here yesterday—I don't know whether you

heard his evidence, but in effect he said this, that in his long experience with juries he found that they were pretty nearly always right.

WITNESS: Now, just a minute. When he said that, one case flashed through my mind. It was tried before Chief Justice Rose and a jury about three years ago, and I could mention the plaintiff's name, but I won't bring it out in public. A lady was boarding a car at the corner of Albert and Bay. The door was open; the car was stopped; there was no suggestion that either the step or the car moved or anything. She fell, and she broke her ankle. She had no evidence whatever of any kind, and her own evidence I think was fairly honest. She said, "I fell, and I wouldn't have fallen if it hadn't been slippery, and it wouldn't have been slippery unless there was some snow or ice or other foreign substance on the step, but I never saw the step and I can't say from observation whether there was or not." There was plenty of evidence to the contrary, that the step was dry and clean. On that tittle of evidence—it is not evidence at all—on that conjecture, the judge charged strongly in our favour. The jury brought in a verdict directly against us. We took it to the Court of Appeal, and by a majority of two to one it was sustained. Now, with all due respect to Chief Justice Rose, I do not think he can defend that verdict. He would say, I suppose, that is a sporadic case.

MR. FROST: He was speaking of the great run of cases.

A. Yes, I suppose he was.

Q. I suppose that there are exceptions; there are bad decisions from both judges and juries, aren't there?

A. Oh, there are, but the situation is this, as I see it: Juries are not corrupt or anything of that sort, but they are not experienced. A judge has all his life been accustomed to the weighing of evidence and the sizing up of witnesses and that kind of thing; he knows, for example, what is the relative standing of the doctors in a community, and when we have one of the best surgeons in Toronto opposed by a man that everybody knows is a quack, he can size that sort of thing up, but the jury can't; they give the same weight to some doctors I could name as they do to Dr. Gallie, and there you are; it is a case of experience. I have too much respect for my fellow men to suggest that they would do anything deliberately dishonest or wrongful, but they don't know.

MR. CONANT: Mr. Fairty, I don't want to shut you off at all, but I think your advocacy of the abolition of the jury system would be rather futile. If you want to direct your remarks to let us say curtailment of the system ——

A. Before I finish with my question of the efficiency or inefficiency, let me say that I made a careful study of a whole year's cases in the jury and non-jury cases, the same type of cases, and I found that the average jury case took eleven hours and one minute, and the average non-jury case took six hours and thirty minutes.

Q. There is no doubt about that.

A. And when you consider—I was told by the sheriff that the cost of sum-

moning jurors and constables was $208 a day, and when you add the light and the heat and everything else of the courtrooms it must be nearly $500 a day.

Q. Well, what curtailment do you think there should be, Mr. Fairty?

A. Well, now I come to the question of remedies. The first remedy that could be suggested would be complete abolition. I am frank to say that if I were in your position, sir, I would find it difficult to recommend such a thing, because it does run contrary to public opinion; it may be uninformed public opinion, but it is public opinion—although it has been done at the present time in England, except where they are permitted as a special measure.

Q. You are referring now to the burden in England to-day?

A. Yes.

Q. Have you any remark to make on that?

A. Yes.

Q. That is a very interesting subject to me. In England, as I recall it, and in one of our provinces, they have shifted the burden.

A. New Brunswick.

Q. New Brunswick?

A. Yes. Well, as to that, I only have to say this: After all, the courts have got to use a judicial discretion, and why should they not grant juries in one negligence case unless they grant them in all? I mean, there is no reason that I can see why it would not be just an extra application to the court, because the judges would come around to a practice whereby they would grant them in every negligence case anyway unless there was something very, very intricate about it, and we would be just as bad as we were before, and with the extra expense of another interlocutory application.

Q. Of course, you are confining your remarks particularly to negligence cases?

A. I am.

Q. There are a great many other categories.

A. Well, if you will permit me to confine myself to negligence cases, that is all I am dealing with.

Q. All right, go ahead.

A. Then the second thing that is suggested is making it more expensive, that is to say, instead of the average fee for setting down a case now, to make it $25 or $50 or something. I am completely against that, because if the jury system is right it should be available to the poorest in the land, in my judgment.

There should not be one law for the rich and another for the poor, and in any case in practice it would come against the poor defendant anyway, so I see nothing in that.

I think that the Legislature might seriously consider the abolition of the jury in actions against municipal public bodies, for the reason that all these revenues are public revenues, and justice is absolutely assured to everybody by a trial before our excellent and patient Bench.

Q. You mean what might be called creatures of the municipality?

A. Yes.

Q. Hydro commissions?

A. Hydro commissions.

Q. Public utilities commissions?

A. Yes, all through the province.

Q. Transportation commissions—and there are quite a large number of such organizations.

A. Just the same as a bill that was introduced in the House a couple of years ago. I suggest that, or I suggest that Mr. Justice Middleton's remedy might be adopted; that is, by giving the Appellate Courts more power. I am not at all sure that the remedy proposed by the judges is the proper remedy, which means, as I understand it, practically the thing that Mr. Chitty suggested in the *Fortnightly Law Review*, that a decision of a jury should be given the same treatment as the decision of a judge.

