

The "Report on Prosecution" in the Light of Canadian Practice

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THE "REPORT ON PROSECUTION" IN THE LIGHT OF CANADIAN PRACTICE

I HAVE been asked to write an article on the Fourth Report of the National Commission on Law Observance and Enforcement, that on Prosecution, in the light of Canadian Practice: and as an honorary member of the American Bar Association and of State Bar Associations from Maine and New York to Nebraska, and from Wisconsin and Michigan to Missouri, I gladly assent.

It is to be emphatically and plainly stated and to be understood throughout, that I have no spark of missionary spirit—I have no desire or intention to laud Canadian methods or to criticize those of the United States. All free peoples have the institutions they judge to be best for them; and, while I am confident that Canadian institutions are best for Canadians, I do not say or suggest that they would be best for Americans; that is for Americans themselves to decide, and they need no assistance from me. Moreover, while I have for many years visited American Bar Associations and have a fair knowledge of American Law and Practice, I take practically all my facts as to the United States from this official Report without criticism or qualification.

In considering Canadian institutions, the opinion very general in the United States that Canada is a "Colony of England" governed from across the Atlantic must be laid aside. Canada no more "belongs to," or is "governed by" England, than England belongs to, or is governed by Canada: both are self-governing Nations in the British Commonwealth of Nations or British Empire; both having the same King who reigns but does not rule, the ruling being done by those to whom it belongs, the People of each Nation. And, while like the Thirteen Colonies the English Law and Practice were taken over by the greater part of Canada—the Criminal Law and Practice by all of Canada—the development and present state of Law and Practice are due wholly to Canadian effort. It will be impossible to deal with all the Provinces of Canada, and unless otherwise stated I treat only of my own Province, Ontario, formerly Upper Canada.

This Report made by a Commission appointed by the President and composed of gentlemen of the highest qualifications as to scholarship, experience, ability and character—with the Chairman and some others of whom I am proud to claim personal friendship—has attracted great public attention and created no little public alarm. The facts disclosed were to a certain extent common property among members of the legal profession: but the faults and their causes were not generally known to the people, and they are undoubtedly startling.

The first matter calling for adverse comment by the Commission is the Prosecuting Attorney's office.

The Prosecuting Attorney, by whatever name he is called, is, in the State, an elective officer whose "position is elective for a short term"; and it is thought that "very likely in our democratic polity, the position may remain elective for short terms in order to make one upon whom so much depends amenable to public opinion." But it is considered that, sooner or later, responsibility for good government must be concentrated and "control over prosecutions" vested in "a central responsible office beyond the reach of local politics." As things are, "criminal justice and local politics have an intimate connection * * * notoriously this connection * * * is the bane of prosecution * * *." So with this "system of prosecutors elected for short terms * * * it has happened frequently that the Prosecuting Attorney devotes himself to the political side and sensational investigatory functions of his office * * *."¹ The evil of the office being a political office and its incumbent being "in politics" is dwelt upon again and again, and it is part of the Second of the formal Recommendations that there should be "Better provision for the selection and tenure of prosecutors in the States."

When, following the passage at Westminster of the Canada or Constitutional Act of 1791, 31 George III, cap. 31, Upper Canada came into existence as a separate political

¹ Of course, it is not said or suggested by the Commission that the Attorney should not personally conduct "sensational" investigations or prosecutions. At least two Prosecuting Attorneys of the highest character and capacity are known to have become Governors of their State and one of them (as I knew, *ex relatione ipsiusmet*) would but for the stubbornness of one man, have been his Party's candidate for the Presidency, largely by reason of their success in "sensational" prosecutions.

entity, she was by virtue of the Royal Proclamation of 1763 under the Criminal Law of England (slightly modified by Provincial legislation of the former Province of Quebec): by that Act, she was made free to select or make her own law through her own legislature; and, to make assurance doubly sure, she passed an Act in 1800, explicitly adopting the English Criminal Law and Practice. There were two sets of Courts which in practice tried criminal cases—the one permanent, and the other transitory. In each District (afterwards each County or Union of Counties), there was a Court of Quarter Sessions presided over by the Justices of the Peace which met four times each year and tried cases with a jury: then there was a Court of Oyer and Terminer and General Goal Delivery constituted from time to time, generally twice a year, for a particular District, by Commission in the King's name under the Great Seal of the Province. While the former Court had theoretically jurisdiction in all felonies, as well as in all misdemeanors, in practice it did not try capital felonies: the latter Court had full jurisdiction. The general practice in both courts was by Indictment—the Information *Ex Officio* was seldom used and has long been obsolete. As in England, there was an occasional Trial at Bar before the Judges of the Court of King's Bench with a jury but that has not been seen for over a century.

