THE ROLE OF THE PRIVATE PROSECUTOR:

A Critical Analysis of the Complainant's Position in Criminal Cases.

By Fred Kaufman*

It has always been a matter of some concern to those engaged in the administration of criminal justice in Canada to define the rights and the standing of a private prosecutor in the prosecution for criminal offences. Two recent but contradictory opinions,[1] each from a source entitled to the greatest respect, have added to the uncertainty, and it is the purpose and scope of this article to examine this vexatious question. Towards that end, the discussion which follows has been divided into six parts: (a) general observations; (b) summary convictions; (c) preliminary inquiries; (d) procedure by indictment; (e) summary trials, and (f) conclusions.

1. GENERAL OBSERVATIONS

It is the essence of a crime that it is a wrong of so serious a nature that it is regarded as an offence, not merely against an individual, but against the State itself.[2] Since the state is embodied in the person of the Sovereign, it follows that prosecutions for crimes must always be carried on in the name of Her Majesty, and it has long been settled that non-observance of this rule will make a nullity of the proceedings. This was clearly laid down by the Quebec Court of Appeal in *Woo Tuck v. Scallen*:[3]

> It matters not who may be the informant or the complainant — the Crown is the source and fountain of justice, and all criminal suits must be brought in the King's name in every Crown case. The King who represents the State is the accuser, and comes forward in the interest of justice and of all the people, and asks for punishment for the offence committed. The individual Sovereign personifies the State; it is a fundamental constitutional rule that all prosecutions take place in the name of the Crown.

Note, however, that the sole question before the Court was the "heading" of the case and not the "conduct," and any remarks which may indicate that a private prosecutor may not conduct proceedings in the name of the crown must therefore be considered *obiter*.

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[1]Wilson, J., in *R. v. Schwerdt*, (1957) 119 C.C.C. 81, and Lagarde, J., in his *Supplément au nouveau code criminel annoté*, (1958) p. 89 ff.

[2]Tremeear's Annotated Criminal Code of Canada, 5th ed. (1944) p. 1.

[3](1929) 46 Que. K.B. 437, 51 C.C.C. 365.

This decision was followed in *Gaboury v. Gagné*,[4] but here the proceedings at first instance not only were not in the name of the sovereign, but they were also conducted by counsel retained by the victim of the crime. Howard, J., put it this way:

> The respondent, the alleged victim of the assault, laid the information and complaint in both cases, and with that his function as prosecutor should have ended and his name should have disappeared from the record from that time on except as a witness.[5]

This principle was again confirmed in *Maynard v. Lapointe*,[6] where Chasse, J., granted a motion of non-suit "not because Mr. Philippe Pothier appeared in the record as counsel for the complainant, but rather because the complainant appeared in the record in the place of The King."

We may therefore accept the fact that all criminal prosecutions must be taken in the name of the sovereign. Does that mean, however, that only the law officers of the Crown or their substitutes may prosecute? Not so, and the Code itself provides part of the answer.

2. SUMMARY CONVICTIONS

Part XXIV of the Code, which deals with summary conviction matters, is, in reality, a little code by itself. As such it contains its own definitions, and two of these are of special interest:

> 692. In this Part,
> (a) "Informant" means a person who lays an information; . . .
> (e) "Prosecutor" means an informant or the Attorney-General or their respective counsel or agents.

Furthermore, section 709 provides that "the prosecutor is entitled personally to conduct his case," and that both he and the defendant "may examine witnesses personally or by counsel or agent."

It is clear, therefore, that the person who lays the information remains in full control of the proceedings, although it is a matter of doubt whether or not he can stop the proceedings once he has started them.[7]

Parenthetically, it may be of interest to dwell for a moment on the word "agent." Does this mean a person other than a barrister and/or solicitor? Apparently so, for the word "counsel," by definition,[8] means "a barrister or solicitor, in respect of the matters or things that barristers and solicitors, respectively, are authorized by the law of the province to do or perform in relation to legal proceedings."

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[4](1930) 48 Que. K.B. 353.

[5]At p. 355.

[6][1951] Que. S.C. 113.

[7]For a good discussion of this problem see Martin's Criminal Code, 1955, p. 1053 ff.

