THE CANADIAN BAR REVIEW

THE CANADIAN BAR REVIEW is the organ of the Canadian Bar Association, and it is felt that its pages should be open to free and fair discussion of all matters of interest to the legal profession in Canada. The Editor, however, wishes it to be understood that opinions expressed in signed articles are those of the individual writers only, and that the REVIEW does not assume any responsibility for them.

It is hoped that members of the profession will favour the Editor from time to time with notes of important cases determined by the Courts in which they practice.

☞Contributors' manuscripts must be typed before being sent to the Editor at 44 McLeod Street, Ottawa.

The following resolution (moved by Judge Armstrong and seconded by the Honourable J. B. M. Baxter) passed at the Annual Meeting of the Canadian Bar Association in 1923, seems not to have met with the attention its importance deserves.

"RESOLVED: That the Committee on Administration of Criminal Justice be requested to make enquiry from trial judges of criminal cases with juries, as to whether greater justice would not be secured by enacting, say, that ten out of twelve jurors in capital punishment cases and, say, nine jurors in other indictable offences, may bring in a verdict after the lapse of, say, three hours."

The necessity for a unanimous verdict by the jury in criminal cases has been the cause of many miscarriages of justice in Canada. Instances are continually cropping up where by the persistence in disagreement of one or two jurors the fair trial of a person charged with a criminal offence is rendered abortive, and unnecessary expenditure incurred in the administration of justice. We need only mention two recent instances—the *Paris* case in New Brunswick and the *Delorme* case, the latter still dragging its weary way through the Quebec courts at the moment of writing. It would seem to us, therefore, that the proposal for a majority verdict in criminal cases as outlined in the above mentioned resolution is one that might be adopted with satisfactory results to all interests concerned. At all events the need for some reform is imperative.

Speaking of juries, it is unnecessary in these days of enlightenment as to the beginnings of our legal institutions, and of candid enquiry into their value under present social conditions, to argue that the jury system as it now obtains should be held sacrosanct because of

its origin, or that it is an impeccable method of procedure for attaining the ends of justice. It was not handed down from heaven as a special revelation. Nor was it promulgated by Magna Charta as Blackstone so vainly imagines. What English judges have upon occasion thought of the system is well exemplified by the remarks of Baron Alderson in a case where justice was shockingly turned aside by the verdict rendered. "Good G—d! Mr. Sheriff, can't I have another Jury, and let these twelve persons go into another court, where they can't do so much mischief? . . . Prisoner, the Jury have acquitted you. Heaven knows why! No one else in the whole court could have the slightest doubt of your guilt, which is of the grossest kind; but you are acquitted, and I can't help it"! What the jury system can do in France is pointedly illustrated by the case of Germaine Berton, who was recently acquitted of the murder of M. Plateau, a journalist, although she frankly confessed to having committed the crime. It would seem that the French jury conceives its function to be that of deciding whether one who has broken the law should or should not be punished in the circumstances, rather than that of pronouncing a verdict of guilt or innocence in respect of the crime charged. Such a condition of affairs is bound to set the flood-gates of crime wide open. Some interesting light on the jury system from the American point of view is afforded by Mr. McConnell's article contributed to this number of the REVIEW.

We leave the matter to our readers with a quotation from Burke's speech on the Quebec Act, alluding to the dislike of the system in question by French-Canadians of the eighteenth century:—"We are told that to require unanimity in a jury shocks the Canadians. Truly, Sir, I know it is the substance and character of a jury to be unanimous by our law; but if I could be suffered, in a great public cause, to give an opinion, I do not think that unanimity is absolutely necessary, but that the majority of a jury might do just as well. . . . Even in this country, the majority always turns the scale. The inconvenience is this, — the rest, finding they must yield, trifle with their oath; they cannot be quite so strict with their oath as I could wish them."

