

workmen, or in extending to them special facilities for emigration, or by some other plan, founded on the equitable principle that society should make some compensation to persons whose employments have been sacrificed to its industrial necessities.

I have been obliged by the length to which this paper has extended, to omit all reference to the means employed by trade societies to restrict the use of apprentice-labour. This subject I hope to discuss at an early opportunity.

V.—*Observations on Trial by Jury, with Suggestions for the amendment of our present system.*—By Arthur Houston, Esq.

[Read Monday, 15th April, 1861.]

TRIAL by Jury is not unjustly reckoned one of the main pillars of our national liberty, and has contributed in no mean degree to that harmonious union and happy co-operation among the various members of the body politic, to which philosophic historians have attributed the stability of our political institutions. For, as the legislative department of government is connected with the people by the elective franchise, so is the executive department by that system which forms the subject of the present paper.

At a period, therefore, when law reform occupies so large a share of public attention, this institution is well deserving of our most serious consideration. It is well worth our while to seek how we may best preserve its essential characteristics in principle, and secure all its advantages in practice; how we may disentangle it from any regulations calculated to trammel its free action, and surround it with every means and appliance necessary to render its operations immediate and effective. For, should it fail in any of these particulars through the force of extraneous circumstances, there is great danger of its gradually falling somewhat into disuse, and ceasing to constitute that important element in our judicial system which it has done almost from time immemorial—a tendency towards which may, I think, be detected in the character of some enactments of comparatively recent date.

In this paper, therefore, I propose briefly to examine:—

1. What is the fundamental principle of trial by jury, and what are the advantages resulting therefrom?
2. The machinery by which the system is worked in this country and in England, and how its efficiency is thereby affected.
3. The defects, if any, existing in these institutions, and their remedies.

Every one acquainted with the constitutional history of our country is aware that, though this mode of trial has existed at least from the Saxon conquest of Britain, yet, during that interval, it has undergone a great variety of modifications in its form. Originally it appears that those who composed what was called the jury, consisted chiefly of the parties believed to be best acquainted with the cir-

cumstances of the case, those, in fact, who would now be placed in the witness-box; the persons, if any, who were by when the crime was committed, or the event in question took place; the relatives and friends of the accused or of the litigants; the individuals residing in the locality, practising the trade, or otherwise qualified to speak on the collateral subjects connected with the suit—all these people conferred together, after having made oath to deliver true judgment; and by their decision on the matter of fact the presiding judge was guided. Under this arrangement a conflict of evidence of course often arose, and appears to have been determined merely by the weight of testimony on either side: thus the system too often degenerated into one of what was called compurgation, especially in criminal cases, where the acquittal of the accused seems to have depended more on the number of those whom he could induce to come forward and swear to his previous good character, than on any nice adjustment of the probabilities of evidence.

How or when this imperfect system was replaced by one in which the functions of witness and juror were separated does not distinctly appear; probably, indeed, the change was gradual, and confined at first to particular localities; but when the Norman kings definitively recognised and sanctioned the mode of trial itself, they naturally enforced conformity to that standard which they considered the most desirable.

Habituated, as we are, to consider the very essence of a jury to be that of certain individuals, limited to the mystical number of twelve, wholly uninterested in the case, cooped up in a box, and shut off from all communication with the outer world, except in the court, it is not easy to realise the idea that anything like a satisfactory verdict could have been returned by a heterogeneous mixture of witnesses and jurymen, some of them personal adherents of the parties concerned, and all, doubtless, wrangling in a manner truly edifying. Yet, that such must on the whole have been the case, we may rest assured, from the fact that the privilege of thus "appealing to the country," as it was called, was one for which a fine was cheerfully paid to the king; and the acquisition of the revenue thus obtainable is said to have been induced the astute Henry Plantagenet to introduce the practice of sending round judges on circuit. From a comparison between the ancient and the modern course of procedure in cases tried by jury, we can discover but one characteristic common to both, namely, that private persons should judge of matters of fact, leaving questions of law for the decision of those qualified by a specific training for the performance of that duty. This therefore is the essential element of the system, and the source from which its benefits have flowed. No matter what may be the number of the jury, the conditions under which they arrive at a verdict, or the degree in which that verdict involves legal considerations, the fundamental principle is, after all, that questions of fact shall be decided not by the court but by the country.

