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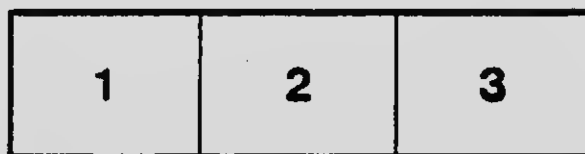

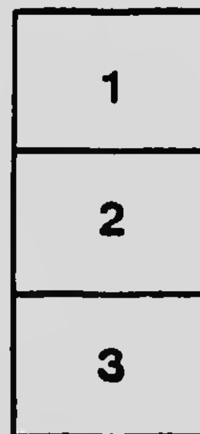

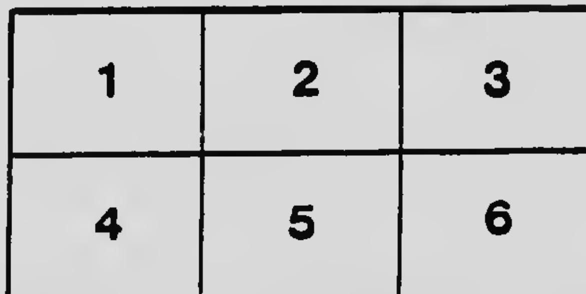

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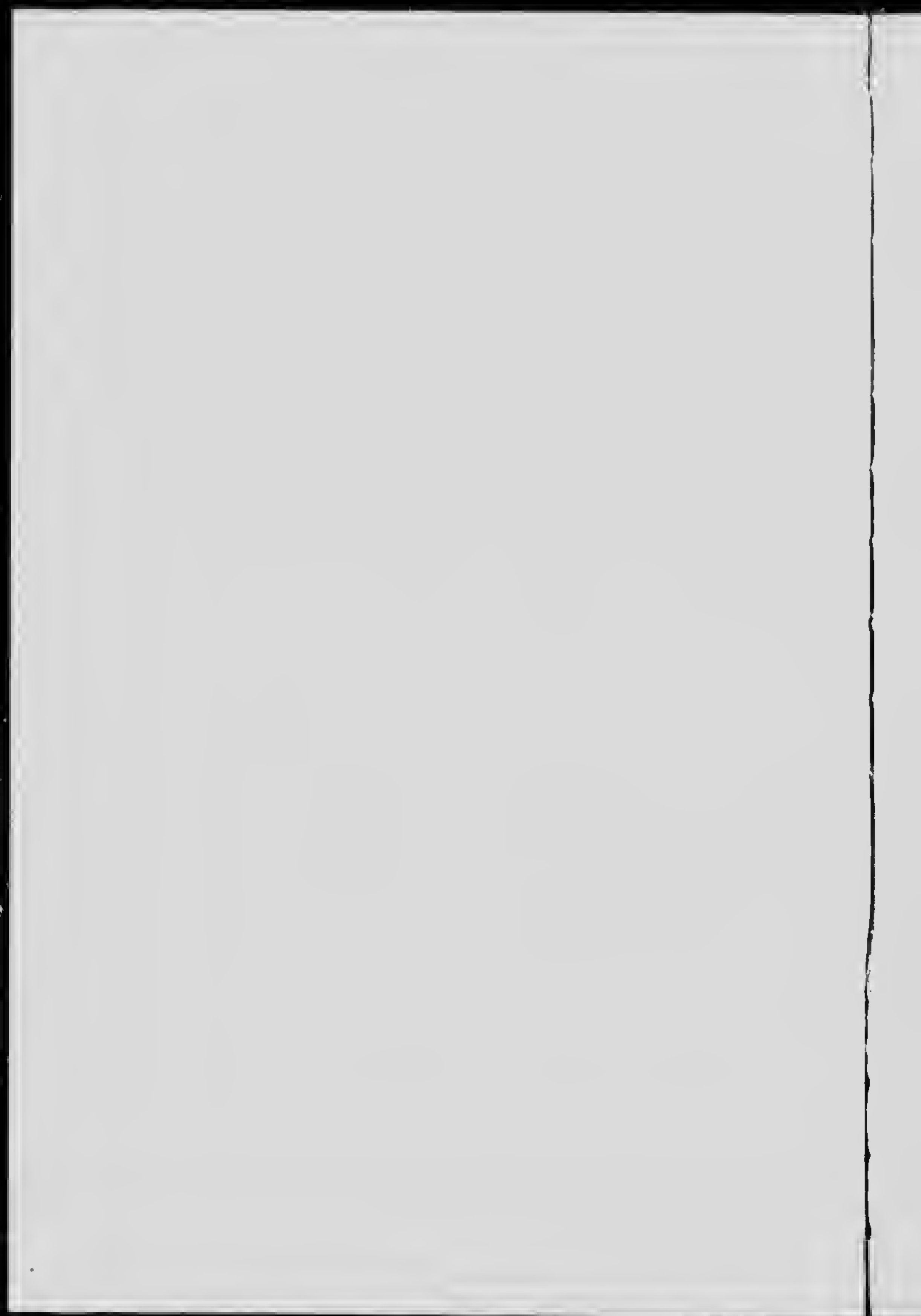


