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TRIAL BY JURY:
THE DARK SIDE OF THE SYSTEM.

A PAPER READ BEFORE THE LITERARY
INSTITUTION IN 1859.

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TRIAL BY JURY: THE DARK SIDE OF THE SYSTEM.

TRIAL by Jury is one of the many English institutions incorporated in the judicial system of this country so far as criminal cases are concerned. How far this institution has successfully worked in this country is a question so complicated that jurists and lawyers alone can deal with it exhaustively. In the present times of unrest and political excitement, the working of the jury system in aid of administration of criminal justice in the Presidency High Courts has bulked largely in public view. Like all human institutions that have reached ever so high a stage of development, the institution of trial by jury has in the past as very often in the present, given rise to strong animadversions, in that in practice, this institution cannot claim to be a wholly successful and satisfactory factor in the Administration of Justice. Professor Sidgwick in his well-known work "Elements of Politics," whilst discussing the merits of the jury system, refers to a rather out-of-date but very weighty contribution to this question—"The Dark side of Trial by Jury," being a lecture delivered some time in 1859 at the Literary Institution. The discourse came to be delivered consequent on the rejection of Lord Campbell's very moderate measure of reform in trial by jury. Mr. Joseph Browne (of the Middle Temple) who delivered this discourse said "he was conscious of having expressed himself with vehemence on some points but the strongholds of ancient prejudice were not to be breached by soft words." The text of Mr. Browne's discourse, we believe, will greatly interest members of the Bench and the Bar, and may induce criticism on whatever drawbacks or disadvantages in the jury system in India by the light of Mr. Browne's arguments:—

The trial by jury is a theme which has moved the tongues as well as the pens of some of our ablest speakers and writers. Volumes have been written and spoken on the subject, and yet it appears to me that only one side of it—the bright side—has been

I propose to attempt "the dark side" of the picture—a view which I am too sensible is not so agreeable as the other—which may like a photographic portrait, shock our national vanity severely, but may also for that very reason be more useful.

The writers who have hitherto treated this subject and particularly the trumpeters of the "glorious constitution," have flattered our pride by a strain of unlimited panegyric on this ancient and popular institution. Thus the commentator Blackstone who may serve as an example of the rest, has spent a long chapter in explaining "the various machinery and appendages of this institution": like some enthusiastic antiquary exhibiting a precious relic of ancient art, he has taken pains to put it in the best possible light, has pointed out all its beauties to notice, and has dwelt with rapture on every minute charm imperceptible to the eye of any but a connoisseur. After summing up its numerous excellencies, he declares the trial by jury to be the palladium of British liberty, the glory of the English Law, and the most transcendent privilege which any subject can enjoy or wish for. (Book iii. 379.)

Such is the language to which we have been long accustomed, and one feels guilty of impeaching the wisdom of our ancestors, affronting the sages of the law, and profaning the mysteries of the constitution in venturing to question the excellence and expose the weakness of an institution which has received the suffrages of so many great and venerable men, and has stood the revolutions of so many ages. It is Uzzah touching the Ark of the Covenant.

But the age has no right to cast this reproach. It is an age whose principal business has been to pull down the institutions of our forefathers, and build up better. It is an age of law reform—an age of universal change—the transition period of our history.

At this present time, (a) by recent Acts of Parliament, the trial by jury is actually abolished in practice in ninety-nine out of every hundred causes tried in the county courts, and it would appear as if the suitors had pronounced against it since they have the option of adopting it in all cases and yet choose it only in one of a hundred. I trust therefore I may without offence venture upon this daring enquiry. It is a highly useful exercise, and, one sometimes pregnant with unexpected discoveries, to forget for a time if possible that we are Englishmen, and turn

(a) This change been made since this essay was first written.

as it were a stranger's eye on those national customs or institutions which we have never heard spoken of except in the language of panegyric, and which therefore we have never subjected to the ordeal of impartial investigation. It is by the exercise of this habit only, that the reflective man can rise superior to the prejudices of his age and nation, and march with the van in that great career of knowledge and improvement which distinguishes the present period. And after all, if the trial by jury be really deserving of the praises which have been lavished upon it, it can have nothing to fear from the fullest investigation, but will rather come out from the ordeal with renewed lustre and more convincing claims to our admiration, than when we took upon trust all that had been said in its favour.

The importance of the inquiry is too obvious to need illustration. Neither do I propose to enter into the history of the subject any further than may be auxiliary to the main purpose of my inquiries, which are directed to ascertain "how far this tribunal is suited to the wants of the present age," rather than the time and the manner in which it sprung up and grew to its present shape (b).

The time has at length arrived when "the trial by jury" must "itself" be "tried." I arraign it at the bar of public opinion. I accuse it of incapacity of ignorance, of partiality of cumbersomeness, of barbarism. These are the counts of the indictment which I am about to open.

1. The first and foremost charge is the "want of previous qualification" for their functions, under which jurymen necessarily labour.

And here at the outset it becomes absolutely necessary to distinguish between the "different sorts of juries," in order to guard myself against misapprehension.

The fertile womb of the law has brought forth such a litter of juries that their mother has not names for them all. They can only be compared to the numberless tribes of dogs, all differing in colour size and shape but as the naturalists say, all of one species. There is the common jury and the special jury the grand jury and the petty jury, the coroner's jury and the sheriff's jury, the compensation jury and the annoyance jury, the ward jury and the leet jury, the jury of matrons and the jury of ale-conners, and nobody knows how many more besides.

(b) The history and antiquities of the jury system are very fully treated in the elaborate work of Mr. Forsyth on "Trial by Jury," printed at Cambridge in 1852, which collects all that German and English research has contributed towards the subject.

These juries as might be expected, differ from one another as widely in point of education and intelligence as they do in or station, or in the importance of the matters they have to deal with. The observations which are perfectly true of a sheriff's jury may be wholly inapplicable to a grand jury. Some juries are composed of men as enlightened, as free from prejudice, as used to debate, as competent to deal with a difficult question as those whom I have the honour to address—as if this were always the case, few of the objections which I am about to urge would have any application. The nearest approach perhaps in practice to the best idea of a jury, is to be found in the special juries of London. No testimony is needed to their great intelligence, knowledge of the world, and practical sagacity; but unfortunately they try but a very small minority of the causes which the courts have to dispose of. "Special juries" indeed are entirely a modern innovation. Until the present century they were rarely heard of except in great mercantile causes; and even at the present day they are only adopted in causes of some importance, as the ordinary cases will not bear the expense of a special jury (c).

The common jury therefore continues, and must of necessity continue, to be that which disposes of nine-tenths of the trials civil and criminal, which occupy the courts of law; and it is of this jury that I have chiefly to speak.

It has certainly always struck my mind that there was a remarkable contrast between the mode of procedure adopted by our countrymen in relation to their legal disputes, and that which they follow in the ordinary affairs of life. If a man wants a pair of shoes made, nobody shall serve him but one who has undergone a regular apprenticeship to the trade and has practised it for years. If a man breaks his leg, he never thinks of trusting his precious limb to the hands of any but an experienced surgeon, who has spent half a life in the exercise of his profession. If he happens to be involved in a difficult question of law, he will take the advice of none but one who has grown grey in the study of reports and statutes; and yet with all this, if his property, his reputation, his liberty, or his life is at stake on a disputed question of fact, he will—may he must intrust it to the voice of twelve men, not one of whom may have ever entered a court before, not a creature of whom may have ever experienced the arts of debate or the subtleties

(c) The cost of a special jury was very lately about £22, and of a common jury not above £2.

of counsel, nor have balanced the doubtful evidence of opposite witnesses, nor have been called to the decision of any dispute more important than the quarrels of his children, or the discussions of the pothouse. As Numa was taken from the plough to the sceptre, so at the summons of the law our jurymen quit their shops for the courts of justice; they march straight from the weighing of candles to the weighing of testimony:—from the measuring of tape to the measuring out of fate;—from dealing in bacon and cheese to dealing with the lives, properties and liberties of men. Verily we are a wise people, whose Commonalty possess by intuition the faculty which costs a lawyer many years to acquire,—many long years of laborious study and practice,—the faculty of hearing without being deluded by sophistry and eloquence, of catching and connecting as it flies the broken and disjointed evidence of numerous and contradictory witnesses; of selecting what is material, and rejecting what is irrelevant, of sifting the wheat from the chaff, the substantial from the seeming, and extracting the kernel of truth from the misshapen husk of errors in which it is enveloped. The Greeks fabled that the Goddess of Wisdom sprang fully armed and grown from the head of Zeus. The English seriously believe that judicial wisdom springs forth mature from every tradesman's head. This is a fit article of faith for a nation of shopkeepers.

But seriously, how is this? Is it because it requires long study and practice to make a boot, or to set a broken limb, or to solve a question of learning, but none to try a cause. (d) No! The case admits of a much more rational solution than this; and the whole proceeding bears the unmistakable feature of primitive simplicity and ancient rudeness. The time was when the transactions of men were simple, and their manners were the same—when the jury were the neighbours of the parties and the witnesses of the facts, when their functions consisted in deciding the cause from their own personal knowledge of the litigants and the facts in dispute more than from any evidence offered to them, when fixed and refined rules of law extending to every predicament had no existence, and when the jury pronounced no more than a sort of general opinion, that one party had more right to hold than the other had to demand a house or a field.

(d) A patent cause for example, with thirty witnesses practical and scientific on each side. The last in which I was concerned occupied six days, and the jury had the good sense to declare that they thought some better tribunal ought to be provided to deal with such cases.

In times like these the practice of summoning juries took its rise, and to such a state of things it might be well enough adapted. But now how different are our transactions, our laws, our manners and customs—everything, except our juries! The barber no longer bleeds us, and the grocer has ceased to deal in physic, yet the butcher and the baker continue to try our causes; and we consider this the perfection of wisdom and policy!

One single circumstance without more, demonstrates as I conceive, an incurable incapacity in most common juries to perform their functions in a proper manner. It is shortly this:—they are not on a level with the advocates who address them. I do not mean in point of wealth or station in society, but in point of education, intellect, schooled habits of reasoning and forensic experience. It is of no avail to assert that there are very clever and well-informed men behind the counter, who might have made advocates themselves. We have to do with the rule and not with the exceptions. The leading advocates at Nisi Prius are picked men, eminent for their native talent, or for legal and general acquirements men whose natural abilities have been proved and sharpened in a thousand contests, and whose powers are testified by their having fought their way to the front rank of that army of intellectual gladiators—the Bar of England. And whom have they to deal with? I speak now of most common juries. How often do they consist of men whose studies have been confined to their order-books and ledgers, whose minds have only been exercised in driving bargains and providing for their payments, who have taken part in no debates but those of the ale-house and club room, and whose discernment has been chiefly practised in finding out whether Mr. Smith or Mr. Jones was to be trusted? These are the “*duodecim probos et legales homines,*” the “*Judices facti,*” the favourites of the Law.

Here is ignorance set to judge of learning, inexperience to deal with consummate art, and very often rustic solidity to contend with the most refined talent. What man is there I ask, who has been a suitor himself and has had his case tried by a country jury, what plaintiff or defendant is there who has not trembled for his cause however just, as he heard his evidence breaking down and his case changing like a dissolving view under the delusive address of the opposing counsel, and reflected on the quality of the men by whose discernment he must stand or fall?

Now this is exactly reversing the natural, the desirable order of things. Instead of the advocate being superior to the judge, the judge ought to be above the advocate. (c). Though this is the most obvious of truisms, yet it sounds like a discovery, because our practice is just the contrary. When such a phenomenon occurs on the Bench,—when the judge is unequal to cope with the superior faculties of a great advocate, the evil is felt and lamented by the whole profession of the law. But any disproportion which may have ever existed between a judge and an advocate is a trifle to what perpetually occurs between the counsel and the jury; and the scene which happens at every country assize would only be paralleled by setting Col. Rawlinson and Dr. Hinckes to dispute the meaning of the cuneiform inscriptions before the judges of a ploughing-match.

A little experience of the courts will be sufficient to convince any impartial observer that even the want of acquaintance with the law and practice of the courts which is attributable to all juries (the lawyers being exempt from serving), is a very frequent cause of the most serious mistakes. The defendant's counsel omits to ask a witness as to a conversation, or to put in a particular letter. The jury find against him for that reason, not being aware that the evidence was inadmissible by law. Many a cause has been lost by an injudicious plea having been put on the record, but which the jury would have attached no weight to, had they known anything of special pleading. There was a case lately and the like has often occurred, in which a jury disputed for nearly twenty four hours about the amount of their verdict, intending that it should not carry costs, and at last gave the plaintiff only a shilling damages with that intention, being ignorant all the while that damages to the amount of a penny would entitle him to the whole costs of the action.

The counsel for the parties are constantly obliged to explain the law to the jury, in order to give them correct ideas of the bearing and effect of the facts; but the jury naturally distrust the statements of counsel, and as the judge often omits to notice what every lawyer takes for common learning, the unlearned jury make grievous errors where law and fact are interwoven in the verdict.

(c) The very name of "judge" imports it. When we say such a person is a judge of a thing, we mean that he possesses superior knowledge, experience, and discernment.

The "glorious uncertainty of the law" has been the boast of many a lucky rogue who has slipped through the jailor's fingers; but few have been conscious how little of it was owing to the law itself, and how much to the glorious ignorance and uncertainty of juries. Let a man only withhold a just claim from his creditor, encroach on the property of another, or do violence to his person, and he will soon discover to his cost that there is very little uncertainty in the dealings of the law with him: it is when the result of a cause depends on the uncontrolled discretion of a jury that the reign of chance begins, and let the law be never so clear, it is often the toss of a die whether the plaintiff or defendant wins. The most trivial circumstance having the least possible connection with the merits of the case, the lucky chance of the defendant's counsel getting the last word, the plaintiff's being unpopular or his attorney too sharp, the defendant's having an acquaintance on the jury, the misconduct of one witness or the omission to call another, or twenty other things of as little real weight may turn the scale, and thus the verdict often belies the predictions of the most sagacious lawyer.

We shall of course be told that though juries of themselves would neither comprehend the law nor the facts of half the cases which come before them, yet with the aid of the judge they are perfectly able to do so. The extent and value of the judge's assistance it is indeed impossible to overrate, and without it there can be no doubt that the trial by jury would have been wholly unendurable, and would long ago have shared the fate of trial by battle, the wager of law, and other barbarous contrivances: but what I maintain is this, that the judge does a great deal too much for the jury to have the credit of doing anything; in point of fact, that they generally do little more than find a verdict which he has already suggested to them, and that when they do take upon themselves to find contrary to his opinion, the court will most commonly set aside the verdict, and order a new trial, with the exception indeed of certain doubtful or trifling actions in which it is considered a merey to the parties to stop further litigation. (a).

(a) It is a rule in the Courts not to grant new trials for the mistakes of the jury, where the amount of the verdict is under £20 in the superior Courts, or under £5 in the Sheriff's Court.

But if the aid of the judge be so necessary that the jury cannot move without him, and if the courts declare that they are not fit to go alone, that they go wrong the moment they presume to differ from his opinion, and that a "perverse verdict" as it is technically called cannot be allowed to stand, where is the use of troubling the jury for their opinion?

The strongest of all possible decisions that juries in general are unqualified to discharge the functions nominally entrusted to them, is to be found in the fact that the courts will hardly suffer them to have an opinion of their own in opposition to that of the judge. ^(b)

2. "Impartiality" has usually been reckoned among the distinguishing excellencies of juries or even as that particular feature in which they excelled every other tribunal; and it is satisfactory to think that in most cases this praise is well deserved. Yet on the other hand it is certain that there are some classes of cases to which this observation is wholly inapplicable, and some in which the partiality of juries constitutes their greatest merit. Such is the case, for instance, with the whole class of trials for political offences, in which the cardinal merit of juries has consisted in their leaning to the popular side. And until the laws of the land are such in every respect that all good citizens must wish to see them enforced to the letter, I am far from wishing to do away with the protection that liberty has derived from this cause; but what is to be said in extenuation of the prejudice and partiality of juries in cases where no poor man is to be protected against the oppression of the powerful, and no common rights are to be vindicated against prerogative? What chance has a defendant of fair play from a jury where national or religious prejudice envelopes the case? Does any one believe that the verdict in the prosecution of Dr. Achilli against Dr. Newman, would have been given by a jury of Roman Catholics? How long is it since an Irish jury found a verdict of wilful murder against Lord John Russell, because a poor man had fallen a victim to a national famine; or refused to convict the notorious Phoenix conspirators at Tralee? In many parts of Ireland, it is next to impossible to get a conviction of the

(b) This is not true of all cases; but it is correct so applied to causes of importance, where the judge has a strong opinion that the verdict was wrong. In numerous cases the judge will say, I should not have found the same verdict, but the jury are the constitutional judge of the fact.

assassins who execute the dark and bloody decrees of Whiteboys and Ribbonmen. On the other hand, when popular feeling is strongly excited against the accused, the jury becomes a blind instrument of vengeance. Every one of the Judicial murders and confiscations committed under Charles II., was committed by means of a jury. Look again at civil causes,—what chance has a railway company at this moment of defending successfully any claim which arises out of an accident on their line? (c) Certain classes of litigants are half-beaten by their name and occupation before they come into court. Common juries and sheriffs, juries generally look upon an honest lawyer as quite a black swan. Their creed is that no attorney ought to go to law himself,—that apothecaries' bills must be taxed,—that candidates at election must pay all demands that may be sent in to them,—that bill-discounters are rogues, and the like.

All their partialities are saved up for brother chips, for carpenters, builders, tailors, shoemakers, and such like innocents, who are booked to win the moment they enter the course with a gentleman to contest the reasonableness of their bills or his liability to pay. I have very rarely seen an instance of a gentleman successfully resisting the demand of a tradesman on the ground of exorbitancy.

There are certain species of unpopular actions also in which the plaintiff stands so little chance of success, however plain his evidence may be, that the odds are three to one against him. Such for instance are all actions by common informers, proceedings on the game laws, tithe causes, actions for penalties, forfeitures and the like. (d) Neither can it be said that partiality is the sin of common juries only. There is a class of actions which are occasionally brought against country justices of the peace, for some of the eccentric freaks committed by

(c) Common juries seem unable to distinguish between the importunities of compassion and the demands of justice. A poor man who runs against a cart, and gets his leg broken by his own neglect, usually obtains a verdict against the owner, especially if he is wealthy. If the man is killed and his widow sues, the defence is yet more hopeless.

(d) Lord Kenyon once tried an action for a penalty for shooting game without a licence. The case was clear, and the defendant's counsel was hard pressed. At length, "Gentlemen," said he, "it's true they have sworn that my client fired at the bird, that it fell dead and that he bagged it. It is of no use to deny that. But how does it appear that the bird was killed by the shot? What proof is there that it did not die of the fright?" The jury were convinced by this ingenious argument, and found a verdict for the defendant.

them in their magisterial capacity. Whenever any country justice is unlucky enough to transgress the law, or turn it into an engine of oppression and wrong, and some village attorney is found bold enough to incur his worship's eternal wrath by taking up and vindicating the cause of the sufferer, the justice "par excellence" has only to see that his cause is tried by a special jury in order to secure the most liberal measure of indulgence that a sinner could wish. A country gentleman has great bowels of mercy for the sins of a brother justice and sportsman, recollecting that himself is no Solomon perhaps, and may some day need a good turn of the same kind. "Veniam damus petimusque vicissim," is their motto, and thus it happens that the victim of illegal proceedings who would obtain £100 damages from a common jury will get a shilling or nothing from a special one.

To take another instance which comes nearer home—who can read the reports of insurance causes, without astonishment. An action is brought on a life policy against an insurance office. The defendant pleads that the policy was agreed to be void if they were deceived as to the habits of the insured, and that in truth he was an habitual drunkard, afflicted with delirium tremens, which fact was purposely concealed from them. They call a dozen witnesses, obtained with the utmost difficulty out of the enemy's camp, some of them friends and servants of the defunct, but all concurring in the fact in dispute. The plaintiff calls a few others who swear that they did not see the party habitually drunk, just as the sheep-stealer said he had a dozen witnesses who would swear that they did not see him steal the sheep. It also appears that the man died of delirium tremens a few months after the date of the policy. The judge sums up all in favour of the defence and it seems a gone case, when to the astonishment of all but the lawyers, the jury go through the form of a consultation, and then return a verdict in favour of the claim. "Heaven and earth, do I hear right?" exclaims an unsophisticated stranger. "Oh my good sir," says one in the secret, "you don't understand,—half the jury have got policies on their own lives.

