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# Judicial System of Ontario

William Renwick Riddell

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## THE JUDICIAL SYSTEM OF ONTARIO

WHEN, in 1791, the Province of Upper Canada began its separate existence, it consisted in fact of considerably more territory than the present Province of Ontario. The Royal Proclamation of October, 1763,<sup>1</sup> had created a "Government" of Quebec, the western boundary of which was a line drawn from the southern end of Lake Nipissing to the point at which the present international boundary crosses the St. Lawrence. But the Quebec Act of 1774<sup>2</sup> much enlarged the Province of Quebec; the southern boundary was extended along the St. Lawrence, Lake Ontario, the Niagara River, the south shore of Lake Erie to the western limit of Pennsylvania, then south along the western limit to the Ohio River and down the Ohio to its junction with the Mississippi, then "northward" to the Hudson's Bay Company's Territory. (The word "northward" was long afterwards authoritatively interpreted as meaning "up the Mississippi.")<sup>3</sup>

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<sup>1</sup> This Proclamation may be read in Shortt & Doughty's Constitutional Documents 1759-1792, published by the Dominion Archives or in the Report for 1906 of the Ontario Archives.

<sup>2</sup> 14 George III Chap. 83 (Imp.).

<sup>3</sup> The Dominion of Canada made as the eastern boundary of the new Province of Manitoba the western boundary of the Province of Ontario (formerly Upper Canada), and claimed with Manitoba that "Northward" meant due "North" so that the boundary line would intersect Lake Superior. Ontario claimed that "Northward" meant up the Mississippi to its headwaters. An arbitration decided that Ontario's contention was sound and this was approved by the Judicial Committee of the Privy Council. We must therefore consider the western boundary of the Province of Quebec as fixed by the Quebec Act as running up the Mississippi to the northwest angle of the Lake of the Woods and thence due north.

When Quebec was divided into two Provinces, Upper Canada and Lower Canada, all to the east and the west of a certain line<sup>4</sup> and the Ottawa River became the Provinces of Lower Canada and Upper Canada respectively. Before this, however, the Treaty of 1783 had given to the United States the territory to the right of the Great Lakes and connecting rivers. But Britain held the military posts Michillimackinac, Detroit, Niagara, Oswego, Oswegatchie, etc., until August, 1796, when they were given up under Jay's Treaty of 1794, thereby reducing the de facto Upper Canada to the Upper Canada de jure, now the Province of Ontario.<sup>5</sup>

The English Law, civil and criminal, had been introduced into Quebec by the Proclamation of 1763; but the Quebec Act of 1774 had displaced the English civil law by the previously existing Canadian law, in substance the Coutume de Paris, while the English criminal law remained in full force.<sup>6</sup>

The Canada Act or Constitutional Act of 1791<sup>7</sup> provided for a Parliament of two Houses for each of the new Provinces with full power to determine and enact such laws as should be thought advisable for the Province.

At the time of the passing of this Act the territorial unit for the administration of justice was the District.<sup>8</sup> In 1763 the whole "Government of Quebec" was divided into two Districts;<sup>9</sup> in 1788 the territory afterwards Upper Canada, theretofore part of the District of Montreal,<sup>10</sup> was divided into four Districts,<sup>11</sup>

<sup>4</sup> Still the boundary line between the Provinces of Ontario and Quebec.

<sup>5</sup> These posts were retained by Britain until the agreement in the Treaty of 1783 was implemented that British creditors should not be prevented from recovering the debts lawfully due them by citizens of the new nation. By Jay's Treaty of 1794, the United States agreed to pay these debts, and the posts were delivered up in August, 1796.

<sup>6</sup> Except as modified by statute, the English criminal law as it stood in 1763 is still in force throughout Canada.

<sup>7</sup> 31 George III, Chap. 31 (Imp.). It was during the debate on this statute in the House of Commons at Westminster that the historical quarrel between Burke and Fox took place.

<sup>8</sup> There were during the latter part of the French regime three divisions or districts for judicial purposes in Canada; viz., those of Quebec, Trois Rivières, and Montreal. The first British Governor formed only two, as there were not enough English speaking persons at Trois Rivières who could be made Justices of the Peace.

<sup>9</sup> Those at Quebec and Montreal.

<sup>10</sup> The District of Montreal stretched from the River St. Charles westward as far as the Province reached.

<sup>11</sup> Lunenburg, Mecklenberg, Nassau and Hesse, being the territory round Cornwall, Kingston, Niagara, and Detroit respectively; the names of these were changed by the first Parliament of Upper Canada (1792) into Eastern, Midland, Home (Niagara being then the capital of the Province), and Western.

and another District (Gaspé) was formed of the eastern part of the District of Quebec; while afterwards a District of Three Rivers was formed between those of Montreal and Quebec.

