

SIDELIGHTS ON PRACTICE BEFORE THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

Periodically the members of the profession are treated to dissertations upon the constitutionality or political expediency of appeals to His Majesty in Council—more rarely to criticism of the juristic infallibility of the decisions of the august body which advises His Majesty as to their disposal. Opinions on the subject change continually, but as a rule the practice and procedure regulating the appeals retain their English characteristic of stability. After seventeen years of more or less peaceful application, some changes have been made in the Judicial Committee Rules, and the rules have been republished in full.

In these short notes no attempt has been made to digest the new rules, but the subject has been treated from the viewpoint of a Canadian practitioner who is only too glad to leave to his London agent as many technical details as possible, and is concerned mainly with what he himself may expect to encounter.

Appeals can only be brought to His Majesty in Council pursuant to leave obtained either from the court from which it is desired to appeal or from the Judicial Committee of the Privy Council. The statutes of the various provinces set out with sufficient clarity the conditions upon which leave can be granted by the provincial courts. It is necessary to obtain special leave from the Judicial Committee in cases of—

Appeals from a provincial court where for various reasons leave may not be obtained from the provincial court.

Appeals from the Supreme Court of Canada.

Appeals *in forma pauperis*.

There are certain underlying principles which influence the decision as to whether or not a case is such as to make it proper to grant leave. On the other hand, the Judicial Committee is quite unfettered in the exercise of its discretion, and it may easily happen that an appeal which seems to contain all the elements which in the past have appeared to influence their Lordships to grant leave, will be thought by them not to be such as to merit the exercise of the prerogative, whereas a case which appears simple, and of little importance save to the parties directly influenced, will present itself to them in quite a different light.

The considerations which appear desirable to be urged in favour of granting leave are, (1) that the case is of wide general importance, in the result affecting the country at large and not merely the individual litigant, such as a case involving a constitutional question, (2) that the question to be decided affects future rights, (3) that there has been a difference of opinion among the judges of the courts below, and (4) that the court, from which it is desired to appeal, has been bound by a previous decision of its own, the correctness of which it is now desired to question. The greatness of the sum of money involved will not be sufficient in the absence of the above considerations.

The considerations which tend to influence the refusal of leave are, (1) that the petitioner should have had an appeal as of right from the provincial court either to His Majesty in Council or to the Supreme Court of Canada and should have elected to appeal to the latter,—he is then considered to have chosen his forum, but this would not apply where either appeal could only have been taken by special leave, (2) undue delay, (3) unanimity in the courts below and no obvious grounds upon which to found an attack upon the final decision, (4) that the matter in dispute though involving a large sum of money does not affect the people at large, nor does it raise any important principle of law.

Section 1025 of the Criminal Code provides: "Notwithstanding any royal prerogative, or anything contained in the Interpretation Act or in the Supreme Court Act, no appeal shall be brought in any criminal case from any judgment or order of any court in Canada to any court of appeal or authority, by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard."

For a number of years this section has been successfully invoked where a disposition to appeal from Canadian courts has been shewn in criminal cases. The effect of the section was fully considered in *Nadan v. The King*.¹ This was an appeal arising out of two convictions, one under the Canada Temperance Act and the other under the Alberta Liquor Act.

The Alberta Court of Appeal had granted leave to appeal to His Majesty in Council. The respondent presented a petition to rescind the leave so granted on the grounds *inter alia* that sec. 1025 was conclusive of the matter. Consideration of this petition was postponed until the appeal should be heard. The judgment of their Lordships is dismissing the appeal contains three very important rulings:—

¹ 42 T.L.R. 356.

1. That in sec. 1025 the expression "criminal case" is wide enough to cover offences against the public law, even if not created in or treated by the Canadian Criminal Code.

2. That the powers conferred by the British North America Act upon the Canadian Parliament are confined to action to be taken in Canada and may not affect the exercise in England of the royal prerogative.

3. Special leave to appeal in a criminal case will only be granted when it is shewn that by a disregard of the forms of legal process, or by some violation of the principles of natural justice or otherwise substantial and grave injustice has been done.