The following may be enumerated as among the chief advantages attending this system:—

1. As regard the effect on the litigants or traversers themselves. Men more readily accept the judgment of their fellows than those

who are set in authority over them. They are rather inclined to consider the latter as a hostile power, only too ready to punish and oppress: the former they view in the light of unpires and peace-makers, and patiently bow to their decision accordingly.

2. As regards the effect produced on the community in general. In the first place it arms with the irresistible force of public sanction, every sentence passed by the law. The sympathy which weakness, even when guilty, is wont to excite when found arrayed against strength, no longer exalts a criminal into a hero, or sanctifies him into a martyr. Every man makes it a personal matter; he feels that he might have been called on to decide on the fact of the guilt or innocence of the accused, and acquiesces in the justice of the decision which has been arrived at, and of the sentence that has in consequence been pronounced.

Moreover, as has been well pointed out by M. de Tocqueville, trial by jury forms an invaluable school for training the community in the exercise of some of the most important duties of a citizen, and some of the highest departments of their moral and intellectual nature. This has been so admirably expressed by the writer above alluded to, that I cannot do better than quote the substance of his judicious observations on the subject. "The jury," he remarks, "and especially the civil jury, serves to imbue the minds of the citizens of a country with a part of the qualities and character of a judge, and this is the best mode of preparing them for freedom. It teaches every man not to shrink from the responsibility attaching to his own acts; and this gives a manly character, without which there can be no political virtue. It forces men to occupy themselves with something else than their own affairs, and thus combats that individual selfishness which is, as it were, the rust of the community. It is a school into which admission is free and always open, which each juror enters to be instructed in his legal rights, where he engages in daily communication with the most enlightened of the upper classes, where the laws are taught him in a practical manner, and brought down to the level of his apprehension, by the effort of the advocate, the instruction of the judge, and the very passions of the parties in the cause.

3. As to its influence on the administration of justice. If the determination of the guilt or innocence of the accused, and of the merit of the respective claims of two litigants, were left to the decision of a judge, a twofold danger it is thought would arise. It has been generally considered that the previous training of a judicial personage more or less unfits him for the investigation of broad questions of fact. He has been accustomed, it is said, to confine his reasonings within so narrow a circle, has been obliged to concentrate his attention on points so minute, that his mental vision is incapable of taking a comprehensive view of subjects involving a variety of complicated facts; just as a philosopher who had passed his life in microscopic examinations would find himself unable to realise the wonders of the heavens revealed by a powerful telescope. This is true, in a degree at least, and as long as such an opinion prevails, it is well not to be forced to run counter to it, but to be able to relieve the judge of that labor for which he is at all events *believed* to be natu-

rally unfitted, and to employ his services only where their value is universally admitted and felt.

Besides, some suspicion of partiality must always attach to a judge who has a personal interest in the decision he is called on to pronounce. Such is the frailty of our race, that neither the most exalted station nor the loftiest genius is exempt from the influence of private advantage. The examples of such men as Lord Bacon, who though the "wisest and brightest," was yet the "meanest of mankind," afford a melancholy corroboration of the truth of the statement. This consideration, however, has lost a great deal of its importance since the judicial office was rendered independent of the crown, and the exponents of the law of the land can deliver their honest opinions without fear of being degraded from their rank at the caprice of an offended sovereign. Yet judges are no more immaculate than other men; and the less the temptation to act with partiality, the better.