Q. You would not go that far?

A. I would, but I don't think that is far enough. I mean, I have seen plenty of decisions of judges treated with far more respect than I would suggest they are entitled to, and I am not at all sure that that will cure things very much. I think that remedial action should be taken where there is a plain case of injustice, and this is the way I would do it: I would pass this Act:

> "Section 26 of Chapter 100 of the Revised Statutes of Ontario is amended by adding thereto the following subsection: ——"

Q. Wait a minute till I compare this with the judges'.

A. Well, I haven't had a chance to see theirs. Here is mine:

> "(4) Where a verdict or finding of a jury is, in the opinion of the Court of Appeal, at such substantial variance with the evidence or the weight of evidence as to constitute a miscarriage of justice, the said court may set aside such verdict or finding."

Now, what is wrong with that? If it is plainly a miscarriage of justice, shouldn't it be set aside?

Q. Mr. Fairty, the longer I have considered this and listened to the submissions the more I think it comes down not so much to a matter of verbiage or phraseology or formula, but it all depends upon the method in which the Court of Appeal applies that formula.

A. Yes, to a large extent it does, or, worse still, the method in which the Supreme Court of Canada applies the formula; because the Supreme Court of Canada at the present time takes this plain attitude: "We are not interested in the results of the machinery, the product of that machinery; we are only interested in whether the machinery works." So when the Chief Justice of Ontario told you lately that the Supreme Court of Canada has said in several cases that the Appellate Division was wrong, I think that is an inaccurate way to put it. What they have said is: "We don't care whether it is right or wrong; we don't care whether injustice has been done or has not been done; the only thing we are looking at is, did the machinery work? If it worked, we care not what came out of it." That is the whole attitude of the Supreme Court of Canada to-day, and, to my way of thining, it is practically a denial of an appellate jurisdiction. On that I should like to read something else, if you are not wearied.

MR. FROST: Did you hear Chief Justice Robertson yesterday?

A. Part of it.

Q. Did you hear his reference to that?

A. I did, and that is what I was rather surprised at. He said, "The Supreme Court of Canada said we were wrong."

MR. STRACHAN: I thought they went a good deal further than that; I thought the Supreme Court's decisions went a great deal further than that.

WITNESS: I am bound to agree with Dr. Wright at the Law School; I think a great deal of the best thinking on jurisprudence these days, whether you like it or not, comes from south of the line, I mean by the law schools there and their commentators and what I might call their judicial philosophers. One of the books I should like to refer to is a book that was published last year, which is commented on very favourably by Dr. Wright. It has to do with Criminal Appeals in America, and is written by Professor Orfield of Nebraska Law School. Although he deals primarily with criminal appeals, what he says has also validity with regard to civil appeals, and if you will permit me I should like to read—it is not long—what he says about this:

> "Excessive powers of juries are partly a remnant of pioneer conditions in which there was something like contempt for scientific methods and technical skill and over faith in versatility—in the ability of any man to do anything. . . . Reluctance to review the case, leading to ultra-technical review of the record is an outgrowth of a conception of the jury in criminal causes as more than a fact finding agency—as an ultimate tribunal. . . .

> At any rate, successive appeals confined to search of the record for error are no guarantee of sound results on the facts."

And yet that is all the Supreme Court of Canada ever undertakes to do.

> "Even with respect to the facts the view of the jury should not be treated as final. The notion of democracy involved can offer little solace to a defendant improperly convicted. Jury trial can serve its function as a safeguard against arbitrary invasion of individual rights, without being treated as final or absolute. This function does not demand that arbitrary convictions be accepted. True, as a matter of convenience an Appellate Court will generally take the view of the jury or trial court as to the facts of the case. But the Appellate Court should not be precluded from reviewing the facts. There should be nothing sacrosanct about the view of twelve laymen who happen to sit on a case. The whole history of juries has involved efforts at controlling their verdicts. The theory of finality of jury determination of facts must be thrown into the scrap heap of discarded absolutes."

MR. FROST: That, of course, sounds logical, but, Mr. Fairty, in practice how can you get away from the great advantage that the jury has, that has the opportunity of seeing the witnesses and sizing them up and applying that human nature, that human quality that jurors as a cross-section of the public are supposed to have? How do you get away from that?

A. Now, just let me take that illustration I have given you, about that lady on the step. There was really no evidence there of any negligence—mere guesses; one guess superimposed on another guess is not evidence, surely—and how can you defend a jury verdict of that sort? And should not the Court of Appeal be given power to set a thing like that right?

Q. I agree; but how are you going to get the formula that is going to permit them to distinguish between what is perverse and unjust and the other run of cases?

A. Well, the Chief Justice of Ontario yesterday, to my way of thinking, made a very wise remark; he said that that thing, in his judgment, could be safely left to the good sense of an Appellate Court.

MR. CONANT: If it were broadened, you mean?

A. Yes.

MR. FROST: Who said that?

A. The Chief Justice of Ontario, and Mr. Justice Middleton, who has had more experience and, in my judgment, is as good a judge as there ever was.

Q. Chief Justice Robertson said this, that he thought that this matter should stand over until a better formula was obtained. Now, the big question is, what is the formula?

MR. CONANT: What is the formula?

MR. FROST: What is the formula?