THE COURTS OF ONTARIO

PAPER PREPARED

BY

THE HONORABLE

WILLIAM RENWICK RIDDELL, L. H. D., Etc.,

of TORONTO (Justice of the King's Bench Div'n, H. C. J., Ont.)

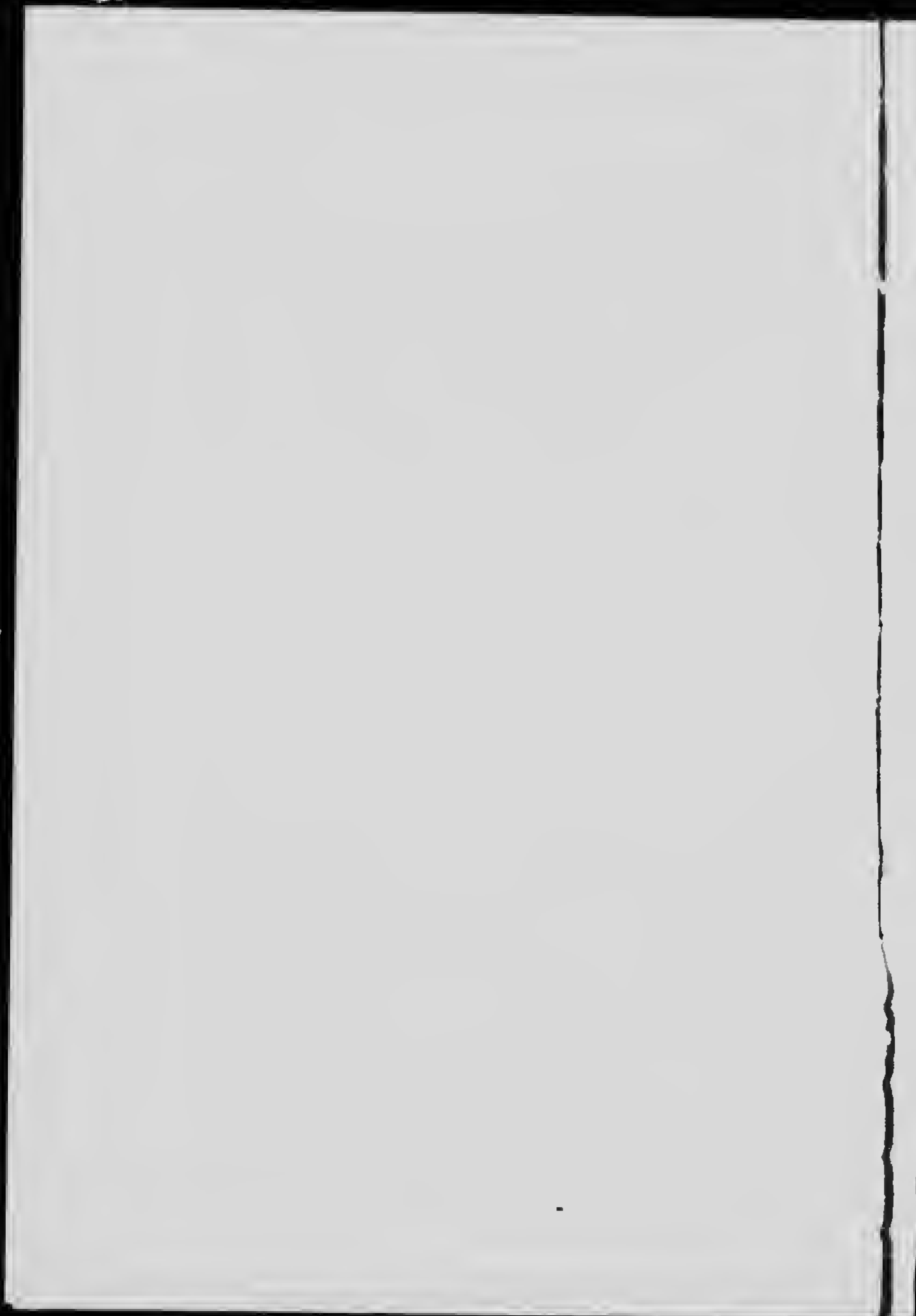
