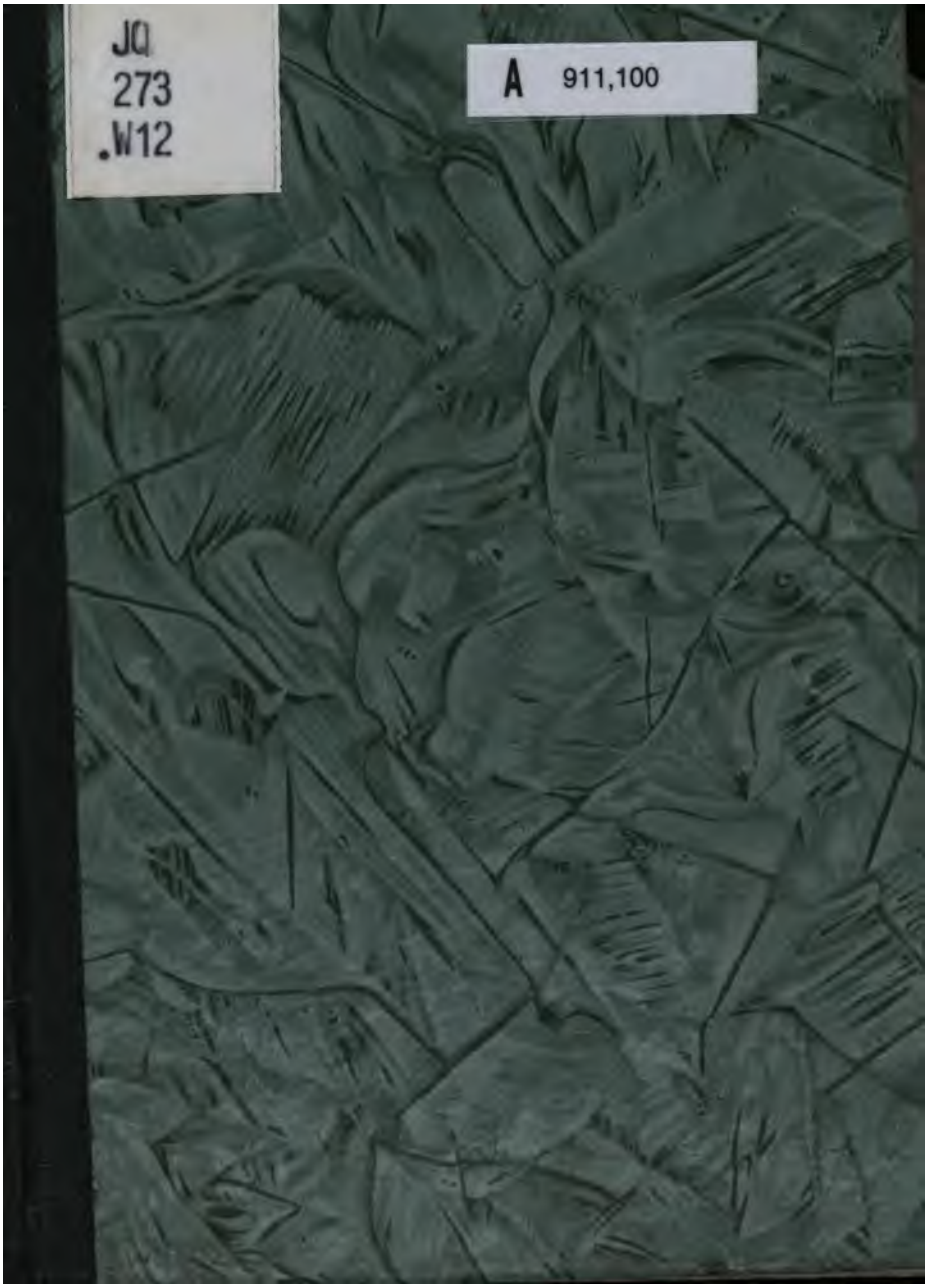

THE INSTITUTION OF TRIAL BY JURY IN INDIA.

BY

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DEAR READER,

For years past, we Indians have been enjoying the benefits of the Institution I have endeavoured to describe in these pages, but to the best of my belief, there exists, at present, not one combined source of information on the subject, and I trust that this humble volume will prove its usefulness till a more pretentious one be forthcoming.

The Institution in itself is unique and antique, in the history of the Judicial World, and many able writers, have tried to trace its source without coming to a definite agreement.

In the narration of its application to this country, so far as my efforts are concerned, I have taken care to verify my statements and have endeavoured to be precise in my affirmations; nevertheless mistakes and discrepancies will meet the searching eye, and from my critics, if any, I seek protection in the usual formula, "errors and omissions excepted."

Bearing in mind the utility and importance of the system I was dealing with, I was of opinion that an exposition of bare facts, stripped of all comments, was not desirable ; consequently I have made comments wherever possible.

Further, while once serving on a special jury, in a case of culpable homicide not amounting to murder, I found some of my colleagues somewhat at sea, as to their province and line of action, hence, I have attempted to mark out the respective provinces of a Judge and a Jury, and if my lines can guide anybody my labour will not have been in vain.

Yours, &c.
S. P. W.

"Masses of men together are wiser and better than the single individuals who compose them."
—*Aristotle.*

INDEX.

THE INSTITUTION OF TRIAL BY JURY, IN INDIA.

INTRODUCTORY.

When a subject, extensive and multifarious in itself, with its origin deep-rooted in antiquity, has been investigated with assiduity, but with differences of opinion, as to its historical principles, its application in practice, and even as to the import of its existence, when it concerns the most vital interests of human life, and is considered one of the most glorious achievements, of a glorious country like England, and a constant follower of her flag, wherever she plants it, there will surely be a general agreement, as to the desirabilty of investigating it, as far as its intrinsic difficulties will allow.

The system known as Trial by Jury, may, at its best, be safely put at the head of all the Judicial systems, upto now known in the civilized world. It is a system, which, can hardly be said, to do any harm, for, Trial by Jury, means nothing but Justice in its purest and simplest form. Yet, so unfavour-

able indeed, is the opinion of some, with respect to the system, that they are inclined to proscribe the whole, for the defects of a part, to reject much that is sound, on account of the little that is unsound, by one sweeping and indiscriminate condemnation. But when, looking minutely into its spirit, we consider the success, with which it has worked, and the amount of check, it has helped to put on crime, by making the laws of the land, better and more widely known, we cannot but admire its dual character, which, while calling in the people, to form their opinion on the facts, retains and profits by all the advantages, derivable from the training and experience of a judge, as regards the law, of a case. Mr. Routledge in his "Popular Progress in England" speaks of the system, as preserving the freedom of the people, and illumining the administration of the kingdom:—"Trial by Jury never in itself, required any defence in England, and has never needed a man, to maintain its glorious position, as one of the mainstays—and as often *the*

mainstay—of English freedom. Erskine, regards it "as the Commons' House of the Judicial system, as affording a safeguard to the people." Burke, in his Review of Blackstone, (annual Register, 1768,) connects the disuse of Trial by Jury in Sweden and elsewhere on the continent, with the decline of free-government in those countries. He compares the Institution, with the House of Commons:—"it was in the higher part of Government, what Juries are in the lower—as a control issuing immediately from the people, and speedily to be resolved into the mass, from whence it arose." Burke, evidently gives the key-note, to the original Parliamentary system, viz., "as each man was judged by his peers, so was each one to be taxed and legislated for, by his peers."

Of late, much has been said on the subject, and attempts have been made to banish Trial by Jury from the Indian law-courts. But the cry that has been raised, is not so much against the system itself, as against its application in

practice. And the practice too, is not condemned owing to any inherent defect, but in consequence of irregularities observed, or stated to have been observed, in isolated cases, in which, again, the conclusions drawn have not always been in strict accordance with facts, or records, or reports. What has been urged, therefore, against the system, has been mostly urged on the strength of, "personal experience at the bar" but with such marked divergence of opinion, as to create a reasonable doubt, of their general soundness.

On the other hand, so strong, so universal, and so effective, was the people's voice against the abolition of the system, that after a long and careful inquiry, into its advantages and disadvantages, the Special Commission, entrusted with the duty of conducting the inquiry, gave its opinion in favour of allowing the system to stand untouched.

THE ORIGIN OF THE SYSTEM.

But before coming to the era, and method, of the introduction of Trial by Jury, in the British Indian Empire, it would not be, it is hoped, outside the province of this brochure, to peep into the birth, and birth-place of the Institution, for which, we must plunge into the depths of antiquity. We cannot be guided, by the conflicting opinions of different writers, nor can we accept or reject any one of the theories advanced. There are some, who believe, that the system is a western graft, indigenous to England, and has been derived from "the Celtic tradition based on the principles of Roman Law." Others honour, Alfred the Great, who, we find in the 'De Jure Saxonium', codified an excellent body of laws, from the laws of Æthelred, Egbert, Inna, and Ossa, as the founder of the system. While it has been traced to Scandinavia by one scholar, another finds it to have existed in Asia, a third brings it from France, and a fourth (Tacitus) considers Germany, to be its birth-place.

Carlyle says "in one part of Switzerland there is an old usage of very remote tradition, called the "street-court" itself *quite a rude jury*, by which tradition, if two men meet upon the high road, men travelling on business, say, carriers, drovers, and one of them, does some injury to the other and they cannot agree about it, they are bound to wait there till seven other persons shall have come up, and these shall judge of the dispute, hence the name "street-court," "road-court," and they are to decide it irrevocably." Some ascribe the Institution, to the great Saxon Legislator, Woden.