Taking first the Court of Oyer and Terminer, generally called the Assizes, the Commissioner who presided was always a Judge of the Court of King's (or Queen's) Bench after its creation in 1794; or, after the creation of the Court of Common Pleas in 1849 he might be a Judge of that Court.

While, theoretically, the English practice of the Private Prosecutor conducting the prosecutions was taken over, I can find no instance of any prosecution in these Courts of Oyer and Terminer being conducted in early times by anyone but the Attorney General or Solicitor General. It may be, indeed, that these officers in this way were able by the fees paid, by the Crown, small as they were, to eke out their pitifully inadequate salaries. When the work had grown to dimensions beyond the power of these officers, it was the custom to retain some Member of the Bar to prosecute for the Crown, the Attorney General and Solicitor General still

taking some cases but fewer and fewer as time went by. The office of Solicitor General disappeared on the formation in 1867 of the Dominion of Canada with the Province of Ontario, one of the Provinces (corresponding to States of the Union)—and the first Attorney General of the Province, the Honourable John Sandfield Macdonald, was the last Attorney General to prosecute in person. For more than half a century, all criminal prosecutions at the “Assizes” have been conducted by Counsel retained for the Crown by the Attorney General—all prosecutions in this or any Court are Crown and not private prosecutions. It is rare that any Counsel is retained for the “Assizes” in more than one County for any year—and while the Counsel is retained by a Minister of a particular political party, and usually as a little political patronage, there has never been so much as a whisper or hint from accused, Counsel for the defence, newspaper, or member of the public that politics entered into a prosecution or *nolle prosequi*.²

In the Inferior Court, the Court of Quarter Sessions (now called “General Sessions”) of the Peace, matters were long in the same unsatisfactory condition as in the like Court in England—the complainant or his Counsel conducted the prosecution. The Indictment, indeed, might be and in practice generally was drawn up for a small fee by the Clerk of the Peace who was the Clerk of the Magistrates in Quarter Sessions. As early as the first quarter of the last century, it was urged by some,³ that there should be a permanent officer appointed for each County to conduct criminal prosecutions in the local Courts. The agitation was fruitless for many years; but at length in 1857, the Parliament of the Province of Canada took action—the former Provinces of Upper Canada and Lower Canada had been united in 1841, to form the Province of Canada, a condition which continued until the formation of the Dominion of Canada in 1867,

² The old practice of giving a Superior Court Judge when he was going on Nisi Prius Circuit for Civil cases, a Commission of Oyer and Terminer and General Goal Delivery to try Criminal cases also, has long been effete: and the Superior Court Judge now tries such cases like Civil cases under his Commission as Justice of the Supreme Court.

³ Amongst them, Chief Justice William Dummer Powell, a native of Boston, who had been the First Judge at Detroit.

when the two former Provinces resumed their separate political existence under the names, Ontario and Quebec.

The Act of 1857, 20 Vict. cap. 59 (Can.), provided for a Barrister of at least three years' standing residence in the County being appointed by the Governor, County Attorney in each County—the Clerk of the Peace might be appointed—the tenure of the office being during pleasure. He was not by himself or partner to act directly or indirectly for anyone accused of crime: he was to receive all Informations, to examine and collect evidence, to draw and prosecute Indictments, and while where the act or omission complained of was rather a private injury than a public offence, private prosecution was allowable, the County Attorney was to watch it and if necessary take it into his own hands. He was to prepare cases for the Court of Assize, and unless the Crown was represented by Attorney-General, Solicitor-General or other Counsel, he was to conduct the prosecutions there (other duties were prescribed not of importance here). This is substantially the situation at the present time.

