REFORM OF CIVIL PROCEDURE.

By the Constitution of the Canadian Bar Association it is provided that the objects of the Association shall be to advance the science of jurisprudence and promote the administration of justice and uniformity of legislation throughout Canada so far as consistent with the preservation of the basic systems of law in the respective provinces.

At the first session of the Association held at Montreal on March 19th and 20th, 1915, Mr. Lafleur in an address said:

> Not only does the substantive law invite the efforts of the reformer but also the law of procedure. Many a suitor is deterred from pressing his claim in a sister province by the unfamiliar terms and methods employed in another forum than his own. Here at least we should not be hampered by the traditions of the past, for archaic forms and practices are survivals of a period when the rights of litigants were too often lost sight of in the intricacies of procedure. Procedure should be the obedient handmaiden and not the arrogant mistress of substantive law.

At the same meeting of the Association there was appointed a Committee on "Administration of Justice and Civil Procedure."

In 1918 this committee, under the chairmanship of Mr. W. J. McWhinney, K.C., recommended that a special committee should be appointed to draft a uniform code of practice and procedure.

At this time the conference of Commissioners on Uniformity of Laws throughout Canada began to function, and since then much excellent work has been done in codifying and making uniform the laws of the provinces in matters of substantive law.

The special committee suggested by Mr. McWhinney was never appointed and nothing has been done by the Association in the way of reforming or making uniform the Adjective law.

The Committee formerly called the Committee on Administration of Justice and Civil Procedure has dropped part of its title and is now spoken of as the Committee on Administration of Justice.

This would seem to indicate that the Association has abandoned any idea of reforming or making uniform the civil procedure.

It may not be practicable to have a system of procedure uniform in all particulars in the various provinces, but it is submitted a reform in our civil procedure is long overdue.

The administration of justice in civil cases is not satisfactory to the public.

It is a plain fact that persons who become involved in a lawsuit dread the ordeal of a trial in a Court of Justice, and notwithstanding the extra cost of paying arbitrators nearly all litigants would prefer to submit their differences to arbitration.

This preference is not due to inefficiency of the Bench. Practically without exception the Courts of Canada are respected for impartiality and freedom from any form of favoritism.

Arbitration is preferred to a trial in Court for several reasons.

The arbitrators meet and take evidence at times convenient to the parties. Therefore there is no need of having witnesses present perhaps for several days before the hearing actually begins.

Hearings by arbitrators are held or may be held in private. Persons involved in litigation do not care to have their linen, whether clean or otherwise, washed before the public. In most cases the trial of differences between parties is none of the public's business.

There is in arbitrations a relaxing of the rules of evidence and there is not that strict formality in procedure that seems so mysterious and vexing to laymen.

Recently there has been much discussion in England in regard to certain suggestions of reforms in civil procedure as made by Mr. Heber Hart, K.C., in a letter to the *London Times.*

The *Law Journal* in its issues of December 6th, 13th and 20th of last year discusses these proposed reforms which are as follows:

1. The withdrawal of the right to trial by jury and the substitution therefor (except in small cases), of a right to trial by three judges.

2. One appeal only to be allowed, and no new trials, the Appellate Court itself rehearing a case with witnesses or receiving further evidence, whenever necessary.

3. A preliminary hearing before a Master after the close of pleadings:

4. The fixing of dates for the trial of all cases.

5. The abrogation of the greater part of the law of evidence.

6. The limitation of party and party costs; and

7. The development of a convention amongst lawyers that an advocate who is convinced that his client's cause is untenable in fact or law ought either to retire from the case, or to limit his efforts to a simple presentation of the allegations and contentions of his client.

The abolition of trial by jury in civil cases is at least to the mind of the lawyer a very necessary reform. What with disagree-

ments, longer trials and perverse verdicts very often due to popularity of one party or unpopularity of another trials by jury are in many cases very unsatisfactory and are unnecessarily expensive not only to the litigant but often to the members of the jury and certainly to the Municipality that pays the jury fees.

Trials by a judge alone or by three judges in more important cases might well take the place of trial by jury. A trial by three judges unquestionably would be an improvement upon the present method of trial by jury.

The only possible objection would be on the ground of impracticability. It would be more difficult to arrange the calendar and docket upon the various circuits and at *nisi prius* sittings. This is not, however, an insurmountable difficulty. There would need to be some limitation to the right to a trial by three judges. It might be that at times Masters of the Supreme Court could be appointed to act as judges along with the Circuit Judge.

That part of item two which would do away with new trials must appeal both to lawyers and laymen. New trials usually result from the improper admission or rejection of evidence, or from misdirection, or in the case of trial by a judge alone by a misconception of the law.

In such cases practically the whole expense of the first trial is utterly wasted to the great annoyance and disgust of those who have to pay the bills.

A rehearing by the Appeal Court with witnesses would not mean a repetition of all the evidence taken at the trial.

It is open to question whether there would be any advantage to the public to have but one appeal nor can one see much to be gained by a preliminary hearing before a Master.

The suggestion is that at this hearing

> so far as practicable every direction should be given which may appear necessary for the final determination at the trial of all questions in dispute between the parties and any order made which the Master (or Court) thinks calculated to promote a speedy and just decision of the Cause.

The Law Journal at p. 373, says:

> If the idea is, for instance, that matters of formal proof—which are put in issue by the pleadings, but are in most cases uncontested at the trial, should be cleared out of the way before the case comes on for trial, or that facts capable of admission should be required to be admitted, we are all in favour of it, though we are not convinced that a 'preliminary hearing' is the best method of ensuring the results.

The fourth suggestion is as to fixing a date for the trial of each cause. The difficulties in carrying out this suggestion are very obvious. In conjunction with the trial of causes in chambers rather than in open Court an arrangement for fixing dates of hearings might be worked out in a practicable way so that the judges would not be left in unnecessary idleness and witnesses would not have to be kept waiting for days preliminary to giving their evidence.

The abrogation of the greater part of the law of evidence is the fifth suggestion.

In this connection may I again refer to the *Law Journal* of January 24th, 1931, where at page 57 reference is made to an article by Mr. C. H. S. Fifoot: "Trial by Jury" in the *Fortnightly Review.*

Mr. Fifoot says:

> Most of our law of evidence has been elaborated by the Judges under the necessity and with the object of controlling the juries with which they have had to work and many of the resultant rules are in the last resort explicable only upon this supposition.

The *Law Journal* then follows with a statement by the American Jurist Thayer as referred to by Sir William Holdsworth in his History of English Law:

> The rules of evidence are due to the existence of the jury, and have been evolved by the Judges, partly to prevent the jury from being misled by the testimony produced and partly to keep them to the issue defined by the pleadings of the parties.

It is the conclusion of Mr. Fifoot that the abolition of trial by jury in civil cases would permit of the doing away with many of the rules of evidence and would have as a result a more satisfactory administration of justice.

No attempt has been made to deal fully with all of the suggestions made but the object of this article is to suggest that the question of the reform of Civil Procedure be dealt with by the Conference of Commissioners on Uniformity of Laws or that a special committee be struck as suggested by Mr. McWhinney in 1918.

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