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Ontario Courts and Procedure

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ONTARIO COURTS AND PROCEDURE.

THE progress made in England under the Judicature Acts of 1873 and 1875, with occasional revisions of procedure, has a deep interest for the American lawyer in search of judicial efficiency. In recent years a number of our lawyers have studied the English courts at first hand and upon their return have spread the news of great accomplishments in the home of the common law. These enthusiastic reports have been subjected to incisive criticism, so that controversy has arisen, and it has been difficult to determine to what extent inference from undoubted facts would apply to our own unsettled conditions. Or, quite as commonly, conservatism has answered enthusiasm for an alien model by way of confession and avoidance. It is admitted that England administers justice with dispatch and certainty but asserted that legal and social traditions there are mainly responsible and we Americans could not avail through adoption of their administrative machinery.

The issue has been clouded. It has been impossible, for instance, to estimate the influence of the English bar in making a practical success of simplified procedure. Our country was the first to diverge from common law procedure, and the experience of many states has seemed to prove that formalism could not be abolished by enactment. We could account for the failure of minutely legislated procedure in New York on the ground that it was entrusted to disaffected agents, but this explanation hardly suffices for a number of younger code states. Somewhere we missed a large factor and have been groping while England has made conspicuous progress.

There is strong reason why a point should be made of the English bar with its social distinction, thorough training, narrow specialization and close attachment to the court. If it could be proved that England's solution depends mainly on this factor, rather

than upon frank recognition of the administrative side of the judicial function and wide latitude for the control of procedure by the courts, we would have to set our time for emancipation from formalism and inefficiency far ahead. And it is possible that the controversy thus naturally engendered might continue indefinitely if there were available no experience of the essential features of the English system under conditions similar and readily comparable to those of the typical state.

The success of unification of courts and simplification of procedure in England led to their adoption in all parts of the Empire. To ascertain to what degrees these principles may be presumed to be workable in our country we should observe results in a jurisdiction which presents conditions similar to those of the typical state and which has given the English system a thorough test.

Ontario probably meets these requirements more satisfactorily than any other such jurisdiction. This province is identical from the social and industrial standpoint with neighboring states. In character of population, resources, commerce, modes of living and transacting business, political divisions, popular government and social ideals, Ontario is very near to such states as Michigan and Ohio, and very remote from the mother country. It is more the type of an American state than are a number of the states themselves. Its resemblance to the typical state is everywhere seen; its difference, except in this one field of administering justice, is hard to detect.

Ontario had a population in 1911 of 2,523,000, making it the premier province. Its capital city, Toronto, according to the same census, numbered 376,538, but it has been growing rapidly since. Hamilton, the second city, has a population at present of about 100,000. The county organization of Ontario is practically the same as that of the typical state except that there are a few instances of a "union of counties" whereby a single county organization suffices for two counties lying contiguous. The vast northern region, extending to Hudson Bay, consists of districts not yet organized into counties.

The settlement of Upper Canada by English, Scotch and Irish settlers led in 1791 to its separation from the land of the habitant, and permitted recognition of the common law in Ontario while Quebec retained the civil law. Ontario is no pioneer province, though it has always had a frontier with its special difficulties in administering justice. In the main it is a long settled province with a distribution of population in city, village and country similar to the average northern state.

Some picture of the people of Ontario may be useful in establishing a background for the scheme of courts which will be presented. The average American needs to disabuse his mind of certain notions before he can appreciate the significance of this province as the home of a free people who are working out problems essentially the same as ours under especially favorable circumstances. We incline to think of Canada as a narrow strip of territory inhabited by expatriates who are to be pitied because they are neither English nor Americans. Our tacit monopolization of the word American illustrates well the insignificant role we accord them. And conceiving of the English mind as insular we give a far lower rating to the mind of the colonial.

Just so far as we do this we reveal a pitiable provincialism. The intelligent Canadian is in fact subject to influences more broadening than ours. He must not only know his own field but must keep in touch with developments of all kinds in both England and the United States, and his facilities for doing so are excellent.

Americans not aware of the birth of a Canadian national spirit are not abreast of the times. This sense of nationality is evinced not only by abhorence of annexation to the United States, but quite as much by insistence upon their divergence from the British type and their virtual independence. These people resent the implication that if they are not English they must be American. They are *Canadian* and are determined that this shall mean to the world something superior to any other designation. And in working out their ambitious programme their advantages are many. They possess greater political flexibility than the States; they are more free to choose from existing models on both sides of the Atlantic.

The people of Ontario, taking this as the typical province, are singularly fortunate. They are a fairly homogeneous stock, enriched by bounteous resources of timber, soil, and mine, strategically located to handle a continent's commerce, now fully possessed of a national ideal, who are consciously selecting and rejecting, and building into their political and social structure what they find of value. Nothing could be wider of the mark than to think of them as political dependents or isolated provincials.

These facts are significant because we must not think of Ontario as having had a ready-made judicial system forced upon it. No people were ever more free to work out their own ideals than the people of Ontario. The essentials of their system were taken only after being proved in England and with the fullest knowledge of developments in the States. Conscious deliberation governed in making use of the new material and only so much was adopted as

could properly be applied to conditions far different from those in England. Ontario had fewer immovable landmarks to resist the flow of new forms and so was able to make the system more uniform than the mother country.