A. Well, how long does it take to get a formula? If it stands over it will stand over forever.

MR. CONANT: Mr. Fairty, I am not prejudging; I am not expressing my final opinion. It seems to me this question comes down to a consideration of this more or less fundamental proposition: You have from jury trials, from my experience and from what I know of such things, two different classes of verdicts, which may be subject to appeal: a judgment which we will call perverse, and another class, in which different minds might honestly differ. Now, so far as I am concerned, I am disposed, if a formula could be developed to deal with the perverse judgment ——

MR. FROST. So would I.

MR. CONANT: —— to open the Court of Appeal to deal with that, but I am not disposed at the moment to allow the Court of Appeal to reverse what may be a difference, an honest difference, of opinion.

A. Well, that is how I have approached the situation. I go completely with you, sir. I think that is the way it should be.

Q. Now, where is the formula?

A. If it is so at variance with the evidence and the weight of evidence as to constitute a miscarriage of justice—which is pretty strong language, and it is used elsewhere in the Judicature Act—surely that is a good formula. You wouldn't ask anything better than that.

Q. Well, of course, but with that opening, under that guise, if you want to call it that, a Court of Appeal might call any judgment a miscarriage of justice simply because they honestly disagreed with what the jury had found.

A. Well, if you lose all confidence in your Court of Appeal, then I don't know where you are. But at the present time let me say this, that my experience is just this: The last case in which I was up before the Court of Appeal, Mr. Justice Fisher said in open court to me, "I am sorry, Mr. Fairty. I appreciate your point of view, I think you are right in coming here, but, in view of the attitude of the Supreme Court, I do not see there is any hope whatever of bringing any more cases before us."

Q. Well, of course, that is a denial of justice, for the court to ——

A. That is what they said, "There is no sense bringing any more cases up here of this kind." That is true. Then what happens? I have found, as you do find when there is practically no appeal, I have found that reacting upon the trial courts. I am not going to go into details, but you know perfectly well the difference in treatment in a Division Court case when you can appeal and when you can't appeal, and it is coming right down to that, that if you deny a practical right to appeal it is affecting the validity of our trial courts. That is a very serious thing, in my way of thinking, and it is all based upon the attitude of the Supreme Court of Canada, which I think is an outworn and an outmoded attitude.

Q. I am going to ask you the same question as I asked Chief Justice Rose yesterday. I may not be framing it the same way, but I asked him if he thought that with our present system, with the jury's verdict practically the final say, it did not lead to the carrying on or promotion of actions that never would otherwise have been started?

A. I say definitely. Chief Justice Rose, as I understand it, said, "Yes, that happens in sporadic cases." I say it happens in fifty percent of our cases.

Q. Well, my recollection of what the Chief Justice said is that he was reluctant or hesitated to admit that that was the case. Wasn't that his reaction?

MR. FROST: Yes, I think it was. He said it was, in effect, the exception.

WITNESS: I think there is a great deal of perjury going on in that class of action, there is a great deal of subornation of perjury, and a lot of things I can't prove.

MR. CONANT: Well, Mr. Fairty, frankly, I think perhaps that is the most serious aspect of the whole thing. I am only expressing my own view, not the view of the Committee.

A. I brought it to the attention of the law officers of the Crown on one occasion, a case where a juryman told us he had accepted a bribe, and he intimated that he had been bribed before. Now, how are you going to prove those things? You can't get a conviction, there is no way at all of getting anywhere, but those things I think are going on and have gone on in our courts. Mind you, I think that is a very, very isolated case; I would not for one moment suggest that that is the common thing with jurymen—as I say, I think the average common man is a pretty decent fellow—but that sort of thing does creep in. And, furthermore, I was going further—I have rather lost the thread of things—I was going further into the question of juries. You have heard here how they are picked, and you know it better than I do; all I know is what I get, what I run up against.

Q. I would not be so sure of that.

A. Here is a set of jury lists, the first that come to hand. First of all, I suppose, there is a fairly decent selection from the voters' lists, and practically every man of substance in that whole list is struck off before we see it. Here is H. C. Hatch; he could afford to come and act as a juryman; he is off. Thomas H. Fox, who I happen to know is sales manager of the Imperial Oil, he is off. And so it goes. If by any chance some people respect their citizenship so highly that they come and say, "I will serve as a juryman," what happens? They go off with the four challenges right away on the part of the plaintiff, and who is left? You have left the residue of this list, who probably have a majority of people who are dissatisfied with the world, disappolnted, and have a grudge against society.

MR. FROST: Of course, I agree with you; I think that the exemptions are altogether too broad, not only too broad ——

A. Well, look at it; there is the way it comes to us in the office.

MR. FROST: The truth of the matter is this: in this day and generation the people owe a great deal to their country, and one of the ways in which they can serve their country is on the jury, and they should be there regardless of position.

MR. CONANT: These red lines indicate that they have been excused?

A. Yes, have been excused.

Q. By the presiding judge?

A. I don't know; that is the way it comes to us.

MR. SILK: The sheriff takes it up to the judge.

WITNESS: Maybe some are dead; I don't know; there may be one or two men dead.