But in avoiding this danger, we have fallen into another: while guarding against unfairness on the part of the bench, we have failed to shield ourselves completely from the same peril in the jury-box. It is easy to perceive that the greatest risk incurred in this respect is when the question at issue involves political or religious considerations. Notwithstanding the much deplored depravity of human nature most men's hearts are, after all, in the right place. We never hear of sympathy with thieves or assassins as such, except among those who make robbery and murder their profession. Whenever, therefore, a man is arraigned for the commission of any such crimes, the feeling of the bench, and the jury, and the country at large is the same; there is no chance of a sentiment of pity or admiration for the act rising up between justice and her victim. Indeed the risk is quite in the opposite direction: it not unfrequently happens that people confound indignation against the crime with indignation against the accused, and are ready to wreak summary vengeance on the latter, without much troubling themselves to discover whether he deserves it or not.

In such cases as these there is no difference of opinion as to the right or wrong of the alleged act; there is room for doubt only as to its perpetrator. There are some actions, however, which derive their character for morality from no principle of natural equity, but depend in this respect on the artificial judgments of society, and may therefore be held laudable by one branch of the community, and culpable by another.

Such are all matters connected with politics and religion, or, more properly speaking perhaps, party and sect. In these every one chooses, or at least adopts, a side, and insensibly allows all his opinions to take a corresponding bias, whenever they come in contact with the fixed principles thus recognized.

When, therefore, the offence imputed involves a reference to such artificial standards, the danger of partiality arises with more or less certainty. Even where the act is one which is of itself criminal in the general estimation of mankind, yet, if it has also a political or sectarian as well as a moral aspect, the impartiality of those who are to sit in judgment on it is more or less severely taxed. And here

it is to be observed, that it does not necessarily follow that people are always morally criminal in giving an opinion contrary to what the facts warrant ; they are often only morally blind. The connection between processes of thought and processes of feeling is so subtle and mysterious, that to separate them frequently requires the most vigorous exertion of the will. The wish is father to the thought, says the proverb ; and how often do we find that the opinions of our maturer life have been affected by the prejudices of our childhood, without our once suspecting that such was case, until some accidental circumstance suddenly reveals the truth to us ?

Having thus indicated the advantages derived from the system of trial by jury, and also some of the dangers inseparable from it, the problem that remains for solution is, how to secure the former, and how to provide against the latter, in the highest possible degree.

To effect the first object, it is clear that the system must be extended to its utmost practicable limits. It must be made applicable to the greatest variety of cases, and rendered as certain and as speedy in its operation as it can. These recommendations will bring it into repute with private persons who have differences to settle, and with the state which has criminals to prosecute. Besides this, it must be so contrived that the members of the community shall feel no repugnance to serve as jurors, lest this high duty should be discharged unwillingly, or fall into unworthy hands, and cease to afford that moral training which it is calculated to supply.

The second object, the avoidance of the risk of partial verdicts, can only be accomplished by taking care that where such risk arises, the jury shall be composed of those who, by position and education, are most capable of arriving at a decision unaffected by interest or prejudice.

Now, the points in which our existing system seems to violate these principles are the following.

1. In the rule requiring the verdict to be returned unanimously.
2. The coercion employed to bring about that unanimity.
3. The want of a more respectable element in common juries.
4. The mode adopted in the selection of juries in general.

For the rule insisting on a unanimous verdict various origins have been assigned, but to me it appears to spring from that maxim of our law, which declares that the accused shall always *stand* the benefit of the doubt. If the case against him were such that he could not be proved to the satisfaction of the entire of the twelve men who had listened attentively to the evidence, a doubt would in fact subsist, and he would be entitled to the advantage of it. Whatever may have been its foundation, however, the rule itself must soon have come to be attended with considerable inconvenience ; for as it seldom happens that twelve persons, selected at random, can make up their minds to agree on any subject presenting the slightest difficulty, as some are stupid, some perverse, and many constitutionally reluctant to do any act whereby a life would be forfeited, or severe punishment incurred, the ends of justice must have been frequently defeated. Besides, if one unscrupulous person who had an interest in the acquittal of the prisoner, or in the decision of the suit, managed

to obtain a seat on the jury, he could by his single dissent neutralise the votes of his eleven impartial colleagues.