What Ontario adopted consciously in the Judicature Act of 1881 was unification of the system of courts and a schedule of rules comprising the modern procedure. The several tribunals known as the Queen's Bench, the Chancery Court, the Common Pleas Court, and Court of Appeal, were fused into a single Supreme Court of Judicature possessing the utmost flexibility. This court was given the power to revise and amend the procedural rules, subject to the veto of Parliament. Several extensive revisions have been made under this power without interference by the legislative branch, so the automony of the court in this field is pretty well established. Of course considerable fundamental procedure exists in the Judicature Act and there is no question that Paliament can also alter procedure at will, but there is no prospect that there will ever be interference in the delicate and technical development of procedural authority. The Supreme Court rules are also the rules, as far as applicable, for proceedings in the inferior courts, except the lowest court of all, the Division Court, which has still simpler procedure.

Canada has always had expertly selected judges and judicial tenure had uniformly been for good behavior. As in England, no change was suggested with respect to the judicial office when the modernizing process was effected. Seen in the largest way it has been simply the recognition of the need for unification and administrative control together with businesslike procedure and freedom for developing this procedure to meet all needs.

Coincident with this movement was the merger of law and equity so that a single system of justice would prevail. In effect this gives to every court the fullest remedy in every case. Harmony is secured by the rule that in case of conflict the rules of equity shall prevail.

The structure of the court organization to meet the needs of people living in cities and villages and on farms is so rational as to appear to solve this problem for all time. Every county is provided with a County Court which has jurisdiction sufficiently high to take care of the greater number of causes arising, both civil and criminal. In form, the criminal causes are tried in a separate court, the Court of General Sessions of the Peace, but the County Court judge is *ex officio* judge also of that court. The jury list and time and place of sitting are the same in both courts. For the more important causes the trial judges of the Supreme Court go on circuit, holding court in forty-six assize towns outside of the capital. By

reason of having residence at Toronto, and being all of equal judicial authority, charged alike with responsibility for trying causes and hearing appeals, this court is given a solidarity which is unattainable under the system prevailing in nearly all of the States. It not only hears appeals from the County Courts, but from its own trial branches, so that final authority is vested in a comparatively compact body. There is no further appeal for causes brought in the County Court so that our fallacious freedom of appeal to successive courts for less important litigation is avoided.

Then, to bring justice near to every man, so that causes involving values too slight to permit of going to a center for trial may be economically adjudicated before a real tribunal, the County Court judge treats his county as a circuit, and goes to the various villages to hold Division court when there are matters to be adjudicated. In this way the absurdities of our justices of the peace, competing with each other under the fee system, are escaped. The smallest civil cause in Ontario is tried before a Crown judge, appointed for life after at least ten years service at the bar, and I believe that the cost is actually less than with us with our division of tribunals. The justice of the peace is retained in Ontario, but with only criminal jurisdiction, so as to afford always and everywhere a magistrate to enforce the peace. In the towns he is supplanted by the police magistrate, who is a professional, and ordinarily a lawyer.

With this brief glance at the system, and before presenting details, it may be well to mention the differences between a Canadian province and an American state. In the first place there is in Canada no such dual system of courts as we have. The judges are all officers of the Dominion, deriving their powers from the federal capital, Ottawa. The police magistrates, justices of the peace and examiners are provincial officers, but are never properly called judges.

For causes begun in the Supreme Court of Ontario there is appeal to the Supreme Court of Canada at Ottawa, and for certain causes to the Judicial Committee of the Privy Council in London. Such a cause appealed to Ottawa cannot be appealed subsequently to London without the consent of the Privy Council, and this is given so seldom as to be practically negligible.

While an Ontario litigant may eventually have to go a great ways with his appeal, it should be noted that only about ten appeals are taken each year to London, and not many more to Ottawa, so for the great bulk of business there is but one review and that under speedy and economical circumstances.

The other greatest difference between the neighboring countries lies in the fact that Canada, having no written constitution, neces-

sarily makes her legislature supreme. Canadian courts, like those of England, have no power to declare statutes unconstitutional. On the other hand, the advisory power with respect to proposed legislation, which was expressly disclaimed by the United States Supreme Court, is put to a practical use in Canada. Bills in Parliament are not infrequently submitted to two judges of the Supreme Court. The counsel given is as to whether it is outside the class of objects of legislation alloted to the particular parliament, whether provincial or of the Dominion. The judges may thus exercise an important function with respect to legislation, but as they decide only as to validity, and not as to advisability, they escape all responsibility therefor.

Correlative with this supremacy of the legislative branch is absolute adherence to the doctrine of *stare decisis*. The court cannot reverse itself. Relief must come through the legislature, however unsuited to changing times a precedent may be. These matters confessedly make the work of the Ontario courts more straightforward, and subject them to less political strain than can ever be the case in our country.

Personnel of the Bench.

Judges must have been ten years in practice at the bar before appointment. This implies not merely a degree of competency, but it means also that by the time he has been chosen by the state for this pre-eminent work, the judge has pretty clearly developed his moral bent. He must have been industrious and studious over a period long enough to indicate a fixity of characteristics. The element of hazard is reduced to a minimum. The candidate has been in a hard school and there has been every opportunity for his ability and habits to be observed.

The selection is made by the Minister of Justice for the Dominion and the ministry must approve. The commission is signed in the name of the King by the Governor-General. But in fact the choice is that of the official leaders of a party which is directly charged by the electorate with the government of the nation and is held responsible for results.

Vacancies to a judgeship in Ontario are filled from the Ontario bar. Ordinarily the choice is made from the party in power but there have been instances of appointments to the bench given to lawyers of the opposing party. While not common, this is no very sensational circumstance, which indicates the high respect paid to this office. Political lines are drawn very close throughout Canada and to place the office above the party in even a few instances is

strong proof of the responsibility felt as well as a signal tribute to the appointee.