Now, may I go on, with the permission of this Committee. I have been speaking pretty frankly, I think; I am going to even treat the members of the Bench, with the greatest respect I hope, but still as public servants and not demigods, and I cannot help feeling that a certain percentage of the failure of the jury system lies in the far too perfunctory charges that are made by judges to the juries. I do not think it is good enough. In that case of Banbury v. Bank of Montreal, Lord Justice Scrutton said it was not to be tolerated that they should say, "You have heard an excellent address by each counsel, and you have heard the evidence; you can retire to your jury room," and that is what too many of our judges do. I don't know what you are going to do about that, but in itself that is a criticism of the jury system. In fact, a man who has been Treasurer of the Law Society said that he thought the fault lay more with judges than with juries; I do not think so, but that was his opinion, anyway, to me expressed.

The worst of it is, as I say, the penalty that we pay through the fear of injustice, not the actual injustice suffered. I have it here, and I want to be sure that I have it accurately: the average time for a non-jury negligence case in 1936 was six hours and twenty minutes; the average time for a jury case was eleven hours and two minutes. In that connection, think of it from the public aspect. Here were two cases that we had in 1938 of which I have a memorandum:

> "A youth who was riding a bicycle westerly on Dundas Street near Augusta collided with the side of a street car behind the exit doors. He claimed a truck backing up caused him to swerve, and his claim against the Commission was that the car was proceeding at an excessive rate of speed, although what bearing this had on the accident was hard to see.
>
> The bicycle the boy was riding was damaged and he received slight and trivial bruises. I think that either of us would have thought that $50.00 would have been adequate compensation for his injury.
>
> His action came on for trial before the Honourable Mr. Justice

McFarland and a jury in the Supreme Court and lasted on the 9th inst., from 3.00 to 5.00, all the day on the 10th, 14th and 15th and the jury were out till 8.30 p.m. They brought in a verdict dismissing the action against both defendants and assessing his damage at $238.75, an amount as stated above extremely generous but doubtless in part caused by the exaggerated claim put in by the plaintiff.

We, therefore, had a case involving a trivial amount which took up the time of the Assize Court for nearly three and a half days at a cost to the public of probably between $1,000.00 and $1,500.00."

MR. CONANT: How much was the verdict?

A. If he got it, it was $238.00, but they refused to give it to him.

Q. You say the jury's verdict was $238?

A. Yes.

Q. And what would the total costs and expenses be involved in that case?

A. I say from $1,000 to $1,500 to the public.

Q. Now, to the parties themselves; another $500.00 altogether?

A. I would easily say that.

Q. So that that case would perhaps involve expenses of $2,000.00, would it?

A. I think so, yes.

Q. And the amount adjudicated was $238.00?

A. Yes; and $50.00 would have been plenty, because he was not hurt at all.

MR. STRACHAN: Of course, that brings up another point, Mr. Fairty—the light-hearted way in which counsel issue writs for twenty and thirty thousand dollars in the Supreme Court, where perhaps, as in this case, the total damage could not possibly be more than two or three hundred dollars. There is no way of checking that.

A. Things are worse in the County Court, much worse. Not only do we have frequent cases in the office where the taxed costs far exceed the verdict, but I make this definite statement, that in my judgment, going through the County Court list and considering that those things take two to three to four days to try, with a trivial case, with a jury of twelve men and the same constables and that sort of thing, honestly I think the county and the city would be money in pocket to pay the claims asked by the plaintiff.

MR. FROST: What do you think of Mr. Justice Middleton's suggestion yesterday, that the whole County Court procedure should be simplified, with an idea of making it less expensive, in other words to have the County Court system an intermediate system between Division Court and Supreme Court?

A. I am all in favour of that.

Q. And to abolish all the multiplicity of rules and powers and what-not, and make it, as I say, a court that would lie in between, that would be very much less expensive and more summary?

A. Well, I am in favour of it completely.

MR. CONANT: In regard to that observation, Mr. Fairty, really don't we have to admit that our profession is responsible for some of these abuses?

A. Well, I think their attitude is largely wrong; they are too complacent.

Q. Yes, I know; but the litigants themselves, the people themselves, can hardly be accused of promoting or carrying on all this elaborate litigation; do you think so?

A. No, I don't think so; I am bound to say that; that is unquestionably true in some cases. Now, I am going to suggest another remedy which I imagine you will think is revolutionary, but I think it is of distinct value. If we are going to have the untrammelled jury system I personally would like to see women on juries. They are citizens, they should have the rights and duties of citizens, and, to my judgment, they are the custodians of the family pocketbook, they are the local ministers of finance, and they have far more common sense about money than the men have, and they size up their own sex far better. As I say, probably you couldn't have that kind of story, "A woman plaintiff is all I need," if you had six women on the jury.

MR. FROST: They would be more critical, you mean?

A. Yes. I have made enquiries from the American jurisdictions where this practice is in effect, and they are all in favour of it; they all think it works out.

MR. CONANT: They have women jurors in England, have had for some years.

WITNESS: Yes, and it has worked well; and if you are going to have the jury system at all, I should like to see women on juries myself.

I don't know about the calibre of jurors. I would like to see it improved. On the other hand, I am bound to say this, that I think I have as much regard for the liberty of the subject as anybody, and I hate bureaucracy as much as anybody, but I do not see any reason why every citizen should not have a right to sit on a jury if the jury system is right, and I do not see why men on relief should be barred from sitting on juries. I think it should be a complete cross-section of the community.