[8]Section 2(7), Criminal Code. Wherever the word "section" appears without further qualification, it refers to the Criminal Code of Canada, 2-3 Eliz. II, c. 51, and amendments thereto.

The history of section 709, as Martin points out,[9] shows that the Criminal Code of 1892 used the words "counsel or attorney". This was changed in 1906 to "counsel, solicitor or agent", and so it remained until 1955, when the present wording was introduced. This situation is somewhat reminiscent of the nomenclatures employed at various times by the Bar of the Province of Quebec in describing the functions of its members. In 1913, for instance, the diploma given to a successful candidate entitled him to practice as an "advocate and attorney." The candidate of 1932, on the other hand, was entitled (according to the diploma) to exercise the functions of "advocate, counsel, attorney, solicitor and barrister." More recently, economy prevails and the sole term is "advocate" which, by definition,[10] means "attorney, solicitor, legal adviser." Apart from their historical significance, however, these terms may be used interchangeably, and they must also be taken to include such ancient and honourable functions as proctors-in-admiralty and serjeants-at-law who, at one time, had the exclusive right of audience in courts of Common Pleas.[11] But an "agent" is not a member of the Bar, and the point may therefore arise in some jurisdictions as to his standing.

In Quebec, it is the "exclusive prerogative of the advocate in the exercise of his profession . . . to plead before any court,"[12] and "notwithstanding any law to the contrary," any person who usurps the functions of an advocate becomes liable to a fine not exceeding five hundred dollars.[13] There is at least one other such law to the contrary and this, surprisingly enough, is found in the Quebec Code of Civil Procedure:

> 1273. No person can act as attorney of either of the parties before a Commissioners' Court, unless he is an advocate or attorney at law, or the holder of a special power of attorney, or unless it is in the presence and with the consent of the party.

This is certainly an equitable provision, particularly when we consider that the jurisdiction of a Commissioners' Court is restricted to suits involving thirty-nine dollars or less, and even then not in every case!

The case may therefore arise where a police officer, for instance, appears on behalf of the complainant — a custom not unknown in some jurisdictions — only to find himself later accused of having usurped the functions of an advocate, for in Quebec, at least, it does not matter whether he was paid or not for his legal services.[14]

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[9]Criminal Code, 1955, p. 1058.

[10]Bar Act, 2-3 Eliz. II, c. 59, as amended by 3-4 Eliz. II, c. 41, s. 2(a). For an interesting discussion of this question see Frank M. Godine, (1953) 31 Can. Bar Rev. 1035.

[11]Hood Phillips, *A First Book of English law*, (1955) p. 21 ff.

[12]Bar Act, *ante.*, s. 5(b).

[13]*Ibid.*, s. 99.

[14]In some other jurisdiction, however, it is not an offence to render certain legal services, provided the public is not misled and no fee is charged. *E.g.* Revised Ordinances of the Northwest Territories 1956, c. 57, ss. 11 and 12.

3. PRELIMINARY INQUIRIES

Preliminary inquiries are dealt with in Part XV of the Code and, as in the case of summary convictions, the Code itself is reasonably clear: the prosecution may call witnesses and the accused has a right to cross-examine them; the accused, if he wishes, may also call witnesses and, in that case, they may be cross-examined by the prosecution.[15] Note that the Code speaks of "prosecution", whereas in section 451(h) the more conventional term "prosecutor" is employed:

> A justice acting under this Part may grant or refuse permission to the *prosecutor* or his counsel to address him in support of the charge . . .

Is this of importance? Apparently not: "A perusal of the two subsections suggests to me that there is no significance in this difference."[16] Indeed, the term "prosecution" is not even defined, and one is therefore tempted to presume that the draftsmen of the Code grew weary of writing "the prosecutor or his counsel," when one word would do.

Presuming, then, that the two terms are synonymous, who is the prosecutor? The answer is found in the Code's definitions:

> 2(33). "Prosecutor" means the Attorney General or, where the Attorney General does not intervene, means the person who institutes the proceedings to which this Act applies, and includes counsel acting on behalf of either of them.

This definition appeared for the first time in the revision of 1955, but the term itself was in use well before that.

