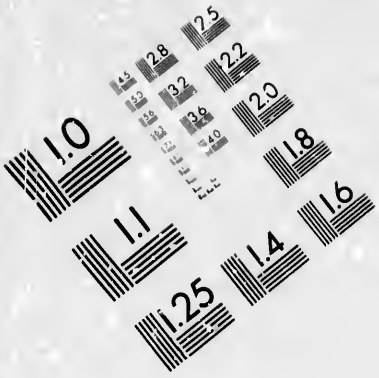


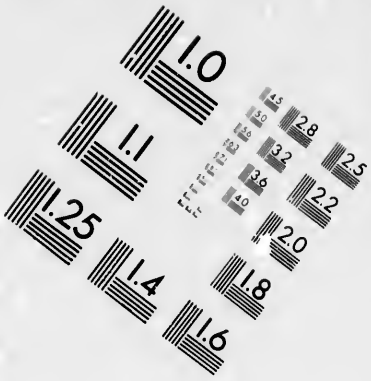


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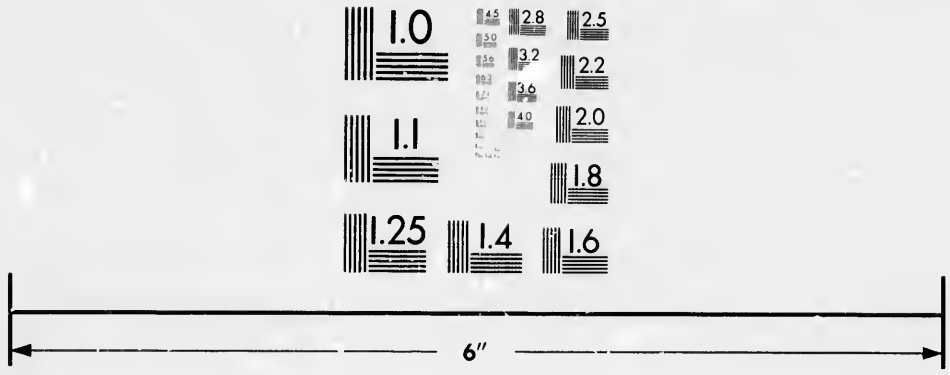


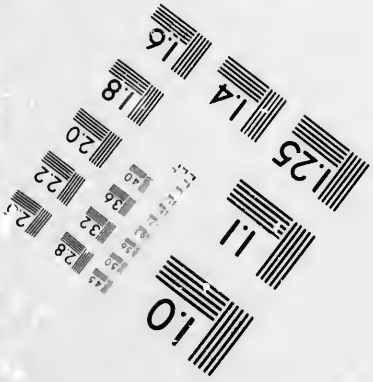


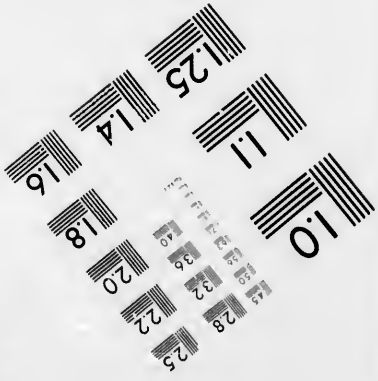


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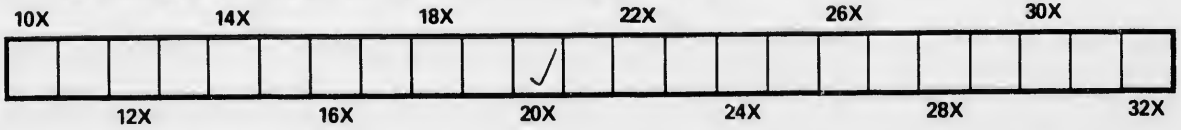

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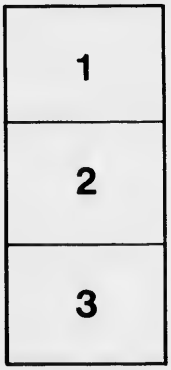


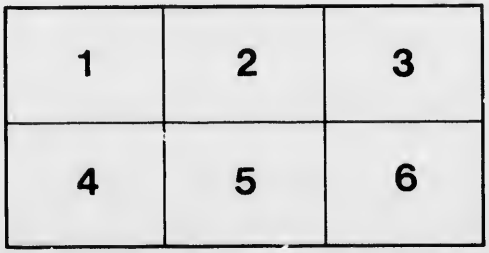


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# "HOW SAY YOU?"

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A Review of the Movement for Abolishing the

# Grand Jury System

IN CANADA

BY

JOHN ALEXANDER KAINS

OF OSGOODE HALL, BARRISTER-AT-LAW

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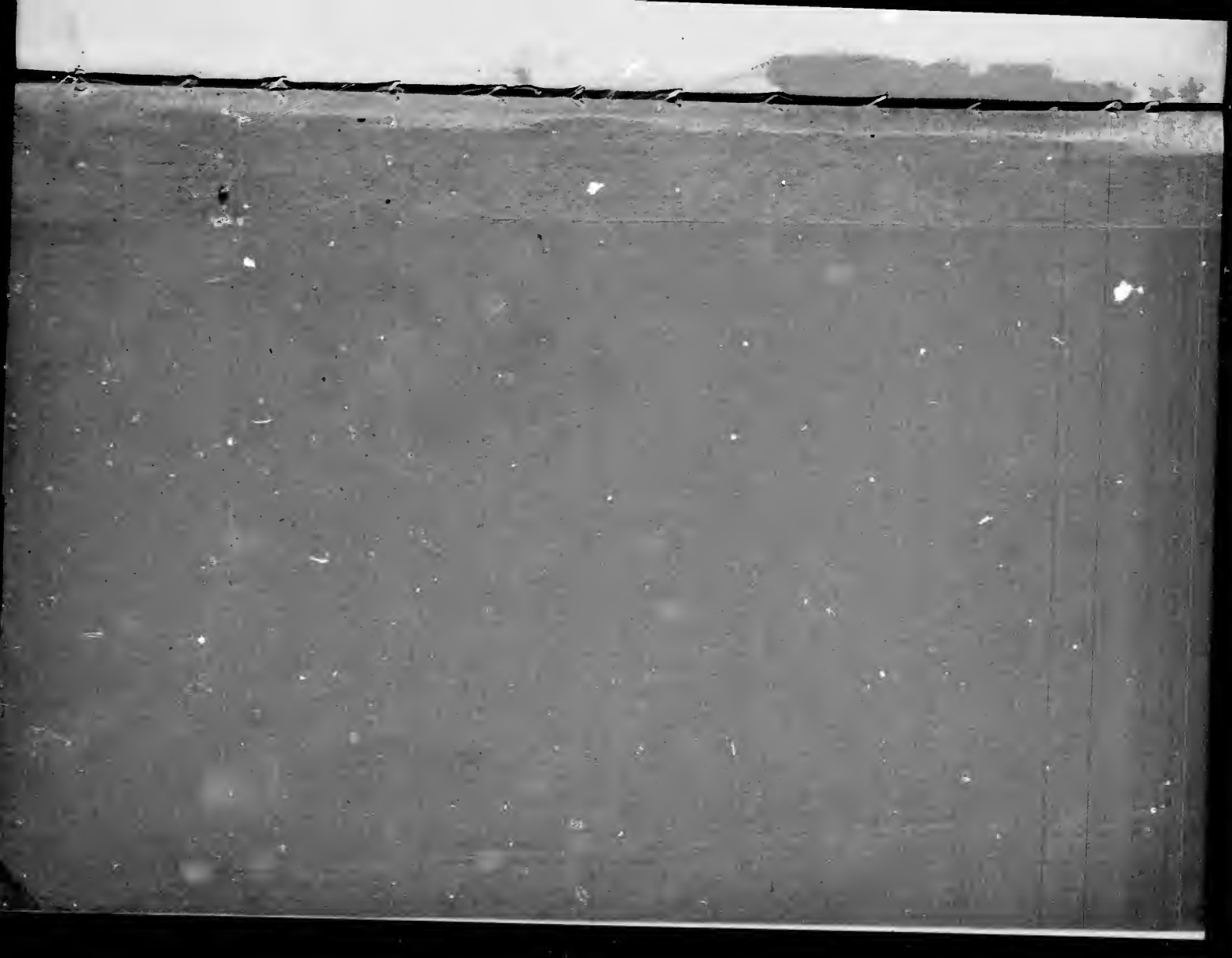
THE JOURNAL, ST. THOMAS
1893



# "HOW SAY YOU?"

A Review of the Movement for Abolishing the

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IN CANADA

BY

JOHN ALEXANDER KAINS

OF OSGOODE HALL, BARRISTER-AT-LAW

THE JOURNAL, ST. THOMAS
1893

TO THE HONORABLE

Sir John Joseph Caldwell Abbott, K. C. M. G.

AND

TO THE HONORABLE

Sir John S. D. Thompson, K. C. M. G.

*The Premier and Minister of Justice, respectively, of the Dominion of Canada,*

THIS COMPILATION

—IS—

*In recognition of their distinguished talents and ability, respectfully inscribed.*

## TABLE OF CONTENTS.

# PREFACE.

THE question of the abolition of the Grand Jury system in Canada, which, for a considerable period, had received more or less attention from the Bench and from the public and legal press, acquired about three years ago fresh impetus, when the Honorable Senator Gowan, in his place in Parliament, inquired, among other things, if the Government had under consideration the propriety of submitting a measure looking to a change in the system, and substituting therefor one similar to that prevailing in Scotland.

The result of this inquiry, and the action of the Government thereon, subsequently appeared in the form of a blue book containing the opinions of the Canadian judges and some others, which I have quoted largely from in the following pages.

Since the issue of this blue book the press has referred to the question at length ; with singular unanimity still pressing for the abolition of the system. As, however, there was considerable divergence of opinion among the judges, the Honorable the Minister of Justice in introducing, this year, his measure codifying the criminal law of the Dominion (although personally in favor of the change) did not appear to see his way clear to include therein the desired reform, and the matter remains, therefore, as it was.

I find that a good deal of misapprehension exists in the minds of the general public on the subject of abolishing the grand jury. It is thought by many, who appear to have imbibed the belief either from the charges of the judges or in some other unaccountable way, that the grand jury is to be abrogated pure and simple ; when they are informed that, while it is proposed to do this, the idea is at the same time to furnish a satisfactory substitute for it, they appear to be perfectly satisfied and profess themselves to be anxious for the change.

The judges and the press having discussed the subject, and the matter having reached its present stage, it may well be urged that the public, that large body of laymen who are chiefly concerned in this matter, should be informed of the position of affairs in order that they may be able to form an intelligent opinion. Many of these being practical men are quite competent to pronounce upon the subject ; particularly may this be said of the more intelligent of those who have served, or are eligible to serve, upon grand juries, and of those who are in the commission of the peace.

In addressing myself to this large, influential and intelligent body I may be permitted to refer :

(a.) To the unanimity of the press, both Conservative and Reform, in favor of the change.

(b.) To the vast number of cases in all the Provinces of the Dominion which are now speedily, cheaply and satisfactorily disposed of without the intervention of the grand jury.

(c.) To the position taken by the Government and Legislature of Ontario in reducing the number of grand jurors to thirteen, as shewing that public sentiment, at least in that Province, is not in favor of continuing the present costly system.

(d.) To the large body of judges, of great experience, who are opposed to the old system, and who advocate a new and improved one.

(e.) To the serious objections urged by men of ability against the grand jury.

(f.) To the limited field of labor now occupied by the system as compared with former years, owing to comparatively recent legislation.

(g.) To the fact that the reasons for maintaining the grand jury have long since passed away with the decadence of the powers of the Crown and with the appointment of independent judges.

(h.) And to the further fact that the meanest subject need not fear, under our system of government, the frown of the rich and powerful, while on the other hand the wealthiest cannot purchase immunity from deserved punishment.

The subject is one of extreme consequence, and may be considered as having now entered upon a stage, which, at an early day, will be a final one.

In the following pages the writer has endeavored to review the question within reasonable compass, having regard, however, to such completeness as the data at his command will permit. He is well aware that very much more might be said upon the subject. The most that he can hope for will be that he shall have created in the minds of his readers a desire for further information about a matter which will be found as interesting as it is important.

Being very mistrustful of his powers, he would be more diffident, were it not that he has the feeling that he is doing little else than collate the opinions of the many eminent men whose remarks will be found herein.

St. Thomas, Ontario, November, 1892.

# The Beginning of the End.

" Not in vain the distance beacons, Forward, Forward, let us range,
Let the great world spin for ever down the ringing grooves of change."
—TENNYSON.

In considering the question of the expediency of abolishing the functions of the Grand Jury in relation to the administration of criminal justice in Canada, it would not be particularly profitable (even if space permitted) to inquire at any length into the origin and early history of the system, or to do more than very briefly refer to the signal services it performed in early times, when kingly oppression and judicial tyranny prevailed in England. An examination into these matters would no doubt be interesting from an historical or archæological point of view, but would answer no useful purpose here, owing to the gradual constitutional curtailment of the powers of the Crown and to the great changes effected by modern legislation. I may, however, say, *en passant*, that the question is often asked, " What is the origin of the very remarkable and characteristic system of trial by jury ? " Some popular histories regard the institution as the work of the great and good King Alfred, but doubt is thrown upon this as having no well-grounded historical foundation. In the history of early Anglo-Saxon times may be found that which was undoubtedly the foundation of a tribunal somewhat similar in principle to our Grand Jury.

In criminal cases the twelve senior thegns, according to the ordinance of Ethelred II., were sworn in the county court, that they would accuse no innocent man and acquit no guilty one. These twelve men were a jury of presentment or accusation, like the Grand Jury of later times ; and the absolute guilt or innocence of those accused by them had to be determined by subsequent proceedings, viz. : by compurgation or the ordeal. Whether this is the actual origin of the Grand Jury or not, the Assizes of Clarendon and Northampton established the criminal jury on a definite basis. By the Articles of Visitation of 1194 four knights were to be chosen from the county, who, by their oath, were to select two lawful knights of each hundred or wapenstake—or if knights were wanting, free and legal men—so that the twelve might answer for all matters within the hundred, including all the pleas of the Crown, the trial of malefactors and their receivers, etc. This is the historical Grand Jury.

Those desirous of informing themselves more fully on these ancient and very interesting branches of the subject, may find what they wish in the pages of Bracton, Fleta, Blackstone, Lord Hale, and other early writers, and, in more modern times, in Forsyth's History of Trial by Jury, Hawkins' Pleas of the Crown, Hill on Repression of Crime, Freeman's Norman Conquest, Stubbs' Constitutional History, and in the works of other writers.

Suffice it here to repeat that the institution of the Grand Jury is of great antiquity. It will be found that its great rights and privileges were recognized and secured by Magna Charta, and that in dark and perilous times it stood manfully to its ancient and sturdy traditions, and to the oath which enjoined upon its members that no one should be left unpresented from fear, favor or affection or hope of reward.

That in early days it was, as its friends maintain, the palladium and bulwark of English liberty, cannot be questioned, and if the Crown now possessed the arbitrary powers of those star-chamber times, it would, in the present day,

be as unwise as it would then have been to advocate the abolition of the system.

As, however, the Crown has been shorn of many of its ancient prerogatives and privileges, including the luxury of abusing the liberty of the subject, the propriety of abolishing the Grand Jury may safely be advocated as a step in the direction of simplifying the practice and procedure in courts of justice, and as being otherwise in accordance with the spirit of the age.

It is quite manifest that the liberty of the subject will never again be imperilled by the encroachments of the Crown, or by the tyranny of the Bench, and, while it may be still necessary to have some check on the magistracy in matters involving the liberty of individuals, it does not follow that no other tribunal but the ancient grand inquest is available for the purpose. With the protection afforded by the intervention of a competent, safe and satisfactory substitute for the Grand Jury, and with the assistance of the courts, which even now are constantly called upon to exercise supervision over the decisions of the Justices of the Peace, no fear need be apprehended in this respect.

In France, Italy and many other European countries, in our own North-West Territories, and in some of the States of the American Union, the system does not prevail.

In Scotland, also, there is no Grand Jury, the duty of investigating and bringing to trial in that country being assigned to a public prosecutor, styled the Lord High Advocate, under whom an officer bearing the extraordinary name of Procurator-Fiscal is appointed for each local district. The business of this latter official is to take the initiative in the prosecution of crimes, and, there being no coroner's investigations in Scotland, he also performs the duties usually assigned to the coroner in Canada.

In the following pages it will be observed that I have collected the opinions of a large number of persons who share the belief that this Scotch system, in a modified form to suit a younger country, might safely, and with great advantage to the public, be adopted in this Dominion.

In England, in modern times, the Grand Jury has often been objected to as a superfluous step in the prosecution of criminal offences, and many eminent judges, such as Lords Brougham,* Denman, Chelmsford and others have been very outspoken in condemnation of the system.

Some years ago it was proposed to abolish its functions in cases which had already been before a magistrate possessing similar powers, but, like many another ancient law which has survived its usefulness, it has been found as yet

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*This celebrated judge and law reformer, in a letter to his friend, the Procureur-General of France, expressed himself as follows: "I confine myself for the present to the office of public accuser, a necessary institution in every state, which we entirely want in England. . . . It seems incredible that in a civilized country in which the principles of jurisprudence have been so profoundly examined . . . . . an anomaly as glaring in its machinery as leaving to chance the execution of the criminal law should have continued down to the present day. You will scarcely believe that when a man has been the victim, either in his person or his property, of any crime or misdemeanor, the prosecution, the preferring of the accusation, should not be the duty of any public functionary. The individual who has already suffered from the consequence of the offence, is bound by the magistrate to become the public accuser. He has already suffered much; it is not sufficient; he must bring to justice those who have inflicted this suffering upon him. Hence springs a host of inconveniences too long to enumerate, of which I shall cite but one, and that will be enough. Nothing is more frequent than

impossible to dislodge from its hold on the affections of the English people this almost sacred relic of their memorable past.

Not so very long ago it was necessary that all civil cases in the Province of Ontario, tried in the Superior Courts of common law or in the County Courts, should come before a petit jury. A civil suitor was not then required to ask for a jury, but got one as a matter of course. As the law now is, the suitor, whether the issue involves millions of dollars or only a few hundreds, does not, as a matter of right, get a jury, but must demand one, except in actions of libel, slander, criminal conversation, seduction, malicious prosecution or false imprisonment, and not even in those cases if the parties, their solicitors or counsel waive such a trial; and very often the presiding judge strikes out any jury notice that may have been given and tries the suit himself, even should the result mean financial ruin to the unsuccessful litigant.

The exercise of this arbitrary power on the part of the judiciary has not, as far as I know, been objected to, and it certainly has the merit of cheapening and expediting the proceedings of the courts, which are results now aimed at by the modern law-reformer.

As will appear in the following pages, many of the Canadian judges to whom the matter was referred by the Minister of Justice object to the abolition of the system, and some of them say that public opinion is not yet "ripe" for it.

It will be remembered that in Canada, within a comparatively recent period, some very radical reforms, including the one just referred to, have been made in the law and in the administration of justice, such, for instance, as the fusion of law and equity, the changes with reference to the rights of married women, the extensions made to the franchise, the increased jurisdiction given to criminal and civil courts and police magistrates, the important additions made to the Extradition Act, and the passing of the Devolution of Estates Act in the Province of Ontario, than which as Chancellor Boyd says in Re Reddan 12, O. R. 781: "No greater change has been effected in the law by any recent legislation, when its far-reaching consequences are properly appreciated it may be found that the absorption of realty by personalty tends to systematize jurisprudence in much the same way as the absorption of law by equity." Besides which, numberless other important changes have been made by Dominion and Provincial statutes respectively, which space forbids my referring to.

