FREE LAW FOR THE POOR*

The late Lord Buckmaster, speaking in 1925, at the Annual Meeting of the Canadian Bar Association, said as follows—

"Finally, there remains the big problem which I noticed with great pleasure formed one of the matters for consideration at your meetings, and that is, what steps we are to take to remove from our profession the reproach that the poor man cannot get the same even-handed justice as the rich. It does not mean that he does not get justice before the Bench. That I have never heard said. But that in the ability to employ clever counsel and clever lawyers and to spend the money necessary for the preparation of a case, he was at a disadvantage with the rich litigant and the result of that disadvantage may well be that the scales of justice may be turned against him."

In speaking thus His Lordship no doubt had in mind the amendments to the English Consolidated Rules of Practice then in contemplation.

For many centuries English law has made provision for persons too indigent to engage solicitors or retain counsel. The earliest authority for this is the Statute XI, Henry VII, Chapter 12, entitled "A Means to Help and Speed Poor Persons in Their Suits." This Statute inaugurated the well-known in forma pauperis procedure, amended and improved from time to time and culminating in the revolutionary changes embodied in The Poor Persons Procedure Rules of 1926.

By these Rules, which may be seen in "The White Book," the general Law Society and the several provincial law societies, acting through committees appointed for the purpose, are empowered, after full enquiry, to grant a certificate entitling the recipient to institute, defend or participate in any legal proceeding, (other than a criminal or bankruptcy matter) as a poor person, upon terms to be presently referred to. The certificate must be to the effect that the person is not worth more than £50, that his income does not exceed £2, or, in special cases £4 per week, and that he has reasonable grounds for the steps that he desires to take. It must also give the name and address of a solicitor, nominated by the Committee, who has consented to act for the person, without charge. The certificate is filed with the registrar of the court, who notifies the solicitor named with..."
in it. No court fees are payable and unless otherwise ordered by the court, the poor person is not liable for any costs and cannot recover costs, other than disbursements. The acceptance by a solicitor or counsel of any fee, save as authorized by an order of the court, is forbidden and anyone violating this rule becomes thereby guilty of contempt of court. The proceedings once begun, cannot be discontinued or settled nor can the solicitor or counsel engaged in it withdraw without the consent of the court. On the other hand, the court has power, in a proper case, to cancel the certificate, where for instance it is discovered that the holder has misrepresented his financial position to the Committee. In the event of an adverse decision in the litigation, no appeal may be launched without the previous consent of the court. Where the poor person succeeds, the court may order costs to be taxed and paid to the solicitor and counsel engaged and may direct a charge in their favour to be registered against any real property that may be recovered, provided that the profit costs so taxed or charged shall in no case exceed one-fourth of the amount of the money or of the value of the property recovered.

Arrangements have been made with the newspapers for the publication, at greatly reduced rates, of advertisements in cases in which service by advertisement has been ordered, with the medical profession, whereby its members give evidence without charge, with the Automobile Association, to furnish expert witnesses gratis, and with the various police and other authorities, for the waiving of witness fees where constables, municipal employees, or naval officers or employees are called as witnesses.

Reports on poor persons procedure are published annually by the Law Society and make most interesting reading. Included as appendices to these reports are reports from each of the provincial centres at which committees have been organized. These accounts establish four main facts, namely, that the applications have been dealt with expeditiously and effectively by the committees, that adequate assistance has been forthcoming from conducting solicitors and barristers, that court cases have been conducted satisfactorily, and that all really deserving persons have been assisted.

In addition to the London Committee, sitting in nine divisions, there were in 1933, no less than ninety-one provincial committees. The work has proved eminently successful. During 1933, the last year for which figures are available, no fewer than 6,355 applications were received, of which 3,121 were granted.
It is interesting to note that approximately 63% of the applications related to matrimonial causes. In the same year, poor person litigants in London alone recovered, either through judgment or by way of settlement, sums totalling £16,000. An idea of the volume of work may be gained from the fact that the London Committee has now 63,000 files. The only expenses are for office rent, clerical staff, etc., and these, aggregating in 1933 rather more than £6,000., are borne by the Government. So far at least as the provinces are concerned, every secretary acts gratuitously.