I think it is clear that "the person who institutes proceedings" is the person who lays the Information and, in the absence of intervention by the Attorney General, the informant thus becomes the prosecutor. That is the practice which is now followed in the Province of Quebec where, as a rule, the Attorney General will not intervene unless the charge is of sufficient gravity to warrant the immediate appearance of a crown attorney.[17] So well imbedded is the principle of "private prosecutions," that even police cases are prosecuted at this stage by counsel retained by the municipality concerned.

In discussing this practice, Lagarde, J., justifies the custom "car ce n'est là qu'un stage préliminaire où d'ailleurs l'autorité du magistrat enquêteur est très grande."[18] That the powers of the justice are very great indeed is not in question. It is his inquiry and, so long as he does not infringe on certain basic rules, he may conduct it as he sees fit. Towards that end he may well say to the informant: "You made a grave accusation and, what's more, you made it under oath. Bring me your evidence." Indeed, if he so desired, the justice

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[15]Sections 453(1) (a) and 454(4).

[16]*Per* Wilson, J., in *R. v. Schwerdt*, (1957) 119 C.C.C. 81 at p. 86.

[17]Thus, the Attorney General will intervene in all cases where an accused is held in virtue of a coroner's warrant. He will also generally intervene in cases of rape, but this practice dates back to the time when rape was still a capital offence.

[18]*Supplément au nouveau code criminel annoté*, (1958) p. 89.

could even examine the witnesses himself, and this does not infrequently happen in cases where the informant is not represented by counsel.

I should have been happier if the learned author had based himself entirely on the provisions of section 2(33), fortified as they are in this case by the powers of a *magistrat enquêteur*. But, with great respect, I cannot agree with the proposition that a private prosecutor acquires standing because the preliminary inquiry "is but a preliminary stage" in what the Code calls "procedure by indictment." If, as Guerin, J., said in the *Woo Tuck* case,[19] "it is for the protection of the whole community that where an individual may be deprived of his liberty, the right of prosecution and conviction shall not be entrusted to any but the Sovereign power," it matters not what stage the case has reached. One must therefore look to statutory authority and this, I suggest, is found in the provisions of Part XV.

I therefore conclude that, in the absence of intervention by the Attorney General, the informant and his counsel have standing before a justice or a magistrate at a preliminary inquiry.[20]

4. PROCEDURE BY INDICTMENT

The similarities between trial by a judge and jury and the speedy trial by a judge alone are so great that we may consider both situations together. This may sound somewhat unorthodox, but we must bear in mind that both deal with the trial of indictable offences, that each was generally preceded by a preliminary inquiry, and that indictments must be drawn before the trial may start. It is here, however, that we notice an odd situation.

Section 478(1) reads as follows:

> Where an accused elects . . . to be tried by a judge without a jury, an indictment in Form 4 shall be preferred by the Attorney General or his agent, or by the Deputy Attorney General, or by any person who has the written consent of the Attorney General, and in the province of British Columbia may be preferred by the clerk of the peace.

Compare this with section 489:

> (1) In the provinces of New Brunswick, Quebec, Manitoba, Saskatchewan, Alberta and British Columbia and in the Yukon Territory and Northwest Territories it is not necessary to prefer a bill of indictment before a grand jury, but it is sufficient if the trial of an accused is commenced by an indictment in writing setting forth the offence with which he is charged.
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> (2) An indictment under subsection (1) may be preferred by the Attorney General or his agent, by the Deputy Attorney General, *or by any person with the written consent of a judge of the court* or of the Attorney General or, in any province to which this section applies, *by order of the court.*[21]

For the sake of accuracy, it should be added at this point that the persons enumerated in subsection (2) of section 489 may prefer an indictment even in cases where there was no preliminary inquiry or where the accused was liberated

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[19](1929) 46 Que. K.B. 437 at p. 441.

[20]The only judgment to the contrary is that of Lane, J., in *R. v. Berthiaume*, (1922) 37 C.C.C. 114, which is not followed.