A County Crown Attorney is appointed for each County or Union of Counties.⁴ The office of County Crown Attorney is a political appointment, made by the Government in power; but the appointee at once ceases to be a politician. It would be an intolerable scandal for an officer of His Majesty in such a capacity to act the partisan—"it is not done." While some accused of crime in Ontario as elsewhere are heard to complain of persecution—for

"No rogue e'er felt the halter draw
With good opinion of the law"—

there never has, so far as I can discover, been any suggestion that politics entered into the proceedings, and I hesitate to

⁴ Nominally by the Lieutenant-Governor, who is in his Province, the personal representative of His Majesty, but actually by the Government responsible for that as for every other act to the Representatives of the People in the Legislature. Our Constitution bristles with camouflage of this kind, keeping up the old forms which once had substance.

The Lieutenant-Governor, a century ago, did actually govern; now he "signs on the dotted line," and his office is "*lucus a non lucendo*"—he is called "Lieutenant-Governor" because he is not the Lieutenant of any Governor and he does not govern.

think what would happen to a local politician who should venture to interfere.

And there is no glory to be won by this officer in his prosecutions; all of any importance are conducted by Counsel temporarily and *pro hoc vice*, retained by the Crown; sometimes, indeed, Special Counsel is sent to conduct important cases at the Sessions.⁵

The tenure of office is "during pleasure" but in practice is for life if the incumbent conducts himself properly.⁶ What has been said of the County Attorney applies, *mutatis mutandis*, to his assistants, thus providing for the desiderated "permanence and continuity * * * of the organization of which the Prosecuting Attorney is the head," and thus answering the remainder of the Second formal "Recommendation."

Our system makes practically impossible the shocking occurrences which the Report calls "things to be read every day in the press," that is, "that a Judge has 'scored' a District Attorney or a Prosecutor has denounced the laxity of a Judge."

Our Judges are appointed nominally by the Governor-General of the Dominion, in fact by the Government in power⁷—and for life, not being removable except on the Address of both Houses of Parliament. The appointment is now political but the appointee drops his politics when appointed.⁸ In our practice, the Judge at the trial has no right to rebuke Counsel for his conduct of a case—an Appellate Court of which I was a member has within the year made it quite plain that the trial Judge has nothing to say as to what witnesses are to be called,⁹ and has no right to

⁵ The Sessions have been for many years presided over by the County Judge who must have been a Barrister of at least seven years' standing when appointed. The Justices of the Peace, if any of them ever appears, are mere figure-heads—another instance of camouflage.

⁶ The only one that I know of that was superseded, made himself offensive by blatant public advocacy of Annexation.

⁷ Another instance of our camouflage.

⁸ Two Judges have in our Province lost their office by meddling in politics but that was when we were the Province of Upper Canada, and more than a century ago, and no whisper has been heard of judicial politics since.

⁹ The difference between the Canadian Practice and that in an American State may well be considered to result from the different manner of providing for the responsibility of public officers to the people. In most States of the Union—at least from about the fourth decade of the last century—the system

criticize Counsel as to his conduct of a case—he is a Judge and must adjudicate on the evidence given by the witnesses Counsel considers it proper to call—he is not a Prosecutor.

In our practice the Judge, as in the United States Federal Court, has the right—it may sometimes be a duty—to comment upon and state his opinion as to the facts, so long as he makes it perfectly clear that the jury is not bound by his opinion but must determine the facts upon their own views of the evidence.

While this is not made any part of the formal recommendations, it is clear that the Commission was in accord with the views of several State Bars in "favor of this power of the Judge to discuss and concisely comment upon the facts and the evidence * * * and thus * * * influence the decision of the jury."

The unseemly spectacle said to be read of "every day in the press" of the United States of "a prosecutor" denouncing "the laxity of a Judge," has never been seen and cannot be conceived as happening in Canada—neither is in politics

has been direct responsibility, and as a consequence Judges and Prosecuting Attorneys are elected directly by the people and that for a limited time. It is only human that they being always in the public eye will prefer, if possible, to act in such a way as to attract public attention—"spectacularly," if you will—and be and remain popular. This is what is so much deprecated in the Report.

In Canada, we elect, from time to time, persons to represent the people. These Representatives are of course divided into political parties, and from the majority party, a Ministry is formed to carry on the administration of the country.