The success of the work has been due in large measure to the voluntary services of the honourary secretaries and other members of the various committees. The brunt has, however, been chiefly borne by the members of the profession who have volunteered their services and whose names appear on the panels from which the committees select solicitors and counsel to take charge of the various cases. In London, as well as in nearly all of the provincial districts, it has been found possible to provide a sufficiently numerous rota of both solicitors and barristers, willing to undertake this somewhat ungrateful work. The report, however, expresses regret that those volunteering should form so small a percentage of those in practice. For instance, in London, out of a total of 5,312 solicitors, only 711 have volunteered. The result is that those willing to serve must be called on more frequently than in fairness they should be.

The work of the official committee is supplemented and assisted by the voluntary efforts of a number of private legal aid societies, one of which, made up of Catholic lawyers, bears the appropriate title of Guild of Our Lady of Good Counsel.

It may be asked whether those who benefit by these services always appreciate how much they owe to their solicitor, who receives no more than the barest out of pocket disbursements, sacrificing his own and his clerk’s time and doing work that is in many instances most distasteful to him. The reports show that the answer to this question is not always in the affirmative. One case, indeed, is mentioned, in which an applicant who failed to appear at the trial of her case, although she had been given her railway fare for the purpose, afterwards questioned a very favourable settlement her counsel and solicitor had secured for her and which had been approved by the judge. Many applicants are, moreover, under the impression that solicitors and counsel who act for them are paid for doing so by the state. Grateful letters from applicants are, however, frequently received, and as time goes on, the attitude of persons assisted steadily improves.
The Rules are limited to High Court actions including cases remitted for trial to the County Court, but it appears that the Honourary Secretaries are finding themselves called upon to give advice and assistance in cases outside the Rules and thus are materially increasing the value of their already very valuable services.

Criminal cases are not, of course, dealt with. There is an Act known as the Poor Persons Defence Act, providing for a fee of three guineas to counsel appointed by the court to represent an indigent accused. The compensation is, however, inadequate, and results are therefore unsatisfactory, and a strongly developed opinion has recently arisen in favour of the appointment of public defenders. The late Sir Edward Marshall Hall, K.C., who defended the accused in so many causes célèbres, emphasized on many occasions the hopeless inadequacy of the Poor Persons Defence Act, and urged the appointment of public defenders, supplied with adequate funds and backed by a suitable organization.

In Spain the institution of public defender dates back five centuries and the office still exists. There were public defenders in the Papal States in the eighteenth century, as witness the address of the Pauperum Procurator in defence of Count Guido Franceschini, on trial for the murder of his wife, the preparation of which is described in The Ring and The Book, a poem based, as Browning tells us, on the official record of an actual trial that took place in Rome in 1790. In some sections of the United States, public defenders have been appointed, on the same principle as the public or State prosecutors. The office of public defender has recently been created by statute in California, Connecticut and Minnesota and there are a number of other places such as Portland Oregon, Columbus, Cincinnati, Dayton Ohio, and Indianapolis Indiana, where the office has long existed and has proved successful. The institution of public defenders has been endorsed by Dean Wigmore, the late Chief Justice Taft, and other outstanding authorities. Other countries that have public defenders are Hungary, Norway and Argentina.

Although the matter of the desirability of the appointment of public defenders has been considered on several occasions by the Canadian Bar Association, no definite action has ever been taken, and so far as the writer is aware, no Canadian province has hitherto made provision for such an appointment. On this subject of public defenders, it may be remarked that it would seem to be as much a function of the State to shield the innocent
as to convict the guilty. Does not the "presumption of innocence" require that the State should defend, as well as prosecute, accused persons?