It was perhaps under these circumstances that the idea of bringing some pressure to bear on the jury, in order to overcome their disinclination to concur unanimously in the verdict to which an honest interpretation of the evidence would naturally lead. Originally this pressure seems to have been much more violent than at the present time. It is pretty certain that in case of lengthened disagreement, the jury were, or could be, carried about in a cart from one assise-town to another, in the retinue of the judge who tried the cause; and when all hopes of agreement were finally relinquished, these worthy citizens were ignominiously dragged on hurdles for a considerable distance, and shot into a ditch—operations which they must have found very refreshing after their protracted labors. In modern times, happily, these barbarous practices, though not explicitly forbidden by the legislature, have been altogether discontinued; but two engines for enforcing unanimity are still in use, namely, starvation and imprisonment.

Let us consider the policy of requiring complete unanimity, and of the means adopted to ensure it.

In the first place, it strikes me as rather singular, that in the whole of our legislative and judicial system this is the only department in which it is thought essential that such universal agreement should exist. When cases are heard in appeal, the decision of the greater number of the judges is the decision of the whole: even where opinions are equally divided, the matter is not thereby left in doubt, the decision of the court below being affirmed, which is virtually a recognition of the same principle. Again, the narrowest majority in parliament is sufficient to determine matters affecting the dearest interests of the community, life and property, peace and war. Then, too, in all bodies formed for the purposes of local self-government, the same principle prevails. Yet why should not absolute unanimity be required in all these instances, as well as in the one we are discussing? Why not insist on it when a case comes before the Law Lords, or the full court in Westminster or Dublin? Wherefore not lock up the Commons in parliament assembled, till they gave their individual assent to some measure of reform, for instance, or as unanously rejected it? What feelings of brotherly love might not be aroused and fostered in the bosoms of members of civic corporations, poor law boards, and vestry-meetings, under the gentle stimulus of indefinite confinement in each other's society, and a total suspension of all supplies! How would their exasperated feelings gradually subside at the approach of dinner hour, till they were found complimenting each other when that interesting period arrived! But seriously, if it is found that the affairs of the community are adequately managed on the principle of decision by majority in all instances but one, it will require a very strong case indeed for rejecting the principle in that one solitary case. If a fact is proved to the complete satisfaction of eight or ten impartial men out of twelve jurors, the certainty of its truth is sufficiently established for all practical purposes.

But whatever may be the thought of the policy of insisting on en-

ture unanimity, there cannot, it seems to me, be two opinions on the impolicy of endeavouring to create it artificially ; and that, too, by curtailing men's natural liberty, and depriving them of necessary subsistence—starvation and imprisonment, without even the poor consolations of fire or light. "The jury," observes Blackstone, "in order to avoid intemperance and causeless delay, are to be kept without meat, drink, fire, or candle, unless with the permission of the judge, till they are all unanimously agreed."

Now the hypothesis on which such a system rests is altogether erroneous. It supposes, in the first place, that some of the jury are unwilling to bring in a verdict in accordance with the evidence, and in the next, that this reluctance will be overcome by bodily suffering actual or apprehended. Now, granting the first proposition to be true, the second will be true only on condition that the repugnance of a section of them to agree to a just verdict is not greater than the resolution of their colleagues to act conscientiously ; and also that the powers of endurance possessed by the two sections respectively are in the same relation. Obviously the latter is a mere accident, and as self interest is a more powerful motive than abstract love of justice, it will prompt one man to make greater sacrifices of health and ease, than another of equal physical capacity, not under its influence. Thus the hypothesis utterly fails. But, in addition to this, bodily exhaustion so impairs the intellectual powers, and so blunts the moral faculty, that we may reasonably infer that in complicated cases the probabilities of a righteous verdict being returned are thereby materially diminished. When the whole system is completely prostrated by long days of painful attention to conflicting evidence, and long hours of fasting, sleeplessness, and anxious deliberation, the necessity of coming to some conclusion is at last the only idea that can be steadily kept in view : and if there be an active partisan of either side, doggedly resolved not to give way, he may confirm the wavering, bring over the hostile, or, by protracting the struggle, necessitate the discharge of the jury as a matter of humanity.

