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JAMES H. DEWEESE ELECTED PRESIDENT OF NDAA; FRED E. INBAU RECEIVES "FURTHERANCE OF JUSTICE" AWARD

James H. DeWeese, Prosecuting Attorney of Miami County, Troy, Ohio, was elected President of the National District Attorneys' Association to succeed Patrick Brennan, Prosecuting Attorney of South Bend, Indiana. The following officers were also elected: *Executive Vice President,* Keith Mossman, Vinton, Iowa; *Treasurer,* Fred E. Sisk, Las Animas, Colorado; *Secretary,* Harry Ackerman, Tucson, Arizona; *Vice Presidents,* Garrett H. Byrne, Boston, Massachusetts; William F. Frye, Eugene, Oregon; Richard E. Gerstein, Miami, Florida; Albin P. Lassiter, Monroe, Louisiana; William B. McKesson, Los Angeles, California; Frank H. Newell, III, Towson, Maryland; George M. Scott, Minneapolis, Minnesota; William J. Raggio, Reno, Nevada; *Historian,* Emory L. Carlton, Tappahannock, Virginia; *Associate Member, Executive Committee,* Melvin G. Rueger, Cincinnati, Ohio.

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Fred E. Inbau, Professor of Law at Northwestern University, was chosen to receive the Furtherance of Justice Award for 1961. Professor Inbau is the fourth recipient of this award. Previous awards have been given to J. Edgar Hoover, Director of the F.B.I.; Frank S. Hogan, District Attorney of New York County; and Frank E. Moss, United States Senator from Utah, and two term president of NDAA. An embossed brass plaque was presented to Professor Inbau by President Patrick Brennan. The wording of the plaque is as follows:

> "Furtherance of Justice Award to Fred E. Inbau, Professor of criminal law, Northwestern University for his outstanding contributions, resourcefulness and originality as lecturer and author. He has rendered great service in enhancing the administration of criminal justice as director of Northwestern University's short courses and conferences for prosecuting attorneys, defense counsel, newsmen, police officials, judges and legislators. Presented at the 12th annual meeting at Portland, Oregon, on July 29, 1961."

PUBLIC SAFETY v. INDIVIDUAL CIVIL LIBERTIES: THE PROSECUTOR'S STAND

FRED E. INBAU

The author is Professor of Law at Northwestern University. This address was the keynote address at the 1961 Annual Conference of the National District Attorneys' Association in Portland, Oregon, July 26, 1961.

Today we are faced with a serious international threat to our national existence. This we all know and recognize; and we are taking reasonable and appropriate measures to guard against any Communist attack upon this country. We are also trying to hold back the threat to the security of the free world generally. What many of us don't realize, however, is that we are also faced with another serious threat to our public safety and security from another kind of enemy right within

our own borders—unorganized as well as organized criminals. Just yesterday the F.B.I. released a report which reveals that although the population in this country has increased 18% since 1950, the crime rate has increased 98%. Murder, rape, or assault to kill occurs every 3 minutes. A burglary is perpetrated every 39 seconds. Robberies and burglaries in 1960 were 18% higher than in 1959.

We are not only neglecting to take adequate measures against the criminal element; we are actually facilitating their activities in the form of what I wish to refer to as "turn 'em loose" court decisions and legislation. To be sure, such decisions and legislation are not avowedly for the purpose of lending aid and comfort to the criminal element, but the effect is the same. It is all being done in the name of "individual civil liberties."

Danger Signs in Supreme Court Decisions

What particularly disturbs me, and I am sure many of you, is the dangerous attitude that has been assumed by the United States Supreme Court. The Court has taken it upon itself, without constitutional authorization, to police the police. It has also functioned at times as a super-legislative body. Moreover, even as regards its constitutionally authorized judicial function, the Court has gone far beyond all reasonable bounds in imposing its own divided concepts of due process upon the states. It has also gone much too far as regards its concepts of admissibility of evidence in criminal prosecutions in the federal courts.

These are harsh words, I know. But the time has come for some plain speaking with respect to what has been going on in the field of criminal law.

I propose to demonstrate to you the validity of every statement I have just made. Before doing so, may I make it clear at the outset that I am not opposed to the Bill of Rights. I believe in the Bill of Rights, which is so often shaken in the face of some of us by flag-waving civil libertarians when these critical issues of criminal law administration are under discussion and debate. I believe in due process, equal protection, free speech, and all else. But I also believe that we should not be unmindful of what is contained in the Preamble to the Constitution itself. The Preamble states that the purpose of the Constitution was "to establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the Blessings of Liberty to ourselves and our Posterity."

The Exclusionary Rule

To illustrate what I have in mind, let me start off with a recent United States Supreme Court decision, *Mapp v. Ohio*,[1] which imposed the exclusionary rule upon all the states as a requirement of due process, whereas previously it was only a rule of evidence applicable in about half the states and in the federal courts also.

For many years the United States Supreme Court held that state courts and state legislatures were at full liberty to accept or reject the exclusionary rule with respect to evidence obtained as a result of unreasonable search and seizure. The Court said so as recently as 1949 in *Wolf v. Colorado*.[2] In that case the Court held that although the Fourth Amendment unreasonable search and seizure provision was applicable to the states through the Fourteenth Amendment, the admissibility of evidence thus seized was a matter for each state to decide. Now, this June, the Court holds that if a state admits such evidence it is a violation of due process! All states, therefore, must follow the exclusionary rule.