[21]Italics added.

at the *enquête*. This is what is generally known as a "preferred indictment," and it is used but rarely, even by the Attorney General. The origin of this proceeding is found in the functions of the grand jury, which has now been abolished in the provinces and territories mentioned in section 489. However, in those jurisdictions where the grand jury still exists, a distinction is drawn between those persons who may prefer an indictment even where there was no committal for trial, and the "prosecutor" who may only do so after a preliminary inquiry.[22]

If, therefore, we leave aside the special power of the clerk of the peace in British Columbia, we must conclude that the Attorney General is obliged to intervene in every case where an accused elects to be tried by a judge without jury, for without the Attorney General's consent there can be no indictment, and without indictment there can be no trial. Yet, where an accused is either obliged or by his own choice elects to be tried by a judge and jury, the prosecutor may, under certain circumstances, obtain consent to sign the indictment.[23] Unless, therefore, the accused must be tried in a superior court of criminal jurisdiction, he may thwart the possible interference on the part of a private prosecutor by his election for trial by a judge alone. If that is correct — and the Code would so indicate — it would mean that a private prosecutor retains some degree of standing only in those cases which, by definition, are considered the most serious!

Could this have been the intention of Parliament? The question itself is fraught with danger, for where the wording is clear, it is not for those who have doubts to delve into the collective mind of the legislature. But while the wording may be clear, there are sufficient inconsistencies to raise grave doubt. Let us therefore examine certain sections of the Code which may help us in reaching a decision. This may be done under two headings: (a) sections which indicate that, with but one exception, the prosecution must be left to the crown, and (b) those sections which favour the private prosecutor.

(a) Exclusive Crown Prosecutions

1. Section 480 provides that the Attorney General may, notwithstanding an accused's election for a speedy trial, order a trial in a superior court of criminal jurisdiction. No mention is made of a "prosecutor."

2. Section 584 gives the Attorney General the right to appeal under certain conditions. Again, no mention is made of a private party.

3. The Attorney General may, *in every case*, "at any time after an indictment has been found and before judgment," make an order to stay the proceedings. This is provided for in section 490 and is known as a *nolle prosequi*. This right may be exercised even where an indictment was authorized by a judge or the

[22]See section 487. The prosecutor may bring himself within this category by obtaining the consent of either the Attorney General or of a judge, or by order of a court constituted with a grand jury.

[23]For circumstances under which a court did grant permission, see *R. v. Weiss*, (1915) 23 C.C.C. 460.

court after the Attorney General had refused to sign it.[24] Furthermore, it is a matter of discretion "and not subject to any control by the courts."[25] What section 478 hath given, section 490 hath taken away.

4. Section 1081 of the pre-1955 Code provided that in certain cases a court, in order to suspend a senteuce, needed "the concurrence of counsel acting for the Crown in the prosecution of the offender." It followed that if a prosecution was in private hands (as many were and are), a court, even though inclined to be lenient, could not follow its own feelings because the private prosecutor, whose interests can hardly be those of a minister of justice, might withhold his consent—if, indeed, he could give it. This situation arose in *R. v. Boulding*,[26] where a magistrate suspended a sentence despite the protests of counsel retained by the informant. I cannot conceive that Parliament intended to punish an accused in whose case the Attorney General did not intervene, yet that was the result.

(b) Private Prosecutions

1. The Code provides in section 631 that "the person in whose favour judgment is given in proceedings by indictment for defamatory libel is entitled to recover from the opposite party costs in a reasonable amount." Furthermore, section 546 provides that "a prosecutor *other* than the Attorney General or counsel acting on his behalf is not entitled, on the trial of an indictment for the publication of a defamatory libel, to direct a juror to stand by. This would clearly indicate that a private prosecutor may conduct the proceedings, and that is what in fact takes place. The origin of this rule is found in the common law which has long considered defamatory libel as "a tort of a quasi-criminal character, affecting an individual rather than the community."[27] There is authority, too, for the proposition that even where the crown intervenes, costs may still be granted a successful defendant against the informant, for it was he who took the initial step.[28]

In this connection, one might well ask how a private prosecutor may carry on where the accused has chosen trial by a judge alone and the attorney general does not wish to sign the indictment. The answer is that he has reached a *cul de sac* from which he cannot escape. I wonder if this occurred to Parliament when defamatory libel was removed in 1955 from the list of those offences which must be tried by judge and jury.