Freeman, and Forsyth, speak of it as distinctively an English Institution. Hallam, considers it primeval. Sir Henry Maine, declares that in the present mode of Trial by Jury, is to be found a surviving trace of the popular courts of the Teutonic nations - the Courts of the Hundred. Sternhood, attributes its origin to Regner, King of Denmark and Sweden. From these various theories it would be fallacious to give any one person, coun-

try, or era, the credit of having given birth to this institution, since wherever we look into ancient history, we come across institutions akin to Trial by Jury, and consequently akin to each other. In Switzerland, it existed in the form of a street-court or "Strasse Gericht." In India, its analogy can be found in the "Village Punch" or the "Panchayat", in the "Recognition System" in England, in France, in the "King's-Court" and in the ancient civilization of Egypt, in the "Council of Thirty." But the question as to when Trial by Jury, was first established in England * is a very difficult one to answer. According to Stubbs, the lawyers of the Plantagenet period shaped the institution of the recognition system of the Anglo-Saxon times into its present form. The Grand Jury of the Hundred, who had the power to dispose of all the business of the Sessions, existed as early as 978 A. D. in the time of Ætherald the

* The system was introduced into France in 1791. Into Scotland, in civil cases only, in 1815. Into Russia in 1886. And so recently as nine years ago, in 1888, into Spain.

Unready. William Longman in his " History of England " thinks that it existed in the early Anglo-Saxon and in the Anglo-Norman times, in as much as, we find that those who sentenced the criminal to punishment, were quite distinct from those who put the sentence into execution. That those who pronounce the verdict shall be the prisoner's equals, was established by Magna Charta which provides :—" No freeman shall be taken, or imprisoned, or disseised, or outlawed, or banished, or any ways destroyed, nor will we pass upon him, nor will we send upon him, unless by the lawful judgment of his peers (Judicium Parium) or by the law of the land. " Some are of opinion that this clause of the Great Charter of English Freedom, is the first embodiment of the system in England. Also the right and privilege of trial by equals and neighbours, was declared as the birthright of the people of England by the Act of Settlement.*

Henry II remodelled and expanded the system to

* Statute 12, 13 of William III, 1701 A. D.

such an extent that some writers have called him the father and founder of the system in England.

The generally received opinion as to the time, at which it was found fully developed, is the middle of the 13th century. The system in its present state is the outcome of the slow and constant growth of the civilization of many generations. It would not be rash to affirm that the present one is closely connected with the ancient methods of trials, viz :—Ordeal * Compurgation † and Battle.‡ For, whether it was Henry II, or King John, or Edward I, who introduced it in England, it is an EXTRACT of the then existing modes of trial in civil and criminal cases.

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* In this trial, the Suspected or accused person was made to undergo a cruel punishment and it was believed that if innocent, he would be rescued by providential interference.

† Means purification; the suspected person being required to clear himself by producing a certain number of neighbours to swear to their belief in his innocence; failing the right number required by the law, the person's guilt was taken as proved.

‡ It was something of the nature of, "playing a duel." This mode was adopted in the case of one man demanding justice or satisfaction from another.

In those days the Juries were more *witnesses* than *judges* of facts. They were selected from the neighbourhood of the locality, country, or city where the crime was committed. Personal knowledge of events, was regarded as essential to a just consideration of the case. To find a verdict, on the Jury's special knowledge of the accused, or of the prosecution, and of the witnesses, was never considered as outside the province of a Jury. Even upto the time of Charles II, it was considered a recommendation to have such a knowledge rather than a disqualification. The judge being empowered, to punish the jurors, for a proved biassed or corrupt verdict. When there were no officials on the Jury, the Jurors were all *boue homenes*, or respectable men. In the reign of Edward III, an unanimous verdict was necessary to decide a case. This original system gradually developed itself till it reached its final stage in the existing mode of Trial by Jury. For many generations the jurors maintained the character of witnesses, and it was

only about two centuries ago, that their *persona* as witnesses died out and that as judges began. This modern Jury may be defined as a body of laymen, appointed to investigate facts, in a civil litigation, or in a criminal process. Under the system now in vogue in England, the number of jurors is as a rule limited to twelve. On this point the "Guide to English Juries" says; "In analogy of late, the Jury is reduced to the number twelve, like as the prophets were twelve to foretell the truth, the discoverers twelve sent into Canaan, to seek and report the truth, and the stones twelve that the heavenly Hierusalem is built on." Three kinds of Jury are recognised at present: the Grand, the Common, and the Special. The first may be called the Jury of Accusation, for, it is their duty to consider whether a crime is committed or not. In fact a *prima facie* case is to be proved before them. If this is done, the bills of indictment are returned for a regular process of trial, before the *petit* or common jury. Forsyth, well defines the

import of this Jury; 'It will often baffle the attempts of malevolence, by ignoring a malicious and unfounded prosecution, but it may also defeat the ends of justice, by shielding a criminal, with whom its members have strong social or political sympathies'.

It is the Common Jury that has to try the cause, where the Crown is the prosecutor, and the prisoner the defendant. While empannelling this Jury, the benevolent spirit of the English law affords a great deal of protection to the prisoner, by allowing him to object to a certain number of those who are selected to try him, without specifying his reasons for so doing. The proceedings before this Jury are opened by the prosecution, which also has the right to reply throughout.

After the summing up of the Judge, the Jury may either retire to consider their decision, or might do so on the spot. The Judge can lock up the Jury for some six hours, without any food, if

they do not agree in their verdict. And, if a certain majority of the Jurors, are not unanimous after this time, the Judge has the power to summon a new Jury, to decide the matter at issue. By the *attaint*, penalties could be imposed on the jurors for giving a wrong verdict. Any man who has £s 10, by the year, in land or tenements of freehold, copyhold or customary tenure, or £s. 20, on lands or tenements held by lease for 21 years, or longer, or who, being a householder that is rated at £s 30, in Middlesex or £s 20, in any other county * is eligible to serve on the Common Jury in England. To this rule some exceptions have been made and certain exemptions from the Common Jury-list granted.

It is not known when a Special Jury was first summoned. It would appear to have grown spontaneously, with the growth of the system. However a Statute, † enacted in the reign of Queen Victoria, provided that any person eligible to be a

* 6 Geo IV c. 50; and 33-34 Vict c. 77.

† 33 and 34 Vict: of "Juries Act, 1870."

juror, and who at the same time enjoys the legal *status* of an Esquire, and is, any way a person of higher dignity, or one who is the owner of a house rated at £s 100 in a town of 20,000 inhabitants, shall enjoy the distinction or privilege of becoming a special juror. A Special Jury is summoned at the Judge's discretion but either party on paying the expenses may obtain the change of *venue* from a Common to a Special Jury in the litigation. A special juror, is paid a nominal fee, of a guinea for his services throughout the case.

Of such description is the English system of "Trial by Jury" which is applied to India with certain modifications, and great reserve.

THE SYSTEM IN INDIA.

It is now over a century, since England took upon herself the mangement of the affairs of this country. Although the English had established themselves in India, from the beginning of the 17th century, it was not till the reign of George III, that Trial by Jury was introduced here by Act XIII of 1774, of the Imperial Parliament of England, for the establishment of a Supreme Court in Calcutta, repealing the Charter of George II. whereby courts of civil, criminal, and ecclesiastical jurisdiction were established in India, in the United Company's settlements of Madraspatam, Bombay, and Fort William, in Bengal. Section 34 of this repealing act provided that "all offences and misdemeanours, which shall be laid, tried, and inquired of, in the said Supreme Court shall be tried by a Jury of British subjects, resident in the town of Calcutta, and not otherwise." In the year 1800, a Supreme Court was established in Madras, and on the 8th May 1824, by Letters

Patent of King George IV., dated the 8th day of December 1823, Supreme Court of Judicature, or a "Court of Oyer and Terminer and Gaol Delivery" was established, in the town of Bombay. In 1866 by Letters Patent a similar Court was established at Allahabad, the Capital of the North-West Provinces. These Courts, were to be regulated under the same provisions, as laid down in the above Act XIII of 1774. In the writ of this Act, known as, "An Act for establishing certain Regulations, for the better management of affairs of the East India Company, as well in India, as in Europe," the sheriff was ordered, to summon a convenient number of the principal inhabitants of Calcutta, to be empannelled as a Grand Jury or Inquest, who, were to hear and determine the existence of such crimes, as were brought to their knowledge and to present the same to the Supreme Court, for trial as the writ ordained. And to summon a like number, as Petit Jury to appear in person and try at a place notified in the

summons the bills of indictment passed by the Grand Jury. The Court was empowered to fine, or other-wise punish, such of the jurors as were guilty of any neglect of duty. The Parliament of the 7th year of the reign of George IV, passed an Act, (VII of 1826) by which these Juries were to consist only of "all good and sufficient" persons who were not the subjects of any foreign state. This Act ordered the Supreme Courts of the presidencies, to provide rules for the qualifications of a juror.* The 3rd Section of this Act, porvided that Grand Juries, and all Juries for the trial of Christians, should consist wholly of persons professing that religion. The Government of India, by their Act XI of 1836, abolished the system in

* In the town of Bombay the qualifications required by the High Court to serve on a Jury are:—The names of all British subjects, between the ages of 21 and 60, haying an income of Rs. 70, a month and upwards, and understanding the English language, are to be entered on the Jury-list. If any person considers, he has a claim to be put on the Special Jury list, the grounds of such claim should be stated, and such claim will be considered by the Clerk of the Crown, so long as Special Jurors are wanted to complete the number on that list—the number 400.

the trial of civil cases. The history of Trial by Jury in India, is chiefly embodied, in the three Criminal Codes of the Council of India, of 1861, 1872, and 1882, and in the general inquiry by the Government of India, in 1890, and by the Bengal Commission of 1893, on the working of the system. While the Code of 1861, introduced the system in its entirety in India, those of 1872, and 1882, simply modified it. The particular offences triable by an Indian Jury are:—Treasons, Felonies, Murders, Forgeries, Perjuries, Crimes, Extortions, Misdemeanours, Offences, Wrongs and Oppressions. In India, the system is not working on an uniform scale, for while in the Presidency towns of Bombay and Calcutta, all the abovesaid classes of crimes are triable before a Jury, the Mofussil Juries have the power to try such of these offences only, as the respective Governments may, from time to time, specify. It seems that the Madras Presidency, was the first to adopt the system, with certain restrictions.