The reader of the "Ingoldsby Legends" will recollect a laughable sketch of the ancient form of a Grand Jury indictment, long since "reformed" It is, of course, a caricature, but is really very little exaggerated. The indictment has been drawn by the clerk:

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the tampering with the prosecutor by the guilty person, when he chances to be rich. I have known, at the time when forgery was punishable by death, many persons acquitted because they had bought off those who had been obliged to enter into recognizances to prosecute. When the trial began the witnesses did not appear; and one of the strongest reasons in favor of the abolition of capital punishment has been found in the great difficulty of compelling the injured persons to prosecute the guilty. This capital defect does not exist in Scotland or in France. Thus in Scotland it never happens, as with us, that on the one hand the guilty escape, and on the other that, from time to time, prosecutions are inspired by unworthy motives. The Grand Jury affords no remedy for this evil; on the contrary, it is a body acting without the least responsibility, and frequently commencing a prosecution against justice. For, as the majority out of twenty-three jurors decides, we can never tell whether such or such a juryman was one of the twelve who voted for the prosecution, or of the eleven who were of the other opinion."

"With all proper diction, and due 'legal fiction';
Viz.' That he, the said prisoner, as clearly was shewn,
Conspiring with folks to deponents unknown,
With divers, that is to say, two thousand people,
In two thousand hats, each peaked like a steeple,
With force and with arms, and with sorcery and charms,
Upon two thousand brooms;
Entered four thousand rooms,
To wit: two thousand pantries and two thousand cellars.
Put in bodily fear twenty thousand in-dwellers,
And with sundry—that is to say, two thousand—forks,
Drew divers—that is to say, ten thousand—corks
And with malice prepense, down their two thousand throttles
Emptied various—that is to say, ten thousand—bottles
All in breach of the peace—moved by Satan's malignity—
And in spite of King James, and his Crown, and his Dignity."

The remark that public opinion was not "ripe" for these changes was no doubt also used when each one of them was first mooted, and, in the case of the first named, it will be recalled that most strenuous opposition was encountered from many eminent judges and from the common law Bar.

Gradually, however, public opinion was moulded into the required form, and the admirable results achieved have fully answered the expectations of the originators of these valuable reforms.

I venture the prediction that it will be the same with the change herein advocated, and, when a much better system shall have been evolved from the present one, people will wonder how it was such a relic of ante-feudal times was permitted to exist as long as it did.

The popularity of the demand for abolition has of late years become so pronounced that I think the subject will scarcely require the robust treatment recommended by Sidney Smith, who, to prevent the too frequent recurrence of railway accidents, suggested, it will be remembered, the killing of a director or two. I think the public is not as yet in the mood to follow, with a slight change in the *dramatis personæ*, the learned divine's sanguinary advice, but would nevertheless suggest as a possible "safeguard" and "bulwark" for those opposing abolition that the arguments of the other side be carefully "made a note on" by the learned dissenting judges, their former errors be recanted and in that manner future danger be averted. I hope the honorable and learned gentlemen will not, as their reply to this, annihilate me in their righteous wrath, ignominiously dismiss my arguments and my case and say "*De minimis non curat lex.*"

Notwithstanding all the efforts made by those who desire to legislate the Grand Jury out of existence, that system may possibly still be flourishing, somewhere, when Macaulay's New Zealander is engaged sketching the ruins of St. Paul's, but, if the signs of the times are any indication, I very much doubt such will be the case, as I think we are now nearing the beginning of the end.

## A SHORT ACCOUNT OF THE EARLY STAGES OF THE MOVEMENT FOR ABOLISHING THE GRAND JURY IN CANADA.

In Canada the question of abolishing the Grand Jury has for a number of years been urged by the public and legal press, as well as by municipal bodies, judges and others, and even by Grand Juries themselves, and very strong arguments have been employed for the abolition of what has been called "the fifth wheel to the judicial coach."

The earliest reference to abolition in Canada which, in a somewhat limited search, I have been able to find, was made by Mr. Justice Gwynne, now one of the judges of the Supreme Court at Ottawa, in an address to the Grand Jury at the Autumn Assizes held in the City of Kingston in the year 1869, when he is reported to have said: "You are aware that (as indeed is almost invariably the case in respect of all crimes) the charges have already undergone a preliminary examination before magistrates, aided in most cases by the counsel of the Crown Attorney, so that practically the duty of grand jurors is reduced to that of inquiring whether in their opinion (twelve at least always concurring), the depositions taken before the magistrate shew sufficient *prima facie* evidence to justify putting the accused upon his trial. Now, the necessity for the continuance of this second preliminary investigation seems questionable, and it is a matter worthy of consideration whether relief might not without danger to the liberty of the subject be extended to the gentlemen who are called upon to discharge the duties of grand jurors to their own great inconvenience, and with so little practical benefit."

His Lordship, as will appear further on, has not only not changed his mind on this point, but now adduces other, and even more cogent, reasons for the abolition of the Grand Jury.

For several years after this the matter, except being alluded to now and then by the press or by a judge or an occasional Grand Jury, appears to have been allowed to rest.

At first the question of abolition was approached with caution, and few went so far as to advocate any material change, but as the matter came to be more freely discussed, the ranks of the abolitionists became augmented until a very large number of intelligent critics, familiar with its failings, now demand either its abolition or a radical change in its composition. Of those who favor the latter course one of the most recent, and the most important, is the Ontario Legislature, which has, as will be noticed hereafter, introduced and passed two Acts for the reduction of the number of jurors. Although the first of these was repealed by the last, which latter provides that it shall not become law until a proclamation issues, I think it is a considerable stride in the right direction, and only a few years ago would not have been thought of. It is, as has been said, "another nail in the coffin of this venerable institution," because one of the main arguments employed for its retention has been that by reason of the large number of jurors on the panel, justice was more likely to be done than by a more limited number, or by any other system.

There can be no doubt that any system which has been in existence for the very long period of years that the Grand Jury has, will require a considerable effort to upheave it. There is among mankind generally a great respect for antiquity, and any suggested improvement must, in order to be successful, possess some very evident advantages before a change will be tolerated.

Senator Gowan, in his first speech on this question before the Senate, said that "some forty-six years ago I entered on judicial life with something of the feeling that all things are good when old," but "my impressions gradually settled down into the conviction that the Grand Jury had survived its usefulness."

The eminent critic and author, Mr. George Saintsbury, says that in writing the history of a literature or acting as a critic he determines "never to like anything old merely because it is old, or anything new because it is new."

A former county judge of Ontario, His Honor Judge (now Senator) Gowan, before mentioned, a gentleman of ripe experience and great ability, who has actively participated in many important legal reforms in Canada, appears, for very many years, to have strongly favored doing away with the Grand Jury system, and has frequently addressed that body in the County of Simcoe on the subject.

In an address to them at the June Sessions, in the year 1880, he is reported to have said: "The question of the abolition of the Grand Jury has, it is satisfactory to know, attracted considerable attention, and is now being discussed in this and other Provinces of the Dominion; and I notice that a gentleman long familiar with the administration of the criminal law has laid before Parliament a measure on the subject. It is well that the matter should be fully considered before legislation takes place, especially as some differences of opinion prevail. I retain the opinion I have so often expressed—that Grand Juries may with safety and with great benefit to the administration of criminal justice be abolished, and that all that is necessary to retain of their functions may be better and more economically performed by responsible agents of the Crown. But I do not purpose enlarging at this time upon what has been already said, indeed, able writers in the public press have taken the matter up, and little has been left to say in the way of reply to those who wish things as they are, that has not already been well said in the public press, The matter is now before the public. I have attained the object I aimed at in addressing Grand Juries, which was not to draw out an expression of opinion from the particular body addressed. I merely availed myself of these occasions, hoping to direct public attention to what I believe to be a great defect in the criminal law, which a long experience had convinced me required reform—a reform that could be economically, easily and safely accomplished."

At the June Sessions of the following year His Honor again addressed the Grand Jury in the following manner:

"I am told that the question of the abolition of Grand Juries has been brought up for consideration in the County Council for this county, now in session. I am pleased to hear of it, for I know there are many gentlemen in that body who have frequently served as Grand Jurors, and who are thoroughly competent in every way to throw light on a discussion that has elicited some public discussion. The cost attending the selection, summoning and attendance of Grand Jurors is a heavy item in county expenditure, and the question on this ground, if on no other, is of great importance to those who have to provide for the cost. If the Grand Jury may be dispensed with, every one can see there will be a large sum yearly directly saved to the county, the machinery to replace it being provided from the general revenue. I speak with confidence in asserting that a proper and effective substitute can be provided at less than half the present cost of Grand Juries, and so all the purposes they serve could be accomplished by an agency requiring no contribution from the county, and far less expensive to the country. This Province would have the necessary agency and be effectively served by being divided into say five circuits, a Crown prosecutor being appointed for each—answering to the Advocate's Depute in Scotland—while the existing local machinery,

our excellent Crown Attorney system, could be taken advantage of as is done under the Scotch Criminal Procedure in respect to the Procurator's Fiscal in each county. All these officers would have a certain tenure, and the same independence of local influence which the law accords to judges. They would advise whenever necessary, and be under the direction of the chief law officer of the Crown, and thus, without any serious disturbance in our system, criminal prosecutions would be placed much on the same footing as under the excellent Scotch system, for which it has been justly claimed that under it the investigation of criminal offences and the proceedings preparatory to criminal prosecution are beyond the control of popular influence in the local sense, while subject to strict official supervision and to the control of public opinion acting in accordance with the constitution. The Right Honorable the Lord Advocate of Scotland, in an address delivered not long ago at Edinburgh before the Social Science Congress, speaking of public prosecutions, remarked: 'It certainly strikes a Scotchman as singular that English law-givers should be engaged in investigating this problem upon first principles as if it had never been attempted before, when, if they look north of the Tweed, they would find it practically solved to the satisfaction of the community.' I said to a Grand Jury, speaking from this place in 1879: In reforming the Grand Jury system we have a model at home in the Old Land—one long-tried and thoroughly tested; and if the wisdom of a scheme is to be measured by its working and effects the system of public prosecutions in Scotland commends itself for imitation and adoption. With all respect for those who favor the retention of Grand Juries, and who have advocated it, I retain my oft-expressed opinion. I continue to think that untrained, changing, secret and practically irresponsible bodies are not safe tribunals to be entrusted with the power of an enquiry in the nature of a review of the magistrate's decision after open investigation of witnesses. I continue to think that Grand Juries may, with safety and great benefit to the administration of criminal justice, be abolished, and all that it is necessary to retain of their functions be better and more economically performed by responsible agents of the Crown. I have not spoken to Grand Juries to draw out any opinion from the particular body of Grand Jurors I addressed. I am only anxious to avail myself of these occasions to reach the thinking public, hoping that in time the subject may receive the attention it deserves, and Parliament may apply the appropriate remedy to what I believe to be a great defect in the criminal law—a system which an experience of over thirty-eight years has convinced me is unsatisfactory, cumbrous, expensive and easily abused in administration, and not in harmony with the institutions of the country."

I make no apology for quoting these able addresses at length, because I know of no other man in Canada, and I think it will be admitted there is none, better qualified by ability, length of experience and a desire to serve his fellow-men to speak authoritatively on this subject, than the learned gentleman who delivered them. Though of a conservative cast of mind, this able and experienced jurist has not been restrained by any consideration of mere sentiment from speaking out strongly in condemnation of the present Grand Jury system.

## SENATOR GOWAN'S EFFORTS IN THE DIRECTION OF ABOLISHING THE SYSTEM.

It might have been anticipated, and was, indeed, in accordance with the fitness of things, that when His Honor Judge Gowan became a Senator of the Dominion he should, in that wider field for the law reformer, continue his attacks on the Grand Jury system.

Accordingly in the month of March, 1889, he delivered the following masterly and exhaustive address, evidently embodying the result of many years' careful research and observation. This speech is the ground-work of my little review, and I bespeak for it a thoughtful perusal, as the Honorable Senator touches upon some points which I have not space to refer to. He said :

"I quite admit the difficulties in doing away with a long established legal institution—the full consideration necessary before acting. The Grand Jury system in England has existed for ages, and has certainly so far survived. It has been vigorously assailed, but notwithstanding the many changes in criminal procedure it exists ; but other usages and laws which existed for centuries have been swept away, both here and in the mother country, and the public gain thereby was soon clearly recognized. The day has gone by when the cunning work and devices of remote ages are held sacred, merely because it is old, and the worship of legal idols, especially, has in modern days been brought to the test, the common-sense test, of utility and fitness. Change merely for change sake is always objectionable, but cautious, gradual, permanent reform, based on experience, and for the love of excellence, must commend itself to every thinking man.

"Some forty-six years ago I entered on judicial life with something of the feeling that 'all things are good when old,' and I look back on nearly forty-one years of continuous judicial service with opportunity for seeing the actual working of the Grand Jury system, during that time having had occasion to meet these bodies rarely less frequently than four times in the year—sometimes as many as six or seven. I may be excused this reference to myself, my object being to show I am able to speak from ample opportunities for observing. What honorable gentlemen may think of my conclusions I know not. I will only say they have not been hastily formed.

"My impressions gradually settled down into the conviction that the Grand Jury had survived its usefulness, and a study of the Scotch Public Prosecutor system, which has worked well and satisfactorily for centuries, confirmed that view, and suggested the advantage of applying it, in modified form at least, to criminal procedure in Canada ; for I quite agree in an observation made by the learned Chief Justice of Ontario, made to a Grand Jury in 1889, that 'it is quite impossible to dispense with the institution until some very careful substitute is found.' I submit, however, we have an admirable model in Scotland, one long tried and thoroughly tested, and if the wisdom of a scheme is to be measured by its successful working, that of public prosecutors in North Britain commends itself for imitation and adoption.

"Honorable gentlemen will know that the main and primary function and duty of our Grand Jury is, in effect, to determine whether the magistrate, stipendiary or ordinary, who has committed a prisoner to jail on a criminal charge after hearing the evidence against him, had any justification in subjecting the prisoner to trial—whether, in fact, the committing justice had or had not perverted his duty and committed a prisoner for trial upon a charge unsupported even by *prima facie* testimony.

"Stipendiary magistrates, in Ontario, at all events, are able and experienced lawyers. The ordinary justice of the peace may not always be fully up to the mark, but each and all constitute tribunals competent to commit an alleged offender to jail to await his trial, and we must suppose the appointing power (wherever it may reside) takes care that such tribunals are competent and disposed to discharge their duties aright There is, at all events, action in the light, and individual responsibility—and rightly so, for it may be four or five months before a Grand Jury can pass upon the case of a prisoner committed for trial.

"What is to be said touching the functions and operations of the Grand Jury which constitutes this tribunal of review upon the findings of the subordinate ministers of justice, often men of large experience in their duties, who work openly under a sense of personal responsibility, and whose oath of office requires them to do equal justice to the rich and the poor—'Justice to the citizen and the stranger demanding it as accuser or accused.'

"Few are intimate with the actual workings of the Grand Jury system, so that its defects and the evils connected with it rarely attract public attention. My purpose will be served in referring briefly to some of what I regard as inherent and insuperable evils of this accusing power.

"The institution of the Grand Jury dates back to the earliest period of English history, its purpose being to enquire into criminal charges and offences supposed to be committed in the locality, and of returning unto the court to which it is summoned its delivery thereon. Always a clumsy means of certifying cases for trial, it has degenerated into 'little better than a sham.' It is in several respects mischievous in its tendency, and certainly is out of harmony with the genius and spirit of our system of criminal jurisprudence.

One of its worst features is its secret and practically irresponsible character, every member of the body being sworn to secrecy before he is admitted to act. The best guarantee of civil liberty the open administration of justice—is wanting, and publicity, the very essence of confidence in judicial proceedings, the greatest security for good conduct—is strictly guarded against. A secret tribunal of this kind, where a majority decides, is practically irresponsible, and may be made to serve as a block to a proper prosecution —a screen for an offender who has been sent up for trial by a magistrate after an open enquiry.

"In all my experience I am not aware of any case in which it has served as a bar to an unfounded prosecution, wherein the sole agency of a responsible Crown prosecutor would not have accomplished the same thing. But I am strongly of opinion that bills have been ignored and charges suppressed that in the interest of justice, and indeed in the interest of the person charged, if innocent, had better been disposed of by public, open trial. There are temptations to covert approach and tampering with such a body ; and it has been said, I fear not without ground, that the recommendations of individual jurors from the neighborhood, strongly imbued with local or other prejudices, have prevailed against evidence. Possibly the advice and assistance of the Crown counsel may frequently serve to overcome this, but even in this there is a danger (I mean the free access of Crown counsel to the jury for advice and assistance), for a passive jury may become the mere conduct pipes for giving expression to the convictions of the Crown counsel, without any responsibility attaching to him. His advice may be good, but in finding a bill or no bill on the evidence before them the jury are alone seen and responsible. The Crown counsel has certainly opportunity, as I have said, for presenting his views, for which, from the secret character of the tribunal, he is in no way amenable.

"Then the Grand Jury is a changing body—those from time to time composing it being men not accustomed to the examination of witnesses or the investigation of facts. How easy for a partial or unwilling witness, or one who has become interested in averting a trial or conniving with the accused

or his friend, to suppress or color his statements in the secret examination before the Grand Jury. There is no adequate check upon such a one. Again, it is quite possible that the Grand Jury or the necessary majority may be prejudiced or moved by mistaken pity, and so refuse to put a person on trial; and even when their action is warranted they are not in a position to justify their finding The interposition of a Grand Jury does not shorten the imprisonment of a person committed for trial, even if a bill be ignored, but the necessity for it may cause his detention for five or six months, in some cases, unless he claims, as he can in Ontario in most criminal cases, the right to be tried by a judge without a jury.

"Another weighty objection to the Grand Jury is this: there is no challenge, such as there is to the petit jury. Persons related to or closely connected with the prosecutor or the accused may be on the Grand Jury—personally or politically connected, as friend or antagonist—or persons who have a strong personal or pecuniary interest in the matter to be dealt with, or men who hold and have expressed strong opinions on the case. Such persons, every one will say, ought not to be on the Grand Jury in the particular case. But how is it effectually to be guarded against, the safeguard of full right to challenge wanting? Nor is it a sufficient answer to say the verdict of a petit jury must be unanimous, the finding of a Grand Jury is by the majority, but who can calculate upon the influence that may be exerted in a secret tribunal by one or two of its members, moved by prejudice or influenced by unworthy and evil motives—nor is such a thing improbable of occurrence. To my mind this is a grave objection.

"Then there is the possibility of mistakes without corrupt motive—mistakes that may lead to very serious consequences. I do not press this objection, not being an evil inherent in the system; all the same, gross mistakes have been made, to my certain knowledge. A good many years ago, before the appointment of Crown Attorneys, the foreman of the Grand Jury brought in several bills into court, and one of the prisoners was about to be arraigned when, by the merest accident, it was discovered that only eleven of the Grand Jury heard the evidence, the others having left the Grand Jury room for some purpose. In another case the jury heard a near relative of the accused, an intended witness for the defence, whose name happened to be the same as that of the chief Crown witness, who happened to be out of court when the name was called, and the other entered the Grand Jury room and gave evidence that induced the Grand Jury to ignore the bill.

"An eminent Crown counsel, now on the Bench, mentioned recently to me a matter that occurred in his own practice. He had witnesses to prove the distinct admission by the accused of his guilt. The Crown officer sent them before the Grand Jury, who heard the evidence; but, singular to say, ignored the bill. The explanation of the Grand Jury did not speak much for their intelligence. It was this: 'Why, we had no evidence against the prisoner but what he said himself.' One would have thought such evidence sufficient to satisfy an ordinary mind, but not so with this jury.