Occasionally appointments are made from the County Court bench to the Supreme Court and in this connection it should be noted that there are instances of County Court judges declining this promotion because they have not wished to change their residence. The possibility of such promotion, carrying a large increase in salary and wider influence, may be regarded as a valuable spur to the ambition of the County Court judge. He does not feel upon acceptance of judicial position that he is forever barred from advancement. On the contrary he is directly on the road to the most exalted position in the Province.

The lesser judicial officers, masters, examiners, police magistrates and justices of the peace, are appointed by the provincial ministry upon recommendation of the attorney-general for the province.

All appointments for judicial office are for good behavior. While in practice this is almost equivalent to life tenure, it should be understood that there is always present a very simple and efficacious form of recall. Supreme Court judges may be removed upon an address of both Houses of the Dominion Parliament. Only two judges of the higher courts have been removed in the history of Canada and the last instance was over seventy-five years ago. While the system of recall is eminently workable there is assurance that it will not be invoked for partisan reasons and that it will not result in injustice. The worthy judge is certain of continuing and the undeserving is easily disposed of.

County Court judges are even more readily removed. Any person whatsoever can prefer charges informally to the Governor-General. Of course this official is not compelled to act upon these complaints, but the freedom for submitting charges keeps him informed of public opinion and presumably permits him to issue a warning if impropriety is alleged. If there appears to be valid cause for investigation he designates two High Court judges and a barrister to conduct the investigation. The barrister secures the evidence and presents it at a hearing at which the incumbent is permitted to be represented by counsel. The committee then report facts and their recommendations to the Governor-General, and an order is made by him and his council, either removing the incumbent or declaring him innocent. There have been three such removals in the past forty years.

The salary of a judge of the Supreme Court is $7,000 and an additional sum of $1,000 is paid by virtue of the statute which pro-

vides for submitting bills in Parliament to judges for their counsel. There are still five chief justices who receive each an additional $1,000, but in the case of three there will be discontinuance upon the retirement of the present incumbents, owing to the more thorough unification which has been effected since their appointment.

After fifteen years' service, or on being permanently disabled, a judge of the Supreme Court is entitled to a pension of two-thirds of his salary; after twenty-five years of service, if seventy years of age; after twenty years of service, if seventy-five years of age, or after thirty years of service regardless of age, to his full salary.

County Court judges receive a minimum salary of $3,000 with an additional $500 for the York County Court judge. But there is an additional salary for these judges for acting as surrogates, and they also receive pay as masters of the High Court, and for arbitrations, so that the average pay for this position is about $4,500. All judges on circuit receive besides railroad fares an allowance for lodging of $6 a day, and while in cities are allowed $10 a day. Retirement at the age of seventy-five is compulsory upon County Court judges. If service has been for thirty years the full salary is continued as a life pension.

The security of tenure enjoyed by Ontario judges, as compared with the uncertainty surrounding the office in most of the states, makes a comparison of salaries very difficult. But aside from this long average tenure and the retirement pension, it is clear that the Ontario judge is paid more for his services than the average American judge working in similar fields.

All the other differences accentuate this advantage enjoyed by the Canadian judge. The elected judge must ordinarily pay a considerable sum and expend much time and energy as a mere ante for the privilege of being named on the ballot. And after a term of six years, more or less, he must repeat this contribution. The direct primary has nearly or quite doubled the expense of campaigns for judges. The elected judge realizes that he must run the gauntlet periodically, whatever the character of his services, with the probability that sooner or later a vote influenced by matters entirely outside his realm will reject him. We proffer the candidate for judicial honor insufficient salary, a gambler's chance of winning and holding, and dependence in old age.

There are probably few Ontario lawyers who could not afford as a purely financial speculation, to commute their probable net earnings at the bar for a judge's salary and pension, and as the position carries with it security as well as the opportunity for distinguished service, it is evident that there is a wide range for choice among the

bar when a vacancy must be filled. But with accumulation of wealth under modern commercial conditions there is being evolved, though more slowly than with us, a class of specially talented and ambitious lawyers whose earnings are so great that acceptance of judicial honors would mean a financial sacrifice. This situation, hardly appreciable as yet, is recognized, and is made the basis for a proposal looking to higher salaries for judges.

To recapitulate: all agents of the department of justice are appointed, or, in other words, expertly selected; the appointment of judges is by the official heads of the party entrusted with government; their removal is simple and this power is exercised by elected representatives of the people; compensation is adequate and the choice of material is almost unrestricted; the chosen judges are relieved of uncertainty concerning their living and are charged with a single direct responsibility, that of administering justice; their own welfare and that of the public is thus made coincident.

Here we have real democracy. There is genuine popular choice exercised by a rational process as opposed to the lottery involved quite generally in elections. There is protection against unjust accusation. There is continuing discipline without embarrassment. There is every incentive to faithful service and absolute freedom while properly discharging the one responsibility implied by the office. The terms of employment are exceedingly simple compared with the highly involved relationship brought about by dependence upon election machinery with short terms and periodic elections as a form of discipline.

The Supreme Court.

Since the beginning of the year 1913 the Supreme Court has comprised nineteen judges who sit in the following divisions:

First Appellate Divisional Court, five judges;

Second Appellate Divisional Court, five judges, who are members of the

High Court, which comprises fourteen of the nineteen judges of the court, and has nine members regularly engaged in trial work.