For my own part, I cannot read without disgust and indignation the insurance trials. By this time the offices have nearly learnt the lesson that juries have endeavoured to teach them, that they must never contest a policy which they have once effected, by whatever fraud they may have been drawn into it.

3. What great and mysterious advantages are concealed in "the sacred number twelve"? "It seemeth to me," says Sir Edward Coke, "that the law delighteth herself in the number of twelve, for there must not only be twelve jurors for the trial of matters of fact, but twelve judges of ancient time for trial of matter of law. Also for matters of state there were in ancient time twelve counsellors of state. And that number of twelve is much respected in holy writ, as twelve Apostles, twelve stones, twelve tribes," etc.

Yet the law has not been constant in its attachment to this favourite number, for a grand jury may consist of twenty-three, and so may a coroner's jury. In a grand assize the number was sixteen, in an attaint twenty-four, and the twelve judges have now increased to fifteen.

If the reason assigned by my Lord Coke be the true one which induced our ancestors to fix on this as the number of a jury, it savours abundantly of the superstition and credulity of the times in which it had its birth, but makes it so much the more doubtful whether it was ever adapted to constitute the most satisfactory tribunal, or to meet the convenience of the people. Supposing for a moment that a jury of three or five men would be just as competent to try a cause as one of twelve, the smaller number would be preferable to the larger, if it were only on account of the great inconvenience inflicted on men in business by the perpetual and vexatious summonses of the Sheriff. In order to supply the requisite number of jurymen the Sheriff is compelled by law to summon not twelve only, but forty-eight at the least and often seventy-two; and these although they have no earthly concern with the causes to be tried, are obliged under pain of a smart fine to attend the courts for days and sometimes for weeks together, to the entire neglect of their business however urgent it may be, and without any species of compensation that deserves the name. I speak now of the common jury. Not a functionary in the court gives his services for nothing except the jurymen. The judge has a splendid salary, the counsel an adequate fee, the attorney has the costs of the trial, the witnesses have their expenses, the very crier of the court spends not his breath in bawling "silence" for nought: the jurymen is the only one in the whole company of performers who has no reward for his services. No reward did I say!—I had almost overlooked the coin if he is on a Sheriff's jury he has no less than a great of good and lawful money of Great Britain. And if on a common jury he has actually eightpence! The law values his services at the hire of a porter and gives him enough

to get a pot of beer or a glass of grog. And for this he must forsake his most urgent affairs to give his time and attention to the disputes of strangers ! What wonder that they should be on the fidget to get away to their shops and their farms. What wonder that they should despatch the business of the verdict like a grace before dinner. What wonder that they will cut the knot rather than take the pains to untie it, and astonish the spectator by jumping to a conclusion in five minutes upon evidence which a Parke or a Tindal would take days to consider (c).

But to return to the great number who are summoned: another evil is that in many counties it is impossible to get a special jury together, as instead of twelve it generally happens that not more than four or five will attend, and sometimes none at all inasmuch as the special jurymen, for the sake of escaping the fatigues of the jury box can afford to despise the fines imposed by the judge. The consequence is, that causes of great magnitude and importance are tried by tales-men, who are much better qualified to judge of the breed of a bull, or the weight of a prize pig, than of the arguments of counsel.

But these are not the only evils arising from Lord Coke's favourite number; a greater remains to be mentioned, namely, the destruction of all responsibility for the verdict.

If you have but one judge to decide a cause, he knows that the shame of a blundering or a partial decision rests solely upon him, and the consciousness of this habitually exercises a salutary influence on his conduct. It restrains him from any gross carelessness or manifest partiality if it does no more, and in a case on which public attention is concentrated, it produces all that scrupulous impartiality and careful consideration which may be witnessed every day on the bench. If you have even three or four judges the influence of the same motives is very sensible so long as each delivers a separate judgment and gives publicly his reasons for it. But the responsibility that is shared among twelve is diminished to nothing, above all when their deliberations are secret, and the result only is published.

When a man enters a jury-box he knows there are eleven other men there who are bound to find a verdict as much as himself. Why should he cudgel his brains about the case if he finds it beyond his sphere?

(c) There is a proverb among the lawyers, that an opinion without a fee is worth nothing.

Perhaps his thoughts are in his shop, where he sees the pleasing vision of his apprentices playing at cards; or he is contriving how to take up Mr. Jones's bill; or wondering whether Sanders means to pay; perhaps he is simply unable to understand the case; the witnesses are so contradictory, the case so dull and the evidence so long and tiresome; Sergeant Wiles is so deep, and Counsellor Bellow so fierce, that he gives it up as a bad job, and leaves it to the others to find a way out of the maze, for he is completely obfuscated. Imagine each of the chosen twelve to be relying in this way on the others, and you may conceive how a troublesome or difficult case will be disposed of, when every man of them knows that his shirking will be a secret to all the world but his brother jurors, and very often even to them—in short, that he has only to say ditto to the opinion of the majority in order to pass muster. All these evils arising from the present number required to form a jury, would obviously be much diminished by reducing it to five or three. The time of our merchants and traders would be saved, causes would not go off for want of special jurors, and every juror would be urged by increased responsibility to give increased attention to the evidence and the verdict.

“Responsibility” I said, but the word is an empty sound as applied to a jury. There is no practical responsibility impending over them, however gross their misconduct may be. I am aware that in legal theory a jurymen might be fined for gross misconduct, such as spinning a tee-totum for the verdict—but nobody ever heard of a jurymen being called to account since the days of Charles II., when it was decided to be unlawful to fine a jury for a perverse verdict. This is a wide departure from the practice of our ancestors, the same who invented this trial. They had provided a most formidable engine to terrify the weak or dishonest juror from departing from the line of his duty. “Attincta,” says my lord Coke, “is a writ that lieth when a false verdict is given; for if the petty jury be attainted of a false oath, they are stained with perjury, and become infamous for ever; for the judgment of the common law in the attain, importeth eight great and grievous punishments. 1. Quod amittant liberam legem in perpetuum; that is, he shall be so infamous as he shall never be received to be a witness or of any jury. 2. Quod terræ et tenementa in manus domini regis capiantur. 4. Quod uxores et liberi extra domus suas ejicerentur. 5. Quod domus sue prostrentur. 6. Quod arbores sue extirpentur. 7. Quod prata sue arentur. Et 8. Quod corpora sua carceri mancipentur. So odious

is perjury in this case in the eye of the common law; and the severity of this punishment is to this end: ut "pœna" ad paucos, "metus" ad omnes perveniet, for there is misericordia puniens, and there is crudelitas parcens. And seeing all tryalls of reall personall and mixt actions depend upon the oath of twelve men, prudent antiquity inflicted a strange and severe punishment upon them if they were attainted of perjury."

Really there is something quite refreshing in this passage. It has the genuine salt and savour of the olden time. It exhibits a true picture of the people who founded the jury system. This formidable contrivance for keeping jurors in order having been long obsolete and lately abolished, they may now do just as they please without fear of consequences or even of exposure, for it is their own fault if any body knows the secrets of the jury-box, or is able to fix a charge on any individual juror. If the judge were to pay no attention to the cause, he would expose himself before the counsel and the parties; if he were to exhibit any gross or unfair leaning to one side, he would be cried down by the newspapers; if he tossed up a shilling for his decision, he would be dismissed from his office; but all these things "may be done," "have been" done, are practised "at this day" by juries, with the most perfect impunity. "Such" is their responsibility and such it will continue while they are constituted, as at present.

4. The "unanimity" exacted from jurymen is one of the most obvious of all objections to our present system, and though it be the easiest to remove, no attempt to do so is made, such is the invincible force of custom. Yet one would suppose that the objections urged against it were much too plain and too weighty to be either gainsaid or resisted.

In the first place it has not even the sanction of antiquity. In the time of Ethelred, the law was that in a jury of twelve the verdict of eight should prevail, as Lambard shows in his *Eirenarcha*. And it appears from Bracton and Fleta, two of the most ancient of our law books, (a) that in the time of Henry III. when the jury could not agree, the practice was for the judge to order others to be added to them until twelve out of the entire number could be got to concur in a verdict. But in the reign of Edward I. the judge exercised the option of doing this, or of compelling the original twelve to agree by starving them into it. And Barrington

(a) Bracton, lib. iv. c. 19. Fleta, lib. iv. c. 9.

(20) observes that as it was probably found that when new jurors were added, there was the trouble of trying the cause over a second time at last for the greater despatch of business they insisted in all cases on the unanimity of the original jury. And Mr. Evelyn has shown in his notes ⁽¹⁾ to Lord Hale's Pleas of the Crown that one time when the jury differed in opinion, the verdict of the majority was followed. Even our modern law is not consistent in this respect for in grand juries and coroner's juries a majority of voices decides the question provided the majority be not less than twelve in number. In Scotland, criminals are tried by a jury of fifteen according to an ancient custom and a majority of one voice is enough to hang a man. If a difference of opinion arises among the judges, a bare majority determines the judgment; and a balance of one or two voices in the Exchequer Chamber and the House of Lords has disposed of not a few lives and estates. A majority of twenty-three to six acquitted Warren Hastings, and a majority of only one voice liberated the Liberator from prison.

If we try the practice of requiring unanimity from a jury by reason and experience, it will appear not less repugnant to these than to the most ancient usages of other nations and of our own.

It needs little observation to discover that the minds of men are as various as their faces, and that this variety whether it arises from nature or education or both, is as certain to produce a difference in their views of the same subject, as if every man saw it through a differently-coloured pair of spectacles. Nothing is more common than to find men differing upon the mere objects of the senses. But when we come to things which are visible only to the mind's eye, and are not to be determined by a foot rule or a bushel measure; when we have to deal with motives and intentions, with the credibility of testimony, with conflicting probabilities, and inferences from evidence we have bid farewell to all union of opinion, we have arrived in the very regions of doubt and disagreement.

Now the questions which juries have to dispose of are the most doubtful difficult and complicated, which can arise from the refinement and complexity of men's transactions in an advanced stage of society. They are riddles which would have puzzled Oedipus and the Sphinx too. And as if they were not sufficiently knotty of themselves, the mistake, suppressions and misrepresentations of witnesses

⁽¹⁾ Vol. ii. p. 297, n. c.

combine to render them still more intricate and perplexing.

In these circumstances it would be contrary to all experience, if a real unanimity of opinion existed in the vast number of cases in which juries pretend to find unanimous verdicts,—it would be a lie against nature, and nothing short of a miracle. Our ancestors who contrived this scheme for solving the riddles of the law knew well enough for experience soon taught them, that to take the free and unforced opinions of each of the jury and expect them to be unanimous, would be childish folly,—hence they found a contrivance exactly suited to the genius of the age for extorting that agreement which they were determined to have. If the head of a juror was impenetrable his stomach was made of softer stuff. The ancients indeed or some of them, conceived that organ to be the seat of reason, but I never heard of any people who made so direct and forcible an appeal to it as our forefathers. Those were the days of unanimity and uniformity. If a man ventured to dissent from his fellow-catholics he was burned,—if he would not agree with his brother jurors, they were all starved together, consenters and dissenters. The old writ “*de heretico comburendo*” has been long obsolete, but the starving of jurors still astonishes the nineteenth century and raises the laughter of Europe. It is true it is never carried to the point of actually killing a juror outright. The judge has a discretion by the modern practice of remitting the torture when it is approaching the killing point.’ As in the dungeons of the Inquisition a surgeon always stood by and felt the pulse of the victim, when his agonised frame was breaking, to see that his sufferings were not pushed too far for nature to endure, so the judge in an English court of law in the nineteenth century,—“the judge of that law which boasts the attribute of mercy,”—plays the surgeon to the unhappy jurymen who are guilty of the heinous crime of differing in opinion from their fellows, and only remits the torture of famine when a juror’s life is in danger. It is a “degradation” to follow a system which clings to so insufferable a piece of barbarism, and which after having abolished the torture of prisoners and criminals, inflicts it on jurymen. “Not one joy more revolting or absurd would it be if the jurors were tied up to a post and flogged till they agreed.” Yet monstrous as it is, it cannot be dispensed with so long as unanimity is exacted. The one monstrosity begets the other. Do away with starving system and you will no longer have unanimous verdicts. Is this consequence so alarming that any extremity is to be

endured first? Shall the most difficult questions of property and liberty be decided by a simple majority of the judges? Shall the questions of peace or war and the fundamental laws of the kingdom, be decided by a majority of the House of Commons; and are you afraid to entrust questions of mere debts, trespasses and slanders to the majority of a jury? Shall the principle of a majority be decisive in all assemblies of men, in your companies, your institutions, your public meetings, your elections, your vestries, your corporations, your courts, your parliaments,—everywhere but in your juries? “Behold the amazing force of custom!” Had this starved unanimity never existed in this country before, were it now to be introduced for the first time, all England would cry out against it as piece of Gothic barbarism, as a violation of nature, as a contradiction to all our other institutions, as a disgrace to the age. But because it has been in use for centuries, it is submitted to by all, defended by very many, and cried up by some as the perfection of policy. After this I cease to wonder that the Chinese make their women’s feet into goat’s hoofs, or that the wise Egyptians worshipped crocodiles. I have no right to be astonished that the Spartans whipped their children to death at the altar of Artemis, or that the old Romans allowed the creditor to slay his debtor like a sheep; for “I see every day in our own courts, a spectacle sufficient to remind me that custom exerts a dominion” over mankind in every age and in every country, against “which reason in vain rebels, and humanity pleads in vain.”

The truth is that “this starved unanimity of juries, is one of the unmistakable features of barbarism which betray the “barbarous age in which the jury system arose.” The people who devised it had no books, and no newspapers, no letters, no post-office, no coaches: they beat their wives and sold their children for slaves; they amused themselves by baiting bulls and bears, and thrashing hens at Shrovetide; they drowned old women as witches and massacred Jews for their wealth; they were a people whose language would be hardly intelligible to us, whose costume would be outlandish and whose manners brutal. In everything but blood, they were far more foreigners to us, than the present inhabitants of Vienna or Moscow. These were the authors of our jury system.

I have consumed so much space in exhibiting the causes which render the verdicts of juries unsatisfactory, that I can only take a rapid glance at the evil consequences which necessarily flow from them.

The first is that certain classes of men have no confidence in the administration of justice. They do not believe that they are fairly dealt by in the jury-box.

No insurer resisting a life policy, no great company resisting a claim for an accident, no lawyer or doctor suing for his bill, no gentleman contesting the charges of a tradesman, no landlord suing for a forfeiture, no person who has rendered himself by any means unpopular, can safely depend on the impartiality of a jury. The fact is familiar to every lawyer and calculated on beforehand. Nay, even a merchant of London suing a trader of a country town is not safe in a disputed case with a jury of that town. In parts of Wales, a Welsh jury can hardly be got to do justice to an Englishman against a Welshman. This is not as should be. The judges of the fact ought to be as much above suspicion as the judges of the law.

Another consequence is the disgraceful scenes which constantly occur in the jury-room, and even in open court. What can be more scandalous to the administration of justice than the disclosures which frequently take place of the secrets of the jury-room? It would be easy to produce a score of cases out of the law reports, many of them recent, in which it has been proved that the jury tossed up or drew lots for the verdict; and there was a case at Peterborough in which they settled their dispute by balancing a poker, the fall of which to the right hand decided the guilt of the accused; and it has sometimes occurred that one obstinate fellow with a mule's head and a camel's stomach has starved the other eleven into a verdict against their convictions and their oaths. Still more frequent are the cases in which the "most monstrous compromises have been made between the conflicting opinions of the discordant twelve. To illustrate what I mean, take a late case in which a defendant was sued for publishing an anonymous letter containing the vilest charges against the plaintiff. If the defendant was the author of it the case called for the severest damages, and the only dispute was whether he was the writer or not. The jury found for the plaintiff, but astonished everybody by giving only a shilling damages. The secret was that some of them thought the defendant was not the writer at all, and only consented to give way to the rest on condition that the damages should be reduced to nothing. So conscious indeed are the judges of the scandal that would result from the disclosure of what passes between the jury, that they have done all they can to prevent the curtain from being

drawn, and to shut out the public eye from the interior of the jury-room. When new trials have been moved for and supported by affidavits of jurymen that they had tossed up for the verdict, the Court have laid down a rule that they will not hear such affidavits (a). Now as no one is allowed to enter the jury-room but the officer of the Court, and he only to ask if they are agreed, the effect of this rule is that the Court will hear nothing of what passes within that sanctum. What does this amount to but a practical declaration that the behaviour of juries when retired from the public eye will not bear the light? Nor is the ignorance or absurdity of uneducated juries confined to their private room—but is frequently displayed in open court by the most farcical verdicts. Not long since in the Sheriffs' court when the usual question was put "For whom do you find?"—the reply was "We are magnanimous for the plaintiff." And only the other day on a woman indicted for keeping a disorderly house, the verdict was "Not guilty, but we hope she won't do it again." There is hardly an assize which would not furnish a chapter for "Punch."

Another evil, and a very great one, is the exclusion by law of certain kinds of evidence, because, as the phrase is in our law books, it would have too much influence with a jury. Thus until recently the testimony of the parties and all persons who had any legal interest in the success or failure of the action was excluded. On the same principle what is called "hearsay evidence" is with few exceptions rejected by our law. "If it were to be assumed that one long inured to judicial habits might be able to assign to hearsay evidence just so much and no more credit than it deserved, yet upon the minds of the jury, unskilled in the nature of judicial proofs, evidence of this kind would frequently make an erroneous impression. Being accustomed in the common concerns of life to act on hearsay and report, they would naturally be inclined to give such credit when acting judicially; they would be unable to reduce such evidence to its proper standard when placed in competition with more certain and satisfactory evidence; they would be apt to forget how little reliance ought to be placed upon evidence which may be so easily and securely fabricated (b)."

(a) *See observations of Barons Parke and Alderson in "Burgess v. Langley," 1 Dowling & Lowndes, 23.

(b) Starkie on "Evidence," p. 33, n.

So when a man is tried for felony who has been before convicted of a similar crime, the law will not allow the jury to know of his former conviction until they have found him guilty of the present charge (6 & 7 W. 4, c, 111), because they would attach too much weight to it. This is the reason openly stated in the books. Now in excluding these and several other branches of evidence, the law just shuts up so many ways of arriving at the truth; not because they would not be of the greatest service in the hands of a thoroughly qualified and practised judge, but because the raw and inexperienced dozen of farmers or petty tradesmen do not know how to deal with them. In hundreds of cases it thus happens that the only avenues to the truth are closed. It is an every day affair for the knowledge of a loan, or a contract, or an essential fact in a cause, to be confined to a solitary witness since dead, but who has written an account of the transaction while fresh in his memory, 'ante litem motam,' and who was open to no suspicion. Yet in no such case is the evidence admissible, though there be no other to be got. Even a receipt for money by a witness since dead has been excluded.

Another evil, and of every day occurrence, is that causes involving long accounts or requiring a scrutiny into numerous matters of detail are utterly impracticable to be tried by a jury, and are therefore obliged to be referred to an arbitrator who can patiently examine and note down the details 'seriatim.' How constantly this occurs is well known to those in the habit of attending the courts; and when it does happen, the expense and delay of the trial is thrown away. Over and over again I have heard parties, before they got into court, declare that they would insist on having the case tried out, and would never consent to refer it to arbitration; but upon the attempt being made in court to go into the details in dispute, the judge, the jury, the counsel, and the parties, have all become convinced of the impracticability of dealing with it there, and it has by universal consent been turned over to an arbitrator. This is the consequence of setting twelve men to do what one could manage infinitely better.

The last evil I shall mention, and the greatest, is the number of erroneous verdicts that are come to, and of new trials that are requisite to correct them. "Trial by jury in civil cases," said Lord Mansfield, "could not subsist now without a power somewhere to grant new trials. There are numberless causes of false verdicts, without corruption or bad intention of the jurors. They may have heard too much of the matter before the trial, and imbibed prejudices

without knowing it. The cause may be intricate : the examination may be so long as to distract and confound their attention.