"Even in the city of London, where it is supposed the most intelligent Grand Juries in England are summoned, the same has occurred. I recollect several cases of the kind recorded in the *Law Times*. One was the case of a foreman by mistake endorsing 'a true bill,' whereas the Jury had actually ignored it. The prisoner was tried and found guilty, though the judge charged in his favor. The mistake was discovered and pointed out, but there was no remedy—everything was regular on its face, and the intention could not be permitted to override the act. This gross failure of justice was remedied, after a fashion, by a pardon through the Home Office.

"Another case I remember was an indictment against a man and woman. The jury really found no bill against the woman, and the practice was, where two were indicted, to draw the pen through the name of the party against

whom no bill was found. This, by mistake, the foreman omitted to do, and both prisoners were convicted and sentenced. The judge in that case cut the knot with courage, if not sanction of the law, and discharged the prisoner. And still another case: A prisoner had a very remarkable name, and the foreman of the Grand Jury happened to be in court when he was arraigned, and spoke up, saying: 'Why, we ignored that bill,' and sure enough it proved to be the fact The foreman explaining, 'Not because we did not think there was a case, but because he had been sufficiently punished by the imprisonment since commitment.'

"The cost of Grand Juries is considerable—from $40,000 to $50,000 yearly in Ontario, I would say. This would be saved were the body abolished. I am not disposed to advance the saving of money as a cogent reason in itself against the institution, but certainly an improved, a safer and more efficient system, modelled something after the Public Prosecutors in Scotland, could be obtained with a smaller outlay, If Grand Jurors were not required it would leave more material free from which to select the petit jury, which everyone will admit is the more important one of the two—the one that finally decides upon the guilt or innocence of the accused.

"It has been urged that the Grand Jury system is an educator of the people, those serving as Grand Jurors gaining a certain knowledge of law and a right conception of its salutory influence, which they become agents in diffusing in their neighborhood, and thus inspire the public with more respect for the law and its administration. Perhaps so, and a man in a lifetime may have two or three opportunities for gaining such knowledge; but it must be homœpathic in amount, and it seems to me that an intelligent reader of one of our great dailies, which rarely fail to give full and intelligent reports of important cases, would gain much more information at his own fireside.

"The Grand Jury system, I know, is regarded by some as 'a great bulwark of our liberty,' a representative and democratic institution. It is an ancient institution, no doubt; but I fail to see how it can deserve the name of a democratic institution—how it can represent even the county from which it comes, except by a legal fiction, and I can discern no propriety in a grand, or any other jury, fulfilling a sworn duty 'in accordance with the public will.' In the dark days of England's history it may have stood between the people and arbitrary power. I think Hallam mentions one case, not with approval—indeed, he rather thinks they forgot their oath; but few in the present day fear that arbitrary power will venture to raise its hand in the courts or elsewhere; and if it did the people of this country would not, I am very sure, fight behind the feeble barricade of a modern Grand Jury.

"'Popular liberty' and 'popular rights' are happily established in this country on a sure basis, and are understood and valued, and I must utterly deny that Grand Juries are in any sense or to any extent the palladium of either. Possibly this clinging to a worn-out institution grows out of the fear that the country could not supply its place, but I have all confidence that an honest and non-political substitute may easily be found. Why should we Canadians have any fear on this head? The history of our country has shown that the people of Canada are keenly alive to the value and importance of the due administration of justice, and prepared to uphold it—no country more so in the whole British Empire; and, I will venture to add, no place where a larger proportion of able and honest agents, fitted by professional training for administration, can be found. In the year 1877 I called public attention to some of the evils I have pointed out in the Grand Jury system, and also to facts going to show it was discredited—that even then a large number of criminal cases never came before Grand Juries, but were tried by a judge, without a jury, upon an act of accusation prepared by the local crown attorneys from the depositions taken before the committing magistrates. I said:

"'It may be noted that now, as a matter of fact, by far the greater number of criminal charges in Ontario are submitted for trial on an act of accusation, in the nature of an indictment, which the county crown attorney prepares, the intervention of a Grand Jury being altogether dispensed with. I refer to trials before the county judge's criminal court, which, as you are aware, possesses a jurisdiction embracing for trial, by judge alone without a jury, nearly every offence known to the law, except capital felonies. In this judicial district only thirty-one cases during the present year were submitted to Grand Juries; ninety-two were cases not brought before them at all, but were tried by the judge without a jury, and all upon charges formulated by the crown attorney from the depositions taken before the committing magistrates; and the proportion will probably be the same in other jurisdictions in Ontario. A late return to the Legislature showed that only one-fifth of the prisoners committed last year, embracing all the more serious charges, passed before a Grand Jury—the presentation of all the rest, or four-fifths, the crown attorneys were alone responsible for.'

"And I also pointed out another fact—the power of Grand Juries being cut down, discredited as it were, by statute. I may quote the following passage:

"'Moreover, there is evidence on the statute book that the Grand Jury are not so entirely trusted as in former years, for in a number of cases they are disabled from entertaining a charge unless there has been a preliminary proceeding, or the indictment for the offence by the direction of the attorney-general, or by direction or consent of the court or judge having authority to try the same'

"Some two years after this, in 1879, public attention was aroused in England by a very scandalous case which occurred there. It brought into bold relief one of the inherent evils of the Grand Jury system, and went to show the danger of entrusting such a body with a power of enquiry in the nature of a review into the decision of magistrates after an open examination of witnesses. I had referred to this danger indeed for years; I thought that neither in the interests of public justice, nor indeed in the interests of one accused, was a secret enquiry such as a Grand Jury makes, desirable or safe.

"I will ask permission of the House to read from a leading article in one of the great London dailies, referring to the case of Sir Francis Truscott and the Grand Jury system generally, and giving an instance of the power which a Grand Jury possesses of sending a man for trial upon evidence taken in secret with which he has never been confronted. The circumstances were briefly these: A charge of libel was made before a magistrate against Sir Francis Truscott, and when the magistrate heard the evidence he refused to grant even a summons. There was really nothing in the charge, and the magistrate dismissed it. Nothing daunted, the prosecutor waited till the next sitting of the Central Criminal Court, went before the Grand Jury, produced a post-card containing the said libel, and probably swore to the handwriting of Sir Francis Truscott. At all events, the Grand Jury found a true bill, and the process of the court followed. Sir Francis was ignorant of the proceeding—was, in fact, on the Continent at the time. The result was, the charge hung over him for a month, until he returned, when the case came up for trial and he was vindicated. Such a scandal might well produce comment. The article from which I will read was in the London *Times*:

"'The action of the Grand Jury which put an alderman and the proximate Lord Mayor of London on his trial for libel upon evidence given in his absence, behind his back, calls attention anew to the singular survival among us of this ancient institution. It may be hoped that the circumstances will give it its long desired *coup de grace*. Grand Juries have had their history, and once had their uses. They have served in past generations as

means of testifying to the public opinion of the country, and it still occasionally happens that this purpose of their existence is faintly recalled.

"'These futile presentments—a relic of ancient activity—serve to illustrate the uselessness rather than the utility of Grand Juries as exponents of public opinion; and, indeed, it cannot be doubted that there are ample means of ascertaining the balance of public judgment at once quicker and more trustworthy in their action. What other purposes do Grand Juries serve? They have functions, as parts of our machinery of criminal justice, which are generally useless, or injurious only as impeding the action of the courts; but, as the case of Sir Francis Truscott proves, they are sometimes positively mischievous, exposing an innocent man to all the annoyance and disrepute of being subjected to a criminal trial upon evidence altogether insufficient to sustain such a charge. They never serve a good purpose, and at times they serve a bad one. This ought to be sufficient to procure the abolition of an institution that has lost its use. But old institutions die hard among us, especially if, though their use has departed, they add any touch of dignity or of ornament to the life of rural denizens.

"'We pass by at once the notion that Grand Juries are of any value as exponents of public opinion.

"'It is with Grand Juries as a part of the machinery of the criminal law that we now have to deal. The purpose of their existence in this character was to correct the errors or imperfections of the actions of local benches of magistrates. A magistrate or magistrates in petty sessions might commit a man for trial upon evidence that did not even raise a *prima facie* case against him, and the Grand Jury might stop the case from going further by finding that no true bill had been established against the accused. On the other hand, it might conceivably happen that a local bench would wrongly decline to send for trial a person against whom a sufficient case had been established, and the complainant could then go before the Grand Jury and, by convincing them that he had evidence enough to require a trial to be heard, could obtain a true bill from them. Is either of these purposes of any value now? We cannot say that no magistrates ever commit a man for trial upon evidence that does not establish a *prima facie* case; but when the accident happens there is no saving of time of any importance in getting the prosecution quashed before a Grand Jury, while this mode of obtaining the result is always unsatisfactory to the accused. The hearing of the Grand Jury is in private, and the baseless character of the evidence on which the charge is founded is thus never publicly demonstrated. Suspicion may always arise—and not unfrequently does arise, in such cases—that the evidence for the prosecution was somehow manipulated in the Grand Jury room, so as to lose the force it had at the preliminary investigation before a magistrate. We do not suppose this ever does happen; if it did it would furnish an additional argument against the machinery; but the result is that an unfortunate man, against whom we must assume there was no case whatever, remains under a cloud from which he is never properly cleared, The feeling of inadequacy of this private investigation was, we believe, the leading motive that led the late Recorder of London, Mr. Russell Gurney, to condemn so strongly the retention of Grand Juries. The other side of their action is at least equally to be condemned. It is this which has been forcibly illustrated by the case of Alderman Sir Francis Truscott. The Grand Jury can send a man for trial upon evidence with which he has never been confronted.

"'Nothing can justify a system under which evidence given in private is made the ground for officially declaring that a man must be put on his trial. The course of justice must be open from beginning to end, and the wrong suffered by a secret committal is even greater than that suffered by a secret acquittal. In the latter case society may suspect that the legitimate penalties of wrong doing have been illegitimately evaded. In the former case an innocent

man has to complain that a secret and irresponsible tribunal has proclaimed him suspected of guilt upon evidence given in secret and in his absence.

"'Grand Juries have been long known to be useless institutions; Sir Francis Truscott's case proves that they may be injurious, and the claim for their abandonment is founded upon a positive wrong. We must, however, insist upon the truth that mere uselessness affords a strong argument for the removal of any part of our judicial machinery that must, by its existence, prove an impediment to the prompt discharge of judicial functions.'

"On the very grounds referred to in this article I had years before argued for the abolition of Grand Juries, and the fact of Sir Francis Truscott's case showed a particular evil I indicated as possible having actually occurred.

"What I said from time to time to Grand Juries was not with any desire of an expression of opinion from these bodies, but as the means of directing public attention to the subject, and promoting, if possible, an enlightened discussion. My object was, to a certain extent, accomplished, and the matter was freely discussed in the public press some years since.

"Grand Juries I addressed in every case adopted the views I presented; but like bodies, I must say, did the same thing in the case of eminent judges who held the contrary view. From the very seat from which I spoke the late Sir Matthew Cameron, a most able judge, coming after me, took occasion to 'blow a counter blast,' strongly favoring the retention of the Grand Jury, and the body he addressed expressed concurrence in his views—as did a Toronto Grand Jury some time after, with emphasis. And so it was in the case of other judges for and against the system. In almost every case the opinions expressed from the Bench were echoed from the jury box. I may say also the late Chief Justice Draper held Sir Matthew Cameron's views respecting Grand Juries.

"In point of fact, the judges of Ontario are divided on the subject. I mentioned the names of two deceased judges who thought it inexpedient and unsafe to abolish Grand Juries. I may say, on the other hand, that the late Chief Justice Harrison on several occasions declared himself in favor of the abolition of Grand Juries.

"I feel I ought to give the reported words of my friend, the late Sir Matthew Cameron. I will accordingly read from the report of his address at Barrie in 1880:

"'The Grand Jury might also become a thing of the past. He referred to the Bill passed by the Ontario Legislature reducing the number of Grand Jurors required to be summoned from twenty-four to fifteen, but it had not yet become law, because it was doubtful whether the Provincial Legislature had the power to make such a law; but it was hoped the Dominion Government would take the matter up and allow the Act to pass; but inasmuch as they had not done so the Act was not yet in force.

"'The Grand Jury was expensive, it was urged by those who would have it abolished. But the question was, could a better or cheaper system be devised? The whole cost of the Grand Jury system would probably not exceed $1,200 a year in a county of ordinary extent, a sum which he thought would be exceeded were the Grand Jury superceded by a crown prosecutor, as has been suggested. The Grand Jury has been designated, by reasons of its important functions, the bulwark of our liberty But apart from its value in this respect it was useful as an educator. Grand Jurors, during their attendance at court, gained a knowledge of the laws and heard much of interest and importance. Going home and diffusing this knowledge among their neighbors they helped to establish in the land a correct and salutary conception of the law, and to inspire the public with more respect for it. A man's liberty was of the utmost importance, and we should hesitate before taking away any of the protection which the law throws about it. As to the

want of training urged against grand jurors, His Lordship said he thought more of the opinions of twelve practical men than of one learned man. Men of skill and learning are apt to theorize. Speaking of the need for the existence of the Grand Jury, His Lordship's opinion was that men were constituted pretty much as they were hundreds of years ago. There were still to be found contentions and wrangling; men were, as ever, liable to be carried away by their passions. Our forefathers had been wise in their generation. There had been displayed by them in times past great precision, great intelligence and great learning, in their provisions for the safety of the subject and the just administration of the law, and he did not think that such a change had come over subsequent generations as to warrant the doing away with valuable institutions which they had founded for the protection and well-being of the individual and society at large. All courts were expensive, but necessary. It might be urged that not one-hundredth part of the population were engaged in litigation, while the rest were taxed to pay for it. But what was the case of litigants to-day might be the case of other people to-morrow. He had mentioned this question of the abolition of the Grand Jury to every one of these bodies whom he had the honor to address, and asked their opinion, that it might be sent, as others had, to the Secretary of State He was aware that a Grand Jury sitting in the place of the one he was addressing had given an opinion favoring the abolition of this tribunal; but most Grand Juries had taken a different view of the question. The representative of a constituency might, on the spur of the moment, support some movement apparently looking towards economy, and without reflecting upon the ultimate issue of it. So, men who have objected to the Grand Jury system may have been led to do so, actuated solely by the question of expense. His Lordship had, therefore, dwelt at some length on this subject in order to present it clearly and fully to them, and to have their opinion as to whether it would be advisable to change the system, and what character of change, if any, they would suggest.'

"I will also, if the House will bear me, quote the views of two very learned judges now on the Bench—the Hon. J. H. Hagarty, Chief Justice of Ontario, and the Hon. Mr. Justice Gwynne, of the Supreme Court. In addressing a Grand Jury in Toronto some years ago the former said:

"'With reference to the usefulness of that old-fashioned institution, the Grand Jury, without entering into the constitutional question he would simply say it was quite impossible to dispense with it until some very careful substitute was found, which the present law certainly did not present. Parliament, in its wisdom, of course, might decide on a substitute, but until that was done he was sufficiently old-fashioned in his notions to think that grand juries could be made use of as a most excellent institution, performing a most important function in the administration of justice, and standing, as he had often known them to stand, as a very proper barrier between absurd charges frequently made and the innocent person who was thus saved the ignominy of standing in the dock on a charge that no twelve men could entertain.'

"Mr. Justice Gwynne, in an assize address to a Grand Jury, at Kingston, spoke of the evils of the system, and after referring to the preliminary examination before magistrates, and the inconvenience of requiring another enquiry before a Grand Jury, the learned judge continued:

"'Such, however, is our law, that at the busiest portions of the year you are called from your avocations and private pursuits to render to the country the invaluable service of determining whether the magistrates who have already investigated the cases have or have not grossly perverted their duty, and whether there is, in fact, any sufficient justification for the detention of persons whom they have committed, and for subjecting them to trial for the offence charged. I do not pretend to suggest that the intervention of Grand Juries should not still be maintained in state offences, as a protection to the

subject against the tyranny of the government, if the days for government acting the *role* of tyrants are not passed away; but to call for their intervention in those cases of crimes against society at large, which are the ordinary subjects for the ordinary consideration of grand juries, is, to my mind, an absurdity which can only be accounted for by that veneration for antiquity which seems to overshadow in some things the human mind. . . . Well, gentlemen, the law calls upon you, twelve at least concurring, to investigate these cases, which have already been so investigated that, as a result, five out of the eight accused are confined in jail in the custody of the sheriff, and I trust you will find, as indeed I doubt not you will, that the committing magistrates have not been so arbitrary and unjust as to commit the parties without some *prima facie* evidence justifying the putting them on their trial —that, in fact, you will find that their labors have not been in vain, and perhaps you may be induced to enquire whether the service you are called upon to render the public is of that value as to present an equivalent for the inconvenience to which, in your capacity of grand jurors, you are put.'

"The subject was a good deal discussed by the general press, and I have numerous articles cut from leading journals before me. I shall only occupy your time with the substance of one, but it is from the pen of a man of great ability—the ablest and best informed public writer on the continent, in my judgment. I will read from the *Bystander*, an admirable publication, which was given up a few years ago, to the great regret of its many readers:

" 'The Grand Jury question continues to be the theme of observation from the Bench. Everybody knows that the history both of the Grand and Petit Jury is, in its details, a chapter of accidents. But in its main character neither of these institutions is accidental; nor is the origin of either of them so local or personal as some recent antiquaries seem to imagine, the jury being found in Scandinavia as well as in England. The Grand Jury was, perhaps, in its origin merely an instrument for bringing offenders to justice, very necessary at a time when there was no regular police, as well as for presenting local matters requiring reform. This function is now almost obsolete; but the same cannot be said as to the cognate function of determining what cases ought to be sent for trial. Some sort of preliminary consideration of the evidence there must be; it will never do to put a man in the dock on mere suspicion; all the authorities say in effect that, if the Grand Jury is abolished, a public prosecutor must be instituted in its place. Certainly the Grand Jury, in its present form, seems a waste of time and money. Nor, sitting in secrecy as it does, and without the guarantee afforded by clear personal responsibility, is it perfectly fit on all occasions to be entrusted with the key of justice. Into its conclave political and social considerations may find their way. This liability was brought home to the minds of most people in England by the case of Governor Eyre, which the Grand Jury refused to send to trial. But political feeling had been excited, and the Grand Jury closed the gate. A public prosecutor would be guarded by his professional instincts against irrevalent considerations, and though he would, in the first instance, owe his appointment to the government, it is difficult to imagine any circumstances in which his care for his own reputation and his interest in his office would be likely to give way to his desire to oblige a minister. To the institution of a public prosecutor in time we shall probably come.

"By the abolition of the Grand Jury some better materials might be set free for the composition of the petit juries. Assuredly it can only have been accident that assigned the more important function to the weaker tribunal. In England it is appalling to see to what hands the most momentous causes and even the issues of life and death are consigned. If the judge is strong and uses his influence he may guide the jury right, but otherwise the result must be often a mere toss-up—or, what is even worse, it must be decided by the tricks of advocates. Any sort of prejudice is sure to carry the day. Our

people are, on the average, better educated and more intelligent than the English ; yet we have had recent proof that the jury-box may be swayed, in the face of the clearest evidence, by local sentiment, and more than once suspicion has prevailed that grosser influences were at work.'

"I am unable to say how opinion preponderates amongst the superior ministers of justice or amongst professional men, nor can I speak with absolute certainty of general public opinion on the subject. All I saw, however, in the general press, favored the abolition of grand juries.