2. Section 558 provides that "the Attorney General or counsel acting on his behalf" is entitled to reply even in those cases where counsel for the prisoner is given the right to address the jury last, *i.e.* where no witnesses were called

[24]See *R. v. Edwards*, (1919) 31 C.C.C. 330.

[25]*R. v. Comptroller of Patents*, [1899] 1 Q.B. 909 at p. 914.

[26](1920) 33 C.C.C. 227.

[27]*Ex parte Genest*, (1933) 71 Que. S.C. 385.

[28]*R. v. Blackley*, (1904) 8 C.C.C. 405.

by the defence. The inference would be that where a private prosecutor conducts the proceedings he may not reply, but where the Attorney General has intervened, he or his agent may have the last word. It may be argued that Parliament did not wish to give this power to anyone but an agent of the Crown who must not only be a prosecutor, but also a minister of justice.[29] With respect, I do not think that this was so.

The common law of England gave a right of reply to the Attorney General and the Solicitor General, but only where they appeared in person. This was confirmed by a resolution of H.M. Judges in 1884[30] and again by the Court of Criminal Appeal in the famous case of *R. v. Bywaters*.[31] In Canada, this very exceptional right was at first given to the law officers of the Crown "or to any Queen's Counsel acting on behalf of the Crown."[32] This was later changed by striking the word "Queen's," and so it appeared in the Code of 1892. In view of this history, may one not conclude that Parliament intended to abolish the distinction between a law officer and his agent, rather than create a new distinction — this time between crown counsel and counsel for the prosecutor?

3. Lastly, since the Code is not as clear as one might wish, it may be well to examine the position of the common law. Section 7(1) provides that

> The criminal law of England that was in force in a province immediately before the coming into force of this Act continues in force in the province except as altered, varied, modified or affected by this Act or any other Act of the Parliament of Canada.[33]

If, therefore, the common law of the appropriate period permitted private prosecutions in indictable matters, it may help to clarify the present situation.

The answer is that the common law did (and still does) permit a private prosecutor to prosecute:

> Subject to the powers of the Attorney General, any citizen is at liberty to prosecute, although he usually prefers to complain to the police and leave it to them. There are a few unofficial prosecutions, usually brought by a business concern which for some reason or other wishes to keep the proceedings in their own hands. I use the word "unofficial"; it is the best I can think of, since to call such prosecutions "private" would be misleading: the great majority of prosecutions are in theory private. It is true that the proceedings are in the name of the Queen, but then in any *civil* action it is the Queen who issues the writ of summons and in whose name the attendance of the defendant is commanded; in each case the Crown is acting at the request or upon the information of an individual. Again, every *police* prosecution is in theory a private prosecution; the information is laid by the police officer in charge of the case, but in so doing he is acting not by virtue of his office but as a private citizen interested in the maintenance of law and order.
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> Until 1879 the Attorney General was the only person who could be described as a public prosecutor. The Attorney General holds an ancient office; he is a member of the government

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[29]See *R. v. Banks*, (1916) 12 Cr. App. Rep. 74; *Boucher v. The Queen*, (1955) 20 C.R. 1, and *Pursey v. The Queen*, (1956) 24 C.R. 233.

[30]5 St. Tr. (N.S.) 3.

[31](1922-23) 17 C.A.R. 66.

[32]32-33 Vict., c. 29, S. 45.

[33]The crucial date for Quebec is 1763; the dates for other provinces will be found in Martin's Criminal Code, 1955, p. 34.

> and also a member of the Bar, of which he is *ex officio* the head. As a barrister he is retained on behalf of the government to conduct its legal business; he is in fact what his name implies: the general attorney appointed by the Queen to conduct her legal affairs. Until the end of the last century he was permitted to have a private practice as well, and until 1945 his briefs on behalf of the government were marked with a fee as in the case of ordinary counsel. The greater part of his work is in the civil courts, but he has always been responsible for advising the Crown on important criminal matters and for conducting those prosecutions in which the Crown is directly interested. He also decides on behalf of the Crown when not to prosecute. As I have said, even the prosecution that is initiated and conducted by a private individual is brought in the name of the Crown; and this must be the theoritical justification for the Attorney General's power to enter a *nolle prosequi*, which is an answer to an indictment and prevents the prosecution of it.[34]

The question, then, is this: Does the Criminal Code "alter, vary or modify" the common law. I suggest the answer is "yes".