In each District there was a Court of Common Pleas of unlimited civil but no criminal jurisdiction<sup>12</sup> and a Prerogative Court for probate of wills, etc. There was also a Court of General (or Quarter) Sessions of the Peace, composed of all the Justices of the Peace in and for the District, which sat quarterly and tried criminal cases with a jury<sup>13</sup> and which had certain administrative jurisdiction; these did not try capital cases.

The French Canadian never tired of wondering that the English preferred an adjudication of their rights by tailors and shoemakers rather than by their judges, and consequently most of the civil cases were tried by judges without the intervention of a jury; but some concession was made by Ordinances of Quebec to the love of the English speaking for the jury system.

There was also a Court of King's Bench for the Province which had full criminal jurisdiction, but only appellate jurisdiction in civil matters. This was presided over by the Chief Justice of the Province who had no seat in the Courts of Common Pleas. There were also Courts of Oyer and Terminer and General Gaol Delivery in each District once a year or oftener to try criminal cases including capital cases;<sup>14</sup> these were all jury courts.

The first Parliament of Upper Canada met in the summer of 1792 at Newark (now Niagara-on-the-Lake) and by the very first chapter of its first statute it made the English law the rule of decision in all cases of property and civil rights,<sup>15</sup> and since that time in this Province the law has been and is the English law,

<sup>12</sup> The Judges of the Courts of Common Pleas, three in each Court (except that of Hesse), were all laymen, except the Judge of the Hesse Court who lived at Detroit. He was the only Judge of that Court and was the well-known William Dummer Powell, born in Boston, Massachusetts, who afterwards became Chief Justice of Upper Canada. These Judges were all justices of the peace, and in that capacity sat in the General Sessions of the Peace with extensive criminal jurisdiction; some of them also received commissions of Oyer and Terminer and General Gaol Delivery, from time to time, which empowered them to preside at the Criminal Assizes.

<sup>13</sup> Theoretically the General Sessions could try all felonies and misdemeanors, and in the Tudor and Stuart times many thousands of culprits were hanged on the order of such Courts; but by the time of which we are now speaking capital offences were left for the Assizes to try.

<sup>14</sup> There were the Courts generally called "Criminal Assizes" presided over by Judges who received a special commission for the purpose.

<sup>15</sup> (1792) 32 George III Chap. 1 (U. C.). The English rules of evidence were also introduced by the same Act.

civil and criminal, as it was in 1792 and as modified by local legislation. The second chapter<sup>16</sup> directed all issues of fact, also all assessments of damages, to be determined by a jury. As this would prove a serious burden to litigants in cases of small importance, Courts of Requests were provided<sup>17</sup> in every locality, presided over by two or more Justices of the Peace with jurisdiction up to forty shillings (\$8.00); the four Courts of Common Pleas were left standing until two years later.

In 1793 the Prerogative Courts were abolished and a Court of Probate erected, with Surrogate Courts in each District.<sup>18</sup>

But the whole system was revolutionized in 1794 when the Courts of Common Pleas were abolished and a Court of King's Bench erected with a Chief Justice and two puisne Justices and with full jurisdiction, civil and criminal, for the whole Province.<sup>19</sup> This sat at the Capital of the Province "in term," but Commissions of Assize and Nisi Prius, Oyer and Terminer and General Gaol Delivery issued to the Judges of this Court to hold trial Courts in each District,<sup>20</sup> generally twice a year.

By an Act of the same year<sup>21</sup> a Court of Record was established in each District called the District Court, with limited jurisdiction. This was presided over by a District Court judge. The Court of Quarter Sessions was not interfered with.

<sup>16</sup> 32 George III Chap. 2 (U. C.).

<sup>17</sup> 32 George III Chap. 6 (U. C.). The shilling in Canada until the sixth decade of the last century was according to the Halifax, Quebec, Provincial, or Canadian Currency and was worth 20 cents. In some parts of the Upper Province the York shilling was recognized (equal to 12½ cents) but it almost invariably received the full name "York shilling," i.e., the shilling of New York currency.

<sup>18</sup> The Prerogative Courts were not much frequented by the English speaking Canadians, while in the French Canadian law there was no necessity for proving wills at all. But the Prerogative Courts sometimes appointed curators and guardians, etc. The Act establishing the Court of Probate and its Surrogate Courts was (1793) 33 George III Chap. 8 (U. C.).

<sup>19</sup> 34 George III Chap. 2 (U. C.).

<sup>20</sup> While the names of others continued to be contained in the Commission of Oyer and Terminer and General Gaol Delivery for the trial of criminal cases, the Judges of the Court of King's Bench were the real judges of these Courts. The English system of Commissions of Assize and Nisi Prius for the trial of civil cases was now introduced for the first time and the Judges of the Court of King's Bench sitting under these commissions took the place of the Judges of the Courts of Common Pleas who sat under the authority of permanent commissions.