All of the judges are on the same footing with respect to powers, and any one of them can exercise the authority of any other if necessary as a matter of convenience. The five judges of the First Appellate Divisional Court are permanently attached to this branch and cannot be compelled to try causes, but they may consent to engage in trial work. And as some variation in employment is occasionally desirable it is quite common for them individually to stop hearing appeals and go on circuit. Aside from the relief afforded

by a change it enables them to keep in touch with the life of the people.

The Second Appellate Divisional Court is made up from selections made by the High Court Division in December for the succeeding year's service. A judge who might strongly prefer trial work could probably escape this assignment, though he could be compelled to serve for the year if it became necessary to fill the Second Appellate Divisional Court. Or a judge preferring to spend a year at the capital could ordinarily be accommodated by selection for appellate work. An exchange of work between two judges by mutual agreement is very common. A very comfortable and economical adjustment is effected and this flexibility does not rest upon minute statutory regulation. The responsibility rests upon all and the freedom for fulfilling the obligation makes the burden lighter individually as well as conserving economy for the court as a whole.

The fact that half of the appellate judges are drawn from the trial division and that the remaining appellate court judges frequently participate in trial work, not only makes for an equitable distribution of the work and economy of administration, but also prevents the differences of experience and temperament which result from long continued specialization. The trial judges are of equal authority with those who will pass upon their work in review and they receive the same pay. This lends dignity to trial in the first instance which must always be the essential feature for the average litigant. The appellate judges, keeping in touch with trials, are less likely to develop an academic quality often seen in our appellate tribunals. The rights of individual litigants are not belittled in their minds by comparison with the great background of case law; they are not oppressed by the overwhelming need of developing the common law by decisions, as seems to be the case in the States.[1]

"One gets tired of hearing appeal cases day after day, and likes to get out and hear causes tried occasionally for relief," said one of the appellate judges, speaking on this point. "I would hate to have to hear appeal cases all the time for the rest of my official career. I like the stress and excitement of the trial courts.

"Now I must say most emphatically that I cannot perceive any possible harm in permitting a judge to vary his work in this manner —to try cases for a time and then to hear appeals for a time, or to participate in both kinds of work in any way that suits the convenience of the court and his own inclination. I do it myself. I see my brothers doing it. I cannot imagine any evil consequences.

[1] Vid. The Administration of Justice in the Modern City; by Roscoe Pound, 26 Harvard Law Review, 302.

I think it well for an appellate court judge to get in touch with trial work from time to time, and the trial judge can spend some time in reviewing with advantage to himself and to the work."

The High Court as a trial court has no divisions whatever. There are simply nine judges who try all the causes originating in their court. They have jurisdiction without limit up or down. But there is a penalty in costs if a cause which could be tried in County Court is begun in the High Court. By stipulation any cause, however great the subject matter, may be tried in the County Court, thus permitting occasionally of a saving of time, though the limitation upon appeals applies to such a trial. It cannot be appealed beyond the Ontario courts without express permission of the Judicial Committee of the Privy Council and this is practically never given.

The calendar provides for two terms per year for both jury and non-jury trials in each of the forty-six assize towns outside of the capital, and in Toronto a session is being held almost continuously. The Supreme Court also maintains its "weekly court" in Toronto, and the larger cities, in which all matters that can be disposed of without trial, stated cases, the interpretation of wills, and so forth, are heard. On Tuesdays and Fridays the judge in charge of the weekly court sits "in chambers" and dispenses with his gown. But the technicality does not prevent the moving of matters not in chambers. The judge will say, "Now consider that I have my gown on; proceed." Two clear days' notice is required for appearance in this court and the calendar is made up for each day's business the evening before. If a matter which should be "in court" is brought "in chambers," lesser costs must be taxed and if there is no appearance the moving party cannot proceed, as the other party is entitled to notice of hearing in the proper tribunal.

In Toronto two masters are regularly employed, holding sessions daily at eleven o'clock and once a week during vacation. One, the Master in Ordinary, specializes on matters submitted to him as referee. In the other counties the County Court judge is usually the master of the High Court.

The Supreme Court administers through a committee of five members the funds paid into court on behalf of infants and otherwise. With the aid of a trust company about $5,000,000 is kept invested and a uniform rate of interest approximating five per cent is earned for the funds of all such wards of the court.

The two appellate divisions ordinarily sit in alternate weeks. Causes appealed are all put upon a general calendar and from this the divisions in turn take each week as many causes as can be disposed of.

There is no appeal from the Second Appellate Divisional Court to the First, or *vice versa*. Each exercises the fullest jurisdiction of the Province. The one which first decides a question of law binds the concurrent division. If it be in a developing field of law it is simply a question of accidental priority as to which settles a doubtful point. The other division will accept the determination just as fully as if it had come from a higher tribunal.

Here we have an instance of the perfect working of a plan which might seem to incur hazards. It is of interest in connection with the reorganization of courts in our more populous states. A new state gets along admirably for a time with five Supreme Court justices. When the population increases the court is increased to seven and then before long it begins to fall behind. A court of seven hearing appeals as a single body cannot work as rapidly as one of five, nor one of five as rapidly as one of three.

When the increase in litigation in the state is evidenced by an increase of the supreme court to nine justices there is certain, under our rigid system, to be trouble. It has been common for such courts to get several years behind. The ordinary relief comes from the creation of intermediate courts of appeal. In this step new difficulties are encountered. If certain more important matters can be appealed as a matter of right from the appellate court to the supreme court, it becomes almost a matter of course, for in just such matters the opportunity for successive appeals is certain to be availed of to the limit. One of the litigants appeals as a right and the other is carried up willy-nilly. The intermediate court becomes little more than a hurdle. This greatly increases the cost of litigation, and the primary objects of the intermediate court, saving time and lessening the load of the supreme court, are defeated.