Some eminent jurists of the past, including Justice Benjamin Cardozo, at the time when he sat on the New York Court of Appeals, were opposed to the exclusionary rule. In his celebrated opinion in *People v. Defore*[3] Justice Cardozo gave some clear cut, sensible reasons why New York chose not to follow the exclusionary rule. He adhered to the view that relevant evidence should not be brushed aside and ignored solely because of the methods the police used to obtain it. The great scholar, Dean John Henry Wigmore, was opposed to the rule, and in his monumental treatise on Evidence he pointed out the historically unfounded judicial reasoning that was used in the first federal case to adopt the exclusionary rule.[4]

In any discussion of the pros and cons of the exclusionary rule, consideration should also be given to the fact that the free, law abiding countries of England and Canada have always admitted evidence even though it may have been unreasonably seized.

After all these years of a general recognition of the exclusionary rule as a rule of evidence only, and after it was for so long proclaimed to be such by the Supreme Court itself, the Court in *Mapp v. Ohio* suddenly labels the rule to be a require-

[1] 81 S.Ct. 1684 (1961).
[2] 338 U.S. 25 (1949).
[3] 242 N.Y. 13, 150 N.E. 585 (1926).
[4] See 8 Wigmore, Evidence § 2184 (1940).

ment of due process. Of little comfort is the fact that three of the nine justices (Frankfurter, Harlan, and Whittaker) adhered to the former viewpoint.

Why this change in the Court's attitude? The answer, in my opinion, is very simple. It's just another example of the Court's continuing efforts to police the police—and that is an executive, or at most a legislative function of government. It certainly is not the constitutional function of the judiciary.

One further word regarding *Mapp v. Ohio*, and this will be of concern to those of you who come from the states that have been admitting illegally seized evidence. What courts will decide whether the evidence has been unreasonably seized? Your state courts? And will their decisions be final? Or will the decisions be the subject of federal court review by an independent determination of unreasonableness? If the latter—and that has been the trend—you had better plan on enlarging your staff to keep up with the volume of business. And we'll need more federal judges. In fact, we'll need more justices on the Supreme Court itself.

Furthermore, you'll experience some real jolts if the same standards of "unreasonableness" are applied to your own cases as in many federal cases. You recall *Work v. United States*,[5] where looking into a narcotic peddler's garbage can was held to be an unreasonable search. There are also such cases as *Morrison v. United States*,[6] where the court suppressed as evidence the soiled handkerchief found in a sex pervert's shack, after it was pointed out by a child victim who led the police to the location and told them where they would find the handkerchief the offender used to clean himself off after the commission of his act. The Court held that the handkerchief was merely evidentiary material; that since it was not an instrument of the crime, or the fruits of the crime, or a weapon, or contraband, it was not subject to seizure.

CONFESSIONS

Another recent Supreme Court decision, *Culombe v. Connecticut*,[7] further illustrates the Court's growing assumption of power over the states and their courts and police. The facts of the case need not concern us now. What is important is the Court's pronouncement that if it finds a criminal confession has been coerced, the state court conviction will be reversed even though it is "convincingly supported by other evidence."

If the present trend continues, the time is not far off when the Court will impose upon the state courts—as a due process requirement—the same kind of rule that now prevails in the federal courts by reason of the *McNabb-Mallory* decisions.[8] As you know, those two cases hold that if a confession is obtained by federal officers during a period of unnecessary delay in taking the arrestee before a committing magistrate, the confession is not usable as evidence, regardless of how voluntary or trustworthy it may be.

Even before the Supreme Court gets around to doing that, however, some of what the Court has already said and done as regards the federal law enforcement officers will have "rubbed off" on the state courts, and they will establish similar rules even though they are not required to do so by any United States Supreme Court decision. As an example of that, there is the 1960 decision of the Michigan Supreme Court in *People v. Hamilton*,[9] in which the Michigan Court adopted the *McNabb-Mallory* rule. It did so of its own volition, since the rule has not thus far been labeled as a requirement of due process. So now, in Michigan, if there is a delay in taking an arrested person before a committing magistrate, and the court finds that the delay was for the purpose of interrogating the arrestee with a view to obtaining a confession if he happens to be guilty, the confession is inadmissible as evidence.

Let me give you another example of state court activity along a similar line. The New York Court of Appeals recently held in *People v. Waterman*,[10] that law enforcement officers have no right to interrogate anyone after he has been indicted—or, to put it another way, after the "formal commencement of the criminal action." The reasoning back of the decision appears in the following excerpt from the court's opinion:

> "An indictment is the 'first pleading on the part of the people' ... and marks the formal commencement of the criminal action against the defendant. Since the finding of the indictment presumably imports that the People have legally sufficient evidence of the defendant's guilt of the crime charged ... the necessities of

[5] 243 F.2d 660 (D.C. Cir. 1957).
[6] 262 F.2d 449 (D.C. Cir. 1958).
[7] 81 S.Ct. 1860 (1961).
[8] Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943).
[9] 357 Mich. 410, 102 N.W.2d 738 (1960).
[10] 9 N.Y.2d 561, 175 N.E.2d 445 (1961).

