JUDICIAL SENTENCES.

There has been some discussion in Canada of late concerning inequality in the sentences for the same offence pronounced by those who preside in our various courts of criminal jurisdiction, and a suggestion has emerged from it that machinery in the nature of a referendum on judicial decisions be set up to correct this inequality and to standardize sentences. Such a project not only strikes at the independence of our judiciary but is diametrically opposed to the best juristic thought of to-day. The idea is not new; it is merely a revival of Beccaria's discredited theory of equal punishment for all offenders who commit crimes of a specified kind. It ignores the modern view of penologists as to the necessity for individualization of sentences. Instead of making the punishment fit the crime, as standardization would do, the individualization theory makes the punishment fit the criminal. Sir Paul Vinogradoff put the case in a nutshell when he said: "No abstract equations will do; the judge stands to the criminal in the position of the doctor who selects his remedy after diagnosing the disease and the resources of the patient's organization." In saying this Sir Paul was in harmony with Saleilles and other jurists of continental renown.

The subject was touched upon in a most informative way by Mr. Justice Adamson, of the Manitoba Court of King's Bench, in discharging the jury at a recent assize in Winnipeg. We publish his observations below for the benefit of our readers.

Gentlemen of the Jury:—

On behalf of this Judicial District, I wish to thank you for your attendance and service at this Assize. It is not a pleasant duty to pass sentence on one's fellow-man, and I am well aware that many of you are here at great personal inconvenience and sacrifice. Citizenship, however, not only involves rights and privileges, but also duties and obligations, and I am sure that you will agree with me when I say that jury duty is one of the highest and most important duties of a Canadian. It is said that a people always gets the kind of government which it deserves. The administration of criminal justice is a most important branch of government, and by the jury system we in Canada will have justice administered as we wish. Whether we have a lax administration with crime rampant and life and property unsafe, or whether we have a clean law-abiding country largely free from crime greatly depends on how well, how intelligently and with what fidelity, Canadian juries do their duty. That is why it is so essential that the best and highest type of citizens should serve as jurors, and that is why sec. 11 of The Jury Act, R.S. Man. 1913, ch. 108, provides as follows:—

"The names selected shall be those of persons as, in the opinion of the selectors or the majority of them are, from the integrity of their character, the soundness of their judgment and the extent of their information, the most discreet and competent for the performance of the duties of jurors."

I wish to draw this to the attention of the Reeves and Secretary-Treasurers of every municipality in the Province who have to do with the preparation of the original or first list from which the jurors are chosen.

Before discharging you I wish to make some remarks upon a subject which has recently been a matter of public discussion. I refer to the supposed inequality of judicial sentences. If there does exist any injustice which this phrase suggests, it should be remedied. Moreover, those unfortunate persons who are subjected to the imposition of sentences and their friends and relations should be relieved of any anxiety which they may have on this score.

Before forming an opinion on this matter, the public and those who are specially interested should have accurate information of what the present procedure is, and what actually does take place. Convicts are sentenced either by (1) a magistrate, or (2) in the County Court Judges' Criminal Court, or (3) in this Court—the Court of King's Bench. The most serious offences—those involving the most severe penalties—are tried in this Court, unless the accused himself elects for a summary trial before a magistrate or for a speedy trial in the County Court Judges' Criminal Court.

In this Court it has become a practice to reserve sentence of those who have been convicted to the end of the Assize, so that the judge before whom the prisoner or prisoners has or have been convicted, and whose duty it is to impose sentence, shall have an opportunity of consulting and advising with the Chief Justice and the other judges of this Court. Usually a meeting of the judges is called, and the judge who has tried the case states the facts of the case and the prisoner's admitted record, if he has any. The case is discussed and precedents for similar offences in English as well as in Canadian Courts are considered. The trial judge then has to take the responsibility of deciding what the sentence shall be. The sentences which it is my painful duty to impose upon those who have been convicted before me at this Assize have been decided upon after consultation and advising with the Chief Justice and other judges of this Court, and I can assure you that they have been most carefully considered.