About the year 1852, an act was proposed in the Council of India, to give to every man, the right of being lawfully tried by the judgment of his peers. But the act was considered premature, for the *comparatively* ignorant and uncivilized people of this country. Before the epoch of the introduction of the system, its place was occupied by the trial by Panchayat. All the local Governments, thought very highly of this system, and considered it to be best suited, to the *primitive* inhabitants of this country. The only misgivings against it, were the opinions of some of the officials, who, as Sir George Campbell puts it in his "Modern India" said, that "in fact the Judge generally puts into the box some of the pleaders and such people about the Court, in order to comply with the law, intimates to them very broadly his opinion; they always agree, and there is no more trouble." Whether these remarks are true or not, it is difficult to decide, but as far as an opinion formed upon the very slight existing evidence can be justified, it

appears that not only was it liked by the people, but some went even so far, as to consider it superior to the Jury system. In 1861 an Enactment* was passed in the Parliament, whereby High Courts were to be established in the presidency towns of India, in place of the Supreme, and Sudder Adawalat Courts, then existing. The same civil, and criminal jurisdiction, was enjoined for the former, as obtained by the latter.

The Supreme Council of India, introduced the latter system, by act XXV of 1861, of the Code of Criminal Procedure, under which the Indian Juries were to be of the nature of an examining body, selected from the loyal subjects of Her Majesty, and guided in their office, as to the technicalities of the law, by the presiding Judge. The constitution of an Indian Mofussil Jury required, that it should be in the power of the Local Government, to specify the crimes liable to be tried by them. That every year a list of the Jurors, was to be

* Act XXIV, XXV Victoria c. 104.

published, prepared by the Collector,* with the assistance of the Sessions Judge. That each Jury was to be formed of persons, chosen by lot from those summoned to act as such. The jurors, on naming their foreman, were to take an oath as required under the Indian Oaths Act of 1873. Section 307 of the Code of Criminal Procedure required: "If in any case the Sessions Judge disagrees with the verdict of the jurors.....so completely that he considers it necessary for the ends of justice to submit the case to the High Court, he shall submit it accordingly, recording the grounds of his opinion, and when the verdict is of acquittal, stating the offence which he considers to have been committed." This section is of the utmost importance, in the application of the system in the mofussil. If abused, it gave the Judge the power to reject the verdict of a Jury. As it stands in the Code at present, it impresses on the minds of the jurors,

* In the Presidency towns these lists are made by the Clerk of the Crown, as provided by section 313 of the Criminal Code of 1882.

their responsibility and serves to thwart many a false verdict. The respective duties of the Judge and the Jury may be classified as follows :—It is for the Judge (1) to ascertain the issues to be decided, (2) to decide all clear questions of equity, and some questions of fact, (3) to superintend the nomination and the working of a Jury. The Jury has, (1) to decide which view of the facts is true, (2) to determine the meaning of all technical terms, and words used in an unusual sense, (3) to decide custom and class law.

The system thus introduced in India, having rolled on, if not quite successfully, yet smoothly for nearly 30 years, the Government of India in 1890, ordered a general inquiry into its worknig.

In the meantime, in 1865, the Grand Jury was abolished in India. A similar process of trial, in cases triable by that Jury, now exists in the proceedings before a Magistrate. If the Magistrate thinks, that a *prima facie* case is proved by the prosecution, he commits the accused to take his

trial before a Court of Sessions. By the "High Court Criminal Procedure Act" passed in 1865, it was enacted that a Jury, composed partly of natives, can try European criminals, and it was not essential to have an European Jury, for the trial of Europeans. The Code of 1872, extended the power of the Local Government, with regard to their right of specifying the class of offences, to be tried by a Jury. By this Code, any majority was made valid for a verdict, as against the majority of four-fifths, of the Code of 1861. It further enacted, that in the absence of the jurors, the deficiency may be supplied from those present in the Court. Under Act X of 1875, the High Court Jury was to consist of nine persons instead of twelve. The new Code of 1882, reduced the minimum number of mofussil jurors, from five to three, and made some slight modifications, in the rules for the choosing * of a Jury, and the preparing and

* S 275, In a Trial by Jury before the Court of Session of a person not being an European, or an American a *majority* of the Jury shall, if he so chooses, consist of persons, who are neither Europeans nor Americans.

revising of the Jury-list. Section 303, of this Code provides, that the Judge may ask and record, questions to the Jury, to ascertain their verdict. Under the Codes of 1861, and 1872., the selection of jurors, was to be made, from within an area of ten miles, from the place where Sessions trials are held. The Code of 1882, made all persons liable, to serve as jurors, between the ages of 21 and 60, with certain exemptions. Act X of 1886, made another important change, in this Code, to the effect, that when a person accused of a number of offences, is charged with them, at the same trial, he shall be tried by a Jury, for such of them as are so triable, and with the aid of Assessors for the others. All these changes treat of Trial by Jury before a Court of Sessions in particular.

We may now proceed, to consider the introduction and extension of the system, separately, in the three presidencies, as also in the other provinces of India.

IN THE BOMBAY PRESIDENCY,

the closing year of the 18th century, inaugurated a new era in the history of judicial administration. In 1799, Mr. Jonathan Duncan, the then Governor of Bombay, established a number of courts, and introduced a Code of Regulations, for the administration of justice, in civil and criminal cases. In 1802, Native Commissioners, were appointed to act as arbitrators, in cases not exceeding Rs 50 in value. After over 25 years of satisfactory working of this method (of justice), the Code was revised, and reorganised during the Government of Mr. Mountstuart Elphinstone, and it was declared by the Elphinstone Code of Bombay Regulations, that, for the well-being of the subjects of the state, it was necessary to make known to them, the rules and principles on which the administration of justice, was to be carried on. Accordingly by Regulation XIII of 1827, the Criminal Courts of the Presidency were allowed the assistance of a body of natives who

were known to the Judges, as respectable and leading citizens. This body was termed the Panchayat, or the Assessors, or " more nearly a Jury. " Their line of action was, to advise the bench on complicated or technical points, the final decision in every case, being left to the sole discretion of the Judge. Before this step was taken the Panchayat or arbitration system, existed in India. This very primitive native institution, may be explained in a few words:—The Panchayat, or, the Indian Jury of Five, * is to be found in all castes and creeds. It consists of five persons, nominated by both the disputing parties; each party nominating two, and the four so nominated, appointing a fifth, who may be called the foreman. Their business was, not to weigh the evidence, but to find out the truth. The evidence was heard in private, and not necessarily in a court of law. This institution served a very good purpose, and barring the evils

* To the Indian mind this number has a peculiar sanctity. Their proverb " Panch Parmeshwar " means ; five arbitrators, are like theLord Almighty, and consequently they cannot err.

of stray corruption, it was very useful in amicably settling disputes, without exposing the parties to the expenses of a law-court. In short, it was found so efficient, that the Bengal Government sanctioned and encouraged the system by a certain regulation of 1793. Sir George Campbell in his "Modern India" speaks of the Panchayat, "as one of the most marked in the customs of the country, and having the strongest of all the sanctions—that of public opinion." Henry St. George Tucker, a director of the late East India Company, in his "Our Indian Government," speaks very favourably of the system.

In the Mahomedan law of the past we find, that the Judge was assisted in his office, by the Sahib-e-Majlis (lit., master of the assembly or foreman) i. e., associate of the Judge, whose judicial function it was, to read aloud the depositions to the witnesses, and to repeat the words of testimony verbatim, after the Judge.

From this, we might safely conclude that the

Bombay Government, and for the matter of that the Bengal and the Madras Governments also, acted wisely, and in compliance with the prevailing customs and traditions of the nation, in introducing the Panchayat or Assessor system of trial, in our Criminal Courts, by their special regulations.

Next came the Criminal Procedure Bill, which was brought before the Council of India in 1859. This Bill included the introduction, of Trial by Jury in this country. It was however a contested point, on that question, whether the Local Government, or the Legislature was to decide the cases, and places, where the system was to be adopted, and enforced. The Bill was passed in the same year, but the system, did not come immediately into force. The point in dispute above referred to, was settled, in 1861, when the Bill was reconsidered and afterwards passed as Act XXV of 1861, in favour of the Local Government, which was also empowered to increase the number of jurors, from four to nine.

This "Indian Code of Criminal Procedure" laid the foundation of our Indian Juries.