> appropriate police investigation 'to solve a crime, or even to absolve a suspect' cannot be urged as justification for any subsequent questioning of the defendant.... Any secret interrogation of the defendant, from and after the finding of the indictment, without the protection afforded by the presence of counsel, contravenes the basic dictates of fairness in the conduct of criminal causes and the fundamental rights of persons charged with crime."

If the Michigan Supreme Court adopts the same rule that the New York Court did in the *Waterman* case—and my guess is that it will—then the police of Michigan (or rather I should say, the people of Michigan) will be confronted with an intolerable situation. What the two rules put together will mean is this: after the judicial process has started there can be no interrogation of the accused; and after arrest there can be no interrogation of the arrestee, since he must be brought before a committing magistrate without unnecessary delay. In other words, police interrogations will be outlawed altogether.

The seriousness of this development can be fully appreciated only when consideration is given to the fact that under such restrictions most serious crimes will go unsolved, because the only way most of them can be solved is by the interrogation of persons under suspicion. This point I need not labor to you men. But it certainly needs hammering home to some judges and legislators.

I referred to the *Mallory* case earlier—the U. S. Supreme Court decision outlawing a confession obtained by federal officers during a delay in taking the arrestee before a federal commissioner for arraignment. I think you'll be interested in what Mallory, the rapist, did after the Supreme Court turned him loose. Shortly thereafter he assaulted the daughter of a woman who had befriended him. Later he was caught in Philadelphia while burglarizing the home of a woman who claimed he raped her. Mallory was convicted of burglary and aggravated assault.

Judicial Legislation

Earlier I referred to the Supreme Court's indulgence in judicial legislation. Let me illustrate what I had in mind.

In the famous (or infamous) case of *McNabb v. United States*,[11] you may recall that the Court relied upon an old federal statute which dealt with the arraignment of arrested persons, and the Court's opinion related how this statute was intended to guard against "the evil implication of secret interrogation of persons accused of crime." As a matter of fact the statutory provision had no such purpose back of it. It had been tacked onto an appropriation bill for the purpose of putting an end to a practice that existed about the 1890's whereby federal commissioners and marshalls were cheating the government in the matter of fees and mileage expense charges. That's why they were thereafter required to take an arrested person before the nearest magistrate. Moreover, there was no reference at all to the time when this was to be done. The Court filled that in.

Furthermore, in the *McNabb* case you will also recall how the Court erroneously assumed that the defendants had not been promptly arraigned. And even when that fact had been called to the court's attention in a petition for a rehearing, the petition was denied.

A further example of the Court's eagerness to ascribe to a statute a meaning which was not at all in the minds of the legislators concerns Section 605 of the Federal Communications Act. Section 605 was not aimed at law enforcement officers as a prohibition against wiretapping for law enforcement purposes. It was merely a 1934 re-enactment of a provision in the Radio Act of 1927, with an entirely different purpose in mind.

Another example of the Court's propensity to distort the meaning and purpose of a statutory provision in order to reach a result commensurate with the Court's own philosophy is *Carroll v. United States*.[12] That case held that the government had no right to appeal from a trial court order suppressing evidence on the ground of an unreasonable search and seizure. It viewed appeals by the Government to be "unusual, exceptional, not favored." And this is a case where it seems clear to many, including the Court of Appeals, that the Congress wanted to confer that right upon the government.

Legislative Restrictions

Not only have the courts been unduly restricting the police and prosecution, many legislatures have been doing the same thing. In Illinois we now have a statute prohibiting any kind of electronic eavesdropping over the telephone, on the street, or anywhere else.[13] And mind you, this was not a piece of legislation engineered by the hoodlum element of Illinois; it was the work of some starry-eyed civil libertarians.

[11] *Supra* note 8.

[12] 354 U.S. 448 (1957).

[13] Ill. Rev. Stat. ch. 38, §§ 14-1 - 14-7 (1961).

Anyone with law enforcement experience in metropolitan areas, or in the federal government, knows all too well that wiretapping and other electronic eavesdropping activities are indispensible to effective law enforcement. To be sure, there must be controls upon the police to prevent abuses. But there are all too many legislators and others who will not lift their heads out of the sand and face up to the practical realities of law enforcement.

I could go on with additional illustrations, but these few should serve to permit me to draw some conclusions for your consideration.

Conclusion

We can't have "domestic tranquility" and "promote the general welfare" as prescribed in the Preamble to the Constitution when all the concern is upon "individual civil liberties."

Individual rights and liberties cannot exist in a vacuum. Alongside of them we must have a stable society, a safe society; otherwise there will be no medium in which to exercise such rights and liberties. To have "rights" without safety of life, limb, and property is a meaningless thing. Individual civil liberties, considered apart from their relationship to public safety and security, are like labels on empty bottles.

This truism that we can't have unbridled individual liberties and at the same time have a safe, stable society is the first message that we must get across to the public.

I am fed up with such platitudes as "the right to be let alone"—when it is used as though it were an unconditional right. Sure, as individuals, we all would like to be let alone. You and I at times would like to do as we please. If we are in a hurry to go somewhere in our car, we might want to run a red light or to exceed the speed limit and be let alone after we do it. The burglar, the robber, the rapist would also like to be let alone. But in the interest of public safety and public welfare, there must be reasonable restraints upon the conduct and activities of all of us.