Just one other thing while I am on this subject: I am more than impatient with the attitude of mind which keeps on harping about the rigidity and the bureaucracy of the administrative machinery that every community has had to set up these days. Why have they had to set it up? Why do we have these boards and commissions? Because of the failure of the common-law system to work. And I ask members of my profession whether they really are not short-

sighted in opposing these things. The best illustration I can give of that is the Workmen's Compensation Act. I imagine every one of you knew the conditions before the Act was passed; they were shocking to employer and to workman alike. The Workmen's Compensation Act—and I can speak with authority, because we have thousands of cases before it every year—has worked excellently and well, and when Chief Justice Meredith refused to let lawyers have anything to do with it, except possibly as chairman, he did an excellent job, in my opinion. Some of our profession were in favour of it, but those whose pocket it touched took the attitude of the silversmiths at Ephesus, that they would have nothing to do with it, and they opposed it vigorously, and they are doing the same thing to-day. So let Lord Hewart talk about the new despotism, and let Sir William Mulock talk about the infringement of liberty of the subject: if you are going to object to those things, have something better in their place.

MR. CONANT: Of course, your observation is pertinent, Mr. Fairty; we have had considerable evidence, and I think that a great many people have ignored, or at least have not faced the realization or the reality that these commissions have developed because of the expense, the involvement and the delay of litigation through the courts.

A. Certainly; of course.

Q. And various parliaments before us—because this is not the result of five or six years', it is the result of twenty-five years' experience—have developed these boards and commissions to expedite, simplify and make readily available the adjustment of conditions and rights; there is no doubt about that.

A. My experience is, they have done good work.

Q. Isn't that the case?

A. That is what I think about it, yes, that is exactly what I think about it.

Now I want to deal with the question of challenges. As I say, it works out that every man of obvious substance is challenged by the plaintiff the minute he is put in the box. Now, why should there be any challenges at all? I really challenge anybody to say why, and I do not see why there need be.

Q. You mean except for cause?

A. Except for cause. I have had plenty of my friends who have said, "Well, as a citizen I thought I ought to sit on juries." They have been up there, and they have gone through the whole Assize, they have been called half a dozen times, and the minute their names appear, as manager or accountant or something of the sort, off they go; or even if they are dressed well they are not allowed to sit there. The result is, as I say, what you have left are some uneducated, unintelligent men who have a grudge against society, and what sort of justice do you expect from that type of system?

Q. How much longer will you be, Mr. Fairty? I don't want to hurry you.

A. I think I am getting close to the end; twenty minutes, or fifteen.

Q. Well, that's all right.

A. Then this is more or less of a small point: I cannot see why the debate upon the issues laid before the jury is carried out in the way it is. In the ordinary debate the affirmative opens, the negative replies, and the affirmative has a short answer. In this case the negative has to go first, the affirmative goes after it, and the negative has to guess what the affirmative has to say; and plenty of times there are things I could answer but I have no chance to answer them, and even an appeal to the judge does not necessarily produce results.

Then I want to deal with the question of the place of trial; I will deal with that only briefly. I can only suggest this, that here is the situation: The place of trial is regulated by the plaintiff at the present time; he is *dominus litis*, and must show extraordinary reasons to have it changed. It is not balance of convenience; there must be substantial injustice before it is changed. Why should that be so? That is not the rule in England. Why should the fact that an accident happens, and two fellows rush to the Registrar's office, each trying to issue his writ ahead of the other, determine the place of the trial? I mean, that sort of thing should be done as it is in England. I do not suggest there has to to be a summons for directions.

Q. What difference is there in England?

A. It is a summons for directions there, and that, among other things, is one of the matters that is dealt with.

Q. On the directions is the place of trial determined?

A. Yes. Now, going on, the question of jury challenges: This is more or less of a trivial thing, but there is a serious defect at the present time in the law. At the present time four challenges are allowed to each party, and if there are more than one plaintiff or more than one defendant, still the challenge must be split up among them. There is nothing at all to indicate how such challenges are to be split up. Perhaps the trial judge in the case of two defendants would allow each party to challenge two, although there is no obligation on his part to adopt this procedure. What would happen in the case of three defendants I do not know. There is a mistrial if you allow more than four challenges by all defendants or all plaintiffs, as the case may be. So I think that should be looked into, because it often happens that the issue is between the two defendants, and not between the plaintiff and the defendants at all.

Q. Do you think there should be four for each defendant or each party to the action?

A. As I said, I think there should not be any, but if you have the present system something should be done to change the law and make it clear what the Legislature wants.

Q. Of course, in an action with a large number of parties, you might largely exhaust your panel; that is the difficulty.

A. Then, in regard to experts, I am inclined to agree with the members of

the Bench who spoke yesterday, that that thing is not as serious as apparently it looms before this Committee, especially with regard to medical men. I find the average medical man in Toronto, with rare exceptions, fair and reasonable, and there is not as much controversy as one would think, but, even so, there has been enough so that the medical profession have been very restive. I don't know whether you have seen the report that they suggested should be adopted. I have it here. We would not accept it at all.

Q. What's that?

A. We would not accept it at all.

Q. What is it?

A. Their suggestion for a remedy.

MR. SILK: I think this is what you want on place of trial.