About the same time, the system came into force in the other presidencies, and most of the places where it obtains now; but the public of this presidency, so distrusted it, and were so ignorant of its benefits, that it required full six years, before it could be made operative in their courts. Prior to this, in 1866, the Government of India, had forwarded some papers on the working of the system in the Bengal Presidency, and enquired of the Bombay Government, as to the places where the system was introduced, and how it was working. Some time after this, the Bombay Government issued orders, whereby the Sessions Judge of Poona, was ordered to try cases under the Jury system, instead of, by the aid of Assessors, which mode of trial was carried on, in Poona and the other districts of the presidency till then, in accordance with Regulation XIII of 1827. Accordingly from the 1st of January 1867, the system of Trial by Jury

was introduced into Poona. The Government restricted the number of jurors to five* only. The offences, liable to be tried by this Jury, were those for which the punishment was death, transportation for life, or upwards of 10 years, or imprisonment for over 10 years. From 1867 to 1884, the system worked without any extension, or development in this presidency. In 1884, the Governor of Bombay in Council took up the subject of his own accord, without any popular desire. From the satisfactory working of the system in Poona, the Government was inclined to extend the system to other districts; more especially to Surat, Satara, Belgaum, Karachi City and Ahmedabad, and the Government Notification, No. 6638, of 16th September 1884, was issued accordingly. The number of these Mofussil Juries, was fixed at five, as was the case in Poona. But this notification was the fore-runner

* But it was proposed that it should consist of seven, and it was actually found difficult to have a Jury of that number.

of a number of others. The Local Government, seemed to be bent upon issuing notification after notification, with regard to the system, during the latter portion of the year 1884, and they followed each other, in such rapid succession, as to convince the public, that the Government were exerting their utmost for the proper introduction of the system. From this we can infer, that the Government were fully aware of the importance, and greatness of the right that was to be allowed to the subjects, and were, but guarding against any future misgivings or abuse of power.

This Notification, was not at once put into force, but its operation was put off, to some remote date by another order. However, it was soon found that the district of Ahmedabad, was quite prepared to have the system in its law-courts, and consequently it was introduced into that district, by Regulation No. 8085, of 21st November. Eight days later, came another mandate, by which, an extension of the system, was made to the city

of Karachi. This was shortly followed by another official anouncement, dated the 8th day of December 1884, which in its turn was to have introduced Trial by Jury into the Thanna District. But this district, was also to be treated like the above ones, for, another decree of the Governor in Council, cancelled this regulation. And it was not till 14th May 1886, that Thanna had this system bestowed on it.

From 1st March 1885, the system was extended to Surat and Belgaum. It seems that in the same year, some agitation was made from Satara, to introduce the system in its law-courts. But the Government, would not approve of it, and the question has unfortunately never been raised again, or anything done in that direction, and Satara has to content itself, with the existing mode of Trial by Assessors. By Order No. 3003, of April 29th of 1885, Trial by Jury, was limited to such offences, in the district of Ahmedabad, as were punishable by death only. The manner in which the

Government handled the system piecemeal, might appear to be half-hearted, at first sight, but the fact was, that they were only feeling their way cautiously, and only introducing the system in places, where the people were educated enough to serve as jurors.

In this way Trial by Jury was introduced in the Bombay Presidency. Out of 23 districts of the Presidency, 6 only have been fortunate in obtaining it.

In 1887, a cry was raised from Belgaum, Surat, and Ahmedabad, against its unsatisfactory working; and its failure, to promote the ends of justice in certain cases, was now and again, brought to the notice of the higher authorities. This led the Government, to invite the opinions of the High Court Judges, and of others in a position to speak on the subject.

The various minutes of the Puisne Judges (vide, pp, 63-65) and the then Chief Justice—Sir Charles Sargeant, Kt.,—lead us to a favourable view of the system. There can be no

doubt of the official complaint, of the failure of justice, especially in murder cases in some districts. But at the same time, we must bear in mind what the Chief Justice has maintained, that the present working of the system, has in "no way affected the judicial administration of the country," and that the misgivings are "not to such an extent as to create public dissatisfaction." The system, can not be easily abolished, and, "any change in its working, is much to be deprecated." The late Government, appear also to have considered it unwise and unstatesman-like to officiously interfere with the quiet working of the system.

There is no doubt that Progress and Education, will, in course of time, help to improve the system, in India, and will make amends for the present deficiencies, and it is also certain that matters may be made worse, by prematurely trying to amend the law, at every small note of dissatisfaction.

But a different view of the matter was taken by the Government,

Act XXV of the Legislature of 1861, of the Council of India, introduced the system of Trial by Jury in India, and the Bengal Government, was the first to have enforced it, at a time, in seven, out of forty-six districts, of their Presidency.

From the year 1793, we have a regular insight into the Judicial administration of that Presidency. Upto that time the Panchayat system was recognized by the Government, as can be gathered from the Bengal Regulation of 1793. From 1793 to 1832, in cases where a Mahomedan was to be tried, the Judge received the assistance, of a duly appointed, law-officer, who expressed his opinion on the point at issue, from a religious point of view, or who declared what the *Futwah** demanded.

During the Administration of Lord William Bentinck, by Regulation VI of 1832, following the

* "Futwah-e-Alumgeeree" was the title of a book written in the time of Aurangzebe. It was something like "a digest of the Mahomedan Law."

Bombay Regulation XIII of 1827, (page 25) it was left to the Judge's discretion, to refer any case he liked, to a body of respectable native citizens, in place of referring it to the law-officer. It depended solely on the Judge, to have any number of them employed. It was his business to guide them, in the discussions which arose, and to decide the case either in accordance with, or contrary, to the decision of those consulted, as he thought best. In this mode of trial, we have a remote trace of the introduction of Trial by Jury in Bengal.

And in 1862, the system was introduced in the districts of Dacca, Hooghly, Burdwan, Nuddea, Patna, Morshedabad, and 24 Pergunnahs, as necessitated by the Indian Criminal Code of 1861. The Juries were to consist of seven persons. They were required to be unanimous in their verdicts, but, in certain cases, the verdict must at least be of five against two. Their verdict was considered to be final, except in cases, where it was evident that they were misguided by the presiding Judge, on a

point of law, or, in the explanation of a legal technical term. It was the nature of the offence and not the punishment which it merited, that settled whether it was to be tried by a Jury or otherwise.

Offences against public Tranquility, (rioting &c:) False evidence and offences against Public Justice, those affecting the human body, offences against Property, as well as those relating to Documents, Trade or Property Marks were liable to be tried by a Jury. The Judge was empowered, if he thought necessary, to call a new Jury, if the Jury first empannelled, returned a verdict by a very small majority. If the new Jury did the same, the prisoner was to be acquitted. Five years later, inquiries were made, as to whether the newly-introduced system was working satisfactorily; and the report was favourable. The then Lieutenant Governor of Bengal, the good Sir Cecil Beadon, in his farewell address to the people of that place, spoke very highly of the system, and although he advised its extension to the remain-

ing districts of the Presidency, it was deemed advisable to give it a longer trial. Again in 1874, the system was to have been extended to Cuttack, Midnapore, Chittagong, and three other districts, but somehow or other it was not done, for in 1892, it was reported that the system was working only in those seven districts, where it was first introduced in 1862. In 1884, Lord Ripon made inquiries as to the places, where the system could safely be extended, and, a majority of the Judges,* of the Calcutta High Court, expressed a firm opinion that the time had not yet arrived to extend the system to the Lower Provinces. In 1888, the attention of the Government, was called to some of the provincial reports, that there had been a great increase of crime in some important districts. In 1890, the Government of India, instituted a general inquiry into the working of the system. The Bengal Government was asked to report, as to how the

* Justices, Mitter, Norris and Ghose, were in favour of its extension.

system worked in that Presidency, and the alterations it would like to have in the system. The Local Government of Bengal once more invited the opinion of the High Court, on (*a*) how the system had worked in the Lower Provinces, (*b*) what was thought of its merits as a means for the suppression of crime, and (*c*) what improvements, if any, were needed in its application. The High Court's opinion, was for amending the law in some points, and one* of the Judges suggested the abolition of the system, in cases liable to capital punishment. The Lieutenant Governor condemned the system, as entirely unsuitable to this country, and proposed to withdraw certain offences, from the category of those triable by Jury. The Supreme Government, approved of the alteration, and soon followed the famous Notification, of the Bengal Government of 20th October 1892, which afterwards led to the appointment of the commission, by the Imperial Government

* Mr. Justice Tottenham.

of the United Kingdom, to enquire and report on the working of the Jury system in Bengal.

Under this Notification, Sir Charles Elliot, the Lieutenant Governor of Bengal, made use of the power conferred on the Local Governments, by section 269, of the Criminal Procedure Code of 1882, of withdrawing certain offences from the cognizance of Juries. From 1885 to 1890, as many as 1489 cases were tried by Juries, and it was found that by the above resolution, nearly half the number of cases, were withdrawn from Trial by Peers.

The Notification brought the Government of India, in bad odour with the people of this country and of England. The "Daily News," in an article on this resolution, charged the Government of Lord Lansdowne, with a monstrous abuse of power: "An outrageous blow upon human liberty has been aimed by a tyrannical bureaucrat in Bengal." A public meeting, was held on the 20th December in the Town Hall of Calcutta, (The Pioneer, 22-12-92) to protest against the action of the Government,

and it was resolved: "the meeting is of opinion that Section 269 of the Criminal Code be so amended that the Local Government, may not be able in future, in times of tranquility and peace, to take away by an executive order, one of the greatest safeguards of the liberty of the people." This and other things, led the Parliament of England, to instruct the Indian Government, to appoint a Special Commission, for an impartial inquiry into the matter. Accordingly the Jury Commission* was appointed in February 1893.