"Most general verdicts include 'legal consequences,' as well as propositions of facts : in drawing these consequences the jury may mistake and infer directly contrary to law. The parties may be surprised by a case falsely made at the trial, which they had no reason to expect, and therefore could not come prepared to answer. If unjust verdicts, obtained under these and a thousand like circumstances, were to be conclusive for ever, the determination of civil property in this method of trial would be very precarious and unsatisfactory. It is absolutely 'necessary to justice,' that there should upon many occasions be opportunities of 'reconsidering' the cause by a new trial' (c). That the power to rectify the mistakes of juries is requisite no-one disputes; but new trials are a heavy grievance to the parties. They double the delay, anxiety, and expense of an action, and sometimes render it wholly abortive by protracting the proceedings until one of the parties dies or becomes insolvent, or leaves the country, or gets disgusted with the delay and abandons the suit, or gladly accepts an unprofitable compromise. But though a large part of the time of the courts is spent in motions for new trials, it would be a great mistake to suppose that the number of new trials granted on account of the errors of the jury represents the full extent of those errors. No : a crowd of cases must be added, in which the parties rather submit to a mistaken verdict than incur the risk and expense of appealing to the court,—another class in which the courts will not interfere with the discretion of the jury,—and a third, in which the courts refuse to send the case to a second jury on account of the smallness of the sum in dispute. In regard to this last description of cases, there is no correction for the mistakes of the jury ; they have it all their own way.

This is in civil causes ; but how is it in criminal cases, where new trials are never granted after an acquittal, and very rarely after a conviction, so that the errors of the jury go wholly uncorrected. Apply Lord Mansfield's observations to criminal trials, and what do they lead to ? There is not a session or assize passes, but we see notorious criminals escape in spite of convincing evidence, and to aggravate the evil, the law never allows a man to be tried again on the same charge. It is thus that the whole herd of villains who live by plunder come to look on the

(c) *Bright v. Eynon*, 1 Barrow, 393-4.

law as a rotten old net, full of holes through which any slippery fish may escape.

I have now done with the mischiefs arising from trial by jury, not because the catalogue is exhausted but because time and patience would fail me to detail them all. And when I survey the numerous evils flowing from the defects of this tribunal, I cannot help thinking they will before long force on the public the consideration of the question, whether the time has not arrived when the wants of the age loudly call for an improved mode of trial, and when the jury must experience the same fate so far as its general application is concerned which the ordeal, the battle, and the law-wager have in turn undergone.

Some of the defects indeed which have been exposed are capable of an easy remedy whenever men shall cease to regard the jury system as an ark too sacred to be touched by the hand of innovation. The useless and excessive number which now composes a jury may be reduced, a majority may take place of unanimity, and the jury-room may cease to be the only place in which the law furnishes innocent men; but how shall we get rid of the want of previous qualification, the rustic ignorance, the partiality, the prejudice, the rude haste, the want of publicity and responsibility, which are the most glaring evils of juries? These are defects which seem inherent in the system, and inseparable from it; they are organic "diseases" which can only be cured by "death". Though I should stand alone in this conviction, I will avow it. After long reflection on the numerous and heavy grievances which flow from the unlimited application of this form of trial, I for one am convinced that it is not adapted to the refinement of the age we live in, that it has had its day and must soon be thrown aside into the huge heap of antique legal lumber, or limited in its application to a very confined class of cases.

No one pretends to deny that it has served important uses in times past; that when it first arose and usurped the place of the ordeal and the battle, it was a great stride in the path of justice and civilisation; that it has often since then shielded the subject from the power of the crown, and the poor from the oppression of the rich; that it has tended to temper the rigid rules of law by the eternal principles of common sense and justice, and to harmonise the administration of an antiquated and technical system of law with the public feeling and opinion of the time being,—though even in this its merits have been over-rated. Neither is it necessary while

introducing a better system, to deprive liberty of any security which it derives from the trial by jury. Retain it by all means if you will, in all prosecutions for political offences, and in every case wherein public liberty may be concerned or wherein the judge may possibly have a bias. But let all ordinary cases be heard by a man of superior discernment and practised skill, whose natural powers have been sharpened by a life spent in forensic contests, who cannot be easily deceived by a witness, because he is conversant with every kind of testimony; nor by an advocate, because he has been an advocate himself; who is fit to hear and to estimate at its true value every species of evidence hitherto excluded, which may open an avenue to the truth; whose attention is not to be exhausted by the length, nor his comprehension distracted by the complexity of the evidence: give the suitor I say, a man with these qualities, who performs his functions under the public eye, who is in no hurry to get away to his shop or his farm, whose very trade and business it is to weigh, investigate and decide on questions of doubt and difficulty: in a word, let the facts be decided by the same experienced judges as the law, and the whole body of the law will feel renewed and invigorated by the change. A great part of its supposed uncertainty will vanish, new light will pour in from sources of evidence now shut up, the scales of justice will be held with even hands, the heavy grievance of new trials will be vastly diminished, the suitor will obtain his rights with greater speed, economy and certainty, and the criminal will no longer find refuge in the sophistry of counsel or the weakness of juries. (d).

(d) In concluding these pages, the writer cannot forbear a reflection on the felicity of the times we live in, when we feel our liberties so secure, as to expose without apprehension the infirmities of that ancient Institution which was in days gone by the only refuge of liberty! A Frenchman or Italian would be apt to exclaim of us, "O fortunatos nimium, sua si bona norint."



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TRIAL BY JURY
THE DARK SIDE OF THE SYSTEM.

A PAPER READ BEFORE THE LITERARY
INSTITUTION IN 1859.

BY
JOSEPH BROWN,
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TRIAL BY JURY: THE DARK SIDE OF THE SYSTEM.

TRIAL by Jury is one of the many English institutions incorporated in the judicial system of this country so far as criminal cases are concerned. How far this institution has successfully worked in this country is a question so complicated that jurists and lawyers alone can deal with it exhaustively. In the present times of unrest and political excitement, the working of the jury system in aid of administration of criminal justice in the Presidency High Courts has bulked largely in public view. Like all human institutions that have reached ever so high a stage of development, the institution of trial by jury has in the past as very often in the present, given rise to strong animadversions, in that in practice, this institution cannot claim to be a wholly successful and satisfactory factor in the Administration of Justice. Professor Sidgwick in his well-known work "Elements of Politics," whilst discussing the merits of the jury system, refers to a rather out-of-date but very weighty contribution to this question—"The Dark side of Trial by Jury," being a lecture delivered some time in 1859 at the Literary Institution. The discourse came to be delivered consequent on the rejection of Lord Campbell's very moderate measure of reform in trial by jury. Mr. Joseph Browne (of the Middle Temple) who delivered this discourse said "he was conscious of having expressed himself with vehemence on some points but the strongholds of ancient prejudice were not to be breached by soft words." The text of Mr. Browne's discourse, we believe, will greatly interest members of the Bench and the Bar, and may induce criticism on whatever drawbacks or disadvantages in the jury system in India by the light of Mr. Browne's arguments:—

The trial by jury is a theme which has moved the tongues as well as the pens of some of our ablest speakers and writers. Volumes have been written and spoken on the subject, and yet it appears to me that only one side of it—the bright side—has been depicted.

I propose to attempt "the dark side" of the picture—a view which I am too sensible is not so agreeable as the other—which may like a photographic portrait, shock our national vanity severely, but may also for that very reason be more useful.

The writers who have hitherto treated this subject and particularly the trumpeters of the "glorious constitution," have flattered our pride by a strain of unlimited panegyric on this ancient and popular institution. Thus the commentator Blackstone who may serve as an example of the rest, has spent a long chapter in explaining "the various machinery and appendages of this institution": like some enthusiastic antiquary exhibiting a precious relic of ancient art, he has taken pains to put it in the best possible light, has pointed out all its beauties to notice, and has dwelt with rapture on every minute charm imperceptible to the eye of any but a connoisseur. After summing up its numerous excellencies, he declares the trial by jury to be the palladium of British liberty, the glory of the English Law, and the most transcendent privilege which any subject can enjoy or wish for. (Book iii. 379.)

Such is the language to which we have been long accustomed, and one feels guilty of impeaching the wisdom of our ancestors, affronting the sages of the law, and profaning the mysteries of the constitution in venturing to question the excellence and expose the weakness of an institution which has received the suffrages of so many great and venerable men, and has stood the revolutions of so many ages. It is Uzzah touching the Ark of the Covenant.

But the age has no right to cast this reproach. It is an age whose principal business has been to pull down the institutions of our forefathers, and build up better. It is an age of law reform—an age of universal change—the transition period of our history.

At this present time, (a) by recent Acts of Parliament, the trial by jury is actually abolished in practice in ninety-nine out of every hundred causes tried in the county courts, and it would appear as if the suitors had pronounced against it since they have the option of adopting it in all cases and yet choose it only in one of a hundred. I trust therefore I may without offence venture upon this daring enquiry. It is a highly useful exercise, and one sometimes pregnant with unexpected discoveries, to forget for a time if possible that we are Englishmen, and turn

(a) This change been made since this essay was first written.

as it were a stranger's eye on those national customs or institutions which we have never heard spoken of except in the language of panegyric, and which therefore we have never subjected to the ordeal of impartial investigation. It is by the exercise of this habit only, that the reflective man can rise superior to the prejudices of his age and nation, and march with the van in that great career of knowledge and improvement which distinguishes the present period. And after all, if the trial by jury be really deserving of the praises which have been lavished upon it, it can have nothing to fear from the fullest investigation, but will rather come out from the ordeal with renewed lustre and more convincing claims to our admiration, than when we took upon trust all that had been said in its favour.

The importance of the inquiry is too obvious to need illustration. Neither do I propose to enter into the history of the subject any further than may be auxiliary to the main purpose of my inquiries, which are directed to ascertain "how far this tribunal is suited to the wants of the present age," rather than the time and the manner in which it sprung up and grew to its present shape (b).

The time has at length arrived when "the trial by jury" must "itself" be "tried." I arraign it at the bar of public opinion. I accuse it of incapacity of ignorance, of partiality of cumbersomeness, of barbarism. These are the counts of the indictment which I am about to open.

1. The first and foremost charge is the "want of previous qualification" for their functions, under which jurymen necessarily labour.

And here at the outset it becomes absolutely necessary to distinguish between the "different sorts of juries," in order to guard myself against misapprehension.

The fertile womb of the law has brought forth such a litter of juries that their mother has not names for them all. They can only be compared to the numberless tribes of dogs, all differing in colour size and shape but as the naturalists say, all of one species. There is the common jury and the special jury the grand jury and the petty jury, the coroner's jury and the sheriff's jury, the compensation jury and the annoyance jury, the ward jury and the leet jury, the jury of matrons and the jury of ale-conners, and nobody knows how many more besides.

(b) The history and antiquities of the jury system are very fully treated in the elaborate work of Mr. Forayth on "Trial by Jury," printed at Cambridge in 1852, which collects all that German and English research has contributed towards the subject.

These juries as might be expected, differ from one another as widely in point of education and intelligence as they do in or station, or in the importance of the matters they have to deal with. The observations which are perfectly true of a sheriff's jury may be wholly inapplicable to a grand jury. Some juries are composed of men as enlightened, as free from prejudice, as used to debate, as competent to deal with a difficult question as these whom I have the honour to address—as if this were always the case, few of the objections which I am about to urge would have any application. The nearest approach perhaps in practice to the beau idea of a jury, is to be found in the special juries of London. No testimony is needed to their great intelligence, knowledge of the world, and practical sagacity ; but unfortunately they try but a very small minority of the causes which the courts have to dispose of. "Special juries" indeed are entirely a modern innovation. Until the present century they were rarely heard of except in great mercantile causes ; and even at the present day they are only adopted in causes of some importance, as the ordinary cases will not bear the expense of a special jury (c).

The common jury therefore continues, and must of necessity continue, to be that which disposes of nine-tenths of the trials civil and criminal, which occupy the courts of law ; and it is of this jury that I have chiefly to speak.

It has certainly always struck my mind that there was a remarkable contrast between the mode of procedure adopted by our countrymen in relation to their legal disputes, and that which they follow in the ordinary affairs of life. If a man wants a pair of shoes made, nobody shall serve him but one who has undergone a regular apprenticeship to the trade and has practised it for years. If a man breaks his leg, he never thinks of trusting his precious limb to the hands of any but an experienced surgeon, who has spent half a life in the exercise of his profession. If he happens to be involved in a difficult question of law, he will take the advice of none but one who has grown gray in the study of reports and statutes ; and yet with all this, if his property, his reputation, his liberty, or his life is at stake on a disputed question of fact, he will—may he must intrust it to the voice of twelve men, not one of whom may have ever entered a court before, not a creature of whom may have ever experienced the arts of debate or the subtleties

(c) The cost of a special jury was very lately about £22, and of a common jury not above £2.

of counsel, nor have balanced the doubtful evidence of opposite witnesses, nor have been called to the decision of any dispute more important than the quarrels of his children, or the discussions of the pothouse. As Numa was taken from the plough to the sceptre, so at the summons of the law our jurymen quit their shops for the courts of justice; they march straight from the weighing of candles to the weighing of testimony:—from the measuring of tape to the measuring out of fate;—from dealing in bacon and cheese to dealing with the lives, properties and liberties of men. Verily we are a wise people, whose Commonalty possess by intuition the faculty which costs a lawyer many years to acquire,—many long years of laborious study and practice,—the faculty of hearing without being deluded by sophistry and eloquence, of catching and connecting as it flies the broken and disjointed evidence of numerous and contradictory witnesses; of selecting what is material, and rejecting what is irrelevant, of sifting the wheat from the chaff, the substantial from the seeming, and extracting the kernel of truth from the misshapen husk of errors in which it is enveloped. The Greeks fabled that the Goddess of Wisdom sprang fully armed and grown from the head of Zeus. The English seriously believe that judicial wisdom springs forth mature from every tradesman's head. This is a fit article of faith for a nation of shopkeepers.

But seriously, how is this? Is it because it requires long study and practice to make a boot, or to set a broken limb, or to solve a question of learning, but none to try a cause. (*d*) No! The case admits of a much more rational solution than this; and the whole proceeding bears the unmistakable feature of primitive simplicity and ancient rudeness. The time was when the transactions of men were simple, and their manners were the same—when the jury were the neighbours of the parties and the witnesses of the facts, when their functions consisted in deciding the cause from their own personal knowledge of the litigants and the facts in dispute more than from any evidence offered to them, when fixed and refined rules of law extending to every predicament had no existence, and when the jury pronounced no more than a sort of general opinion, that one party had more right to hold than the other had to demand a house or a field.

(*d*) A patent cause for example, with thirty witnesses practical and scientific on each side. The last in which I was concerned occupied six days, and the jury had the good sense to declare that they thought some better tribunal ought to be provided to deal with such cases.

In times like these the practice of summoning juries took its rise, and to such a state of things it might be well enough adapted. But now how different are our transactions, our laws, our manners and customs—everything, except our juries! The barber no longer bleeds us, and the grocer has ceased to deal in physic, yet the butcher and the baker continue to try our causes; and we consider this the perfection of wisdom and policy!

One single circumstance without more, demonstrates as I conceive, an incurable incapacity in most common juries to perform their functions in a proper manner. It is shortly this;—they are not on a level with the advocates who address them. I do not mean in point of wealth or station in society, but in point of education, intellect, schooled habits of reasoning and forensic experience. It is of no avail to assert that there are very clever and well-informed men behind the counter, who might have made advocates themselves. We have to do with the rule and not with the exceptions. The leading advocates at Nisi Prius are picked men, eminent for their native talent, or for legal and general acquirements men whose natural abilities have been proved and sharpened in a thousand contests, and whose powers are testified by their having fought their way to the front rank of that army of intellectual gladiators—the Bar of England. And whom have they to deal with? I speak now of most common juries. How often do they consist of men whose studies have been confined to their order-books and ledgers, whose minds have only been exercised in driving bargains and providing for their payments, who have taken part in no debates but those of the ale-house and club room, and whose discernment has been chiefly practised in finding out whether Mr. Smith or Mr. Jones was to be trusted? These are the “*duodecim probos et legales homines*,” the “*Judices facti*,” the favourites of the Law.

Here is ignorance set to judge of learning, inexperience to deal with consummate art, and very often rustic solidity to contend with the most refined talent. What man is there I ask, who has been a suitor himself and has had his case tried by a country jury, what plaintiff or defendant is there who has not trembled for his cause however just, as he heard his evidence breaking down and his case changing like a dissolving view under the delusive address of the opposing counsel, and reflected on the quality of the men by whose discernment he must stand or fall?

Now this is exactly reversing the natural, the desirable order of things. Instead of the advocate being superior to the judge, the judge ought to be above the advocate. (c). Though this is the most obvious of truisms, yet it sounds like a discovery, because our practice is just the contrary. When such a phenomenon occurs on the Bench,—when the judge is unequal to cope with the superior faculties of a great advocate, the evil is felt and lamented by the whole profession of the law. But any disproportion which may have ever existed between a judge and an advocate is a trifle to what perpetually occurs between the counsel and the jury; and the scene which happens at every country assize would only be paralleled by setting Col. Rawlinson and Dr. Hinckes to dispute the meaning of the cuneiform inscriptions before the judges of a ploughing-match.

A little experience of the courts will be sufficient to convince any impartial observer that even the want of acquaintance with the law and practice of the courts which is attributable to all juries (the lawyers being exempt from serving), is a very frequent cause of the most serious mistakes. The defendant's counsel omits to ask a witness as to a conversation, or to put in a particular letter. The jury find against him for that reason, not being aware that the evidence was inadmissible by law. Many a cause has been lost by an injudicious plea having been put on the record, but which the jury would have attached no weight to, had they known anything of special pleading. There was a case lately and the like has often occurred, in which a jury disputed for nearly twenty four hours about the amount of their verdict, intending that it should not carry costs, and at last gave the plaintiff only a shilling damages with that intention, being ignorant all the while that damages to the amount of a penny would entitle him to the whole costs of the action.

The counsel for the parties are constantly obliged to explain the law to the jury, in order to give them correct ideas of the bearing and effect of the facts; but the jury naturally distrust the statements of counsel, and as the judge often omits to notice what every lawyer takes for common learning, the unlearned jury make grievous errors where law and fact are interwoven in the verdict.

(c) The very name of "judge" imports it. When we say such a person is a judge of a thing, we mean that he possesses superior knowledge, experience, and discernment.

The "glorious uncertainty of the law" has been the boast of many a lucky rogne who has slipped through the jailor's fingers; but few have been conscious how little of it was owing to the law itself, and how much to the glorious ignorance and uncertainty of juries. Let a man only withhold a just claim from his creditor, encroach on the property of another, or do violence to his person, and he will soon discover to his cost that there is very little uncertainty in the dealings of the law with him: it is when the result of a cause depends on the uncontrolled discretion of a jury that the reign of chance begins, and let the law be never so clear, it is often the toss of a die whether the plaintiff or defendant wins. The most trivial circumstance having the least possible connection with the merits of the case, the lucky chance of the defendant's counsel getting the last word, the plaintiff's being unpopular or his attorney too sharp, the defendant's having an acquaintance on the jury, the misconduct of one witness or the omission to call another, or twenty other things of as little real weight may turn the scale, and thus the verdict often belies the predictions of the most sagacious lawyer.

We shall of course be told that though juries of themselves would neither comprehend the law nor the facts of half the cases which come before them, yet with the aid of the judge they are perfectly able to do so. The extent and value of the judge's assistance it is indeed impossible to overrate, and without it there can be no doubt that the trial by jury would have been wholly unendurable, and would long ago have shared the fate of trial by battle, the wager of law, and other barbarous contrivances: but what I maintain is this, that the judge does a great deal too much for the jury to have the credit of doing anything; in point of fact, that they generally do little more than find a verdict which he has already suggested to them, and that when they do take upon themselves to find contrary to his opinion, the court will most commonly set aside the verdict, and order a new trial, with the exception indeed of certain doubtful or trifling actions in which it is considered a merey to the parties to stop further litigation. (a).

(a) It is a rule in the Courts not to grant new trials for the mistakes of the jury, where the amount of the verdict is under £20 in the superior Courts, or under £5 in the Sheriff's Court.