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The Honourable Mr. Justice Surveyer, of the faculty of law in McGill University, has favoured us with the following extract from a most interesting letter written by Mr. J. S. O'Brien, a former McGill student in the faculty of law. Mr. O'Brien on his graduation in law at McGill was awarded the Macdonald Scholarship, and is now further pursuing the study of law at the University of Dijon, in France:—

"As far as the law course at the University of Dijon is concerned, it appears to me to be similar to our course at McGill in its general outline with the addition of a few subjects, such as Political Economy, that are commonly found in the Arts courses in Canadian universities. The system of instruction is very much similar also, excepting that there is seldom a reference to leading cases in order to illustrate difficult points; on the other hand, reference to the authors is perhaps more frequent here than in the McGill law schoool. The courses given for the licentiate appear to be given in more detail by the professors here; the necessity for research work is not so great but the amount of material to be absorbed from the lectures is much greater.

"The number of students attending the law school is very small as is also the number of professors on the staff; the results of the war are shown here as in everything else with which I have come in contact in France. The lectures which I have been following are almost all in the course for the third year and it is seldom that the attendance exceeds ten students. They are older on the average than the third year class at McGill, all having spent some years either at war or in performing the obligatory military service.

" The students' life is different from that which I have been accustomed to. When the lectures are completed for the day there is not the opportunity for the students to remain together in the vicinity of the university. There is a Students' Association, it is true, but the quarters provided are small and not very attractive, at some distance from the university, and are not patronized very much. The average undergraduate may devote more time to his studies here —I really think he does—but in his spare time spent with fellow students he is generally forced to have resort to one of the numerous cafés. There are no games provided for the students, no exercise, in fact none of the university literary or athletic activities to which I have been long accustomed, and which mark the greatest difference for me in my change from one university to the other.

" The student is naturally different from the Canadian student. To me he seems to be more gay and yet more serious than the undergraduate at home; and I would include the French-Canadian student with the others in Canada when I say that the student here is more serious. Inasmuch as the French-Canadian and the purely French student both have the Latin temperament they both seem to me to have the common attribute of gayness of spirit. The student in France has a more mature outlook on life than either his French or English brothers in Canada, however. The seriousness of the position in which his country is placed at the present time appears to present a problem

that is personal to every undergraduate. Whereas the student in Canada discusses national politics as a more or less interesting pastime, the French student deals with the national problems as with affairs that are of vital import to himself, or, at least, that is the impression that I receive. Of course, the delicate financial position of France has been felt more by the individual than any similar problem that has ever been faced by the Canadian Government. There is also the intense national feeling here that has not been fully developed in Canada."

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The amelioration of the law as to "Contributory Negligence" has been receiving some attention of late years in different parts of the Empire. In 1917, there appeared, in Volume 37 of the *Canadian Law Times,* at page 23, a pioneeer article on the subject by Mr. M. J. Gorman, K.C., of Ottawa, the opening sentence of which was as follows:—

"It has long been a reproach to England and the English Provinces of Canada, by jurists in countries and places where the civil law obtains, that the former are entirely illogical in penalizing a plaintiff who has been guilty of contributory negligence, by ordinarily depriving him of any redress whatever, even where the defendant is equally or even more guilty."

A second article by Mr. Gorman appeared in Volume 42 of the same periodical, at page 425, and a further article on the same subject was contributed by Mr. Angus MacMurchy, K.C., of Toronto to the December number of the first volume of the CANADIAN BAR REVIEW. The question was also actively taken up by the Ontario Bar Association at its last annual meeting, and a committee was appointed to deal therewith.