After a very careful inquiry, from the first introduction of the system into that presidency, the Commission was of opinion, that there was no sufficient reason, to justify the Government, in with-

* The Commission consisted of the following five gentlemen:
Mr. Justice H. T. Prinsep, (President).
Sir Jotendro Mohun Tagore, } Representing the Native Com-
Sir Romesh Chunder Mitter, } munity,
Sir Griffith H. P. Evans, Representing the Bar,
& Mr. C. A. Wilkins, C. S., Sessions Judge.
Mr. H. C. Streatford, Under-Secretary to the Bengal Government, acted as Secretary to the Commission.

Mr. Prinsep had in 1890, expressed himself as: "The Jury are prone to acquit or take an unreasonably lenient view of the conduct of the accused in cases of homicide," but here he was at one with the other members of the Commission, in upholding the system.

drawing the particular offences from the cognizance of Juries. The Commission made useful suggestions for the better working of the system. The important improvement proposed by the Commission was to modify the latter portion of section 307, (see page 21) of the Criminal Procedure Code into something like the following:—"In dealing "with the case so submitted, the High Court "shall consider the entire evidence; giving due "weight to the verdict of the Jury, and to the "opinion of the Sessions Judge and of the dis- "sentinent jurors, if any, and may exercise &c. &c."

The Commission maintained, that an extended use of this section, would produce mischievous results. For, some of the supposed perverse verdicts can be attributed, to the inexperience of the Judge in his charge to the Jury, and to the prevailing distrust of the police, strengthened by the belief, that some of the cases are simply got up by that body.

Consequently, by a Resolution of 29th March 1893, the notorious notification, of 1892 which,

so to say, caused the triumphant acknowledgment, of the Indian people's voice, in the cry for their rights, and in the redress of their grievances, by The World's Model Council of Legislation, and Examplary Assemblage of Administration—the Parliament of England, was cancelled.

The Commission saw no reason, to think of withdrawing riot cases, from the consideration of Juries. Nor did it believe, the necessity of adopting a retrograde measure, in murder cases.

The Commission left it to the Indian Government, to decide on questions of paying the jury, locking up the Jury, and extending the system to other offences, comprized in the Indian Penal Code.

On the latter question two of the members* of the Commission, were of opinion that the extension should be made at an early date.

"That the system has worked fairly well in the more advanced districts, to which it has been applied"—an opinion arrived at by the Bengal

* Sir Jotendro Mohun Tagore & Sir Romesh Chunder Mitter.

Government after their inquiry in 1884,—was the unanimous opinion of the Commission.

The Question of Trial by Jury was again to the front in 1883, at the time of the Ilbert Bill.

THE ILBERT BILL. On the 9th March 1883, the Council of India, presided over by H. E. The Marquis of Ripon K.G., G.M.S.I., G.M.I.E., met at Government House Calcutta, when the Hon. C. P. Ilbert C.I.E., introduced the Bill : of giving superior Native Magistrates in the Mofussil, Jurisdiction over European British subjects. So terribly was public opinion excited at the time, that the Liberal Gevernment of Mr. Gladstone, with Lord Kimberley as the Secretary of State for India, was threatened with disfavour.

The feeling of the European community against it, was "so strong and I (Hon. Mr. Miller) cannot help saying so powerful for mischief" that at the close of Mr. Miller's speech against the Bill, he was lustily applauded by the European spectators in the Council, to which the President had to protest, that manifestation of sentiments was against the rule of the Council as of all legislative assemblies in the world.

The Ilbert Bill, was in conformity with the various opinions of the leading native gentlemen, and of the High Court Judges of the presidencies; and, according to the Hon : Sir Stuart Bayley, it had its origin in a suggestion made by the Government of Bengal, in 1882, when Sir Ashley Eden was the Lieutenant Governor.

This honourable gentleman in supporting the Bill, condemned the opposition in terms of : "I had hoped that 25 years had really done something *to obliterate the feeling of race antagonism, of bitterness and hatred which was familiar to us a quarter of a century ago.*"

The Hon. Rai Bahadur Kristodas Pal C.I.E., complimented the English nation by saying : "I have too strong a faith in the character of John Bull, to believe for a moment, that he will carry to the bitter end his opposition to a noble attempt, to establish that equality in the eye of the law, which the history of his own country, and the teachings of his own political system so loudly proclaim."

However, the Bill was passed by a majority. The Hon. Messrs. J. Quinton, Kristodas Pal, H. Reynolds, Durgá Charan Láhá, Raja Siva Prasad, J. Gibbs, C. P. Ilbert, Sir Stuart Bayley and H.E. the Commander-in-Chief ably defended the Bill, whereas, Hon. Messrs. R. Miller, G. Evans, H. Thomas, Lt. Gen. Wilson, and the Lt. Governor of Bengal voted against it.

The System in the Madras Presidency.

In this Presidency, the system has never attracted much public attention, nor has it ever incurred the displeasure of the chief officials, as it has in the other presidencies.

The Panchyat system, was there recognized in the year 1793 and also in 1828, by certain regulations of the Government of Fort St. George in Council. The number of the Panchayatees, was to be from five to nine. The Judgment of the majority, was to decide the case. No one was to preside over them. There was no appeal from their decision, and it was the duty of the Zilla-Judge, to see it put into execution. The Panchayats were to consist of the most respectable inhabitants of the village, and any person refusing to serve on a Panchayat was liable to a fine.

It is evident that the principles of this mode of trial in civil cases, are analogous to those of Trial by Jury.

The Assessor system of trial in criminal cases

was introduced by Act VII. of 1843. The Sessions Judges were to avail themselves of the aid of respectable natives, "by constituting them Assessors or Members of the Court, with a view to benefit by their observations, particularly in the examination of witnesses, or by employing them more nearly as a jury, to attend during the trial, to suggest points of inquiry, and after consultation to deliver in their verdict."

Before this, in 1827, Sir Thomas Munro, Governor of Madras, was meditating upon the gradual introduction, of Trial by Jury, in the Presidency in criminal cases. But on the 6th of July, he was taken ill with cholera, at Putecundah in the Ceded Districts, and there succumbed to the fell disease. Mr. Henry Sullivan Greame, the Senior Member of the Council, took the reins of Government and on the 11th September notified the Jury Act, as Act X of 1827.

The 1st section of this Act, premised that the Government had deemed it expedient, to in-

troduce the system in order to expedite Criminal trials, and to raise the character of the people and to facilitate the tracing of facts from the evidence, by the extended employment of the Natives of India, in the administration of Criminal Justice. This Act provided, that the Constitution of a Madras Mofussil Jury, shall be as under:— Persons between the ages of 25 and 60, shall be eligible to serve on Juries; Fakirs, Gooroos, Priests and Peers, being exempted; as many as thirty and more (upto seventy-two) jurors shall be summoned, out of which, from eight to twelve persons shall be chosen by lot. The jurors were to be paid, a rupee a day, from their arrival in the Courts, to their discharge, plus the days required for travelling both ways, to the Court, and back home—15 miles a day being considered the travelling rate. The jurors were required to take an oath, that they would be guided, solely by the dictates of their conscience, and by the evidence before them. The verdict was to be of three-fourths, of their member.

The Act further provided, that the Court should protect a juror slandered, or otherwise assailed, in the performance of his duties, by punishing the offender, with a fine of Rs. 200, or with one year's imprisonment. Corruption and bribery, were strictly punished, in the persons of both, the juror receiving, and the party offering, the bribe, by a fine equal to ten times the amount offered, or received, and by imprisonment from one to five years.

In 1843, certain alterations were proposed in the Judicial Administration, by the land commissioners of the province of Madras, and the system of Trial by Jury was to the front, but remained unaltered.

On the passing of the Criminal Procedure Code in 1861, by the Supreme Council of India, the Madras Government, by their Act XVII of 1862, repealed the Jury Act, and introduced the system into Tanjore, Cuddalore, Arcot, Chittoor, Cuddapah, Rajahmundry, Vizagapatam, Tranquebar nd a few other districts.

In 1868, the High Court ordered, that after the trial of every third or fourth case, another Jury be called; and about the same time the High Court ordered,* that a monthly Sessions, was to be held in the districts, on the first Monday of each month, or, in case of holidays, on the first Court day, after the first Monday of the month.

It was found unsafe, to convict a person on the evidence of one of his accomplices, without any other corroboration, consequently in 1868, the Madras High Court enacted, that the Jury should be told, in the Judge's charge, that although, it was not prohibited by the law, to convict an offender, only on the evidence of his accomplice, still as a general rule of practice, it is considered unsafe to do so.

In 1873, the number constituting a Jury, was reduced to five; and in 1876, certain exemptions were made, from serving on Juries, especially as regards, attorneys, vakils, and advocates.

* A similar order was issued, in the Bombay Presidency by the High Court Circular No. 32 of 1879.

In 1883, the Hon. M. E. Grant Duff, the Governor in Council so enacted that the Sessions Courts of the entire Presidency of Madras, except those in the Agency Tracts of Ganjam, Godavery, and Vizagapatam, shall obtain Trial by Jury, in certain criminal cases, and the assistance of two or three assessors in other cases.

Under Section 335, of the Criminal Code the High Court of Madras, has power, with the consent of the Local Government, to sit at any place outside the Presidency Town, and on such occasions Juries are empannelled, upon special arrangements provided by Section 316.

The result of the general inquiry of 1890, declared that the system worked satisfactorily; the classes of offences triable by a Jury, being well chosen and capable of extension.

And the individual opinion of the Sessions Judge, Mr. Benson, of Arcot, who says: *Juries are more often right on the facts, than Judges in their self-sufficiency give them credit for*, is a

matter for consideration. For, it often happens, that the verdicts of Juries though not upheld by the Sessions Judges, when referred to those of the High Court, are accepted, by them.