And talking about wants, let us have these wants alongside the want to be let alone. I want to be able to walk along the street after dark and be relatively secure that someone will not crack my skull for the money in my wallet. I want my daughter to be able to walk home after dark and be relatively free from being dragged into an alley and raped. I want property owners to be reasonably free from racketeers, and from the thefts committed by burglars, robbers, and others.

The public must be made aware of the practicalities of law enforcement. They must be made to understand that law enforcement officers cannot offer the required protection demanded of them from within the strait-jacket placed upon them by present day court and legislative restrictions.

THE CAREER PROSECUTOR OF CANADA

HENRY H. BULL

The author was recently appointed Crown Attorney of the City of Toronto at County of York, Toronto, Ontario, Canada. He served as Assistant Crown Attorney in Toronto at the time this article was prepared.

This article is from an address given at the Short Course for Prosecuting Attorneys at the Northwestern University School of Law on July 31, 1961.

Not every prosecutor in Canada is a career man. There are those who look upon the position as a temporary training ground, prolific of experience—as a transitory step in a broader legal career—as a part-time adjunct to bolster an inadequate practice—or as a refuge from the rigours of a competitive profession. There are those, however, of whom I like to count myself as one, who with a sense of dedication consider this their avocation, who bridle at the question so often asked by the Perry Masons acting for the defence "when are you going to quit prosecuting and get on the right side?" Never, in nearly a quarter of a century, has it ever occurred to me that I was on the wrong side.

In making comparisons of the Canadian and American prosecutors, it must not be taken that I make any claim to the superiority of the Canadian system or that I am critical of any other. Any partiality I may show is that natural preference that one has for what is familiar to him and what is his own.

It might perhaps have been expected that the difference between us would be obvious—that the image of the Canadian prosecutor was an integral

part of the picture of rough and ready barrel-head justice being meted out to parka-ed and muk luk-ed Eskimos by an itinerant magistrate who, while flanked by red-coated Mounties, raps for order on a cask of whale blubber with a frozen seal fin.

On the contrary, it is the similarities which are obvious and the differences which are difficult of discernment.

An Historical Analysis of the Administration of Justice in Canada

similarities with the united states

The judge, the jury, the witness, the accused and his counsel, the prosecutor, each plays his part and follows the same script that, making allowance for the peculiarities of local custom, you are so familiar with at home.

There you recognize the same methods of proof, the same rules of evidence, the same trial technique, the same presumption of innocence, and as you heard the judge's rulings solemnly sounding through the courtroom like an echo from your own, you would realize that this too was a court not only of law, but of justice.

This similarity is founded in history—founded in the common heritage we share of the English Common Law, with its beginnings in the customs and practices of the fields and farms and roads and villages of our Anglo-Saxon and Norman forebears, who realized that freedom is not so much a matter of the formulation of sonorous abstractions, as of protecting the rights of each single person in the state, and that the test of freedom lies in the rights of the individual and in the readiness of the law to uphold them.

This similarity is also founded in the constant progress towards the democratic ideal.

Four centuries after Magna Carta this concept was brought to these shores by the first settlers who, with their successors, imbued with a zeal for freedom, and endowed with pioneer energy forged it into the guarantees that are commonplace today and are common to our two nations: the maintenance of right—the liberty of the individual—the dignity of man.

differences with the united states

But, as you sat in that courtroom and watched the prosecutor, the Crown Attorney, in traditional gown of barrister's stuff or Q.C.'s silk, ply his trade before the judge and jury, examining and cross-examining, objecting, submitting, pleading, arguing very much as you would, you might ask yourself "Are we the same? Does that title, Crown Attorney, have a significance I cannot see? Do those black robes discreetly conceal a subtle difference, a difference which is a reflection of the fundamental difference of the political philosophy of our two countries?"

Although we can be said to be equally successful in arriving at our present stage in the development of democracy, we have done so by means that are remarkably dissimilar. Let us explore for a moment the paths of our constitutional histories.

The birth of the American nation was accompanied by a drastic and complete severance with the Mother Country. The basic principles of its system of government, conceived in a spirit of national independence, were firmly established by the end of the 18th century and reflected the political philosophy of the era. American institutions rest on the assumption that the whole job of representing the will of the people should not be entrusted to one authority, that the essence of good government lies in the division of power by a system of checks and balances.

On the other hand, the transition of Canada from colony to nation has been a much more gradual process of constitutional evolution. It was not until 1867 that the Dominion of Canada as a federation of provinces was created. Even then it did not achieve sovereign statehood. Its foreign affairs were still controlled exclusively by Britain, and even in its domestic matters it was not entirely free. The evolution continued, however, until independent national status was recognized at the end of the First World War and ultimately confirmed by the Statute of Westminster in 1931.

Canada now is a completely antonomous constitutional monarchy, holding equal status with Great Britain and the other nations in the British Commonwealth.

Her political system has been fashioned in the main after the British constitutional tradition as it had developed through the 18th century and on into the 19th. There Parliament had succeeded in taking over most of the powers of the King. Cabinets made up of elected representatives of the people and responsible to Parliament gained complete control over the executive branch of government, and in addition, as leaders of an increasingly well disciplined party majority, they were able to direct the legislative activities of Parliament.

This constitutional tradition came to be based on not the separation but the fusion of powers.