<sup>21</sup> (1794) 34 George III Chap. 3 (U. C.). The jurisdiction was from 40 shillings (\$8.00) to £15 (\$60); the jurisdiction was increased by subsequent legislation.

The Court of King's Bench (with its subordinate Courts of Assize and Nisi Prius, Oyer and Terminer and General Gaol Delivery), the District Court, the Court of Requests, the Court of Probate (with its Surrogate Courts) and the Court of Quarter Sessions may be considered the original of our present judicial system.

While it was considered that the delivery to the Lieutenant Governor of the Great Seal of the Province ipso facto made him keeper of the Seal for the Province with the powers of the Lord Chancellor therein, and while it is certain that a Court of Chancery had been held occasionally by the Governor of Quebec, the Lieutenant Governor of Upper Canada never held a Court of Chancery.<sup>22</sup>

In 1837 a Court of Chancery was erected, with the Lieutenant Governor as Chancellor, and one Vice Chancellor.<sup>23</sup> This Court was reorganized in 1849,<sup>24</sup> with a Chancellor and two Vice Chancellors, and so continued until its merger in 1881.

The business of the Court of King's Bench had increased so much that in 1837<sup>25</sup> provision was made for two more judges. This was, however, a temporary measure, and in 1849 a new Common Law Court was erected, the Court of Common Pleas,<sup>26</sup> with precisely the same jurisdiction and powers as the Court of Queen's Bench.<sup>27</sup> These two Courts of King's Bench and Common Pleas each had a Chief Justice and two puisne justices, and so continued until their merger in 1881.

<sup>22</sup> Several cases of the Governor sitting as a Court of Chancery at Quebec are of record in the Canadian archives. Chief Justice Powell tried to get the Lieutenant Governor of Upper Canada to act as a Chancellor in an action brought against him (Powell) by Sir James Monk, Chief Justice in Lower Canada, but without success.

<sup>23</sup> 7 William IV Chap. 2 (U.C.). The Lieutenant Governor did not in fact officiate as Chancellor: the Vice-Chancellor was Robert Sympson Jameson, the husband of the well-known authoress, Mrs. Anna Jameson.

<sup>24</sup> 12 Vic. Chap. 64 (Can.).

<sup>25</sup> By the Act (1837) 1 Will. IV Chap. 1 (U. C.).

<sup>26</sup> 12 Vic. Chap. 63 (Can.).

<sup>27</sup> The Court of Queen's Bench had a sentimental precedence—for a time the Chief of that Court was Chief Justice of the Province; and so long as there was any division of the High Court of Justice into Divisional Courts, the list of judges began with those of the Queen's Bench Division, the successor of the former Court of King's Bench (I was the last to be appointed to the King's Bench Division—in 1906), then followed the names of those of the Chancery Division, the successor of the Court of Chancery (founded in 1837), and those of the Common Pleas Division, the successor of the Court of Common Pleas (founded in 1849). Later a fourth Division was formed, i.e., the Exchequer Division; but this did not represent any previously existing Court.

Before considering the fusion of the Courts in 1881, we must say something of the Courts of Appeal.

Before the Act of 1794, creating the Court of King's Bench (see n. 19), appeals were taken from the Courts of Common Pleas to the old Court of King's Bench (none ever existed in the Province of Upper Canada); by that Act, the Lieutenant Governor or Chief Justice and two or more members of the Executive Council were made a Court of Appeal in matters over £100, a further appeal being allowed to the Privy Council at Westminster where more than £500 sterling was involved. This same Court of Appeal was given jurisdiction in appeals from the Court of Chancery in 1837; but the Court was abolished in 1849, and a new Court of Error and Appeal constituted to hear appeals from the two Common Law Courts and the Court of Chancery. It was composed of all the Judges of the then Courts of first instance,<sup>28</sup> and this Court was in 1874 re-constituted and thereafter consisted of five Judges, permanently of the Court of Appeal, and so continued until the merger of 1881.

The District Courts dating back to 1794, one in each District, with purely civil jurisdiction, became County Courts in 1849;<sup>29</sup> these were presided over by barristers.

The Courts of Requests originally erected in 1792 were at first presided over by Justices of the Peace *virtute officii*, but in 1833<sup>30</sup> it was provided that Commissioners to be appointed by the Governor should hold these courts and in 1841<sup>31</sup> it was enacted that Courts to be called Division Courts presided over by the Judge of the District Court should take the place of these Courts of Requests, thus putting an end to non-professional judges in these the lowest courts.<sup>32</sup>

The Court of Probate, with its Surrogate Courts created by the Act of 1793 (see n. 18), was abolished in 1858<sup>33</sup> and a Surro-

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<sup>28</sup> (1849) 12 Vic. Chap. 65 (Can.). It will be seen that this Court had a strong resemblance to the English Court of Exchequer Chamber.