TRIAL BY JURY, IN THE OTHER PROVINCES OF INDIA.

Having thus inquired into the introduction, the development, and the working of this system, in the three presidencies of this country, we pass on to the system of Trial by Jury in the other parts of India.

The year 1862, saw the introduction of the Jury System, in the Sessions Court in the province of Assam Proper, and within a short time, its success, and popularity, opened for it, a way into six other districts, of the Assam Valley. All criminal offences, within the jurisdiction of the Goalparah Court, were, till 1866 tried by this system, but it was discontinued, when the seat of this Court, was transferred to the Cooch Behar State. Its want however, was so keenly felt, that the Government of Bengal, on 31st August 1867, ordered its reintroduction.

An enactment of 1875, placed all the crimes, upto then tried, by the Recorder and Judge, of the Courts of Rangoon and Moulmein, under the jurisdiction of the Jury system.

In the town of Akyab, in British Burmah, this system of Trial by Jury obtains, also known as "*Trial Per Pares*" (peers) and "*Trial Per Pais*" (country).

It was notified in the British Burmah Gazette, that in these three towns, the Jury-lists, should be made by the Deputy Commissioners, assisted by the Magistrates of the respective towns.

The system is not in force, in the rest of Burmah, for, though, it was introduced there by Regulation VII of 1886, when the Indian Code of Criminal Procedure, was made fully applicable to the whole of Upper Burmah, except the Shan States, three years later, it was enacted that trials there should be conducted, by the Sessions Judge alone, without the aid of a Jury.

In the Native State of Mysore in 1887, the system of trial of Sessions cases by Juries was introduced into the Chief Court, on its Original side for the following offences: Theft, extortion, robbery or gang robbery, house-breaking, breach of trust, cheating, abetment of any of the above offences, and habitually dealing in stolen property.

Since the transfer of the Original Criminal Jurisdiction, from the Chief Court, to the District Court, in September 1890, the system continues to obtain in the latter Court.

The system is stranger to most of the other native states, which have the Assessor system of trial, and in two or three instances the system obtains in the Magisterial Courts also.

It exists in three only, Allahabad, Benares, and Lucknow, out of forty-nine districts of the North West Provinces and Oudh. Murder cases are not tried by it. The number of jurors was, in 1873, fixed at seven. The Lieutenant Governor of these provinces, and Colonel Erskine,

the Sessions Judge of Lucknow, expressed their opinions, in favour of the system, in replying to the general inquiry, of the Government of India, in 1890. In Assam particularly, it appeared to have been working very well, in all cases including homicide.

Lahore, Rawul-Pindee, Peshawar, Simla, and Delhi, obtain trials by Jury, consisting of nine jurors, whereas it is restricted to five only, in the districts of Umbala, Mooltan, Jullundhur, Amritsar, Ferozepore, and Sealkote in the province of the Panjab. From July 1873, it has been the practice in that province, to pay *bona fide* travelling expenses, not exceeding Rs. 3 per *diem*, to jurors or assessors coming to the Court, from a distance; it being left to the Court, to decide the class by rail, to the fare of which, a person is entitled. And if they are detained in Court, beyond a day, they are entitled to subsistence allowance, for the whole term of their attendance at Court, at a rate not exceeding Rs. 5 per day.

In the Central Province, Nagpore, Jubulpore, Saugor, Raipore, and Hoshangabad, are the Jury districts.

In most of the other districts of the presidencies, and the provinces, the Assessor System is in vogue and in the Mofussil, the jurors and the assessors both enjoy very nearly the same privileges, and are persons of one and the same stamp. But in the case of Assessors, the Judge has the right to set aside their verdict. In the case of Jurors, if the Judge disagrees with their verdict, he must refer it to the High Court.

Taking it all in all, any critic of this system, cannot but decide, in its favour. It may be said, that the chief reason, why Trial by Jury has flourished, in all its "pristine vigour," and "has so long stood, and still stands so high in public favour, is, that notwithstanding all its glaring and familiar defects, no other machinery has ever been devised, which is not open to similiar or greater strictures." Trial by Jury, is a school for the education of the people, in the laws of the country. It forces the Judge, who has finally to sum up, and lay the facts before the Jury, to remain attentive throughout the trial, it makes corruption, or high-handedness difficult, in as much as, there is not one Judge to try the case, but many. The people look with more confidence on the verdict of a Jury, which is constituted of men, taken from among themselves, of men with kindred sympathies, kindred feelings, men, who springing from their own society, are better fitted to understand and decide, than on that

of a Judge, who, from his isolated position, cannot so well understand their manners, and their institutions. If the verdict is any way erroneous, the responsibility lies with the Public at large, in the case of a Jury, but in the case of a single Judge, it is the State, that is held responsible. It often happens, that the verdict of a court, is totally against the anticipations of a community, or of a large portion of it. Under such circumstances, nothing serves the Government, better than the Jury system, because the force of the popular indignation, is greatly broken, not being centered on the Judge alone, who is the representative of the Government, but spread over the larger area of the Jury. Mr. Justice (now Sir John) Jardine of the Bombay High Court, has remarked: * "The Bombay Government, in criticizing Trial by Jury, observe, that the Sessions Judges have little experience of Juries, and are not practised in delivering

* In his paper on "The Jury Question" of 1893, read before the East India Association, in England.

charges." It is an acknowledged fact, that the Sessions Judges are not men trained at the Bar, nor can their learning, experience or position, compare with the learning, experience, and position of the Judges in England. Besides, our Sessions Judges are transferred from one place to another, without any consideration of their knowledge of the language, or the society of those places; for instance, "from the Canarese country to the Mahratta region or to Sind, or as in my own case (Justice Jardine's) to Burmah."

Thus Trial by Jury, becomes all the more important in India. For, a Jury of the country, can alone well understand, the shades of evidence, the characters of witnesses, and their moral standard, and assist the Judge,—quite a stranger to the people—in his office.

Besides, the Mofussil Courts in India, have from time to time, strongly protested against the malpractises* of the police, their tyrannical abuse of

* A case from the District of Thanna, was referred to the Bombay High Court, in which "the bones of a crocodile were produced as those of a man said to have been murdered."

power, in forcing out confessions or evidence, for a crime, or a supposed crime, even from persons wholly unconnected with it. The Indian Law Reports, have on their pages a series of such horrible tortures, by the police and Dr. Chevers, has alluded to them, in his "Medical Jurisprudence." The Sessions Judges of Hooghly, Belgaum, Poona and other places have now and again all protested against the bad repute of the police, and have frequently urged the Government, to interfere in the matter.

As regards our country, it is urged that the ignorance, and want of culture, of the ordinary Indian, his timidity, his want of tact, in weighing the *pros* and *cons* of the issue, and above all, his religious and social prejudices, make him thoroughly unfit to serve on the Jury, and lead to miscarriage of justice.

No evidence nor any statistical statements, support this random remark.

That in cases of murder, and culpable homicide, the Indian Jury takes, an unreasonably mild view.

of the conduct of the accused, is another serious charge brought against it.

For a while even admitting the import of this allegation can it not be justified !

For, a Hindu, who would not kill an insect, cannot willingly lend himself, to the execution of a human being. His religious and moral instincts, incline him to a verdict of not guilty, but there is at the same time, before him, the fact of his having taken the oath, and his own inner sense, of what is right, leads him, however reluctantly, to a verdict of guilty, which he seeks to modify, by a strong recommendation to mercy, thus reconciling his sense of justice, with his inborn scruples about hanging.

And after all, is his hesitation so very misplaced ? In most cases, it is only circumstantial evidence that is offered, and various minds take various views of such evidence, and all are disposed, to accept it with extreme caution. Even trained

judges differ, * and who shall decide when they disagree ?

Not only in India, but even in England, and in other civilized countries, the oft discussed question —a question of the greatest and utmost importance to a State, is, whether capital punishment is at all justifiable. With the Indians, it is a religious, as well as, a social and political question. To quote Mr. Justice Jardine, again; "Under the Indian Law, a Sessions Judge, is not bound to pass sentence of death, even for murder; he may sentence to transportation for life, giving his reasons, and many such sentences are passed." The Law also states,

* In 1889, one Dada Ana was charged with Dhatura poisoning, before the Sessions Judge and a Jury at Ahmedabad. The Jury gave the verdict of "not guilty." The Judge differing, referred the case to the Bombay High Court. A new trial was then ordered. This trial ended in the acquittal of the accused. The case was again brought before the High Court. Justices Jardine and Candy heard the appeal, but while Justice Jardine was for acquittal, Justice Candy would convict. The Chief Justice joined the bench, and sentenced the prisoner to transportation for life. The difference of opinion, was caused by the questions ; "Did the accused fetch the Dhatura from the field ; and did it cause the death ; was it in the stomach?" I. L. R. 15 Bombay, page 452.

(Section 377 C. P. Code), that no capital sentence of a Sessions Judge, can be put into execution, before two of the High Court Judges, have considered the case over again, in open court and confirmed the sentence. This serves to show, that the Government, either for moral, political or religious reasons, is not a little disinclined to inflict capital punishment in India.

That rich and influential men, possess means of keeping out of the Jury, is another grievance against it. If it be true, where lies the fault? And whose? The remedy is near at hand. The Jury lists should be prepared, with greater care than is the case at present. It has been suggested to apply the English principle in India, where a Common Juror is the owner of freehold estate &c: (See p. 13) Rather than have on a Jury, persons whose only qualification is wealth, and who in no way are in touch with the people, or who have a superflous knowledge of the language, in which the trial is carried on, we had better have

middle-class persons, of superior understanding and education.