Leave to appeal *in forma pauperis* may be granted either in cases where there is an appeal as of right or where special leave must first be obtained. The petitioner must be able to swear that exclusive of his interest in the subject matter of the litigation and his personal wearing apparel he is only worth £25. His counsel must also certify that he has reasonable grounds for appeal.

It is well to remember that the effect of obtaining leave to appeal *in forma pauperis* is to eliminate the giving of security, and the payment of a number of cash disbursements. The only really large item to be considered is the cost of the printing of the record. This is a consideration to be borne in mind before advising an appeal to the Supreme Court of Canada in cases where cost is of prime importance. In the event of success costs are taxed on the pauper scale, now including the costs of the application. The amendment made in 1925 removed the anomaly whereby the costs of an application for leave to appeal *in forma pauperis* were sometimes taxed at a higher figure than the costs of the actual appeal.

Where it is necessary to obtain special leave from the Judicial Committee the appellant presents by counsel a petition, setting out the points at issue, the course of the litigation, and the circumstances which tend to make the case one which is proper to be heard by His Majesty in Council.

Before dealing in particular with petitions for leave it is well to remark that the general practice before the Judicial Committee is in many ways different from that before our courts. It must be remembered that although no appeals from the English Court of Appeal or from Scotland come before the Judicial Committee, yet the members of the English Bar are all qualified to practise before it. They are, of course, bound by the etiquette of the English Bar, so that some knowledge of that etiquette is almost essential for any one who intends to bring a case before the Judicial Committee.

In England the two professions of barrister and solicitor are quite separate. The functions of each are as clearly defined as are those of Bench and Bar, and there is a correspondingly great amount of formality attendant upon the relations of the one to the other. The fact that *only* the barrister can be heard to argue a case in court needs no reiteration, but in other ways also the distinction makes a practical difference.

Pleadings and other documents which in Ontario would be drawn and settled by one man in his dual capacity will there be drafted by the solicitor, sent to the barrister for revision, and settled in consultation. This means in practice that the document is drawn up on brief paper, forwarded, with all other necessary papers, by the solicitor's clerk to the barrister's clerk (the fee being marked on the instructions), and in due course returned. When the solicitor desires it a consultation is arranged, the appointment being made by the respective clerks, and the solicitor attends at the barrister's chambers to make such suggestion as he thinks proper. The final decision and the responsibility therefor rests with the barrister.

Similarly, when a Canadian barrister comes to London to argue a case in which he has retained English counsel, he does not enjoy the rather informal and lengthy conversations to which he may have been accustomed in Canada. He will probably have one short half hour which may have been arranged weeks in advance. Indeed, if time is going to be short, he will be well advised to instruct his agent by letter to arrange conferences for him on his arrival.

It must not, however, be thought that the work is for that reason scamped, for one has only to be present at a consultation with one of the leaders of the English Bar to realize how their peculiar training directed to this one side of the profession enables them to grasp the essentials of a case with what appears the greatest of ease.

There are, of course, any number of other little distinctions in status, relics of the days when solicitors were the retainers rather than the supplement of the barristers. Solicitors may not, for example, be invited to lunch in the Temple by any barrister. Such distinctions, no doubt, serve their purpose, and in England are a great help in the furtherance of the great work of keeping people in their proper places.

Again as between barristers, there is a great gulf fixed between the junior and the leader, viz., the great man who, having applied for and obtained appointment as a K.C., wears a silken gown and enjoys the precedence which is his prerogative. All barristers start as

juniors and as such they haunt the chambers of a leader (or perhaps a less junior junior) devil for him, take odd briefs, which he may turn their way, either alone or accompanying him. They do not receive any salary, but are paid by the leader for what work they do for him, and on their briefs by the solicitors retaining them (a junior's fees being usually one-third his leader's). It is against Bar etiquette for a leader to go into court alone, he must always be accompanied by a junior. Solicitors in retaining a junior will usually consult the leader's wishes and as a rule one of the juniors in his chambers is briefed. It is, therefore, most important for a junior to be able to attach himself to a busy and well-known barrister. This gives ample scope for the gentle art of "wangling." Of course, as a rule, the junior when in court guards a discreet silence and confines his activities to taking copious notes, but occasionally his leader fails to turn up and then comes the junior's chance to make or break himself.