"I think the question is worthy of consideration by the government (with all the advantages which a government possesses for a full examination), in view of a uniform and better procedure applicable to the whole Dominion, by substituting for the Grand Jury a more perfect system for working out on safe lines an important branch in the machinery of criminal procedure. Such a change has been strongly urged in England, and a remark made by the Lord Advocate of Scotland in an address in Edinburgh before the Social Science Congress struck me at the time as highly suggestive. He said: 'It certainly strikes a Scotchman as singular that English law-givers should be engaged in investigating this problem upon first principles, as if it had never been attempted before, when, if they look north of the Tweed they will find it practically solved to the satisfaction of the community.'

"Some thirty years ago a young Scotsman settled in Ontario, full of life and energy. He was soon pushed to the front in matters of public concern, where methodical and business habits were required. Of course, he became a grand juryman, and naturally his fellows selected him as foreman. He industriously applied himself to gain a knowledge of the duties of the new position. Having done so he arrived at the conclusion the Grand Jury was a useless, if not a mischievous institution, and he contrasted it with the excellent system in the land he had left. With the courage of conviction he at once acted, told his fellow-jurors, 'I can see no manner of use in what you are doing ; we are a bill of expense to the country, and we are losing our own time. Let us recommend that the thing be abolished.' And accordingly a presentment was prepared to that effect. That Scotsman is no longer young ; his energy, ability and self-denial secured for him deserved success ; he is now one of the merchant princes of Canada, and I rejoice to see him at this moment occupying a seat on the floor of this chamber. I will not venture to name him, but it is gratifying to know he is in sympathy with my move. Yes, he is one of the men from north of the Tweed to whom the Lord Advocate referred as knowing, and therefore valuing, the admirable system of public prosecutors in that country.

"In Ontario the ground is well prepared for a change in that direction, and modern legislation has led up to it. Let me take a brief review.

"The conduct of criminal prosecutions in the Province of Upper Canada was in a very unsatisfactory condition for many years previous to 1857. In the early settlement of the Province offences of a serious character were rare, the counties few in number and the law officers of the Crown—the Attorney and Solicitor-General, were able to give personal attention to the conduct of cases at the assizes, usually two in the year, the sittings of these courts being regulated by the judges, and following each other at such intervals as enabled this to be done. But it was not so in courts of general sessions of the peace ; these courts were held four times in the year, at periods appointed by statute. The great bulk of the criminal prosecutions in the Province was in these courts, and these prosecutions were left to take care of themselves, or, what was still more objectionable, left to the conduct and control of private individual prosecutors, who engaged counsel to conduct them. In process of time, owing to a rapidly increasing population and other circumstance not necessary to advert to, the volume of criminal cases largely increased, and the law officers of the Crown, members of the Government, necessarily

engaged in many other duties, could rarely attend the courts of assize; the number of counties also increased, and with this came added courts, so that it was quite impossible for the Attorney and Solicitor-General to give personal attendance except at courts at the seat of government, or, in exceptional cases, at the courts of assize in other parts of the province, and the practice arose for the Attorney-General to commit the Crown business to members of the bar selected by them, who acted for them at the courts of assize—or, more recently, to leave the business to the local crown attorney, though that, I believe, has been rarely done. A constant change in Crown officers was inevitable, and could scarcely conduce to efficiency or gender a full sense of the responsibilities of the position—the appointments being only *ad hoc*.

"The court of quarter sessions, with a greatly increased business in number and importance of cases, remained as before—prosecutions controlled by individuals or left entirely to the courts. This condition, in a matter so important as the administration of the criminal law, was calculated to cast discredit on the law and its administration, and there were, in fact, many instances of gross failures of justice from the imperfect presentation of cases, or partial or personal feeling or prejudice entering into a prosecution. Complaints became numerous and serious of the evils generated under such system.

"In 1855 I remember a series of articles appeared in the only law periodical then published in the country; and, indicating public opinion, were supposed to some extent to have stimulated the legislative action which shortly after took place—the passing of the law which has survived in all its integrity the love of change, not an inconspicuous feature in modern legislation. I refer to the County Crown Attorney's Act, the work of the right honorable gentleman now the First Minister of the Crown in Canada. That Act was passed in the year 1857, and is one of the best and most valuable of the many statutes effecting reform in law procedure which Sir John Macdonald has placed on the statute book. In one of the articles I referred to, setting out with the proposition that counsel acting for and commissioned by the Crown was essential to the due administration of justice in all the criminal courts, and called for with a view to the more efficient restraint and punishment of crime, and moreover that aided by public prosecutors the business of the courts of assize would be on a better, safer and more economical footing, it was urged:

"'If it be necessary that a Crown counsel should conduct the criminal business of the court of assize (and that it is necessary no one denies), is it not equally necessary that there should be such an officer for a like purpose at the quarter sessions? Both are courts having criminal jurisdiction, with similar powers for the punishment of offenders; if the courts of assize can sentence to hard labor in the common jail, or to long imprisonment in the penitentiary, so can the courts of quarter sessions. A judgment of the court of assize affects liberty and character (comprehending the interests of many—wife, children, relatives, etc.) in no greater degree than would a judgment of the quarter sessions. Are the cases at the sessions few and insignificant? No; these courts sit four times in the year (the courts of assize sit only twice) and dispose of more cases than the superior courts; and, if we leave out capital felonies and some few offences excepted from the jurisdiction of the quarter sessions, the description of cases in both courts is the same. Do the judges of assize need the assistance of counsel more than the judges of the courts of quarter sessions? Certainly not. What then—does a crime when presented for trial at the quarter sessions lose the distinctive character it has at the assizes? Is an offence against the peace or dignity of the Crown—the Queen, the plaintiff—at the sessions to be regarded wholly as an offence of private nature, affecting only the individual injured (who is allowed to manage and conduct it as he sees fit)—that the party injured is, in fact, the plaintiff? Certainly not, or the law would

confer upon him the rights of a plaintiff. A crime, then, is to be regarded in all respects as losing nothing of its nature or character whatever tribunal it is brought before for investigation. But in practice the Queen is represented in the courts of assize, and by her representative 'learned in the law' brings her cases before the court and jury, presenting them in that clear and intelligent way which so greatly aids the administration of justice; while in her courts of quarter sessions her cases are left to take care of themselves.'

"In respect to the value of a public prosecutor at the assizes it goes on to say:

"'On the assize day the Crown officer appears, commonly at the opening of the court. He knows little or nothing of the business he has to conduct; even of the cases remaining from the last assizes his predecessors may not have left any notes for his guidance; of the new business he must look to the depositions and other papers for his information. The Crown officer's first care, then, is to hunt up the depositions and papers in each case, and to examine them, that he may be able to judge from the facts and circumstances alleged what offence should be charged and how it should be set forth; and herein are important considerations, for the same facts may support charges of a very different character, and a misdemeanor or a more serious charge—felony—or several charges of a like hue, may rest on the facts. Again, the charge may require to be varied in several counts of an indictment as they can be sustained in evidence. The examinations, etc., taken by magistrates, are not to be relied on as designating the offence with legal accuracy—what it may be is to be collected from the statements therein—and it is often necessary to examine the prosecutor and his witnesses *viva voce* to understand the matter set out in the depositions, or to obtain *data* from facts and circumstances necessary to be alleged and proved, but yet not stated in the depositions. Having decided on the offence to be charged and the mode of laying the same the indictment is drawn. The Crown officer must then ascertain if the witnesses necessary to the finding a bill and proceeding to trial are present. If not they must be sent for, or if impossible to procure their attendance in time an application must be made to put off the trial to another court—frequently causing great inconvenience to the prosecutor, the witnesses and the public, and working with unnecessary severity against the party accused.

"'If an indictment be found the trial goes on, the Crown, if need be, exercising its right to challenge. The prosecution is conducted by an officer of the Crown, who feels that his duty is, not to fight for a conviction, but to lay the facts bearing upon the matter calmly and deliberately before the court and jury—his aim is to bring under review all that tends to throw light upon the charge, his only wish that the supremacy of the law may not be defeated from the omission of proper evidence, or through any inaccuracy in the proceedings. Whether examining witnesses or addressing the court or jury he feels his position; and being specially appointed to aid in the administration of justice he is free from that bias which, otherwise, he might not be able to divest himself of if the paid advocate of the party directly affected.'

"And speaking of the anomalous procedure at the sessions the writer observes:

"'Then the clerk of the peace prepares an indictment, as best he can, on the depositions returned to him. In ordinary cases he may be equal to it, but he is not competent to determine the way in which the charge should be laid, the sufficiency or completeness of the evidence, etc. for competency involves a thorough knowledge of the body of criminal law, the law of procedure and the law of evidence. Can it be a matter of surprise, then, that prosecutions are defeated from defects in the indictment, or fail for want of sufficient evidence being at hand.'

" 'The indictment drawn, the duties of the Clerk of the Peace as to the proceedings are at an end; the jury is then called but the right of challenge in the Crown is here a nullity. At the trial the chairman examines the witnesses (re-examining them if needed), and cross-examines the defendant's witnesses, and is compelled to combine in some measure the office of judge and Crown prosecutor. This is obviously an anomalous position, the judge at any moment liable to have exception taken to his mode of examination, his questions objected to, and then required as a judge to decide on the propriety of the questions by himself proposed. Yet this is forced on the chairman wherever counsel is employed on the defence, for he has either tacitly to allow justice to be defeated, by permitting half answers and doubtful or colorable assertions to go before the jury as evidence, or to elicit the whole truth, by examination and cross-examination of witnesses. This observation has special force when the witnesses for the prosecution are disposed to favor the accused. But sometimes the complainant will retain counsel. Why should he do so? It is not a proceeding to give satisfaction to him, but to vindicate public justice. He has but expense and trouble. The fruits of the conviction, when the criminal has any property, go to the country or the Crown. With counsel, then, so retained, the matter is not bettered; he is disposed to identify himself with the complainant, and look on his client as the prosecutor, instead of considering himself acting for the Crown. Will he not be moved to handle the case just as he would an action of trespass, giving an exaggerated view to the jury, and using all his ability to secure a conviction against the accused—in whose favor the benevolent principle of the English law has made all exception, and commands the very judge to be his counsel. Any one familiar with the proceedings at quarter sessions must have been struck with the contrast between a counsel commissioned by and acting for the Crown and the counsel employed by the complainant—the former conducting his case in a fair, calm and ingenuous manner, the latter professedly acting for the Crown, but in reality bringing all the tact and ability he is master of to advocate his employer's views. . . . . .

" 'Our own experience has presented many cases in which no doubt could be entertained of the guilt of the parties; and yet, by reason of some defect an acquittal, of necessity, took place; and from different quarters we have heard of similar cases in which the ends of justice have been defeated. Again, an offence is committed and public justice—the safety of the community—demands that the offender should be proceeded against and punished. But the party injured reasons thus: 'To have the prosecution properly conducted at the sessions I will be compelled to employ counsel and pay him out of my own pocket; and this, too, in addition to my personal expenses and loss of time, etc., in attending the court. It may be my duty to lend my aid in punishing a criminal act, but it will be better for me to put up with the injury done than subject myself to the annoyance of a cross-examination of defendant's counsel, and be at such trouble and expense. The public are as much interested in the prosecution as I am; the county will be the gainer; I cannot be.' The matter is then allowed to drop. Even where willing to engage counsel parties are not always able to do so—and yet the law professes to shed its protection over all. Criminals are thus allowed to escape, and, emboldened by impunity, to persevere in crime. Is this reconcilable with justice or the principles of sound policy?

" And the suggestions follow, viz.:

" 'That in every county or union of counties, for judicial purposes, a barrister of several years' standing should be appointed, with some certain tenure of office and a small salary attached to it (as it were, a retainer from the Crown), with certain fees on every indictment and trial, the fees now payable to clerks of the peace for indictments to cease. An arrangement of this kind would induce respectable practitioners to accept an office that would thus confer a certain *status*.

"'The duties of the county attorney might be as follows: To act for the Crown at the quarter sessions in the same way as the attorney-general, or other Crown officer, officiates at the assizes; to receive from magistrates and coroners the informations and papers in criminal cases; to inspect these papers and examine the character and sufficiency of the evidence; to secure the necessary documents and the attendance of all necessary witnesses—in a word, to get up the evidence and arrange all things ready for the trial. To attend, also, at the assizes, and assist the attorney or solicitor-general, or queen's counsel (as the case may be), and in the absence of such an officer to conduct the business himself. And, moreover, to assist magistrates by his advice in their primary investigation of important cases. The county-attorney might also see to the enforcement of forfeited recognizances; appear for the Crown on application to bail prisoners; might have the charge of prosecutions, under the law for summary convictions, connected with the revenue or public domain—in fact, all cases prosecuted in petit sessions by public officers in the name of the Queen.

"'We have now noticed briefly what has occurred to us in favor of the institution, and the duties we would have assigned to county attorneys, and believe the subject is of sufficient importance to claim the attention of the law officers of the Crown during the present session of parliament. The point occupying greatest prominence is the absolute necessity for Crown prosecutors at the quarter sessions; and we appeal to every one conversant with the transactions of these courts if criminal trials can be conducted satisfactorily, or consistent with the public interest, on the one hand, and what is due to the accused on the other, while criminal prosecutions are left to take care of themselves (unless, indeed, the judge acts in the double capacity of judge and public prosecutor), and defences are conducted by counsel for the accused—if compelling parties injured in addition to their loss, to pay for conducting a trial for an offence of a public nature is reconcilable with the spirit of justice and attention to individual rights, and if there is not a consequent unwillingness to prosecute, or private agreements to compromise, in defeat of justice—if cases of failure in justice and abortive prosecutions against guilty parties are not of frequent occurrence at the sessions, from errors in the indictment, defects in the evidence, the want of searching examination of witnesses, and the like. Need we pursue this question further, having everything that can be deduced from principle and experience in support of our views. While, then, it must be admitted by all that the interests of the public require that no guilty offender should escape punishment, it would seem an equally clear and incontrovertible position that whenever, from any defect in the system of prosecutions, or from whatever cause it proceeds, a prisoner escapes that punishment which is due to his crimes, substantial justice is wounded and public wrong thereby increased.'

"All that was said applies now to the several provinces where the office of local Crown prosecutor (Crown attorney) does not exist, and I have dwelt on the subject, for I am particularly desirous the matter should be placed as fully as possible before all concerned. If honorable gentlemen will bear with me, I should like to give a general view of the county crown attorney system in Ontario, and to refer to the statutes for those who wish to fully examine. The Act respecting the appointment of local crown attorneys will be found in Consolidated Statutes of Upper Canada, chap. 37. It provides that barristers of at least three years' standing at the Bar shall be appointed to aid in the administration of justice, and to perform the duties assigned to county attorneys, and disables the officer or his partner in business from being directly or indirectly concerned as counsel or attorney for any person or party charged with treason, felony or other offence punishable under the criminal law.

"Chap. 106 of the same statutes prescribes these duties, which are: To receive from magistrates and examine all informations, etc., connected with

criminal charges ; if necessary, cause such charges to be further investigated, and to secure the attendance of witnesses, etc. ; to institute and conduct, on the part of the Crown, prosecutions for felonies and misdemeanors at the courts of quarter sessions ; and, in the same manner as law officers of the Crown, institute and conduct similar proceedings at the assizes. To watch over the conduct of cases at the sessions, and without unnecessarily interfering with private individuals who wish to prosecute, to assume wholly the conduct of a case where justice towards the accused seems to demand his interposition.

"It also is made his duty to assist the Crown officer in the criminal business at the assizes, and in his absence to represent the Crown at such court.

"If required by general regulations touching his office, he is to institute proceedings before justices of the peace in a variety of matters made punishable on summary conviction, and is empowered to institute such proceedings on a complaint in writing, or as public prosecutor, in cases wherein the public interests require the exercise of such office.

"He is required also to advise magistrates and instruct them in respect to criminal offences brought before the magistrate for preliminary investigation or for adjudication, and a general provision requires the county crown attorney to perform such duties as may be assigned to him under general regulations by the governor-in-council. Before he is qualified to act he must take the oath prescribed for the faithful performance of his duty. These are the chief provisions respecting the county crown attorney system in Ontario, faintly outlined.

"Before leaving the subject of the County Crown Attorney system and public prosecutors I should like to quote the opinion of the celebrated Lord Brougham, expressed in a letter to his friend, the Procureur-General of France.

"After speaking of the excellent organization of the French High Courts of Cassation : 'I confine myself for the present,' he adds, 'to the office of public accuser, a necessary institution in every state, which we entirely want in England.'

"'It seems incredible that in a civilized country in which the principles of jurisprudence have been so profoundly examined . . . an anomaly as glaring in the machinery of our jurisprudence as leaving to chance the execution of the criminal law should have continued down to the present day. You will scarcely believe that when a man with us has been the victim, either in his person or his property, of any crime or misdemeanor, the prosecution, the preferring of the accusation, should not be the duty of any public functionary. The individual, who has already suffered from the consequence of the offence, is bound by the magistrate to become the public accuser He has already suffered much ; it is not sufficient ; he must bring to justice those who have inflicted this suffering upon him. Hence springs a host of inconveniences too long to enumerate, of which I shall cite but one, and that will be enough. Nothing is more frequent than the tampering with the prosecutor by the guilty person, when he chances to be rich. I have known, at the time when forgery was punishable by death, many persons acquitted because they had bought off those who had been obliged to enter into recognizances to prosecute. When the trial began the witness did not appear ; and one of the strongest reasons in favor of the abolition of capital punishment has been found in the great difficulty of compelling the injured persons to prosecute the guilty. This capital defect does not exist in Scotland nor in France. Thus, in Scotland it never happens, as with us, that on the one hand the guilty escape, and on the other that, from time to time, prosecutions are inspired by unworthy motives. The Grand Jury affords no remedy for this evil ; on the contrary, it is a body acting without the least responsibility, and

frequently commencing a prosecution against justice. For as the majority out of twenty-three jurors decides, we can never tell whether such or such a juryman was one of the twelve who voted for the prosecution, or of the eleven who were of the other opinion.'

"I have noticed somewhat in detail the county crown attorney system of Ontario, for I desire to bring its excellent features under the notice of honorable gentlemen from Provinces where the system does not exist, and I can bear testimony to its value and admirable working. It is only right I should add that without some such system to take the place of the Grand Jury institution I dare not say it would be safe to abolish that institution, but with the erection of some such system throughout Canada a great and needed reform would be accomplished, a more perfect criminal procedure provided; and the subject is one expressly reserved under the British North America Act to the Parliament of Canada. On the grounds I have referred to I maintain it would be in the interests of justice, secure more certainty in punishment and be a wise and economical reform, one not difficult to accomplish. How and under what tenure crown prosecutors should be appointed, the limits of their duties, and other matters of necessary detail, it would now be premature to enter upon, as it is outside my purpose now to discuss the appointments required, and whether made by the general government or otherwise arranged, these considerations properly belonging to a matured measure.

"I may remark that under the law in Ontario the offices of clerk of the peace and local crown attorney were combined in the same person. This was doubtless originally done on grounds of economy and expediency. My own view would favor a nearer approach to the Scotch system, which has worked so well and drawn to it a full measure of public confidence.

"The several Provinces can abundantly supply the necessary agency. In Ontario there are trained officers that can be utilized.

"I am myself quite satisfied a comprehensive scheme of the character indicated is feasible, would be calculated to secure uniformity as well as a better and more responsible system for criminal procedure, and would certainly not cost more than Grand Juries.

"Such a work is one that should be undertaken by the Government, with its ample means for enquiry and looking to the ways and means.

"I have placed my notice on the paper to enable me to lay before the government and the people of Canada what my experience has convinced me would be a valuable reform. I hope to secure the attention of thoughtful men, inside and outside of Parliament, to the subject.