It has been proposed to pay the Juries their reasonable expenses, and this is a proposal which ought to receive careful consideration.

Some of the opinions of the Bombay High Court Judges, are well worth looking into :—Mr. Justice Parsons, is of opinion that,"The system worked and does work, as well if not better than it was expected to do, and in case of any offence triable by it, it cannot be lightly abolished. The verdict of a Judge and a Jury, inspires a confidence, and carries with it in public opinion, a weight far greater than that of a Judge and Assessors, or even that of an Appellate Bench of this Court."

This is substantiated by Mr. Justice Farran :— " When a Judge and Jury, work harmoniously together, and the evidence is sifted, by the Judge in his charge, and the true issues which arise, are pointed out to the Jury, the verdict of the latter, ..

...by reason of the local knowledge they possess, and their more perfect acquaintance, with the habits, customs, and modes of thought, of the accused, and of the witnesses examined before them, is more likely to be correct, than the decision of a Judge, though the latter approaches, the consideration of the case, with a more trained intelligence, and a more logical mind, but with less accurate perception of native life and native thought."

Mr. Justice Candy, was for amending the system but not for abolishing it. "It is supposed to be a sign of healthy self-government, not to take a retrograde measure by abolishing it."

Mr. Justice Birdwood, thought: "Its introduction, was regarded as a step of political education, but we began at the wrong end."

The late ever lamented, noble talented, good Mr. Justice Telang was averse to any alteration in the system, but suggested the withdrawal of murder cases, from the jurisdiction of this system in those Districts only, where failure of justice was feared.

He added: "The system should not be introduced in other districts in capital cases at the first start."

Of the remedies against failure of justice, and amendments suggested in the law, an important one, is the suggestion, that Government should strongly urge upon the Sessions Judges, the desirability of oftener referring to the High Court, the cases in which they have good reasons, for dissenting from the verdict of a Jury. The Government would not approve of the suggestion, for the remedy is worse than the disease. Not only would it weaken the responsibilities of a Jury, but at the same time increase the tendency to acquit and complicate the procedure, by delay and trouble.

Another remedy suggested, that of "raising distinct issues for the finding of a Jury" is also objectionable. But the desideratum being "a statement of the facts found by the Jury, and not the reasons for their finding," the Government have approved of the proposal, to amend the law,

so as to "empower the Judge to require special verdicts, after a general verdict has been taken, of the jurors, on some issues of facts, and on their reliance on particular evidence."

Suggestion has also been made, that the Sessions Judge should state clearly, in his charge to the Jury, the points for determination in each case, while defining the offence under trial.

Under various sections of the Procedure Code, the rights of European British subjects are defined and maintained; and by Sc., 451 it is established, that such accused persons can justly claim to be tried by their co-religionists, or by a mixed jury instead of by a jury of natives; and that in places where such a jury is not practicable, the case may be transferred to some other court, where it may be practicable.

Trial by Jury is an English Institution, and in a country like India, of mixed nationalities, and many languages, it is essential and clear that European misdemenants should have a fair, repre-

sentative and proper trial. Therefore, this privilege conceded to the European British subjects is justifiable.

To the painter and the sculptor, the goddess of justice, is blind and chaste without distinction. And equality of justice is the pivot of the benign rule in India.

Nevertheless, in the Procedure Code we do not find similar concessions, in the trials of other nationalities. Do not the same reasons, that justify the concession in the one case, hold good with equal force in the other cases. The foreignness of the language of the trials being of special consideration. The distinction, as it obtains, is invidious and amendable.

Trial by Jury is trial by equals, and trial by equals, in India, is trial by a mixed Jury of the combined nationalities, whose verdict may be relied upon, as disinterested and free from natural bias or prejudice.

Procedure in a Trial by Jury, The Judge, The Jury and the Verdict.

In writing under this head, it is necessary that the explanations offered must be correct and authenticated. Accordingly, the authorities consulted are Prinsep's, "Code of Criminal Procedure," Mayne's "The Indian Criminal Law," a London Barrister's "Every Man's Own Lawyer," Webster's International Dictionary, the Cyclopœdia Brittanica, and Letters Patent of the Indian High Courts.

Court Procedure.

It is within the jurisdiction of the Presidency, District, Sub-divisional, and 1st class Magistrates to commit an accused, to take his trial before a Court of Sessions, provided always that such Magistrates, have heard the complainant, and the evidence produced in support of the prosecution, as also the defence or statements of the accused, and have then decided that the charge is not groundless.

In the Letters Patent of the Indian High Courts provision is made for four Criminal Sessions known as Courts of Oyer and Terminer and Gaol Delivery. In Bombay there are five Criminal Sessions with fixed dates, but with an interval of at least sixty days between any two.

When a Sessions Court is held, the accused must appear in person (and surrender, if on bail) and plead to the Charge, read out in Court and explained to him, by his own mouth, and not through his counsel.

If he refuses to plead and claims to be tried, the Court shall choose jurors and try the case.

In every trial before a Court of Sessions the Crown becomes the prosecutor; and the Clerk of the Crown has the right to frame, add to, or otherwise alter the Charge as the case may be, after the commitment of the accused by the Magistrate.

In choosing jurors, objections without stating grounds, are allowed to the number of eight on

behalf of the Crown, and eight on behalf of the person or all the persons charged.

The name cards of the jurors summoned are put in a box and drawn out, one after another till 9 persons are duly impanelled. But if, after the objections are taken, the jury cannot consist of nine persons of the jurors summoned, any juror then attending the Court or any person, whom the Court considers fit, can be taken on the Jury provided he is not objected to. And in the absence of such jurors or persons the trial must necessarily be postponed till a proper jury is empannelled.

The jurors then choose their foreman, and are sworn to their responsibility. The foreman is to be the spokesman of the Jury.

The prosecution then lays open the charge, and calls witnesses or evidence, to prove the same. After which, the prosecuting counsel makes his statements on the strength of the Penal Code and

the evidence adduced. The defence now endeavours to disprove the charge, by either calling witnesses or submitting his own statement. If he brings forth any evidence, then the prosecuting counsel has the right to have his last say again, after the speech of the defending counsel. After the examination in chief of a witness, the counsel of the opposite party, is entitled to the cross-examination of that witness. The prosecuting counsel also enjoys the monopoly to explain certain statements during the whole trial. The Judge next sums up the case, as submitted by the counsels on either side, explains the law, and the jury after due consideration return their verdict.

The Judge,

(From O. E. juge Fr. juger to judge) is a public officer, who is invested with authority, to hear and determine litigated causes, and administer justice between parties, in courts held for that purpose.

Bacon has maintained that : The parts of a Judge in hearng a case are four, viz : (*a*) to direct the evidence, (*b*) to moderate length, repetition or impertinency of speech, (*c*) to recapitulate, select and collate the material points of that which hath been said, (*d*) to give the rule or sentence.

In other words (*a*) it is right and proper for the Judge, to reject certain proffered evidence, that can have little direct bearing on the offence, which it is the object to prove and disprove, or, to accept evidence that goes to prove the accusation, but which at the same time, lessens the gravity and importance of the charge; (*b*) it is in the Judge's jurisdiction, to condemn out of the way references and irrelevant statements; (*c*) it is his duty to sum up the evidence, in as concise and clear a manner, as ever possible, and to string together the facts, that the prosecution have proved, or the defence have maintained; (*d*) and by virtue of his office, to explain the literal meaning of the law of the country, and to pronounce the finding of disputed legal

points, in conformity with the practice and usage of the law.

In short, the province of the Judge is to sum up the evidence, lay down the law, and on matters of fact, to direct only in the *sense of guiding*. He may, if he chooses, express his opinion on a question of fact, or a question of mixed law and fact, relevant to the proceedings, but it does not devolve upon the Jury, to consider to any definite extent such opinion.

In fact, in a trial by a Judge and Jury the bounds of the former are very limited; questions of law being his only province and all questions of fact, bearing on the issues to be decided are mainly for the latter.

And even, on questions of law, it is the obligation on him, to render the law very liberally.

It must also be understood that the Judge is a distinct personage from a Judge-Advocate, whose *role* in particular trials, is that of a prosecutor.

The Judges are appointed by the crown, and once appointed they are to hold their offices during good behaviour. They are protected from any action for acts performed in their official duty.

The Jury.

The Jury (from O. F. Jurée, L. Jurari akin to jus, juris right, law) are a body of men, selected according to law, impanelled and sworn to inquire into, and try matters of fact, and to render their true verdict, according to the evidence legally adduced.

The Jurors, must be sworn on their sacred religious books, that; they shall well and truly try and true deliverance make between The Sovereign Lady the Queen and the prisoner at the bar, and a true verdict given according to the evidence. So help them God.

They are to judge of the accused on the merits of the evidence, on the truthfulness and circum-

stances of the facts, and the consistent relevancy of the Criminal Law under consideration.

Bias, prejudice, racial difference, justification or otherwise of the times and events, must be outside of their minds, as the oath demands.

Every man is honest and innocent till his guilt is proved, and the dictates of a pure conscience, require a careful attention, honest motives, and a high moral of judging between right and wrong. The Jurors are supposed to be possessed of these qualities and "are not in any way punishable for their verdict; though it be apparently contrary to the evidence, or the direction of the Judge. The Jury alone are the Judges of the fact, and have an absolute power in criminal cases to acquit or convict."

No juror is to be bound by the ruling of the Judge, on any matter of fact, "and when there is a conflicting testimony as to the point at issue, it is exclusively for the Jury to say, which side is to

be believed and the Court will not interfere with the verdict." The directions of the Judge as to the weight value and materiality of the evidence, may or may not influence the Jurors in their verdict.