WITNESS: Place of trial: this is the English rule:

> "There shall be no local venue for the trial of any cause, matter or issue, except where otherwise provided by statute, but in every cause, matter or issue in every division the place of trial shall be fixed by the court or a judge.
>
> In fixing the place for the trial of any action, cause or issue or matter the court or judge shall have regard to the convenience of the parties and their witnesses and the date at which the trial can take place, and when a view may be desirable the locality of the object to be viewed; and to the other circumstances of the case, including (*inter alia*) the wishes of and expense to the parties, the relative facilities for trial in Middlesex or at the assize and the burden imposed on jurors.
>
> This rule shall apply to every cause, matter or issue notwithstanding that it may have been assigned to any judge."

Well, that is pretty well common sense; but our law, as I say, is that the plaintiff is *dominus litis*, and the venue will not be changed unless the defendant shows some serious injury or injustice to his case will arise from trying it at the place proposed. That is Atwood v. Hall, 27 *Ontario Weekly Notes*, page 86. Surely the English rule is more in accordance with common sense.

MR. CONANT: Well, do you think there is any substantial injustice arising from our rule, Mr. Fairty?

A. Well, I don't know. There was a case we had, of an automobile colliding with a street car at Bay and Fleet. The plaintiff happened to live in St. Catharines. Practically everybody connected with the case, including all the witnesses, resided in Toronto, and yet we were forced to go to St. Catharines to try the case. I do not think that is fair.

Q. You went to St. Catharines to try a case against the Toronto Transportation Commission?

A. Yes. The accident took place at the corner of Bay and Fleet. That is the law. You may be amazed, but that is the truth, and it has happened to other litigants. We had to take twenty witnesses to Belleville in one case.

Q. They could take you to North Bay or Port Arthur on the same basis?

A. Yes. We have had to go down to St. Thomas. I think that law should be changed.

MR. FROST: Of course, that seems to be an absurdity.

WITNESS: As far as experts are concerned ——

MR. CONANT: Mr. Fairty, have you made up any short or concise list of your recommendations?

A. I made some recommendations. I want to change one. I did say at first blush that I thought the cost of juries should be increased, I thought possibly that the cost of juries to the litigants should be increased. I recant that attitude; I do not think it is right.

I suggest this about experts: At the present time you can have your property valued by the Toronto Real Estate Board; they appoint the men best suitable for the job, and they give you a report for a modest fee. Now, it might not be a bad thing if something along that line were adopted so that the litigants in an action might have the Academy of Medicine or somebody appoint somebody to go and give evidence in court. I almost agree with Mr. Justice Middleton, that the parties should be able to call their own men, but the opinions of such a board would carry much more weight than the opinions of the witnesses called by either party, and I think it would be substantially in the interests of justice. I know the system is not perfect, but I think it is more perfect than our present system.

MR. SILK: That might also apply to assessment appeals.

WITNESS: Here is what I have said about a thing that I think is of very serious importance. It has nothing to do with me except as a solicitor trying to help this situation. This is in regard to small claims courts. I will read what I have said:

> "In addition to our other work, our legal staff voluntarily gives free advice to or train men who are in need of the same. Other than this, of course, we do not do legal work for them. This brings us in contact with the domestic problems of a great many men of moderate income and I have been struck with the inefficiency with which our Division Courts are functioning as small claims courts. The costs for institution of action in Division Court for small claims are as a matter of fact higher in proportion than in the higher courts whereas the reverse should be the case. These fees should and could be substantially lowered. I see no reason why most services of process should not be done by registered mail. Further, the amount of time taken out of a working man's day to press a small claim makes it almost impossible

for him to proceed with the same. Again, it is not always that a small claim in the Division Court is treated with the respect and tolerance by a judge that it shonld be, considering the importance it may have to the parties.

In the public interest I suggest a real small claims court for large cities where the fee for entering an action would be nominal and where the sessions of the same would be held in the evening. I am sure that the services of members of the Junior Bar to act as judges in such courts could be secured for a very reasonable amount and those taking such work would receive an invaluable training. This would also relieve the present intolerable congestion in the Division Courts in the larger cities."

What I mean is, something under $50 or so, for the poor man. At the present time, suppose a workman has a claim to which he is legally entitled of four to six dollars; he can't afford to take it to Division Court. I would have those small claims courts set up in four sections of Toronto, where they could go in the evening, and where there would be no red tape or anything but strict equity, and where young lawyers would get an invaluable training, and their services would be remunerated very lightly. I think it is worthy of consideration. It has been done; there are nineteen states that have small claims courts at the present time.

Third-party procedure in Division Court: I cannot see why the Division Court Act or rules do not permit third-party procedure. If it is necessary in the higher courts it may become equally necessary in this court.

MR. FROST: I agree with that.

WITNESS: Negligence Act: It would seem proper that a plaintiff under this Act could admit partial responsibility and sue for a percentage of his damage. Under Parker v. Hughes, 1933 O.W.N., 508, however, the percentage of damage found is applied to his claim not his damage, a situation which, as Mr. Justice Masten pointed out, demanded legislative intervention.

MR. CONANT: How would you attack that? How would you approach that?

A. I would file a claim saying, "The plaintiff admits that he is fifty percent liable for this collision, and he therefore sues for the other fifty percent." Why not? That is surely the logical sequence of our Negligence Act.

