

**COUNCIL OF THE GOVERNOR GENERAL
OF INDIA**

VOL. 4

JAN. - DEC.

1865

P. L.

Abstract of the Proceedings of the Council of the Governor-General of India assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament 24 and 25 Vic., cap. 67.

The Council met at Government House on Monday, the 20th March 1865.

P R E S E N T :

His Excellency the Viceroy and Governor-General of India, *presiding*.

His Honour the Lieutenant-Governor of Bengal.

The Hon'ble H. B. Harington.

The Hon'ble H. Sumner Maine.

The Hon'ble Sir C. E. Trevelyan, K. C. B.

The Hon'ble W. Grey.

The Hon'ble G. Noble Taylor.

The Hon'ble H. L. Anderson.

The Hon'ble J. N. Bullen.

The Hon'ble Mahārājā Vijayarāma Gajapati Rāj Bahādur of Vizianagram.

The Hon'ble Rājā Sāhib Dyāl Bahādur.

The Hon'ble R. N. Cust.

The Hon'ble Mahārājā Dhīraj Mahtab Chand Bahādur, Mahārājā of Burdwan.

The Hon'ble D. Cowie.

CIVIL COURTS' (CENTRAL PROVINCES) BILL.

The Hon'ble Mr. HARRINGTON presented the Report of the Select Committee on the Bill to define the jurisdiction of the Courts of Civil Judicature in the Central Provinces.

PARSEES' MARRIAGE AND DIVORCE BILL.

The Hon'ble Mr. ANDERSON presented the Report of the Select Committee on the Bill to define and amend the law relating to Marriage and Divorce among the Parsees.

HIGH COURTS' CRIMINAL JURISDICTION BILL.

The Hon'ble Mr. MAINE moved that the Report of the Select Committee on the Bill to amend the Procedure of the High Courts of Judicature in the exercise of their original Criminal Jurisdiction and to provide for the exercise of such jurisdiction at places other than their usual place of sitting, be taken into consideration. He said—"Sir, the Select Committee, in reporting on this Bill, accompanied its report with a very full explanation of the amendments which it proposed to introduce; and the Bill has now been before the public

for rather more than a month. During that period almost no criticisms on it have been received, and apart from the point on which public attention has chiefly fastened—the abolition of the Grand Jury—I am inclined to say that the measure has been received with favour. The few remarks which I intend to make in placing my motion before the Council will be addressed to observations—for I can hardly call them objections—in the frequent conversations which I have naturally had on the subject of the Bill. The first relates to the institution of Special Juries in criminal cases. This improvement has long been called for by the best English Jurists, but it is scarcely an innovation. For Special Juries have always been allowed in the trials of misdemeanors. Why they are denied in charges of felony, I never could understand, and probably the reasons are entirely historical. But the existing system does not work well even in England, for I am informed that in very difficult cases, when the attention of the Jury has to be fixed upon a long and intricate issue of evidence, a process has to be resorted to which may be called, though in a very innocent sense, packing the Jury, that is to say, packing it for the purpose of obtaining Jurors adequate to the enquiry. A notable example of that occurred, I am told, in a great English *cause célèbre*, the trial of William Palmer of Rugeley, for murder by poisoning. The particular point to which I wish to direct the Council's attention is an incident of the substitution of one system for another. We place all present Grand Jurors on the Special Jury list, but we provide that no addition shall be made to the list until by death or loss of qualification the number of Special Jurors has diminished to 200. This maximum we prescribe in order that the Special Jury list may not produce the pernicious effects attributed, I believe with justice, to the Grand Jurylist in Calcutta, and certainly complained of bitterly by the communities of the two other Presidency Towns—the undue exhaustion of the lower list by the higher. Now there are certain gentlemen at present in Calcutta who, by the acquisition of qualification, would probably be able to get very soon on the Grand Jury list, and there are others who, arriving in India before the Special Jury list has diminished to 200, and possessing the qualification of education and property, may, nevertheless, be unable for a time to get their names enrolled on it. Well, Sir, it might be enough to say that some inconveniences must attend every transition from one system to another, and that this is one of those inconveniences. But I will go on to express my fervent hope that when this measure comes into full operation, we shall not find people thinking themselves degraded, as I fear they do at present, by serving on Common Juries. I trust that when any gentleman of education and property happens to be excluded from the Special Jury list, he will not say, as at present, that he suffers degradation and humiliation, but only that there are others in Calcutta

as educated and opulent as he is, and that there is not room for all on the Special Jury list.