<sup>29</sup> (1849) 12 Vic. Chap. 78 (Can.). The Districts had become so multiplied that their boundaries in many cases became identical with the boundaries of the Counties, and it was not thought worth while to retain the District.

<sup>30</sup> 3 William IV Chap. 1 (U. C.).

<sup>31</sup> 4 & 5 Vic. Chap. 3 (Can.).

<sup>32</sup> In Ontario every civil suit is tried before a Judge who must have been a member of our Bar for at least seven years (ten years in the case of a Judge of the Supreme Court). An exception lies in certain disputes between master and servant, which may be tried by Magistrates.

<sup>33</sup> 22 Vic. Chap. 93 (Can.). This Act formally repealed 33 George III Chap. 8 (U. C.).

gate Court for each County, presided over by a judge with same powers as a Judge of a County Court, was provided for.<sup>34</sup> The County Courts, Division Courts, Surrogate Courts, and Courts of General Sessions (these are now presided over by a Judge of the County Court) still continue.

But in 1881 the Courts of Appeal, Queens Bench,<sup>35</sup> Chancery, and Common Pleas were united and consolidated into one Supreme Court of Judicature for Ontario<sup>36</sup> composed of two permanent divisions: (1) the Court of Appeal for Ontario and (2) the High Court of Justice for Ontario; of this High Court there were at first three Divisions, i.e., Queen's Bench, Chancery, and Common Pleas Divisions—later a fourth, the Exchequer Division, was added. Each Division had a Chief Justice (the Chancery Division a Chancellor) and two puisne Justices. The Court of Appeal had a Chief Justice (the Chief Justice of Ontario) and four puisne Justices. These four Divisional Courts of the High Court Division sat alternately in term to hear appeals. This was found inconvenient; and an act was passed in 1909, brought into force January 1, 1913, which erected a Supreme Court with two Divisions, (1) the Appellate Division for appeals only, and (2) the High Court Division for trials.

The Appellate Division at present consists of two Divisional Courts, each of five members with co-ordinate and co-equal authority and jurisdiction, each bound by the decision of the other. The First Divisional Court consists of the Chief Justice of Ontario and four Justices appointed to the Appellate Division; it is the successor of the Court of Appeal for Ontario and its members cannot without their consent be required to try cases. The Second Divisional Court is made up of five Justices of the High Court Division who have been elected by the Justices of that Division in December of each year to constitute the Second Divisional Court for the coming year—the personnel of this Court changes

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<sup>34</sup> The Judges of the Surrogate Court are appointed by the Province, those of all other Courts by the Dominion. Almost invariably, at least in later years, a Judge of the County Court has been appointed Judge of the Surrogate Court.

<sup>35</sup> The Court of King's Bench became, of course, the Court of Queen's Bench in 1837 on the accession to the throne of Queen Victoria, but the Statute formally changing the name was not passed till 1839, 2 Vic. Chap. 1 (U. C.).

<sup>36</sup> This was effected by the Ontario Judicature Act (1881), 44 Vic. Chap. 7 (Ont.).

from year to year.<sup>37</sup> The other members of the High Court Division are supposed to preside in trial Courts and as Judges of first instance.

But every Justice of the Supreme Court has the same powers as every other and any one may sit in any Court whether of appeal or of first instance.<sup>38</sup> From every Judgment at the trial before a Supreme Court Judge an appeal lies to the Appellate Division. The Divisional Courts generally sit on alternate weeks, but sometimes when work is pressing they sit concurrently, four being a quorum in a Divisional Court.<sup>39</sup>

An appeal also lies to the Appellate Division from the County<sup>40</sup>

<sup>37</sup> The reason for this rather odd method of forming Appellate Courts is of course historical. It would not have been devised had the matter been *tabula rasa*. The members of the First Divisional Court do frequently take trial Courts, and the Members of the High Court Division frequently sit in the First Divisional Court.

<sup>38</sup> The work to be done by the several Judges is a matter of arrangement amongst themselves and there never has been the slightest difficulty or want of harmony: appointments are made or exchanged at will to suit the convenience, health, or desire of the various Judges—no litigant or lawyer can ever be sure who will try his case or hear his appeal.

<sup>39</sup> Provision is made in the Act for an additional Divisional Court, if necessary.