In the United States much is being done in the way of affording legal assistance to poor persons, but along lines entirely different from those followed in England. Instead of depending on volunteer effort, most of the States of the Union provide, out of public funds, for a staff of salaried attorneys and for permanent offices and other expenses. In many of the States, however, notably New York, the necessary funds are furnished, not by the Government but through voluntary contributions, chiefly from the legal profession. The New York Legal Aid Society was founded as far back as 1876 and there are similar societies in most of the other States. These individual organizations have, since 1911, been banded together to form the National Association of Legal Aid Societies, which holds an annual convention and publishes a periodical, The Legal Aid Review. This Association is performing a nation-wide work for social justice. According to The Legal Aid Review for April 1934, there are now thirty-eight affiliated associations.

The Legal Aid Society of New York may be taken as typical of the class that is sustained entirely or chiefly by the voluntary contributions of its members. The purpose of the Society is stated in its constitution to be as follows—

"The purposes of the Society shall be: to render legal aid, gratuitously if necessary, to all who appear to be in need of such aid and deserving thereof, and unable to procure it elsewhere, including gratuitous legal aid to any poor person accused of crime; and to promote measures for the protection of poor persons with respect to their legal rights."

The membership is made up of individuals, law firms and business corporations or partnerships. A contribution of $1000. or more in any one year entitles to life membership. Those who contribute $100. or more annually are known as patrons. Sustaining members contribute $50. annually, but this, in the case of a partnership, covers five members of the firm. Regular members contribute $20. and associates $10. annually, while $1. per year is accepted as a membership fee from members of the Bar of less than five years standing. In 1933 grants and membership fees amounted to $101,507. and earnings to $21,269., making a total of $122,776. The total expenditure was $121,257. There would, however, have been a serious deficit but for the fact that before the end of the year, the sum of $26,000. was
raised “by a special underwriting of a small group of law firms.” With reference to the raising of revenue, the Report for 1933 contains the following—

“Grateful as the Society is for the help received it seems unfair that the burden of support for an organization which fills so wide a need should fall on a comparative few. With 35,000 to 40,000 clients a year we ought to have a commensurate number of supporters. However, despite much effort to enlist general support, legal aid seems to lack a public appeal, such as hospitals and relief agencies. The friends we make are a goodly number and they are lasting and very generous, but the contributions of the many are hard to get. Special effort toward interesting a larger number of people is to be made in the coming year.”

As there are no public defenders in New York State, the Society affords assistance in criminal as well as civil proceedings. The two departments are, however, entirely separate and carry on their work at different addresses. In 1933 the Society handled cases for 34,906 persons on the civil side and 1,151 on the criminal side, making a total of 36,057 poor persons to whom the Society afforded assistance.

The offices in which the work in civil cases is carried on, occupy 3000 square feet of floor space and comprise a large reception room, a good-sized well stocked library, a stenographers' room, eight interviewing rooms or attorneys' offices, and a filing room.

The management of the Society is in the hands of thirty-six directors, who are empowered to employ and pay such attorneys, and clerical and other assistants as may be necessary to the carrying on of the work of the Society. The work of management is divided up among a number of committees, the members of which act without remuneration. There are, an executive committee, a committee on finance, a law committee, to aid and direct the paid attorneys on the civil side, a voluntary defenders' committee, to perform a similar office for the attorneys on the criminal side, a committee on co-operation with social agencies, and a committee on legislation, whose duty it is to watch pending legislation affecting poor persons with respect to their legal rights or remedies.

A salaried Attorney-in-Chief, acting under rules approved by the Board of Directors, has supervision of the offices on the civil side, and similar duties are performed on the criminal side by “The Attorney for the Voluntary Defenders' Committee”. Under the Attorney-in-Chief are twelve salaried attorneys, one of whom is a woman, several law clerks, a cashier, a financial
secretary, four stenographers, two reception and filing clerks, a statistical clerk and a telephone operator. On the criminal side, though only about 1,200 cases are handled, as compared with 35,000 on the civil side, these are of such a serious nature that a staff of five attorneys, a social worker, four investigators, and two stenographers is required to handle the work. One of the annual reports gives an interesting description of the Society’s method of procedure on the civil side, which may be worth quoting in full.