Sir, it may be perhaps asked,—I don't mean that the objection has actually been made—why, if you think so highly of Special Juries in the Presidency Towns, do you not extend them to the Mofussil? The answer might be, that we make the best use we can of the material in the Mofussil. But, a still more satisfactory reply is possible, namely, that our Juries in the Mofussil will be more nearly akin to Special than to Common Juries. Our Jury material in the Mofussil is scanty, but it is exceedingly good. The non-official class there corresponds, I am told, more nearly with the class from which Grand Juries in the Presidency Towns are taken, and the remainder of the European element of the Juries will consist of those military men whose exemption from service is partially repealed by this Bill. Sir, I think that military men will make excellent jurors, and I consider that the public gratitude is due to His Excellency the Commander-in-Chief for the liberality with which he has opposed himself to many natural military prepossessions and has declared himself in favour of this part of the measure. Military men cannot be charged with interested deference to the Civil Government, but they can never be without sympathy for justice and order. These are the exact qualifications one would wish for in a juror, and I do not think that these new duties will be felt by Officers a distasteful burthen on them. I should imagine that there are many hours in the day which hang heavily on the hands of an active-minded Officer in an Indian cantonment, and I should imagine it far from disagreeable to him to give up a portion of his time to one of the most impressive, most elevating, and most instructive of employments—participation in a criminal trial conducted by a trained Judge, aided by skilful Counsel, under the rules of evidence. The experience thus gained would not, I should suppose, be wholly without use to military men in those strictly judicial functions which sometimes devolve upon them.

The next point, Sir, which requires notice may have escaped attention from its being enveloped in technical phraseology. We continue the right of peremptory challenge in the Presidency Towns, but it is not given in the Mofussil by the Code of Criminal Procedure nor by this Bill. The reason is, that, though we do not give the right, we give the result of exercising the right. For the Bill declares that the majority of a Jury which is to try European British subjects shall consist of Europeans or Americans only. Now this privilege of peremptory challenge, which is a very questionable one, is, I think, only justifiably used in the Presidency Towns when it is employed to eliminate from the Jury persons who may be supposed to have a vague and undefined dislike to the prisoner; and I think it is carried to the furthest allowable point when it

secures for the prisoner a majority of persons of the same race with himself. In fact the old English writers on law, who do not often offer a justification for the doctrines they lay down, justify the right of peremptory challenge on the plea that, if it did not exist, certain privileges which particular persons are entitled to by general understanding would be attainable with difficulty, as, for example, the privilege of a foreigner to be tried by a Jury *de medietate linguæ*.

Next, Sir, as to the composition of the Jury. My Hon'ble friend Mr. Bullen has not embodied in an amendment the objection which he felt to the proposal of the Select Committee, or else I should have deferred what I have to say on the subject. I am now bound to state that, if the issue had simply been between a jury deciding by unanimity and a jury deciding by majority, I must have voted for an unanimous jury. I hold strongly with the author of the most philosophical of the recent treatises on English Criminal Law—Mr. Fitzjames Stephen—that, rather than create a jury deciding by majority, it is always better to strike off the minority altogether. The gist of the institution is the concurrence of the jurors. All systems of jurisprudence require some conditions to be satisfied before justice is done on the accused. Some will be satisfied with nothing less than a confession of guilt—a confession often extorted by what is little less than moral torture. Others demand that certain irresistible presumptions shall arise upon the evidence. Others again require that unity of proof shall be made up out of what are called fractional proofs. But the English law differs from the rest in laying down simply that, when a certain number of men of average intelligence are so convinced by the evidence as to be of one mind upon the prisoner's guilt, the arm of the law shall move. Everything, therefore, turns upon concurrence, and if by requiring only a majority, you dispense with the concurrence of the minority, you may just as well dispense with the minority itself. But the jury recommended by the Select Committee is not open to the reproach of violating this principle. It is a jury deciding by nine against three, but there is an alternative concurrence required instead of the concurrence of the three, namely, the concurrence of the Judge. The concurrence of the Judge counts as equal to the concurrence of the three last jurors. Our jury is therefore in harmony with Mr. Stephen's canon, and I think we gain a great advantage in retaining the almost consecrated number of twelve.

Next, Sir, as to the expedient by which we propose to replace the functions of the Grand Jury. All I claim for it is that it is the best of the substitutes which can be found. I am not going to attack the Grand Jury to-day. I have little to add to, and nothing to retract from, the arguments which I used against it on a former occasion; and I propose this morning to leave the discussion

of its character to others. But I freely admit that, though I do not think the Grand Jury a good institution anywhere, and should be disposed to use even stronger language on it in India, it is an institution for which it is very difficult to find a substitute. That proposed by the Select Committee has, at all events, the advantage of expressing and corresponding to the actual operation of the Grand Jury system in England. I really believe that, taking England and Ireland as a whole, the cases in which during one single year Grand Juries ignore Bills otherwise than under the direction of the Judge may be counted upon the fingers. So then, Sir, if the Bill becomes law, before a European British subject is placed at the bar, the Magistrate acting under the increased responsibility which this measure will create (for his miscarriages will no longer be shielded by the secret inquiry before the Grand Jury) must first make up his mind that there is evidence for a committal. Next, the papers will go to the Advocate General (for that I am told is the practice, though not the express law), who will say whether he agrees with the Magistrate. Lastly, the Judge, before the trial, will declare the charge upon the depositions to be sustainable. I end, therefore, by affirming that, if even an innocent man be unfortunate enough to have such a load of suspicion attached to him that it breaks through all this protective machinery, on every principle of justice he ought to be openly tried, and trust for the vindication of his innocence to the enquiry before the Common Jury."