<sup>40</sup> The jurisdiction of the County Court is given by the Revised Statutes of Ontario (1914) Chap. 59, sec. 22, as follows:

- "22. (1) The County and District Courts shall have jurisdiction in:
- (a) Actions arising out of contract, expressed or implied, where the sum claimed does not exceed \$800;
  - (b) Personal actions, except actions for criminal conversation and actions for libel, where the sum claimed does not exceed \$500;
  - (c) Actions for trespass or injury to land where the sum claimed does not exceed \$500, unless the title to the land is in question, and in that case also where the value of the land does not exceed \$500, and the sum claimed does not exceed that amount;
  - (d) Actions for the obstruction of or interference with a right of way or other easement where the sum claimed does not exceed \$500, unless the title to the right or easement is in question, and in that case also where the value of the land over which the right or easement is claimed does not exceed that amount;
  - (e) Actions for the recovery of property, real or personal, including actions of replevin and actions of detinue where the value of the property does not exceed \$500;
  - (f) Actions for the enforcement by foreclosure or sale or for the redemption of mortgages, charges or liens, with or without a claim for delivery of possession or payment or both, where the sum claimed to be due does not exceed \$500. 10 Edw. VII, c. 30, s. 22 (1) part; 1 Geo. V, c. 17, s. 48;
  - (g) Partnership actions where the joint stock or capital of the partnership does not exceed in amount or value \$2,000;
  - (h) Actions by legatees under a will for the recovery or delivery of money or property bequeathed to them where the legacy does not exceed in value or amount \$500, and the estate of the testator does not exceed in value \$2,000;
  - (i) All other actions for equitable relief where the subject matter involved does not exceed in value or amount \$500; and

and Surrogate Courts and from the Division<sup>41</sup> Courts in certain

- (j) Actions and contestations for the determination of the right of creditors to rank upon insolvent estates where the claim of the creditor does not exceed \$500. 10 Edw. VII, c. 30, s. 22 (1) part."

<sup>41</sup> The jurisdiction of the Division Court is given by the Revised Statutes of Ontario (1914) Chap. 63, Secs. 61 and 62, as follows:

"61. The Court shall not have jurisdiction in

- (a) An action for the recovery of land, or an action in which the right or title to any corporeal or incorporeal hereditaments, or any toll, custom or franchise comes in question;
- (b) An action in which the validity of any devise, bequest, or limitation under any will or settlement is disputed;
- (c) An action for malicious prosecution, libel, slander, criminal conversation, seduction or breach of promise of marriage;
- (d) An action against a Justice of the Peace for anything done by him in the execution of his office, if he objects thereto;
- (e) An action upon a judgment, or order of the Supreme Court or a County Court where execution may issue, upon or in respect thereof. 10 Edw. VII, c. 32, s. 61.

"62. (1) Save as otherwise provided by this Act, the Court shall have jurisdiction in:

- (a) A personal action where the amount claimed does not exceed \$60;
- (b) A personal action if all the parties consent thereto in writing, and the amount claimed does not exceed \$100;
- (c) An action on a claim or demand of debt, account or breach of contract, or covenant, or money demand, whether payable in money or otherwise, where the amount or balance claimed does not exceed \$100; provided that in the case of an unsettled account the whole amount does not exceed \$600;
- (d) An action for the recovery of a debt or money demand where the amount claimed, exclusive of interest whether the interest is payable by contract or as damages, does not exceed \$200, and the amount claimed is
  - (i) Ascertained by the signature of the defendant or of the person whom as executor or administrator he represents or—
  - (ii) The balance of an amount not exceeding \$200 which amount is so ascertained or—
  - (iii) The balance of an amount so ascertained which did not exceed \$400 and the plaintiff abandons the excess over \$200.

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.

The jurisdiction conferred by this clause shall apply to claims and proceedings against an absconding debtor.

- (e) An action or contestation for the determination of the right of a creditor to rank upon an insolvent estate where the claim of the creditor does not exceed \$60;

(2) Claims combining

- (a) Causes of action in respect of which the jurisdiction is by subsection 1 limited to \$60, hereinafter referred to as class (a);
- (b) Causes of action in respect of which the jurisdiction is by subsection 1 limited to \$100, hereinafter referred to as class (b);
- (c) Causes of action in respect of which the jurisdiction is by subsection 1 limited to \$200, hereinafter referred to as class (c), may be joined in one action; provided that the whole amount claimed in

cases. In certain cases of importance an appeal lies to the Supreme Court of Canada or to the Privy Council.<sup>42</sup>

*The Practice (Civil).*—In the lowest Court, the Division Court, the forms are of the simplest character, and pleading in any proper sense there is not. In the Supreme Court and County Courts the keynote is to be found in one of the Consolidated Rules:

“A proceeding shall not be defeated by any formal objection; but all necessary amendments shall be made upon proper terms as to costs and otherwise to secure the advancement of justice, the determining the real matter in dispute and the giving of judgment according to the very right and justice of the case.”