But if the aid of the judge be so necessary that the jury cannot move without him, and if the courts declare that they are not fit to go alone, that they go wrong the moment they presume to differ from his opinion, and that a "perverse verdict" as it is technically called cannot be allowed to stand, where is the use of troubling the jury for their opinion?

The strongest of all possible decisions that juries in general are unqualified to discharge the functions nominally entrusted to them, is to be found in the fact that the courts will hardly suffer them to have an opinion of their own in opposition to that of the judge. ^(b)

2. "Impartiality" has usually been reckoned among the distinguishing excellencies of juries or even as that particular feature in which they excelled every other tribunal; and it is satisfactory to think that in most cases this praise is well deserved. Yet on the other hand it is certain that there are some classes of cases to which this observation is wholly inapplicable, and some in which the partiality of juries constitutes their greatest merit. Such is the case, for instance, with the whole class of trials for political offences, in which the cardinal merit of juries has consisted in their leaning to the popular side. And until the laws of the land are such in every respect that all good citizens must wish to see them enforced to the letter, I am far from wishing to do away with the protection that liberty has derived from this cause; but what is to be said in extenuation of the prejudice and partiality of juries in cases where no poor man is to be protected against the oppression of the powerful, and no common rights are to be vindicated against prerogative? What chance has a defendant of fair play from a jury where national or religious prejudice envelopes the case? Does any one believe that the verdict in the prosecution of Dr. Achilli against Dr. Newman, would have been given by a jury of Roman Catholics? How long is it since an Irish jury found a verdict of wilful murder against Lord John Russell, because a poor man had fallen a victim to a national famine; or refused to convict the notorious Phoenix conspirators at Tralee? In many parts of Ireland, it is next to impossible to get a conviction of the

(b) This is not true of all cases; but it is correct as applied to cases of importance, where the judge has a strong opinion that the verdict was wrong. In numerous cases the judge will say, I should not have found the same verdict, but the jury are the constitutional judge of the fact.

assassins who execute the dark and bloody decrees of Whiteboys and Ribbonmen. On the other hand, when popular feeling is strongly excited against the accused, the jury becomes a blind instrument of vengeance. Every one of the Judicial murders and confiscations committed under Charles II., was committed by means of a jury. Look again at civil causes,—what chance has a railway company at this moment of defending successfully any claim which arises out of an accident on their line? (c) Certain classes of litigants are half-beaten by their name and occupation before they come into court. Common juries and sheriffs, juries generally look upon an honest lawyer as quite a black swan. Their creed is that no attorney ought to go to law himself,—that apothecaries' bills must be taxed,—that candidates at election must pay all demands that may be sent in to them,—that bill-discounters are rogues, and the like.

All their partialities are saved up for brother chips, for carpenters, builders, tailors, shoemakers, and such like innocents, who are booked to win the moment they enter the course with a gentleman to contest the reasonableness of their bills or his liability to pay. I have very rarely seen an instance of a gentleman successfully resisting the demand of a tradesman on the ground of exorbitancy.

There are certain species of unpopular actions also in which the plaintiff stands so little chance of success, however plain his evidence may be, that the odds are three to one against him. Such for instance are all actions by common informers, proceedings on the game laws, tithe causes, actions for penalties, forfeitures and the like. (d) Neither can it be said that partiality is the sin of common juries only. There is a class of actions which are occasionally brought against country justices of the peace, for some of the eccentric freaks committed by

(c) Common juries seem unable to distinguish between the importunities of compassion and the demands of justice. A poor man who runs against a cart, and gets his leg broken by his own neglect, usually obtains a verdict against the owner, especially if he is wealthy. If the man is killed and his widow sues, the defence is yet more hopeless.

(d) Lord Kenyon once tried an action for a penalty for shooting game without a licence. The case was clear, and the defendant's counsel was hard pressed. At length, "Gentlemen," said he, "it's true they have sworn that my client fired at the bird, that it fell dead and that he bagged it. It is of no use to deny that. But how does it appear that the bird was killed by the shot? What proof is there that it did not die of the fright?" The jury were convinced by this ingenious argument, and found a verdict for the defendant.

them in their magisterial capacity. Whenever any country justice is unlucky enough to transgress the law, or turn it into an engine of oppression and wrong, and some village attorney is found bold enough to incur his worship's eternal wrath by taking up and vindicating the cause of the sufferer, the justice "par excellence" has only to see that his cause is tried by a special jury in order to secure the most liberal measure of indulgence that a sinner could wish. A country gentleman has great bowels of mercy for the sins of a brother justice and sportsman, recollecting that himself is no Solomon perhaps, and may some day need a good turn of the same kind. "Veniam damus petimusque vicissim," is their motto, and thus it happens that the victim of illegal proceedings who would obtain £100 damages from a common jury will get a shilling or nothing from a special one.

To take another instance which comes nearer home—who can read the reports of insurance causes, without astonishment. An action is brought on a life policy against an insurance office. The defendants plead that the policy was agreed to be void if they were deceived as to the habits of the insured, and that in truth he was an habitual drunkard, afflicted with delirium tremens, which fact was purposely concealed from them. They call a dozen witnesses, obtained with the utmost difficulty out of the enemy's camp, some of them friends and servants of the defunct, but all concurring in the fact in dispute. The plaintiff calls a few others who swear that they did not see the party habitually drunk, just as the sheep-stealer said he had a dozen witnesses who would swear that they did not see him steal the sheep. It also appears that the man died of delirium tremens a few months after the date of the policy. The judge sums up all in favour of the defence and it seems a gone case, when to the astonishment of all but the lawyers, the jury go through the form of a consultation, and then return a verdict in favour of the claim. "Heaven and earth, do I hear right?" exclaims an unsophisticated stranger. "Oh my good sir," says one in the secret, "you don't understand,—half the jury have got policies on their own lives.

For my own part, I cannot read without disgust and indignation the insurance trials. By this time the offices have nearly learnt the lesson that juries have endeavoured to teach them, that they must never contest a policy which they have once effected, by whatever fraud they may have been drawn into it.

3. What great and mysterious advantages are concealed in "the sacred number twelve"? "It seemeth to me," says Sir Edward Coke, "that the law delighteth herself in the number of twelve, for there must not only be twelve jurors for the trial of matters of fact, but twelve judges of ancient time for trial of matter of law. Also for matters of state there were in ancient time twelve counsellors of state. And that number of twelve is much respected in holy writ, as twelve Apostles, twelve stones, twelve tribes," etc.

Yet the law has not been constant in its attachment to this favourite number, for a grand jury may consist of twenty-three, and so may a coroner's jury. In a grand assize the number was sixteen, in an attaint twenty-four, and the twelve judges have now increased to fifteen.

If the reason assigned by my Lord Coke be the true one which induced our ancestors to fix on this as the number of a jury, it savours abundantly of the superstition and credulity of the times in which it had its birth, but makes it so much the more doubtful whether it was ever adapted to constitute the most satisfactory tribunal, or to meet the convenience of the people. Supposing for a moment that a jury of three or five men would be just as competent to try a cause as one of twelve, the smaller number would be preferable to the larger, if it were only on account of the great inconvenience inflicted on men in business by the perpetual and vexatious summonses of the Sheriff. In order to supply the requisite number of jurymen the Sheriff is compelled by law to summon not twelve only, but forty-eight at the least and often seventy-two; and these although they have no earthly concern with the causes to be tried, are obliged under pain of a smart fine to attend the courts for days and sometimes for weeks together, to the entire neglect of their business however urgent it may be, and without any species of compensation that deserves the name. I speak now of the common jury. Not a functionary in the court gives his services for nothing except the juryman. The judge has a splendid salary, the counsel an adequate fee, the attorney has the costs of the trial, the witnesses have their expenses, the very crier of the court spends not his breath in bawling "silence" for nought: the juryman is the only one in the whole company of performers who has no reward for his services. No reward did I say?—I had almost overlooked the coin if he is on a Sheriff's jury he has no less than a great of good and lawful money of Great Britain. And if on a common jury he has actually eightpence! The law values his services at the hire of a porter and gives him enough

to get a pot of beer or a glass of grog. And for this he must forsake his most urgent affairs to give his time and attention to the disputes of strangers ! What wonder that they should be on the fidget to get away to their shops and their farms. What wonder that they should despatch the business of the verdict like a grace before dinner. What wonder that they will cut the knot rather than take the pains to untie it, and astonish the spectator by jumping to a conclusion in five minutes upon evidence which a Parke or a Tindal would take days to consider (e).

But to return to the great number who are summoned: another evil is that in many counties it is impossible to get a special jury together, as instead of twelve it generally happens that not more than four or five will attend, and sometimes none at all inasmuch as the special jurymen, for the sake of escaping the fatigues of the jury box can afford to despise the fines imposed by the judge. The consequence is, that causes of great magnitude and importance are tried by tales-men, who are much better qualified to judge of the breed of a bull, or the weight of a prize pig, than of the arguments of counsel.

But these are not the only evils arising from Lord Coke's favourite number ; a greater remains to be mentioned, namely, the destruction of all responsibility for the verdict.

If you have but one judge to decide a cause, he knows that the shame of a blundering or a partial decision rests solely upon him, and the consciousness of this habitually exercises a salutary influence on his conduct. It restrains him from any gross carelessness or manifest partiality if it does no more, and in a case on which public attention is concentrated, it produces all that scrupulous impartiality and careful consideration which may be witnessed every day on the bench. If you have even three or four judges the influence of the same motives is very sensible so long as each delivers a separate judgment and gives publicly his reasons for it. But the responsibility that is shared among twelve is diminished to nothing, above all when their deliberations are secret, and the result only is published.

When a man enters a jury-box he knows there are eleven other men there who are bound to find a verdict as much as himself. Why should he cudgel his brains about the case if he finds it beyond his sphere ?

(e) There is a proverb among the lawyers, that an opinion without a fee is worth nothing.

Perhaps his thoughts are in his shop, where he sees the pleasing vision of his apprentices playing at cards; or he is contriving how to take up Mr. Jones's bill; or wondering whether Sanders means to pay: perhaps he is simply unable to understand the case; the witnesses are so contradictory, the case so dull and the evidence so long and tiresome; Sergeant Wiles is so deep, and Counsellor Bellow so fierce, that he gives it up as a bad job, and leaves it to the others to find a way out of the maze, for he is completely obfuscated. Imagine each of the chosen twelve to be relying in this way on the others, and you may conceive how a troublesome or difficult case will be disposed of, when every man of them knows that his shirking will be a secret to all the world but his brother jurors, and very often even to them—in short, that he has only to say ditto to the opinion of the majority in order to pass muster. All these evils arising from the present number required to form a jury, would obviously be much diminished by reducing it to five or three. The time of our merchants and traders would be saved, causes would not go off for want of special jurors, and every juror would be urged by increased responsibility to give increased attention to the evidence and the verdict.

“Responsibility” I said, but the word is an empty sound as applied to a jury. There is no practical responsibility impending over them, however gross their misconduct may be. I am, aware that in legal theory a jurymen might be fined for gross misconduct, such as spinning a tee-totum for the verdict—but nobody ever heard of a jurymen being called to account since the days of Charles II., when it was decided to be unlawful to fine a jury for a perverse verdict. This is a wide departure from the practice of our ancestors, the same who invented this trial. They had provided a most formidable engine to terrify the weak or dishonest juror from departing from the line of his duty. “Attincta,” says my lord Coke, “is a writ that lieth when a false verdict is given; for if the petty jury be attainted of a false oath, they are stained with perjury, and become infamous for ever; for the judgments of the common law in the attain, importeth eight great and grievous punishments. 1. Quod amittant liberam legem in perpetuum; that is, he shall be so infamous as he shall never be received to be a witness or of any jury. 2. Quod terræ et tenementa in manus domini regis capiantur. 4. Quod uxores et liberi extra domus suas ejicerentur. 5. Quod domus sue prostrentur. 6. Quod arbores sue extirpentur. 7. Quod prata sue arentur. Et 8. Quod corpora sua carceri mancipentur. So odious

is perjury in this case in the eye of the common law; and the severity of this punishment is to this end: ut "pœna" ad paucos., "metus" ad omnes perveniet, for there is misericordia puniens, and there is crudelitas parcens. And seeing all tryalls of reall personall and mixt actions depend upon the oath of twelve men, prudent antiquity inflicted a strange and severe punishment upon them if they were attainted of perjury."

Really there is something quite refreshing in this passage. It has the genuine salt and savour of the olden time. It exhibits a true picture of the people who founded the jury system. This formidable contrivance for keeping jurors in order having been long obsolete and lately abolished, they may now do just as they please without fear of consequences or even of exposure, for it is their own fault if any body knows the secrets of the jury-box, or is able to fix a charge on any individual juror. If the judge were to pay no attention to the cause, he would expose himself before the counsel and the parties; if he were to exhibit any gross or unfair leaning to one side, he would be cried down by the newspapers; if he tossed up a shilling for his decision, he would be dismissed from his office; but all these things "may be done," "have been" done, are practised "at this day" by juries, with the most perfect impunity. "Such" is their responsibility and such it will continue while they are constituted, as at present.

4. The "unanimity" exacted from jurymen is one of the most obvious of all objections to our present system, and though it be the easiest to remove, no attempt to do so is made, such is the invincible force of custom. Yet one would suppose that the objections urged against it were much too plain and too weighty to be either gainsaid or resisted.

In the first place it has not even the sanction of antiquity. In the time of Ethelred, the law was that in a jury of twelve the verdict of eight should prevail, as Lambard shows in his Eirenarcha. And it appears from Bracton and Fleta, two of the most ancient of our law books, (a) that in the time of Henry III. when the jury could not agree, the practice was for the judge to order others to be added to them until twelve out of the entire number could be got to concur in a verdict. But in the reign of Edward I. the judge exercised the option of doing this, or of compelling the original twelve to agree by starving them into it. And Barrington

(a) Bracton, lib. iv. c.19. Fleta, lib. iv. c. 9.

(20) observes that as it was probably found that when new jurors were added, there was the trouble of trying the cause over a second time at last for the greater despatch of business they insisted in all cases on the unanimity of the original jury. And Mr. Evelyn has shown in his notes ^(b) to Lord Hale's Pleas of the Crown that one time when the jury differed in opinion, the verdict of the majority was followed. Even our modern law is not consistent in this respect for in grand juries and coroner's juries a majority of voices decides the question provided the majority be not less than twelve in number. In Scotland, criminals are tried by a jury of fifteen according to an ancient custom and a majority of one voice is enough to hang a man. If a difference of opinion arises among the judges, a bare majority determines the judgment; and a balance of one or two voices in the Exchequer Chamber and the House of Lords has disposed of not a few lives and estates. A majority of twenty-three to six acquitted Warren Hastings, and a majority of only one voice liberated the Liberator from prison.

If we try the practice of requiring unanimity from a jury by reason and experience, it will appear not less repugnant to these than to the most ancient usages of other nations and of our own.

It needs little observation to discover that the minds of men are as various as their faces, and that this variety whether it arises from nature or education or both, is as certain to produce a difference in their views of the same subject, as if every man saw it through a differently-coloured pair of spectacles. Nothing is more common than to find men differing upon the mere objects of the senses. But when we come to things which are visible only to the mind's eye, and are not to be determined by a foot rule or a bushel measure; when we have to deal with motives and intentions, with the credibility of testimony, with conflicting probabilities, and inferences from evidence we have bid farewell to all unison of opinion, we have arrived in the very regions of doubt and disagreement.

Now the questions which juries have to dispose of are the most doubtful difficult and complicated, which can arise from the refinement and complexity of men's transactions in an advanced stage of society. They are riddles which would have puzzled (Edipus and the Sphinx too. And as if they were not sufficiently knotty of themselves, the mistake, suppressions and misrepresentations of witnesses

^(b) Vol. ii. p. 297, n. c.

combine to render them still more intricate and perplexing.

In these circumstances it would be contrary to all experience, if a real unanimity of opinion existed in the vast number of cases in which juries pretend to find unanimous verdicts,—it would be a lie against nature, and nothing short of a miracle. Our ancestors who contrived this scheme for solving the riddles of the law knew well enough for experience soon taught them, that to take the free and unforced opinions of each of the jury and expect them to the unanimous, would be childish folly,—hence they found a contrivance exactly suited to the genius of the age for extorting that agreement which they were determined to have. If the head of a juror was impenetrable his stomach was made of softer stuff. The ancients indeed or some of them, conceived that organ to be the seat of reason, but I never heard of any people who made so direct and forcible an appeal to as our forefathers. Those were the days of unanimity and uniformity. If a man ventured to dissent from his fellow-catholics he was burned,—if he would not agree with his brother jurors, they were all starved together, consenters and dissenters. The old writ “*de heretico comburendo*” has been long obsolete, but the starving of jurors still astonishes the nineteenth century and raises the laughter of Europe. It is true it is never carried to the point of actually killing a juror outright. The judge has a discretion by the modern practice of remitting the torture when it is approaching the killing point. As in the dungeons of the Inquisition a surgeon always stood by and felt the pulse of the victim, when his agonised frame was breaking, to see that his sufferings were not pushed too far for nature to endure, so the judge in an English court of law in the nineteenth century,—“the judge of that law which boasts the attribute of mercy,”—plays the surgeon to the unhappy jurymen who are guilty of the heinous crime of differing in opinion from their fellows, and only remits the torture of famine when a juror’s life is in danger. It is a “degradation” to follow a system which clings to so insufferable a piece of barbarism, and which after having abolished the torture of prisoners and criminals, inflicts it on jurymen. “Not one joy more revolting or absurd would it be if the jurors were tied up to a post and flogged till they agreed.” Yet monstrous as it is, it cannot be dispensed with so long as unanimity is exacted. The one monstrosity begets the other. Do away with starving system and you will no longer have unanimous verdicts. Is this consequence so alarming that any extremity is to be

endured first? Shall the most difficult questions of property and liberty be decided by a simple majority of the judges? Shall the questions of peace or war and the fundamental laws of the kingdom, be decided by a majority of the House of Commons; and are you afraid to entrust questions of mere debts, trespasses and slanders to the majority of a jury? Shall the principle of a majority be decisive in all assemblies of men, in your companies, your institutions, your public meetings, your elections, your vestries, your corporations, your courts, your parliaments,—everywhere but in your juries? “Behold the amazing force of custom!” Had this starved unanimity never existed in this country before, were it now to be introduced for the first time, all England would cry out against it as piece of Gothic barbarism, as a violation of nature, as a contradiction to all our other institutions, as a disgrace to the age. But because it has been in use for centuries, it is submitted to by all, defended by very many, and cried up by some as the perfection of policy. After this I cease to wonder that the Chinese make their women’s feet into goat’s hoofs, or that the wise Egyptians worshipped crocodiles. I have no right to be astonished that the Spartans whipped their children to death at the altar of Artemis, or that the old Romans allowed the creditor to slay his debtor like a sheep; for “I see every day in our own courts, a spectacle sufficient to remind me that custom exerts a dominion” over mankind in every age and in every country, against “which reason in vain rebels, and humanity pleads in vain.”

The truth is that “this starved unanimity of juries, is one of the unmistakable features of barbarism which betray the “barbarous age in which the jury system arose.” The people who devised it had no books, and no newspapers, no letters, no post-office, no coaches: they beat their wives and sold their children for slaves; they amused themselves by baiting bulls and bears, and thrashing hens at Shrovetide; they drowned old women as witches and massacred Jews for their wealth; they were a people whose language would be hardly intelligible to us, whose costume would be outlandish and whose manners brutal. In everything but blood, they were far more foreigners to us, than the present inhabitants of Vienna or Moscow. These were the authors of our jury system.

I have consumed so much space in exhibiting the causes which render the verdicts of juries unsatisfactory, that I can only take a rapid glance at the evil consequences which necessarily flow from them.

The first is that certain classes of men have no confidence in the administration of justice. They do not believe that they are fairly dealt by in the jury-box.

No insurer resisting a life policy, no great company resisting a claim for an accident, no lawyer or doctor suing for his bill, no gentleman contesting the charges of a tradesman, no landlord suing for a forfeiture, no person who has rendered himself by any means unpopular, can safely depend on the impartiality of a jury. The fact is familiar to every lawyer and calculated on beforehand. Nay, even a merchant of London suing a trader of a country town is not safe in a disputed case with a jury of that town. In parts of Wales, a Welsh jury can hardly be got to do justice to an Englishman against a Welshman. This is not as should be. The judges of the fact ought to be as much above suspicion as the judges of the law.

