The Mid-Winter Meeting of the Ontario Members of the Canadian Bar Association*

The mid-winter meeting of the Ontario Members of the Canadian Bar Association took place in London, Ontario, on Friday and Saturday, February 4th and 5th, 1955, with 717 members of the bar and their guests in attendance. The working programme included two panel discussions, a talk by Dr. I. M. Rabinowitch of Montreal, on the "Use and Abuse of Chemical Tests for Intoxication", and the presentation of committee reports.

At the opening session on Friday afternoon Wilfred P. Gregory, Q.C., Vice-President of the Association for Ontario, acted as chairman and His Worship, Mayor Allan Rush, of London welcomed members and their guests.

Isadore Levinter, Q.C., followed with the report of the Ontario Subsection of the Section on Civil Liberties, which covered work in three fields. The function of juries in our system of administering justice, he said, and the development, functions and purposes of the grand jury have been the subject of study. The establishment of a uniform code of procedure before administrative tribunals and other such statutory authorities, to safeguard the rights of citizens, is being currently studied and work continues on a draft statute. The subsection feels that the minimum standards laid down should require notice of the complaint and of the relevant facts, recognize the right of the party to contest the allegations, in appropriate cases to cross-examine, and to be represented by counsel, and should require the authority to set forth its findings of fact and the reasons for its decision. Some question has been raised whether the enforcement of the Fair Accommodations Practices Act is properly within the jurisdiction of the Civil Liberties Subsection.

The Commercial Law Subsection has given consideration to a number of subjects during the past year, including problems arising under the Registry Act, the Investigations of Titles Act, the

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Quieting of Titles Act, the Assignment of Book Debts Act, the Bulk Sales Act and the Bills of Sale and Chattel Mortgages Act. During 1954 it was asked to submit recommendations to a subcommittee of the Ontario Legislature on the registration of conditional sales contracts and similar documents of title and pledge, particularly with regard to motor vehicles. During the year an intensive study was made of the search and certification of titles under the Registry Act. Suggestions were made for the improvement of Registry Office facilities and procedures. The group also thinks that machinery should now be set up to certify titles to lands registered under the Registry Act before the filing of all plans. Before a scheme of certification of titles could be put into operation the present congestion in the Registry Office must be eliminated.

The two main subjects receiving study by the Labour Relations Subsection are "The Status of Trade Unions before the Law in Ontario" and "Problems Created by Secondary Boycotts and Jurisdictional Disputes". The year's programme also provides for "A Critical Review of the Practice before the Ontario Labour Relations Board" and an investigation of "Property Rights in a Job".

Interpretation of blood tests and other tests of the percentage of alcohol in the blood were discussed in detail by Dr. I. M. Rabinowitch in a two-hour address at a meeting on the Friday afternoon, to which a number of visiting doctors and police officials had been invited. Some of those present will already have read the expression of Dr. Rabinowitch's views in the Canadian Bar Review,[1] but he is a vivid speaker, as well as writer, and his speech gave them added insight into a difficult subject, upon which there is much controversy.

On this occasion Dr. Rabinowitch reiterated that chemical tests have a valuable place in ascertaining whether or not a person is intoxicated, but that they must be used in conjunction with clinical examinations by a qualified medical practitioner in order that they may be seen in their proper perspective. Such conditions as hunger, fatigue, low blood-sugar, lack of sleep, the effects of drugs, like the barbiturates, and certain postmortem phenomena were cited as examples of factors which must be taken into consideration in determining whether, in fact, a given percentage of

[1] See Rabinowitch, Medicolegal Aspects of Chemical Tests of Alcoholic Intoxication (1948), 26 Can. Bar Rev. 1437, and Correspondence (1953), 31 Can. Bar Rev. 1069, *1190*, and (1954), 32 *ibid.* 243.

alcohol in the blood had a given effect upon the person at a given time.

