the interim report of the New Brunswick Barristers' Society Committee on the Administration of Justice.

Other sub-sections centered discussion, in which all present were asked to share, around pre-announced topics. The Commercial Law sub-section considered zoning problems under the chairmanship of J. Edward Murphy, Q.C. The Administration of Criminal Justice Sub-section of which John T. Carvell is chairman dealt with a proposal for payment to barristers on appeals for indigents convicted of capital offences; abolition of the right of prosecutors to stand jurors aside, giving them the same privilege of peremptory challenge as is available to the accused; amendment of the Criminal Code to make a magistrate who has drafted a charge or information incompetent to sit on the hearing, and to empower clerks of the peace and Crown prosecutors to swear informations; and an amendment to provide for discharge of the accused on a "not proven" verdict if eight jurors agree on a "not guilty" verdict. The meeting of the Labour Relations sub-section at which David M. Dickson presided examined the rights and responsibilities of trade unions, while the Civil Liberties sub-section chaired by William A. Gibbon discussed legislation to provide for judicial review of administrative decisions. A well attended meeting of the Junior Bar sub-section decided to invite junior barristers of the Maritime Provinces to a joint convention this autumn; C. T. Gilbert was chairman.

Saturday afternoon the New Brunswick sub-section on Legal Education and Training and the Faculty of Law of the University of New Brunswick sponsored a symposium on current developments in the law. Talks were given by J. Paul Barry, Q.C., Norwood Carter, D. M. Gillis, and W. F. Ryan. The purpose of the symposium was not to present technical papers based on extensive research; it was rather to bring to the attention of the busy practitioner in a somewhat informal way recent cases and statutes in selected areas of the law which might be missed in the pressure of day to day practice. These talks are reproduced below substantially as delivered.

I

Some Aspects Of The New Criminal Code

Since April 1, 1955, we have been operating under the revised and shortened Criminal Code. It is an improvement in length and conciseness, but has made few changes in substantive law. The purpose of my remarks is to note some changes of which we should be cognizant in our daily practice.

The terms of reference to the Commission, as they appear in the Report printed in Hansard on May 14, 1952, show that it was not intended that important substantive legal changes should be considered: other commissions are dealing with such matters as insanity and capital punishment, lotteries and corporal punishment.

Sir James Stephen, author of the Digest of the Criminal Law of England, was the compiler of the Code which was rejected in England but adopted in Canada in 1892 with some changes. With all of the amendments made since that time, a change was necessary to consolidate and simplify the Code as well as to incorporate rules of practice which have become rules of law.

The code as adopted in Canada was based upon the English common law system, but because of the wording of our sections, judicial interpretation has resulted in important differences between English and Canadian criminal law. Examples are provocation, provocation combined with drunkeness, false pretences, and sedition. There appears to be a growing tendency on the part of our Canadian Supreme Court to philosophize rather than interpret, especially since becoming a Court of last resort in all cases. I am not too sure that this attitude is a beneficial one.

The Commission made several recommendations which were not adopted, for instance the abolition of minimum punishments except in murder, and the permission to convict on false pretences when that offence is proven in a theft charge or vice-versa. In my opinion, the recommendations were good ones: it is difficult to tie the hands of a judge in sentencing (for example one year for car theft) or to require the Crown to insert the other count in a theft or false pretence charge. Minimum punishments are retained in driving while impaired or intoxicated, theft from the mails, and sexual psycopathy.

Changes in the law with respect to the defence of insanity, capital punishment, corporal punishment and lotteries have been left to other bodies as I have said. The problem of criminal sexual psycopaths is also being considered by a special commission, as is the problem of remission and parole. You will see therefore that substantive changes in the Criminal Law are yet to come.

But what has been done? Here are a few of the changes:

(1) The number of sections is cut from over eleven hundred to seven hundred and fifty.

(2) Sentences are grouped, with maximums of (a) death, (b) life, (c) 14 years, (d) 10 years, (e) 5 years, and (f) 2 years.

(3) There are no common law offences now. The Code is all inclusive: adultery is therefore no longer a crime in New Brunswick. However, the new code still continues common law defences, common law procedure and punishment for contempt of court where not provided for in the Code.