Instead of balancing power against power, democracy was achieved by making the Prime Minister and his Cabinet fully responsible for carrying out the will of the electorate. All of which being done in the name of the Crown.

It is in this context that we should once more look at the black-robed figure of the prosecutor in the courtroom. But before we strip him of his trappings, let us take another brief glance into history to help us better understand what we shall see.

At the end of the American War of Independence, only a generation after the conquest of New France by the British and the establishment of the rule of law for both victor and vanquished, there came the impact of the migration of thousands of Loyalists from south of the border. Settling in the Maritimes along the Atlantic Coast and in the central region now known as Ontario, but then called Upper Canada, they brought with them not only their original English heritage but the heritage of a hundred eighty years of development in the American colonies towards freedom and liberty. They shared the same zeal as the framers of the Declaration of Independence for the ideals to be desired, but differed violently as to the manner in which these ideals were to be attained. They were not prepared to abandon the institution of the monarchy and preferred to achieve their ends by constitutional means.

Whether they came from the rugged frontier with its pioneer ways or from the older colonies where life had been settled and refined if not effete, they all had this in common: they had been prepared to stand by their principles, many of them to fight for them, and, stripped of their homes, their goods, their wealth, were prepared to make a new start in a new and unknown land. With none of the facilities, comforts, or amenities to which many of them had been accustomed, they began with axe and adze to hew a home for themselves out of the wilderness.

But more important than the homes they built was the framework of government they erected. English Civil Law and trial by jury were quickly established, and the foundations were soon laid for representative and local government.

It has been said by some that this early establishment of local government by the Loyalists in central and eastern Canada may be one reason why those pioneer provinces differed in many respects from the frontier areas of the United States.

The bitterness engendered by the war made them look with suspicion on the institutions created by the American Constitution, and they therefore leaned heavily towards the basic principles then extant in England.

Having seen an electorate become what they considered a band of mutinous rebels, they were slow to place the power directly in the hands of the majority. It took them half a century to fully accomplish representative and responsible government. They shied away from the elective process for any office, judicial or administrative, and reserved it only for their representatives in the legislatures and municipal councils.

It was in this climate that the young country grew, a climate modified by the influence of the War of 1812, which nurtured a sense of national identity; by the influence of the non-Loyalist immigrants from south of the border with their leanings towards republican and more democratic forms of government; and by the influence of the arrival of tens of thousands of immigrants from the British Isles with their strong feelings for monarchy.

A NEED FOR A COUNTY "PROSECUTOR"

By 1857, ten years before Confederation, the growing population, with the concomittant growing business of the criminal courts, was pushing settlement and civilization farther and farther into the remoter parts of the country, away from the shoreline of the natural inland waterway of the Great Lakes. Means of travel and communication were still in an elementary state. They consisted for the most part of water, horse, and stage coach; the railroad just completed between Toronto and Montreal was as yet of little value in reaching the hinterland. Roads were either nonexistant or primitive and often impassable, due to lack of development and to the rigours of the climate.

All of this made it increasingly difficult for the law officers of the Crown—the Attorney-General and his agents, located at the central seat of government—to attend effectively to their duties with respect to the administration of justice in the remoter parts of the province.

Provision was therefore made for the appointment of a Crown Attorney for each county in the province to aid in the local administration of justice. The powers and duties then assigned to him have remained substantially the same until the present day.

The office was indigenous to Ontario. There was

and still is in England no similar provision for a uniform system of permanent officials appointed for the local administration of justice. The law officers of the Crown—the Attorney-General, the Director of Public Prosecutions (an office which post dates the office of Crown Attorney), and Crown counsel appointed ad hoc for a particular place, a particular sitting, or a particular prosecution—perform some of the functions of a Crown Attorney but not all. There is still a considerable amount of resistance in England to the idea of professional prosecutors, whether they be temporary or permanent.

In the rest of Canada today the other provinces have either followed the pattern created in Ontario or have developed systems of their own adapted to their local requirements.

THE NORTHWEST MOUNTED POLICE

This force, originally known as the North West Mounted Police, was created in 1873 to forestall any trouble in our West with the Indians and with the lawlessness that you were experiencing on your own frontiers. We were fortunate that the first settlers, being primarily interested in fur-trading, had established and maintained relatively amicable relationships with the Indians for economic reasons. The population was sparse and the infiltration of new-comers gradual, with no great trek or mass movement towards the mountains and the West Coast. Canada was spared a civil war of her own, and the upheaval caused by yours was not felt to any great degree north of the border.

The Mounted Police, a thoroughly trained, semi-military force under rigid discipline, early earned the respect of settler and Indian alike with a reputation for effectiveness, impartial fairness, and above all, for incorruptible integrity.

This reputation they still enjoy today. Their operations have been extended from the original policing of our western frontiers to those of a national police force. As such they concentrate their efforts on such matters as national security, immigration, customs and excise, revenue and coinage offences, and the narcotic drug traffic.

In addition they operate under contract in eight of the ten provinces as provincial police (Ontario and Quebec have their own forces), policing generally wherever there are no, or inadequate, local or municipal forces to do so. In the smaller communities and sparsely settled areas where there is no full time prosecutor, they perform his functions with respect to minor offences, which make up the vast bulk of the work of the inferior courts. In the remote northern areas they also act as justices of the peace.

