THE STATISTICAL AND SOCIAL INQUIRY SOCIETY OF IRELAND.

LEGAL AID FOR POOR PERSONS.

By The Right Hon. Sir Thomas Molony, Bart.

[Read before the Society on Wednesday, February 4th, 1931.]

At the annual meeting of the English Bar held on the 11th February, 1928, a discussion arose on the question of legal aid to poor persons, and the Attorney-General, Sir Douglas Hogg (now Lord Hailsham) said, in winding up the debate:—

> "The generosity of the medical profession was a byword and an example to the rest of the world, and the lawyers, although they lagged behind, did more perhaps than was generally recognised to assure that the poor of this country had that expert help which they could not otherwise afford. I should like to see the day coming when just as medicine administers to all who need it help for the body, so in every great centre of population we might see something akin to a legal hospital where the poor people could rely on getting the advice and help which they needed."

It is curious when questions of legal reform come before the public how few people think of looking at the matter in its historical perspective, but approach it as if a new idea had suddenly dawned on the mind of man. The question of legal aid was considered in Scotland over 500 years ago, and found a very practical solution in the Scots Parliament Act, 1424, which provided:—

> "If there be any poor creature who, for the lack of skill or expenses, cannot, or may not, follow his cause, the King, for the love of God, shall ordain to purvey and get a leal and wise advocate to follow such poor creature's causes; and if such causes be obtained, the wronger shall indemnify both the party injured and the advocate's costs and travail."

This Statute is characteristic of Scotch charity and Scotch prudence, because the "leal and wise advocate" acts in the first instance for the love of God, and if he wins, he can get from the wronger his costs and travail.

England allowed 70 years to elapse before following Scotland's example, but in 1497 Parliament passed a famous statute which contains more elaborate provisions as to the manner and extent of the legal aid to be given. It provided:—

> "that every poor person or persons having causes of action against any persons shall have . . . writs and subpœnas . . . therefor nothing paying, for the sealing, nor to any person for the writing . . . that the Chancellor shall assign clerks to write the said writs ready to be sealed; and also learned counsel and attornies for the same, without reward taken therefor; and

> if the writs be returned before the King in his bench, the justices shall assign to the said poor person or poor persons, counsel learned by their discretions, which shall give their counsels, nothing taking for the same; and the justices shall likewise appoint attorney for such poor persons, and all other officers requisite and necessary . . . which shall do their duties without any reward for their counsels, help, and business, in the same; and the same law shall be observed of all such suits to be made before the King's justices of his common place, and barons of Exchequer, and all other justices in the courts of record."

This statute is very precise that in Chancery the writs shall be issued free and the Chancellor shall provide learned Counsel and attornies "without reward taken therefor," and in the common law courts the justices shall assign to poor persons "Counsel learned by their discretions" and also an attorney and all other necessary officers, who shall do their duties "without any reward for their counsels help and business"—making it in fact a pure work of charity.

These statutes, admirable in their conception, did not survive the turmoil of the reformation era, and the law relapsed into its primative severity, from which it did not finally emerge until well on in the 19th century.

People who see a legal system working with apparent smoothness and efficiency do not think of the slow progress through which it has been evolved. They do not recollect that in England counsel for the accused was not allowed to make a speech in a felony case until 1836; or a party, or his or her wife or husband, to give evidence in a civil case until 1851; or the accused, or his or her wife or husband, to give evidence in a criminal case until 1898; or that legal aid was not given to a prisoner by modern statute until 1903, or that a person accused had no right of appeal in a criminal case tried by a jury until 1907.

In the Free State the position was somewhat worse, because the accused, or his or her wife or husband, could not give evidence in a criminal case (with a few exceptions) until 1924, and there was no right of appeal in a criminal case tried by a jury until the same year, and there is, even now, no statutory provision affording legal aid to poor persons, although by custom a prisoner without means who is accused of murder can have counsel and solicitor assigned to him at the public expense.