If, on the other hand, the second appeal for less important matters is arbitrarily cut off, there may arise a real question as to what may be the law of the state, so that provision must be made for the additional appeal in certain causes. In Illinois and Missouri, where there are such intermediate courts, a dissenting vote results in certifying the cause to the supreme court.

Again, if the capacity of the supreme court is increased by permitting it to work in divisions, as in Missouri, such is our instinct for contention, that we are not satisfied unless matters on which there is a dissenting vote, are referred to the entire court.

The whole matter of appeal in our great commercial states is in a wretched plight. One of the worst features arises from the fact that in the same suit the plaintiff and the defendant may alternately prevail and it is truly said that if there were still another appeal

beyond the supreme court there would in many cases be a different result. After such fluctuations in justice it is the finality rather than the essential correctness of the supreme court's decision that makes the law.

This last fact gives force to the demand that a second appeal be arbitrarily cut off unless some novel proposition of law can be raised.

It is evident that there must be a great restriction upon appeals or there must be devised some method of dividing an enlarged supreme court into two or more branches which can work independently and yet in harmony. While not "on all fours" with our situation, the Ontario Supreme Court throws some light for our guidance. If we should adopt a unification which would permit of increasing the supreme court temporarily by calling in trial judges no excuse would remain for long delay on appeal. A plan which would involve dividing the supreme court in two branches would work as well for any number of branches, and it could be raised numerically to meet emergencies.

In Ontario appeals are practically always argued orally. There is no need for argument in favor of this wholesome practice. It is a natural method which obtains in any appellate court which is not pressed for time. But when a supreme court has reached a membership of seven or more, if all members are to participate in all appeals, there must be resort to briefs. The practice is so common with us that we have all but lost sight of the advantages of the direct oral presentation of appeals. One of the things which immediately impresses the visitor in Toronto is the great merit of a face to face discussion of an appealed cause. Often for an hour or two the respective counsel must answer questions put by the judges. It is obvious that there is a much fuller hearing than is humanly possible when the printed page is relied upon for submitting the facts. The judges too perform most of their work in each other's presence benefiting to the utmost from the interchange of views.

Such hearings benefit alike the court, the counsel, and the litigants. If our overworked supreme courts were to sit in divisions of three or five and hear oral argument as a matter of course there would be more unanimity of decision and less need for certifying causes to a larger division or to the entire court. The matter of organic structure of the court and the method of procedure are linked together and in considering them as coequal factors there is a far better chance for agreement with respect to reform proposals.

In the Ontario Supreme Court four of the five judges in each appellate division make a quorum.

Causes may be appealed beyond the Ontario Supreme Court in the following cases:

When the title to real estate is involved.

On the validity of a patent.

When the matter in controversy exceeds $1,000.

Matters of annual rent or fee and like matters affecting future rights.

Any other cause by leave of the Appellate Divisional Court which entertains the first appeal, or by leave of the Supreme Court of Canada or the Judicial Committee of the Privy Council.

In the following cases the appellant has his choice between the Supreme Court of Canada and the Privy Council:

When the judgment is for $4,000 or more.

When the title to real estate is affected.

But if in such a cause the appellant elect for the Supreme Court of Canada there can be no further appeal to the Privy Council except by leave of the latter court. In ten years there were but fifteen such double appeals.

To avoid supposed local influences or prejudices, and reach a court of more conservative tendencies, the usual course is to appeal to the Privy Council if large corporate interests are involved, while causes of a private nature ordinarily go to Ottawa. Ontario sends from twenty to thirty appeals to Ottawa in the average year and about ten or twelve to London.[2] The percentage of appeals beyond Ontario is very low, and causes begun in County Court cannot be appealed a second time (regardless of subject matter), without special permission, which is rarely granted.

It is not uncommon for a cause to be commenced, tried, and appealed in Ontario, and settled finally in London within a year and

[2] The report of the Registrar of the Supreme Court of Canada "to a Select Committee of the Senate" (1913) shows fully the number of Ontario appeals since the establishment of the court in 1876. The following figures are totals for the ten year period from 1903 to 1912 inclusive:

Total number of appeals	299
Pending or not prosecuted	23
Quashed, settled or disposed of upon preliminary motions	37
Affirmed	187
Reversed	49
Modified	3
Average number of appeals per annum	29.9

The same report shows the appeals from the Supreme Court of Canada to the Privy Council. During the same period of ten years there were 33 applications, an average of 3.3 per annum, and only 15 were granted, an average of 1.5. Affirmed 7, reversed or modified 5, pending or not prosecuted 3.

a much longer time would cause remark. A comparison between this practice and our practice with respect to matters transferred from the state courts to the United States courts is a fair one, and probably will be found much to the advantage of the Canadian litigant in point of time involved.

The Ontario Supreme Court maintains a registry in each of the assize towns. The local registrar is ordinarily clerk of the local County Court.

County Courts.

There are forty-eight County Courts and seventy-four County Court judges. York County, in which the city of Toronto lies, leads with four judges who are known as the County Court judge, the Junior County Court judge, the Second Junior County Court judge, and so forth. With only one exception, the Surrogate Courts of the Province, one for each county (or union of counties) are presided over by County Court judges, who receive an additional salary for this service.