The familiar red-coated figure of the Mountie not only has become the national trade mark of Canada to the rest of the world, but also at home is a symbol of law and order contributing in no small measure to the respect in which the law is generally held.

THE CRIMINAL LAWS OF CANADA: ENFORCEMENT AND ADMINISTRATION

THE CRIMINAL CODE

One of the specific fields assigned to the Federal Parliament is that of criminal law and procedure. Under that authority have been enacted the Criminal Code of Canada and certain other statutes dealing with specific matters, such as trade combines and narcotic drugs; in all of these statutes is embodied the whole of the criminal law, both substantive and procedural, which is uniform for the whole country.

The provinces have no authority to legislate in the field of criminal law, although they may provide for penalties including fines and imprisonment for the enforcement of legislation made in pursuance of their specific powers. These offences are referred to as quasi-crimes, since they are dealt with in the same manner as minor offences under the Criminal Code. Specific examples are to be found in traffic and liquor offences.

THE COURT SYSTEM

When it comes to the enforcement of the law and the administration of justice there is a shift in the emphasis. These matters fall within the exclusive legislative powers of the individual provinces.

In each province this power includes the constitution, maintenance and organization of the provincial courts of both civil and criminal jurisdiction.

Each province has set up its own juridical system of trial and appellate courts at all levels. Although individual to their respective provinces, these systems are virtually the same. Generally speaking there are three levels of criminal courts, and although the names vary from province to province, their respective jurisdictions are similar throughout the country. Reference can be made therefore, for the purpose of illustrations, to those in Ontario.

The Supreme Court, which is the top echelon, has jurisdiction to try any indictable offence. The

distinction between felony and misdemeanour having been abolished in Canada, all offences are divided into two classes depending on the method of trial: indictable offences, which embrace the more serious and general crimes; and summary conviction offences, which are the lesser offences. The Supreme Court has exclusive jurisdiction to try the gravest of the indictable offences—murder, manslaughter, treason, rape and the like—and, as a general rule, persons accused of these last-mentioned offences must be tried by a court composed of a judge and jury.

Jurisdiction at the lowest echelon is exercised by the Magistrates' Courts. In addition to all summary conviction offences, of which traffic offences make up the greatest part, magistrates have absolute jurisdiction to try a number of indictable offences, such as petty theft, assaults, gambling, prostitution, and so on. In addition, on the election of the accused, a magistrate may try any person charged with an indictable offence other than those expressly declared to be within the exclusive jurisdiction of the Supreme Court.

Since trials in the Magistrates' Courts are summary and speedy, by far the greatest majority of cases, estimated at 90 to 95 per cent of all criminal trials, are heard by a magistrate sitting without a jury.

Where a person is accused of an indictable offence which is within the exclusive jurisdiction neither of the Supreme Court nor of the magistrate, he may elect to be tried by a court composed of a County Court Judge sitting with a jury—known as the General Sessions of the Peace—or a County Court Judge sitting alone without a jury—known as the County Court Judges' Criminal Court. Both these courts exist in every county.

Appeals from convictions in all of these courts may be taken to the provincial Court of Appeal, in some instances as of right, in others only with leave of the Court. The Crown may appeal from acquittal on questions of law but not from findings of fact.

Appeals may be taken from the provincial Courts of Appeal on questions of law to the Supreme Court of Canada.

SELECTION AND TENURE OF JUDGES, CROWN ATTORNEYS AND ASSISTANT CROWN ATTORNEYS

Judges and Court Officials

The constitution requires that the judges of the Superior, County and District Courts in each province be appointed by the Dominion Government for life (which is presumed to end at 75) and to hold office during good behavior. They can be removed only by impeachment. The magistrates are appointed by the Province for life and good behavior. All other court officials, clerks, sheriffs, bailiffs, and the like, are appointed by the Province during pleasure. Into this category in Ontario fall all Crown Attorneys and their Assistants.

Crown Attorneys

Although I have said the appointment of the Crown Attorney is a provincial one, it is, in effect, an appointment by the Crown. Canada being a constitutional monarchy, governmental authority rests in theory in the monarch, who cannot act alone, but only by and with the advice of her ministers, who are elected representatives responsible to Parliament, and whose advice she never rejects.

Being otherwise engaged on the other side of the Atlantic, the Queen carries on her function of government in Canada through her representatives. In federal matters she is represented by the Governor General, who is advised by the Privy Council for Canada, made up of the Prime Minister and his Cabinet. In provincial matters she is represented by the Lieutenant-Governor (not to be confused with your nomenclature), who is advised by the Executive Council, made up of the Premier of the Province (the equivalent of your Governor) and his Cabinet.

The appointment of Crown Attorneys is made by the Lieutenant-Governor-in-Council, which is to say, by the Queen, on the advice of her ministers. In practice the Attorney General of the Province, who is a Minister of the Crown, makes his choice of a suitable member of the Bar in good standing and recommends his nominee to his colleagues for confirmation by Order-in-Council.

The appointment is during the pleasure of the Lieutenant Governor, who it seems is very easy to please. Recently a Crown Attorney retired on pension after over forty years in office; another is still going vigorously at the age of 80 or better. In my own jurisdiction the present incumbent is only the third to hold the office since the First World War. He has been Crown Attorney for eleven years, prior to which he was an Assistant for twenty-one years.