In England help was first given to poor litigants in the superior courts by enabling them to sue in forma pauperis, which means that Court fees were remitted and only out-of-pocket expenses allowed to the solicitor, and nothing to the barrister. This remedy was little used, because the poor litigant had to find the solicitor, and the solicitor had to search for documents and witnesses, and very often failed to obtain his out-of-pocket expenses. Sometimes in criminal courts the judge asked a barrister to defend a prisoner in a case of difficulty where the prisoner had no means. This duty was never declined, but often imperfectly performed for want of information or lack of evidence, and the accused person suffered.

Nothing more was done until 1903, when the Poor Prisoners Defence Bill was introduced, and, after being referred to a Select

Committee, was ultimately passed into law. This was a step in the right direction. It enabled a Certificate to be given by the judge or magistrate for legal aid and the consequent provision of counsel and solicitor for the accused, subject however to certain limitations which have now ceased to be operative.

The Poor Persons Department of the Royal Courts of Justice (now the Poor Persons Procedure Committee of the Law Society) assists in the High Court cases. There are no Court fees, but two great restrictions are placed on its activities:—

(1) The definition of Poor Person, which confines aid to a person whose usual income from all sources does not exceed £2 a week, and who does not possess goods or money, apart from wearing apparel, in excess of £50 in value. In certain exceptional cases aid may be given when the income does not exceed £4 a week or the goods £100.

(2) Poor persons are required to pay a certain sum to cover disbursements, £5, or in some cases a larger amount.

An estimate has been made by a high authority of all poor persons' cases with the following result:—

The Poor Persons Procedure Committee of the Law Society was responsible for 2¼ per cent. of the cases, of which 2 per cent. were divorce cases.

Twenty-five per cent. were criminal cases to which the Act of 1903 applied.

Ten per cent. were Police court quasi civil cases, such as applications for Maintenance and Separation Orders. 62⅜ per cent. were County Court cases, and ⅛ per cent. were High Court cases not taken by the Poor Persons Committee.

We thus have 72¾ per cent. of cases in which no public assistance is given, and 27¼ per cent. in which some assistance may be given.

No provision having been made by the law for legal assistance in 72 per cent. of the cases, the question arose, how could such assistance be given?

Schemes were brought forward from time to time, and in 1923 public attention was directed to the question by a paper read by Commander Harrington Edwards at the Law Society's Conference in Plymouth. In that paper Commander Edwards presented a Scheme prepared by himself and Mr. Noble, then a practising barrister, now a Colonial judge. He stated the cardinal principle which should govern the Society:—

> "It would have to be laid down clearly from the beginning that all legal aid administered by the association is to be given gratuitously and that not a penny is to be taken, even for disbursements, from those assisted. Essentially this should be a work of charity in which members of both branches of the legal profession can co-operate."

And then, speaking of the general results to be expected from such a Society or Institution, he said:—

> "I do not propose to go into details of the many cases with which such an Institution could deal, as every lawyer must himself have come across numerous cases where the poor suffer from lack of knowledge of law or means to preserve their

rights. There are the numerous cases of poor widows and girls on the death of their husband or father, poor tenants in their dealings with landlords, and defrauded and ruined investors, etc. Few poor people yet appreciate the benefits conferred by the Poor Prisoners Defence Act, and last but not least, there is the case where a man with little money brings a case, wins it, and the other side appeals, and he has no money to appear on the appeal."

The matter was not taken up by the Law Society and very little was done until the publication by Mr. Gurney-Champion of his very remarkable book "Justice and the Poor in England," in which he gave a full account of the administration of the law in England and Wales as it affects poor persons.

In the foreword, which is signed by the present Archbishop of York, then Bishop of Manchester, the Bishop of Pella, Vicar-General of the Catholic Diocese of Southwark, Mr. Scott Lidgett, past president and Hon. Secretary of the National Council of Free Churches, and Lucy Gardner, of the Society of Friends, the following statement appears:—

"We have knowledge of the present deplorable condition of the poor in legal matters, who in many cases, through not being able to pay for the ordinary facilities to secure justice, are denied justice in the civil and criminal courts, and are unable to know, or to be advised about, their legal rights and duties; it appearing that in those few cases where legal aid is given in this country, it is never given as of right, full and permanent, and is not one of the character which an ordinary citizen is accustomed to receive by paying for it."