The County Courts have no jurisdiction in libel or crim. con. actions, but in other civil matters, jurisdiction is, by consent, and subject to considerations of taxing costs, virtually unlimited. The statutory limits are:

1. Contract causes involving $800.
2. Personal (tort) actions involving $500.
3. Recovering real or personal property to a value of $500.
4. Foreclosure and sale of property value of $500.
5. Causes involving equitable relief involving $500.

If suit is brought in the County Court for a greater amount than above specified there will be a trial unless the defendant expressly disputes the jurisdiction, in which case the plaintiff may transfer the cause to the High Court on *praecipe*.

The County Court judge exercises criminal jurisdiction as judge of the Court of General Sessions, to be referred to under a later heading. The terms of the County Court for trial of civil jury causes fall on the second Tuesdays of June and December; and for non-jury civil causes in April and October. The Court of General Sessions is set for the same time so that the same jury panel can be employed for both civil and criminal causes. The Assize jury terms are set so as to equalize the time between terms and the non-jury Assizes are set to coincide with the General Sessions, which permits of expedition in clearing the calendar of the more serious criminal matters.

The Division Court.

The way in which a competent tribunal is provided for the trial of the smallest civil matters, without resort to the notoriously inefficient lay justices of the peace with which the States are generally infested, is ingenious. The Province is apportioned among "divisions" which usually coincide with the township boundaries. The division gives the name to the Division Court, in which the County Court judge officiates in every division every sixty days or oftener.

The jurisdiction of the Division Court extends to

1. Personal actions (in tort) involving not over $60, or by agreement not over $100.
2. Contract actions not over $100 providing the whole of the unsettled account does not involve over $600. Where the amount is determined by the signature of the defendant, jurisdiction extends to $200. There can be no action to recover land.

If the suit in Division Court be in tort or replevin and for more than $20, or in contract and for more than $30, either party can demand a jury, but must give notice one week before trial and deposit a fee of $6. The jury consists of five members, but probably not in one case out of fifty is a jury demanded.

The pleadings in Division Court consist mainly in the summons, containing a brief statement of the claim, and the statement of defense, which the defendant must interpose to prevent summary judgment. Probably in half of these trials there is no counsel. No attorney fees are taxed except in cases in which more than $100 is recovered. A litigant may be represented by a non-professional agent.

If the judgment in Division Court is for less than $100 there is no appeal, but a motion for a new trial can be made to the judge of the Division Court. This stifles appeal of petty civil litigation, nearly all of which is heard without a jury, and appeal is seldom resorted to when more than $100 is awarded. Such appeal, when taken, is direct to the Appellate Division of the Supreme Court. On a recent calendar I found but one appeal from a Division Court out of seventy-five causes.

The details of the Division Court have thus been set forth because Ontario has solved completely the problem of adjudicating minor controversies with a minimum of cost to litigants and to the public. First rate judicial talent is provided for every cause. Sending a real judge to every hamlet to try petty controversies every two months or oftener might seem at first to be extravagance on the part

of the public. But it must be considered that the practical abandonment of juries is due directly to the employment of a competent judge. Instead of making a holiday for a jury and a half a dozen witnesses and virtually forcing litigants to employ counsel, the Division Court judge, a Crown judge who may be appointed at any time to the Supreme Court, disposes of these matters in actual conformity to law in a tenth of the time required under the haphazard sporting method which we generally employ. Such a judge justifies his high salary as compared to a cheap magistrate if only by the volume of his output obtainable through expertness and the freedom from vexatious delay incident to contentious trials. For this minor business which cannot stand the charges that heavier traffic can stand there is Oriental simplicity and dispatch.

But there is another great saving to the public to offset the judge's fair salary. It comes from the practical absence of appeals in this class of causes. As to the saving indirectly by virtue of dispensing real justice and discouraging the bulldozing that is incident to adjudication by haphazard methods in incompetent tribunals, there can be no arithmetical rendering.

There is a like saving by classification of causes in the county seat towns and cities. Speedy trial is effected by putting the small grist into the Division Court, which may be held as often as once a week. Following a custom which was a natural development under primitive conditions, we have preserved inferior judges for inferior jurisdiction in our cities. We need to assimilate the seemingly revolutionary view that wherever there is a sufficient population to justify maintaining a full-salaried judge, even the smallest litigants should have the benefit of his services. Only by such means can we get away from the use of juries with their attendant expense and uncertainty, and lessen appeals. It is easy to prove economy for the public as well as litigants through such a practice.

Trying petty causes without counsel would probably not be opposed by the better element of the American bar. A lawyer who is fit to express a disinterested opinion is only annoyed by such matters. He knows that if he takes such a case for trial either he or his client must lose. But unless a real judge is provided to hear these causes counsel must, in self defense, be retained, and the client is influenced further by the pernicious thought prevalent with us that trial in the inferior court is only the beginning of the trouble.

One will see these little matters tried thoroughly at the rate of twenty to thirty a day in Toronto. The impression is gained that precise justice is obtained just as fully as in more important litigation. The litigants do not have their day in court, it is true, for fifteen

minutes suffices in the hands of a capable judge to unravel their difficulties. When there is no counsel, and the parties are permitted to question each other, there is practically the "confrontation" which Arthur TRAIN[3] was inclined to commend as a feature of the Italian procedure. The trial is vociferous in spots but the truth comes out speedily. And while there is at first a despotic appearance, it is an appearance only. The jury and a full day's trial can be had by depositing $6, which is only a moiety of what it costs the Province. Or, subject to costs, the smallest cause can be thrashed out in County Court before a jury of twelve.