This Ministry is responsible for every act or omission to the Representatives; and when the Ministry fails to retain its majority it must retire and give way to a Ministry that can command a majority, or have an election of another Legislature. We have no "Constitutional Limitations," and can have a General Election at any time.

The Ministry, in fact, appoints every officer, the Dominion Ministry, the Judges, and the Provincial Ministry, the Prosecuting Attorneys; and these Ministries are responsible to the Representatives for these as for all other acts. The appointments are for life, subject to removal for cause, and the appointees cease at once to be politicians: the Judges have not even a vote. So far is the insistence upon the administration of public affairs upon non-political lines extended, that a very prominent Minister in Ontario was relieved of his office in the last Administration for endeavoring to make votes for his party, in his dealing with a certain charitable fund. This, the Prime Minister denounced in no uncertain terms as wholly improper. Every country has the government it desires—really *desires*, not simply effects to desire.

The statement that a Trial Judge has no right to criticize Counsel as to his calling or omitting to call witnesses is general, as is the absence of right on the part of the Judge to call a witness in a Civil case—he may, of course, *sua sponte* recall any witness already called even over the objection of Counsel. In a Criminal case, the Judge may in theory call a witness, but I have never known this to be done.

and neither can gain any advantage by commenting on the conduct of the other.

Apparently it is politics which is the cause of the much deprecated "typical American State polity, Police, Sheriff's office, Coroner's office, and Prosecuting Attorney's office * * * wholly independent, each unwilling to aid the other as a rival candidate for publicity." With us, the Sheriff is appointed for life by the Provincial Administration and takes no part in Criminal Prosecution—the same is true of the Coroner; and the local Police, while appointed by the Municipal Councils, or by their authority, are not politicians and always act in harmony with the County Crown Attorney's office—indeed, with the exception of the non-political Provincial Police under the Attorney-General's office, the Municipal Police Force is mainly relied upon for ferreting out crime.

The next point to be considered is the forum, i. e., Non-jury Trials. Several States have provided by legislation that charges of even serious crime may be tried by the Court without a Jury if the accused so elects. In practically all but the gravest cases, capital cases, the accused committed to trial with us must speedily be brought before the County Court Judge, the charge clearly stated to him and he be called upon to elect the form of trial, County Judge alone, or Jury. We have not gone so far as to allow a Non-jury Trial in capital cases—rightly or wrongly, we consider that no one shall be put to death by law unless and until he has pleaded guilty or twelve of his countrymen are convinced of his guilt. Moreover, notwithstanding the election of an accused to be tried by a Judge alone, the Attorney-General may require his guilt to be established before a Jury.

The system of Non-jury Trial has worked well in Canada, and much the greater number of criminal cases are disposed of in this way.

The Grand Jury has with us no such duty as that for which its retention is recommended by the Report, that is, "as a general investigating body for inquiring into the conduct of public officers."

Whether when a case is to be tried with a Jury, an Indictment by a Grand Jury should be necessary is to a great

degree a matter of detail, but considerations of time and expense do enter into the question. In some States, the necessity has been done away with in all cases, in some in all but the more or the most serious offences. With us, in theory, the Information *Ex Officio* still exists but it has long been obsolete. Until the Criminal Code of 1892, a prosecution before a Jury might be had on the Presentment of a Coroner's Jury without an Indictment;¹⁰ but since that time an Indictment has always been necessary. While there have been opinions expressed by several competent to judge, that a simple Information by the Crown should be substituted for an Indictment, so far Parliament has not acted in that sense, and there is no Canadian experience to look to.

The system of "Public Defender" paid out of public funds and elected, the Commission is "not prepared to recommend * * * generally;" and "if the criminal bar were made what it ought to be and the Prosecutor's office were properly organized, probably no public defender would be required."

While occasionally a voice is raised in Canada for the Public Defender System, we have not, so far, adopted or even seriously considered its introduction.¹¹ Possibly the thought that no such officer is necessary is due to the two circumstances contra-indicating such necessity according to the Commission, that is the Criminal Bar being made as it ought to be and a proper organization of the Prosecutor's office.

As to the latter, I have already dealt with our system—as to the former, it is said that "most lawyers of standing * * * avoid practice in the criminal courts * * * as a result the criminal courts in our cities are largely without * * * competent and well-educated prosecutors and defenders."¹²

¹⁰ The practice was not approved or generally followed. I pursued that course only once in a somewhat long and active practice in the service of the Crown: I never knew of any other instance.