5. SUMMARY TRIALS

With the exception of certain cases which must be tried by judge and jury,[35] magistrates (as distinct from judges) may acquire jurisdiction either by operation of law,[36] or with the consent of the accused.[37] This does not, however, change the nature of the offence, which remains indictable, and a clear distinction must be drawn between the summary trial of an indictable offence and a summary conviction matter. It is, perhaps, unfortunate, that the word "summary" should appear in both cases and, in Quebec, the area of possible confusion is widened by the fact that all judges of the Court of Sessions of the Peace are also named as magistrates. As a result, where an accused elects to be tried by a magistrate, he will appear before a person who is entitled to be called a judge, for that very same person — unless he is a municipal judge as distinct from a Judge of the Sessions — may also preside over speedy trials, as defined in Part XVI of the Code.[38]

The procedure for a summary trial is simple:

> Where an accused elects to be tried by a magistrate, the magistrate shall
> (a) endorse on the information a record of the election, and
> (b) call upon the accused to plead to the charge, and if the accused does not plead guilty the magistrate shall proceed with the trial or fix a time for the trial.

Clearly, the Code does not require an indictment and the accused is tried upon the Information.

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[34]Devlin, *The Criminal Prosecution in England*, 1958, pp. 20-21. See also Stephen's *Criminal Law of England*, Vol. I, p. 494, *R. v. Knowles*, (1913) 22 C.C.C. 66 at p. 68 and *R. v. Schwerdt*, (1957) 119 C.C.C. 81.

[35]Section 413(2).

[36]Section 467.

[37]Section 468.

[38]Section 466(a) (ii). A somewhat similar, but more extreme, situation exists in the Yukon Territory and the Northwest Territories, where judges of the Territorial Court have the power of a magistrate, a judge *and* of a judge of a superior court of criminal jurisdiction: sections 2(16), 2(38) (g) and (h), 466(a) (viii) and (ix), and 466(b) (ii) and (iii).

There is one case, *R. v. Beauvais*,[39] which at first blush would seem to indicate that where the magistrate's jurisdiction is not absolute — that is to say where it is derived from the election of the accused — an indictment is needed:

> Section 478 covers only the cases contemplated in ss. 450, 468 and 475, in which the accused's consent is required to give the *magistrate* jurisdiction. Then it is imperative that there be, besides the information, a formal indictment in the name of Her Majesty The Queen.[40]

In the first place, since the case at bar was one of absolute jurisdiction, the statement is an *obiter*. However, I think it is fair to say that the learned judge inadvertently used the term "magistrate" when, in fact, he meant "judge." That was the opinion of the Quebec Court of Appeal in *Decary v. The Queen*,[41] and we may therefore accept the fact that no indictment is needed in the case of summary trials.

That being so, the Attorney General's intervention is not nearly as clear as in the case of trial by a judge or judge and jury. It is not surprising, therefore, that great confusion exists.

Among the first of the cases which deal with the subject is *Re McMicken*,[42] a judgment of the Manitoba Court of Appeal. The facts were as follows. Mr. McMicken was a police magistrate who held daily court in Winnipeg. On October 16, 1912, two election cases were to be heard by him at 11 a.m., but when the complainants and their counsel arrived, they were told that both cases had already been disposed of and that each accused, upon a plea of guilty, was fined $50. Proceedings were then instituted by the complainants against the magistrate, alleging misconduct in that, *inter alia*, he did not give the private prosecutor a chance to be heard.

Richards, J. A., had this to say:

> . . . there is no question that a private prosecutor has a right to be heard, not only as to the commission of the crime, but as to question of aggravating or mitigating circumstances to be considered by the magistrate in deciding what punishment he will inflict.

In support of this statement, the learned judge cited a passage from Stephen's *Criminal Law of England*:[43]

> If, as is often the case, there is a private prosecutor, he can and does manage the whole matter as he might manage any other action at law;
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> The course pursued is precisely the same in all cases, and whoever may be the prosecutor. A prosecution for high treason, conducted by the Attorney-General, differs in no one particular in matter of principle from the prosecution of a servant by his master for embezzling half-a-crown.