In this connection it should be added that it is the use of the jury rather than the presence of counsel that makes the small case cost more than it is worth. There is about equal dispatch before the Division Court judge when counsel appear. And in trial without jury, if the judge be first class, one litigant can afford to face the issue without counsel, even though his opponent be so equipped. The calling of the jury almost universally in our justice courts virtually obliges the parties to retain counsel, and jury and counsel combined prolong such trials.

It should be understood that there is no wish to alter the wise provisions which guarantee for us trial by jury, representation by counsel, or reasonable privilege of appeal, but to shape conditions for litigation which cannot stand to pay for all these frills so that there will be substantial justice. Providing competent judges would seem to be the only way and genuine economy would be one of the benefits.

In villages where Division Court is held there is a local clerk, usually a postmaster or storekeeper, and he is empowered to issue process. The Division Court has also its own bailiff, whereas the process of all other courts is served by bailiffs appointed by the sheriff and accountable to him. While on this subject it might be interesting to note that the County Court judge is the ranking officer of the county and the sheriff is next. It is to be understood that all ministerial as well as judicial officers are appointed and for good behavior. There is no pension for others than judges, but registrars who become superannuated are occasionally provided for by permitting others to do their work in their names.

The Criminal Side.

Ontario administers justice criminally under a Dominion code dating from 1892. The machinery for trying persons accused of crime

[3] Courts, Criminals, and the Camorra, p. 203.

seems at first glance rather complicated, but a closer study reveals the same rational spirit which prevails on the civil side and a real harmony underlying the criminal substantive law and the rules for its enforcement.

The old distinction between misdemeanors and felonies has been abolished. Offences which are the subject of indictment are "indictable offences" and all lesser ones are simply "offences."

It is easy to understand, as has been shown, how it is possible to afford for the most humble and isolated litigant a judge of high ability in adjudicating minor civil matters, for such matters can await trial for a week or a month. But criminal complaints may arise unexpectedly in the most remote places and for their consideration there must be provided everywhere and at all times a magistracy. This is the excuse for the retention of the justice of the peace. These officers are appointed on recommendation of the Attorney General by the Provincial government for life subject to *supersedeas* for misconduct. The fact that only one such *supersedeas* has been issued in the 122 years of provincial history probably does not justify belief in the sublimated character of the magistrate as much as in the sensible procedure which does not impose upon a lay official duties beyond his proper capacity. Still it does point to a higher type resulting from appointment than from election. It is still an honor to be a justice of the peace in Ontario and appointment is commonly employed as a means for recognizing political services. This is seen in the cities where the police magistrate has taken over the work of the justice of the peace, following the policy of providing expert officials as far as possible, so that the office of urban justice of the peace is purely honorary. To be sure a city justice can perform the work of the police magistrate if need occurs, but it is rarely so.

The process of eliminating the unprofessional element is further observed in the statute which permits of police magistrates for counties or portions of counties, which has been availed of to a considerable extent. These police magistrates, deriving their appointment from the same source as the justices, are usually lawyers, and are always upon salary. In rural districts they receive at least $600 a year, and in the towns the salary is normally $1,400, being less or great in proportion to the size of the town or city.

The jurisdiction of the justice of the peace to try causes is limited to specified offences of a minor character (virtually infractions of ordinances and with no real element of crime) and the penalty which he can impose is fixed by the ordinance or statute.

In higher offences the justice of the peace acts only as examin-

ing magistrate. The accused is presented on summons or warrant, or if arrested "upon sight" an information is drawn up and sworn to immediately upon presentation in court. The examination is similar to one conducted before a magistrate in the typical state, but if the justice discharges the accused there may be a proceeding which the writer has not heard of elsewhere. In such case the complainant may demand that he himself be bound over to prefer an indictment at the court at which the accused would have been tried if the magistrate had committed him. By this means the opportunity of the magistrate to go wrong, should he chance to be partisan or of the Dogberry type, is precluded.

Since 1897 all towns of 5,000 must have each a police magistrate and the system has worked so well that it has extended to the smaller cities. Where there is a population of more than 40,000 the police magistrate is provided with a deputy. These magistrates must not be called judges; they are addressed directly as "Your Worship," while the County Court judge is addressed "Your Honor" and the High Court judge "Your Lordship."

The Supreme Court, while able to try any indictable offense, has reserved to it exclusive jurisdiction in the following matters: treason and treasonable offences, taking oaths to commit crime, piracy, corruption of officers, murder, attempts and threats to murder, rape, libel, combinations in restraint of trade, bribery, and personation under the Dominion Election Act.

Aside from conducting examinations, the police magistrate can try by consent, involving a waiver of jury, any cause which the General Sessions can try. But without such consent his trial jurisdiction is much narrower. He has no power to impanel a jury.

Upon arraignment before a police magistrate, if the cause is one triable in General Sessions, the court asks the accused if he will be tried forthwith without a jury or will await trial in the next court of competent jurisdiction, stating which court it is, whether the Assizes or General Sessions, and when it will sit. Inasmuch as the General Sessions is quite commonly limited to two terms a year, and bail must be procured to avoid a period of incarceration, it is very common for the accused to submit to trial forthwith without a jury. It is estimated that police magistrates dispose finally of three-fourths of all the criminal causes arising in the towns and cities. The advantages offered the accused in exchange for a waiver of jury trial thus results in a tremendous saving to the Province which fully justifies the existence of the special magistracy as distinct from the County Court judge.