"The applicant enters a large, airy, plainly furnished waiting room, arranged so as to facilitate the flow of business and the uninterrupted passage of both clients and staff. The applicant approaches the reception desk. Here, out of earshot of other applicants, he is asked the general nature of the advice or relief he wishes, who directed him to the Society, his nationality and citizenship, whether he can pay for a lawyer and whether he has been there before.

This is recorded on a numbered card which is later used by the attorneys for a record of the case.

Then, in his turn, the applicant is shown into one of the small interviewing rooms, where he is met by an attorney. If the applicant is a woman, she may if she prefers, be interviewed by a woman attorney.

The attorney then endeavours tactfully to secure from the applicant information designed to make sure that he is truly unable to afford a lawyer and is not seeking to impose on the Society and deprive some private attorney of a proper fee. If the attorney finds that the applicant has a worthy case, worthily pursued, his case will be handled, regardless of race, nationality or creed, if it is possible for the Society to do so. If he and his case are acceptable, the client is then encouraged to tell his whole story. If the case is taken up, the client is given an identification card, with a number and certain other data and a short summary of the rules governing the relations between clients and the Society, and its attorneys.

In most cases the other party to the controversy is also communicated with and, if possible, a friendly adjustment is sought. If litigation is found to be unavoidable, the client is referred to one of the trial lawyers, in the municipal court department of the main office, should the case be one for the recovery of money or property within the jurisdiction of the municipal court. If it is a case for the Supreme Court, the Surrogate Court, or the Workmen’s Compensation Bureau, the client is turned over to a specialist in that particular branch in question."

Before the first interview, applicants are charged a retaining fee of fifty cents, in all except workmen’s compensation cases, unless they are destitute (as is, in fact, the case with most of them) and have been referred to the Society by a social agency. The purpose of the retainer is threefold — first, to make the client feel that he is not the recipient of charity; second, as a stake
in his case, to insure better co-operation; and third, to help the Society to help others.

A sum to cover expenses may be required for the acceptance of a court matter or other case entailing a money outlay, since the Society has only a limited fund for this purpose, available in very small amounts, for extremely destitute persons. Expenses recovered are refunded. Costs allowed by the court, as distinguished from expenses advanced by the client, are retained by the Society. If the costs recovered exceed the 10% commission chargeable, then the commission is waived. Attorneys' allowances made by the court in matrimonial cases and paid by the opposite party, are retained by the Society, as are also allowances for counsel in workmen's compensation cases. In collection cases (except workmen's compensation claims) when the sum recovered exceeds five dollars, a commission of 10% is charged; and a similar charge is made where property is recovered. For successful defences in civil actions, where money or property is not involved, a sum is charged not exceeding five dollars in a municipal court case or ten dollars in an action in any other court, including matrimonial cases. In estate cases, three per cent of the recovery is authorized. A two dollar deposit is requested in supplementary proceedings, in order to insure co-operation. This deposit is returned, if co-operation is afforded. Fees may be waived in a proper case, at the discretion of the Attorney-in-Chief. These regulations are sometimes departed from, but only for convincing reasons.

In criminal cases, no fees are charged and no appeals are taken to higher courts, except in rare instances. The criminal defence work had its inception in the provision of New York State Law requiring the judges to assign counsel for indigent defendants. This led to much incompetent representation. No lawyer with a good practice wanted such cases and those willing to take them had not usually either the ability or the facilities for handling them. This led to grave abuse and injustice. Hence it is that the Voluntary Defenders Committee stands ready to take these assigned cases as well as those that come to it by direct application or through social welfare organizations. The accused must, of course, be too poor to pay for the services of a private attorney. No capital cases are taken, for here the law makes adequate provision for payment of counsel.