¹¹ Of course, a Public Defender would be appointed by the Government of the Province, and *pro vita aut culpa*. We do not believe in the election for life or for a term of any such officers.

¹² One of the arguments adduced against the Public Defender System is that it should be "the duty of the Prosecuting Attorney to consider the interests of the accused as involved in the interests of the State." This is our theory. It is the bounden duty of the investigating and prosecuting officer to bring out *all* the facts, whether favorable or unfavorable to the accused.

This is not the case in my Province, or, as I believe, in any Province of Canada. No lawyer of the highest standing considers it beneath him to take a part in criminal prosecutions, prosecuting or defending. I have never but once known of a refusal to accept a brief in a criminal case, and that was on personal grounds; and our Barristers, often King's Counsel of the highest standing, are constantly seen in criminal trials. I have never known but one of high standing "specializing" in Criminal Law.

Apparently much of the allegedly unsatisfactory condition of the practitioners in the Criminal Courts is considered to be due to the organization of the Bar. There is in this regard "a heavy responsibility upon the leaders of the profession and upon Bar Associations to bring about and maintain adequate standards of admission, of competency and of conduct." Unfortunately, while "Bar Associations grew up in the latter part of the nineteenth century * * * except in a few States, they are voluntary associations and have little or no hold on the habitual practitioners in criminal cases." In the Province of Upper Canada, now Ontario, in 1797, a Society called then as now "The Law Society of Upper Canada" was provided for by statute to consist of the existing practitioners of law: to the governing body, the Benchers, of this Society was and is entrusted the duty of regulating admission to the Bar. The Benchers prescribe the qualifications for the admission of Students-at-law and the curriculum of studies, appoint examiners, and "Call to the Bar."¹³ All Barristers are Members of the Law Society and subject to its jurisdiction exercised through the Benchers. Professional misconduct is visited by suspension or expulsion, a discipline

¹³ At the present time the equivalent of Senior University matriculation is required of the applicant to be admitted as a student. He must be a student for five years (three, if a graduate in Arts or Law) and attend at least two years the lectures in the Law Society's Law School at Osgoode Hall, Toronto.

The Solicitor (formerly Attorney) who cannot, as such, act as Counsel in Court, has a somewhat similar course, on the satisfactory completion of which the Law Society gives him a Certificate of Fitness, upon the presentation of which to a Judge of the Supreme Court he is "Admitted." Most practitioners are both Barristers and Solicitors: a few are only Solicitors, and still fewer only Barristers.

not infrequently exercised.^{13a} It is usual for a Judge if he become cognizant of improper conduct in a Barrister to "bring it to the attention of the Law Society."¹⁴

We consider that we have reasonably well illustrated the wisdom of the Third formal Recommendation of the Commission which calls for "Such an organization of the Legal Profession in each State as shall insure competency, character, and discipline among those who are engaged in the Criminal Court.

One, the Fifth, Recommendation is novel.

It is said that "Police and prosecutors feel strongly that they ought to be able to interrogate suspected and accused persons, and extra-legal examinations by officials, and extra-legal examinations by prosecuting attorneys go on continually * * *," thus leading to "the abuses of the third degree" and tempting "criminal investigators and prosecutors constantly to unlawful means of enforcing the law."

It is recommended that there should be made "Provision for legal interrogation of accused persons * * * before a magistrate, where counsel could be present to protect the party's rights," and "the evidence could be taken down with guarantees of accuracy * * *."

We have no experience of such a system and cannot assist in this regard.¹⁵

^{13a} The Benchers of the Law Society of upper Canada keep a vigilant eye on the conduct of the members—all Barristers practicing must be members: just before the proof of this article came into my hands, the Benchers offered a reward of \$1,000 for the apprehension, etc., of a Barrister, who had appropriated a client's money and disappeared.

¹⁴ The success of the method of a Profession being made self governing in the case of lawyers has induced the Legislature to grant the like power to and require the same service of the Medical Men, the Dentists, the Pharmacists, the Land Surveyors, who have been made responsible for qualifications and conduct of their members. Other professions have much the same system.