The Hon'ble Mr. COWIE said that, as he had the honour of a seat in the Select Committee on this Bill, and had signed its report without reservation, he would say nothing more on the present occasion than to record his sincere belief that those gentlemen—and among them were many esteemed friends of his own—who had taken up the idea that the abolition of the Grand Jury was tantamount to the destruction of one of the strongholds of British liberty, would, under the influence of the provisions which the present Bill contained, before long be ready to admit that they were mistaken.

The Hon'ble Mr. CUST said that he gave his entire and hearty support to the measure now before the Council. The Hon'ble Member who introduced the Bill had, on more than one occasion, explained the reasons and objects of the Bill. He (Mr. Cust) could only speak from personal experience of twenty years in the Mofussil to the absolute necessity of some such measure, and he trusted that this was only the first of a series of measures by which local tribunals would be provided in every part of India for the trial of every class of Her Majesty's subjects, for it was really an anomaly that we should provide tribunals, and Codes of Criminal Procedure, for the trial of the Natives of India, and the subjects of European friendly States, and American citizens, and have to send Englishmen many hundred miles to be tried in the Presidency Towns.

As regarded the Grand Jury, sufficient reasons had been shown for its abolition in the Presidency Towns, and as regarded its extension to the Local Courts, the first objection was, that there would be no means of collecting a Grand Jury which would not consist almost entirely of Natives; and the second objection was, that, when so collected, a Grand Jury would only be a cause of delay and an obstacle to justice.

The Hon'ble MR. BULLEN said that he could not deny that a strong case had been stated against Grand Juries, and that it was difficult to meet many of the objections which had been raised. In spite, however, of the eloquence of the Hon'ble Mover, in spite of his arguments as to the theoretical inutility of Grand Juries, he confessed to an instinctive apprehension that, if they were abolished, it would some day be found that an institution of great practical use and value had been lost. He did not, however, suppose that any thing he could now say would affect the fate of the Bill, and he would not therefore take up the time of the Council by repeating arguments which he had already urged in Committee.

The Hon'ble MR. ANDERSON—"As I took part in the former debate upon this Bill, and mentioned some of the reasons which induced me to give it my support, I feel it due to that portion of the public which is opposed to the abolition of Grand Juries to state more in detail, though as briefly as I can, the grounds on which I still approve of that provision in the Bill. In doing this, I feel I can add nothing to what has been, at various times, advanced by my Hon'ble friend the mover; but I am anxious, on a question in which the public has taken considerable interest, to endeavour to show that, if unable to convince others, I have at least convinced myself. In the former debate I rested my support of the Bill principally on the consideration that the panel of the Petty Jury was not equal to the duty imposed upon it, that it had been starved by the constitution of another panel, and that it was of obvious importance that the admirable material now squandered on Grand Juries should be made available for the performance of duties the gravity of which could not be exaggerated, and which now devolved upon Petty Juries. I still regard this as a practical argument of no inconsiderable force; I still think that a Legislature is not justified in remaining passive when it sees the dearest interests, the lives and liberties of the governed hang upon the verdicts of those whose previous training and habits of thought have not fitted them for the office, while gentlemen of intelligence and education take no other part in the administration of justice than what is implied in the solemn trifling, or the pernicious meddling, as the case may be, of Grand Jury investigations. It may, however, be urged that this is only an objection to an accident of