The next case which must be considered is *R. v. Boulding*,[44] where the Saskatchewan Court of Appeal held that a private prosecutor has standing at

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[39](1956) 24 C.R. 365.

[40]At p. 369; italics added.

[41]Unreported; (1960) No. 1452, Court of Queen's Bench (Appeal Side), Montreal.

[42](1912) 20 C.C.C. 334.

[43]Vol. I, p. 494.

[44](1920) 33 C.C.C. 227.

a summary trial, not because he represents the complainant, but rather because he becomes counsel for the crown while conducting the case:

> . . . But in this case, I am of opinion that, there was counsel acting for the Crown in the prosecution of the offender. It is quite true that the prosecution was conducted by counsel for the railway company which was the privare prosecutor, but it was a "criminal prosecution instituted for the interests of the public in the name of the King and not to gratify the objects of an individual."[45]

Let us now turn to the latest in the series of cases which support the position of the private prosecutors. It is *R. v. Schwerdt*,[46] a judgment of Wilson, J., of the British Columbia Supreme Court. The facts are not difficult. An Information was laid against the accused charging him with perjury. When the case came up before a magistrate, it appeared: 1. That the prosecuting officer for the City of Vancouver refused to act as prosecutor in the case; 2. That the Attorney General for British Columbia refused to intervene; 3. That the informant and his counsel appeared and demanded the right to prosecute, and 4. That the learned magistrate conceded this right and was prepared to proceed either by way of summary trial, should the accused so choose, or hold a preliminary inquiry. The accused then sought a writ of prohibition.

Wilson, J., proceeded systematically:

1. As to the right to lay the information there can be no question.
2. The old English procedure, except as changed by Code, still stands.
3. Under English law a private prosecutor could, on November 19, 1858,[47] in the absence of intervention by the Crown, carry through all its stages a prosecution for any offence.
4. A private prosecutor has every right to conduct the preliminary inquiry.
5. Where an accused elects to be tried by a judge without jury, the private prosecutor reaches an impasse unless he can persuade the Attorney General or the Clerk of the Peace to prefer an indictment.
6. Where the accused elects to be tried by a court composed of judge and jury, the private prosecutor may still play a role since the court may allow "any person" to prefer an indictment.
7. The *McMicken* case[48] "is still good law."
8. The new Code did not alter the common law on the subject.
9. A private prosecutor therefore may conduct a summary trial.

However, having so found, the learned judge made one further observation which is of interest:

> I wonder, with respect, if this result was contemplated and desired by the able and devoted gentlemen who drafted the new Code.[49]

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[45]*Per* Haultain, C.J.S., at p. 228.

[46](1957) 119 C.C.C. 81.

[47]The crucial date for British Columbia.

[48](1912) 20 C.C.C. 334.

[49]At p. 91.

Lagarde, J., in dealing with this question, also considered the Code.[50] Unlike Wilson, J., however, he felt that there were sufficient indications to conclude that a private prosecutor does *not* have the right to conduct indictable matters, save in the case of defamatory libel.

One might wish that the learned author had examined these indications in greater detail, but it is hard to find fault with his conclusion, based on a study of the relevant sections of the Code, that "*le code criminel, complété par la* common law, *fait donc une distinction entre l'acte criminel et l'infraction.*"[51] In one case — the indictable offence — the Crown is in charge. In the other — the summary conviction — the Crown *may* intervene, but otherwise the private prosecutor remains at the helm, a principle which, by statute, is extended to preliminary hearings. And, lest it be thought that section 471 introduces this right to summary trials, I submit that the wording itself should remove any doubt:

> Where an accused is tried by a magistrate in accordance with this Part, the evidence of witnesses for the prosecutor and the accused shall be taken in accordance with the provisions of Part XV relating to preliminary inquiries.

True, the Code speaks of a "prosecutor," but does the word "taken" not refer to the mechanics (if I may use that word) of the case, rather than the procedure? I submit that it does.