Another consequence is the disgraceful scenes which constantly occur in the jury-room, and even in open court. What can be more scandalous to the administration of justice than the disclosures which frequently take place of the secrets of the jury-room? It would be easy to produce a score of cases out of the law reports, many of them recent, in which it has been proved that the jury tossed up or drew lots for the verdict; and there was a case at Peterborough in which they settled their dispute by balancing a poker, the fall of which to the right hand decided the guilt of the accused; and it has sometimes occurred that one obstinate fellow with a mule's head and a camel's stomach has starved the other eleven into a verdict against their convictions and their oaths. Still more frequent are the cases in which the "most monstrous compromises have been made between the conflicting opinions of the discordant twelve. To illustrate what I mean, take a late case in which a defendant was sued for publishing an anonymous letter containing the vilest charges against the plaintiff. If the defendant was the author of it the case called for the severest damages, and the only dispute was whether he was the writer or not. The jury found for the plaintiff, but astonished everybody by giving only a shilling damages. The secret was that some of them thought the defendant was not the writer at all, and only consented to give way to the rest on condition that the damages should be reduced to nothing. So conscious indeed are the judges of the scandal that would result from the disclosure of what passes between the jury, that they have done all they can to prevent the curtain from being

drawn, and to shut out the public eye from the interior of the jury-room. When new trials have been moved for and supported by affidavits of jurymen that they had tossed up for the verdict, the Court have laid down a rule that they will not hear such affidavits (a). Now as no one is allowed to enter the jury-room but the officer of the Court, and he only to ask if they are agreed, the effect of this rule is that the Court will hear nothing of what passes within that sanctum. What does this amount to but a practical declaration that the behaviour of juries when retired from the public eye will not bear the light? Nor is the ignorance or absurdity of uneducated juries confined to their private room—but is frequently displayed in open court by the most farcical verdicts. Not long since in the Sheriffs' court when the usual question was put "For whom do you find?"—the reply was "We are magnanimous for the plaintiff." And only the other day on a woman indicted for keeping a disorderly house, the verdict was "Not guilty, but we hope she won't do it again." There is hardly an assize which would not furnish a chapter for "Punch."

Another evil, and a very great one, is the exclusion by law of certain kinds of evidence, because, as the phrase is in our law books, it would have too much influence with a jury. Thus until recently the testimony of the parties and all persons who had any legal interest in the success or failure of the action was excluded. On the same principle what is called "hearsay evidence" is with few exceptions rejected by our law. "If it were to be assumed that one long inured to judicial habits might be able to assign to hearsay evidence just so much and no more credit than it deserved, yet upon the minds of the jury, unskilled in the nature of judicial proofs, evidence of this kind would frequently make an erroneous impression. Being accustomed in the common concerns of life to act on hearsay and report, they would naturally be inclined to give such credit when acting judicially; they would be unable to reduce such evidence to its proper standard when placed in competition with more certain and satisfactory evidence; they would be apt to forget how little reliance ought to be placed upon evidence which may be so easily and securely fabricated (b)."

(a) *See observations of Barons Parke and Alderson in "Burgess v. Langley," 1 Dowling & Lowndes, 23.

(b) Starkie on "Evidence," p. 38, n.

So when a man is tried for felony who has been before convicted of a similar crime, the law will not allow the jury to know of his former conviction until they have found him guilty of the present charge (6 & 7 W. 4, c, 111), because they would attach too much weight to it. This is the reason openly stated in the books. Now in excluding these and several other branches of evidence, the law just shuts up so many ways of arriving at the truth; not because they would not be of the greatest service in the hands of a thoroughly qualified and practised judge, but because the raw and inexperienced dozen of farmers or petty tradesmen do not know how to deal with them. In hundreds of cases it thus happens that the only avenues to the truth are closed. It is an every day affair for the knowledge of a loan, or a contract, or an essential fact in a cause, to be confined to a solitary witness since dead, but who has written an account of the transaction while fresh in his memory, 'ante litem motam,' and who was open to no suspicion. Yet in no such case is the evidence admissible, though there be no other to be got. Even a receipt for money by a witness since dead has been excluded.

Another evil, and of every day occurrence, is that causes involving long accounts or requiring a scrutiny into numerous matters of detail are utterly impracticable to be tried by a jury, and are therefore obliged to be referred to an arbitrator who can patiently examine and note down the details 'seriatim.' How constantly this occurs is well known to those in the habit of attending the courts; and when it does happen, the expense and delay of the trial is thrown away. Over and over again I have heard parties, before they got into court, declare that they would insist on having the case tried out, and would never consent to refer it to arbitration; but upon the attempt being made in court to go into the details in dispute, the judge, the jury, the counsel, and the parties, have all become convinced of the impracticability of dealing with it there, and it has by universal consent been turned over to an arbitrator. This is the consequence of setting twelve men to do what one could manage infinitely better.

The last evil I shall mention, and the greatest, is the number of erroneous verdicts that are come to, and of new trials that are requisite to correct them. "Trial by jury in civil cases," said Lord Mansfield, "could not subsist now without a power somewhere to grant new trials. There are numberless causes of false verdicts, without corruption or bad intention of the jurors. They may have heard too much of the matter before the trial, and imbibed prejudices

without knowing it. The cause may be intricate : the examination may be so long as to distract and confound their attention.

"Most general verdicts include 'legal consequences,' as well as propositions of facts : in drawing these consequences the jury may mistake and infer directly contrary to law. The parties may be surprised by a case falsely made at the trial, which they had no reason to expect, and therefore could not come prepared to answer. If unjust verdicts, obtained under these and a thousand like circumstances, were to be conclusive for ever, the determination of civil property in this method of trial would be very precarious and unsatisfactory. It is absolutely 'necessary to justice,' that there should upon many occasions be opportunities of 'reconsidering' the cause by a new trial' (c). That the power to rectify the mistakes of juries is requisite no one disputes; but new trials are a heavy grievance to the parties. They double the delay, anxiety, and expense of an action, and sometimes render it wholly abortive by protracting the proceedings until one of the parties dies or becomes insolvent, or leaves the country, or gets disgusted with the delay and abandons the suit, or gladly accepts an unprofitable compromise. But though a large part of the time of the courts is spent in motions for new trials, it would be a great mistake to suppose that the number of new trials granted on account of the errors of the jury represents the full extent of those errors. No : a crowd of cases must be added, in which the parties rather submit to a mistaken verdict than incur the risk and expense of appealing to the court,—another class in which the courts will not interfere with the discretion of the jury,—and a third, in which the courts refuse to send the case to a second jury on account of the smallness of the sum in dispute. In regard to this last description of cases, there is no correction for the mistakes of the jury ; they have it all their own way.

This is in civil causes ; but how is it in criminal cases, where new trials are never granted after an acquittal, and very rarely after a conviction, so that the errors of the jury go wholly uncorrected. Apply Lord Mansfield's observations to criminal trials, and what do they lead to ? There is not a session or assize passes, but we see notorious criminals escape in spite of convincing evidence, and to aggravate the evil, the law never allows a man to be tried again on the same charge. It is thus that the whole herd of villains who live by plunder come to look on the

(c) *Bright v. Eynon*, 1 Burrows, 393-4.

law as a rotten old net, full of holes through which any slippery fish may escape.

I have now done with the mischiefs arising from trial by jury, not because the catalogue is exhausted but because time and patience would fail me to detail them all. And when I survey the numerous evils flowing from the defects of this tribunal, I cannot help thinking they will before long force on the public the consideration of the question, whether the time has not arrived when the wants of the age loudly call for an improved mode of trial, and when the jury must experience the same fate so far as its general application is concerned which the ordeal, the battle, and the law-wager have in turn undergone.

Some of the defects indeed which have been exposed are capable of an easy remedy whenever men shall cease to regard the jury system as an ark too sacred to be touched by the hand of innovation. The useless and excessive number which now composes a jury may be reduced, a majority may take place of unanimity, and the jury-room may cease to be the only place in which the law furnishes innocent men; but how shall we get rid of the want of previous qualification, the rustic ignorance, the partiality, the prejudice, the rude haste, the want of publicity and responsibility, which are the most glaring evils of juries? These are defects which seem inherent in the system, and inseparable from it; they are organic "diseases" which can only be cured by "death". Though I should stand alone in this conviction, I will avow it. After long reflection on the numerous and heavy grievances which flow from the unlimited application of this form of trial, I for one am convinced that it is not adapted to the refinement of the age we live in, that it has had its day and must soon be thrown aside into the huge heap of antique legal lumber, or limited in its application to a very confined class of cases.

No one pretends to deny that it has served important uses in times past; that when it first arose and usurped the place of the ordeal and the battle, it was a great stride in the path of justice and civilisation; that it has often since then shielded the subject from the power of the crown, and the poor from the oppression of the rich; that it has tended to temper the rigid rules of law by the eternal principles of common sense and justice, and to harmonise the administration of an antiquated and technical system of law with the public feeling and opinion of the time being,—though even in this its merits have been over-rated. Neither is it necessary while

introducing a better system, to deprive liberty of any security which it derives from the trial by jury. Retain it by all means if you will, in all prosecutions for political offences, and in every case wherein public liberty may be concerned or wherein the judge may possibly have a bias. But let all ordinary cases be heard by a man of superior discernment and practised skill, whose natural powers have been sharpened by a life spent in forensic contests, who cannot be easily deceived by a witness, because he is conversant with every kind of testimony; nor by an advocate, because he has been an advocate himself; who is fit to hear and to estimate at its true value every species of evidence hitherto excluded, which may open an avenue to the truth; whose attention is not to be exhausted by the length, nor his comprehension distracted by the complexity of the evidence: give the suitor I say, a man with these qualities, who performs his functions under the public eye, who is in no hurry to get away to his shop or his farm, whose very trade and business it is to weigh, investigate and decide on questions of doubt and difficulty: in a word, let the facts be decided by the same experienced judges as the law, and the whole body of the law will feel renewed and invigorated by the change. A great part of its supposed uncertainty will vanish, new light will pour in from sources of evidence now shut up, the scales of justice will be held with even hands, the heavy grievance of new trials will be vastly diminished, the suitor will obtain his rights with greater speed, economy and certainty, and the criminal will no longer find refuge in the sophistry of counsel or the weakness of juries. (*d*).

(*d*) In concluding these pages, the writer cannot forbear a reflection on the felicity of the times we live in, when we feel our liberties so secure, as to expose without apprehension the infirmities of that ancient Institution which was in days gone by the only refuge of liberty! A Frenchman or Italian would be apt to exclaim of us, "O fortunatos nimium, sua si bona norint."

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TRIAL BY JURY:
THE DARK SIDE OF THE SYSTEM.

**A PAPER READ BEFORE THE LITERARY
INSTITUTION IN 1859.**

BY
JOSEPH BROWN,
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TRIAL BY JURY: THE DARK SIDE OF THE SYSTEM.

TRIAL by Jury is one of the many English institutions incorporated in the judicial system of this country so far as criminal cases are concerned. How far this institution has successfully worked in this country is a question so complicated that jurists and lawyers alone can deal with it exhaustively. In the present times of unrest and political excitement, the working of the jury system in aid of administration of criminal justice in the Presidency High Courts has bulked largely in public view. Like all human institutions that have reached ever so high a stage of development, the institution of trial by jury has in the past as very often in the present, given rise to strong animadversions, in that in practice, this institution cannot claim to be a wholly successful and satisfactory factor in the Administration of Justice. Professor Sidgwick in his well-known work "Elements of Politics," whilst discussing the merits of the jury system, refers to a rather out-of-date but very weighty contribution to this question—"The Dark side of Trial by Jury," being a lecture delivered some time in 1859 at the Literary Institution. The discourse came to be delivered consequent on the rejection of Lord Campbell's very moderate measure of reform in trial by jury. Mr. Joseph Browne (of the Middle Temple) who delivered this discourse said "he was conscious of having expressed himself with vehemence on some points but the strongholds of ancient prejudice were not to be breached by soft words." The text of Mr. Browne's discourse, we believe, will greatly interest members of the Bench and the Bar, and may induce criticism on whatever drawbacks or disadvantages in the jury system in India by the light of Mr. Browne's arguments:—

The trial by jury is a theme which has moved the tongues as well as the pens of some of our ablest speakers and writers. Volumes have been written and spoken on the subject, and yet it appears to me that only one side of it—the bright side—has been depicted.

I propose to attempt "the dark side" of the picture—a view which I am too sensible is not so agreeable as the other—which may like a photographic portrait, shock our national vanity severely, but may also for that very reason be more useful.

The writers who have hitherto treated this subject and particularly the trumpeters of the "glorious constitution," have flattered our pride by a strain of unlimited panegyric on this ancient and popular institution. Thus the commentator Blackstone who may serve as an example of the rest, has spent a long chapter in explaining "the various machinery and appendages of this institution": like some enthusiastic antiquary exhibiting a precious relic of ancient art, he has taken pains to put it in the best possible light, has pointed out all its beauties to notice, and has dwelt with rapture on every minute charm imperceptible to the eye of any but a connoisseur. After summing up its numerous excellencies, he declares the trial by jury to be the palladium of British liberty, the glory of the English Law, and the most transcendent privilege which any subject can enjoy or wish for. (Book iii. 379.)

Such is the language to which we have been long accustomed, and one feels guilty of impeaching the wisdom of our ancestors, affronting the sages of the law, and profaning the mysteries of the constitution in venturing to question the excellence and expose the weakness of an institution which has received the suffrages of so many great and venerable men, and has stood the revolutions of so many ages. It is Uzzah touching the Ark of the Covenant.

But the age has no right to cast this reproach. It is an age whose principal business has been to pull down the institutions of our forefathers, and build up better. It is an age of law reform—an age of universal change—the transition period of our history.

At this present time, (a) by recent Acts of Parliament, the trial by jury is actually abolished in practice in ninety-nine out of every hundred causes tried in the county courts, and it would appear as if the suitors had pronounced against it since they have the option of adopting it in all cases and yet choose it only in one of a hundred. I trust therefore I may without offence venture upon this daring enquiry. It is a highly useful exercise, and one sometimes pregnant with unexpected discoveries, to forget for a time if possible that we are Englishmen, and turn

(a) This change been made since this essay was first written.

as it were a stranger's eye on those national customs or institutions which we have never heard spoken of except in the language of panegyric, and which therefore we have never subjected to the ordeal of impartial investigation. It is by the exercise of this habit only, that the reflective man can rise superior to the prejudices of his age and nation, and march with the van in that great career of knowledge and improvement which distinguishes the present period. And after all, if the trial by jury be really deserving of the praises which have been lavished upon it, it can have nothing to fear from the fullest investigation, but will rather come out from the ordeal with renewed lustre and more convincing claims to our admiration, than when we took upon trust all that had been said in its favour.

The importance of the inquiry is too obvious to need illustration. Neither do I propose to enter into the history of the subject any further than may be auxiliary to the main purpose of my inquiries, which are directed to ascertain "how far this tribunal is suited to the wants of the present age," rather than the time and the manner in which it sprung up and grew to its present shape (b).

The time has at length arrived when "the trial by jury" must "itself" be "tried." I arraign it at the bar of public opinion. I accuse it of incapacity of ignorance; of partiality of cumberdomeness, of barbarism. These are the counts of the indictment which I am about to open.

1. The first and foremost charge is the "want of previous qualification" for their functions, under which jurymen necessarily labour.

And here at the outset it becomes absolutely necessary to distinguish between the "different sorts of juries," in order to guard myself against misapprehension.

The fertile womb of the law has brought forth such a litter of juries that their mother has not names for them all. They can only be compared to the numberless tribes of dogs, all differing in colour size and shape but as the naturalists say, all of one species. There is the common jury; and the special jury the grand jury and the petty jury, the coroner's jury and the sheriff's jury, the compensation jury and the annoyance jury, the ward jury and the leet jury, the jury of matrons and the jury of ale-conners, and nobody knows how many more besides.

(b) The history and antiquities of the jury system are very fully treated in the elaborate work of Mr. Forsyth on "Trial by Jury," printed at Cambridge in 1852, which collects all that German and English research has contributed towards the subject,

These juries as might be expected, differ from one another as widely in point of education and intelligence as they do in or station, or in the importance of the matters they have to deal with. The observations which are perfectly true of a sheriff's jury may be wholly inapplicable to a grand jury. Some juries are composed of men as enlightened, as free from prejudice, as used to debate, as competent to deal with a difficult question as these whom I have the honour to address—as if this were always the case, few of the objections which I am about to urge would have any application. The nearest approach perhaps in practice to the beau idea of a jury, is to be found in the special juries of London. No testimony is needed to their great intelligence, knowledge of the world, and practical sagacity; but unfortunately they try but a very small minority of the causes which the courts have to dispose of. "Special juries" indeed are entirely a modern innovation. Until the present century they were rarely heard of except in great mercantile causes; and even at the present day they are only adopted in causes of some importance, as the ordinary cases will not bear the expense of a special jury (c).

The common jury therefore continues, and must of necessity continue, to be that which disposes of nine-tenths of the trials civil and criminal, which occupy the courts of law; and it is of this jury that I have chiefly to speak.

It has certainly always struck my mind that there was a remarkable contrast between the mode of procedure adopted by our countrymen in relation to their legal disputes, and that which they follow in the ordinary affairs of life. If a man wants a pair of shoes made, nobody shall serve him but one who has undergone a regular apprenticeship to the trade and has practised it for years. If a man breaks his leg, he never thinks of trusting his precious limb to the hands of any but an experienced surgeon, who has spent half a life in the exercise of his profession. If he happens to be involved in a difficult question of law, he will take the advice of none but one who has grown grey in the study of reports and statutes; and yet with all this, if his property, his reputation, his liberty, or his life is at stake on a disputed question of fact, he will—may he must intrust it to the voice of twelve men, not one of whom may have ever entered a court before, not a creature of whom may have ever experienced the arts of debate or the subtleties

(c) The cost of a special jury was very lately about £22, and of a common jury not above £2.

of counsel, nor have balanced the doubtful evidence of opposite witnesses, nor have been called to the decision of any dispute more important than the quarrels of his children, or the discussions of the pothouse. As Numa was taken from the plough to the sceptre, so at the summons of the law our jurymen quit their shops for the courts of justice; they march straight from the weighing of candles to the weighing of testimony:—from the measuring of tape to the measuring out of fate;—from dealing in bacon and cheese to dealing with the lives, properties and liberties of men. Verily we are a wise people, whose Commonalty possess by intuition the faculty which costs a lawyer many years to acquire,—many long years of laborious study and practice,—the faculty of hearing without being deluded by sophistry and eloquence, of catching and connecting as it flies the broken and disjointed evidence of numerous and contradictory witnesses; of selecting what is material, and rejecting what is irrelevant, of sifting the wheat from the chaff, the substantial from the seeming, and extracting the kernel of truth from the misshapen husk of errors in which it is enveloped. The Greeks fabled that the Goddess of Wisdom sprang fully armed and grown from the head of Zeus. The English seriously believe that judicial wisdom springs forth mature from every tradesman's head. This is a fit article of faith for a nation of shopkeepers.

But seriously, how is this? Is it because it requires long study and practice to make a boot, or to set a broken limb, or to solve a question of learning, but none to try a cause. (d) No! The case admits of a much more rational solution than this; and the whole proceeding bears the unmistakable feature of primitive simplicity and ancient rudeness. The time was when the transactions of men were simple, and their manners were the same—when the jury were the neighbours of the parties and the witnesses of the facts, when their functions consisted in deciding the cause from their own personal knowledge of the litigants and the facts in dispute more than from any evidence offered to them, when fixed and refined rules of law extending to every predicament had no existence, and when the jury pronounced no more than a sort of general opinion, that one party had more right to hold than the other had to demand a house or a field.

(d) A patent cause for example with thirty witnesses practical and scientific on each side. The last in which I was concerned occupied six days, and the jury had the good sense to declare that they thought some better tribunal ought to be provided to deal with such cases.

In times like these the practice of summoning juries took its rise, and to such a state of things it might be well enough adapted. But now how different are our transactions, our laws, our manners and customs—everything, except our juries! The barber no longer bleeds us, and the grocer has ceased to deal in physic, yet the butcher and the baker continue to try our causes; and we consider this the perfection of wisdom and policy!