the institution ; still the accident is one of excessive prominence in the country for which we are legislating. But my objection is not merely to an accident—it is to the institution in its essence. I hold it to have almost every vice which can be predicated of a judicial institution. It is secret, irresponsible, untrained, not guided by judicial wisdom and experience, unaided by legal exposition, keeping no record, taking evidence under imperfect sanctions, passing decisions without the assignment of any reason. I do not impute to it corruption, but I do say that at the only time when Grand Juries exercised any marked and decisive influence on public affairs, they were corrupt. To an institution thus honeycombed with defects, it is the theory, according to Lord Keeper Guilford and Chief Justice Pemberton, to assign a very slight power—according to Lord Somers, a very great power ; but whatever be the theory, it can, if it chooses, exercise an enormous power : it can dam up the whole stream of public justice, and its proceedings cannot be questioned. I have said that at the only time when Grand Juries exercised any decisive influence on public affairs, they were corrupt. This leads me to examine an assertion which has been very frequently put forth in the discussion excited by this Bill, that at a certain period of our national history, the Grand Jury institution vindicated our constitutional liberties, and operated as a bulwark against despotism. I cannot assent to this proposition. All those verdicts which Englishmen regard with gratitude and pride, were verdicts of Petty Juries. The Jury which in Lilburne's case—to use the expression of Mackintosh—defied the bayonets of Cromwell, was a Petty Jury. The Jury which in Penn's case was locked up without food for forty hours, and persisted in finding Penn only guilty “ of speaking in Gracechurch Street,” was a Petty Jury. And I think that Lord Erskine, in his noble speech for the Dean of St. Asaph, stated but the simple truth when he said that to Edward Bushell, the foreman of that Jury, who maintained his opinion under the vilest threats from the Bench, and suffered fine and imprisonment on account of the verdict, we owe almost as much as we do to John Hampden. It was the noble firmness of this humble Englishman which established the great principle of the immunity of Juries. The verdicts in the case of the seven Bishops, in the case against the “ Craftsman” for publishing a paper by Lord Chesterfield, in Woodfall's case, in the case of the Dean of St. Asaph, and in Hardy and Horne Tooke's case, were all verdicts of Petty Juries. The decision against general warrants in Wilkes' case was a judgment from the Bench. When then occurred the great service of the Grand Jury institution ? I presume the period alluded to is that which in the ballads and pamphlets of the time was called the “ reign of Ignoramus,” the shrievalty of Bethell and Cornish in 1680-81, and the shrievalty of Pilkington and Shute in 1681-82. The representative case is that of Lord Shaftesbury—there are

several others, but that is the one chiefly remembered. Now I contend that Lord Shaftesbury and others of his party owed their deliverance, not to the fact that the Jury was either a Grand or a Petty Jury, it might have been, as far as truth was concerned, either the one or the other, it might have been a Court of Areopagus, or a Sanhedrim, or a Vehmlic tribunal of the steel and cord, or any other authority which fancy may suggest, but they owed their deliverance simply to the fact that the Jury was a packed Jury. Now this is a fact as notorious to those who really know the history of the time, as the battle of Hastings or the execution of Charles the First. The panels for the Juries, both Grand and Petty, were arranged by the Sheriffs. Dryden delineates Bethell, one of the Sheriffs, in his finest poem of Absolon and Achitophel, under the name of Shimei—

“ If any dare his factious friends accuse
He packs a Jury of dissenting Jews,
Whose fellow-feeling in the goodly cause
Will save the suffering Saint from human laws.
During his office treason was no crime
The sons of Belial had a glorious time.”

I of course have no sympathy with the political principles of Dryden, and do not cite his lines as conclusive evidence of a fact, but I do say that every historian of mark has regarded the packing of Juries at the time under discussion, as a point on which no room is left for doubt. The panels then were prepared by the Sheriffs, and so perfectly safe did Shaftesbury feel within the jurisdiction of the city, so perfectly unsafe did he feel everywhere else, that he took excellent care never to go a mile from his house in Aldersgate Street. College, the unfortunate enthusiast who was called the Protestant Joiner, was not so prudent. A Bill preferred against him was ignored by the London Grand Jury, but he was rash enough to join in a procession and to make a foolish speech at Oxford, when the King was holding the Parliament in that city. He found, at the cost of his life, after a trial of, if possible, more than the ordinary brutality of that hateful reign, that the institution of Grand Juries had no saving virtues beyond the liberties of the city of London. But the packing of Grand Juries was so flagrant, that the Court determined at all risks to have Sheriffs in its own interest. By a device too long to explain now, of inducing the Lord Mayor to drink to a gentleman as Sheriff, and by a riot at the Poll, it succeeded in returning Sir Dudley North and Mr. Rich as “*de facto*” Sheriffs. Did Shaftesbury—did the “daring pilot in extremity” then trust to this vaunted institution? Not for an hour. He fled at once in disguise to Holland, and ended his turbulent life a few months after as a citizen of that Batavian republic which, in

his pride of power, he had threatened to destroy. But did Russell, Sydney, John Hampden the younger, did Cornish, who had packed so many Grand Juries—did they find any protection from the institution? It is a mere abuse of language to say that Grand Juries vindicated our liberties. The Grand Juries which spared Shaftesbury, were chosen by the same artifices, under the same auspices, as the Grand Juries which were not reluctant to leave innocent blood to be shed by the manifold infamies of Oates and Dangerfield and Bedloe. To support Grand Juries by an appeal to the “reign of Ignoramus” is as if one were in the present reign to assert the reality of the Popish Plot on the authority of the evidence of Titus Oates, or to question the lofty character of Algernon Sydney by a reference to the charge of Sir George Jeffreys.