"If I have succeeded in favorably impressing my honorable friend and leader, and other honorable gentlemen in this house, I have not spoken in vain. What I have said will in some way reach the government, and I hope may receive such consideration as the importance of the subject entitles it to. In that case I am not without confidence of a favorable result, and earnestly hope, next session, at all events, to see a measure brought down dealing with the subject; for in the interests of sound and safe administration it should, I think, commend itself to those who are primarily responsible—for the reform proposed is based on the principle that it is the duty of the state to detect crime, apprehend offenders and punish them, and that independently of a private party."

As a result of this address the government caused a circular letter to be sent to all the Judges having permanent criminal jurisdiction in Canada, and to the attorney general of each Province therein.

On the 23rd of June, 1891, Senator Gowan again returned to the subject of Grand Juries, and delivered the following address:

"Hon. Gentlemen will recollect that the session before last I called attention to the subject of Grand Juries, and endeavored to prove that they had survived their usefulness. My hon. friend, now the Premier, was present on that occasion, and I hoped that I had interested him with the subject, for I had given a good deal of attention to it and I spoke with the experience of some forty-one years in the actual exercise of functions in connection with the criminal law. However that may be, with that kind and courteous consideration for others which has won all our hearts, he was good enough to make some rather extended observations on the subject. I was gratified, because I felt that I had at least impressed our Premier, then the hon. leader of the house, to some extent as to the necessity for some inquiry, and I was gratified that I had secured one step toward the attainment of the object which I had in view. I was glad to get some favourable expression consistent with the position he occupied, on the suggestions I had offered—at least that enquiry should be made, and getting it from such an experienced man as my hon. and learned friend. The matter went in due course to the office of the minister of justice, and last year a circular was issued by the Honorable Sir John Thompson addressed to all the judges in Canada exercising criminal jurisdiction and to the attorney-general of each province of the Dominion, soliciting opinions on the subject. Had that hon. gentleman, Sir John Thompson, pronounced against the measure, or thought proper to shelve it, I would almost have felt I was mistaken in my view, even if I retained my opinion, because I regard him not only as a great lawyer and as an able, far-seeing man, and I may, if a little aside of the question, go a step further and say that I believe him to be not merely a man of broad views, alive to securing just and equal rights to all in our mixed community. Yes, I believe him to be keenly desirous to secure just and equal rights to all without distinction or "partial affection" within the limits of our constitution, that constitution which binds all our provinces together, and which must be our guide in all our legislation. That communication was received by the judges throughout the country, and over 100 replies were sent to the department of justice. These replies are from some, and in fact nearly all leading legal minds in the country, and I have not gone over them, but a summary that I obtained from the Department shows that no less than fifty of those who sent in answers are in favor of abolition, thirty-nine against, ten doubtful, and two who have declined to answer, so that on the whole, as far as numbers are concerned, a very considerable majority is in favor of abolition and a very respectable minority is against it. I have not seen and have not analysed what they said on the subject. I have not been able to study the arguments used, but I notice, taking the first three names, Judge Taschereau, one of the ablest lawyers in Canada, and a man who, although of French origin, has produced the very ablest book on criminal law now in use—one that is a *vade mecum* in every court in Canada—is the first of those who are in favor of abolition. The next is Mr. Justice Gwynne, also a very able criminal lawyer, one who was engaged for many years as crown counsel, and afterwards sat for years on the bench of the Superior Court of Ontario and now occupies a place in the Supreme Court of the Dominion. Then there is Chancellor Boyd, whom we all know in Upper Canada to be a most eminent jurist. While on the other side, taking the first three in the order that I received the list, Attorney-General Mowat, Chief Justice Hagarty, and Sir Thomas Galt, all able men, hold an opposite opinion, so far as I can make out. Perhaps I was not so much surprised with regard to one or two of the gentlemen named, but I certainly felt surprised when I saw the name of Hon. Mr. Mowat, Attorney-General of Ontario, opposed to this change; for he has been for many years (and I have admired his conduct in taking the course he did) a great law reformer, and the obstacles in the way of justice which "the wisdom of our ancestors" had placed in his way—all these technical absurdities, he bore down and toppled over without the slightest hesitation. He was most energetic in the way of reform—in fact he was almost like a

hippopotamus rushing through a cane brake in his desire to make direct and plain the path of ready justice. When I see his views and the arguments he uses I will perhaps be able to appreciate the reasons why he occupies the position that he does. At present all I can say is, I am somewhat surprised that so able a man, and so valuable a man as a law reformer, has taken the view that he appears, on this occasion, to have taken. What I ask is that these papers be produced, and the reason I ask it is this: It is a very important question. It very seriously touches the administration of justice, and here we find one hundred men competent to form an opinion on the subject—men exercised in the office of justice, forming different opinions, some fifty on one side and some thirty-nine on the other, while some are doubtful. I have not gone into an analysis of provinces, but I find that in most of the provinces the judges are pretty equally divided, while in my own province the majority of the judges who have spoken on the subject is slightly in favor of abolishing the system. Now, while I admit, and I think would claim, that the greatest weight should be attached to their opinions, I must admit also that they are not infallible, and with the proper material before them intelligent laymen can as well dispose of such matters as perhaps the most astute lawyer. The condition being this, that a large number are for and a large number against, the majority, however, being in favor of the abolition of the Grand Jury, the material is there for everyone capable of reasoning to form a correct conclusion on the subject. I do not intend to ask, nor do I expect immediate action. I have the fullest confidence in the men who control public affairs, and I have no doubt that at the proper time they will take action. I do not propose to follow up this motion with any action this session, nor perhaps later, if I should be convinced that the reasoning is against me, but what I want is this: that that valuable contribution to the discussion should be within reach of every man, layman as well as lawyer, judges and attorneys-general—that it should be in the hands of all, to enable everyone who takes an interest in the subject to form an intelligent opinion, and to enable me, who have taken some pains on the subject, to get the views of those who differ from me."

In compliance with the request made in the foregoing address by the honorable senator, the government caused a blue book to be prepared and issued, containing the replies of the judges, ninety-seven in number, as well as of the attorney-general of the respective Provinces of Ontario, Nova Scotia, British Columbia and Manitoba. Lengthy extracts from this blue book will be found in my review, and, no doubt, copies of it may be obtained from the proper quarter by those who may desire to see the opinions of the Judges *in extenso*.

## OPINIONS OF SIR JOHN ABBOTT, SIR JOHN THOMPSON AND OTHERS.

In the month of March, 1889, in rep'y to the speech of the Honorable Senator Gowan, already referred to, the Honorable Senator (now Sir John) Abbott said, as reported in Hansard: "I am sure the house has listened with great interest, and is under deep obligations, to my honorable friend for the study and research which he has devoted to this question of the value of the Grand Jury in the administration of justice. It is probable that this venerable system is perhaps getting too venerable for the present age. There is no doubt that it is cumbrous, and in many other respects unsatisfactory. The progress of our free constitutional system, under which offences are tried by independent judges—judges entirely independent of outside influences—has rendered the protection, which the Grand Jury was calculated to give to the citizen, practically unnecessary. There is no danger now of any interference by the Crown, or by a powerful subject, either to cause an unjust prosecution of an innocent person or to shield a guilty one. Such practices have become practically things of the past, and for protection from them, which was largely, no doubt, the reason for the existence of the Grand Jury, that institution is no longer necessary. The preliminary enquiry, it seems to me, so far as it is necessary, into offences which have already been investigated by a magistrate, can best be made by a person trained for the purpose; and probably such an officer as my honorable friend has indicated would be a much more satisfactory means of making this preliminary inquiry than a tribunal composed of a number of gentlemen who are selected rather with respect to the amount of property which they happen to possess than with reference to any special fitness which they may be supposed to have for making such an inquiry. It would be extremely probable, as any one might of himself judge, that the results of a system of that description would be precisely such as my honorable friend has unearthed and has disclosed to us during his address. But at the same time it must be recollected that the great benefits which this antiquated system has conferred upon the people in the past, the security, the protection, which it afforded them through centuries, has greatly attached the people to the institution of the jury; and it would be dangerous and unpopular with the people generally to make any attempt to disparage the efficiency, the position, the power or the advantages of the jury system in any phase of it whatever. It is to be feared, therefore, that at this moment public opinion has not reached a point where it will be safe or judicious to attempt to do away entirely with the Grand Jury system, and substitute for it any other, no matter how well conceived it may be. I can say, however, in answer to my honorable friend's question, that the attention of the government has been attracted to this question for a long time past, and they have had it under very serious consideration; and I may promise him that as soon as the tendency of public opinion is such as to justify an attempt to remove this tribunal altogether from the administration of the law, the government will be prepared with a measure to substitute for it one which will be calculated to perform all the duties of the ancient Grand Jury in a more satisfactory, a more speedy and a more economical manner. It will be impossible for me to state at the moment what precise description of officer would be substituted for a Grand Jury, as my honorable friend asks me to do, but that will be a subject which will, of course, require the careful consideration of the government; and I hope before long, perhaps next session, that the government may be able to present a measure having the tendency which my honorable friend's address indicates, that he desires, and which I think his address is very well calculated to hasten."

As the Montreal *Herald* says, editorially : "Mr. Abbott's remarks will, without doubt, very materially strengthen the position taken by Senator Gowan. It is clear that the former believes the Grand Jury to have lost its usefulness, though he is not prepared to advocate its immediate abolition."

The Halifax "*Morning Herald*," in commenting on Sir John Abbott's remarks, says as follows : "It is our opinion that in the Province of Nova Scotia the people are already prepared for the complete abolition of the Grand Jury system without further delay. It may be as Senator Abbott suggests, that in other portions of the Dominion public opinion is not thus far advanced ; but whenever the government may decide to deal with the matter we do not doubt but the reform proposed will meet with hearty popular approval."

Sir John Thompson, in moving the second reading of his bill respecting the criminal law in April last, is reported in Hansard to have referred to this subject as follows : "The attention of the public has been directed very considerably to one change which was mooted in connection with the re organization of the law relating to criminal matters and criminal procedure, and that is the proposed abolition of the system of indictment by Grand Jury. The attention of parliament and the public has been directed to that question very forcibly, indeed, by a member of the other branch of Parliament, a member to whom, I am sure, both Houses owe a great deal of gratitude for the pains and the care and the attention he has devoted to legislation during the many years of a useful and honorable life. I refer to Senator Gowan. He moved in the matter a year or two ago, and it was thought best that the attention of the public should be drawn even more strongly to the question than it was by the remarks he made on the subject in the Senate. The result was, as the House may remember, that a circular was sent to all the judges in the country who have permanent criminal jurisdiction, and indeed all the officers charged with criminal prosecutions, calling their attention to the change which that learned gentleman thought desirable, and asking their opinions as to its propriety and expediency. It was felt that the opinions of those who are connected with the administration of criminal justice and have its care from time to time would be of great assistance to Parliament in framing any change that might be thought desirable ; and we have had in response to that a great number of replies, most of which have been published, and some of which have come to hand since the publication of the returns by order of Parliament. The opinions upon that subject, by those who were thus addressed, were very divided indeed. Most of the Judges who are accustomed to administer justice without juries in ordinary proceedings were in favor of the change. The others were divided upon the subject ; and it is impossible to deny, in view of so strong a division of opinion on the subject, that it seems unwise, in connection with this measure, to force that provision on the attention of Parliament at present. I must say that I concur personally in the opinion expressed in another place by the learned gentleman to whom I have made reference, and I think that in many respects the administration of justice would be improved if we dispensed with the intervention of Grand Juries."

Sir John then refers to the disputed question of jurisdiction, to which I hereafter refer, and to the question of the unreasonableness of the expectation that Grand Jurors should be expected to give any expression of opinion favorable to the discontinuance of their functions, although, as he remarks, the jurors of the province where he had practiced (Nova Scotia) had nearly always been in favor of the discontinuance of their services, as they considered them onerous and unimportant.

He then proceeds : "There are two strong reasons that induce me to delay any request to Parliament to alter the law with regard to this system. One is the opinion expressed by high authority that, for the present at least, a continuance of the functions of Grand Jurors lead to a large body of

respectable persons in the community being present at the exercise of the functions of the court, and lead to their assistance in the exercise of those functions, the result of which is said to be, and I believe it to be, that these persons have their confidence in the system of justice as administered in this country increased, they feel a greater co-operation and sympathy with the administration; and to some extent additional publicity among the best classes of the community is, in that way, given to the proceedings in our courts of justice."

Sir John concludes his remarks with the consideration of the question of what procedure should take the place of the Grand Jury, and this portion of his address I quote hereafter at length, under that head of the subject.

It is quite evident that the Minister of Justice is, like Sir John Abbott, personally in favor of the abolition of the system, but that before permitting a measure to that effect to be introduced they would like to have an expression of opinion from the public.

Great changes in the law or in legal procedure should be cautiously made To hasten slowly is often evidence of the highest wisdom, but if it can be shewn, as many eminent men think it can, that the reasons for the retention of the system are largely sentimental, then it should be swept away.

The Honorable Senator Trudel, when this matter was brought up first by the Honorable Senator Gowan, stated that, "With reference to the suggestion of the honorable gentleman from Barrie as to the advantages of having a crown prosecutor—that is, an officer whose duty would be to enquire into crimes and bring such matters before the courts, without the co-operation of the private prosecutor—I agree with the honorable gentleman to a great extent. My honorable friend made a comparison between the system existing in Scotland and the system in France. I think the system which prevails in Canada leads to compounding of felonies, and in many cases parties who should go before the criminal court and should be punished, enjoy immunity from punishment because they have money, and have been left in a position to settle the matter with the private prosecutor. I had myself, though a lawyer, occasion to bring personally a criminal accusation before a court of justice, and the costs I incurred and the result of the whole thing were such that I decided that if I were attacked in the future I would try to defend myself, but should never look for redress to a criminal court. In fact to expect the individual who is wronged to take the initiative proceedings, and to incur all the responsibility and all the costs of criminal procedure, places such a burden upon his shoulders that in many instances it is a denial of justice. This means immunity to the guilty party, so that I think this is a matter which commends itself to the serious consideration of the Government."

## A SHORT REVIEW OF THE OPINIONS AND CRITICISMS OF THOSE JUDGES WHO OPPOSE ABOLITION.

"'Tis hard to say, if greater want of skill
Appear in writing or in judging ill:
But, of the two, less dangerous is th' offence
To tire our patience, than mislead our sense.

—POPE.

A few of the judges in considering the question of the abolition of the Grand Jury simply say they are opposed to doing so, but give no reasons therefor, or suggest what should take its place, and many others while objecting to the proposed reform and stating their reasons, are apparently under the impression that only their opinion as to the expediency of doing away entirely with the system was desired, and that they were not required to suggest what should be substituted for it.

Possibly these latter may have considered that as the circular addressed to them by the Minister of Justice did not, in so many words, actually require them to deal with this branch of the subject they might be thought officious if they did so. In both cases no opinion has been given on the subject of a satisfactory substitute, which is unfortunate.

The arguments, therefore, of those who favor the retention of the Grand Jury and who do not consider the question of a substitute, are of little or no value, as they proceed entirely on an erroneous assumption. Possibly many of these judges, if they had considered the matter, would have been favorable to abolition on condition that either the county attorney system, or that of the procurator fiscal, were substituted.

Those who will read the remarks of the judges will observe that there is a difference of opinion among them as to the desirability or otherwise of appointing the crown attorney as a substitute for the Grand Jury. The judges who are opposed to his acting in this capacity say that there would be great danger if he were appointed to perform these duties, on account of his being paid by fees. In reply to this it is said that if this should be so considered then it must be a mistake to continue the county attorney in the performance of the duties he now discharges, as they are largely those of the Grand Jury, and that there is quite as much danger of justice being defeated by the latter body, as now constituted, as there would be were the county attorney (pecuniary interest and all) given sole charge of the bills of indictment.

Undoubtedly the chief argument employed by those who advocate the retention of the Grand Jury is, that it is an ancient and time-honored institution, which has done yeoman service in the past by standing as a shield or bulwark between the crown on the one hand and the subject on the other, and they assert that it still possesses its ancient power in this regard, and is now, what it was in days of yore, the palladium and safeguard of our liberties. These friends of the system say that any change therein would be a dangerous innovation, and they remind one of the exalted opinion Sir Leicester Dedlock, in Bleak House, had of the Court of Chancery, who thought that court, "even if it should involve an occasional delay of justice, and a trifling amount of confusion as a something, devised in conjunction with a variety of other somethings, by the perfection of human wisdom, for the eternal settlement (humanly speaking) of everything" and who was "upon the whole of a fixed opinion, that to give the sanction of his countenance to any complaints respecting it, would be to encourage some person in the lower classes to rise up somewhere—like Wat

Tyler," and who appeared to have a "stately liking for the legal repetitions and prolixities as ranging among the national bulwarks."

Veneration for what has long been wont and custom looks back upon the past as the acme of perfection because it is old : there are those in religion as well as those who practice law, who maintain that what belongs to antiquity and to the fathers has not been improved by the reforms of later times,—for instance I would mention the ancient practice in arraigning a prisoner at the bar,—"John Doe, hold up thy right hand !" Whereupon the accused held up his right hand, if he had one, and if he had no right hand he was excused, without contempt of court, by being told, "Well, hold up thy LEFT hand !" I do not recollect, as my reading does not serve me, what happened if he had no hand at all. This form was intended to distinguish the prisoner from the bystanders. Then the clerk of arraigns proceeded thus, "You are indicted in manner following," and then proceeding with the reading of the indictment to the close, the question was always put, "How say you, John Doe, are you guilty or not guilty ?" Then the prisoner would say, "Not guilty, my lord !" The next question proceeded, "How wilt thou be tried," the answer being, "By God and my country," the prayerful reflection of the clerk was then added, "God send thee a good deliverance,"—a prayer which was often followed by the implored acquittal. On one occasion Lord Norbury in sentencing a poor culprit, used the customary formula, "and may the Lord have mercy on your soul," to which the condemned man added the rejoinder, "There are few men have luck, my lord, after *your* prayers."

As Senator Gowan wittily and rather suggestively remarks, "few in the present day fear that arbitrary power will venture to raise its hands in the courts or elsewhere, and, if it did, the people of this country would not fight behind the feeble barricade of a Grand Jury. The days of arbitrary power have happily passed. A spirit to break down anything because it is old should be avoided, but to maintain a worn-out institution, because it is ancient, must be an absurdity which can only be accounted for by the veneration for antiquity which seems to overshadow in some things the human mind." He says further that popular liberty and popular rights are happily established in this country on a sure basis, and are understood and valued, and he utterly denied that Grand Juries are in any sense the palladium of either.

It has been said that two of the main reasons for the existence of the Grand Jury in early times, were : 1st, The protection of the citizen from vindictive prosecution by the crown or by some powerful oppressor ; and, 2nd, the great influence it possessed and exerted in preventing the escape of criminals who could invoke the aid of powerful friends.

Under our constitutional and democratic system of government danger from these quarters need never again be apprehended.

That the Grand Jury in its inception and for long years thereafter served a useful purpose, is cheerfully admitted, but those were times when the crown exercised most arbitrary powers, when judges were its creatures, and when justices oppressively sent persons to prison who were accused of trivial or political offences, but at the present day in the few cases which come before it, the utility of the Grand Jury depends very much on the character of the justices, and whenever stipendiary magistrates commit for trial, its interposition is entirely superfluous and unnecessary, and even if the committing magistrate should chance to be an unlearned man, the prudence of subjecting his open, honest and above-board (though possibly rough and ready) decision to the supervision and scrutiny of such an irresponsible, unskilled and secret tribunal as the Grand Jury is extremely doubtful.