In the Supreme Court and the County Court all actions and suits are begun by writ of summons, indorsed with the cause of action. The defendant has ten days to appear by filing a formal appearance. If he does not, then judgment may be entered, final or interlocutory, as the case may be, according as the claim is such as permits a special endorsement (e.g., a promissory note, etc.) or not. If interlocutory, and a question of damages is involved, then the case goes to trial for assessment—in the case of other claims, e.g., upon a mortgage, other provisions are made. Upon appearance, unless the defendant waives the right to a statement of claim, the plaintiff files and serves a statement of the facts which he alleges and upon which he bases his right of action—this must be done within three months of appearance;

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respect of class (a) does not exceed \$60; and that the whole amount claimed in respect of classes (a) and (b) combined, or in respect of class (b) where no claim is made in respect of class (a), does not exceed \$100; and that the whole amount claimed in respect of classes (a) and (c), or (b) and (c) combined, does not exceed \$200, and that in respect of classes (b) and (c) combined, the whole amount claimed in respect of class (b) does not exceed \$100.

(3) The findings of the court upon claims so joined shall be separate.

(4) The Court shall also have jurisdiction in actions of replevin, where the value of the goods or other property or effects distrained, taken or detained, does not exceed \$60, provided in The Replevin Act.

(5) The Court shall also have jurisdiction in actions between teachers and School Boards as provided by The High Schools Act, The Public Schools Act, and The Separate Schools Act. 10 Edw. VII, c. 32, s. 62.”

<sup>42</sup> The Supreme Court of Canada sits at Ottawa and is the Appellate Court for all Canada; the cases are few in number, but often of great importance, in which an appeal is taken to that Court from the Appellate Division of The Supreme Court of Ontario.

The Judicial Committee of the Privy Council is composed of Privy Councillors from all over the British Empire (including Canada) and is the final Court of Appeal for all the British world except the Islands of Great Britain and Ireland, appeals from which go to the House of Lords. It is generally constitutional questions that go to that tribunal—not more than half a score a year from Ontario.

if not, the defendant may move to dismiss the action. If a statement of claim is served, the defendant has eight days to file and serve his defence. He may with his defence set up any claim he has against the plaintiff; the plaintiff replies if so advised. When the pleadings are closed, a notice of trial may be given at least ten days before the day of trial. The parties are entitled before the trial to have produced under oath by their opponent all documents and copies of documents bearing upon the causes of action; and also to examine under oath the opposite party before a Master or Special Examiner. Certain actions, such as libel, must be tried by a jury unless both parties waive the right to a jury; certain others, which are purely equitable, by a Judge, unless the Judge otherwise orders. In all other kinds of actions, if either party desires a jury he files and serves a jury notice, but the Judge at the trial may in his discretion try any such case without a jury, upon or without the application of either party.<sup>43</sup> The

<sup>43</sup> I have in an address on the Jury System of Ontario, prepared at the request of the Bar Association of the State of New York, January, 1914, given an outline of the evolution in our practice of the Jury system.

The first break in the jury system was made by the Law Reform Act of 1868, 32 Vic. Chap. 6 (Ont.), which directed actions to be tried by a Judge unless either party filed a notice for a jury—this provision was extended by the Administration of Justice Act of 1873, 36 Vic. Chap. 8 (Ont.). The Act of 1896, 59 Vic. Chap. 18 (Ont.), required actions against municipalities to be tried by a Judge without a jury.

As the law now stands, there are these classes of cases in the Supreme Court and County Court:

1. Those which must be tried by a jury unless the parties in person or by solicitors or counsel consent. These are cases of libel and slander.

2. Those which must be tried by a Judge: i.e., actions against a municipal corporation for non-repair.

3. Those which are tried by a Judge unless he otherwise orders:

(a) Equitable issues,

(b) See class 4.

4. In other cases, if either party desire a jury, he files and serves a jury notice within four days of the close of the pleadings. If the other party submit, the case goes on the jury list for trial. If the other party object, he may move in Chambers before a single Judge. For a long time there was a conflict of judicial opinion as to the principle to be followed in striking out a jury notice. Finally we made a rule making it obligatory upon the Judge in Chambers to strike out the jury notice "when . . . it appears to him that the action is one which ought to be tried without a jury." It is expressly provided, however, that the refusal of a Judge in Chambers to strike out the jury notice shall not interfere with the right of the Trial Judge to strike it out; nor does the order of the Judge in Chambers striking out a jury notice interfere with the right of the Trial Judge to have the case tried by a jury.

If a jury notice is not served, the case goes on the non-jury list and will be tried by a Judge without a jury unless the Judge himself prefers it to be tried with a jury.