One single circumstance without more, demonstrates as I conceive, an incurable incapacity in most common juries to perform their functions in a proper manner. It is shortly this:—they are not on a level with the advocates who address them. I do not mean in point of wealth or station in society, but in point of education, intellect, schooled habits of reasoning and forensic experience. It is of no avail to assert that there are very clever and well-informed men behind the counter, who might have made advocates themselves. We have to do with the rule and not with the exceptions. The leading advocates at Nisi Prius are picked men, eminent for their native talent, or for legal and general acquirements men whose natural abilities have been proved and sharpened in a thousand contests, and whose powers are testified by their having fought their way to the front rank of that army of intellectual gladiators—the Bar of England. And whom have they to deal with? I speak now of most common juries. How often do they consist of men whose studies have been confined to their order-books and ledgers, whose minds have only been exercised in driving bargains and providing for their payments, who have taken part in no debates but those of the ale-house and club room, and whose discernment has been chiefly practised in finding out whether Mr. Smith or Mr. Jones was to be trusted? These are the “*duodecim probos et legales homines*,” the “*Judices facti*,” the favourites of the Law.

Here is ignorance set to judge of learning, inexperience to deal with consummate art, and very often rustic solidity to contend with the most refined talent. What man is there I ask, who has been a suitor himself and has had his case tried by a country jury, what plaintiff or defendant is there who has not trembled for his cause however just, as he heard his evidence breaking down and his case changing like a dissolving view under the delusive address of the opposing counsel, and reflected on the quality of the men by whose discernment he must stand or fall?

Now this is exactly reversing the natural, the desirable order of things. Instead of the advocate being superior to the judge, the judge ought to be above the advocate. (c). Though this is the most obvious of truisms, yet it sounds like a discovery, because our practice is just the contrary. When such a phenomenon occurs on the Bench,—when the judge is unequal to cope with the superior faculties of a great advocate, the evil is felt and lamented by the whole profession of the law. But any disproportion which may have ever existed between a judge and an advocate is a trifle to what perpetually occurs between the counsel and the jury; and the scene which happens at every country assize would only be paralleled by setting Col. Rawlinson and Dr. Hinckes to dispute the meaning of the cuneiform inscriptions before the judges of a ploughing-match.

A little experience of the courts will be sufficient to convince any impartial observer that even the want of acquaintance with the law and practice of the courts which is attributable to all juries (the lawyers being exempt from serving), is a very frequent cause of the most serious mistakes. The defendant's counsel omits to ask a witness as to a conversation, or to put in a particular letter. The jury find against him for that reason, not being aware that the evidence was inadmissible by law. Many a cause has been lost by an injudicious plea having been put on the record, but which the jury would have attached no weight to, had they known anything of special pleading. There was a case lately and the like has often occurred, in which a jury disputed for nearly twenty four hours about the amount of their verdict, intending that it should not carry costs, and at last gave the plaintiff only a shilling damages with that intention, being ignorant all the while that damages to the amount of a penny would entitle him to the whole costs of the action.

The counsel for the parties are constantly obliged to explain the law to the jury, in order to give them correct ideas of the bearing and effect of the facts; but the jury naturally distrust the statements of counsel, and as the judge often omits to notice what every lawyer takes for common learning, the unlearned jury make grievous errors where law and fact are interwoven in the verdict.

(c) The very name of "judge" imports it. When we say such a person is a judge of a thing, we mean that he possess a superior knowledge, experience, and discernment.

The "glorious uncertainty of the law" has been the boast of many a lucky rogne who has slipped through the jailor's fingers; but few have been conscious how little of it was owing to the law itself, and how much to the glorious ignorance and uncertainty of juries. Let a man only withhold a just claim from his creditor, encroach on the property of another, or do violence to his person, and he will soon discover to his cost that there is very little uncertainty in the dealings of the law with him: it is when the result of a cause depends on the uncontrolled discretion of a jury that the reign of chance begins, and let the law be never so clear, it is often the toss of a die whether the plaintiff or defendant wins. The most trivial circumstance having the least possible connection with the merits of the case, the lucky chance of the defendant's counsel getting the last word, the plaintiff's being unpopular or his attorney too sharp, the defendant's having an acquaintance on the jury, the misconduct of one witness or the omission to call another, or twenty other things of as little real weight may turn the scale, and thus the verdict often belies the predictions of the most sagacious lawyer.

We shall of course be told that though juries of themselves would neither comprehend the law nor the facts of half the cases which come before them, yet with the aid of the judge they are perfectly able to do so. The extent and value of the judge's assistance it is indeed impossible to overrate, and without it there can be no doubt that the trial by jury would have been wholly unendurable, and would long ago have shared the fate of trial by battle, the wages of law, and other barbarous contrivances: but what I maintain is this, that the judge does a great deal too much for the jury to have the credit of doing anything; in point of fact, that they generally do little more than find a verdict which he has already suggested to them, and that when they do take upon themselves to find contrary to his opinion, the court will most commonly set aside the verdict, and order a new trial, with the exception indeed of certain doubtful or trifling actions in which it is considered a mercy to the parties to stop further litigation, (a).

(a) It is a rule in the Courts not to grant new trials for the mistakes of the jury, where the amount of the verdict is under £20 in the superior Courts, or under £5 in the Sheriff's Court.

But if the aid of the judge be so necessary that the jury cannot move without him, and if the courts declare that they are not fit to go alone, that they go wrong the moment they presume to differ from his opinion, and that a "perverse verdict" as it is technically called cannot be allowed to stand, where is the use of troubling the jury for their opinion?

The strongest of all possible decisions that juries in general are unqualified to discharge the functions nominally entrusted to them, is to be found in the fact that the courts will hardly suffer them to have an opinion of their own in opposition to that of the judge. (b)

2. "Impartiality" has usually been reckoned among the distinguishing excellencies of juries or even as that particular feature in which they excelled every other tribunal; and it is satisfactory to think that in most cases this praise is well deserved. Yet on the other hand it is certain that there are some classes of cases to which this observation is wholly inapplicable, and some in which the partiality of juries constitutes their greatest merit. Such is the case, for instance, with the whole class of trials for political offences, in which the cardinal merit of juries has consisted in their leaning to the popular side. And until the laws of the land are such in every respect that all good citizens must wish to see them enforced to the letter, I am far from wishing to do away with the protection that liberty has derived from this cause; but what is to be said in extenuation of the prejudice and partiality of juries in cases where no poor man is to be protected against the oppression of the powerful, and no common rights are to be vindicated against prerogative?

What chance has a defendant of fair play from a jury where national or religious prejudice envelopes the case? Does any one believe that the verdict in the prosecution of Dr. Achilli against Dr. Newman, would have been given by a jury of Roman Catholics? How long is it since an Irish jury found a verdict of wilful murder against Lord John Russell, because a poor man had fallen a victim to a national famine; or refused to convict the notorious Phoenix conspirators at Tralee? In many parts of Ireland, it is next to impossible to get a conviction of the

(b) This is not true of all cases; but it is correct as applied to causes of importance, where the judge has a strong opinion that the verdict was wrong. In numerous cases the judge will say, I should not have found the same verdict, but the jury are the constitutional judge of the fact.

assassins who execute the dark and bloody decrees of Whiteboys and Ribbonmen. On the other hand, when popular feeling is strongly excited against the accused, the jury becomes a blind instrument of vengeance. Every one of the Judicial murders and confiscations committed under Charles II., was committed by means of a jury. Look again at civil causes,—what chance has a railway company at this moment of defending successfully any claim which arises out of an accident on their line? (c) Certain classes of litigants are half-beaten by their name and occupation before they come into court. Common juries and sheriffs, juries generally look upon an honest lawyer as quite a black swan. Their creed is that no attorney ought to go to law himself,—that apothecaries' bills must be taxed,—that candidates at election must pay all demands that may be sent in to them,—that bill-discounters are rogues, and the like.

All their partialities are saved up for brother chips, for carpenters, builders, tailors, shoemakers, and such like innocents, who are booked to win the moment they enter the course with a gentleman to contest the reasonableness of their bills or his liability to pay. I have very rarely seen an instance of a gentleman successfully resisting the demand of a tradesman on the ground of exorbitancy.

There are certain species of unpopular actions also in which the plaintiff stands so little chance of success, however plain his evidence may be, that the odds are three to one against him. Such for instance are all actions by common informers, proceedings on the game laws, tithe causes, actions for penalties, forfeitures and the like. (d) Neither can it be said that partiality is the sin of common juries only. There is a class of actions which are occasionally brought against country justices of the peace, for some of the eccentric freaks committed by

(c) Common juries seem unable to distinguish between the importunities of compassion and the demands of justice. A poor man who runs against a cart, and gets his leg broken by his own neglect, usually obtains a verdict against the owner, especially if he is wealthy. If the man is killed and his widow sues, the defence is yet more hopeless.

(d) Lord Kenyon once tried an action for a penalty for shooting game without a licence. The case was clear, and the defendant's counsel was hard pressed. At length, "Gentlemen," said he, "it's true they have sworn that my client fired at the bird, that it fell dead and that he bagged it. It is of no use to deny that. But how does it appear that the bird was killed by the shot? What proof is there that it did not die of the fright?" The jury were convinced by this ingenious argument, and found a verdict for the defendant.

them in their magisterial capacity. Whenever any country justice is unlucky enough to transgress the law, or turn it into an engine of oppression and wrong, and some village attorney is found bold enough to incur his worship's eternal wrath by taking up and vindicating the cause of the sufferer, the justice "par excellence" has only to see that his cause is tried by a special jury in order to secure the most liberal measure of indulgence that a sinner could wish. A country gentleman has great bowels of mercy for the sins of a brother justice and sportsman, recollecting that himself is no Solomon perhaps, and may some day need a good turn of the same kind. "Veniam damus petimusque vicissim," is their motto, and thus it happens that the victim of illegal proceedings who would obtain £100 damages from a common jury will get a shilling or nothing from a special one.

To take another instance which comes nearer home—who can read the reports of insurance causes, without astonishment. An action is brought on a life policy against an insurance office. The defendants plead that the policy was agreed to be void if they were deceived as to the habits of the insured, and that in truth he was an habitual drunkard, afflicted with delirium tremens, which fact was purposely concealed from them. They call a dozen witnesses, obtained with the utmost difficulty out of the enemy's camp, some of them friends and servants of the defunct, but all concurring in the fact in dispute. The plaintiff calls a few others who swear that they did not see the party habitually drunk, just as the sheep-stealer said he had a dozen witnesses who would swear that they did not see him steal the sheep. It also appears that the man died of delirium tremens a few months after the date of the policy. The judge sums up all in favour of the defence and it seems a gone case, when to the astonishment of all but the lawyers, the jury go through the form of a consultation, and then return a verdict in favour of the claim. "Heaven and earth, do I hear right?" exclaims an unsophisticated stranger. "Oh my good sir," says one in the secret, "you don't understand,—half the jury have got policies on their own lives.

For my own part, I cannot read without disgust and indignation the insurance trials. By this time the offices have nearly learnt the lesson that juries have endeavoured to teach them, that they must never contest a policy which they have once effected, by whatever fraud they may have been drawn into it.

3. What great and mysterious advantages are concealed in "the sacred number twelve"? "It seemeth to me," says Sir Edward Coke, "that the law delighteth herself in the number of twelve, for there must not only be twelve jurors for the trial of matters of fact, but twelve judges of ancient time for trial of matter of law. Also for matters of state there were in ancient time twelve counsellors of state. And that number of twelve is much respected in holy writ, as twelve Apostles, twelve stones, twelve tribes," etc.

Yet the law has not been constant in its attachment to this favourite number, for a grand jury may consist of twenty-three, and so may a coroner's jury. In a grand assize the number was sixteen, in an attainder twenty-four, and the twelve judges have now increased to fifteen.

If the reason assigned by my Lord Coke be the true one which induced our ancestors to fix on this as the number of a jury, it savours abundantly of the superstition and credulity of the times in which it had its birth, but makes it so much the more doubtful whether it was ever adapted to constitute the most satisfactory tribunal, or to meet the convenience of the people. Supposing for a moment that a jury of three or five men would be just as competent to try a cause as one of twelve, the smaller number would be preferable to the larger, if it were only on account of the great inconvenience inflicted on men in business by the perpetual and vexatious summonses of the Sheriff. In order to supply the requisite number of jurymen the Sheriff is compelled by law to summon not twelve only, but forty-eight at the least and often seventy-two; and these although they have no earthly concern with the causes to be tried, are obliged under pain of a smart fine to attend the courts for days and sometimes for weeks together, to the entire neglect of their business however urgent it may be, and without any species of compensation that deserves the name. I speak now of the common jury. Not a functionary in the court gives his services for nothing except the juryman. The judge has a splendid salary, the counsel an adequate fee, the attorney has the costs of the trial, the witnesses have their expenses, the very crier of the court spends not his breath in bawling "silence" for nought: the juryman is the only one in the whole company of performers who has no reward for his services. No reward did I say!—I had almost overlooked the coin: if he is on a Sheriff's jury he has no less than a great deal of good and lawful money of Great Britain. And if on a common jury he has actually eightpence! The law values his services at the hire of a porter and gives him enough

to get a pot of beer or a glass of grog. And for this he must forsake his most urgent affairs to give his time and attention to the disputes of strangers! What wonder that they should be on the fidget to get away to their shops and their farms. What wonder that they should despatch the business of the verdict like a grace before dinner. What wonder that they will cut the knot rather than take the pains to untie it, and astonish the spectator by jumping to a conclusion in five minutes upon evidence which a Parke or a Tindal would take days to consider (e).

But to return to the great number who are summoned: another evil is that in many counties it is impossible to get a special jury together, as instead of twelve it generally happens that not more than four or five will attend, and sometimes none at all inasmuch as the special jurymen, for the sake of escaping the fatigues of the jury box can afford to despise the fines imposed by the judge. The consequence is, that causes of great magnitude and importance are tried by tales-men, who are much better qualified to judge of the breed of a bull, or the weight of a prize pig, than of the arguments of counsel.

But these are not the only evils arising from Lord Coke's favourite number; a greater remains to be mentioned, namely, the destruction of all responsibility for the verdict.

If you have but one judge to decide a cause, he knows that the shame of a blundering or a partial decision rests solely upon him, and the consciousness of this habitually exercises a salutary influence on his conduct. It restrains him from any gross carelessness or manifest partiality if it does no more, and in a case on which public attention is concentrated, it produces all that scrupulous impartiality and careful consideration which may be witnessed every day on the bench. If you have even three or four judges the influence of the same motives is very sensible so long as each delivers a separate judgment and gives publicly his reasons for it. But the responsibility that is shared among twelve is diminished to nothing, above all when their deliberations are secret, and the result only is published.

When a man enters a jury-box he knows there are eleven other men there who are bound to find a verdict as much as himself. Why should he cudgel his brains about the case if he finds it beyond his sphere?

(e) There is a proverb among the lawyers, that an opinion without a fee is worth nothing.

Perhaps his thoughts are in his shop, where he sees the pleasing vision of his apprentices playing at cards; or he is contriving how to take up Mr. Jones's bill; or wondering whether Sanders means to pay: perhaps he is simply unable to understand the case; the witnesses are so contradictory, the case so dull and the evidence so long and tiresome; Sergeant Wiles is so deep, and Counsellor Bellow so fierce, that he gives it up as a bad job, and leaves it to the others to find a way out of the maze, for he is completely obfuscated. Imagine each of the chosen twelve to be relying in this way on the others, and you may conceive how a troublesome or difficult case will be disposed of, when every man of them knows that his shirking will be a secret to all the world but his brother jurors, and very often even to them—in short, that he has only to say ditto to the opinion of the majority in order to pass muster. All these evils arising from the present number required to form a jury, would obviously be much diminished by reducing it to five or three. The time of our merchants and traders would be saved, causes would not go off for want of special jurors, and every juror would be urged by increased responsibility to give increased attention to the evidence and the verdict.

"Responsibility" I said, but the word is an empty sound as applied to a jury. There is no practical responsibility impending over them, however gross their misconduct may be. I am aware that in legal theory a jurymen might be fined for gross misconduct, such as spinning a tee-totum for the verdict—but nobody ever heard of a jurymen being called to account since the days of Charles II., when it was decided to be unlawful to fine a jury for a perverse verdict. This is a wide departure from the practice of our ancestors, the same who invented this trial. They had provided a most formidable engine to terrify the weak or dishonest juror from departing from the line of his duty. "Attincta," says my lord Coke, "is a writ that lieth when a false verdict is given; for if the petty jury be attainted of a false oath, they are stained with perjury, and become infamous for ever; for the judgment of the common law in the attain, importeth eight great and grievous punishments. 1. Quod amittant liberam legem in perpetuum; that is, he shall be so infamous as he shall never be received to be a witness or of any jury. 2. Quod terræ et tenementa in manus domini regis capiantur. 3. Quod uxores et liberi extra domus suas ejicerentur. 4. Quod domus suæ prostrentur. 5. Quod arbores suæ extirpentur. 6. Quod prata suæ arentur. Et 8. Quod corpora sua carceri mancipentur. So odious

is perjury in this case in the eye of the common law; and the severity of this punishment is to this end: ut "pœna" ad paucos, "metus" ad omnes perveniet, for there is misericordia puniens, and there is crudelitas parcens. And seeing all tryalls of reall personall and mixt actions depend upon the oath of twelve men, prudent antiquity inflicted a strange and severe punishment upon them if they were attainted of perjury."

Really there is something quite refreshing in this passage. It has the genuine salt and savour of the olden time. It exhibits a true picture of the people who founded the jury system. This formidable contrivance for keeping jurors in order having been long obsolete and lately abolished, they may now do just as they please without fear of consequences or even of exposure, for it is their own fault if any body knows the secrets of the jury-box, or is able to fix a charge on any individual juror. If the judge were to pay no attention to the cause, he would expose himself before the counsel and the parties; if he were to exhibit any gross or unfair leaning to one side, he would be cried down by the newspapers; if he tossed up a shilling for his decision, he would be dismissed from his office; but all these things "may be done," "have been" done, are practised "at this day" by juries, with the most perfect impunity. "Such" is their responsibility and such it will continue while they are constituted, as at present.

4. The "unanimity" exacted from jurymen is one of the most obvious of all objections to our present system, and though it be the easiest to remove, no attempt to do so is made, such is the invincible force of custom. Yet one would suppose that the objections urged against it were much too plain and too weighty to be either gainsaid or resisted.

In the first place it has not even the sanction of antiquity. In the time of Ethelred, the law was that in a jury of twelve the verdict of eight should prevail, as Lambard shows in his Eirenarcha. And it appears from Bracton and Fleta, two of the most ancient of our law books, (a) that in the time of Henry III. when the jury could not agree, the practice was for the judge to order others to be added to them until twelve out of the entire number could be got to concur in a verdict. But in the reign of Edward I. the judge exercised the option of doing this, or of compelling the original twelve to agree by starving them into it. And Barrington

(a) Bracton, lib. iv. c. 19. Fleta, lib. iv. c. 9.

(20) observes that as it was probably found that when new jurors were added, there was the trouble of trying the cause over a second time at last for the greater despatch of business they insisted in all cases on the unanimity of the original jury. And Mr. Evelyn has shown in his notes (*b*) to Lord Hale's Pleas of the Crown that one time when the jury differed in opinion, the verdict of the majority was followed. Even our modern law is not consistent in this respect for in grand juries and coroner's juries a majority of voices decides the question provided the majority be not less than twelve in number. In Scotland, criminals are tried by a jury of fifteen according to an ancient custom and a majority of one voice is enough to hang a man. If a difference of opinion arises among the judges, a bare majority determines the judgment; and a balance of one or two voices in the Exchequer Chamber and the House of Lords has disposed of not a few lives and estates. A majority of twenty-three to six acquitted Warren Hastings, and a majority of only one voice liberated the Liberator from prison.

If we try the practice of requiring unanimity from a jury by reason and experience, it will appear not less repugnant to these than to the most ancient usages of other nations and of our own.