I contend then that no argument can be drawn from history in favour of Grand Juries, but I would wish now to mention some of what seem to me the dangerous incidents inseparable from the institution. I would, however, first premise that if a Grand Jury ignore a Bill on the recommendation of a Judge, its operation is superfluous, and the duty had better be left to the Judge; but that if a Grand Jury ignore a Bill without the recommendation of the Judge, its operation is mischievous. I will first take the large class of cases,—and I should remark that I only intend to allude to large classes of cases—in which the witnesses are either unwilling or can be tampered with. It is obvious that the interim between the commitment by a Magistrate and the investigation of a Grand Jury affords an ample opportunity for buying off hostile witnesses, for allowing such witnesses to be “got at”—I believe that is the technical phrase. If a witness of this kind chooses before a Grand Jury to omit a material part of his testimony, or even entirely to deny it, what remedy is there? You cannot assign perjury on his second statement. But take the larger class of unwilling witnesses, by which I mean those who will tell the truth, and nothing but the truth, but who will not, except under severe pressure, tell the whole truth. These are not the mere hard swearers of our Courts, they are men who have some regard for truth, but they do not consider themselves bound to disclose damaging facts, unless directly questioned regarding them. The prisoner may be a relative, a friend, a comrade: a feeling of honour may be aroused, or an idea that it is unlucky to give evidence that may lead to a conviction. Now witnesses of this kind require very discriminative treatment: their examination has, in the English Courts, been almost elevated into a science. I leave it to the Council to imagine how far the lubricity of a witness of this kind is tested in the Grand Jury room. But there is another considerable class of cases in which the character of the prosecutor is as much at stake as the character of the prisoner. Now it is not

a pleasant reflection to those who feel a real interest in the due administration of justice when a prosecutor is able to say—"The character of either the prisoner or of myself was to stand or fall by a certain issue, I was ready to place myself upon God and my country as to that issue. I had convinced an impartial Magistrate that my case demanded the most ample investigation. I had retained Counsel to assist me. I was prepared to meet my adversary in open Court before the Judges of the land, when by some process over which neither I nor any one else had any control, my case suffers an estoppel, how, why, I know not, "*quibus indiciis, quo teste probavit*;" there was not even a grand and verbose epistle, there was simply "not a true Bill," the prisoner got a clean tablet, and I was disgraced." Is this satisfactory? Foreign Jurists have regarded the English system of trial as one carefully devised for the escape of the guilty. It is very meet and right that every reasonable presumption should be in favour of the prisoner; it is very meet and right that every humane indulgence should be extended to him. It is the just pride of an Englishman that this is so, whatever may be the cost. But it is not meet and right that, in addition to all the advantages which our merciful system grants to the prisoner, he should have the safeguard which is implied in the mysterious, incomprehensible, and, for all the public knows, the sortitionic agency of a Grand Jury. I confess I regard the system with the same feeling with which Crassus viewed the diviners, "*mirari se quod haruspex haruspicem sine visu aspicere posset*." I cannot make out how, when the Sessions are on, one Grand Jury-man can look at another without laughing.

But there is a class of cases in which another element exercises considerable influence over both Grand and Petty Juries, but which in the latter instance is in a great measure controlled by the wisdom and experience of the Judges—the element of sentiment. There are many cases in which the facts on the surface are very plain and very easily proved, but a question of great complexity then arises as to whether the facts are not susceptible of an explanation consistent with the innocence of the prisoner. Now it is at this conjuncture, at which the functions of a Grand Jury should really have ceased, that the dominion of sentiment commences. But I can explain my meaning more clearly by mentioning a case which excited considerable attention at the time, and was alluded to by Sir Frederick Thesiger (now Lord Chelmsford) when in 1857 he introduced his Bill for the abolition of Metropolitan Grand Juries. The Medical attendant of a County Lunatic Asylum was assaulted by a patient; he in consequence directed the patient to be placed under a cold shower-bath for thirty minutes, and then to have a dose of tartar emetic administered to him. The bath and the dose were soon given, and the man died

within an hour. The case was sent for trial by one of the most able Magistrates in London, the present Chief Magistrate at Bow Street, Sir Thomas Henry, and the Grand Jury ignored the Bill. Now this, as Sir Frederick Thesiger said, was a case which demanded the most complete and unreserved enquiry. Such an enquiry might very probably have led to the same result as the proceedings of the Grand Jury, but the ends of justice and the interests of the public would then have been satisfied. Now this case represents a large class which Grand Juries, for sentimental reasons, will not permit to be tried. I might go on multiplying instances in which justice is defeated by the action of Grand Juries. It will be sufficient for me now to say, that every lawyer in modern times who has studied the subject has pronounced against Grand Juries. I will not merely allude to the Law Commissioners and to Jurists, whose opinions every thinking man must regard with reverence, but to men of the highest practical experience, to the late Lord Denman, who, when Common Serjeant, gave his opinion on the subject in the *Edinburgh Review*; to Lord Chelmsford, who was twice Attorney General, and to Mr. Stuart Wortley, Solicitor General under Lord Palmerston's former administration, who has paid the greatest attention to Criminal Law and its administration, and who, when Recorder of London, pronounced Grand Juries to be useless and obstructive.