Removal from office must also be by Order-in-Council and other than for obvious reasons of health or age would be for malfeasance or misfeasance.

Assistant Crown Attorneys

The appointment of Assistants is made similarly to that of Crown Attorneys, that is to say by the Lieutenant-Governor-in-Council, to hold office during pleasure. They may be employed full-time or part-time as the local need demands. In York County, where I come from,—a jurisdiction of close to 1 ¾ million people—there are 12 full-time and several part-time Assistants.

When the need arises for replacements or additions, the Crown Attorney makes a selection on a basis of merit from those members of the Bar who have applied for or who he knows are interested in the position. His recommendation is then made to the Attorney General, who usually accepts it.

There is less permanency among Assistants than among the Crown Attorneys, inasmuch as many of them look upon the job as a temporary training period for a career of advocacy, others are not content with the modest emoluments of the position, and still others turn out to be unsuited. On the other hand there are those who, as I have done for twenty-two years, make it a career.

The Assistants act under the direction of the Crown Attorney and when so acting have the like powers and perform the like duties as he does. Everything I now say, therefore, about the nature and function of the office of Crown Attorney applies with equal force to his Assistants.

Appointment of Crown Attorneys
Non-political

The office is non-political, except in so far as an Attorney General is apt to show some preference for members of his own party when making an appointment. I know of many cases where persons of opposite political stripe have been appointed, but it has been many years and before my recollection since anyone has been fired for political reasons. The patronage system is rapidly becoming a thing of the past, and all civil servants, federal and provincial, enjoy the same sort of security. This we believe makes for stability of administration.

The Crown Attorney, of course, may not engage in any political activity, and, in fact, in the larger centres, they, like judges and magistrates, are disfranchised.

THE OFFICE OF THE CROWN ATTORNEY

Authority and Duties

The Crown Attorney's principle function is to prosecute in all the provincial courts I have mentioned persons charged with indictable offences and where in his opinion the public interest so requires conduct proceedings in respect of summary conviction offences.

There is in Canada no counterpart to the United States Attorney, since there are no federal courts of first instance in criminal matters and no federal court system. The Supreme Court of Canada, which sits at the nation's capital at Ottawa, is entirely appellate as the court of last resort from the Courts of Appeal of the various provinces in matters civil and criminal.

As a provincial civil servant the Crown Attorney is responsible for the proper conduct of his office to the Executive and in particular to the Attorney General, whose agent he is. Although appointed for a specific locality—usually a county—he is in no sense a municipal official, nor is he responsible to the local municipal authorities.

The office being appointive rather than elective, the Crown Attorney is not responsible directly to the electorate. This has profound significance. He is free of the external pressure and influence from groups or individuals who might be tempted for their own ends, well-meaning or nefarious, to pervert the course of justice. He is free of the internal pressure of political ambition, the urge for self advancement, and the desire for public acclaim that might lead him to strive for convictions rather than to see that justice is done.

The Crown Attorney, a public officer engaged in the administration of justice in criminal matters, does not deal with the civil side and is not available to the public for advice or assistance in that respect. He has certain administrative and ancillary powers not germane to these discussions, but his most important function is the prosecution of criminal offences.

He does not in practice institute criminal proceedings on his own initiative. Although there is power to do so, it is one which is sparingly used and only in exceptional circumstances. All criminal proceedings are commenced by information or complaint sworn by an individual, whether private citizen or law enforcement officer, before a justice of the peace.

He Is Not A Policeman

The Crown Attorney is not a law enforcement officer; that is a policeman's function. He is not a gangbuster, nor is he bent on ferretting out the lawbreaker and bringing him to the bar of justice. He has no investigatory staff of his own, and

although he necessarily works in close conjunction with the local police in the preparation of cases and their prosecution to a proper conclusion, he has no jurisdiction or authority over them.

He may, and quite frequently does, give advice to persons, including police, who wish to lay charges, as to whether a criminal offence is disclosed by the facts, whether a prima facie case is made out, and whether a prosecution is justified. If he finds that these things are so he refers the person to the police for further action or directly to a justice, who will exercise his discretion as to whether he will issue his process.

For all practical purposes it can be said that the Crown Attorney comes into the picture after the proceedings have been commenced. He then assumes the responsibility for the prosecution, doing all things requisite for the speedy, efficient, and proper disposition of the case. In this he is assisted by the police in charge of the case, who, although he has no authority over them, willingly accede to his requests and take his direction for investigation and preparation. He however takes no direct part in the investigation such as taking statements or confessions from accused persons which I understand is the practice in some of your jurisdictions. Such matters he leaves to the police.

He, then, is the attorney for the people or the State against the accused in a proceeding in which the State dissociates itself from the act of its own member, denunciating his conduct and exhibiting an antagonism in its will against the will of the wrong-doer.

He Is An Attorney For The Crown

The Crown Attorney however is something more. The Crown embraces the whole of the state including the wrong-doer himself. On the one hand the monarch, in return for the fealty and allegiance of the subject, guarantees that the subject shall enjoy peace—the Queen's Peace. On the other hand the monarch has repeatedly guaranteed to every subject, since King John affixed his seal to the Great Charter on the meadows of Runnymede, the right of fair trial and due process of law.

It is in this sense that I and my colleagues are attorneys for the Crown.