FOR THE

ANNUAL MEETING

OF THE

NEW YORK STATE BAR ASSOCIATION

NEW YORK, N. Y., JANUARY 20, 1912



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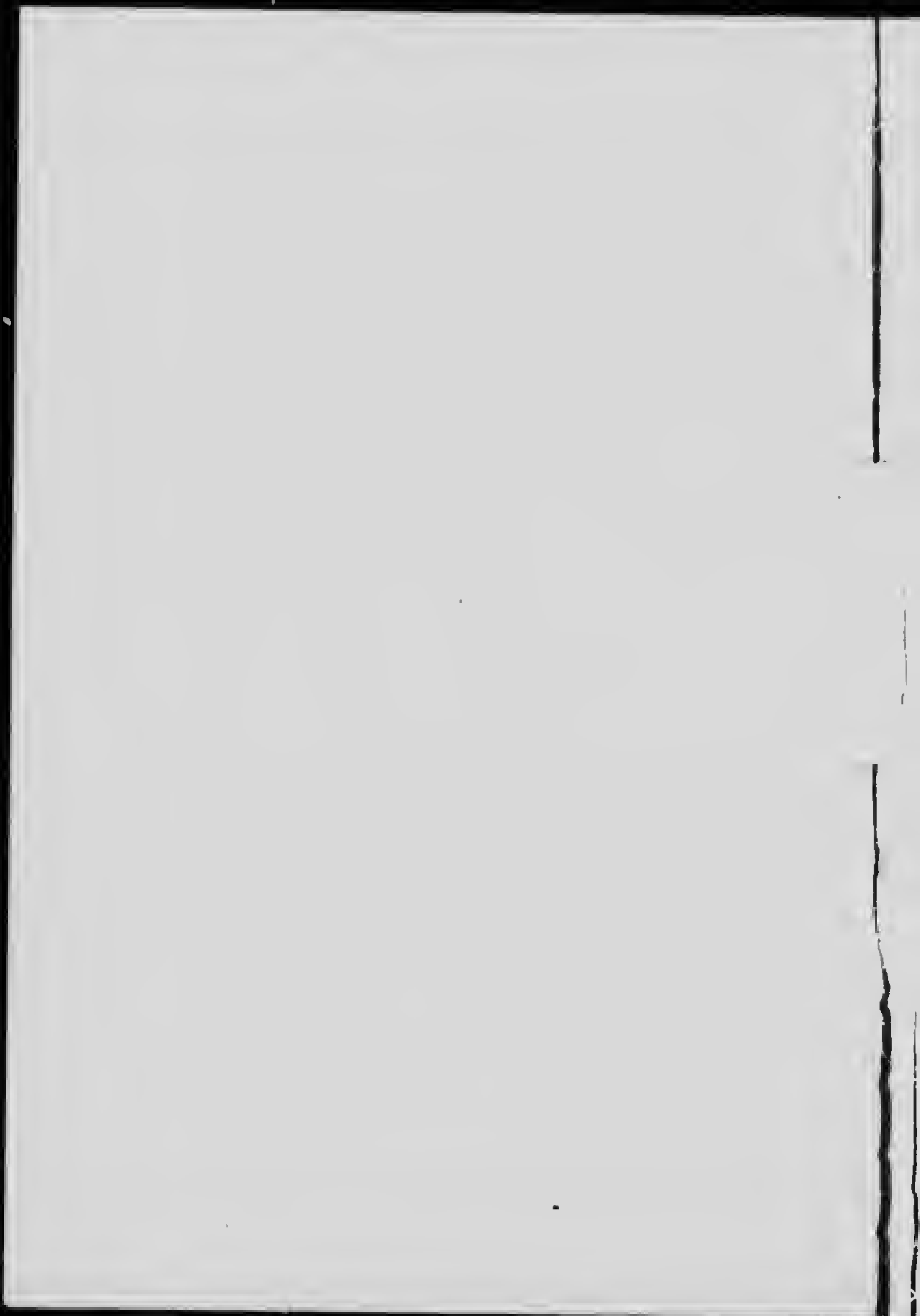