Great stress is laid by several of the judges on what they call the educational advantages afforded by the congregating together of the Grand Jury. Now, let these so-called advantages be examined into. The Grand

Jury appear at the opening of the court, they hear from the presiding judge a few remarks addressed to them in necessarily technical and professional language, the meaning of which many of them do not understand. From the time they enter upon the performance of their duties until they make their final presentment they are in secret session. They are rarely in court, except when they return their bills, and even then, only half a dozen or so appear. They do not remain in the court-room enjoying the advantages possessed by a petit jury who are engaged day after day in hearing evidence, weighing facts under the careful supervision and direction of the court, listening to able speeches and arguments of counsel, gaining a useful knowledge of law and business and performing their duties under the censorship of the press and the public.

To s[illegible]hat two or three days' attendance as a Grand Juror at court, once perhaps in every five or six years, is an educator, is not the kind of argument that would, on the trial of an action before them, be tolerated by the learned gentlemen who advance it.

Can anybody point out what particular educational advantages are afforded by the assembling together for two or three days, in a private room, of twenty-three gentlemen, unlearned in the law, and wholly unskilled in the consideration of matters requiring no mean amount of legal knowledge?

These worthy citizens are largely strangers to one another, drawn as they are from all parts of the county, and three-fourths of them are utterly unacquainted with the most elementary forms of legal procedure, the examination of witnesses or the sifting of evidence, thus leaving to the residue of their number the management of important matters which are supposed to require the whole panel.

Nevertheless, some of the friends of the Grand Jury, in pleading for its life, dwell upon the importance of thus periodically collecting together the principal yeomen and squires in order that they may have an opportunity of being educated in legal matters by listening to a judge's one charge and by solemnly deliberating in secret over such criminal matters as may come before them. I think that if an educating influence is desired the Grand Jury system does not answer the purpose, but that it is actually a deterrent, inasmuch as its continuance withholds from the petit jury, (who are clearly in a position to learn something from listening to the proceedings of the courts), a better educated and more substantial class of men. When, therefore, this argument for the continued existence of the Grand Jury is analyzed it will be seen that there is not only nothing in it, but that it in fact operates as a very strong reason in favor of the abrogation of the system. Take, for instance, two men of equal intelligence, place one on the Grand Jury and the other on the petit jury at the same assize. Will it be for one moment pretended that the Grand Juror has learned more than the other as a result of his attendance? Will it not be far more likely that the petit juror has increased his stock of legal knowledge to a greater extent than his brother juror? True, it may be said that the abrogation of the Grand Jury system will wholly release from service between twenty and twenty-three men at each court. While this may be so the tone of the petit jury would be elevated by the infusion of more intelligent men into its ranks, and although the whole number of jurors will be reduced, those best capable of learning will be selected to serve, including all those who would otherwise have been on the Grand Jury panel, and the result will be a decided gain to the community.

As the Penetanguishene Herald says: "The idea that the attendance of the Grand Jurors at the sessions and assizes is an educational factor for the community loses no force by the abolition of that body. Cutting adrift the Grand Jurors leaves better material available for the petit jury. The attendance of the men upon that jury who formerly served as Grand Jurors, would better facilitate justice at petit jurors' hands." Judge Deacon says "that

the value of any education in law or criminal procedure which the members of any Grand Jury can possibly obtain at any attendance upon a court must be exceeding small, and is, in my opinion, greatly counterbalanced by the mischief they can do when not under the eye of the court."

There is another matter which should not be lost sight of in this connection. It is well known that, as between the Grand Jury and the petit jury, the latter has always been considered as the more unlearned tribunal. The very manner in which its members are selected gives color to this as shewing that they are not believed by the selectors to be, in the words of the statute, as "discreet as their brethren of the Grand Jury, who are always chosen first, so that this belief is not altogether groundless, and innumerable extraordinary and ridiculous verdicts, arrived at no one knows how, have but helped to confirm the idea.

Barham in the "Ingoldsby Legends" has thus immortalized a certain jury:

> "Last of all, may'rs and magistrates, never be rude
> To juries! They're people who *won't* be pooh-pooh'd!
> Especially Sandwich ones—no one can say
> But himself may come under their clutches one day;
> They then may pay off, In kind any scoff,
> And, turning their late verdict quite 'wisey wersey'
> 'Acquit you' and *not* recommend you to mercy."*

It is therefore high time that the standard of this body should be elevated and improved. Replacing the least well-informed of them with men who would be liberated from service on the Grand Jury would have the desired effect, and the result could not fail to be other than eminently satisfactory, not only to the general public, interested in seeing the criminal law properly administered and respected, but to that large class of civil suitors who, when they pay for it, should certainly have the right to expect that their cases would be tried by a body possessing at least ordinary intelligence.

Now and then a judge gets the better of one of those juries "who know all about it." I remember a case of this character which came before the Honorable Chief Justice Galt some years ago. On the occasion referred to a young man was arraigned on a charge of having stolen a box of cigars. The evidence had, in their opinion, been strong enough to warrant the jury, notwithstanding the judge's strong charge in the prisoner's favor, in finding a verdict of guilty. His Lordship, one of the most tender-hearted of men, as everybody knows, in sentencing the trembling culprit did so in the most solemn tones imaginable to the following effect: "Prisoner at the bar, have you anything to say why the sentence of the court should not be pronounced upon you for the felony of which you have been convicted?" The prisoner thereupon blurted out something in the usual way to the effect that he was innocent of the charge, whereupon the chief justice said: "Prisoner, you have been found guilty by the jury of a serious offence, a very serious offence, indeed. Now, you know, prisoner, it was very wrong of you to take, as the jury have considered you did, this box of cigars, and it only remains for me to sentence you. The sentence and judgment of the court upon you for the felony of which you have been convicted by the jury is that you be confined in —— the common jail of this county for the period of —— twenty-four hours, and that you be then discharged." A sentence which met the approval of the general public who had heard the case.

In another case, tried before Mr. Justice Maule, His Lordship thus addressed a culprit: "Prisoner at the bar, your counsel thinks you

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*"At a quarter sessions held at Sandwich, in England, on Tuesday, the 8th of April, 1845, Thomas Jones, mariner, aged seventeen, was tried for stealing a jacket, value ten shillings. The jury, after a patient hearing, found him 'not guilty' and recommended him to mercy!"

innocent ; I think so too ; but a jury of your own countrymen, in the exercise of such common sense as they possess, which does not appear to be much, have found you guilty, and it remains that I should pass upon you the sentence of the law. That sentence is that you be kept in imprisonment for one day, and as that day was yesterday, you may go about your business." The fortunate prisoner was thereupon released and "went about his business," thinking, no doubt, that law was an uncommonly puzzling thing.

A number of the judges treat of the importance which attaches to the general public being allowed to think that justice is administered in as pure and enlightened a form as possible, and that nothing so conduces to this as allowing citizens of substance to take an important part in judicial proceedings ; and that this knowledge must be productive of contentment which lies at or near the basis of all good government. One learned judge says that through them the body of the people can be reached and a healthy public tone created, whenever, in the public interest, the judges feel called upon to direct attention to new legislation, or evils requiring redress, or legislative interference, or when dangers threaten our system by the combination of forces, political or otherwise. A wise deliverance on the subject in charges to the Grand Jury does much to awaken interest, remedy abuses, explain fallacies and generally assist in the proper administration of affairs. The judges, he argues, are able through the Grand Jury to press upon the public the necessities for various reforms, such as prison reform care of non-criminal poor, improvements in court houses, jails, etc., and to receive from them many suggestions indicating the trend of outside thought and opinion ; their attendance is of great public advantage, they become acquainted with the working of our system of jurisprudence, familiarized with many of the principles of law and are prepared to suggest steps to be taken in the amendment of law or of bringing in new statutes, which to the lay mind seem necessary ; from them come our justices of the peace, legislators and many officials. Another learned judge says that as an educator of the people it has great merit, as an inspirer of love of law and order and respect for constituted authority, its influence is beyond question. It brings the best men of the county together. It gives the people a most invaluable insight into the manner in which justice is administered and is a factor in elevating the tone of society, and we have the combination of general common knowledge on the part of a jury with the experience and legal training of a judge. A learned county court judge says that through the judge's address to them, the various changes in the law are made known to them and through them to the people. Their attendance familiarizes them with the modes of the administration of justice and the procedure of the courts and has a tendency to keep people out of petty and frivolous disputes causing needless and expensive litigation. Selected as its members are from all parts of the county, and representing all shades of public opinion, they discuss the several topics laid before them by the judges and on their return to their homes they take with them the ideas they have acquired, and thus public opinion is moulded, the reeves of the municipalities are instructed, and the hands of the county council strengthened, when the time comes to make any necessary appropriation.

The changes are rung at great length upon these advantages, with slight change of phraseology, but, in the main, agreeing with what I have written. It would be impossible to give all the opinions on these points at length, nor would it answer any useful purpose to do so.

In reply to these arguments I can only repeat what I have already pointed out in another place, viz., that in consequence of the very brief period in which the Grand Jury remain in the court room, their opportunities for acquiring the knowledge which is considered so valuable, are limited to hearing a short charge from a presiding judge, which surely must be considered a very homeopathic dose of politico-legal-municipal economy to be disseminated

"when they return to their homes" among the large contingent of the body-politic which they are supposed to represent. With the abolition of the present system, and with a competent substitute in its place, none of these advantages, if they are such, would be lost, but, on the contrary, much more extensive opportunities would be afforded to an improved petit jury for learning these and many other things, so that the continuance of the system as at present is, at this moment, actually operating disadvantageously to the country, as it prevents the diffusion of much more valuable legal and general knowledge.

Again, it is argued that when an accused person is discharged by the "no bill" of a Grand Jury, he occupies a better position in the eyes of the public than if he had been placed in the dock, and acquitted after a trial in court. Now, what is the fact, the Grand Jury is a tribunal which sits in secret, none of its proceedings in the investigation of a case are known to the public. For aught the latter know, the accused may have escaped by reason of some flaw in the indictment, or through want of thorough enquiry, or by a misconception of the law or in consequence of the favorable leaning of a friend or two, and the tender-heartedness of others on the jury—in fact through any of a variety of lucky contingencies. However honorable some people might think an accused person's acquittal in this "no bill" way to be, there are always a great many more who regard the secret and unexplained proceedings of a Grand Jury as anything but a clearing of his character, whereas, if he had stood his trial in open court and been honorably acquitted, no malicious busy-body could go about insinuating that he had got off by what is popularly termed a "fluke." On this point the Honorable Attorney-General Longley, of Nova Scotia, says: "In most cases when a party is charged with crime it is his interest to court a public trial. Even when innocent his innocence can be best vindicated after a public investigation. It very often happens that with a cloud of suspicious circumstances surrounding the case the public will not accept the bald statement of 'no bill' from a Grand Jury as a vindication." He refers to the fact that on several occasions since he has held his office he has been asked to file a *nolle prosequi*, but that in the interest of the accused he has declined to do so, as he has felt such a course would fail to satisfy the public and leave the enemies of the accused in a position to say that if there had not been a special interposition a conviction would have been obtained. In every case the wisdom of his course had been justified by the complete vindication of the accused persons.

He further says: "I have known instances of parties consenting to the trial under the Speedy Trials Act who were, so far as could be judged, innocent of the charge, but who sought the earliest opportunity of a public vindication. This leads me to conclude that individuals in this country do not place a priceless value upon that institution which is supposed to guard them from the horrors of a public investigation. When once a charge of crime is preferred against a man supported by evidence, either of a direct or circumstantial character, the finger of suspicion is at once pointed toward him, and this can be best removed by an investigation of the most public character."

His Honor Judge Deacon says on this point: "A really innocent person will generally desire a public and open vindication, and will not be content with a 'no bill' or other suppression of the charge."

Judge Bain says: "Should an innocent man be committed, his character will be more fully and satisfactorily vindicated by the trial and acquittal by a common jury, than by a secret investigation before a Grand Jury."

Some years ago the late Chief Justice Cameron addressed a Grand Jury on this question, among other things, referring to the disgrace felt by an innocent person when put on trial. His Lordship appeared to overlook that a man may be put in jail by order of a magistrate after a preliminary trial and kept there. If there is any disgrace, the being sent to jail is surely

greater than being placed in the dock. The truth is, there may be no disgrace either in the dock or in the jail, nor is there if a man be subsequently acquitted. But the innocent man would naturally prefer to have his innocence established upon a public, open enquiry, instead of being simply allowed to go on the "no bill" of a secret tribunal.

Some of the judges dwell upon the dangers which occasionally arise from the committals made by an inexperienced and untrained magistracy, who, not having acquired a legal education, are not conversant with the rules of evidence, and it is asserted that the Grand Jury act as a wholesome corrective of this, which would be lost were the system abolished.

There would be considerable force in this argument if the Grand Jury was swept away entirely, and no adequate and proper substitute provided to replace it. As, however, the better opinion appears to be, as already stated, that it would not be advisable to abrogate the functions of the Grand Jury unless such substitute was provided, all the arguments based on the ground of danger arising from this source must necessarily fall to the ground.

Very few who favor the abolition of the Grand Jury desire that the magistracy of the country shall take its place. There are such serious and obvious objections to this course that I do not consider it worth while further to discuss the point, as there should, manifestly be, as most people admit, some tribunal interposed between the committing magistrate and the prisoner's dock. For, while occasionally a capable magistrate may be found fully competent to dispose intelligently of the more serious cases which might come before him, the average justice of the peace is not fit either by education or training to do so, and, indeed, would not care to undertake the additional responsibility.

A few of those who consider that it would be better "to leave well enough alone," appear to think that the question of expense is a mere bagatelle, and should not, for a moment, be allowed to weigh against the other excellencies which they discover in the system. The general public, viewing the matter from the standpoint of the long-suffering and already too much governed tax-payer, may very justly say, that, before agreeing to this judicial argument, they would like it to be confronted with some reliable figures, in order that they might judge for themselves whether they are not paying too much for this mere matter of sentiment.

From a comparative return for the five years ending in 1889, compiled by the county treasurer of Northumberland and Durham, in the Province of Ontario, and set out in the return to the Minister of Justice already referred to, I have ascertained that the average yearly cost of the Grand Jury in those united counties, for attendance and sheriff's fees alone, was $1,020.76. To these should be added the fees of the clerk of the peace, the selectors, the justices, additional fees to the sheriff, the expenses of ballotting, crier's and constable's fees, and the additional per diem allowance which the jurors receive since the passing of the recent Ontario statute. These additional sums would not be less than $180, and thus the total would be $1,200 per annum.

In the large County of Bruce the average is very much higher—the per diem allowance and services by the sheriff amounting alone to $2,253. In Middlesex the per diem allowance alone, paid in 1889 to the Grand Jury, was $1,165.40 before the increase. In Hastings, Judge Fralick makes the average paid to Grand Jurors alone for the five years ending with 1890, and before the increase, $788.74 In Leeds and Grenville, according to Judge Macdonald, the total before the increase was about $857. In Elgin, which is a small county, the average amount per annum all told for the last five years would not fall far short of $1,000.

The estimates for Hastings and Leeds and Grenville are, I think, too low, and I imagine that a fair average of all the expenses caused by the

system in Ontario would be about $1,400 for each county, thus making the aggregate for the thirty-seven judicial districts $51,800. I find that the *Law Journal* and some other papers a few years ago fixed the gross sum at $50,000 before the increase in the per diem allowance.

As suggested in another place, if the Grand Jury should be abrogated and a public prosecutor be appointed for a group of, say, three counties, there would be a fund of $1,400 for each county, making $4,200 for the whole group. Surely a thoroughly competent person could be found to accept the position for each group, for one-half the last named sum, and thus a saving be effected for each county of $700, and with an improved system to take the place of the old one.

The figures I have used are from an Ontario standpoint; if in other provinces the amounts are smaller, as would appear to be the case, at least in Nova Scotia, according to Mr. Justice Townshend, who places the gross sum per annum at the exceedingly small sum of $200, there would either have to be more counties grouped or a reduction in the salary of the official. These are matters of detail which could easily be arranged.

If the amount I have mentioned should not be considered adequate to secure the services of a first-class person, then the suggestion made by *The Canada Law Journal* of January, 1892, might be adopted, which is as follows; "Five Crown officers could be appointed for the province (Ontario), one for each circuit, and might be paid a salary of $3,000 a year each, and then the Province would be a gainer to a considerable extent financially. It costs for Crown counsel about $10,000 per annum out of the provincial treasury, so that the change we suggest would require only $15,000 additional, and the county would therefore be relieved from the whole cost of the present system. And it occurs to us that the suggestion that an official, like a circuit Crown officer, would be more subject to bias and partiality than the Grand Juries are, is entirely gratuitous. The same remark would apply to the judges themselves, if there was anything in it, but the fact that the judges are not influenced, is a convincing reason for believing that a Crown officer, paid a salary equivalent to that of a superior court judge, and selected, not on political but on meritorious grounds, would be just as respectable, just as unapproachable and just as pure as the purest judge on the bench."

One learned judge says that "the great objection to the Grand Jury system seemed to be its expensiveness; but there were other institutions in the county against which the argument of expense could be employed, but which could not at all be dispensed with." His Lordship does not intimate what other institutions he refers to, but surely that should be no reason for continuing the Grand Jury if it can be shewn that a more efficient, or even an equally efficient, substitute can be provided at one-half the expense; indeed, what it has to do with the point I have not been able to discover.

His Honor Judge Hughes says on this subject: "The great expense of the present system of administering criminal law, where the intervention of the Grand Jury is employed, is not its most serious feature, but it is worthy of consideration and investigation. The money wasted in that way might be profitably employed in setting and keeping on foot a more efficient and expeditious and less tedious mode of procedure, and I know of no case of such a public character, that the remedy I suggest could not be sufficient for, and more satisfactory than, that of entrusting such weighty responsibilities to a Grand Jury, which is largely composed of a partisan magistracy, appointed by a partisan administration, which governs by a party and for a party, as has been the case for upwards of eighteen years in Ontario.

All the fees and the mileage expended, and all the unnecessary delays incident to the present mode of proceeding before a Grand Jury, and its attendant and needless expense, if not entirely saved, would be very much lessened, and might be better applied in paying the salary of a public

prosecutor, such as I suggest, and a fixed salary and the travelling expenses of an efficient stipendiary or police magistrate as well, all of which might be provided for at the same time, at less expense. The large expenditure connected with the printing and circulating statutes, gratuitously, to the immense body of honorary, non-acting magistrates (who are now nominally qualified under commissions of the peace in the several counties in Ontario might be utilized and economized towards paying those salaries."

His Honor Judge Reynolds on this point says : "Those who clamor for the abolition of the system talk of the great expense and waste of time it involves, but we should all remember that every man owes it to his country that he should sacrifice his time and means to secure good government, the pure and unsullied administration of justice and the blessings of liberty untrammelled."

The average juryman will say, that, while all this sounds very well, it will not go down with him, and that he must, in addition to the compliment conveyed by the learned gentleman, be paid the sum of two dollars per day and mileage ; and that, although he may owe to the country all that these high-sounding phrases intimate he does, the county must pay him his per diem allowance (not forgetting the mileage), and thus enable him to return it to the tax collector when that functionary is on his rounds.

While the learned judge is no doubt right in saying we should all remember what he so patriotically and generously says on this point, I very much fear that Grand Jurymen, about pay day, are troubled with poor memories, and will accept what the law allots them without any twinges of conscience, allowing the patriotic part to be taken for what it is worth.

It is a fact worthy of remark that of the county judges of Ontario who have replied to the circular of the Minister of Justice, twenty-two are in favor of abolition and only eight against it, while of the five who are classed as doubtful, Judges Price, Kingsmill and Barrett are clearly in favor of the abrogation of the system, provided a satisfactory substitute could be found. As to Judge Woods, of Chatham, I do not see why his name is put in the doubtful column, because he is decidedly in favor of abolition. So that practically there are twenty-six for and only eight against abolition, with one really doubtful.