Particular attention was drawn to the increasing use of barbiturates, or sleeping tablets, because of their effects, which may not be unlike those of alcohol. These effects may be particularly noted when the drugs have been taken some hours before or shortly after alcohol has been consumed. Under such conditions, the barbiturates may intensify the effects of the alcohol. Therefore, in such cases, Dr. Rabinowitch said, tests for alcoholic intoxication should include tests for barbiturates. The importance was stressed of a searching cross-examination of expert witnesses in this regard in order to reveal whether, among other things, the existence of these conditions was taken into consideration by the expert in his interpretation of the blood-alcohol and other alcohol tests.

In discussing the pitfalls encountered in making blood tests Dr. Rabinowitch maintained, as he has done repeatedly in the past, that the higher the alcoholic content of the blood, the higher the probability of intoxication, is a statistical conclusion only. Therefore, being statistical only, it may or may not, and need not necessarily, apply to the individual. Whether a person is or is not intoxicated depends, not upon the alcohol content of the blood, but upon the alcohol content of the brain, which is not necessarily paralleled by the blood content. For this reason alone, he disagreed with the common proposition that a given percentage of alcohol in the blood will always have the same effect, and discussed a number of cases that clearly illustrated his point.

Another reason for the widely divergent findings, which he demonstrated by actual cases, is the "Mellanby Phenomenon". According to this phenomenon, repeatedly confirmed independently by different groups of workers in different laboratories in England and the United States, the effect of a given percentage of alcohol in the blood depends to a very large extent upon whether the concentration of alcohol is increasing, has reached its maximum, or is decreasing. This alone, Dr. Rabinowitch argued, disproves the claim that a concentration of 0.15 per cent of alcohol in the blood is, under all conditions, certain proof of intoxication.

The speaker then dealt with urine, saliva and breath tests, and, by actual cases, showed why these rarely reflect accurately the exact percentage of alcohol in the blood. For example, when there is still some alcohol in the stomach, the percentage of alcohol in the urine is, under normal conditions, almost invariably higher—and may be very much higher he said—than the actual percentage

of alcohol in the blood. Furthermore, a parallel between the amount of alcohol in the saliva and the amount of alcohol in the blood is noted only after all the alcohol that has been consumed has left the stomach, has been completely absorbed from the intestines and has distributed itself throughout all the different organs in the body. The reason for this, Dr. Rabinowitch explained, is that the percentage of alcohol in the saliva tends to parallel the percentage in the arterial blood rather than in the venous blood, and, until all alcohol has left the stomach and been completely absorbed, the percentage in the arterial blood may be higher than in the venous blood. But, even then, there may be at times an unpredictable increase in the saliva without a corresponding increase in the blood. For these reasons, saliva-alcohol tests, Dr. Rabinowitch maintained, have no place in a court of law, except as proof that alcohol had been consumed. Breath-alcohol tests, for a number of physiological reasons he cited, have also no place in a court of law, again except to establish that alcohol had been consumed.

The business session on Saturday morning opened with the presentation of three subsection reports. Since the mid-winter meeting in February 1954, the Criminal Justice Subsection reported, it has held four meetings in Toronto and one in Niagara Falls, three of which resulted in the adoption of resolutions. The first resolution dealt with statements to police officers by accused persons under arrest. In the opinion of the subsection these should not be admitted in evidence against the accused at trial unless they were made under oath and in the presence of a justice of the peace. Secondly, the subsection felt that corporal punishment should not be imposed as part of the penalty on conviction for any criminal offence. The last resolution recommended that representations be made to the Parliament of Canada to restore the right to trial by jury under the new Criminal Code, where an application has been made to have the accused declared an habitual criminal, and to ensure the accused's right of appeal from a finding on such a charge.

The reports of the Junior Bar and Insurance Law Subsections, which have been less active than some of the others, revealed that a great deal of energy has been directed toward re-vitalizing them. The Junior Bar are attempting to increase their membership by a series of "get started" talks, by successful members of the profession, on problems likely to be encountered by the young lawyer. Consideration is being given to co-operating with other provincial

subsections in reviewing such topics as Legal Aid and Legal Education. The Insurance Law Subsection, in the hope of stimulating the interest of the younger members of the bar in their work, have made it a practice to review recent insurance decisions at their meetings and to invite speakers to deal with particular insurance problems.