In describing a barrister's chambers one must not forget to mention his clerk, for the barrister's clerk is a most important person. He looks after the chambers, sees that the briefs are in proper order when received, that all necessary papers and books are ready to accompany the barrister into court, maintains touch with all the courts so as to know when the cases in which he is engaged are to come on, keeps the accounts, haggles over the size of fees, renders bills (adding his fee of 5 per cent. to the fee marked on the brief), and generally acts as a most trustworthy serjeant major. If the barrister is a very busy man his clerk will have numerous assistants watching the various courts in which the barrister is to appear, ready at any moment to rush off in a taxi to bring him from another court or chambers, different men being charged with the carriage of his person, his books, his brief, his wig, and his gown. So that when a really busy leader comes into court in a really big case he is surrounded with a cloud of followers, his clerks and their assistants, other leaders, their clerks and assistants, juniors and their clerks, and last but not least, the solicitor with his clerks and assistants.

When a junior feels that he has attained that eminence at the Bar when he is more busy than perhaps his wife approves, and his services are required for their value and not for their cheapness, he applies for silk and, in due course, is made a K.C. Then comes a reorganisation of his chambers, for a leader must have his own private room and may not continue to share one. There is more wisdom in this than perhaps meets the eye, for if it were not the custom that juniors should share their loneliness there would not be so many to

survive to become leaders. His clerk must increase all his fees and make sure that every brief is marked "with you Mr. . . ." that the great man may not find himself in court unattended and alone. Of course, many of his best clients will desert him, probably for one of his own and less expensive juniors, but that is all part of his gamble.

The practical effect of this system will become apparent to a Canadian practitioner at the very outset, for unless he has decided to employ no English counsel at all he will have to make up his mind as to whom he will employ, either in presenting the petition or the appeal or both.

It is, however, necessary that the Canadian supply himself with a wig, for without it he may not appear before the Committee. Wigs can be hired at a fee calculated to allow a fair profit to the wig makers.

The presenting of a petition for special leave to appeal is something quite different from the usual counsel work. Unless the case is of great importance, and expense a minor consideration, it is better to entrust it to an English junior who has had experience in that line of work than to employ a leader unused to it, be he never so adept at arguing an appeal.

If English counsel are to be employed on the appeal, it is usual to employ the same junior on the petition as on the appeal, but there is no hard and fast rule as to this, nor is it essential when Canadian counsel are to argue the appeal that any English counsel, leader or junior, be employed.

As most petitions are presented by English counsel and with the least possible delay, it will usually be found advisable to have the petition revised and settled in England. Consequently the form of it is not of great importance as far as the Canadian solicitor is concerned. It is, however, of great importance that nothing be inserted in a petition which may tend to mislead or to give a false impression to the Board which hears it. There must be full disclosure of every fact irrespective of its effect. Appeals have been dismissed, without being heard on their merits, where it has appeared that leave was obtained by misrepresentation or suppression of fact. It is by no means uncommon for the respondent to present a petition for rescission of leave granted in response to an objectionable petition. Under the new rules this will probably be more unusual, as provision is made for notice of intention to apply for leave to appeal, so that a respondent should now be able to take exception to misrepresentations when the petition is presented. Under the old rules he might

have no idea that an appeal was even contemplated until leave had been granted. On the other hand, it is imperative that solicitors in England drafting a petition and counsel settling it should fully understand the point of view of Canadian counsel, and the best method of answering this requirement is perhaps for the Canadian counsel to prepare a rough draft of the petition, setting out fully the particular circumstances which in his view make it proper to be heard by the Judicial Committee, viz., the national importance of the case, conflicting decisions in the courts below, wide-reaching result affecting future rights, amount of money involved or affected by the decision. The facts set out in the petition must be verified by an affidavit, sworn either by the petitioner or his agent, and the petition must also be signed by the petitioner or his counsel who will present it.

A petition for special leave to appeal *in forma pauperis* will in addition set out the poverty of the petitioner as described above, and his inability to provide security for costs.