*The Canada Law Journal* of January, 1892, in an editorial on this subject says : "County judges, by reason of their local knowledge, are specially fitted to speak upon this matter, and they are well aware of this blot on the administration of justice, and it is a significant fact that they stand twenty-two to nine in favor of abolition, notwithstanding the bald way in which the question was put to them. Add to this majority Judge Wood, who favors abolition as regards the sessions and apologetically pleads for a compromise, and the minority is a very small one. The point is this, the county court judges are thrown into very close contact with the workings of all institutions in their districts. They mix more frequently with the people than do the superior court judges, and in consequence they have a fuller knowledge of matters like the workings of the Grand Juries, and are more in touch with the way the ordinary man transacts his affairs than judges whose time is spent almost wholly in an atmosphere of law. They understand from the very nature of the localized position what influences have been at work when there is an evident miscarriage of justice. Most of the county judges have been practitioners and politicians in their respective counties. They know the factions and local jealousies and family differences of half their constituency. They know the most of the men on the Grand Inquest at each court, and when some failure of justice, as regards either the innocent or guilty occurs, they can put their finger on the weak spot and say from what cause the innocent was presented for trial or the morally and legally guilty man allowed to escape. We need not give names, but our readers will at once

recognize the fact that there are a number of the county judges who have had very wide experience and have given the matter special attention, and it is not saying anything disrespectful to the superior court bench, that the opinion of such men must, from their surroundings, personal observation and local knowledge, be the very best evidence we can get on the subject."

A writer in the Vancouver *World*, referring to this matter, remarks : "The county judges of Ontario are unanimous in the opinion that the Grand Inquest should be abolished. This is a remarkable factor. The county judge there has an extensive prerogative and jurisdiction and presides over the general sessions. He is chosen for his office as being a public man of the particular county, and knows familiarly and intimately, to a man, the Grand Jurors. The county judiciary, from their actual knowledge and experience, possess an even truer and more exact opinion on this subject than the superior court bench, the judges of which are centered in Toronto."

A certain learned and witty Ontario Chief Justice who, fortunately, still lives to grace his high position, often gets off a "good thing." These are, unfortunately, often lost in oblivion or linger only in the memory of those who happen to have heard them. There is one which may come in appropriately here : Speaking of the Act enabling county court judges to officiate in other counties than their own, he observed : "Itis very hard on the people of a county to have a judge coming among them whose law they are not accustomed to." As the learned judge will have no objection to a good-natured rejoinder, I, as my contribution, beg leave to offer the following : Lord Brougham once said in the House of Lords, that he remembered a case wherein Lord Chancellor Eldon referred it in succession to three chief courts below to decide what a certain document was. The Court of King's Bench decided it was a lease in fee ; the Common Pleas, that it was a lease in tail ; the Exchequer that it was a lease for years. Whereupon Lord Eldon when it, came back to him decided for himself that it was *no lease at all*. Which goes to shew that even in the highest courts of the land, until at least the millenium shall have arrived, perfect unanimity may not be looked for, and that, occasionally, "the people of a county" may expect even from learned chief justices, an interpretation of the law different from what other learned chief justices may have accustomed them to.

Some of the judges argue that in the event of the abrogation of the Grand Jury a special prosecutor would have to be appointed at great expense, for each county to discharge the functions now performed by the Grand Inquest. Those who advocate the appointment of such an official say to this that it is not proposed to appoint an officer of the character indicated, for each county, any more than it is the fashion to appoint one superior court judge or crown counsel for each county. These judges and counsel, with great advantage to the public, go on circuit twice a year, and so could the public prosecutor, and thus a great saving of expense would be effected to the country.

On the whole I think it will be found that the great majority of those who are in favor of a substitute for the Grand Jury, and many who would be favorable to a change if a substitute satisfactory to them could be found, appear to be of opinion that the appointment should not be given to the county attorneys (who would, of course, still retain their present positions with some changes in matters of procedure necessitated by the altered state of things), but that a public prosecutor chosen from the bar, should be appointed by the crown, who should travel on circuit similarly to the judges of assize.

As Senator Gowan says : "How and under what tenure crown prosecutors should be appointed, the limits of their duties and other matters of necessary detail, it would now be premature to enter upon as it is outside my purpose to discuss the appointments required, and whether made by the general

government or otherwise arranged, these considerations belonging to a matured measure."

The eminent scholar Mr. Goldwin Smith writing on this subject, is thus reported: "A public prosecutor would be guarded by his professional instincts against irrelevant considerations, and though he would, in the first instance, owe his appointment to the Government, it is difficult to imagine any circumstances in which his care for his own reputation and his interest in his office would be likely to give way to his desire to oblige a minister. *To the institution of a public prosecutor we in time shall probably come.*"

Coming from a layman, as this does, it is very valuable as an initiative to a body that should now have something to say in a matter which so intimately concerns them.

In case the Grand Jury should be abolished and the county attorney be considered an improper substitute for that body, then one argument employed by many of the judges will lose its force, as it is very strongly urged by them that this officer, if paid by fees to perform the additional duties, would have a strong personal inducement to forment and institute criminal prosecutions. The same argument would, of course, apply were a public prosecutor, paid in the same manner, appointed. This objection would, however, be overcome if the latter official was paid an adequate salary.

As it would be necessary that he should be a barrister of some years standing, and one not practising in criminal courts, and as it would, consequently, be too expensive to have one of these officers for each county, they could be appointed for a group of counties; in this way a salary sufficient, as shewn elsewhere, to induce talented and high-minded men to accept the position would be available, with the result that the public would have as much confidence in these officials as they now justly have in the judiciary of the land, against whom no one ever hears a word of well-grounded complaint, although they have very extensive and sometimes use very arbitrary powers. It would be as unlikely that the public would fear an injudicious or improper exercise of the powers vested in and employed by competent public prosecutors as it would be for them to object to the manner in which the judges now exercise those with which they are clothed.

Again, while it would be possible for the public prosecutor to lean unduly to the side of mercy and ignore a bill, on the other hand any harshness he might exercise in unwarrantably finding a true bill could be corrected by the petit jury acquitting the accused.

The attitude of that learned judge who declined to commit himself on the subject of the abolition of the Grand Jury when requested to give his opinion by the Minister of Justice, reminds one of a certain distinguished nobleman in the "Ingoldsby Legends" who, on being asked by the King of Spain for advice on a certain matter, cautiously replied:

> "It's the—as I may say—proudest day of my life!
> But as to the point—on a subject so nice
> It's a delicate matter to give one's advice,
> Especially, too, when we don't clearly view
> The best mode of proceeding, or know what to do;
> My decided opinion, however, is this,
> And I fearlessly say that you can't do amiss,
> If with all that fine tact, both to think and to act,
> In which all know your majesty so much excels—
> You are graciously pleased to—ask somebody else!"

While the brevity of the remarks with which some of the other judges dismiss the subject recalls what was said on the same occasion to the king by another distinguished nobleman, a companion of the last-named individual, viz.:

> "Then the Count de Pacheco
> Whose turn 'twas to speak, O—
> —Mitting all preface, exclaimed with devotion,
> 'Sire, I beg leave to second Don Lewis's motion!"

## EXTRACTS FROM THE OPINIONS OF THE JUDGES AS TO WHAT SHOULD BE SUBSTITUTED FOR THE GRAND JURY.

A great number of those who advocate the abolition of the Grand Jury, and many of those who oppose its abolition, are of opinion that before being abolished, there should be some competent tribunal substituted for it.

Sir John Thompson, when the question came before the House of Commons in April, 1892, is reported in *Hansard* to have thus remarked: "Another consideration which has had great weight with the judges who desire that the change should not be made at present, is the uncertainty as to what procedure would take the place of that before the Grand Jury. I can suggest no other as likely to take its place, except something like this: It is the requirement that every person, before being tried, should be committed for trial after a preliminary investigation or an examination by some competent authority. There are many offences, as most members are aware, for which trial can take place now without any commitment for trial preceding the charge to the Grand Jury and the application to the Grand Jury and the indictment by the Grand Jury. It will be absolutely necessary that we shou'd insist upon a provision, if we should abolish the functions of the Grand Jury, that every person tried must first be committed for trial, and in the second place that the complaint, indictment, charge, or whatever it might be, which would take the place of a Grand Jury's indictments, should be approved by the judge before whom the trial is to come on."

Mr. Justice Gwynne says: "The justices of the peace can always have the assistance of the county crown attorney to advise them in the discharge of their duties, and the courts, under sections 81 and 82 of the Criminal Procedure Act, can always be invoked to intervene in the interest of the person charged with crime when the evidence taken before the justices would seem to justify the accused being admitted to bail instead of being confined in jail to wait their trial. But whether the existing law regulating the discharge of their duties by justices of the peace out of sessions be or be not sufficient to warrant the immediate and total abolition of the Grand Jury system is of no importance, for it can be made sufficient in every particular wherein it may be deemed to be insufficient."

Mr. Justice Taschereau says on this point: "I do not lose sight of the principal argument brought by those who would continue the present system, that is: What will be substituted for the Grand Jury? To whom will the functions they now perform be delegated? The answers to these questions naturally give room to a great divergence of opinion." His Lordship then submits, as the principal features of a new system, six general propositions, which will be found later on in this review. They will be found of great value when the proper time arrives.

Chief Justice Hagarty, who is in favor of retaining the Grand Jury, says: "If the Grand Jury be abolished what is to stand in its place between the person charged before justices and trial at assizes or sessions? I deprecate in the strongest manner the leaving the discretion of arraigning or discharging the person charged to an official like the present county attorney—almost always a practising lawyer whose pecumary interest it is always to proceed to trial and with whom practically (as I have heard remarked) the whole county is divided between those who are his clients and those who are not. . . . . If a lawyer of good standing could be appointed to duties somewhat analagous to the Scottish procurator fiscal, it would, I think, be

essential in Ontario—whatever it may be in Scotland—that he should have no other contentious legal business to employ him in any county or counties for which he would be appointed. No lawyer possibly could afford to hold such an office without a larger salary than any likely to be allowed for each county. Possibly counties could be grouped together under one such officer. Such changes would possibly require the co-operation of the provincial governments."

Chief Justice Galt, who is also in favor of retaining the present system, says: "There ought in fairness to the accused and in the interest of public justice to be some tribunal other than that of a justice of the peace before a man is put upon his trial." . . . . "With all respect for county attorneys, they are not, in my opinion, persons who should decide on criminal proceedings. They are the persons who conduct prosecutions at the General Sessions and, as clerks of the peace, are brought clearly in contact with the justices of the peace."

Mr. Justice Falconbridge, in advancing arguments against abolition, speaks also of the necessity for the interposition of some tribunal between the committing magistrate and the prisoner's dock, and then proceeds: "It is necessary to bear in mind that it will be a long time before the Dominion can dispense with the services of an unsalaried magistracy composed of men who have not followed the law as a profession, even if it would ever be desirable (which I very much doubt) to replace them by a system of paid or stipendiary magistrates who have been regularly trained to the practice and principles of criminal law. This being the case, what system can be devised to replace the present functions of a Grand Jury? Certainly not the appointment of any single officer such as a procurator fiscal, for many reasons."

Mr. Justice MacMahon, who is also opposed to abolition, is of opinion that "where there is not a trained magistracy, that is, a magistracy who by means of a legal education have become conversant with the rules of evidence, there should, I consider, be another tribunal to which committals should be subjected before the accused is put upon his trial. This is in many instances the only safeguard the accused has from being subjected to the ignominy resulting from being placed upon trial; and this applies with particular cogency where the prosecution is instigated by malevolence and endeavored to be supported by perjury—a class of cases now not uncommon in the courts." . . . . "If officers were to be appointed exercising the like functions and clothed with authority similar to that possessed by the procurators fiscal in Scotland, there would be much greater difficulty on account of the wider area to be traversed over in the larger counties in Canada in performing the duties of such an office than in the small counties in Scotland. And if such an officer were to be paid by fees, it might often be urged that it was his cupidity and not the public interest which was actuating him in many instances in conducting prosecutions; and, if paid by salary, that his duties were being performed in a prefunctory manner, that the interests of the public were being neglected and criminals allowed to go unwhipped of justice."

Mr. Justice Ferguson considers it would be inexpedient to abolish the existing Grand Jury system unless something better should be placed in its stead, and that there should be, in justice to an accused person, some tribunal that does not, apart from the Grand Jury, now exist in Ontario, between the committing magistrate and the placing of such accused person in the usual way upon his trial. His Lordship does not, however, suggest what such tribunal should be.

Mr. Justice Street is of opinion it would be difficult to devise a tribunal which would replace the Grand Jury, and, like Mr. Justice Ferguson, does not suggest one.

Mr. Justice Rose considers that up to the present time nothing by way of improvement on the Grand Jury system has been suggested. He is not favorably impressed with the suggestion of leaving to one person the question of whether an accused person is to be put on his trial.

Mr. Justice Burton considers the public should be informed of the nature of the tribunal intended to take the place of the Grand Jury. He does not know how the appointment of an officer like the procurator fiscal has been found to work in Scotland. He then proceeds to say: "But it would, under any circumstances, be impossible in practice to entrust the supervision of all criminal investigations at present performed by Grand Juries to one such official, and the persons filling the office should be men of high attainments, to whom large salaries should, to secure efficiency, be paid. There are obvious reasons, which will suggest themselves to every one accustomed to the administration of criminal justice why so large a discretion should not be entrusted to the county attorneys. I am of opinion, therefore, the first consideration is: What is proposed to be substituted for the Grand Jury? And then does that tribunal, or is it likely to, command the confidence of the public?"

Judge Lazier says that so far at least as the general sessions are concerned the duties now performed by the Grand Jury might be left to the police and other magistrates and the county attorneys or some other public prosecutor.

Judge Price thinks that, "if some satisfactory official board could be named, before whom the complaint and evidence could be laid, and no indictment proceeded upon except such as that board should advise, Grand Juries might be dispensed with and money be saved. If a satisfactory official or board can be appointed the expense would be overcome and equally satisfactory results arrived at."

Judge Deacon suggests that: "If the 140th section of Cap. 174 of R. S. C. (the old Criminal Procedure Act) were made to cover all cases, and a competent public prosecutor appointed to take charge of all prosecutions, then there would be a tangible responsibility, and every step taken openly and above board, the result being a more efficient and less expensive administration of justice, with every satisfaction to the public, who would be able to see for themselves every step in the criminal procedure. I am aware of the diversity of opinion among the judges in regard to the continuance or otherwise of the Grand Jury system, but, apart from them, I do not think the public at large are greatly exercised, one way or the other, about the present system, and would readily fall in with and approve of the change when its beneficial operation was made to appear."

Judge Jones, in objecting to the abolition of the system, also objects to the duties of the Grand Jury being relegated to the county attorney, an officer who is wholly paid by fees, and says there should be no such personal inducement for him to institute criminal prosecutions. He thinks that in cases preferred by private prosecutors there is the same necessity that some competent disinterested tribunal or authority should pass upon the charge before the accused is subjected to the hardship and disgrace of being put in the dock. His Honor also considers that any public officer who is substituted for the Grand Jury should be paid by salary, and not by fees, so that he would be quite independent in his action in such matters.

Judge Ardagh says: "The abolition of the Grand Jury would, of course, be dependent upon the institution of some other body or some other official duly appointed for the purpose." . . . . . "A public criminal prosecutor who had no private interests to serve—whose position and responsibility would be powerful inducements to a strict and conscientious performance of his duties, and whose conduct would subsequently be liable to comment from the court—is the best substitute for the Grand Jury that at present occurs to me."

Judge Macdonald says: "I do not believe there would practically be any injustice done to a person charged with an offence, if he should at the sitting of the court, be placed upon his trial before the ordinary jury without the intervention of a Grand Jury. In the great majority of cases—perhaps nine out of ten—there has already been an investigation before a magistrate, which has enabled the defendant to know the charge made against him. And in the case of the abolition of the Grand Jury I presume in no case would a man be placed upon trial before a petit jury without such previous investigation being had."

Judge Boys suggests retaining the name of Grand Jury, but would reduce their number to three for each county or district to be selected from the best available public officials. His Honor then at considerable length discusses the powers and duties of this Grand Jury, and concludes with a list of seven advantages of his system, which is worthy of perusal.

Judge Upper is of opinion that if the present system be abolished some plan should be devised so that a person improperly committed for trial would have his case reviewed by some authority competent to say whether the accused should be tried or not. As far as his experience goes, about nine persons out of ten elect to be tried in the county judge's criminal court, where there is neither grand nor petit jury in cases where that court has jurisdiction, and that if Grand Juries were abolished, not only would there be a great saving of expense in criminal administration, but the rights and liberties of those whom Grand Juries are supposed to protect would be as effectively protected by whatever authority may be substituted to supply the place and functions of Grand Juries in relation to criminal matters.

Judge Benson, while objecting to abolition, is of opinion "that some investigating official or body must be interposed between the ordinary justice of the peace and court of trial, and it has been suggested that the county attorney system of Ontario might be used for that purpose in this province, and a similar officer be delegated to discharge the duties elsewhere where such an official does not exist. In my humble opinion such important and far-reaching functions should not be discharged by any person who is allowed at the same time to practice his profession. The public prosecutor who is to be substituted for the Grand Jury should be removed from all temptation, as well as opportunity, to make use of the criminal law for the attainment of supposed civil rights or the redress of supposed civil wrongs. He should be absolutely independent in his office, and hold a quasi-judicial position. This can only be accomplished by his holding office during good behavior and being paid by salary."

Judge Fralick expresses the opinion that the best substitute for a Grand Jury would be a grand inquest composed of seven justices of the peace for the county, who should have the same powers as those now possessed by the Grand Jury, and that this would be a great saving of expense. His Honor then describes the mode of drafting the grand inquest.

Judge Ermatinger is of opinion that some provision should be made for the investigation of cases otherwise than by the ordinary justices of the peace in those parts of each county having no stipendiary police magistrate. He would not favor the investigation of cases by an officer, whether magistrate, crown attorney or procurator fiscal, who was paid by fees. "In case the Grand Jury be abolished and no other safeguard than the present magistracy provided, I would suggest that no committal for trial be allowed unless by a bench of at least three magistrates, of whom two should concur to commit. I would not, however, recommend the abolition of the Grand Jury with this safeguard only—it might even be difficult to obtain three magistrates in every case, unless they are paid to attend." His Honor makes other suggestions which space prevents my noticing.

Judge Hughes is in favor of the appointment of an officer whose duties would correspond with those of the procurator fiscal in Scotland. His reasons for this will be found stated at length under the title "A Public Prosecutor."

Judge McCrae thinks that with an intelligent magistracy (which ought to be on a par with Grand Jurors) and our system of county attorneys to take the responsibility of preferring indictments no fear should exist of a person being put on trial without cause.

Judge Robb says that against the advantages to be derived from the abolition of the Grand Jury he knows of no evils that could not be guarded against by proper legislation.

Judges Kingsmill and Barrett say jointly that the substitution for a Grand Jury of any other person or persons such as crown counsel, county judge, sheriff, etc, or two or more of them would not meet with their approval because the prisoner would not be represented. They think that any one sent for trial should, in the event of the abrogation of the Grand Jury, be given the right to apply to a judge on notice to the crown to be discharged on the ground that the depositions were not sufficient to put him on his trial, which would be just as efficient a check on the justices of the peace as a Grand Jury, and would be cheap and simple. To meet the right which a Grand Jury has of calling fresh evidence the judge should have the power to send the case back to the justice for further evidence at the request of the crown if necessary.

Judge Wood considers that any body or tribunal substituted for the Grand Jury should be one commanding public confidence and one which would see that the law was not used as an instrument of oppression and persecution. His Honor assumes that in many cases the crown prosecutor would require the *fiat* of some tribunal or judicial officer before presenting an indictment for trial before a jury.