We learn from Mr. Gorman—who, by the way, is one of our most esteemed contributors — that he tried to get different Attorneys-General of Ontario to introduce a Bill substituting the Civil Law or Admiralty rule, but without success. Last session however Mr. H. P. Hill, K.C., then a member for Ottawa of the Ontario Legislative Assembly, undertook to pilot such a Bill through the House, and it received the approval of the majority of the lawyers there, but when it reached the Legal Committee, it was held up by the then Attorney-General, at the request of the late Sir William Meredith. This session, the present Attorney-General, Hon. W. F. Nickle, K.C., has taken the responsibility of introducing a new Bill, and it will no doubt now become law. The material provisions of this Bill are as follows:—

"3. In any action or counterclaim for damages hereafter brought, which is founded upon fault or negligence, if a plea of contributory fault or negligence shall be found to have been established, the jury, or the judge in an action tried without a jury, shall find:—

First: The entire amount of damages to which the plaintiff would have been entitled had there been no such contributory fault or neglect;

Secondly: The degree in which each party was in fault and the manner in which the amount of damages found should be apportioned so that the plaintiff shall have judgment only for so much thereof as is proportionate to the degree of fault imputable to the defendant.

4. Where the judge or jury finds that it is not, upon the evidence, practicable to determine the respective degrees of fault the defendant shall be liable for one-half the damages sustained."

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It is so generally believed that the Bar is no longer a profession that has the remotest claim to being learned as of old in the humanities that it is pleasant to find some indication now and then that a knowledge of polite literature does exist, if only on one side of a case. For that reason we indulge a reference here to a recent case before Mr. Justice Lush in the English Court of King's Bench Division, where damages were claimed against a police officer for assault. It was complained that the defendant was over-zealous and brutal in exercising his office. Mr. Martin O'Connor, the plaintiff's counsel, informed the court that there was a passage in the poet Pope's work which well described the conduct of the defendant:—

> "But man, proud man,
> Drest in a little brief authority,
> Most ignorant of what he's most assur'd,
> His glassy essence, like an angry ape,
> Plays such fantastic tricks before high heaven
> As make the angels weep."

Sir Henry Maddocks, K.C., for the defendant, pointed out that the quotation so feelingly applied to the case by counsel for plaintiff was not from that mellifluous singer of our Augustan Age, Alexander Pope, but from Shakespeare ("Measure for Measure," ii. 2). He was sure his learned friend would like his authorities to be correctly cited to the Court

A newspaper report of the case states that after this had taken place, and some further evidence heard, the court adjourned; but

whether to indulge in Homeric laughter over the discomfiture of plaintiff's counsel or to verify the accuracy of Sir Henry Maddock's memory of literary masterpieces, is not disclosed.

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It is announced that the Labour Government in England has no intention at the present time of taking steps to reform the constitution of the House of Lords. That is a further manifestation of the prudence of the Prime Minister. He will hasten slowly with great measures affecting the well-being of the nation. We think that no one who has given any consideration to the matter will affirm that the composition of the Second Chamber in the English parliamentary system is at present satisfactory to its members or adapted to the needs of the country. It is pretty generally agreed that what is needed is the introduction of the elective principle in partial replacement at least of the hereditary right to membership. In this way the Second Chamber would be backed by the support and confidence of the people in the exercise of its functions as part of the legislative machinery of the State. It will be remembered that the Coalition Government in 1922 put forward certain proposals for the reform of the Upper House based on the report of a conference presided over by the late Lord Bryce. These proposals were not adopted by either Chamber of Parliament. The report of the Bryce conference sought to preserve a real continuity between the historic House of Lords and any reconstituted Second Chamber, and to that end recommended that the membership of such Chamber should include, (1) persons elected on the principle of proportional representation by panels of members of the House of Commons distributed in certain geographical groups, the number of seats allotted to the area of each group being as nearly as may be in ratio to the population of the area; (2) hereditary peers, chosen by a standing joint committee of both Houses of Parliament; (3) the Lord Chancellor, ex-Lord Chancellors, and the Law Lords; and (4) sons and grandsons of the Sovereign who are peers. So that Mr. MacDonald could not be convicted of novelty-hunting should he formulate a scheme for the reform of the Lords.