It is often advisable to lodge with the petition an appendix setting out in full the reasons for judgment given by the judges in the court appealed from. If possible, at least two copies of the "Case" in the Supreme Court, or of the record, if the appeal is from the provincial courts, should be sent to England with the draft petition and instructions. The agents in England then redraft the petition, making any minor corrections as to style of cause, etc., and send all papers to counsel, who will finally settle the petition. It is for the use of counsel that the extra copies will be useful.

As soon as the petition is settled it is mimeographed or printed and five copies are lodged. Unless there is some special urgency about the case, no petition will now be heard before the expiration of ten clear days from the lodging thereof.

The Judicial Committee will either dismiss the petition or grant leave. In the latter event, they will specify the terms as to security, etc., which they have imposed.

It is well to remember that in cases where a large company or association desires to have special leave to appeal from a judgment for the purpose of having decided a question of law which is of great moment to itself, but where the element of conflicting decisions, or public importance, in the particular action may be lacking, the Judicial Committee have given leave on condition that the judgment and costs in the court below be paid in any event and no costs be asked in the appeal. Such cases are, of course, rare, but the offer to

submit to such a condition may well turn the scales in favour of the petitioner.

When leave has been granted it becomes necessary to despatch to England the record which is to be used on the appeal. The record must eventually be printed and has to be certified by the Registrar of the court appealed from. If not already printed, it may be printed in Canada or may be sent to England typewritten and there printed. The rules as to printing which are incorporated in the Judicial Committee Rules must be strictly observed and great care taken to ensure that everything is done precisely as there laid down. The Registrar of the Privy Council has very wide powers, and his decision that a record is not properly printed will result in great additional expense to the appellant. There is power to omit unnecessary documents, exhibits, etc.

A petition of appeal which sets out the material dates and steps in the litigation must be drawn and filed. It is a formal document, on which is based the King's Order disposing of the appeal and is always drawn by the agents in England.

Each party to an appeal must lodge a "Case." The case may be drafted, settled and printed either in England or Canada, or partly in both. It must be signed by at least one counsel who will argue the appeal. The same remarks apply to the drawing of the case as to the drawing of the petition. It is an important document and should not be left to someone unacquainted with the practice and procedure before the Judicial Committee. If only English counsel are to argue the appeal, it is best to have them draw and settle the case, and if an English junior alone is to be employed, it would be as well to have the benefit of his opinion.

When each party has prepared and had printed its case, they are lodged with the Registrar and the appeal is then automatically set down for hearing. All the documents are then bound together so as to form a neat volume, which is called the Appeal Book. Where a case involves the interpretation of a statute, the Judicial Committee likes to have available the full text of the statute and not merely such extracts as may seem pertinent to counsel drawing the case. As the cost of printing such statutes in full would be considerable, it is sufficient if a number of copies be obtained from the King's Printer and either bound with the case or made available separately.

Unless an appeal is the first on the list there is very much the same difficulty and uncertainty as to when it will be heard as there is in the Canadian courts. It is, however, always wise for Canadian counsel to make the acquaintance of the Registrar and discuss the

matter with him. Information gleaned from anyone else is of little value, and while agents are seldom able to make any very accurate forecast, a different result may spring from a personal visit.

When an appeal to His Majesty in Council has been launched, the parties concerned are apt to show a pardonable curiosity as to when it will be brought on for hearing. Circumstances have combined to make it rather difficult to satisfy such curiosity, but there are certain considerations sufficiently stable to be worthy of note.

Where both parties are anxious to bring an appeal on for hearing with the minimum delay the only factor which has to be considered is the time which it will take to complete the printing of the record. The Registrar of the Privy Council notifies the last date by which appeals must be set down if they are to be heard during any particular sittings. If the record can be printed, and certified, and lodged by that date the appeal can be brought on for hearing. The formalities in England, such as entering appearances, lodging petition of appeal, can be attended to by the agents. Where the decision to appeal to His Majesty in Council has been taken at once, and the record despatched to England in time for printing and lodging before the date set by the Registrar, but when neither party has been able to complete and settle its case, it is possible to obtain ample time to settle the cases and yet not delay the appeal, by lodging what are called "dummy" cases, that is, documents containing merely the style of cause, etc. This can only be done by consent. As soon as the real cases are ready they are substituted for the "dummies." The ruling date is, as will be seen, that set by the Registrar of the Privy Council.