Whether sentence by (1) a magistrate, (2) in the County Court Judges' Criminal Court, or (3) in this Court, a prisoner who feels aggrieved or feels that his conviction is unjust, or that the sentence imposed is unequal or harsh, may appeal to the Court of Appeal. If he chooses to do so, he may appeal against sentence only. That is, he may have his sentence reviewed and altered or varied, unless the Court of Appeal, after hearing his statement of the facts and the Crown's version of them, and hearing his record, are of the opinion that the sentence is proper. If he appeals from sentence only, the evidence taken at the trial need not usually be extended, so that taking such an appeal need not be expensive. The Court of Appeal is composed of five judges, all of whom are trained, able, painstaking men. It has been suggested in some quarters that there should be a commission charged with the duty of imposing sentences. As a matter of fact the Court of Appeal is really a commission which will review the sentence of any convict who feels aggrieved, at little expense to him and little additional expense to the state. Moreover, it

is difficult to imagine a more experienced, intelligent and trustworthy commission than the men who compose our Court of Appeal.

Further, a prisoner who is not satisfied with his sentence (whether his case has gone to the Court of Appeal or not) may make representations to the Department of Justice at Ottawa. The Crown has power to pardon any prisoner: Crim. Code, R.S.C. 1927, ch. 36, sec. 1076. The Governor-General also has power by an order under the hand and seal of the Secretary of State to liberate any prisoner on ticket-of-leave: Ticket-of-Leave Act, R.S.C., ch. 197. Almost every prisoner sooner or later makes an application to the Department of Justice at Ottawa for ticket-of-leave. He may make such an application by a simple letter from himself or his wife or his friend or his lawyer to the Justice Department.. The Justice Department maintains a branch known as "The Remission Branch," which, as I understand it, does nothing but consider and deal with such applications. Whenever such an application is made the Remission Branch obtains (1) a report from the Governor of the gaol or penitentiary on the prisoner's conduct, health and other details while he has been confined, (2) a report and statement of the facts of the case from the trial judge or magistrate, with recommendations, if any, and (3) his record. These are considered by the Remission Branch together with his own representations.

In capital cases the judge immediately upon sentence is obliged by statute to make a report to the Secretary of State, and forward to him a copy of the evidence, together with the material exhibits. Such cases are considered and reviewed by the Justice Department, without any expense to the condemned person and without application from him.

With this machinery and safeguards, it would be extraordinary if there were any injustice done.

In 1932 200 persons were convicted and sentenced in the County Court Judges' Criminal Court of this Judicial District, and there was not one appeal from either conviction or sentence. At the last Assize for this Judicial District 30 were sentenced and there was not one appeal from either conviction or sentence. It is estimated that less than one-half of one per cent. of persons who are sentenced in our trial courts appeal to the Court of Appeal. Most of these appeals are against conviction. So far as sentence is concerned the Court of Appeal does not alter or vary the original sentence in more than one in every thousand cases. Even in the cases where the Court of Appeal changes the sentence it would be a matter of opinion and would be so even though it were done by a special commission. This small number of appeals in some sense is an acceptance of very nearly all sentences as not palpably unreasonable or unjust even by those most concerned. As a matter of fact there are very few appeals against sentence only. If from this it can be taken that almost all of the sentences now imposed are just it means that the work of a new court for the purpose of dealing with sentences only would do work which is now satisfactorily done even in the opinion of the prisoners. For the very small percentage of cases (if any) where there is an actual injustice, is not the present method of appeal and application to the Department of Justice the most convenient and quite satisfactory?