¹⁵ So far as I know such a practice has never been suggested in Canada—perhaps from the practical absence of the "third degree." In some half a century's experience in law, I have known of but two instances of abuse of interrogation by police. In one case, it helped to an acquittal, probably caused it. In the other, a British Columbia case, the Supreme Court of Canada ordered a new trial. Crown Prosecutors in Canada do not interrogate the accused. No doubt, as human nature is pretty much the same everywhere, there is an occasional undue excess in police examinations in Canada—this is, however, the exception, not the rule. Such a thing as physical violence is, I think, unknown; I have never heard of a case.

A cogent hint not resulting in formal Recommendation is found in the statement that the prohibition of any reference by Prosecutor or Judge to the failure of an accused on trial to testify "has come to be of little advantage to the innocent and a mere piece in the game of criminal justice * * *." The statement might from our experience have with justice been made more general. Our juries know that an accused may testify, and neither guilty nor innocent is at all advantaged by the omission of Counsel or Judge to tell them so.

But the rule is still retained, apparently because it is supposed "to do no harm."

It is probable that the Commission will make further Reports and Recommendations in respect to Criminal Prosecution. If so, no doubt the abolition of the perfectly idle distinction between Felony and Misdemeanor will be considered as well as what the non-expert considers the silly verbiage in Indictments still to be found in some jurisdictions, leading to the miscarriage of justice through technical errors or defects.

In 1892 when the only practical difference between a Felony and a Misdemeanor in Canada was that an accused on trial for a Misdemeanor might sit beside his Counsel in the well of the Court, while one charged with Felony had to sit in the Prisoner's Dock, our Canadian Parliament abolished the terminology and the distinction altogether—former Felonies and Misdemeanors are now all "Offences." At the same time, there were prescribed forms of Indictment which might be followed; and it would take more than "a Philadelphia Lawyer" to find a flaw in "The Jurors on their oath present that John Smith murdered Henry Jones at Toronto on July 3rd, 1931."¹⁶

¹⁶ Before the Criminal Code of 1892, I, as Defence Counsel, had an Indictment quashed for charging what was a Misdemeanor as done "feloniously"; and another for omitting the word "feloniously" in a charge of Felony—what perfect nonsense!

Of course the classical example of "error" is an Indictment which was held bad in Missouri for terminating "against the peace of State," instead of "against the peace of the State."

To conclude, our experience in Canada proves the wisdom of four out of five of the formal Recommendations—we can say nothing as to the Fifth.¹⁷

WILLIAM RENWICK RIDDELL.

Osgoode Hall, Toronto,
September 3rd, 1931.

¹⁷ Perhaps also the matter of the Jury might call for attention. The statement is made in the report of Mr. Bettman that "selections of Jurors itself means considerable itself in the way of detailed work for the Prosecuting Attorney, the Court, and the clerical department * * *."

I am confident that no Prosecuting Attorney in Ontario ever spent five minutes in the selection of jurors. I never in my personal experience, large as it has been, knew of it taking half an hour to get a jury sworn except once when by reason of special circumstances it took forty-seven minutes. I have heard it mentioned as an extraordinary circumstance that it had taken an hour and a half to get a jury. There, three persons were accused, who severed their defences and were represented by different counsel.

There is no questioning of a juryman in our practice. Prejudice must be proved, if at all, *aliunde*: I have never but once seen a "Challenge for Cause": if there is any real reason to suspect prejudice, the fact is mentioned to Crown Counsel and the person reported suspected is "excused," as of course.

"40 Wall Street,
New York,
Sept. 5, 1931.

The Honorable Mr. Justice William Renwick Riddell,
The Samoset,
Rockland Breakwater, Maine.

My dear Mr. Justice:—

I have read with much interest your article on the Report on Prosecution made by the National Commission on Law Observance and Enforcement, in the light of the Canadian practice. It is a very clear, very interesting statement, and emphasizes the difference between the criminal procedure which has grown up in this country and that in yours. You have adhered more closely to the English original, but we have struck out on different lines, and I regret to say have not improved the laws or practice of criminal procedure in so doing. I am returning the article, which, as I say, I think is most informing. . . .

With kindest regards, I am,

Yours faithfully, .

Geo. W. Wickersham."