This statement, coming from the heads of the Christian Churches, naturally attracted wide attention, and at an informal meeting of Catholic members of the Bar it was decided, with the sanction of his Eminence Cardinal Bourne, to call a meeting at the Cathedral Hall on the 26th April, 1926, for the purpose of discussing the question and establishing, if approved of, a Society for the purpose of giving gratuitous legal aid to poor persons, under the name of "The Society of Our Lady of Good Counsel." I was present at the meeting and spoke of the necessity which existed for such an organisation. The meeting was not unanimous. Some doubted the necessity, some the expediency, and a few pessimists though it was foredoomed to failure. But the opposition gradually diminished, and in the end the Society was established with a Council, Executive Committee, and a devoted band of barristers and solicitors which represented all the best elements in the Catholic social life of England.

The Society although Catholic in its origin and membership exists for the benefit of all poor persons without reference to their religious faith

I have watched with very special care the development of the Society, which has acted in nearly 4,000 cases since its inception, and has done, in my opinion, an immense amount of good.

The method of procedure adopted by the Society is as follows:—

Each applicant, on attending at the offices, is requested to give full details as to his or her means, and to obtain a letter of recommendation from some responsible person who should vouch for the

genuineness of the applicant's lack of means. In the case of Catholics, the " responsible person " is frequently the Parish Priest or a Mother Superior. In the case of non-Catholics, the applicant is often sent by the Poor Persons Department or by a Probation Officer or Welfare Society who are aware of the applicant's plight and have become acquainted with the Society through its activities.

The applicant is then interviewed by the Lady Almoner, who satisfies herself as to the genuineness of the applicants's poverty. Then, either on her own initiative or with the assistance of the Hon. Secretary, full particulars are set out, and the applicant is passed on to the Hon. Solicitors dealing with the class of case in question. The Hon. Solicitors then, at their discretion, either interview the applicant at their own offices or at the offices of the Society, and if needs be, at a later stage, take in Counsel whom they instruct in the usual way.

In this way the applicant gets competent legal advice and assistance without being asked to contribute one penny to the Society for its costs or disbursements.

The success of the Society to a great extent depends on the Lady Almoner, who in many instances brings parties together, mainly husbands and wives, and adjusts their difference without having recourse to one of the solicitors. In London it is possible to specialise to an extent unknown in this country, and we divided the class of cases the Society has to deal with into 14 classes, and for each of these classes one or more solicitors and one or more counsel agreed to act. The poor person thus had the opinion of a specialist in the particular class of case in which he or she might be involved, and there is no doubt but that the work was well and efficiently done. The Society agreed to pay the solicitor his out-of-pocket expenses, including the cost of procuring copies of necessary documents, but it is greatly to the credit of the profession that in many cases the solicitor has not only refused to accept any expenses, but has even paid out of his own pocket the cost of procuring the necessary documents.

The Society has been criticised as being too highly altruistic in its aims, because it takes no fees, or out-of-pocket expenses, and as too local in its operations, inasmuch as it was confined to London. It may be highly altruistic in its aims, because it kept before its mind the ideal lawyer, Sir Thomas More :—

> " He would charge no fees to widows and orphans. He gave to all true and friendly counsel, he persuaded many to settle with their opponents as the cheaper course, for he ever preferred the part of peacemaker to that of lawyer."

At the same time, it is not " local in its operations " because help has been given to people in all parts of the country, and with the sanction, and I think I may say the warm approval of the Bishops, it has been decided to take steps to open fresh centres in various dioceses in England.

But after all imitation is the sincerest form of flattery, and the success of the Society has led to the promotion of the Bentham Committee for poor litigants under the Presidency of Lord Cecil of Chilwood, and the Vice-Presidency of Lord Hailsham. It is undenominational in its character, but works in close co-operation with what I may call the parent society, and we carried our co-opera-

tion to the extent of having a joint Garden Party in the grounds of Lincoln's Inn, kindly placed by the Benchers at our disposal.