There are two other points to which I would wish to advert. The one is the assertion that the Grand Jury is a time-honoured institution which should not be rudely assailed. On this I would remark that, placing aside the consideration that the Grand Jury is not now what was originally contemplated, a sort of inquisition, in some degree resembling our coroner's inquest, and that so far from being the public accuser or prosecutor as was at first intended, it is rather a Committee of Safety for prisoners—placing these considerations aside, I submit that all who know our legal history are aware that our Criminal Law and Procedure, though admirably administered, is still a very imperfect machine, and that this machine has, during the present century, been the subject of continual experiment and improvement. It is not fifty years since the time-honoured institution of trial by battle was abolished. It is not forty years since sheep-stealing ceased to be a capital crime. It is not thirty years since prisoners charged with felony were allowed to be defended by Counsel, and since the time-honoured maxim of the Judge being the prisoner's Counsel was exploded. It is hardly twenty years since the offences of forestalling and regrating were abolished. It is not ten years since divorce on account of adultery ceased to be a luxury of the very wealthy.

The other point to which I would allude is the suggestion that the institution has not been abolished in England, and should therefore not be abolished here. Now, apart from the different circumstances of the two countries, I would urge that the system has been virtually condemned in England : the second reading of Sir F. Thesiger's Bill was carried by a majority of two to one, and the measure was only withdrawn on account of the approaching close of the Session. Early in the succeeding Session Sir F. Thesiger was raised to the Peerage. The present Chancellor has stated that he approves of the abolition of Grand Juries, but wishes the measure to be coincident with the appointment of a public prosecutor : this consideration, and the complication arising from the natural and reasonable wish to maintain the system in the counties, have retarded the long desired reform in England. But beyond this consideration, I am clearly of opinion that it is our duty here to take advantage of the freedom of legislation which the great field of India affords, to look only to what is right and useful, and not to swaddle a country which, in relation to our rule, is still a young country, with the old clothes of ancient systems, but to enable it to feel its life in every limb and to assume a nobler part in the great drama of nations.

I have designedly confined my attention to that portion of the Bill which has excited objection. It remains for me only to say that I regard the Bill in its integrity as an admirable measure, as one representing real and safe progress in a most important department of Government. I confess I shall be glad to see the day when the same Judge who tries the Native shall try the European. I fully admit that this cannot be soon. But if it be eventually found that careful selection and special training cannot produce in the Civil Service Judges in whom the community will have the same confidence as those trained in Westminster Hall, I confess that, notwithstanding my affection for that service with which I have had an hereditary connexion for sixty years, I shall range myself with those who think that all Judges should be Barristers. That there will be some disadvantage in this change I am well aware, but still any change will be better than that the growing intelligence of the Natives of this country should have reason to allege that we commit the protection of their lives and liberty and the redressal of their wrongs to an inferior agency to that which we demand for Europeans."

The Hon'ble MR. HARRINGTON said that there being no motion before the Council for the amendment of any part of the Bill, altered as proposed by the Select Committee, of which he had the honour of being a Member, he would not occupy the time of the Council with remarks on any of the details

of the Bill. Having carefully considered the arguments which had been advanced both for and against the particular Sections of the Bill to which reference had been made in the present debate, he felt bound to say that he was prepared to give to the Bill, as it stood, his unqualified support. He entirely concurred with what his Hon'ble Colleague Mr. Anderson had said in favour of the Bill. He believed that the Bill would be a most useful addition to the Statute Book, and whatever differences of opinion existed as regarded some of the provisions of the Bill, he felt sure that all would rejoice that it would be the means of removing, to a considerable extent, the reproach which had so long attached to the Indian Government, that crimes were either committed by European British subjects in the Mofussil with impunity, or that when they were prosecuted, the prosecution not unfrequently entailed upon the whole of the persons concerned, particularly the accused if he proved innocent of the charge, an amount of hardship which was almost as great a reproach to the Government as the other branch of the alternative.