The above outline will enable one to form some idea of the nature and work of the legal aid societies, which operate in many of the cities in the United States. The legal aid idea
has gone far since 1919. Societies have multiplied all over the country and legal aid to the indigent has become increasingly the subject of municipal or governmental care, both in the civil and criminal fields. This increased recognition bears ample witness to the practical, as well as the ideal, worth of furnishing free law to the poor. In recent years a considerable amount of excellent literature on this subject has been produced.

Many of the Universities in the United States have well-staffed legal aid clinics, comparable with free medical clinics attached to hospitals.

I have endeavoured to outline what is being done in England and also in the United States in the general direction of legal aid to the poor. The systems of organized assistance in force in the two countries are, as we have seen, basically different. Looking at the subject from the point of view of Canada, it is by no means apparent which, if either, of the systems we should endeavour to have adopted. I would indeed be reluctant to recommend the adoption of either, without material modifications.

The subject has not, however, been entirely neglected in Canada. There is, for instance, hardly a Canadian lawyer in active practice who has not had, at one time or another, to perform legal services for the poor as an act of charity and without any expectation of material reward. Even in the matter of organized legal aid to the poor, a beginning has been made. In this respect, as in so many others, the Province of Alberta has lived up to its reputation as a progressive Province. In the Spring of 1932, Rules of Practice were adopted, dealing with proceedings by and against poor and needy litigants. These rules are very similar to, and were apparently modelled on, the English rules. They provide for committees in the various judicial districts, who are empowered to issue certificates to poor persons, after having satisfied themselves in each case that the applicant is unable to employ a solicitor. The committee is authorized to collect from the applicant a sum not to exceed $10.00, to cover out-of-pocket disbursements, though not office expenses. The rules further provide for the waiving, in the case of a poor person, of court fees, stenographers’ fees and sheriffs’ fees, and that no costs shall be awarded against him. A solicitor or counsel who accepts remuneration from a poor person is declared to be guilty of unprofessional conduct, within the meaning of The Legal Profession Act, Alberta, and his certificate is liable to cancellation. The committee, however, may allow the payment of disbursements to the conducting solicitor, to the extent of the deposit of $10.00 collected from the applicant.
If the poor person obtains judgment, costs are taxed, including disbursements for court fees, court stenographers' fees and sheriffs' fees, and in the event of recovery, these are paid to the proper persons. The solicitor is, moreover, entitled to his taxed costs as between solicitor and client, out of the money or other property recovered, and where money or real or personal property is secured through a settlement, the committee may allow the solicitor collection or other charges out of the proceeds.

These rules have now been in force for over two years and have been greatly praised. The Honourable John F. Lymburn, K.C., Attorney General, for instance, reports as follows—

"There can be no doubt but that the provision made by the Rules has met a very definite need and I think it can be fairly said that in the Province of Alberta no litigant is today debarred from his recourse to the courts simply by reason of his inability to pay legal fees."

The first report of the Litigant's Committee of the Edmonton Judicial District is dated April 11th, 1934, and covers a period of one and one-half years. It appears from this that the Committee consists of six Edmonton lawyers, who meet weekly and spend in the neighbourhood of an hour and a half in providing a free legal clinic to needy persons. To the date of the report, the Committee had held seventy meetings, its members, serving entirely without remuneration. The Committee endeavours to see that no one shall be denied access to the courts because of destitute or needy circumstances. Where necessary, litigation is instituted and conducted through the courts, entirely free of charge. In the year and a half covered by the report, the Committee dealt with 240 cases. Domestic disputes leading to separation, alimony and divorce, formed the largest single subject, but cases of every kind were handled. In its efforts to see that justice was done, the Committee did not hesitate to bring action against, among others, a leading philanthropic organization, the City of Edmonton, and several large corporations.