Plural trials: Many cases are arising at the present time where the same issue is being litigated in more than one action. A short time ago one of our buses was proceeding south on Lansdowne Avenue when it was run into by an automobile proceeding at a high rate of speed which knocked the driver off his seat, and the bus, out of control, crashed through a property owner's fence. We first were sued by the property owner and succeeded. We then were sued by the owner of the automobile and, after an appeal, succeeded. Finally, we were sued by a passenger in the bus and succeeded again after a trial which took about three days in the Supreme Court. That trial took place, I may say,

before the Chief Justice of the High Court. In the above case it is fortunate that the results in all cases were the same, but it is suggested that to have the same issue litigated three times with possibly varying results, brings the administration of justice into contempt. It may be unjust that a man's rights should be determined behind his back, but even this I think is preferable to the present situation.

Q. How could you make a man come in if he didn't move himself?

A. Well, I don't know. I think something could be done. There should not be a multiplicity of trials; I think it brings the administration of justice into contempt, if one jury decides one way and another jury decides another way. I think it is worthy of consideration.

I can only say that I understand this Committee have already practically decided that there should be no more juries in Division Court.

Q. Well, if you want to argue that there should be, we will hear you.

A. No, I do not.

Trial lists: I don't know whether this has anything to do with this Committee or not, but there has been too much criticism, I think, of the profession by the Bench about cases breaking down on the trial lists, and, to be perfectly fair to the Bench, I think it often happens because of interference with the clerk. The clerk should be allowed more freedom and discretion on the question of trial lists and less interference from the Bench, and I think things would work out a lot better.

Q. You are referring to the trial lists in getting on?

A. Yes, that kind of thing.

Q. Are you aware that in England they have a much more definite system than we have here?

A. No, I am not; I don't know the rule there.

MR. CONANT: That was presented to me during this Committee. Not only do they have a trial list, but they allocate to each case the estimated time that is to be involved, and the litigants and counsel can accept that as correct and come to court at the time that is indicated on the list.

Did you show that to me, Mr. Silk, or was it Mr. Magone?

MR. SILK: It was Mr. Fowler who gave that in evidence; and he also pointed out that they have two trial lists in most courts over there, one for long cases and one for short cases.

WITNESS: Now, this is one thing that has always appealed to me: I do not think there are many things that are more unseemly in our administration of justice than the treatment of witnesses called to our trials, especially in Toronto.

To have ladies and gentlemen forced to wander around the corridors of the Court House or to sit in the most unsatisfactory and inadequate quarters provided for them is not apt to give the public a favourable impression of the administration of our judicial system. This may be, in Toronto, not susceptible to reform until the provision of a new Court House, but provision for decent accommodation for witnesses and the profession should be one of the first objectives of any such new building.

I may say further that I have no admiration for the physical treatment of witnesses once they are called to the box. The judge is sitting, the jury are sitting, but the witness, unless an invalid, is forced to stand, in an uncomfortable position, it may be for some hours; a circumstance which greatly adds to the nervous tension which a witness called for the first time is probably undergoing. In most of the American jurisdictions the witness box is abolished and a comfortable chair is furnished in which the witness can sit. I cannot see that this practice in any way curtails the dignity or decorum of the court proceedings and it shows a consideration for persons called to court usually in reference to a matter in which they probably have no personal interest, which in my judgment they deserve.

Now about pre-trial: I have discussed that at length with American jurists. One of the judges referred to it as a myth. It is not a myth, but it may be a mirage, because it has worked well over there, and I suspect it has worked very well over there because of the great congestion of their lists and the fact that most of those jurisdictions have nothing at all approximating our examination for discovery. If pre-trial is going to add substantially to the cost and expense to the litigants in an action, then I am not in favour of it. On the other hand, it does seem to me that there are plenty of things that can be brought up before a pre-trial judge that could be very satisfactorily disposed of, with the effect of shortening the proceedings at the trial—such things as plans, admissions, and all that kind of thing—and, even if the judge does see how far the parties are apart on the question of settlement, that is a distinct advantage. In the American courts I imagine fifty percent of the cases are settled at pre-trial, possibly because it takes so long to get on.

MR. FROST: That is probably on account of the state of their lists, too, I suppose?

A. Yes, it is. Then there is one other thing about it: the efficiency of pre-trial, I am told, depends substantially upon the judge that is assigned to do it; if you get a good judge you get good results; if you don't, you don't.

MR. CONANT: The hypothetical dialogue that Mr. Justice Middleton gave us here yesterday was not very encouraging.

WITNESS: There is no judge on the Bench for whom I have a greater respect than Mr. Justice Middleton, but I think Mr. Justice Middleton is wrong in confusing pre-trial with the English summons for directions. I do not think the functions are at all the same—hardly the same, in any event. They are not at all identical. In other words, the summons for directions is simply arranging for the machinery of the case, that is all, venue and that kind of thing. I agree with him that that is unnecessary in our practice, but it might easily be that

that pre-trial idea should be watched, and possibly it can be found to be of value in our courts.

MR. SILK: Just before Mr. Fairty goes, I have something here I should like to put on the record. I wrote to officials in the various other provinces to find whether they have any special law applicable to jury trials where corporations are involved, and I can put that on the record in just a moment.

Mr. J. B. Dickson, Deputy Attorney-General in New Brunswick, says:

> "Our laws respecting juries have no special provisions dealing with corporations. This question has never arisen in the province, so far as I am aware."