Within twenty-four hours after the arrival in jail of one commit-

ted for trial, if the offense is one triable by the General Sessions, the prisoner is brought before the County Court judge, told the nature of the charge against him, and given the option of a trial forthwith in "The County Judge's Criminal Court," without a jury, or of being tried in term by a jury. If he elects for a trial before the judge alone, a day is set; if not, he is remanded to await the first court of competent jurisdiction for trial by a jury of twelve. It is estimated that in fully half of the cases tried there is a waiver of jury. If there is no waiver, when the next General Sessions or High Court Assize comes, whichever may be first, a bill of indictment is laid before the grand jury of thirteen members, by the Crown Counsel. The indictment may be in popular language without technical averment, or it may describe the offence either in the language of the statute or in any words sufficient to give the accused notice of the offence with which he is charged. The following is a sample of the forms given in the statute:

"The jurors for our Lord the King present that John Smith murdered Henry Jones at Toronto on February 13, A. D. 1912."

Without leave of the court no bill can be laid before the grand jury for any offences except such as are disclosed in the dispositions before the magistrate. The grand jury has no power to cause indictments to be drawn up; it simply passes upon such bills as are presented by the Crown Counsel, the prosecuting official.

The accused has twenty peremptory challenges in capital cases; twelve if the offence is punishable with more than five years' imprisonment, and four in all other cases. Although the Crown has only four challenges, yet it may cause any number to stand aside until all the jurors have been called.

It practically never takes more than half an hour to make up a jury in the most serious cases and the individual jurors are practically never asked a question.

In case of conviction the respondent may ask a case upon any question of law to be reserved for the Appellate Division, or the judge may do so *proprio motu*. The Appellate Division may also, by leave of the trial judge, entertain an appeal for a new trial upon the ground that the verdict is against the evidence, but this is a rare proceeding.

No conviction can be set aside or new trial ordered, although 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 Appellate Division, a substantial wrong or miscarriage was thereby occasioned at the trial. If the Appellate Division 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 at Ottawa. This is a very rare proceeding.

A husband or wife 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 the prosecuting counsel or the judge. If this should be done, even by inadvertence, a new trial would result.

No more than five experts are allowed on each side. Very few murder trials consume more than two days even when medical experts are called.

Mention has been made of the Crown Counsel; following an old practice there is an appointment of counsel to represent the people in the criminal causes triable only in the High Court Assizes. A special appointment is made by the Attorney General for the Province for each Assize. The practice is to rotate these appointments among the prominent counsel of the ascendant political party, but the Crown Counsel practically always serves in another county than the one he is resident in. He receives $6 for drawing each indictment and $20 or more for each trial. The allowance is such as to make the work worth an average of $50 a day.

But there is a regular prosecuting official for each county who takes care of all the work not specifically allotted to the Crown Counsel, and this official is known as the County Crown Attorney. He is appointed for life by the Provincial Government and is made responsible for conducting examinations and prosecuting offenders in the General Sessions and inferior courts generally. He is permitted to engage in private practice but in the more populous counties his time is fully occupied with his official duties. He is not counsel to local officers on civil matters.

While the General Sessions Court is set for the same time as the terms of the County Court, so as to utilize the same jury for civil and criminal work, and has the same judge, it has a distinct set of officers. Its registrar is known as the "Clerk of the Peace." But lest this appear to be a needless multiplication of offices it should be noted that the County Crown Attorney and the Clerk of the Peace are in most counties one person.

The big feature of this machinery of criminal justice is the elimination of juries in many cases, brought about by the advantage to the accused of a speedy determination before the magistrate or

County Court Judge. The seeming indirectness of the machinery is thus seen to have full justification, for a very great saving is effected. The weak end of any system of courts is that projected into the rural community. In Ontario this is avoided to a remarkable degree by limiting the powers of the justice of the peace, as well as by making his tenure depend upon other than local influences. Just as far as is economically possible, the professional magistrate is utilized. By setting the jury Assize to alternate with the General Sessions a means is afforded for trying more speedily accused persons who are unable to give bail. Ordinarily when the accused is not in jail his case is allowed to wait the General Sessions. (The frequent use of the words "unusually" and "commonly" and "ordinarily" illustrates the facility afforded for stepping over the rules intended to suit the general run of litigation in the interest of economy or justice in the exceptional case).

The duplication of prosecuting officials is due to the ancient practice of the Attorney General or Solicitor General going out to represent the Province in the most important prosecutions. In time the work became greater than they could do, and the practice of appointing a substitute from the bar originated. The excuse for the retention of the system is that the County Crown Attorney has his hands full without undertaking to prosecute at the Assizes. There is a real advantage in having a non-resident to represent the people in the more serious matters.

The employment regularly for all the less important prosecutions of an official who is expertly selected and not dependent locally for his position is a tremendous step in advance of the usual American prosecuting attorney. The adoption by us of this one detail would do more than any other one thing to make our enforcement of criminal law effective. With us the office is a mere stepping-stone to practice for the young lawyer. It is seldom taken seriously. The tenure is so brief that there is no incentive to make a study of criminology, either as a science or to acquire full knowledge of its local characteristics. The weakness of our prosecuting officers more than anything else results with us in *law enforcement by local option.* We cannot put criminal statutes to any real test as long as the responsible prosecuting officer, often given absolute power to *nolle pros.,* is subject to be disciplined on election day by any considerable element of the local electorate.

HERBERT HARLEY.

CHICAGO.

(TO BE CONTINUED.)