At every Assize town for the jury sittings there are two lists prepared, one a jury list (which is placed first) and the other a non-jury list. It is

civil jury is twelve in number; ten may find a verdict. In many cases, indeed in most cases except those of the simplest character, the trial judge instead of taking a general verdict requires the jury to answer questions of fact submitted to them and upon these answers directs the judgment to be entered according to his own view of the law. The jury agreeing, the trial judge cannot grant a new trial; if the jury disagree, he may traverse the case or call another jury and proceed with the trial afresh. The party discontented with the result of a trial may appeal within thirty days to the Appellate Division. The Court may order a new trial or direct the judgment to be entered which should have been entered. Amendments may be made at any time as may be just. In a few cases an appeal lies to the Supreme Court of Canada, sitting at Ottawa, composed of six Judges—and in a limited number of cases the final appeal from the Court of Appeal or even (upon leave) from the Supreme Court of Canada to the King in Council in Westminster—"The Judicial Committee of the Privy Council." The party failing may be ordered to pay the costs of the successful party, including most of his solicitor and counsel fees.

*Costs.*—In the Supreme Court and County Courts on the civil side there is a fixed tariff of fees for the various services to be rendered by Solicitor and Barrister, also for witness fees, etc. The Judge before whom any action is tried has the right, and generally exercises it, to direct the losing party to pay the costs of the winning party. A Court also very generally directs the payment of costs by a party in default when extending time, making amendments, and the like. In very few cases on the criminal side

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a common practice for the Trial Judge at the beginning of the sitting to run over the records and strike out the jury notice in such cases as he thinks proper. It is not uncommon to place the records in such instances where they should have been in the first instance on the non-jury list; thereby the offender may be penalized, losing time waiting for his action to be tried.

In most of the Assize towns there are also non-jury sittings; at these no jury cases are entered, but if a case should appear which the Judge thinks should be tried with a jury, he may adjourn it to the jury sittings. (I have never known a case of this kind.)

At Toronto there are separate sittings for jury and non-jury cases, the non-jury sittings being practically continuous and the jury sittings six to ten weeks in the year. If a case comes before the Judge presiding at the jury sittings which he thinks should not be tried with a jury, he sends it across the hall to the Non-Jury Court. No doubt if the reverse were to happen the record might be transferred in the opposite direction; but, as I have said, I never knew a case of that kind.

is there any provision for costs. Where, however, a defendant applies to have the conviction of a Magistrate quashed for want of jurisdiction or want of evidence, or the like, he must put up security for the costs, and if he fails may be ordered to pay them.

Appeals are generally decided within three months of the trial—a trial should be had within six months of the issue of the writ.

*Criminal Procedure.*—At the conquest of Canada by the British, 1759-60, the English criminal law was introduced by the conquerors; though (with the exception of a few years) the French-Canadians were permitted to retain their own law in civil matters, the English criminal law continued to prevail in both Canadas except as modified by Provincial Statutes—and these Statutes in general closely follow the legislation in the mother country. This last statement also applies to the Provinces of Nova Scotia and New Brunswick. Accordingly, at Confederation in 1867 the criminal law of all the confederating colonies was almost identical—while the civil law of Lower Canada (Quebec) was markedly different from that of Upper Canada (Ontario), Nova Scotia, and New Brunswick, the Lower Canadian law being based upon the custom of Paris and ultimately upon the Civil Law of Rome, while that of the others was based upon the Common Law of England. Accordingly, the British America Act which created (1867) the Dominion of Canada gave to the Parliament of the Dominion jurisdiction over the criminal law including the procedure in criminal matters. The Provinces, however, retained jurisdiction over the constitution of the Courts of Criminal Jurisdiction as well as over property and civil rights.

For some years there were statutes passed from time to time amending the criminal law; and at length Sir John Thompson, who had been himself a Judge in Nova Scotia, and who became Prime Minister of Canada, brought about a codification of criminal law and procedure. He received valuable assistance from lawyers on both sides of the House, and the Criminal Code of 1892 became law. This with a few amendments made from time to time is still in force.

The distinction between felony and misdemeanor has been abolished; and offences which are the subject of indictment are "indictable offences." Offences not the subject of an indictment are called "offences" simply. Certain offences of a minor char-

acter are triable before one or two Justices of the Peace as provided by the Code in each case. In such cases there is an appeal from a Magistrate's decision adverse to the accused to the County Court Judge both on law and fact; or the conviction may be brought up on certiorari to the High Court on matter of law.

But offences of a higher degree are indictable.

If a crime, say of theft, is charged against anyone, upon information before a Justice of the Peace, a summons or warrant is issued and the accused brought before the Justice of the Peace. In some cases he is arrested and brought before the Magistrate without summons or warrant; but then an information is drawn up and sworn to. The Justices of the Peace are appointed by the Provincial Government and are not, as a rule, lawyers.