"As Others See Us", a symposium on public relations of the bar, with speakers of wide and varied experience, was a feature of the Saturday morning session. J. Douglas Conover, Q.C., Director of Legal Aid for the County of York, A. M. Kirkpatrick, Executive Director, John Howard Society of Ontario, John Marshall, Associate Editor, Windsor Daily Star, and Leslie Wismer, Director of Public Relations and Research, Canadian Congress of Labour, were the guest speakers, with Edson L. Haines, Q.C., chairman of the Public Relations Committee of the Canadian Bar Association, as moderator. Their impressions of potential clients' thinking about lawyers and legal problems should cause all members of the legal profession to pause and reflect.

Before the panel started on the agenda, each speaker made a brief preliminary statement. In his, Mr. Wismer emphasized that every one whose business brings him into contact with others is practising public relations. Most people need a lawyer's services at one time or another, but tend to avoid him because they are uncertain what they are likely to be charged. There is a general hesitation on the part of individuals to take action against corporations because they feel their chances of fair treatment, combined with their inability to employ the talent a corporation can afford, are against them. Mr. Wismer suggested that it is a function of both organized labour and the Canadian Bar Association to propose reforms in the law and he looked forward to closer co-operation between them in the future.

Mr. Marshall in his opening remarks spoke of the reluctance of the citizen to appear as a witness in court. Fear of humiliation and ridicule when under cross-examination, inconvenience and the loss of time from work, he felt, were factors causing many people to avoid giving evidence.

Mr. Kirkpatrick, in speaking of the work of the John Howard Society, stressed the part played by the lawyer in the rehabilitation of an individual accused and convicted of a crime. Often the lawyer is the only ray of hope an accused person has, and the lawyer, therefore, must learn to accept the sinner without condoning the sin. In urging the legal profession to take a greater interest in

criminal law, Mr. Kirkpatrick said that, in 1953, there were 120,000 committals in Canada, of which 58,000 were in Ontario.

Colonel Conover pointed out that legal aid and public relations go hand-in-hand. More than 2,400 cases a year pass before the legal-aid panel in the County of York. In three and a half years some 8,000 applications for legal aid have been received, of which 1,500 concerned criminal charges.

Confidence, interest in the client and in his problem were the qualities, the panel agreed, that the average man looks for in selecting a lawyer. A suggestion of the panel, and one that might well be the subject of serious consideration by the legal profession, was that lawyers should follow the same procedure as the medical profession and set a reasonable preliminary consultation fee. The public know the fee likely to be charged when they go to a doctor for a preliminary discussion of their medical problems and there is no reason why the same situation should not obtain in the case of lawyers. The panel was of the opinion that in such a preliminary consultation the client's problem could be clarified, a course of action mapped out and an estimate of fees given. While on the subject of fees it is interesting to note that not one of the three non-legal men on the platform knew that there are Taxing Officers in Ontario and that, if a client feels that he has been overcharged by his lawyer, the bill can be taxed. It appears that bar associations, in addition to acquainting the public with the varied functions of lawyers, should also make known this and other protections that are afforded the public.

The film "Twelve Angry Men", shown at the conclusion of the panel discussion, was much enjoyed by all who saw it. In portraying the tense atmosphere prevailing in a jury room while twelve jurors decided on the fate of an accused, the film held to the end the audience's interest in the varying psychological reactions of the jurors to the problem at hand. The film is available to county law associations and those wishing to show it should communicate with Mr. Edson L. Haines, Q.C.

At the conclusion of a luncheon given on Saturday for the members of the Canadian Bar Association by the Law Society of Upper Canada, the report of the society, traditionally given by the Treasurer, was read in his absence by R. F. Wilson, Q.C.

The attendance at the Osgoode Hall Law School has climbed, the report stated, from a total of 721 in 1950-1951 to 879 in the session 1954-1955. Special visiting lecturers this year included the Chief Justice of Ontario, the Chief Justice of the High Court of

Ontario, Mr. Justice R. L. Kellock and Mr. Justice J. R. Cartwright of the Supreme court of Canada, and Mr. Justice F. H. Barlow of the Ontario Supreme Court. In addition to scholarships awarded on the basis of academic standing, eighteen bursaries were given in the first, second and fourth years to help needy students in good standing. Several of these result from the generosity of individual donors.