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Last month we commented on the newly established degree of Doctor Juris at Columbia University, to be taken in course by students in the law faculty. We were so bold as to express the view that this might be regarded in the light of a check to the practice of bestowing the doctorate as a decorative tag upon persons who have no academic training. Since then we have been refreshed by reading of

a recent journey of the rector of the University of Bologna for the purpose of advising Premier Mussolini that the Council of the University wished to confer upon him the honorary degree of Doctor of Laws. To the surprise of this genial visitor from the institution which illumined the twelfth and thirteenth centuries with "the gladsome light of Jurisprudence," Mussolini stated that he could not bring himself to accept the high degree without having earned it, and that he would consider taking it in course. Whereupon the rector informed him that to do so it would at least be necessary for him to prepare a thesis and then defend it before the University authorities. The Premier replied that he would undertake to do all this, and would communicate the subject of his thesis in due course to the Council of the University. Signor Mussolini is an extremely interesting person.

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Owing to the change of Government in England, the Committee in charge of the preparations for the meeting of lawyers in London next July have not finished their labours, but we hope to publish the draft Programme in our April number.

We are pleased to announce that the number of reservations on the steamship "Montlaurier" sailing on July 8th exceeds 350. This number of course includes members of the families of many of those who contemplate attending the Meeting, but it is apparent that The Canadian Bar Association will be represented by more than 200 members. Those who contemplate attending the meeting are reminded that it will be necessary for them to obtain passports from the Department of External Affairs.

The President of the Association has received a letter from Mr. Condie Sandeman, K.C., of Edinburgh, Dean of the Faculty of Advocates who, on behalf of the legal profession in Scotland, has invited the Canadian Bar Association party to visit Scotland. A visit to Edinburgh will be arranged to follow the meeting in London.

The Association has arranged that its headquarters in London will be established at the Medicis Hall of the Hotel Cecil, and every effort is being made to provide for the comfort and convenience of members attending the Meeeting.

Members of the Association who are addicted to golf, will be glad to learn that the President has received a letter from Lord Riddell in which he asks them to consider the links of the Walton Heath Golf Club as their golfing home during the period of the Meeting.

The manifestation of interest in this great gathering of lawyers is not confined to professional journals in England. The *Daily Telegraph* recently said of it:—

"Of this year's big social international events of which anything definite is known at present, none is likely to prove more intrinsically interesting, or to yield more beneficial results, than the visit of a thousand American and Canadian lawyers to this country in July. It is correct to say that underlying all other considerations in the minds of those who initiated the project was a wish to make this an international event rather than one of a domestic character, merely bringing together men engaged in a common profession here and across the Atlantic."

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It is gratifying to the members of the Canadian Bar Association to learn that the standard of preliminary education for law students recommended by the Association at its annual meeting in 1922, namely, education equivalent to that represented by the end of the second year in Arts at an approved University, is gradually winning its way with the authorities controlling the matter in the various provinces of the Dominion. It was stated in the Report of the Committee on Legal Education for 1923[1] that the standard had been adopted by Manitoba and Nova Scotia. Now it is announced that on the recommendation of the law school faculty of the University of New Brunswick the Barristers' Society of New Brunswick has decided to put the Association's standard into operation in that province. Thus the hope expressed by Dean MacRae and his associates on the Legal Education Committee in the Report to which we have referred has been realized, and New Brunswick by her example invites the provinces where lower standards still prevail to join in the march of progress.

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We publish in this number an article by the Honourable Senator Belcourt, K.C., on "The Status of the French Language in Canada" originally contributed by him to *The Argosy,* an undergraduate publication of Mount Allison University, Sackville, New Brunswick.

The subject is one of great importance, and we are sure that our readers will be glad to have Senator Belcourt's presentment of it, especially as he discusses it in its legal bearings.

[1] See the Legal Education Number of the CANADIAN BAR REVIEW (October, 1923), at p. 671.