The following statistics are taken from the Annual Report of the Superintendent of Penitentiaries, for the fiscal year ended March 31, 1931: On the 31st March, 1931, there were 3,714 prisoners in Canadian penitentiaries. Dur-

ing that year 1,069 were released from penitentiaries; 654 by expiry of sentence; 413 by parole, under Ticket-of-Leave Act; one by pardon and one by Court order. During that same year 498 were released from gaols, reformatories and industrial farms upon parole. During this one year 913 prisoners were released before expiry of their sentences on parole under the provisions of the Ticket-of-Leave Act. These figures show that the Remission Branch is active and constantly considering such applications. Practically all these cases are paroled as an exercise of executive clemency, and not because the sentence is considered unequal, though that may be a ground for granting ticket-of-leave. Most well-behaved first offenders do not serve their full sentence.

This of course is not a new matter. Our present methods and machinery, which I have spoken of, were not made in a day. Like many other institutions, they grew out of the experience of centuries, and are a product of the wisdom of the most able men the British people have had. The late Sir James Fitzjames Stephen, who is the father of our Criminal Code, in his "History of the Criminal Law of England," discussed this subject. He says, in part, as follows:—(Vol. II, p. 87).

"The subject of the discretion exercised by the judges in common cases, and by the executive government (practically, the Secretary of State for the Home Department) in capital cases, appears to me to be little understood.

"As to this, it must be remembered that it is practically impossible to lay down an inflexible rule by which the same punishment must in every case be inflicted in respect of every crime falling within a given definition, because the degrees of moral guilt and public danger involved in offences which bear the same name and fall under the same definition must of necessity vary. There must therefore be a discretion in all cases as to the punishment to be inflicted. This discretion must, from the nature of the case, be vested either in the judge who tries the case or in the executive government, or in the two acting together.

"From the earliest period of our history to the present day, the discretion in misdemeanours at common law has been vested in the judge. With few exceptions, as, for instance, misprision or treason, the court has always had a discretion to inflict as light a sentence as it chose in such cases. In statutory misdemeanours, the penalty was sometimes fixed, but generally not.

"In cases of felony the judge, till the reign of George III., had no discretion at all. The steps by which power was given to him first to commute the punishment of death after passing sentences; afterwards to abstain from passing sentence of death at all (at this period all felonies were punishable with death); and finally to exercise a discretion unlimited in the direction of lenity have been stated above. The cases which still continue to be capital—practically, murder and treason—supply the only instances worth noticing in which the judge has no discretion. The discretion in such cases is vested in the Secretary of State."

He then discusses commutation in capital cases and continues at p. 89:

"These considerations also apply to a complaint frequently made of the inequality between the sentences passed by different judges for similar offences. The only way in which such a difference could be avoided would be by narrowing the discretion of the judges, and this could be done only by reintroducing the system of absolute minimum punishments, abolished in part in the year 1846, and in part by more recent legislation.

"I must however observe further, that in my opinion the difference between the sentences (which must exist to some extent) is not nearly so great as those who derive their notions upon the subject from reading reports of trials in the newspapers would suppose. Newspaper reports are necessarily much condensed, and they generally omit many points which weigh with the judge in determining what sentence to pass. A person in the habit of being

present at trials would, unless I am mistaken, soon discover that he could foretell pretty accurately the sentence which would be passed in any case which he had watched.

"No one, I think, could fail to be struck with the way in which a definition apparently simple covers crimes utterly dissimilar, and deserving, on every ground, of widely different punishment. This is particularly true in cases in which the offence consists in the infliction of personal injuries. Every circumstance must be known in such cases before anything approaching to a real judgment of the offence can be formed, especially when the two elements of moral guilt and public danger are taken into account. To give illustrations on the subject would occupy more space than I can afford; but I may just observe that a drunken brawl between two or three people coming out of a public-house, ending in the emptying of the pockets of one of the party in a manner differing little from rough horseplay, and the very worst case of highway robbery with violence, would constitute the same offence. Arson, again may be the worst private crime that a man can commit. It may be a little more than half-childish mischief."