During 1953 the Discipline Committee met on thirteen occasions and some twenty-eight complaints were considered and disposed of. An additional 173 complaints were considered by the chairman and vice-chairman and disposed of without reference to the other members.

By the end of 1953 there were 89,200 volumes in the Great Library at Osgoode Hall, and 914 volumes were added in 1954, which, together with the volumes in the students' library, brings the overall total of books available to 99,255.

The society had continued its public relations programme in the following fields:

(1) Law Society publicity;

(2) professional publicity; and

(3) public information programme, including the preparation of literature and pamphlets on legal subjects and the distribution of this literature to and by members of the profession. Through its public relations committee, the Law Society is co-operating with the Association's Committee on Public Relations, among other activities, to investigate the possibility of further outlets through radio and television.

In the field of legal aid, all forty-four county law associations were organized in some form by 1953. Regular clinics were held in seventeen counties. In the face of the argument sometimes heard that "legal aid is not needed in our county", it is of interest that in only two of the forty-four counties or districts were no applications for legal aid received. In the County of York alone there were 1,866 applications in civil matters and 606 in criminal.

The Special Committee on Continuing Education of the Bar had arranged a course of lectures on Labour Law and Labour Relations (which some fifty representatives of both labour and management attended) and, in association with the Ontario committee of the Canadian Bar Association, a course on "Counselling the Average Business Man", compressed into one day, was given on successive Saturdays in Toronto, Ottawa and London. The 1955 series of lectures on Evidence, the report stated, is to be

given at Toronto on March 18th-19th and 25th-26th. Such importance is attached to the programme of continuing education that the committee is to be made a standing committee of the Benchers.

The Compensation Fund, set up in 1953 to compensate clients for loss arising from the dishonest acts of solicitors, came into operation on April 1st, 1954, and as of January 14th, 1955, stood at $103,523.17.

During the general business session on Saturday afternoon further committee reports were presented. In giving a detailed and interesting report of the Legal Education and Training Subsection, H. Allan Leal announced the appointment of Stuart Ryan, Q.C., of Port Hope, as vice-chairman. Mr. Leal said further that, as a result of the policy established a year ago, the committee now includes a student representative from each of the two law schools in Ontario. During the year the committee has given its attention to the 2-4 year plan on minimum standards of legal education and to legal research. On the latter topic, concern was expressed that only seven students in the period 1952-1953 were even doing post-graduate work. The committee also reported that of the 388 student members of the Canadian Bar Association, 301 were from Ontario and efforts were being continued to encourage an even larger student membership.

R. Bredin Stapells, chairman of the Taxation Subsection, said that its chief function in the past has been to collect technical objections to federal taxing statutes and forward them to the Taxation Section to be dealt with at joint meetings with the Canadian Institute of Chartered Accountants held each year in January. The subsection proposes to embark on a programme of general education among the members of the Ontario Bar by setting up local study groups to follow a suggested course of study. The studies could later be put in the form of reports and circulated.

During a recent visit to Montreal, Professor W. Friedmann, the chairman of the Ontario Subsection on Comparative Law, had discussed with a group of Quebec lawyers the possibility of arranging one or two panel meetings during the year. It is hoped these efforts will be successful.