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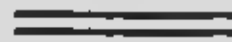

NEW YORK, N. Y., JANUARY 20, 1912

THE COURTS OF ONTARIO

This paper deals in succession with (1) The Profession, (2) The Courts, (3) The Judges, (4) The Civil Practice, (5) Costs, (6) The Volume of Appellate Business, and (7) Criminal Procedure.

1. *The Profession.*— There are two classes of practitioners, Barristers and Solicitors. A lawyer must belong to one; most belong to both. The Barrister alone can conduct a case at trial; the Solicitor alone files pleadings. Barristers are formed into a body — the Law Society of Upper Canada — now nearly a century old; every five years they vote by ballot for thirty benchers, who with certain ex-officio members form the governing body, or bench. Collectively, the benchers form convocation; they fix the standards of education, conduct examinations, etc., and call to the Bar. It is necessary for the candidate for call to have been an admitted student of law for five years, or for three years if a B.A., or LL. B. in some recognized university. After being called by convocation the young Barrister is presented by a bencher to the Court; he is then sworn, and thereafter he has the right of audience. The Court does not call to the Bar, and has nothing to do with the curriculum or examination. Barristers are of two classes — King's Counsel and Stuff-gownsmen — the former are appointed by the administration of the Province from amongst the members of the Bar; they wear a silk gown and sit "within the Bar," thereby having the privilege of pre-audience in the Courts other than Trial Courts. Otherwise, the title is almost entirely honorary. Convo-

cation also fixes the education, etc., of Solicitors; and upon examining them, grants a certificate of fitness. The same requirements as to time of service as an article clerk are imposed as in the case of a Barrister. Upon the certificate of fitness being presented to a Judge of the High Court, he grants a fiat for admission of the candidate as Solicitor, and the oath is administered before the Judge. Thereafter the new Solicitor may practice in all the Courts. Each Barrister and Solicitor pays a fixed sum to the Law Society and receives the official law reports.

2. *The Courts.*—The Court of King's Bench was established in Upper Canada in 1794 by Provincial Statute,[1] with power to hold pleas in all manner of actions, causes or suits as well criminal as civil, real, personal and mixed, in Upper Canada. This Court of course became the Queen's Bench on the accession of Queen Victoria. In 1837[2] a Court of Chancery was established, presided over by the Vice-Chancellor of Upper Canada; and in 1849[3] another common-law Court, the Court of Common Pleas, with the same jurisdiction and practice as the Court of Queen's Bench. At the same time the Court of Chancery was reconstituted with a Chancellor and two Vice-Chancellors.[4] These three Courts continued side by side as the Superior Courts of original jurisdiction until 1881. By the Act of 1794[5] the Lieutenant-Governor of the Province with two or more of his Executive Council constituted a Court of Appeal from the King's Bench, and the same Court became the Court of Appeal from Chancery in 1837, but in 1849 this Court of Appeal was abolished and a new Court of Error and Appeal was constituted to hear appeals from both the common-law Courts and the Court of Chancery. This

[1] 34 George III, C. 2
[2] 7 Wm. IV, C. 2.
[3] 12 Vic., C. 63.
[4] 12 Vic., C. 64.
[5] 34 George III, C. 2

new Court was much like the Court of Exchequer Chamber in England and consisted of all the Judges of the three Courts of first instance. In 1874[6] this Court was reconstituted and thereafter consisted of Judges permanently of the Court of Appeal. In 1881[7] the former system was abolished; all the Courts, Appeal, Queen's Bench, Chancery and Common Pleas, were united and consolidated into one Supreme Court of Judicature for Ontario, composed of two permanent divisions — [1] the Court of Appeal for Ontario [this has five Judges] and [2] the High Court of Justice for Ontario; and of this High Court of Justice there were the three divisions, *i. e.*, the Queen's Bench, Chancery and Common Pleas divisions. Recently another division has been added in the High Court, viz.: The Exchequer Division. Each of these divisions of the High Court of Justice has three Judges. Then there are inferior courts of limited jurisdiction, County Courts, Division Courts and Surrogate Courts in each county or union of counties.