It needs little observation to discover that the minds of men are as various as their faces, and that this variety whether it arises from nature or education or both, is as certain to produce a difference in their views of the same subject, as if every man saw it through a differently-coloured pair of spectacles. Nothing is more common than to find men differing upon the mere objects of the senses. But when we come to things which are visible only to the mind's eye, and are not to be determined by a foot rule or a bushel measure; when we have to deal with motives and intentions, with the credibility of testimony, with conflicting probabilities, and inferences from evidence we have bid farewell to all unison of opinion, we have arrived in the very regions of doubt and disagreement.

Now the questions which juries have to dispose of are the most doubtful difficult and complicated, which can arise from the refinement and complexity of men's transactions in an advanced stage of society. They are riddles which would have puzzled Edipus and the Sphinx too. And as if they were not sufficiently knotty of themselves, the mistake, suppressions and misrepresentations of witnesses

combine to render them still more intricate and perplexing.

In these circumstances it would be contrary to all experience, if a real unanimity of opinion existed in the vast number of cases in which juries pretend to find unanimous verdicts,—it would be a lie against nature, and nothing short of a miracle. Our ancestors who contrived this scheme for solving the riddles of the law knew well enough for experience soon taught them, that to take the free and unforced opinions of each of the jury and expect them to be unanimous, would be childish folly,—hence they found a contrivance exactly suited to the genius of the age for extorting that agreement which they were determined to have. If the head of a juror was impenetrable his stomach was made of softer stuff. The ancients indeed or some of them, conceived that organ to be the seat of reason, but I never heard of any people who made so direct and forcible an appeal to it as our forefathers. Those were the days of unanimity and uniformity. If a man ventured to dissent from his fellow-catholics he was burned,—if he would not agree with his brother jurors, they were all starved together, consenters and dissenters. The old writ “*de heretice comburendo*” has been long obsolete, but the starving of jurors still astonishes the nineteenth century and raises the laughter of Europe. It is true it is never carried to the point of actually killing a juror outright. The judge has a discretion by the modern practice of remitting the torture when it is approaching the killing point. As in the dungeons of the Inquisition a surgeon always stood by and felt the pulse of the victim, when his agonised frame was breaking, to see that his sufferings were not pushed too far for nature to endure, so the judge in an English court of law in the nineteenth century,—“the judge of that law which boasts the attribute of mercy,”—plays the surgeon to the unhappy jurymen who are guilty of the heinous crime of differing in opinion from their fellows, and only remits the torture of famine when a juror’s life is in danger. It is a “degradation” to follow a system which clings to so insufferable a piece of barbarism, and which after having abolished the torture of prisoners and criminals, inflicts it on jurymen. “Not one joy more revolting or absurd would it be if the jurors were tied up to a post and flogged till they agreed.” Yet monstrous as it is, it cannot be dispensed with so long as unanimity is exacted. The one monstrosity begets the other. Do away with starving system and you will no longer have unanimous verdicts. Is this consequence so alarming that any extremity is to be

endured first? Shall the most difficult questions of property and liberty be decided, by a simple majority of the judges? Shall the questions of peace or war and the fundamental laws of the kingdom, be decided by a majority of the House of Commons; and are you afraid to entrust questions of mere debts, trespasses and slanders to the majority of a jury? Shall the principle of a majority be decisive in all assemblies of men, in your companies, your institutions, your public meetings, your elections, your vestries, your corporations, your courts, your parliaments,—everywhere but in your juries? “Behold the amazing force of custom!” Had this starved unanimity never existed in this country before, were it now to be introduced for the first time, all England would cry out against it as piece of Gothic barbarism, as a violation of nature, as a contradiction to all our other institutions, as a disgrace to the age. But because it has been in use for centuries, it is submitted to by all, defended by very many, and cried up by some as the perfection of policy. After this I cease to wonder that the Chinese make their women’s feet into goat’s hoofs, or that the wise Egyptians worshipped crocodiles. I have no right to be astonished that the Spartans whipped their children to death at the altar of Artemis, or that the old Romans allowed the creditor to slay his debtor like a sheep; for “I see every day in our own courts, a spectacle sufficient to remind me that custom exerts a dominion” over mankind in every age and in every country, against “which reason in vain rebels, and humanity pleads in vain.”

The truth is that “this starved unanimity of juries, is one of the unmistakable features of barbarism which betray the “barbarous age in which the jury system arose.” The people who devised it had no books, and no newspapers, no letters, no post-office, no coaches: they beat their wives and sold their children for slaves; they amused themselves by baiting bulls and bears, and thrashing hens at Shrove-tide; they drowned old women as witches and massacred Jews for their wealth; they were a people whose language would be hardly intelligible to us, whose costume would be outlandish and whose manners brutal. In everything but blood, they were far more foreigners to us, than the present inhabitants of Vienna or Moscow. These were the authors of our jury system.

I have consumed so much space in exhibiting the causes which render the verdicts of juries unsatisfactory, that I can only take a rapid glance at the evil consequences which necessarily flow from them.

The first is that certain classes of men have no confidence in the administration of justice. They do not believe that they are fairly dealt by in the jury-box.

No insurer resisting a life policy, no great company resisting a claim for an accident, no lawyer or doctor suing for his bill, no gentleman contesting the charges of a tradesman, no landlord suing for a forfeiture, no person who has rendered himself by any means unpopular, can safely depend on the impartiality of a jury. The fact is familiar to every lawyer and calculated on beforehand. Nay, even a merchant of London suing a trader of a country town is not safe in a disputed case with a jury of that town. In parts of Wales, a Welsh jury can hardly be got to do justice to an Englishman against a Welshman. This is not as should be. The judges of the fact ought to be as much above suspicion as the judges of the law.

Another consequence is the disgraceful scenes which constantly occur in the jury-room, and even in open court. What can be more scandalous to the administration of justice than the disclosures which frequently take place of the secrets of the jury-room? It would be easy to produce a score of cases out of the law reports, many of them recent, in which it has been proved that the jury tossed up or drew lots for the verdict; and there was a case at Peterborough in which they settled their dispute by balancing a poker, the fall of which to the right hand decided the guilt of the accused; and it has sometimes occurred that one obstinate fellow with a mule's head and a camel's stomach has starved the other eleven into a verdict against their convictions and their oaths. Still more frequent are the cases in which the "most monstrous compromises have been made between the conflicting opinions of the discordant twelve. To illustrate what I mean, take a late case in which a defendant was sued for publishing an anonymous letter containing the vilest charges against the plaintiff. If the defendant was the author of it the case called for the severest damages, and the only dispute was whether he was the writer or not. The jury found for the plaintiff, but astonished everybody by giving only a shilling damages. The secret was that some of them thought the defendant was not the writer at all, and only consented to give way to the rest on condition that the damages should be reduced to nothing. So conscious indeed are the judges of the scandal that would result from the disclosure of what passes between the jury, that they have done all they can to prevent the curtain from being

drawn, and to shut out the public eye from the interior of the jury-room. When new trials have been moved for and supported by affidavits of jurymen that they had tossed up for the verdict, the Court have laid down a rule that they will not hear such affidavits (a). Now as no one is allowed to enter the jury-room but the officer of the Court, and he only to ask if they are agreed, the effect of this rule is that the Court will hear nothing of what passes within that sanctum. What does this amount to but a practical declaration that the behaviour of juries when retired from the public eye will not bear the light? Nor is the ignorance or absurdity of uneducated juries confined to their private room—but is frequently displayed in open court by the most farcical verdicts. Not long since in the Sheriffs' court when the usual question was put "For whom do you find?"—the reply was "We are maguanimous for the plaintiff." And only the other day on a woman indicted for keeping a disorderly house, the verdict was "Not guilty, but we hope she won't do it again." There is hardly an assize which would not furnish a chapter for "Punch."

Another evil, and a very great one, is the exclusion by law of certain kinds of evidence, because, as the phrase is in our law books, it would have too much influence with a jury. Thus until recently the testimony of the parties and all persons who had any legal interest in the success or failure of the action was excluded. On the same principle what is called "hearsay evidence" is with few exceptions rejected by our law. "If it were to be assumed that one long inured to judicial habits might be able to assign to hearsay evidence just so much and no more credit than it deserved, yet upon the minds of the jury, unskilled in the nature of judicial proofs, evidence of this kind would frequently make an erroneous impression. Being accustomed in the common concerns of life to act on hearsay and report, they would naturally be inclined to give such credit when acting judicially; they would be unable to reduce such evidence to its proper standard when placed in competition with more certain and satisfactory evidence; they would be apt to forget how little reliance ought to be placed upon evidence which may be so easily and securely fabricated (b)."

(a) *See observations of Barons Parke and Alderson in "Burgess v. Langley," 1 Dowling & Lowndes, 23.

(b) Starkie on "Evidence," p. 38., n.

So when a man is tried for felony who has been before convicted of a similar crime, the law will not allow the jury to know of his former conviction until they have found him guilty of the present charge (6 & 7 W. 4, c. 111), because they would attach too much weight to it. This is the reason openly stated in the books. Now in excluding these and several other branches of evidence, the law just shuts up so many ways of arriving at the truth; not because they would not be of the greatest service in the hands of a thoroughly qualified and practised judge, but because the raw and inexperienced dozen of farmers or petty tradesmen do not know how to deal with them. In hundreds of cases it thus happens that the only avenues to the truth are closed. It is an every day affair for the knowledge of a loan, or a contract, or an essential fact in a cause, to be confined to a solitary witness since dead, but who has written an account of the transaction while fresh in his memory, 'ante litem motam,' and who was open to no suspicion. Yet in no such case is the evidence admissible, though there be no other to be got. Even a receipt for money by a witness since dead has been excluded.

Another evil, and of every day occurrence, is that causes involving long accounts or requiring a scrutiny into numerous matters of detail are utterly impracticable to be tried by a jury, and are therefore obliged to be referred to an arbitrator who can patiently examine and note down the details 'seriatim.' How constantly this occurs is well known to those in the habit of attending the courts; and when it does happen, the expense and delay of the trial is thrown away. Over and over again I have heard parties, before they got into court, declare that they would insist on having the case tried out, and would never consent to refer it to arbitration; but upon the attempt being made in court to go into the details in dispute, the judge, the jury, the counsel, and the parties, have all become convinced of the impracticability of dealing with it there, and it has by universal consent been turned over to an arbitrator. This is the consequence of setting twelve men to do what one could manage infinitely better.

The last evil I shall mention, and the greatest, is the number of erroneous verdicts that are come to, and of new trials that are requisite to correct them. "Trial by jury in civil cases," said Lord Mansfield, "could not subsist now without a power somewhere to grant new trials. There are numberless causes of false verdicts, without corruption or bad intention of the jurors. They may have heard too much of the matter before the trial, and imbibed prejudices

without knowing it. The cause may be intricate: the examination may be so long as to distract and confound their attention.

"Most general verdicts include 'legal consequences,' as well as propositions of facts: in drawing these consequences the jury may mistake and infer directly contrary to law. The parties may be surprised by a case falsely made at the trial, which they had no reason to expect, and therefore could not come prepared to answer. If unjust verdicts, obtained under these and a thousand like circumstances, were to be conclusive for ever, the determination of civil property in this method of trial would be very precarious and unsatisfactory. It is absolutely 'necessary to justice,' that there should upon many occasions be opportunities of 'reconsidering' the cause by a new trial' (c). That the power to rectify the mistakes of juries is requisite no one disputes; but new trials are a heavy grievance to the parties. They double the delay, anxiety, and expense of an action, and sometimes render it wholly abortive, by protracting the proceedings until one of the parties dies or becomes insolvent, or leaves the country, or gets disgusted with the delay and abandons the suit, or gladly accepts an unprofitable compromise. But though a large part of the time of the courts is spent in motions for new trials, it would be a great mistake to suppose that the number of new trials granted on account of the errors of the jury represents the full extent of those errors. No: a crowd of cases must be added, in which the parties rather submit to a mistaken verdict than incur the risk and expense of appealing to the court,—another class in which the courts will not interfere with the discretion of the jury,—and a third, in which the courts refuse to send the case to a second jury on account of the smallness of the sum in dispute. In regard to this last description of cases, there is no correction for the mistakes of the jury; they have it all their own way.

This is in civil causes; but how is it in criminal cases, where new trials are never granted after an acquittal, and very rarely after a conviction, so that the errors of the jury go wholly uncorrected. Apply Lord Mansfield's observations to criminal trials, and what do they lead to? There is not a session or assize passes, but we see notorious criminals escape in spite of convincing evidence, and to aggravate the evil, the law never allows a man to be tried again on the same charge. It is thus that the whole herd of villains who live by plunder come to look on the

(c) *Bright v. Eynon*, 1 Burrows, 393-4.

law as a rotten old net, full of holes through which any slippery fish may escape.

I have now done with the mischiefs arising from trial by jury, not because the catalogue is exhausted but because time and patience would fail me to detail them all. And when I survey the numerous evils flowing from the defects of this tribunal, I cannot help thinking they will before long force on the public the consideration of the question, whether the time has not arrived when the wants of the age loudly call for an improved mode of trial, and when the jury must experience the same fate so far as its general application is concerned which the ordeal, the battle, and the law-wager have in turn undergone.

Some of the defects indeed which have been exposed are capable of an easy remedy whenever men shall cease to regard the jury system as an ark too sacred to be touched by the hand of innovation. The useless and excessive number which now composes a jury may be reduced, a majority may take place of unanimity, and the jury-room may cease to be the only place in which the law furnishes innocent men; but how shall we get rid of the want of previous qualification, the rustic ignorance, the partiality, the prejudice, the rude haste, the want of publicity and responsibility, which are the most glaring evils of juries? These are defects which seem inherent in the system, and inseparable from it; they are organic "diseases" which can only be cured by "death". Though I should stand alone in this conviction, I will avow it. After long reflection on the numerous and heavy grievances which flow from the unlimited application of this form of trial, I for one am convinced that it is not adapted to the refinement of the age we live in, that it has had its day and must soon be thrown aside into the huge heap of antique legal lumber, or limited in its application to a very confined class of cases.

No one pretends to deny that it has served important uses in times past; that when it first arose and usurped the place of the ordeal and the battle, it was a great stride in the path of justice and civilisation; that it has often since then shielded the subject from the power of the crown, and the poor from the oppression of the rich; that it has tended to temper the rigid rules of law by the eternal principles of common sense and justice, and to harmonise the administration of an antiquated and technical system of law with the public feeling and opinion of the time being,—though even in this its merits have been over-rated. Neither is it necessary while

introducing a better system, to deprive liberty of any security which it derives from the trial by jury. Retain it by all means if you will, in all prosecutions for political offences, and in every case wherein public liberty may be concerned or wherein the judge may possibly have a bias. But let all ordinary cases be heard by a man of superior discernment and practised skill, whose natural powers have been sharpened by a life spent in forensic contests, who cannot be easily deceived by a witness, because he is conversant with every kind of testimony; nor by an advocate, because he has been an advocate himself; who is fit to hear and to estimate at its true value every species of evidence hitherto excluded, which may open an avenue to the truth; whose attention is not to be exhausted by the length, nor his comprehension distracted by the complexity of the evidence: give the suitor I say, a man with these qualities, who performs his functions under the public eye, who is in no hurry to get away to his shop or his farm, whose very trade and business it is to weigh, investigate and decide on questions of doubt and difficulty: in a word, let the facts be decided by the same experienced judges as the law, and the whole body of the law will feel renewed and invigorated by the change. A great part of its supposed uncertainty will vanish, new light will pour in from sources of evidence now shut up, the scales of justice will be held with even hands, the heavy grievance of new trials will be vastly diminished, the suitor will obtain his rights with greater speed, economy and certainty, and the criminal will no longer find refuge in the sophistry of counsel or the weakness of juries. (d).

(d) In concluding these pages, the writer cannot forbear a reflection on the felicity of the times we live in, when we feel our liberties so secure, as to expose without apprehension the infirmities of that ancient Institution which was in days gone by the only refuge of liberty! A Frenchman or Italian would be apt to exclaim of us, "O fortunatos nimium, sua si bona norint."

THE LESSON FROM RUSSIA

A FEW NOTES ON THE EFFECT OF THE
RUSSIAN REVOLUTION ON THE PROBLEM OF
HOME RULE FOR INDIA

THE COMMONWEAL OFFICE, ADYAR, MADRAS, INDIA.

1917

P R E F A C E

We have put together in this short pamphlet some reflections on the successful Revolution in Russia as it touched and inspired us in India. There were big meetings held in London, reports of which are also included, and we draw pointed attention to Commander Wedgwood's reference to India. Not only our educated classes but our masses also should be made aware of the work of the poor down-trodden Russians. What moral grit the stricken peasant of Russia displayed will be an inspiration to the equally if not more stricken peasant of India.

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THE LESSON FROM RUSSIA

THE freedom of Russia has sent a wave of enthusiasm through the world of Democracy. Those Democrats who have been watching the trend of events since the outbreak of War in August, 1914, were in a mood of despair, for the real issues of the struggle were made obscure by the dust that militarism had raised. The upholding of the rights of Nationality, the destruction of militarism, the recognition of the ideal of freedom as superior to that of benevolent despotism—all these had somehow got mixed up with their opposites, and we were forced to say with regret that a moral triumph for Prussia was involved in the methods that came to be adopted on the free soil of England. The passing away of the Voluntary System, the treatment meted out to conscientious objectors, the alteration in Parliamentary procedure, the attack on the freedom of the Press, the treatment of the Irish question, etc.—smelt of a spirit akin to Prussianism. The ideal of Great Britain for the independence of Belgians and Serbians and Rumanians lacked the great support of example which her fair and just handling of India and Egypt ought to have afforded. The Russians were fighting for freedom abroad while they were in chains at home. Thus the whole aspect was gloomy; wise Nemesis delayed the victory, and brought about the miracle of the retreat of the early days, the surrender of Warsaw, the middle of Gallipoli, the fall of Kut. At length the much tyrannised-over Russians, perhaps helped by their religious fervour and intuition, saw that Prussianism could not be broken on the battlefield when Petrograd kept Poland and Finland in chains, when the Tsar was a kind of Kaiser. They fought against Prussianism, and have won the most important battle of the War. "All the world knows now that a real Russia exists"—a Russia different from the one that the world fancied.

The new National morality established by the Russians in their own land will enable them adequately to introduce

reforms in international morality. The foundations of that international morality are laid down in a few pregnant words by President Wilson: "Every people should be left free to determine its own polity." On that principle the future of Internationalism has to be shaped. On that principle, as a writer in the April *Nineteenth Century* points out, "the Danes of Schleswig must be free to rejoin the Danes of the Kingdom; the Prussian Poles must be reunited with their brethren in a united and autonomous Poland; the people of Alsace and Lorraine must be allowed to choose the flag under which they live". It is that ideal of Liberty and Freedom for all, that has made us call this War a War of Ideals:

The dim apprehension of that fact has furnished the stimulus and the inspiration to the free peoples who are in league to-day against the Empires whose very existence is a denial of the principle of liberty, a negation of the doctrine of Nationality. Is it imaginable that the freedom-loving sons of Canada, New Zealand, Australia and South Africa would have sprung to arms to secure a territorial readjustment in the map of Europe, or even to curtail the dynastic ambition of Hohenzollerns or Habsburgs?

The writer, Mr. J. A. R. Marriot, in both the above quotations, forgets India. If the Poles and the Alsations and the Danes must be left free to determine their "own polity," then India too must be so left free. And if Australia and New Zealand, Canada and South Africa have "sprung to arms," so has also India, as much as she was allowed to spring forward by the shackles imposed by her short-sighted Government, which did not see what the Indian leaders saw years beforehand, and in their conceit and high-handedness did not act up to the professed advice.

At length the tide is turning. The blow struck by the Russians is having its effect, and by a strange destiny, the Revolution brought forth these words in reference to free England:

Do not go home without realising that in British prisons some of the best young men of this generation are imprisoned for civil and religious offences. Do not forget that in Russia the prisons have been opened.

Such were the words uttered by Mr. George Lansbury, who presided at a huge meeting of British Democrats. Mr. Nevinson, who knows Russians well, recalled the names of heroes "who

marched stage by stage from one dreary barrack to another in the frozen desert of Siberia," and he called upon the large audience to rise to its feet, "to show that we do not forget". Mr. Bellamy, of the National Union of Railwaymen, was there to encourage his people; there was Dr. Lynch, the Irishman, who stood up and demanded "immediate amnesty for political prisoners"; Mr. Zangwill "did not thank her, he congratulated her, and rejoiced that Russia could at last look the world in the face".