At p. 17, in Vol. III, in discussing the crime of murder, he says:

"But there is no definite connection at all between the fact of death and the moral guilt or public danger of the act by which death is caused. The most deliberate, desperate and cruel attempt on life may not cause death, the most trifling assault may cause it. Death may be intentionally caused under circumstances which produce rather pity for the offender than horror at the offence; or, again, under circumstances which indicate determined defiance of the law, but do not involve any special ill-will to any particular person. This extreme variety in the circumstances under which, and the intentions with which death may be occasioned, is the true cause of the great difficulty which has been found in giving satisfactory definitions to the different forms of homicide."

And I add that these very considerations are what often give rise to what appears to be unjust inequality of sentence, but which are not when the moral guilt, the public danger and the whole facts and circumstances of the particular case are considered and duly taken into account, and these are best known to the trial judge. In this Court within the last two or three years one of our judges at the same assize sentenced two men for an offence called by the same name. One man went to the penitentiary for ten years, and the other went to gaol for one month. That has been commented on as an example of inequality. As a matter of fact the offences were quite different, though the two men were convicted of a crime called by the same name. One was the most horrible, cruel and wicked attack by a man with a record for a similar offence upon a little girl the details of which would not bear repetition. The other was an episode with a married woman in the cab of a truck which she largely brought on herself.

Almost every day men who have been convicted or pleaded guilty to theft or fraud in the police courts have their sentences suspended and go free. I think I am right in saying that a very large percentage of first offenders in these crimes, where they are not aggravated, have their sentences suspended. Then other cases come up where persons have a record (that is previous convictions, sometimes a large number and running over a period of years) are convicted of theft or fraud of a serious and perhaps aggravated nature, and in these cases heavy sentences are imposed. Is this inequality? If it is suggested that every man guilty of theft should suffer exactly the same sentence, no matter what his record may be, no matter what the circumstances, no

matter what the moral guilt, no matter what the public danger, then, yes, it is inequality; but it is not an injustice.

As a matter of fact, if justice is to be done, there must be inequality of sentence, because though crimes may be called by the same name, they are always unequal. They are never exactly the same, no matter by what name you call them, any more than two men are ever exactly the same.

What we want in our courts, I suggest, is not uniformity and equality of sentences but justice. The magistrates and judges, in trying to impose just and righteous sentences, consider:

(1) all the facts and circumstances of the particular case;
(2) the moral guilt;
(3) the public danger, and
(4) the record of the prisoner.

Of course individual magistrates and judges differ but prisoners can never suffer through such differences, because their differences are evened up, equalized and rectified by the Court of Appeal or the Remission Branch at Ottawa.

Of course, if the present system did result in any injustice, the question of expense should not be greatly considered. As however there is no injustice in the present method, the cost of new and unnecessary machinery should be given consideration. The cost of the administration of criminal justice is an enormous item in the taxpayers' bill. When one considers the cost of the police, the gaols, penitentiaries, court houses, magistrates, judges, Crown prosecutors and officials, and then remembers that that is only part of the material cost of having criminals in our population, something of the seriousness of this item of cost may be realized. We have in proportion to our population in Canada many more Courts, Magistrates and Judges than they have in England. That is partly due to our scattered population, partly to the fact that we have nine provinces. Our constitution provides that the Province constitutes the Courts while the Dominion pays the stipends of the judges, so that there is not the check on the establishment of expensive machinery which might be desirable.

Is it needful, is it wise, with all the safeguards we now have, to bring into being another tribunal, commission or court, which would unquestionably greatly increase the cost of administering criminal justice? I am sure that the judges would be glad to be relieved of the most unpleasant and disagreeable duty and responsibility they now have, namely, of passing sentence upon their fellow-men. But is it necessary and in the interests of justice? I suggest that it is not only unnecessary but would be a costly experimental innovation which would greatly disturb the machinery of the Courts with results most detrimental to the administration of criminal justice.