The Hon'ble Sir CHARLES TREVELYAN said that he had seen this question opened under Lord William Bentinck, and he esteemed it a privilege that he should be able to take some part in its being closed under Sir John Lawrence. There never was any real doubt as to the advantages to be expected from the settlement of Europeans in the interior of India. The only question was how the protection of the Natives could be reconciled with the maintenance of the just and necessary rights of the Europeans. The clauses of this Bill which provided for the sending of Judges of the High Courts under Commission for the trial of offences committed in any part of British India, and the measures in progress for the formation of independent Courts of a similar character at Allahabad, Lahore, and Karachi, would solve that difficulty. Justice, if not brought to every one's door, would, at any rate, be easily accessible to every one in India, and the scales of justice would be firmly and impartially held by professionally trained Judges assisted by an English Bar, and by an Indian Bar, which, year by year, was approximating to the English standard. He entirely agreed with the Committee that what related to the abolition of the Grand Jury was the least important part of the Bill. With all the advantage of ancient prestige and established habit the Grand Jury system barely held its ground in England, and it was totally unsuited to the interior of India. He was persuaded that the provision which the Bill made for the constitution of Juries of twelve, selected, as described by his Hon'ble friend (Mr. Maine), from the small but highly qualified European class in the interior, delivering their verdict either by a unanimous decision or by the decision of a majority of nine concurred in by the Judge, would be found, after a short trial, to be a far sounder institution than the plan, now in operation at the Presidency Towns, of two Juries, one a Grand Jury, and the other a Petty Jury.

The Hon'ble the MAHARAJA OF VIZIANAGRAM said that the inutility of the Grand Jury system had been so ably discussed, and its disadvantages so fully pointed out by his Hon'ble and learned Colleague, Mr. Maine, that he could hardly do more than give his unqualified assent to all that he had advanced on the subject, and to express a hope that the Bill for the abolition of Grand Juries in the Presidency Towns, in its amended form, might be passed into law.

One immediate beneficial result that was likely to follow the abolition of the Grand Jury, was the opportunity it would afford for the improvement of the Petty Jury system. According to the plan which had hitherto obtained, not only here, but in Madras and Bombay, little discrimination seemed to have been exercised in empanelling Petty Jurors. The Petty Jury list had been made up of men who had not always represented the independence, intelligence, and other qualifications essential to the proper and conscientious discharge of the duties of Jurors. The consequence had been, that the frequency of their failures and shortcomings had led the admirers of the Jury system to deplore the evil as much as though trial by Jury did not exist at all. By the abolition of Grand Juries, the *matériel* of which they were composed might be made use of to strengthen and support the Petty Jury.

The Hon'ble Mr. MAINE :—"Sir, as there is no serious opposition to the Bill, there is really nothing to reply to. But I hope the Council will not refuse me the pleasure of thanking my Hon'ble friend Mr. Anderson for the eloquence with which he has exposed a considerable historical fallacy; and there is also a point on which I should be glad to be permitted to offer some explanation. Sir, in all the controversy on this Bill—a controversy which has been conducted with remarkable courtesy throughout,—there has been only one incident of which I have the least reason to complain. A remark of mine that Grand Juries are an obstruction to justice was pressed on the Grand Jury of a particular Presidency Town as if it had been a special aspersion on Indian Grand Juries. Now, Sir, those words are simply and solely a quotation from Jeremy Bentham; and I assert distinctly that I have said nothing on the subject of Grand Juries which is inconsistent with the exercise of the utmost intelligence and the possession of the utmost conscientiousness on the part of the Grand Jurors. I freely admit that in quiet and ordinary times nothing worse can be charged against a Grand Jury than this, that it starves the Petty Jury and does the Magistrate's work over again for him. It is a costly and complex machine, absorbing the greatest part of the proprietor's capital, but turning out the fabric at one end in exactly the same state as it came in at the

other. But in periods of extraordinary excitement, when class is set against class or party against party, and when there is a vague feeling abroad that everybody must be up and striving, then it is so ill-designed and its parts are so ill-related to one another, that it works awry and produces the monstrous results described in Mr. Ritchie's papers.

Sir, I am not insensible to the force of the objection which fell from my Hon'ble friend Mr. Bullen, that, however plausible be the arguments used, we are nevertheless destroying an honoured institution which is felt at home to be a safeguard of liberty. Sir, I cannot help thinking that much that has been heard from home since this discussion commenced must have tended to modify the opinions once entertained in Bengal as to the extraordinary value attached by the English to the Grand Jury. I speak, not in irony or sarcasm, but in all seriousness, when I say that I attribute much of what I must call the extraordinary exaggeration which was once current here on the subject, to the fact that perhaps the majority of Europeans in India belong to nationalities, especially Scottish, which have no Grand Jury in their natural home, but which, indeed, have that which is the very antithesis and contradictory of a Grand Jury—a system of public prosecutors. But, Sir, the opinion of Scotchmen who have really studied the subject may be gathered from a speech of the Lord Advocate which I read the other day. He was commenting on some proposal, which appeared preposterous both to him and to his audience, for introducing into Scotland some fragment of English law; and he proceeded to say that really if things went on in that way, there would some day or other be somebody actually proposing to transplant into Scotland that institution condemned by every Jurist of credit, the Grand Jury. And now, Sir, as to the opinion entertained of Grand Juries in England. My observation leads me to believe that in all cities, in every part of the country which has the remotest resemblance to the Presidency Towns of India, Grand Juries are intensely disliked. They are looked upon as a waste of time and an outrage upon the common sense of men of business. In the counties, however, they are not unpopular, but their popularity is wholly unconnected with their judicial functions. Mr. Stephen appears to me to have exactly expressed the truth when he speaks of the enquiry before the Grand Jury "as a mere form which nobody would wish to be continued unless for the social advantages which attend the connection of the class from which Grand Jurors are taken with the administration of Criminal Justice." Sir, the country gentlemen, who in any other country than England would be a part, and not the lowest part, of the aristocracy, cannot reasonably be expected to serve on Petty Juries; but they are not unwilling to form part of a splendid ceremony. They come into the county town to meet the Judge and listen to his address, and thus add dignity to what is the most dignified solemnity among