The Ontario Subsection on the Administration of Civil Justice, which has been the most active of all Ontario subsections for many years, indicated that it had made representations to the Attorney-General for Ontario on the Ontario Highway Improvement Act, in particular section 86, as a result of the case of *Noble* v. *Calder*,

[1952] O.R. 577, and that it is preparing a suggested amendment to the section. With regard to trustee investments, a recommendation had been submitted that trustees be allowed to invest up to thirty-five per cent of a trust fund in those investments authorized for companies under the Loan and Trust Corporations Act of Ontario. As a result of *Township of Trafalgar* v. *Hamilton*, [1953] O.R. 320, the committee had passed a resolution having to do with the registration of restrictive municipal by-laws. The Corporations Tax Act, section 36, had been the subject of investigation and representations were made with a view to an amendment, which would require the Crown, in order to preserve its lien, to register a notice against the lands in question. The committee, represented by three of its members, had attended before a select committee of the Ontario legislature and presented the views of the section on the matter of requiring the registration of motor vehicles in some central place. This matter of a better system of registering motor-vehicle titles, to minimize fraud at the expense of lien holders, has been the subject of several reports and recommendations by this committee. Since the mid-winter meeting a bill on the subject has been introduced in the Ontario legislature.

On the Saturday afternoon the Subsection on the Administration of Civil Justice sponsored a symposium on the topic, "Is Our Court System Archaic?", which proved to be one of the highlights of the week-end. His Honour Judge A. J. Cochrane, C. L. Dubin, Q.C., Cecil W. Robinson, Q.C., and Walter B. Williston, Q.C., with J. S. Boeckh as chairman, composed the panel. The subject of court reorganization is one that is being widely discussed by members of the Ontario Bar, stimulated by an article by Her Honour Judge Helen Kinnear that appeared in recent issues of the Canadian Bar Review, "The County Judge in Ontario".[2]

Mr. Dubin set the theme for the discussion by pointing out that its purpose was to analyze the existing judicial system with a view to its improvement in the public interest. With Judge Kinnear's arguments in mind, it is difficult, he thought, to understand the basis of the present division of jurisdiction between the trial division of the Supreme Court and County Courts. Judge Cochrane, a county-court judge for eighteen years, thought that there would be no practical difficulty in combining the two courts.

To the question, "Should the province be divided into judicial areas in which reside a number of the Supreme Court and County

[2] (1954), 32 Can. Bar Rev. 21, *127*. The article was followed by correspondence by various writers (1954), 32 *ibid.* 480, 589, 698, 699, 811, 927.

Court Judges?", Mr. Robinson answered yes, but not under the present system. He suggested the creation of a provincial Superior Court composed of an appellate and a trial division. The trial division could include all present supreme-court and county-court judges, who would be called Justices of the Superior Court. The inconvenience of the present system, under which trial judges of the supreme court work out of Toronto, could be remedied by the creation of judicial areas with resident judges. Mr. Williston thought that no benefit would result from judicial areas if their creation did not lead to specialization by the bench. With the ever-growing complexity of law, specialization by bench and bar alike is a coming need. The panel was generally in agreement that the Court of Appeal should be left at Toronto even if the province were divided into judicial areas.

Both Judge Cochrane and Mr. Robinson were in favour of the abolition of the surrogate court and suggested that its duties should be performed within the framework of a one-court system. Mr. Robinson thought that, if a Superior Court were created in which judges specialized, surrogate-court matters could be grouped with family relations, including divorce. It was generally agreed among the members that, if a Superior Court were formed, it should not be burdened with division-court work.

Turning next to the subject of divorce. The opinions of the members of the panel differed widely on whether jurisdiction in divorce cases should be given the county court, assuming the court is to remain. It was pointed out that the county-court judges are now badly over-loaded with work and that in many counties the increase in the volume of work has been out of proportion to the increase in population. Judge Cochrane commented that a county judge can perform a marriage ceremony and determine the paternity and custody of a child; logically, therefore, he should have the right to deal with divorce, but he himself had no desire for this increase in his jurisdiction. Mr. Dubin, on the other hand, was definitely against the suggestion, believing that divorce, dealing as it does with the status of an individual and his way of life, is a matter of public policy and should be left to the supreme court.

The panel dealt briefly with the subject of the abolition of the writ of summons and the commencement of actions instead by a statement of claim. Those favouring the statement of claim did so because its introduction would mean that the plaintiff would save the ten days that is now spent waiting for an appearance to be entered. But the advantage of specially endorsed writs was a

strong argument against the change. In addition, as was pointed out by Mr. Williston, there are many instances where a limited period is prescribed by statute for the commencement of actions. Often the lawyer has insufficient time to assemble material on which to base a statement of claim, though he can always prepare a writ.