The province of the Jury, is more extensive than that of the Judge, is for the very reason that, the fundamental meaning of the system, indicates, that the accused person shall be judged by his countrymen's knowledge of the motives, and impulses, which may have led to the commission of the alleged crime. And in so judging of the accused, the Jury is not to be hampered or led away by any legal technicalities or by party feelings.

It is within the province of the Jury to recommend an accused to mercy.

The Verdict.

O. E. Verdit Fr. verus true, L. vere truly, and dictum a saying. The answer of a Jury, given to

the court concerning any matter of fact, in any cause civil or criminal, committed to their consideration and determination is the definition of the word Verdict. A word of very great significance and capable of joy and pain.

In England unanimity is essential for a verdict, but in our country a majority decides the case. In the High Court Sessions, the verdict for committal should be of a majority of three, and a verdict of five to four means a new trial of the case.

The verdict of a High Court Jury is final, and there is no appeal to any higher tribunal of justice, from the decision of the Jury.

But in a case where it may be contended, that the Judge in the rendering of some legal point, or in the legal reading, or explanation of a certain word, so directed the Jury as may go aganist the accused; then, the accused may appeal on the grounds of misdirection to the Jury, and failure of

justice. And in a case of this nature, before the sentence is passed on the accused, the presiding Judge, shall submit to the consideration of the Full-Bench, the contested points. But when, he does not admit of the contention, and passes the sentence on the accused, then the prosecuting and the defending counsels must jointly state the case before the Chief-Justice; and if he is agreeable to it he can order a re-trial or permit the accused to appeal to the Judicial Committee of H. M's Privy Councillors. If he is not agreeable to the appeal, then the accused must apply to the Full-Bench, for permission to be allowed to appeal, to the Queen-in-Council.

Under section 41 of the Letters Patent of our High Courts an appeal to the Privy-Council, is practicable only (1) when there is a disputed Jurisdiction, (2) when there is a confused point of law.

What sentence to pass on the accused rests with the Judge.

Trial by Assessors.

Before coming to the concluding remarks, on the subject of this brochure, there is a side-issue that claims attention. Wherever something has been said of Trial by Jury, in the British Indian Empire, mention has always been made of Trial by Assessors.

In the Judicial province of this country, the two have been so closely connected, that it could hardly be said, as digressing from the regular channel of our subject, to comment upon the latter system.

Trial by Assessors, in its rudimentary form, may be said to be the *constitutional sister* of Trial by Jury.

The main principle involved being, to give to an accused, where the nature of the alleged offence and its consequences, are supposed to be grave and serious, the right of a *free trial*; that is to say, a trial by a special periodical court, consisting of

persons chosen by lot, from the educated and leading members of the communities of the place, where the trial is held, presided over by a Government Official, sworn to the rigid enforcement of law established by Government—a Sessions Judge.

The Court is held with all the ceremonial befitting the proud designation, the trial begins, withall its attendant pompousness, witnesses are tried, statements are recorded, evidence is sifted, the prosecution and the defence proving, or believing to have proved, their respective cases through the eloquence of the robed members of the legal profession, the Judge sums up, the Assessors, parley and confer, and pronounce their verdict. The Judge differs, and the law so providing, ignores the Assessors, and passes his own sentence.

In this wise, Trial by Assessors, resolves itself into trial before and by a single individual. And who is he ? A proud designatory, a stranger to the language of the accused, a stranger to the caste toms, and much more, a total stranger to the

prevalent native habits and opinion. For his Judicial capabilities here is a quotation or two:— "Juries are more often right on the facts than Judges in their self-sufficiency give them credit for," and "The Sessions Judges have little experience of the Juries, *and are not practised in delivering charges*" (vide p.p. 50 & 57.)

What then, becomes of the aims of the Rulers, to partake of the help of the leading and representative men from among the subject races, for the better understanding of the law, the proper consideration of the offence, and the merited rendering of true justice? *Ridicule*!

Why then should the system be at all suffered to exist! And why should the Government encourage ridicule of persons whom it calls upon to sacrifice their time and energy for the administration of justice! In some places the Assessors are paid fees, but to what purpose when their verdict is liable to be ignored and defied! The system

becomes farcical and unmaintainable, where the Government is directly interested as the prosecutor. In its present form, it cannot be said to be creditable to the Government, fraught with good to the subjects, or calculated to facilitate the work of judicature. Why not then end it, all atonce or generously amend it, by applying section 307 of the Criminal Procedure (see p. 21.)

History repeatedly teaches us, that the potent factor of the broils of the universe—human nature—is the same all the world over, and it is not always that the Assessors err, nor is it in rare cases only that the Judges are at fault.

And in these days of free comment, advanced criticism, and wholesale deplorable condemnation of political movements, the press exerts a powerful influence over the judgments of those concerned. For although it is Contempt of Court to speak upon a *sub-judice* case, yet the mighty press doth with impunity speak upon an event, that sub-

sequent investigation declares to be a crime, and that virtually becomes a *sub-judice* case. It would be something more than human to say, that the Judges are listless and deaf to the mutterings of the press. For, it is a Court phrase: You will not be led away in your judgment of the case, by what you may have read or heard outside this Court. Well then, as regards the Judge, he is more prone to bias, knowing all one-sided statements and wilful criticisim; and the assessors are less so, on account of their knowledge of the people, of the accused, of native life, speech and thought.

Despite all are not the Presidency High Courts what they should in reality be! Are not the Advocates-General well-versed in their learned dignity!! Are not the Justices able exponents of the law, conscious of their high-vocation, and mindful of their duty towards man, and the state!!!

The system needs be ended or mended. The latter the better.

CONCLUSION.

It has been urged, that a guilty man has a greater and a better chance, of escaping from the penalties of law, when arraigned before a jury, than when tried before a judge alone. In support of which, it is argued that "twelve men taken at hazard, from the body of society, unused to judicial duties or forensic discussions, cannot possess the same aptitude for judicial investigation, as a judge in whom a professional education, the habit of considering the effect of evidence, a long course of training and experience, have developed all the faculties, which are required for the Judicial office." This is an abstract statement. The twelve jurors, may not have the same faculty for judicial investigation, as a judge is supposed to have, yet having been called upon to perform a judicial function, for a very short time only, they take a keen interest in their office, and are ever ready to come to a right conclusion. Each of them has his own experience in life, and a particular knowledge of things, and, as

the jury ordinarily consists of men of business, marchants, and scientists, each in his way tries to get to the truth of the matter, and come to the right conclusion.

Besides, even if we grant, that a Juryman is not expected to possess that special knowledge, which a judge may have as the result of long practice, and experience, we must also grant, that on the other hand, he is free from that "harshness of heart," and strictness of judgment, which are perhaps inseparable from the office of a judge. While the Judge, looks only, or mainly, to the strict letter of the law the Jury has to temper it with mercy, where it can be done, without seriously impairing, or defeating the ends of justice.

Another minor objection, which has been raised against the system, may be quoted in the words of Sir John Edge, the Chief Justice of the North West Provinces, who remarks: "A Jury is very likely to be influenced by small and irrelevant

points, by local surroundings or by prejudice, and as a rule the verdict of all the twelve in England, is in reality, that of the one or two strong-minded and attentive."

By "Trial by Jury," we mean trial by discriminating, and good, and law abiding citizens, assisted, and guided, if not instructed, in their task, by the learned Judge who presides over them. In the old *Decantatum* we find, "Ad quœstionem legis, judices respondent, ad quœstionem facti juratores" which means, "It is the office of the Judge to instruct the Jury on points of law, and of the jury to decide on matters of fact." If such be the constitution of the system, it sounds strange to say, that the Jury, that always decides on matters of fact, gives a wrong verdict in some cases, when in fact the verdict of the Jury, depends entirely on the summing up of the Judge.

For the good working of the system, it is essential, that the Judge should be in perfect

sympathy with the Jury, and that his charge should be clear and fair, without any indication of dictation.

To use a metaphor, practically the Judge is the pilot of the bark of the Jury, the Judge directs, the Jury follows. The Judge decides, the Jury agrees. The Judge passes the sentence, the Jury acquiesces. If the verdict of the Jury, be based on small and irrelevant points, and if the Jury be prejudiced by local surroundings, the Judge has the power to protest against such a verdict, the sufferer has the right to appeal to the Crown, and the Crown claims and exercises the supreme prerogative, to interfere in all matters relating to law and justice. It alone can pardon, or punish criminals, it alone can cancel or amend erring judgments.

Burke, in addressing the House of Commons, on American Taxation, says : "Like all great public collections of men, you possess a marked love of

virtue, and an abhorrence of vice." Are not these words applicable to Trial by Jury. Abhorrence of vice and a marked love of virtue, are the very being and essence of the system. "How can it then be said, that the Jury dealing with facts alone are wrong." The fault lies not in the system but elsewhere, especially in the selection of a Jury. It has been officially maintained, that what is needed is "a reform of the panel so as to secure incorrupt men"–to quote the words of the Declaration of Rights, of the reign of king William III. And there is a concensus of opinion, that, this is what is most needed for the better working of the system in India.

To conclude therefore, Trial by Jury, is a part and parcel, of the fundamental principles, of a free government, and England the land of the free, as she is proudly and boldly termed, cannot consistently do away with the system; she cannot erase it, from her Judicial Administration, in any part of her vast dominions. It was, it is, and it

must ever remain the pride of her Judicial Administration.

It is, "a system of the highest value to a nation, with the possession of which, for the trial of criminal cases, no country can be enslaved, and without which no country can be free."