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CRIMINAL PROCEDURE IN CANADA.¹

WILLIAM RENWICK RIDDELL.

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 modified 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 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 procedure. He received valuable assistance from lawyers on both sides of the House and the Criminal Code of 1892 became law. This with a few amendments made from time to time is still in force.

The distinction between felony and misdemeanor has been abolished, and offences which are the subject of indictment are "indictable offences." And 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 ad-

¹A paper prepared for the New York State Bar Association, January, 1912, at their request.

verse 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 (s. 104), challenging to fight a prize fight or (s. 105) fighting one or (s. 106) being present thereat (s. 118), carrying pistols (s. 119), selling pistols or air guns to minors under 16 (s. 122), pointing pistols (s. 374), stealing shrubs of small value (s. 385), injuring Indian graves (s. 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 producing any witness and having such evidence heard in his behalf as he can procure. All the depositions are taken down in shorthand or otherwise, and if in longhand, 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, who are generally barristers, are appointed for most cities and towns; 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 offense; 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 committal to gaol of any person charged with any offence which the Sessions could try, the Sheriff must notify the County Court Judge, who acts as Judge in the Sessions, and with as little delay as possible the accused is brought before the Judge. The Judge reads the depositions and tells the prisoner what he is charged with, and that he has the option of being tried forthwith before him without a jury or being tried by a jury. If the former course is chosen, a simple charge is drawn up, a day fixed for the trial and the case then disposed of.

If a jury be chosen, at the Sessions or the High Court (Assizes), a bill of indictment is laid before a Grand Jury (in Ontario of 13 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 offence, 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 indictments to be drawn up.

Upon a true bill being found, the accused is arraigned; if he pleads

"Not Guilty" the trial proceeds. He has 20 peremptory challenges in capital cases: 12 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 30 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 jurymen 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.