Upon appearance before the Justice of the Peace, he proceeds to inquire into the matters charged against the accused; he causes witnesses to be summoned, and hears in presence of the accused all that is adduced. The accused has the fullest right of having counsel and of cross-examination, as well as of producing any witness, and having such evidence heard in his behalf as he can procure. All the depositions are taken down in shorthand or otherwise, and if in long hand signed by the deponent after being read over to him.

After all the evidence for the prosecution is in, the Magistrate may allow argument, or he may proprio motu hold that no case has been made out—in which case the accused is discharged—or he may read over aloud all the evidence again (unless the accused expressly dispenses with such reading), and address the accused, warning him that he is not obliged to say anything, but that anything he does say will be taken down and may be given in evidence against him at his trial, and asks, "Having heard the evidence, do you wish to say anything in answer to the charge?" Then, if desired by the accused, the defence evidence is called.

If at the close of the evidence the Magistrate is of opinion that no case is made out, he discharges the prisoner, but the accused may demand that the accuser be bound over to prefer an indictment at the Court at which the accused would have been tried if the Magistrate had committed him.

If a case is made out, the accused is committed for trial with or without bail, as seems just, the witnesses being bound over to give evidence.

Police Magistrates are appointed for most cities and towns, who are generally Barristers; these have a rather higher jurisdiction than the ordinary Justice of the Peace—in some cases with the consent of the accused.

The Courts which proceed by indictment are the Supreme Court and the General or Quarter Sessions. Judges of these Courts are appointed by the Crown (i.e., the Administration at Ottawa) for life and must be Barristers of ten (or seven) years' standing.

The Supreme Court can try any indictable offence; the Sessions cannot try treason and treasonable offences, piracy, corruption of officers, etc., murder, attempts and threats to murder, rape, libel, combinations in restraint of trade, bribery, personation, etc., under the Dominion Elections Act.

Within twenty-four hours of committal to gaol of any person charged with any offence which the Sessions could try, the Sheriff must notify the County Court Judge, who acts as Judge in the Sessions, and with as little delay as possible the accused is brought before the Judge. The Judge reads the depositions, and tells the prisoner what he is charged with and that he has the option of being tried forthwith before him without a jury or being tried by a jury. If the former course is chosen, a simple charge is drawn up, a day fixed for the trial, and the case then disposed of.

If a jury trial be chosen, at the Sessions or the High Court (Assizes), a bill of indictment is laid before a Grand Jury (in Ontario of thirteen persons) by a Barrister appointed by the Provincial Government for that purpose. The Indictment may be in popular language without technical averment; it may describe the offence in the language of the statute or in any words sufficient to give the accused notice of the offence with which he is charged. Forms are given in the statute which may be followed. Here is a sample:

“The Jurors for Our Lord the King present that John Smith murdered Henry Jones at Toronto on February 13th, A. D., 1912.”

No bill can be laid before the Grand Jury by the Crown Counsel (unless with the leave of the Court) for any offences except such as are disclosed in the depositions before the Magistrate. But sometimes the Court will allow other indictments to be laid.

The Grand Jury has no power to cause any indictment to be drawn up.

Upon a true bill being found, the accused is arraigned; if he pleads "Not Guilty," the trial proceeds.

He has twenty peremptory challenges in capital cases; twelve if for an offence punishable with more than five years' imprisonment, and four in all other cases; the Crown has four, but may cause any number to stand aside until all the jurors have been called.

I have never, in thirty years' experience, seen it take more than half an hour to get a jury even in a murder case—and I have never but once heard a juryman asked a question.

In case of conviction, the prisoner may ask a case upon any question of law to be reserved for the Appellate Division, or the Judge may do that *proprio motu*. The Appellate Division may also direct a new trial upon the ground that the verdict is against evidence; but I have never known that to be done.

No conviction can be set aside or new trial ordered even though some evidence was improperly admitted or rejected, or something was done at the trial not according to law, or some misdirection given, unless, in the opinion of the Court of Appeal, some substantial wrong or miscarriage was thereby occasioned at the trial. If the Court of Appeal is unanimous against the prisoner, there is no further appeal, but if the Court is divided, a further appeal may be taken to the Supreme Court of Canada. I have never known this to be done.

A wife or husband is a competent witness in all cases for an accused. He or she is compellable as a witness for the prosecution in offences against morality, seduction, neglect of those in one's charge, and many others. The accused is also competent, but not compellable in all cases. If an accused does not testify in his own behalf, no comment can be made upon the fact by prosecuting counsel or the Judge.

No more than five experts are allowed on each side—four in civil cases.

I have never known a murder case (except one) take four days—most do not take two, even with medical experts.

WILLIAM RENWICK RIDDELL.\*

TORONTO.

\*Justice of the Supreme Court of Ontario.