These British people will help India. In them lies our hope. How we wish there could have been an Indian present at the great gathering to speak on our behalf. However there was one noble Englishman who spoke for our Motherland. He said:

We have a duty also to India. I know well enough that unless we adhere to the old English principles of freedom for all the people in the British Empire, unless you treat your fellow-citizens as though they were reasonable individuals, they will not become reasonable individuals, and you will not end by glorifying the name of England but by degrading us in the dirt. I want to see as a result of this heroic struggle, in which the Indians have taken no small part—I wish to see an acknowledgment that men who are fit to stand side by side with us in the trenches are also fit to stand side by side with us in the government of their own country.

The man who spoke these truthful words was Commander Wedgwood, M. P., and we must thank him for thus championing the cause of Justice. Thus the lesson from Russia is supreme, and our people must learn it as soon as as possible, and must not forget to teach it to our masses.

BRITISH DEMOCRACY AWAKE

THE huge Albert Hall was packed on March 31st by as many of the English Democracy as could get into it, "the *Herald* crowd," as it was called, with the *Herald's* Editor, gallant George Lansbury, in the chair. The *Herald* says:

"The meeting at the Albert Hall on Saturday night was a portent, a prophecy: it was in the literal sense epoch-making: it marked a turning-point in the mood, the spirit, the activities of our country. Over and over again during the speeches one note was struck, and always it met with the most enthusiastic response—the note of *beginning*. Here, one felt, was the first light of morning, the first flush of returning liberty in the black skies of loss and oppression and reaction. The great industrial Triple Alliance, and all the more active elements in the Socialist and Radical movements, found representation in the words and personalities of the speakers; and more impressive even than the courage and eloquence of the speeches was the electric and indescribable spirit of the audience. Every seat in the vast hall was occupied. People stood three deep in the gallery. Five thousand were turned away disappointed from the doors. Russian, Polish, and Jewish refugees were there in great numbers, British working men and women in greater numbers still—all joined together, not merely to congratulate Russia upon its Revolution, but to initiate a revolution in the political, social, and economic life of the British Commonwealth. The most passionate applause of the evening was evoked by two points, insisted on by several speakers—that the soldiers who

REFUSED TO SHOOT

their comrades in the streets of Petrograd have set an example for all the workers of the world to follow; and that when, *and only when*, the soldiers and workers of the world have learnt this lesson, wars will cease. Nobody who was among that more than ten thousand can any longer doubt the signs of the times. The capitalist Press has indulged over this meeting in its usual senseless

orgy of suppression and misrepresentation. But to tell lies is not to alter facts. The meeting was out and out and through and through for Peace, for personal liberty of speech and action, for the ideals of Social Democracy and for

THE RED INTERNATIONAL

—and more—the pettifogging legislation by which our bureaucrats have tried to silence and cripple the democracy was smashed into a thousand fragments. Free speech was not just preached on Saturday—it was practised. The speakers stood up to say what they believed, without fear or favour. Truth showed its greatness and prevailed.”

The great meeting passed the following resolution :

“This meeting sends joyful congratulations to the Democrats of Russia, and calls upon the Government of Great Britain and of every country, neutral and belligerent alike, to follow the Russian example by establishing Industrial Freedom, Freedom of Speech and the Press, the Abolition of Social, Religious, and National distinctions, an immediate Amnesty for Political and Religious offences, and Universal Suffrage.”

What will it be for our India when Great Britain follows in Russia's track, and frees her captive Nations, Ireland, Egypt, India ?

Mr. H. W. Nevinson described what Russia had paid for her freedom. He said :

“Men and women, I have been put up to speak first after our Chairman, simply because I happen to be one of the few Englishmen who were present during those glorious and terrible scenes of the Russian Revolution in S. Petersburg and Moscow twelve years ago; and in consequence I have had the privilege granted me of speaking to a theme which requires no eloquence, and for which the highest eloquence would be inadequate—for I am to speak to the honour and memory of those men and women, boys and girls, who have suffered and died for the cause of Russian freedom. It is a long and glorious roll of honour, and from that roll of honour I would not exclude any party or denomination or race in Russia which has contributed to the struggle. I would include the people who were called Nihilists, and the Social Democrats of Russia, and the Social Revolutionaries of Russia, and the victims who fell on Bloody Sunday,

January, 1905, and those who died, as I saw them die, upon the barricades in Moscow, and those who died in that terrible repression of the Revolution under the hang-ropes that they called Stolypin's necktie, and those who were betrayed by provocative agents more infamous in ignominy even than the man Gordon, whom our Government has not disdained to use; and I would also include those who have striven within the last ten years for the maintenance of the Duma, be they Social Democrats or Constitutional Democrats. I will not trouble about a long list of names, but I think here we must mention the names of a few women, such as Sophie Perovsky, Vera Figner, Vera Zassulitch, Marie Spiridonova, and Katherine Breslikovsky, the aged grandmother, as she is called, of the Revolution, who now, to our great joy, is returning from Siberia to the country she has served. And here in England we are especially bound to mention the names of glorious Russian exiles, such as Stepniak, Felix Volkovsky, Nicholas Tchakovsky, and that great friend of us all, and of all men of good will, Peter Kropotkin. Those are great names, but what shall I say of that great cloud of witnesses, unnamed, unknown, unremembered, the men and women, the boys and girls, who spent years of hideous monotony shut up in such fortresses as that of SS. Peter and Paul; where on one side you can see the marble domes of the Tsar's Dynasty, and on the other the glorious walls sanctified by the blood and tears of the martyrs of freedom? What shall I say of those men and women who were forced to march from stage to stage, and from one dreary barrack to another, on their way to the inhospitable and cold deserts into which they sank as into the oblivion of the tomb; or those I have seen hunted up and down the streets of S. Petersburg and Moscow by mounted Cossacks with heavy loaded whips of leather and lead; or those who were hunted to death by the secret police, who were betrayed by provocative agents, who were handed over to the most terrible tortures that fiendish ingenuity can invent, or the human frame can endure, in the torture chambers of Riga and Warsaw? It is less than ten years ago that men and women, 2,100 of them, were hanged within three years, an average of about two a day, and that the Russian prisons were crowded with 181,000 men and women, chiefly political prisoners, and that 84,000 were sent to Siberia. It is for us that those men and women suffered; in tears and sorrow they planted the seed, of which we now reap the harvest in joy. With

their stripes we are healed. In 1885 the American writer, George Kennan, in passing through Siberia, met Katherine Freshkovsky, then a young woman of thirty or thirty-five, and as they parted she said: 'We may die in prison and exile, our children may die in prison and exile, our children's children may die in prison and exile, but something must come of it in the end.' Something has come of it now, and I wish we could penetrate the darkness into which those noble men and women have passed, so that we could tell them that not all in vain has been their heroic struggle. Men and women, there is a custom, in Russia, at the beginning of meetings like this, which, I think, we might imitate here to-night. It is the custom; in memory of those who have suffered and died for the Revolution, for all the audience to rise and stand silent for a few seconds, to show that they and we do not forget what has been done for the Cause. I call upon the audience now to rise in memory of those who have died and suffered for the Russian Revolution, to show that we do not forget what they have done for us all."

At these words the audience rose and stood silent for some seconds.

Commander Wedgwood, M. P., did not forget India. He said:

"The Russians are free, but they have given us the hope of freedom, and when we rejoice with them, as we do to-night, with the Russians of to-day and the Russians of yesterday, let us remember also all those rebels in other countries, in England and elsewhere, who have gone under in the struggle. (A voice: 'Liebknecht'.) We march on. Russia is free. What are we to do? Every real freedom lover stands for the equality and freedom of all the races. If we feel our responsibilities for the belief that the democracy is international and irrespective of race or colour, then I say that it is our duty everywhere to support those democracies when they are in trouble, and to support them by every means in our power.

"The next thing is this: it is our duty to look to our own house and to see that that freedom which we acclaim in others is extended to the best of our ability, not only to our own people here, but to all people in our great democracies. I pass over the Irish question, because it is an impertinence in an Englishman to deal with the injustices of Ireland. (Applause.) I pass over,

too, the women question: their freedom, I hope, is coming so far as the suffrage is concerned—(applause)—but the suffrage is nothing at all. It is not a question of whether women are going to vote, but a question of custom and public opinion. We are dealing with a beautiful Bill in Parliament 'for the better persecution of prostitutes,' and it has got a clause in it to say that any girl of eighteen can be run in off the streets and put into a home until she is nineteen! It is in the interest of society! Every crime against freedom is promoted in the interest of society! I pass over these things because the point I want to make is, we have a duty also to India. I know well enough that unless we adhere to the old English principles of freedom for all the people in the British Empire, unless you treat your fellow-citizens as though they were reasonable individuals, they will not become reasonable individuals, and you will not end by glorifying the name of England but by degrading us in the dirt. I want to see as a result of this heroic struggle, in which the Indians have taken no small part—I wish to see an acknowledgment that men who are fit to stand side by side with us in the trenches are also fit to stand side by side with us in the 'government of their own country.'

We thank Commander Wedgwood. Would that H. H. the Maharaja of Bikanir had been there to speak for his country. A King himself, he has the right to consort with Kings, but we would that he had come face to face with the English Democracy, to feel the heart of England, and learn where lies the hope of India's freedom.

DAWN IN THE EAST

RUSSIA, by one of time's ironical revenges, has become the envy of less happy lands. Three great meetings, in the Albert Hall, the Queen's Hall, and the Kingsway Hall, last Saturday, acclaimed the Revolution, and in doing so tempered their joyful welcome to the new Russia by strong protests against reaction at home. Comparisons between the present state of Russia and of England were inevitable in a gathering like that at the Albert Hall, which was organised by the advanced wing of the democratic movement and addressed chiefly by leaders of the "rebel" movement. Serious inroads have been made upon the traditional liberties of the British people since the War began, and although ultra-patriotic people in the Albert Hall may have felt that England is hardly so black as she was painted, and that Liberty can hardly be called a lost cause in a country where it finds so many resolute and able defenders, the opportunity of bearing witness against reaction was too good to be lost. A magnificent demonstration of faith in democratic principles was the result. Many remarkable meetings have been held in the Albert Hall, but none so tremendously enthusiastic, so sure of its ground, so convinced of the validity of the principles it was designed to support. Revolutionary Russia, in freeing herself, has set free a new hope for mankind, which finds its incarnation in such huge and unanimous assemblies, filling every corner of the vast amphitheatre and rising tier upon tier to the very roof. There one saw Democracy in its most exalted mood: its generous ardours, its radiant hopefulness, its passionate idealism, its splendid faith in the redemptive force of freedom, gave to the gathering an almost Pentecostal quality.

THE REVOLUTIONARY ROLL CALL

It was an unforgettable experience to share the emotions of this immense audience of democrats, over which Mr. George Lansbury presided. There was a veritable crisis of feeling when Madame Clara Butt stood forth upon the platform to sing,

to the tune of the Russian National Anthem, the words of an old hymn invested with a new and poignant significance :

God the All-Terrible! King, who ordainest
Great winds thy clarions, lightnings thy sword ;
Show forth thy pity on high where thou reignest ;
Give to us peace in our time, O Lord !

Alternate verses were taken up by the audience, and the appeal was poured forth on a wave of surging emotion which shook the foundations of self-control. Madame Butt sang with glorious passion, sustaining in the most extraordinary way the tremendous pressure of the audience which carried it beyond itself. Deep called to deep, too, in that moment of strained silence when Mr. H. W. Nevinson, the first speaker after Mr. Lansbury, called the roll of the brave men and women who have striven and suffered for liberty in Russia. No man had a better right to speak of the Russian martyrs than Mr. Nevinson ; he was one of the few Englishmen present during the terrible scenes of the Revolution in Petrograd and Moscow twelve years ago. Beginning with the Decemocrats of 1825, Mr. Nevinson recited the names of the Russian martyrs, known and unknown—men, women, boys, and girls—who suffered and died for freedom, who marched stage by stage from one dreary barrack to another in the frozen desert of Siberia, in which they sank at last as into a tomb. He told the audience that it is a custom in Russia at such meetings as this to remember the heroes and martyrs of Revolution, and he called upon the audience to rise to its feet "to show that we do not forget". With a single impulse and with impressive dignity, the audience responded to this suggestion and stood up in proud silence.

MR. LANSBURY AND MR. SMILLIE

From the chair Mr. Lansbury read the resolution which sent joyful greetings to the democrats of Russia, and called upon the Governments of Great Britain and of every country, neutral and belligerent alike, to follow the Russian example by establishing industrial freedom, freedom of speech and the press, the abolition of social, National, and racial distinctions, an immediate amnesty for political and religious offences and universal suffrage. He said this was the most representative international assembly since the International Socialist Congress in this country. Russia's freedom has been secured, he went on, because for the first time in modern history working-class soldiers have refused

to fire upon their brothers and sisters. A great roar of cheering emphasised the statement, to which more than one speaker later recurred. "Do not go home," Mr. Lansbury added, "without realising that in British prisons some of the best young men of this generation are imprisoned for civil and religious offences. Do not forget that in Russia the prisons have been opened." Mr. Robert Smillie, the Miners' President, said it was a splendid thing to be able to speak freely about Revolution... in Russia. He hoped Russia was really free; but he was sure that the Nation of which we form a part is not a free Nation. His reference to the conscientious objectors, like that of Mr. Lansbury's, was emphasised by a thunderous cheer. It is for the people of Great Britain, he said, to prove to the Russian people whether we are worthy to send a message of congratulation to them.

MR. ROBERT WILLIAMS AND MR. ISRAEL ZANGWILL

Mr. Robert Williams, speaking as the leader of the transport workers, said that the rights of organisation and combination and civil and political liberty had been challenged by the reactionary classes in this country. The Defence of the Realm Regulations were calculated, in his judgment, rather to defend the privileges of the profiteering classes than the safety of the sovereign realm. He declared that they were resolved to use the powers of the great Triple Alliance of railwaymen, miners, and transport workers against industrial conscription, against "indentured white labour," as against indentured coloured labour. We want to send men like Robert Smillie to represent to the Russian democrats the true attitude of the industrial democracy of this country. Mr. Israel Zangwill delivered a charming speech as a representative of the race which has suffered most from the old Russia. Many of his sentences had a cutting edge. We democrats, he said, never denounced Russia, but only the Russian Government. We welcomed the representatives of the Duma to our shores; it was only the Tsar that we refused to allow to land here. We have always recognised that there was a holy Russia; but it was not the Russia of holy candles and ikons, but the Russia of the holy struggle for freedom. Passing on to speak of the inroads upon British liberties during the War, Mr. Zangwill became very epigrammatic. Lloyd George, diluted by the Constitution (he said) is all very well; but unalloyed George is a National danger. Freedom, it is said, broadens slowly down from precedent to precedent, but our

freedom seems to be falling down from precipice to precipice. For that great gesture with which Russia freed his people Mr. Zangwill said he did not thank her, he congratulated her, and rejoiced that Russia could at last look the world in the face; he rejoiced that this burden is now lifted from the soul of Russia as from the body of the Jews.

MISS ROYDEN AND COMMANDER WEDGWOOD

Miss Maude Royden delivered what was, perhaps, the most generous and free-hearted speech of the evening. It had been suggested more than once that English democrats, because they are in the grip of reaction, had little right to praise Russia, but at least (said Miss Royden) the spirits in prison may send a message to the spirits who are free. We can rejoice that Russia is free, with no grudging after-thoughts about ourselves. She dwelt upon the message of the Russian literature, with its insistence upon the principle that every human being counts for one, and none for more than one. "Why, where do you think the Russian people could have stopped when they were deciding who should have political freedom, before deciding to give it to every man and woman?" Commander Wedgwood, likewise, had the courage to speak counter to the prevailing sentiment of the audience. [He is pro-War, *Ev., N. I.*] If we believe that democracy is international, he said, it is our duty to support that democracy everywhere when it is in danger and trouble by every means in our power—an obvious reference to the part democrats like himself have played in fighting against German aggression.

DR. LYNCH AND MR. ALBERT BELLAMY

One of the most interesting figures on the platform was Dr. Lynch, the Irish rebel, whose career is a romance. He has a wild Irish eye, and, watching him, one saw the very spirit of Revolution at work, ardent, high-spirited, and fundamentally reckless of consequences. He stood up when his time came, and demanded "an immediate amnesty for political prisoners and the establishment of the Republic". He did not qualify this demand. Some one in the audience suggested that the Socialist Republic was wanted, but Dr. Lynch said promptly that for the moment he would be content with any sort of Republic. Amidst all the falsity and hypocrisy of the War it had become more and more apparent (he

said) that this is a War in which on the one side we have militarism, Tsarism, autocracy, and the Trust of Kings; and on the other the Republic. Perhaps the course of events will be, first Russia, then Germany, will get a Republic, and then England—for we have got so much from Germany. He would like to see, not Imperial Federation, that Pecksniffian imitation of the German model, but a ring of British Republics; and he believed that this programme would be found to be the solution of the Irish problem also. Mr. Albert Bellamy, of the National Union of Railwaymen, and Mr. W. C. Anderson, each in his own way, drove home the moral of the Revolution as they would have the British workers understand it.

POLITICAL SANDHYA-KALAM

"The happiest event of our generation is now triumphantly completed."

So says the *Nation*, referring to the Russian Revolution. We can well understand the significance of such a statement, if we realise that the great event is not going to affect "the land of the Tsar" that was, but all the countries of the world in the West and East alike. A thick, black, ugly cloud obstructed the shedding of the Light which the Sun of Democracy gives, and on Russian soil the darkness of autocracy reigned supreme. A change has taken place, but it began some years ago.

Over a decade ago, when Russia made an alliance with France and Great Britain, the first step was taken. British Radicals often disapproved of England joining hands with a country where liberal and democratic principles were not duly honoured. On the other hand Russian Liberals greeted the Alliance with joy and hope, for they saw the significance of the event. A Nation, like a man, is known by the company it keeps; a Nation, like a man, is affected, for good or ill, by the code of morals and honour of its friends. They believed that it would strengthen their cause and not that of the autocracy, if Russia stood on the side of France and England, and against Germany and Austria.

Their hope is fulfilled. Nor is the Revolution a blessing for them only. Russia belongs to the West, but also exists in the East. Thus the whole world is to be touched. Says the *Nation*:

We hope from these tremendous events something for ourselves, much for Europe, everything for Russia. Something is changed in London and in Paris—aye, and in Berlin also—because hope has released a people that sat in darkness.

If Berlin and London and even Republican Paris hope for something from the Revolution, how much more must Delhi and Simla hope? The *New Statesman* says:

For two continents the death-knell of absolutism is being sounded.

The Russian Revolution deals a deadly blow to Prussianism, which the Powers of Light wish to destroy. More than all her achievements on the Eastern Front, more than all her dash and push and victory in Turkey, the Russians have helped the progress of Peace by freeing themselves from the tyranny of Prussianism at home.

It is the greatest event of the War against autocracy, bureaucracy, absolutism everywhere. "The Russian heaven has worked at once on the Irish question," says the *Nation*. It has affected public feeling in India too, though the masses are yet to learn the inner meaning of the Revolution in Russia. *The Christian Commonwealth* describes it as the "Dawn in the East".

Who will explain to the Indian peasants what their brothers in Russia have done? Who will make clear to our masses the inner meaning of this great action which has made a Nation free? Modern people talk of "psychological moments"; our ancient Knowers have taught us the religious significance of "Sandhya-Kalam"—periods, short or long, which join the old to the new, leading individuals and Nations from bondage to Freedom, from mortality to Immortality. Such an hour is this. The Sun of Liberty rose for the children of Nippon a few years ago; it has been rising for waking China; it is now rising for the Russians. Our hour is approaching. India too shall be free: but the sons of India must sacrifice as the sons of Japan did; they must undergo the change of heart that those who were slumbering in the Celestial Kingdom passed through; they must stand up for Right and Justice as the Russians did. Here in India all these lessons are being learnt, and our long connection with Great Britain, who to-day champions the cause of Freedom, entitles us to hope and to stand expectant. We are worshipping in the small hours of the morning.

The Sun of Freedom will soon rise for us also.

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