The difference of opinion, then, lies in the interpretation of the Code. Both learned judges agree on the basic propositions. But Wilson, J., while admitting severe limitations on the rights of a private prosecutor — limitations which are inroads on the common law — does not find sufficient evidence in these statutory enactments to permit him to come to the conclusion that Parliament intended to restrict a private prosecutor to summary convictions and preliminary hearings. Lagarde, J., on the other hand, concludes that Parliament did not intend to enlarge these rights: *inclusio unius est exclusio alterius.*

6. CONCLUSIONS

If any one fact stands out from the above discussion, it is, I think, this: a clear indication is needed of the position taken by Parliament. Did it wish to alter the common law? If so, why not be specific; if not, let us give a private prosecutor the proper tools. Above all, Parliament should not give illusory rights.

It is my opinion — and I say this not only with the greatest respect, but after much hesitation — that the indications found in the Code favour the theory that, in the case of indictable offence, the common law has been "altered, varied, modified and affected" by statute law to the extent that a private prosecutor is deprived of any standing at *trial*, save in the case of defamatory libel. *A fortiori* — and here the law is clear — he has no standing in the court of appeal.

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[50] *Supplément au nouveau code criminel annoté*, (1958) p. 89 ff.

[51] At p. 90.

I think it sound that this should be so. As Lagarde points out, "the method of trial does not change the nature of a crime."[52] It would be absurd to think that the rights of a private prosecutor should be determined, as it well might in many cases, by the choice of the accused. I cannot conceive — and, with respect, Wilson, J., would seem to share my doubts — that this was intended by Parliament.

As Farris, C.J., said in *R. v. Whiteford*:[53]

> A criminal offence is not an offence against an individual but is an offence against society as a whole. The King is recognized as having no partiality to any individual but as representing impartially society as a whole. For individuals who are thinkiug only of themselves and not of society as a whole to have the right to institute and carry on criminal proceedings would destroy the whole fabric of the recognized fairness of our criminal prosecutions.

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[52]At p. 91.

[53](1946) 89 C.C.C. 74 at p. 77.

SEPARATION AS TO BED AND BOARD AND AS TO PROPERTY IN THE QUEBEC CONFLICT OF LAWS

by Walter S. Johnson, Q.C., LL.D.

EDITOR'S NOTE: *Mr. Johnson's major treatise on the Conflict of Laws, published in three volumes, in 1934, 1935 and 1937, has long been out of print and is constantly in demand. He is now preparing a revision, brought up to date, in one volume, to be published by Wilson & Lafleur, Ltd., Montreal. We are happy to be allowed to reproduce here one of the shorter chapters, dealing with separation as to bed and board and as to property.*

Chapter VII

SEPARATION

A. FOREIGN DECREE

Effect of foreign decree

A decree of separation as to property or as to bed and board, pronounced by a competent foreign court having, in our view, jurisdiction over the parties, would be recognized in Quebec. Both forms of separation are recognized in our law, so that our courts could not logically refuse to recognize the authority of the foreign court of the domicile. In *Gourdon v. Lemonier*[1], the consorts, resident in Quebec when the issue arose, were originally of France where the wife had secured a separation as to property. Her separate status was maintained: she could carry on business here in her own name, and acquire property against which her husband's creditors could have no recourse. In the present state of our jurisprudence it is doubtful that our courts would recognize the competence of foreign courts to decree the separation of consorts domiciled here[2]. Nor is it probable that, a decree of separation from bed and board having

[1](1883) M.L.R. 1 S.C. 160, and authorities there cited. And see *Bauron v. Davies* (1897) 6 Q.B. 547; (1896) 11 S.C. 123. *X v. Rajotte* (1938) 64 K.B. 484; if by the foreign law of the domicile at marriage the consorts are separate as to property, the wife may sue in her own name for damages for personal injuries; authorized by husband; confirming 74 S.C. 569; reversed by *Trottier v. Rajotte* [1940] S.C.R. 203.

[2]*Dicey*, Ed. 1958, 338:

"There is only one English case in which the recognition of foreign decrees of judicial separation has been discussed. In that case it was held that a decree granted in the domicile of the parties would be recognized in England, . . ."; citing *Tursi v. Tursi* [1957] 3 W.L.R. 573 (Canada), following *Ainslie v. Ainslie* (1927) 39 C.L.R. (Commonwealth L.R.) 381; and, *ibid*:

"Whether foreign decrees . . . granted by the courts of the parties' residence would be recognized in England is an open question."