The panel discussed the question whether criminal appeals from magistrates should be heard *de novo* or on the basis of the record. It was felt that in many cases there was insufficient time for preparation before the magistrate's hearing and that the interests of the accused are best preserved by a trial *de novo*. It was recommended that the procedure be preserved.

The address at the annual dinner on Saturday was given by D. Park Jamieson, M.B.E., Q.C., LL.D., the President of the Canadian Bar Association, and with it the formal functions of the meeting ended. In speaking of the activities of the executive since the last annual meeting in Winnipeg, he said that the resolution that was passed there recommending the extension of grounds for divorce had been presented to the Prime Minister and the Minister of Justice of Canada.[3]

At the annual meeting in 1953 a resolution recommending that the federal government take such steps as may be necessary to bring about the retirement of judges at age seventy-five was passed. This resolution had been presented by Mr. J. A. MacAulay, Q.C., Mr. Jamieson's predecessor in office. At that time the Minister of Justice asked Mr. MacAulay to sound out the attitude of the provincial governments towards an amendment to the British North America Act, which such a change would require. The governments of British Columbia, Alberta, Ontario, New Brunswick and Nova Scotia had indicated they would favour an amendment. The government of the province of Quebec will not give approval. Final word from the remaining four provinces was being awaited, when Mr. Jamieson spoke, before further presentations to the Minister of Justice.

The setting-up of pension funds as they apply to persons carrying on unincorporated businesses was the subject of a memorandum on the present provisions of the Income Tax Act in this regard, which the president reported had been presented to the Minister of Finance by himself and Mr. Grant Glassco, President of the Canadian Institute of Chartered Accountants. It was em-

[3] On this and other matters reported upon by Mr. Jamieson see, The Thirty-sixth Annual Meeting of the Canadian Bar Association (1954), 32 Can. Bar Rev. 994.

phasized that the request was simply to give the same privileges under the Income Tax Act to those who derive their income from unincorporated businesses as are presently afforded those who derive it from incorporated businesses.

At the annual meeting last September in Winnipeg, immigration was a lively topic. The Committee on Immigration of the Section on Civil Liberties had been reorganized since, and is now composed of Redmond Quain, Q.C., of Ottawa, as chairman, Ulric G. Laurencelle, Q.C., of Montreal, W. G. Burke-Robertson, Q.C., and John H. McDonald, both of Ottawa, and J. R. Taylor of Vancouver.

Turning to matters of more general interest, the president mentioned the importance of public relations to the legal profession and the two recent endeavours by which the profession had made a special effort to serve the public, the legal-aid plan and the compensation fund. On this report by the president of his stewardship another meeting of the Ontario Members came to a close.

A Duty of the Prosecutor

The responsibilities of prosecuting counsel are not confined to a fair presentation of the case. If he knows of a credible witness who can speak of facts which go to show the prisoner's innocence, he must himself call that witness. Moreover, if he knows of a witness who can speak to material matters, then although he need not call him himself, he must tell the prisoner's counsel about him so that he can call him. This was illustrated in a case a few years ago. The London County Council used to have their ambulances repaired by some garage proprietors. When repairs were needed, a note was sent to the garage with the vehicle, specifying the necessary repairs. Now it so happened that a clerk of the garage altered this note so as to make it appear that many more repairs were done than had in fact been done. In consequence the London County Council paid much more to the garage proprietors than they ought to have done. The garage proprietors were prosecuted for fraud, and the question arose as to who should call the clerk who altered the note. Neither the prosecution nor the defence called him. Lord Goddard, the Lord Chief Justice, said that it was understandable that the prosecution should not themselves call him, but it was, he said, 'the duty of the prosecution to make available to the defence a witness whom the prosecution know can, if he is called, give material evidence'. The prosecution had done that, and the defence had not chosen to call him. So the garage proprietors were convicted. (Rt. Hon. Lord Justice Denning, The Traditions of the Bar (1955), 72 So. Afr. L.J. 43, at pp. 44-45)