All criminal prosecutions are carried on in the name of the Crown and are styled "The Queen against John Doe" or sometimes in Latin, Regina versus Doe.

The retention of this terminology I consider to be important. As the Crown symbolizes for the people their principles, rights, and liberties, the carriage of the symbolism into the Courts helps to maintain and preserve a respect for the law.

We have retained a measure of the tradition and ceremony of the English Courts, which again enhances the dignity of the law and its place in the community. Our judges wear robes of different colours, robes according to the courts in which they sit, and the lawyers, when appearing in the higher courts, wear black gown, wing collars, and white Geneve tabs, but have discarded the wig. The Sheriff, who attends the judge in court, wears a cocked hat and frock coat and carries a sword.

Even out of court, judges affect a semi-formal attire, wearing, except on the most informal occasions, director's suit (black jacket and striped trousers, with black homburg hat).

In Toronto every year just after the New Year, on the day of the opening of the Winter sittings of the Supreme Court, known as Assize, and Nisi Prius, Oyer and Terminer and General Gaol Delivery, a special service is held in one of the downtown churches, attended by the Lieutenant Governor, the Attorney General, the judges and magistrates of all the courts, Supreme, County and Municipal—all in their robes—, the Benchers of the Law Society, Court officials, and members of the legal profession. It is a dignified and impressive affair, which strikes an appropriate key-note for the ensuing transaction of the business of the Courts.

He Is A Minister Of Justice

A criminal prosecution in our law is not a contest between individuals, nor is it a contest between the Crown endeavouring to obtain a conviction and the accused endeavouring to be acquitted.

The position of the Crown Attorney is not that of ordinary counsel in a civil case; he is acting in a quasi-judicial capacity or as a minister of justice and ought to regard himself as part of the Court rather than as an advocate. He is not to struggle for a conviction nor be betrayed by feelings of professional rivalry to regard the question at issue as one of professional superiority and a contest of skill and pre-eminence.

He is present in court to present the case for the Crown and has a discretion to do so as he sees fit. This discretion must be exercised with a feeling of responsibility to assist the judge in fairly putting the case before the jury. He also has a discretion to decide what witnesses should be called and

what evidence is relevant, credible, and material, and his discretion will not be interfered with unless it is exercised with some oblique motive. But he has a duty to offer all the relevant evidence no matter how it may tell—against the accused or in his favour—and to call all credible and material witnesses to the occurrence even if they are likely to give different accounts of what took place. He must not hold back or suppress credible evidence that would assist the accused.

Fairness, moderation, and dignity should characterize his conduct throughout. He is engaged in an investigation which should be conducted without feeling or animus on the part of the prosecution with a single view of determining the truth.

This is not to say that the Crown must be supine in the performance of his duties. As Lord Eldon said:

> "Truth is best discovered by powerful statements on both sides of the question."

The adversary system is fundamental to the Anglo-American forensic process.

Vigour is frequently demanded to see that the court is not misled—that the course of justice is not warped. Counsel must not be hoodwinked by those who, while affecting to tell the truth are really twisting facts to help the prisoner, and he must assiduously cross-examine the witnesses for the defence to find out how far they can be relied upon. He must be alert stalwartly to oppose the counsel who allows his duty to his client to transcend his duty to the Court, to the State, and to his conscience.

Finally when he has brought out all the facts thoroughly, argued his points of law intelligently and effectively, he is entitled in his final address to the jury to examine all the evidence and to ask the jury to come to the conclusion that the accused is guilty as charged. In all this he has a duty to assist the jury, but he exceeds that duty when he expresses by inflammatory or vindictive language his own personal opinion that the accused is guilty.

Conclusion

In a recent trial for murder, Crown Counsel allowed himself to be carried away by the ardour of battle to the point that, having already indicated his personal belief in the guilt of the accused, he had this to say (this is a translation of the original French):

> "Every day we see more and more crimes than ever, thefts, and many another thing. At least one who commits armed robbery does not make his victim suffer as Boucher made Jabour suffer. It is a revolting crime for a man with all the strength of his age, of an athlete against an old man of 77, who is not capable of defending himself. I have little respect for those who steal when they have at least given their victim a chance to defend himself, but I have no sympathy for these dastards who strike men, friends—Jabour was perhaps not a friend, but he was a neighbour, at least they knew each other—in a cowardly manner with blows of an axe.
>
> ". . . [A]nd if you bring in a verdict of guilty, for once it will be almost a pleasure for me to ask the death penalty for him."

The Supreme Court of Canada quashed the conviction and ordered a new trial. Mr. Justice Rand had this to say:

> "It cannot be over-emphasised that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before the jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. Counsel have a duty to see that all available legal proof of the facts is presented: it should be done firmly and pressed to its legitimate length but it must be done fairly. The role of prosecutor excludes any notion of winning or losing; his function is a matter of public duty than which in civil life there can be none charged with greater personal responsibility. It is to be efficiently performed with an ingrained sense of the dignity, the seriousness and the justness of the judicial proceedings."

The achievement of these ends is our endeavour, these ideals our aspiration. To them we bring, imperfect as our own human frailty dictates, our intellects, skills and knowledge, an understanding of our fellowman, a compassion for the weakness of the wrong-doer, and a sympathy for his victim, a dignity, a courtesy, a fairness, respect for the law, and a fearless courage for what is right—but above all—integrity.

This is our career.