(4) Instructions on the necessity for corroboration in certain cases, long a rule of practice, has been made a rule of law in rape cases.

(5) Degrees of negligence in criminal law are abolished. This is a major change. Since the **Andrews** case[1] degrees of negligence in crime were recognized as follows: (1) civil negligence (2) gross negligence or wanton misconduct and (3) "something in between" which in 1938 our Code called "reckless driving." This recognition, in my opinion, was illogical in making "reckless driving" while criminal a lesser offence to motor manslaughter. It was a method of avoiding a conviction for manslaughter. Now section 191 provides for criminal negligence in recklessly omitting to observe a duty or in doing something. Duty means a legal duty imposed by law but the code is silent on whether this means statutory law or common law. It remains to be seen whether the sections will be effective. The new section is exactly the same as manslaughter but does not use the word. Parliament also eliminated part of the recommended definition of "duty."

(6) Constructive murder is continued in the definition of murder. The words in the section were changed but the meaning is still retained so that a person with a gun in his possession in the course of committing a major crime is guilty of murder if death results under certain circumstances. This branch of the law of "mens rea" is always debatable: *Rex v. Robichaud*[2] and *Rex v. Hughes.*[3]

(7) "Receiving or Retaining" no longer exists. The offence is now "having": *Rex v. Clay.*[4]

(8) The sentence for nudity in public is six months rather than five years.

(9) Probation orders re driving may be made by the court in motor vehicle offences.

(10) There is a standard maximum penalty in summary conviction cases of 6 months or $500.00.

(11) The Crown does not have to consent to a suspended sentence.

(12) The limitation section has been repealed except in capital, sexual and summary conviction cases.

(13 "Magistrate" has been newly defined.

(14) The Court may now amend a defective indictment which formerly would have been a nullity; s. 510.

(15) An information in a summary conviction matter may now include more than one offence: s. 696 and s. 708 (4).

1. **Andrews v. Director of Public Prosecutions,** [1937] A.C. 576.
2. [1938] 13 M. P. R. 23 (N.B. C. A.).
3. [1942] S.C.R. 517.
4. [1952] 1 S.C.R. 170.

Procedure

The new code retains the right to trial by jury in serious cases but in some cases indictable offences will be tried by magistrates having absolute jurisdiction. This tendency to take away the right to a jury trial has been criticized as an admission of weakness in a jury system, one of our fundamental protections. The Commission wished to abolish Grand Juries as five provinces have now done but did not recommend it. In a five year period, ninety-two percent of all indictable offences were tried by magistrates, six percent by judges alone and two percent by judges with juries. However, an accused may still elect a jury trial before a magistrate and change his mind and elect a speedy trial later. The Commission wished to abolish trial de novo but the recommendation was rejected. Apparently the members of the House of Commons are aware of the weakness of some magistrates.

Formerly an accused charged with murder and convicted of manslaughter could appeal without risk. Now the Crown can appeal from the acquittal of the major charge and the accused could be still tried on the murder charge at a second trial.

We should realize that the Canadian Bar Association started making suggestions to revise the Code in 1943 and continued doing so until the Government assumed the responsibility. Some credit is due to our organization for the improvements made. But there are lawyers who feel that the public generally were not sufficiently represented at the hearings of the commission. That, if true, was not the fault of the commissions as public hearings were held, but it is too much to expect that individual lawyers at their own expense should devote the necessary time and effort to study the matter as do paid members of the staff and commission. Nevertheless, members of the House of Commons did take an active part in the discussion of the bill. There is a tendency even there to allow the civil servants to do the work

Crown prosecutors still have procedural advantages at the trial. Time and interpretative decisions must decide on the Code's weaknesses and strengths.

It remains to be seen how Courts will interpret the meaning of "duty" in criminal negligence cases or the constructive murder subsection of the Code concerning death resulting in the course of the commission of a crime where the accused has a weapon in his possession though not used or the section permitting prosecution with the consent of the Attorney-General of a person who tells two different stories at a trial.

If Crown counsel take their duty seriously and follow the old common law rules governing their conduct (as most of our counsel do) the accused will obtain a fair trial. If Crown Counsel commence to feel and act as if their duty is to obtain a conviction rather than to present the case fairly, difficulties will be encountered.

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