3. *The Judges.*— Judges of the Supreme Court of Judicature and of the County Courts [these last preside also in the Division Courts] must be Barristers of ten years' standing — they are appointed by the Crown — the Dominion authorities — and for life. No layman has civil jurisdiction in Ontario. Small debts, etc., are sued in the Division Courts, presided over by the County Court Judge. The justice of the peace has criminal jurisdiction only, *i. e.*, to investigate alleged cases of crime, etc.

4. *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 High Court and County Courts the keynote is to be found in two of the Consolidated Rules: "The Court or a Judge may at any time amend any defect or error in any

[6] 37 Vic., C. 7.
[7] 44 Vic., C. 5.

proceedings; and all such amendments may be made as are necessary for the advancement of justice, determining the real matter in dispute and best calculated to secure the giving of judgment according to the very right and justice of the case." "The Court or a Judge may enlarge or abridge the time appointed by these rules or any rules relating to time or fixed by any order for doing any act or taking any proceeding upon such terms as may seem just; and such enlargement may be ordered although the application is not made until after the expiration of the time appointed or allowed." In the High 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, 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, crim. con., etc., 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. The 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 a Divisional Court, composed of three Judges of the High Court. The Divisional Court may order a new trial or direct the judgment to be entered which should have been entered. A further appeal in some cases lies to the Court of Appeal, *i. e.*, the other division of the Supreme Court of Judicature — five Judges hear this appeal. In some cases instead of appealing to the Divisional the parties by consent or by order appeal direct to the Court of Appeal. All these Appellate Courts sit at Osgoode Hall, Toronto. 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, is to the King in his 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.

5. *Costs.*— In the High 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 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.

6. *Volume of Appellate Business.*—In 1908, 1,153 cases were tried by the High Court, 180 of these were appealed to the Divisional Court and 130 dismissed, 37 allowed, 10 varied and 2 still undisposed of. The appeals direct from trial to the Court of Appeal were 62, 28 were dismissed, 14 allowed, 8 varied, 12 remained undisposed of. Of all the cases in the Divisional Court, 544 in all, including the 180 from trials, only 43 appeals to the Court of Appeal, of which 23 were dismissed, 11 allowed, 3 varied. The above figures are derived from the report of the Inspector of Legal Offices. From the Court of Appeal to the Supreme Court at Ottawa in 1908 are reported in the Supreme Court Reports, 9 cases, 7 dismissed, 2 allowed [there may be, no doubt are, some cases not reported, but very few]. In the Privy Council in 1908 are reported 6 appeals from the Court of Appeal, of which

5 were all allowed and 1 dismissed; there was also an appeal from the Supreme Court in an Ontario case which was allowed. From issue of the writ of summons to the final disposition by the Privy Council there is no need for two years to elapse.

7. *Criminal Procedure.*—At the conquest of Canada by the British, 1759-60, the English Criminal Law was introduced by the conquerors, although 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 except as modfied by Provincial Statutes—and these Statutes in general closely followed the legislation in the mother country. This 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 that of 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 had become Prime Minister of Canada, brought about a codification of Criminal Law and pro-

cedure. 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 character 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.

Cases triable before Justices of the Peace as for example (§ 583), resisting the execution of certain warrants, (§ 584) persuading or assisting an enlisted man to desert, (§ 104) challenging to fight a prize-fight or (§ 105) fighting one, or (§ 106) being present thereat, (§ 118) carrying pistols, (§ 119) selling pistols or air guns to minors under 16, (§ 122) pointing pistols, (§ 374) stealing shrubs of small value, (§ 385) injuring Indian graves, (§ 431) buying junk from children under 16, etc., etc.

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 short-hand 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 no case is made out, he discharges the prisoner, but the accused may demand that he (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 High Court (Supreme Court of the Province) 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 years' standing.

The High Court can try any indictable offence: the Sessions cannot try treason and treasonable offences, taking, etc., oaths to commit crime, 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 commital 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 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 (without 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 Court of Appeal, or the Judge may do that *proprio motu*. The Court of Appeal 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.

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