English usages—a county assize. Moreover, a County Grand Jury, it must be remembered, consists of the very same persons who, in another capacity, may be said to govern the county, who, assembled at quarter-sessions, tax the county, direct its jail-discipline, and administer its public works. Hence there is a clear advantage in the discussion which their meeting facilitates, and, besides, their power of presentment is of not inconsiderable value, since it enables them to bring up any part of the county which is backward, or which tries to evade its duties, to the level of the rest. But as regards their judicial functions, I never heard that they did more than satisfy Mr. Anderson's canon and find or ignore Bills exactly as the Judge directed them. I am bound, too, to add that if the Grand Jury were defended upon some grounds which have been advanced on its behalf in India, the county gentlemen, who, be it remembered, have interests of their own to protect, would be the first to acknowledge that it could not exist six months longer.

Sir, I am not so blind as not to see the true source of the opposition which once showed itself against this measure. I should think more meanly than I do of the intelligence of my countrymen if I considered them incapable of feeling the force of some of the objections to the Grand Jury system—objections of which the worst that has been said is that they are theoretical, though they have in fact occurred, not simply to the great speculative Jurist Bentham, but to every experienced lawyer who has attended to the subject, to Lord Denman, to Lord Campbell, and to Lord Brougham—all honoured names in the history of our criminal law—objections so strong that when they have once been stated, nobody who possesses the faculty of distinguishing a principle from a platitude will ever venture to defend the Grand Jury. But, Sir, the feeling which once disclosed itself was, I feel sure, something like this: here is another institution in which the non-official class has accidentally attained predominance, swept away by an all-absorbing Government. Now, Sir, if the abolition of the Grand Jury had stood by itself, I should have had some sympathy with that feeling. But it would be just, and even more wise than just, to observe how steadily the current of legislation has recently set in the other direction. There are those two seats at the Council-board which have been reserved by law to my two Hon'ble friends at the other end of the table; and I take the liberty of saying in reply to observations which I should be inclined to describe as somewhat unmannerly had they been seriously intended, that there are no more influential voices in discussion than those of my Hon'ble friends whenever they choose to give us the benefit of their advice, either in Council or Committee. There are also the similar seats reserved in the local Councils, and, lastly, there are those great Municipalities rising up all over India in which a practical preponderance is enjoyed by the

non-official community. Sir, it seems to me that it is only the hard measure which new institutions get as compared with old, that can account for the opinion that the British Crown and British Parliament have recently been indifferent to the just claims of non-official Europeans. For my part I would go still further. I attach the utmost importance to the association of non-officials with officials in the administration of justice. My Hon'ble friend the Lieutenant Governor proposed to try all minor cases in the Presidency Towns by a bench composed chiefly of non-official Magistrates; and though I saw difficulties in the way, I was in favour of the proposal. In the Statement of Objects and Reasons appended to the original Bill, I myself shadowed forth a plan for joining some members of the non-official community with the Zillah Judge in the trial of offences by Europeans, too petty to be reserved for a Judge on circuit. If there be any fragment of truth at the bottom of these miserable assertions of the inveterate hostility of class to class—assertions which seem to me to create the very feeling which they affect to convey—I should expect them to disappear in the common discharge of a most sacred duty. Nor am I without hope that my Hon'ble friend at my side, Mr. Harington, may find room in his Code of Civil Procedure for some system of Civil Juries in the Presidency Towns. We have here as good material for such Juries as exists anywhere in the world, and if they were established, it would not be matter of surprise if they came to rival those London Juries who, under the guidance of Lord Mansfield, founded the Commercial Law of England."

The Motion was put and agreed to.

The Hon'ble MR. MAINE also moved that the Bill as amended be passed.

The Motion was put and agreed to.

The Council then adjourned.

WHITLEY STOKES,

*Offg. Asst. Secy. to the Govt. of India,
Home Dept. (Legislative.)*

CALCUTTA, }
The 20th March 1865. }