However, the principle I am attacking not only vitiates the proceedings of each individual jury, but pollutes the whole system from its source : for, by enhancing artificially the trouble and annoyance attendant on the discharge of the functions of a juror, it operates to lessen the number at all willing to serve in that capacity, and to force the court to avail itself of those who, on each occasion, may present themselves, and who in political cases especially, are just those whose interest in the decision is strong enough to overcome their repugnance to the prospective physical suffering they may have to undergo, and who are therefore exactly the persons whom it would be judicious to exclude. It may indeed be said that the heavy fines to which those summoned by the sheriff are liable for non-attendance, and the right of challenge enjoyed by the litigants, effectually remedy those defects. But in practice they are found inadequate to accomplish this object, for the common sense and common justice of mankind revolt against the idea of inflicting a penalty so heavy on a man, for merely indulging a natural antipathy to neglecting all his private concerns, and undergoing the tortures of fasting and confinement ; so that in point of fact the fines are seldom or never levied, and this uncer-

tainty altogether destroys their effect : each man flatters himself he will escape with impunity, and absents himself accordingly. The court, therefore, is fain to put up with whatever materials accident or interest furnishes, and the right of challenge is exercised in vain where all are nearly equally objectionable.

Thus the existing system, by requiring unanimity, operates to protract the proceedings unnecessarily, and throws immense power into the hands of any of the jury who may be interested in the decision : the means taken to enforce this condition materially reduce the capacity of even the impartial members of the panel to return an upright and intelligent verdict : the prospect, too, of such probable personal suffering and pecuniary loss, tends to confine the duties of a juror in each case to the less intelligent and less unprejudiced classes of the community ; and, lastly, all these defects operating to render the system of trial by jury less efficient, a reluctance to have recourse to its assistance arises in consequence : hence the legislature has been led to substitute for it the summary jurisdiction of the magistrate. The power of the executive has thus been dangerously augmented, the tie which bound it to the people weakened, and the moral training afforded by serving on juries considerably narrowed in the sphere of its influence.

What remedy these defects require is not difficult to perceive. Let the verdict be returned by the votes of the majority, and not necessarily by a unanimous concurrence. And perhaps it would be judicious to increase the number on the jury, and to require a certain definite preponderance of votes to constitute a verdict.* However, when all had given the matter fair consideration, when each had arrived at a conclusion and recorded his vote, no compulsion whatever should be employed to compel them to alter their respective opinions. On the contrary, their wants should be carefully attended to during the period of their deliberations, and if they once expressed an opinion that the required number were not likely to agree to a verdict, and requested to be discharged accordingly, that request should be immediately complied with.

Moreover, in order to improve the quality of the materials of which common juries are composed, at least for the trial of cases of more than average difficulty, perhaps a leaf might be borrowed from the Scottish Statute-book. I know there is a strong repugnance on the part of the English jurists to adopt any principle of the law that prevails north of the Tweed : but the maxim, "*fas est ab hoste doceri*," might for once be strained so as to include that region. Now, according to the plan adopted there, and which was introduced by the Acts of 55 Geo. III. & 6 Geo. IV., every jury in criminal cases consists of 15, and of these 5 must be what are called "special jurymen," possessing a property qualification of £100 per annum. The influence of these respectable men on their less affluent colleagues must prove very beneficial, must raise the character of the entire body in

* Since the above passage was written, I have observed that a somewhat similar recommendation was made by the Common Law Commissioners in their 3rd Report, namely that of the twelve jurors the verdict of nine should be held sufficient to decide the case.

the estimation of the litigants, and give proportionate weight to the verdict.