Similarly, when it is desired to force on an appeal when the other side is inclined to be dilatory, the question as to when it can be heard will be affected by the date set by the Registrar of the Privy Council, and it is in relation to that date as well as in relation to the appropriate periods fixed by the rules that the time can be calculated. Assuming an appeal to be taken from the Ontario Appellate Division, the appellant must first obtain leave and perfect his security, and then either have the Registrar of that court certify and send the type-written record to England or have it printed in Canada at once. If the record is to be printed in England, he should serve notice of its despatch upon the appellant, and he should enter appearance with the Registrar of the Privy Council at once. As soon as the record is printed he should lodge his petition of appeal,—the formal document to be prepared in England.

Now, if the respondent has entered an appearance, the appellant may, on completing his case, and if the printing of the record is finished, lodge his case and after three days serve the respondent with a case notice requiring him to lodge his case within one month, and in default of his so doing the appeal will be set down for hearing *ex parte* as against him. That is, the printing of the record and the case must be completed so as to lodge the case three clear days and one month before the date set by the Registrar of the Privy Council.

If, however, the respondent has not appeared, though he was a respondent when the appeal was admitted, the appeal may be set down at the expiration of three months from the date of the lodging of the petition of appeal, provided the respondent had notice of the leave to appeal and despatch of the record. As the petition of appeal may not be lodged before the record is printed save by special leave, it will be seen that three months may elapse in this case, where the corresponding time was only one month and three days in the other premise.

There will also be observed the necessity of procuring proof of service of notice of the leave to appeal and despatch of the record to England. Notice of leave to appeal may be proved by the order granting leave or other documents included in the record, or by a certificate of the Registrar of the court appealed from. Similarly, proof of notice of the despatch of the record may be made by certificate of the Registrar of the court appealed from, based upon affidavits of service.

Where the non-appearing respondent was made respondent subsequent to the admission of the appeal, it is necessary to show that he received notice of the intention to bring him on the record as a respondent and in such case the appeal may be set down at the expiration of the three months from the date he received notice. In a case where one respondent has appeared and the other has not, the appeal will not be set down for hearing until the longer period has elapsed.

The above remarks will illustrate how by delaying the entry of an appearance until the last moment and by not co-operating in the lodging of a "dummy" case, the setting down of an appeal can be delayed until three months from the completion of the record and another three days and one month from the date that the appellant has lodged his case.

It is most unfortunate that the matter of costs looms so large to every litigant. It is equally unfortunate, though perhaps harder to explain, that it is a most difficult matter to forecast with accuracy.

In this respect appeals to His Majesty in Council prove no happy exception to the rule. Quite aside from the, to us, baffling peculiarities of the English currency which from its historical significance has introduced even into solicitors' bills eccentricities savouring of the romantic, there are certain factors which combine to complicate things to an extreme degree.

These factors are the size of the record, the fees of counsel and the number of days counsel are to be in court.

The fate of a petition for special leave to appeal is always decided very quickly. There is no record to print and the petition itself may be mimeographed or printed fairly cheaply, so one can estimate the cost of an ordinary petition to be presented with care and skill at about £90. Of this sum £50 or £60 will be taxable in the event of success or failure. If a client so desires he can, of course, pay more—in counsel fees. If the petition is for leave to appeal *in forma pauperis*, the cost can be kept down to about £20 and, if unsuccessful, nothing is taxed against the petitioner.

All three factors are very much to the fore in determining the cost of an appeal. The size of the record determines the cash disbursements for printing, and to some extent, strange though it may seem, the solicitor's fees in court. Counsel fees must be provided for on the brief, for each consultation, and refreshers, that is, for each day over the first. The amounts vary so much with the personality of counsel employed that an appeal may cost literally anything from £150 up. But the arrangement of costs or rather the application of available funds is another one of those matters which may be safely left in the hands of a London agent.

Undignified and distasteful though such mundane considerations are to the principals themselves, the respective clerks of the barrister and the solicitor are always ready to engage in controversy as to the size of the fee,—the one not unmindful of the fact that the fee of a barrister's clerk is five per cent. of that to be marked on the brief, and the other that heavy costs discourage clients.

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