Mr. Pitcairn Hogg, from British Columbia, says:

> "As in Ontario so in British Columbia, a mistrial results where it is mentioned in the course of a jury trial that the defendant is covered by insurance. There are, however, no provisions in force in this province in relation to jury trials dealing especially with the case where the defendant is either a municipal corporation or a limited company."

Mr. Juneau, from Quebec, who was before the Committee, says:

> "With reference to your letter of the 13th instant, I beg to inform you that, after many searches, I have been unable to find out that any steps have been taken, in the province of Quebec, regarding jury trials when a corporation is involved. However, I have before me a letter dated September 19th, 1939, addressed to Mr. F. H. Barlow, C.R., Supreme Court, Toronto, Ont., by Mr. Guillaume St. Pierre, Chief Attorney of the city of Montreal, a copy of which is enclosed.
>
> You will note that Mr. St. Pierre informs Mr. Barlow that municipal corporations have made a demand to the effect that the jury trials be abolished in cases of falls on the sidewalks, etc., but that said demand was not granted on account of the opposition by the members of the Bar."

From Prince Edward Island, Mr. Bentley, who is in private practice, says:

> "Answering your letter of 13th inst., the inclination of juries to give verdicts against corporations, especially insurance companies, is well recognized here also, but no steps have been taken in this province by way of general legislation to prevent the jury trial of an action where a corporation is involved. In the case of an action for damages such as a collision action against the owner of an automobile where the owner is insured against loss, the knowledge that the fair trial of the action would be affected by a disclosure of the fact of insurance seems to be general, and I can recall no case where a motion has had to be made based upon such disclosure. If disclosure were made I have no doubt the court would hold a mistrial took place.

There is no statute here preventing a jury trial of an action where a municipal corporation is concerned."

Mr. Wilson McLean, Legislative Counsel of Manitoba, says:

"The only information with respect to jury trials in this province along the line of that which you desire is to be found in section 65 of 'The King's Bench Act,' cap. 44, R.S.M. 1940.

You will note that we have the same provision with respect to trial of actions against municipal corporations in our Act as in yours. We have not, however, any provision preventing trial of actions against other corporations being held with a jury.

Without comparing the Ontario law with the Manitoba law, I am under the impression that out right of trial by jury is somewhat more restrictive than yours."

Mr. Runciman, Legislative Counsel for Saskatchewan, says:

"In the circumstances mentioned at the beginning of your letter," ——

that is, as to what occurs when insurance is mentioned —

"it is recognized here that the judge, following the cases on the question, may in his discretion take the case from the jury or adjourn it for trial before another jury.

We have not in Saskatchewan a provision such as that contained in section 53 of The Judicature Act of Ontario."

That is in regard to non-repair of highways.

"With reference to your inquiry as to any steps taken in this province with respect to trial before a jury where a corporation is involved, I may say that the Legislation Committee of the Law Society, prior to the 1940 Session of the Legislature, recommended amendments providing that in respect of malpractice and in actions against hospitals the action be tried by a judge without a jury unless on special application it be otherwise ordered, and it was suggested that actions against municipalities for negligence be included.

No amendments in this respect were made at the 1940 Session."

Mr. Henwood, Deputy Attorney-General of the Province of Alberta, says:

"There is no legislation in this province denying to a plaintiff the right to a jury if the defendant is a corporation, municipal or otherwise, nor has anything come to the attention of the Department indicating a desire for any statutory restrictions of the kind under consideration by your Committee.

I note your observation with regard to the effect of disclosing to the jury that the defendant is protected by insurance. I presume that the practice in Ontario is the same in that respect as in England. See *Grinham et al vs. Davies, 1929 2 K.B. 249.* See also the judgment of *Dysart J.* in *Wood vs. Armstrong, 1931 2 W.W.R. 359.*

I have not been able to find any reported case of an Alberta court nor of an Ontario court with reference to this practice; if you have any citation would you kindly advise me."

MR. FAIRTY: May I leave with you, Mr. Chairman, for your information, the report of the Ontario Medical Association on expert evidence?

MR. CONANT: Yes.

MR. FAIRTY: And also my suggestion as to amendment to the Judicature Act?

MR. CONANT: Yes.

Now, what else, Mr. Silk?

MR. SILK: I have heard nothing definite from Mr. Walsh. The last word we had, which was at 12.20, was that he could not be sure he would be here.

MR. CONANT: Well, we can't sit this afternoon just on that vague kind of information. What is your wish now, gentlemen? Have you any further evidence you want to bring in?

MR. SILK: Nothing at all. Mr. Dawe wanted to know whether he should come back and explain his memorandum.

MR. CONANT: I don't think that is necessary.

Now, what is your wish, gentlemen? I make the suggestion that if we could agree upon a date, we adjourn for say two weeks or thereabouts to consider this, and then to discuss our finding. Perhaps we could leave it this way: As soon as the transcript of evidence heard this week is available I will endeavour to fix a date say approximately two weeks from now, and we will meet here to discuss the matter further, if that is agreeable. I think perhaps it is well not to fix a definite date at present.

Adjourned at 1.00 p.m.

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TO APPENDIX No. 2

REPORT AND PROCEEDINGS OF THE SELECT COMMITTEE APPOINTED TO INQUIRE INTO THE ADMINISTRATION OF JUSTICE

SESSION OF 1941