Amongst other defective characteristics of our system is the shamefully inadequate remuneration, if remuneration it can be called, which is made to jurors, even those on the special jury list. When a man has been obliged to attend day after day in court, waiting to be called on, has patiently endured the tedious witticisms and stereotyped eloquence of prosy *nisi prius* lawyers, has listened with stifled indignation to the conflicting evidence and evasive answers of dishonest witnesses, has then bestowed considerable time and infinite trouble on the cases he may have been called to decide—surely to hand him a shilling seems a wanton insult. His business, no matter how humble, has perhaps been meanwhile going to ruin, his health has been undermined by anxiety and fatigue, the seeds of a fatal disorder, even, as I myself have known, may have been laid, and at the end of his labours he is rewarded with a shilling! In the name of common decency let this degrading ceremony be dispensed with. When the sum of one shilling was fixed as the fee for trying a cause, its value was probably four or five times as great as now, but even then it was grossly disproportionate to the services rendered. Let a recompence commensurate with the time occupied in the hearing of the case be therefore substituted for the fixed payment of a shilling or a guinea. This, too, would still further diminish the difficulty in finding a respectable panel, and jurors of a comparatively superior class would feel less reluctance to attend.

Finally, with respect to the defects in the present mode of selecting jurors. This, most of you are aware is, as far at least as common juries are concerned, as follows. A return of persons qualified to serve is made in each parish: from this is compiled the jurors' book of each country. Out of this book the sheriff extracts the names of any number between 48 and 72, to try all issues civil or criminal which come on for trial at the assizes, or sittings at *nisi prius*. The order in which these men are liable to be called on to serve is determined by the homely expedient of shaking tickets inscribed with their names in a box, and drawing them as in a lottery, one by one.

This system seems to allow too great discretion to the sheriff: he may empanel just such jurors as he chooses, and pass over those who make interest to be exempted; or he may call those whom he judges likely to return a verdict in accordance with his inclination. No doubt a challenge "to the array," as it is styled, is allowed wherever a suspicion of such foul play exists, but this, even if an effectual remedy for the evil, must yet greatly tend to retard the course of justice. In practice, however, this plan of selection operates as a virtual tax on that portion of the community which entertains the greatest respect for the behests of the law. Once a juror, a juror for ever. The luckless wight who, having the fear of a fine before his eyes, has once attended punctually the summons directing his presence, especially if he has incautiously betrayed signs of superior sagacity during the course of any trial he may have been entrapp'd for, generally finds himself victimised—sacrificed at the shrine of justice, for the remainder of his natural life. While some men escape without once being within hail of the court crier, others grow old in the jury-

box. Any one who frequents our courts may recognise the rueful countenance of these unfortunates year after year.

That the burthen of discharging this duty should be so unequally and often so oppressively distributed, there appears to be no unavoidable necessity in the nature of things. The law has provided adequate machinery for the enrolment of all persons duly qualified to serve: and if the jurors'-books were compiled with sufficient care, there cannot be a doubt but that the number of names would bear a very high ratio to the total number of cases to be tried at any one time, and leave but an insignificant proportion of the duty to the share of each individual. It is much to be feared, however, that the returns are but very imperfectly made. The first step, therefore, towards reform in this direction is, as was pointed out by Dr. Hancock at a recent meeting, to enforce strict compliance with the provisions of the law on the subject, to see that none but those duly qualified are returned, and that none who are so qualified evade the responsibility.

Having thus secured an ample supply of persons qualified to serve, the sheriff should summon, *in rotation*, a number of jurors bearing a definite proportion to the number of cases to come on for hearing; the order in which these are called on to serve being decided as at present by lot; but once having been summoned, and having once attended, they ought not to be liable to be called again, until the entire list on the jurors'-book was exhausted. This, as you will observe, would obviate the necessity of ever having recourse to a challenge to the array, for no suspicion of foul play on the part of the sheriff could arise when the panel was selected by rotation, and marshalled by lot.

The suggestions made in the course of this paper may be thus recapitulated:—

1. The verdict to be decided by the votes of a definite proportion of the jury.
2. Coercion of any kind no longer to be employed to extort a reluctant verdict.
3. The introduction of a "special" element into common juries, wherever cases of peculiar difficulty seemed to demand it.
4. The remuneration of jurors to depend on the time occupied by the case.
5. The functions of the sheriff in the impanelling of juries to be limited to the duty of procuring the attendance of those who became in rotation liable to serve.

By these simple changes, which do not in the slightest degree infringe on the fundamental principles of the system, it seems me possible to divest it of most of the hardships which at present attend its working.