The work done by the voluntary societies naturally attracted the attention of Members of Parliament, and last year Sir John Withers, the M P. for Cambridge University, brought in a Bill to make better provision for the defence of poor persons in criminal cases. The Bill was received with general approval, and, after some slight amendments, was adopted by the Government and is now enshrined on the Statute Book as 20 & 21 Geo. V c.32. It repeals the Act of 1903, and contains all the statute law dealing with the defence of poor persons.

It provides that any person who is committed for trial for an indictable offence shall be entitled to free legal aid in the preparation and conduct of his defence at the trial, and to have solicitor and counsel assigned to him for that purpose if he gets a " Defence Certificate." This leads us to inquire :—

(1) Who is to give the certificate?

(2) On what grounds?

The certificate can be given :—

(*a*) By the committing justices upon his being committed for trial—or

(*b*) By the Judge or Chairman of the Court before which he is to be tried at any time after reading the depositions.

Before giving the certificate the certifying authority must be satisfied that the accused has not means sufficient to enable him to obtain such aid, and if so, it must be given in respect of any person committed upon a charge of murder, and may be given in respect of a person committed upon any other charge if it appears that it is desirable in the interests of justice that he should have legal aid in the preparation and conduct of his defence at the trial.

The statute gives for the first time a right to a Court of summary jurisdiction, or examining justices in the case of indictable offences, to give what is called a " Legal Aid " Certificate, which enables the fees of a solicitor to be allowed at the hearing or taking of depositions, and in a case of murder both counsel and solicitor. The justices must be satisfied of the want of means, and also " that by reason of the gravity of the charge or of exceptional circumstances it is desirable in the interests of justice."

I have already mentioned how a judge occasionally asks a Counsel to undertake the defence of a prisoner in a difficult case, or to argue a particular point which has arisen. Hitherto this has been quite voluntary, but the statute now gives power to the Court to make an order for payment of the Counsel's fee. Personally I do not like this provision, as the Bar have always responded to the request and considered it an honour to assist the Court in the cause of justice.

In applying such a measure to Ireland it has to be borne in mind that in England the costs of prosecution, and in the certified cases the costs of defence, are paid out of local funds, while in Ireland the costs of prosecution are paid by the State. If provision is to be made for the costs of defence on lines similar to the English statute, it would be only right to give power to the Judge to order

the costs of the prosecution to be paid by the prisoner on conviction in cases where the Judge was satisfied of his ability to pay. Such a power exists in England and is often exercised.

The Act of 1930, while important in many respects, leaves untouched a great number of cases in which the voluntary societies must still play a part. It does not diminish the great work of conciliation and advice which forms a large part of the work of the voluntary societies. It does not deal with the County Courts, which in very many cases have been used as engines of oppression of the poor. It has no reference to the cases arising out of employment, equity matters, defamation, matrimonial disputes, and in fact only applies to one or two of the 14 classes into which the work of the Society of Our Lady of Good Counsel is divided.

I should mention that both voluntary societies have Committees of ladies attached to them, and members of these Committees are of very great use in many ways. Lady Winifrede Elwes, who presides over the Ladies' Committee of the Good Counsel Society, spoke at a Congress lately held in London, and after describing the work of the Society concluded an eloquent speech with words which perhaps you will find yourselves able to endorse:—

> "The objects of this Society are those of the very essence of Christianity. It has been suggested to me for the benefit of those who know their catechism that by assisting this Society all are exercising, first the theological virtue of Charity, secondly, the cardinal virtue of Justice, and participate in one of the seven Gifts of the Holy Ghost, *viz.*, the gift of Counsel, and finally, are earning the Blessings of the fourth Beatitude, 'Blessed are they who hunger and thirst after Justice.'"

In bringing under your notice the present position of legal aid to poor persons in England, I am not in any way forgetting the amount of charitable work which has always been done by both branches of the legal profession in Ireland. In my experience they have never failed to respond to any reasonable claim which has been brought to their notice, but there is no organisation and no statute, and the question arises whether the time has not now come when there should be one or both.

Printed at Parkgate Printing Works, Dublin, by CAHILL & Co., LTD.