SUMMARY CONVICTION PROCEDURE

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A considerable number of offences contained in the Criminal Code[1] are described either as indictable offences or as offences punishable on summary conviction, and, obviously, how any particular offence is treated when it comes before a magistrate makes a considerable difference, both in procedure and in the possible consequences to an accused. If the offence is treated as 'indictable', there will be no more than a preliminary hearing before the magistrate and the trial itself will take place later before a court of criminal jurisdiction, in Alberta before either the Supreme Court, or a District Court. If the offence is treated summarily in the magistrate's court, that court will dispose of it in its entirety. If the offence becomes 'indictable', any appeal from conviction or sentence will lie to the Court of Appeal and the Court will base its decision on a record of the original trial. If it is dealt with summarily, any appeal will be heard by a District Court Judge and he will hear the evidence *de novo*. And, commonly, the maximum penalty that a magistrate dealing with an offence summarily may impose is less than the maximum that is within the powers of the higher court on the hearing of an indictment. All these points are important to both prosecution and defence, and they raise the obvious question: Who decides how any particular offence shall be treated and how is that decision carried through and recorded?

To clear away certain preliminary points:

(a) Under Section 480 of the Code, the Attorney General has, in certain cases, the right to demand a trial by jury and if the Crown does so decide neither magistrate nor accused has any right thereafter as to trial. The magistrate can do no more than hold a preliminary enquiry and, if he decides that a *prima facie* case has been made out, the accused must be indicted before the Supreme Court. The Attorney General may demand a trial by jury when the maximum sentence for the offence, or indictment, exceeds five years.

(b) Under Section 413 of the Code, certain classes of offence, notably treason, mutiny, sedition, murder, manslaughter and rape, can only be tried on indictment before a superior court of criminal jurisdiction (in Alberta, the Supreme Court). In this class of case neither the Crown nor the accused has any right to require, or consent to, any other method of trial.

(c) Under Section 467 of the Code, a police magistrate is given absolute jurisdiction over certain kinds of offence, theft and kindred offences involving property worth $50.00 or less, minor assaults, betting offences and comparable minor crime, and, again, neither the Crown nor the accused can require a trial otherwise than by way of summary proceedings before the magistrate.

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[1] 1953-54 (Can.) c. 51.

But, between these extremes of offences there remains a vast array of crimes over which someone would seem to have a choice, or a discretion, as to where and by whom they shall be tried. Is that person the Crown, the magistrate or the accused, and in what order may each exercise whatever choice he has?

Superficially, Section 468 of the Code would seem to be conclusive: The Section reads, excluding references to Section 413 and 467 mentioned above:

> (1) Where an accused is charged in an information with an indictable offence . . . a magistrate may try the accused if the accused elects to be tried by a magistrate.
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> (2) An accused to whom this section applies shall, after the information has been read to him, be put to his election in the following words:
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> You have the option to elect to be tried by a magistrate without a jury; or you may elect to be tried by a court composed of a judge and jury. How do you elect to be tried?
>
> (3) Where an accused does not elect to be tried by a magistrate, the magistrate shall hold a preliminary inquiry in accordance with Part XV . . .

and the Section continues by providing how the magistrate shall endorse a record of these steps in the proceedings on the information. Further, Section 450 of the Code, which deals with the powers of a justice other than a magistrate, contains similar wording for a similar election to be put by him to an accused. It would seem from this wording that, save in the exceptional cases noted before where special provisions apply, it is the accused who decides whether he is dealt with on indictment or summarily. However, to make any such assumption would be to ignore both the pattern and the history of the Code itself.

The essential point is that the Criminal Codes of Canada, as interpreted by the Courts, have drawn in the past a clear distinction between a 'summary conviction' and a 'summary trial'. Summary convictions result from proceedings taken under Part XV of the former Code, part XXIV of the present Code. Summary trials are proceedings under Part XVI of the former Code, Part XV of the present Code, and, from the arguments on which the decisions on these questions given under the former Code are based, it is possible to summarize the position in this regard under the former Code (that is, as at March 31st, 1955) in the form of the following two propositions (the changes, if any, brought about by the introduction of the present Code will be discussed later):

1. It is for the Crown, as prosecutor, first to make a decision on whether to proceed by way of indictment or by way of summary conviction, and its decision will take into account the gravity of the offence as disclosed by the evidence in its possession. If the Crown asks that the complaint be dealt with by way of summary conviction, the accused has no right to be dealt with in any other way.

2. If the Crown does not make such a decision to proceed by way of summary conviction contemplated by Section 468 of the present Code (and corresponding Section of the former Code) arises and it is for the magistrate to give the accused his election. If the accused does elect to be dealt with before a magistrate, it is his election that gives the magistrate his power to hold a summary trial under Part XV of the present Code.

For the first proposition it is, perhaps, sufficient to refer to the notes on Pages 798 and 799 of Tremeear's Criminal Code[2] and the cases cited there, particularly *Rex v. Leahy*.[3] That was a prosecution under Section 285 (4) of the former Code, relating to driving whilst impaired, and the following quotation from the judgment of Judge Ellis, of the Vancouver County Court, gives the reasons for the decision:

> It is obvious . . . that Parliament, when enacting the legislation, drew a distinction in its mind as to the classes of cases which might arise under the Section, and put a responsibility on the Crown to decide which sub-section would be invoked when proceedings were started . . .[4]

In short, if the Crown, where it might, decided on the facts as known to it that the case should be dealt with summarily, and so asked the magistrate, that ended the matter so far as the method of trial was concerned. The decision by the Crown conferred jurisdiction on the magistrate and the accused had no right to demand trial in a superior Court, by judge and jury or judge alone (as he would have under the current system in the United Kingdom).