In approximately one-third of the cases, settlement or adjustment of the matters in dispute was effected. Wherever court proceedings were necessary, the Committee appointed counsel to carry them on, and in every such case the work was willingly undertaken and carried through by the counsel appointed, without remuneration. About one-third of the applicants were persons who had no legal cause of action or who were suffering from some fancied wrong, or who had means sufficient to pay for the service that they were endeavouring to obtain free. All of these cases were sympathetically handled by the Committee,
and the applicants given the opportunity of unburdening themselves, and afforded advice as to the best course to pursue. In most of these cases, the parties went away satisfied. Many applications did not reach the Committee at all. Innumerable interviews and conferences, of which no record was kept, took place at the respective offices of the various members of the Committee, who gave advice and assistance free of charge, rendering it unnecessary for the cases to come before the Committee.

While no other province has, I believe, gone as far as Alberta, there has nevertheless been a certain measure of organized effort in other places. In Saskatoon, Saskatchewan, pursuant to an arrangement between the local Bar and a social service agency, which went into effect in September 1933, junior barristers attend at the agency's offices every Monday evening, for the purpose of giving free legal advice to persons unable to pay for it. So far the work has been confined almost exclusively to the giving of advice, although a few letters have been written. Collections are not taken, if of the type that a solicitor would undertake on a percentage basis.

So far as the writer knows, Windsor, Ontario, is the only other place in Canada where organized legal aid of a public character has been undertaken. On February 10th, 1931, the City Council passed a resolution requesting the City Solicitor to afford legal assistance to indigent residents of the municipality which was not, however, to extend to litigation or to appearances in court. Up to July 1st, 1934, no less than 5,023 persons had been advised by the Department. Advice is given by law students who have been thoroughly instructed in the law found to be most frequently involved. If cases are met with upon which the student concerned feels unable to advise, he consults the City Solicitor. Advice is not given until the office is fully satisfied that the financial circumstances of the applicant are such as to render him incapable of employing and paying an ordinary solicitor. The free service thus afforded has proved most beneficial to the poor of Windsor.

The proceeding *in forma pauperis* is, of course, available in all of the provinces, including Quebec, where it is authorized by the Code of Civil Procedure, but this mode of procedure is of very limited advantage and is rarely resorted to in any of the provinces.

There is in Vancouver a voluntary society of Catholic lawyers, organized in October 1934, for the purpose of aiding
the indigent poor with free legal advice and assistance. It is known as “The Society of Our Lady of Good Counsel in Greater Vancouver” and is modelled on the English society already referred to. The work is carried on in conjunction with the St. Vincent de Paul Society and the Catholic Welfare Bureau, the certificate of either organization that the case has been investigated and that the applicant is too poor to pay legal fees, being accepted. The applicant is first interviewed by the Honorary Secretary, who refers the case to the member who is “next for duty”, save that should the need disclosed require work of a particular kind, the regular roll is deviated from and the case sent to the solicitor who appears most suitable. For example, a criminal case would not be assigned to a member whose practice was confined to estates and conveyancing. The Society has also a legislative committee formed for the purpose of watching proposed legislation, either provincial or municipal, and taking such action as occasion may require. The members at present number 22, all of whom are ready to accept cases. This, so far as the writer is aware, is the only voluntary legal aid society at present operating in Canada.

It is said that in England the attitude of the public towards the profession has become much more favourable since the inauguration by the Law Society of the procedure under the new rules. The same observation is said to apply to the sections of Canada where something is being done towards furnishing free law to the poor.

Quite apart, therefore, from the duty that we should all feel that we owe to those of our less fortunate fellow-citizens who are without means to secure for themselves that equality before the law to which they should be entitled, work of this kind is likely to bring its own reward in the enhanced esteem with which the public is likely to be led thereby to regard the profession.

CUTHBERT SCOTT.

Ottawa.