But, on many occasions, the Crown, or the prosecutor, made no such a decision and left the matter on the basis that the proceedings before the magistrate could be in the nature of a preliminary inquiry, with an indictment to follow if the case proceeded further. First, in such a situation, with the prosecution neutral, what rights had the magistrate himself? Again, it is clear from the decisions quoted in Tremeear,[5] (for example, *In re Macrae, Ex parte Cook*[6]) that the magistrate at least had a discretion to treat the proceedings before him as a preliminary enquiry, whilst the decisions in *Rex v. McLeod*[7] and *Rex v. Helliwell*[8] show that under Part XV of the former Code only an election by an accused to be tried summarily could give a magistrate the necessary jurisdiction to dispose of the case in that way. What was more doubtful, under the former Code, was whether an accused, by electing to be dealt with summarily, could prevent a magistrate who wished to do so from treating the hearing as a preliminary inquiry only.

These decisions presupposed that those concerned had taken the right steps at the right time and had recorded their decisions in due order in the court records. But cases arose in which an accused had been tried summarily without any apparent election by him noted in the records. In Alberta, such a situation was considered by the Court of Appeal in *Rex v. Hills*[9] where it was held, in substance, that, provided the attendant circumstances showed that an accused had consented to a summary trial, the fact that the election had not been formally made in so many words, or had not been recorded in the court records, was not a fatal objection to a resulting conviction. Mr. Justice Egbert, in the later

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[2] 5th ed., Harvey, 1944.
[3] [1939] 4 D.L.R. 764, 73 C.C.C. 99.
[4] *Supra*, footnote 2 at p. 799.
[5] *Ibid.*, at p. 976.
[6] (1900), 3 C.C.C. 72.
[7] (1906), 39 N.S.R. 108.
[8] (1915), 23 C.C.C. 146.
[9] [1924] 1 W.W.R. 636.

case of *Rex.* v. *Belsberg*[10] (before whom the decision in *Rex* v. *Hills* was not cited) took the view that a failure to put the election to an accused specifically was something more than a technical lapse and in that case he quashed a conviction where that had not been done, but, in a later case before him, *Rex* v. *Milner*,[11] he felt himself to be bound by *Rex* v. *Hills* and ruled accordingly. The same point was considered by the British Columbia Courts in the case of *Rex* v. *Mitzel*,[12] and that court followed the same line of reasoning.

That was the position before the present Code came into force last year. Acquiescence by an accused in a summary proceeding was usually the equivalent of a positive election. But the new Code raised a fresh question; did the change of wording between the former Section on this point, Section 781, and the present Section 468 substantially change the law laid down in these earlier decisions? The former Section 781 referred to the 'option' of an accused to be tried forthwith by a magistrate (sub-section 2) and continued, in the following sub-section, that "if the person charged consents to the charge being summarily tried" the magistrate might proceed. Section 468 is much more specific. A magistrate may try an accused "if the accused elects to be tried by a Magistrate" (sub-section 1) and the Section continues by setting out the exact words which the magistrate must use in putting that election to the accused. As was said earlier, on the face of it it would seem from that that failure to address an accused in these words deprive the magistrate of his jurisdiction to proceed further summarily at all.

This point came before the Alberta Court of Appeal again recently in the case of *Re Nisgard*[13] and the judgment of the Court was to the effect that the ruling in *Rex.* v. *Hills* was still good law and binding, that a magistrate still has power to deal with the case summarily even though no words of election are used at the start of the hearing. Once again the Court pointed out the distinction between the two sources from which the jurisdiction of a magistrate to proceed summarily came, the one where the case proceeds under Part XXIV of the Code, the other where the accused himself gives the jurisdiction by an election under Part XV. As Mr. Justice Johnson said in delivering the judgment of the Court:

> Section 468 has no application to a case tried under Part XXIV of the Code (Part XV of the old Code) so that changes in that procedure would not affect the validity of the prior decision . . . . .[14]

The new Code, then, has not changed the law in this respect.

But one is still left with the impression that Section 468 might be more happily worded. Earlier decisions have established that what might be called the first option over trial rests with the Crown and that, if the Crown is silent, the magistrate himself may have some right to refuse to proceed summarily, yet

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[10] (1915), 2 W.W.R. (N.S.) 568.
[11] (1951-52), 4 W.W.R. (N.S.) 658.
[12] *Ibid.*, 342.
[13] (1955-56), 17 W.W.R. (N.S.) 647.
[14] *Ibid.*, at p. 649.

Saskatchewan introduced the holograph clause in enactments regulating the whole subject of wills, although Alberta had one year previously passed a Section 468 ignores this aspect of a hearing before a magistrate. It reads as though the decision rests solely with an accused. Parliament may have intended to change the law in this respect; if so, clearly it has not used language strong enough to bring that about. It may have intended to make no change; if so, having regard to its decision to rewrite the Section to quite a considerable degree, it would seem a pity that it did not go further in the direction of clarity and preface the new Section with such words as: 'Subject always to the right of the Crown to determine whether an offence shall be dealt with on indictment or summarily . . . '. As the Section stands now, an accused has not the full right the Section appears to give him, nor can he claim as of right that the magistrate shall use the words of that Section before proceeding to a summary trial. One of the great virtues of the Criminal Code is that it is both comprehensive and clear; in so far as it fails in either of these it falls below its own high standards.