Judge Woods advocates the appointment of police magistrates and strengthening the hands of the crown attorney and giving him supervision of every case coming before the magistrates. He says there should be as few persons connected with a prosecution as possible, and that local partialities, prejudices or influences should be controlled by an outside supervision.

Justices McCarthy and McKenzie would appear to consider that the magistracy would be a sufficient substitute.

## QUEBEC.

Chief Justice Johnson would be satisfied in case of the abolition of the system if the police magistrate in cities were substituted, but beyond the cities such substitution would not be desirable. if not wholly impracticable as the power of the federal parliament to regulate criminal procedure could not extend to the appointment of local magistrates, and those offices would therefore be held by partisans to the great danger and detriment of justice as well in public opinion as in its actual administration, which is already beset with great difficulty and expense arising from the two languages in use in the province.

Mr. Justice Pelletier admits the keeping up of the Grand Jury to be costly, and would not object if another mode of trial offering similar guarantees were substituted for it.

Mr Justice Wurtele says that if there were able judges of the sessions and district magistrates, and the law required all cases to be referred to them for committal for trial, that in his opinion would be sufficient.

Mr. Justice Pagnuelo is opposed both to justices of the peace and officials appointed by local governments being substituted for the Grand Jury. If the system adopted in France in 1808 as a substitute for the Grand Jury, and

which is now very generally adopted all through Europe, were possible here, he would favor its adoption with modification of details. His Lordship then shortly explains what this system is.

Mr, Justice Brooks does not favor justices of the peace as substitutes for the Grand Jury on account of their generally deficient education and their lack of knowledge of law, nor does he favor the system prevailing in France.

Judge Tessier thinks any new system would be exposed to suspicion and unfriendly criticism.

Judge Taschereau considers all difficulties would be overcome by a proper system of preliminary examination under the responsibility and supervision of officials *ad hoc*.

Judge Mathieu thinks that the preliminary examination before a justice of the peace or police magistrate, and in default of such the authorization of the court would be a sufficient protection for an accused person who, with these provisions, could not be subject to vexatious trials at law.

Mr. Justice Cross considers that if presentation were made at the instance of a public officer only, his responsibility would be great. If possessed of this power he would become arbitrary.

Mr. Justice Gill considers there would have to be some modifications of the preliminary examination before justices of the peace, as those in rural districts are not sufficiently educated.

Mr. Justice Charland is in favor of all preliminary investigations being made by competent magistrates.

Mr. Justice Bourgeois thinks that in the rural districts preliminary inquiries are often made by unskilled or prejudiced justices. If the Grand Jury should be abolished he thinks nobody should be arraigned unless a preliminary investigation had been made by a competent officer.

Mr. Justice Loranger considers that a proper system of preliminary investigation, coupled with the appointment of permanent crown prosecutors, would answer every purpose.

Mr. Justice Lynch knows of nothing which would replace it, but admits that the manner of composing it might be improved so that its membership would be made up of the more intelligent part of the community.

## NOVA SCOTIA.

Mr. Justice Ritchie thinks the prosecuting officer might, in criminal cases, be required to submit the depositions to a judge and obtain his authority to file an indictment or written charge and proceed to trial.

Mr. Justice Townshend, in assuming that if abolished, a somewhat similar mode might be adopted to that under the Speedy Trials Act, considers that it would be open to some grave objections which he points out, and which appear to be more as to form than to matter of substance. If the duties of the Grand Jury are to be left in the hands of the prosecuting counsel in each county, or the attorney-general of each province, it would be objectionable and dangerous on the ground that the former are not in many cases competent men and are generally appointed as a reward for political services without reference to fitness. They have a direct interest in instigating and pushing on prosecutions for the sake of fees, which power is used for oppressive purposes and to shield friends from prosecution who have been guilty of breaches of the criminal law.

Judge Johnston considers that the interests of a party charged would be sufficiently guarded were he to be tried on the commitment of the committing magistrate. There might be a limitation or exception in the case of political offences where a Grand Jury might be called upon.

Judge Desbrisay thinks that all proceedings up to and including prosecutions should be taken by an officer appointed for each county or given

district, who should be a man of responsibility, knowledge and known integrity—whose time should be devoted to the duties devolving upon him, and who should be paid a suitable salary.

## NEW BRUNSWICK.

Hon. Mr. Justice King considers it would be objectionable to put persons upon trial on criminal charges upon the opinion of a committing magistrate unless adequate provision for liberty were made.

## PRINCE EDWARD ISLAND.

Mr. Justice Peters asks: "Suppose the Grand Jury to be abolished, what kind of proemial body are you to substitute for it? Is every one to be at liberty to file an information in the supreme court charging any crime he pleases against an individual in the same manner as he would file a declaration for debt? If so, the prothonotary's office will be the receptacle of many false and scandalous charges, which, if previously investigated by a Grand Jury, would never have seen the light. If not, what advantage is to be gained by substituting a new body to perform the same duties that were performed by the one abolished?"

Mr. Justice Hensley is of opinion it would be hard to find an efficient substitute for the Grand Jury, and thinks it would be dangerous to attempt it.

Judge Kelly thinks the functions of the Grand Jury might conscientiously be transferred to district and county court justices before whom indictments and presentments could be submitted, and at briefer intervals of time than the present procedure permits, and thus when one is falsely accused a speedy removal of the accusation would be accomplished.

## MANITOBA.

Judge Bain says: "It may happen that justices may make commitments on evidence that will not warrant them in so doing; and if Grand Juries are to be done away with it would be necessary that a means should be provided by which persons so committed could be discharged without having to wait for and without having to prepare for a trial. Such a discharge should be by a judicial act, and I would not like to see any single official entrusted with the power of deciding privately, and on his own responsibility, whether one who had been committed for trial should be tried or not Provision would also have to be made for preparing indictments in proper cases against persons who had not been committed for trial."

## BRITISH COLUMBIA.

Mr. Justice McCreight says: "If there is no Grand Jury the duties which they now discharge will, I suppose, be performed by a provincial officer. I cannot say that the change, although it would probably work well in the great majority of cases, might not on some occasions raise doubts as to its policy.

Judge Bole is of opinion that the change proposed is open to the grave objection that the powers of Grand Juries would be transferred to officials, and might in some cases lead to serious complications.

## A PUBLIC PROSECUTOR.

Chief Justice Hagarty, as will be noticed, has said that "to dispense with the Grand Jury is quite impossible until some careful substitute is found."

Many thoughtful judges and others consider that such substitute could with great advantage be obtained by copying from the efficient system of public prosecutors in vogue in Scotland. It is not a new system. It has been long tried and thoroughly tested, and if the wisdom of a scheme is to be measured by its successful working, then, as Senator Gowan says, "that of the Scotch public prosecutor or procurator fiscal should certainly commend itself for imitation and adoption."

The public prosecutors would perform the functions now performed by the Grand Jury. They would have a certain tenure of office and the same independence of local and government influence which the law accords to judges and police magistrates. Being, as they should be, members of the legal profession, they would be able to appreciate the value of evidence, bring out the facts from the witnesses and shoulder a responsibility which it is now impossible to fix upon any one juror. They would be under the direction of the chief law officer of the crown, and thus without any serious disturbance in the machinery of the courts, criminal prosecutions would be placed on much the same footing as under the Scotch system, for which it is claimed that the investigation of criminal offences and the proceedings preparatory to criminal prosecutions are beyond the control of popular influence in the local sense, while subject to strict official supervision, to the control of public opinion in accordance with the constitution and to the criticisms of the public press.

I think I cannot do better than quote here the opinion of His Honor Judge Hughes, the senior judge of the County of Elgin, who, having had thirty-nine years' very active judicial experience, is competent to speak with considerable authority on this point. His Honor says: "A preliminary investigation into crime within each county might be substituted, either before a stipendiary or police magistrate or before a salaried official, somewhat after the plan in existence for many years satisfactorily, and the functions given to a public prosecutor, in Scotland, called the procurator fiscal. I think that such an officer might not only take the place of the Grand Jury, but be the means of a great saving of useless expense, by sending cases to a proper tribunal for trial, and so, in a measure, prevent a great many trifling cases occupying the valuable time of assize and courts of oyer and terminer or other criminal courts of record, which too often delay the trial of important cases, and which might more profitably, to the public, be employed in trying important civil suits or criminal cases of greater moment.

"The county crown attorney is authorized by law to perfect and complete depositions, and to institute proceedings as public prosecutor in cases wherein the public interests require the exercise of his office, and, where necessary, to cause charges to be further investigated and additional evidence to be collected, whenever, upon examination, depositions connected with criminal charges do not appear to be sufficient or complete, and to have further evidence taken where necessary. Owing to the parsimony of the government, this duty is seldom performed, simply because the government allows no remuneration for such services, no matter how necessary they may be, and criminal prosecutions fall to the ground in consequence. In connection with this subject, that duty should be performed assiduously, and with care, with a view to submitting the whole case as it ought to be presented to an

officer who for convenience I will call a procurator fiscal. In the absence of a stipendiary or police magistrate in each county, there should be an officer appointed by the crown, either a retired barrister or one of at least five years' standing and actual practice at the bar of his own province, chosen for his worth and standing in his profession, to act in the capacity of and to be named as above, whose office it should be to perform the present functions of a Grand Jury and enquire into crime within the district of his appointment. He should hold his office independent of the crown, during good behavior, and be paid by fixed salary. He should not be a resident of any county of the district for which he is appointed, or of any county adjoining thereto, nor should he be a native of the district. He should, before the sitting of the court of assize or other criminal court, take a circuit of his district for the purpose of examining depositions and examination of witnesses taken before a justice of the peace, and make necessary enquiries into the crimes alleged to have been committed within his district. To him should be submitted all the depositions of witnesses in the hands of or filed with the county crown attorney in every criminal case. No such case should be instituted, except by preliminary complaint and examination and investigation had upon oath, either before a police or stipendiary magistrate (to be appointed in every county) in lieu of the present absurd and too numerous magistracy, or upon the presentment of the procurator fiscal. In cases where there is no police or stipendiary magistrate in the county and only upon his accusation or indictment, should a criminal case be proceeded with, *i. e.*, after it had been reduced to form and signed by him, and submitted to the counsel acting for the prosecution thereof, on behalf of the crown. This provision should not apply to any case to be presented by criminal information before the high court of justice, or summarily, or coming within the provisions of the Speedy Trials Act, or the Summary Trials Act, or the Juvenile Offenders Act.

"The procurator fiscal should hold his office by commission from the government, upon the recommendation of judges of the high court of justice, and be removable by the government only. He should hold his office during good behavior, removable only for inability, incapacity or misbehavior established to the satisfaction of the high court or any two of the judges.

"In case any relative or person next of kin or connected by marriage or otherwise with the procurator fiscal should be accused of crime in any county within his district, some other competent barrister-at-law should be appointed *ad hoc* to act in his stead. He should be capable and competent of acting in a district consisting of one or more counties; and for the proper and efficient discharge of his duties he should make periodical circuits of the district for which he is appointed as occasion might require.

"After the procurator fiscal has prepared and signed his accusations or indictments, he should hand or transmit them to the county crown attorney of the county in which the cases are to be tried or to the counsel employed by the crown to prosecute them together with all written depositions taken, either by the stipendiary or police magistrate or before himself, and in all cases where it is his opinion that persons should have been accused of crime or should be discharged from custody, or from their recognizance to appear, he should certify the same to the county attorney of the proper county, who should order a discharge, unless there should be an accusation for some other offence against the person accused, or unless the county crown attorney may determine to submit for the consideration and action of the procurator fiscal some additional or newly-acquired evidence pertinent to such accusation.

"Notwithstanding any presentment of the case for trial by the procurator fiscal if the counsel acting for the crown should think the case presented not sufficiently strong, he should have the discretion to decline to proceed with, and withhold the prosecution, but if he should think the evidence sufficient and warrants more than suspicion the prosecution should be proceeded with to trial before the proper tribunal."

His Honor then refers to the question of the relative expense of the two systems, and his remarks thereon will be found in another place under the proper heading.

As the London Free Press, in referring to the subject about three years ago, said; "It is better for the accused as well as for the state, that one (or more) persons trained to the sifting of evidence, should administer affairs, rather than a lot of persons called promiscuously from a population whose attention is directed to far different matters. Indeed, the tendency of the public mind is in the direction of dispensing with juries altogether—that is, juries taken from a promiscuous public whose knowledge of the questions that come before them is necessarily of a limited nature. The principle that is adopted is very much as if one were to set up ignorance, and fall down and worship it, as the incarnation of wisdom, because it took the form of a jury and was squeezed into a box and sworn upon a worn-out Bible that had become greasy with the multitude of adjurations that had been pressed upon its questionable covers."

Mr. Justice MacMahon, of the Ontario Court of Common Pleas, has contributed on the subject of Grand Juries a very valuable paper, in which, among other things, he shews the importance of the system. His Lordship is well qualified to speak with authority, as well from the many years' experience he had before his elevation to the bench, as a most capable and efficient crown counsel, as from a number of years' active work in his present exalted position. He says, "that the care and vigilance exercised by Grand Juries prevents many accused persons from being placed on trial where the committing magistrate acts upon evidence of circumstances which should only be regarded as creating a suspicion, thus totally misapprehending the effect of evidence." Further, "that it is the only safeguard an accused person has from being subjected to the ignominy resulting from being placed upon trial, and this applies with great force where the prosecution is instigated by malevolence and endeavored to be supported by perjury," and that "disastrous consequences to an accused person, necessarily flowing from widespread publicity, are prevented by the ignoring of a bill by a Grand Jury in cases of committals by magistrates where the evidence is too weak and unsatisfactory to raise a fair presumption of guilt."

I shall not attempt to dispute what His Lordship says on these points, but most respectfully submit that the same ends would be as satisfactorily attained if a substitute, in the form of an efficient crown prosecutor, were appointed; indeed, additional advantages would be gained, in that a trained official would be much better able to sift the testimony and discover the improper motives or malice which prompted the proceedings, and the perjury by which it was sought to be established, than a tribunal utterly unskilled in the commonest rudiments of legal science or procedure.

His Lordship urges as an objection to the procurator fiscal that if that official were paid by fees it might be said it was his cupidity and not the public interest which was actuating him in conducting public prosecutions, and if paid by salary that his duties were being performed in a prefunctory manner, that the interests of the public were being neglected and criminals allowed to go unwhipped of justice. The learned judge voices the opinion of several others on these points.

As to the first objection I think it is well taken, as the consensus of opinion appears to be that it would not be advisable to pay the person who should be appointed as a substitute for the Grand Jury, by fees. On the other hand, I think there need be no fear that if the official referred to were paid an adequate salary he would merit the reproach endeavored to be cast upon him, any more than the judges now deserve any reflection upon their disinterestedness and impartiality.

A learned county court judge says that "were the Grand Jury abolished the duties would have to be performed by some special official, and experience shews that those who are public prosecutors are apt to become *persecutors*, and reverse the maxim that 'every man is innocent till he is proved guilty.' They take the role of the detective and seek only for such evidence as will strengthen their view." In reply to this, I think it may safely be asserted, that if the proposed official were paid by fees, or had in any way a pecuniary interest in convicting accused persons, there might be something in the argument; but withdraw that motive, by having the appointee paid a sufficient and fixed salary, and the point is met at once. Such a government official, placed above the temptation of pecuniary or other personal interest, and holding his office during good behavior, as the judges are, would have no incentive to act in any other than a strictly impartial manner, and it would have the effect of elevating him abo e the plane of a policeman or detective, and make his decisions as much above suspicion as the charges and verdicts of the judges themselves.

In *The Canada Law Journal* of January, 1892, it is suggested that a crown officer should be appointed for each judicial circuit, who should take the place of the Grand Jury. *The Journal* considers that such a step would not only facilitate the abolition of the latter, and at once afford a perfect substitute for it, but would be a striking reform of another weak branch of criminal procedure, viz., crown counsel, who, nowadays, only arrive on the scene of trial at the opening of court, and are often hurriedly thrust into a case without any preparation whatever, and so miscarriage of justice takes place. Nor, says *The Journal*, does the present mode of appointing a different crown counsel for each and every subsequent court insure the obtaining of good men? The question of cost is then referred to, and as to this, and some other important matters, I beg to refer the reader to the article itself which appears in a subsequent part of this review under the caption, "The Power of the Press."

As bearing somewhat on this question, I quote the following from the opinion of Mr. Justice Taschereau, of the supreme court, who submits as the principal features of a new system the following general propositions:

"1st. In case of a committal by magistrates, to accept it as the finding of a jury—*a fortiori* of a committal by a coroner, under the verdict of a coroner's jury;—of course, when crown prosecutor, if a public prosecution, consents to an indictment.

"2nd. If a private prosecution, whether preceded by a preliminary examination and a committal or not, indictment to lay only on the fiat or permission of one of the judges who might sit in the court where such indictment is to be, or can be tried.

"3rd. When the magistrate refuses to commit, as under section 80 of the Procedure Act, then the direction of the attorney-general, or consent of the court, or of a judge having jurisdiction, to be obtained and to stand as the finding of the Grand Jury.

"4th. Extend section 140 of the Procedure to all crimes and misdemeanors (see Taschereau's Criminal Law, second edition, p. 769) where there has been no preliminary investigation and decree, the direction of the attorney-general or the consent of the court or judge to stand as the finding of a Grand Jury. Give power, where necessary, to summon and hear witnesses in support of the charge, to prove a *prima facie* case, also to receive affidavits. This, of course, in private prosecutions also.

"5th. As to binding witnesses, prosecutors, summoning defendants or arresting accused parties, the judge might do all these proceedings upon an application by the crown prosecutor, or clerk of the crown, or private prosecutor. In case of bailable offences, he might direct the accused to be brought before him, or before a magistrate for the purpose of giving bail.

"6th. There are numerous matters of detail which would necessarily have to be provided for, but I conceive no difficulty whatever to find regulations for the whole of them. It is a matter of study, combined with experience in the practice of that branch of the law. Assistance would undoubtedly be found in the reference to the Scotch and French systems, where there are no Grand Juries. I believe that in Italy also there is no jure' d' accusation ; of this, however, I am not quite sure as the law there now stands."

## CORONERS, CORONERS' JURIES AND CORONERS' INQUESTS.

"Second Clown—Nay, but hear you, good man delver.

First Clown—Give me leave. Here lies the water; good: here stands the man; good: if the man go to this water, and drown himself, it is, will he, nill he, he goes. Mark you that, but if the water come to him, and drown him, he drowns not himself; argal, he that is not guilty of is own death shortens not his own life.

Second Clown—But is this law?

First Clown—Ay, marry is't; crowner's 'quest law."

—SHAKESPEARE.

It is evident from the foregoing and other instances given in the course of his works that in Shakespeare's time coroners' inquests were not considered to be quite up to the mark, and therefore the immortal dramatist thought them fit subjects for his keen satire.

There can be no doubt that since those days the progress of education has vastly improved the intelligence of the material from which these bodies are generally drawn, but it is a hap-hazard system at best.

As to the coroner himself almost anybody in Ontario was, up to a few years ago, eligible to fill that office, and these positions were bestowed by the party for the time being in power on political partisans only, the question of capacity or fitness being considered, apparently, of secondary importance.

A great improvement was made when only medical men received these appointments, because the usefulness of a coroner's jury is no doubt much enhanced by having an intelligent head to preside over and instruct them. If the new Canadian Criminal Code did not, after July next, practically abolish the functions of the coroner in cases of murder and manslaughter a still greater improvement over the appointment of medical men might have been made if the office had been filled only by a police or stipendiary magistrate, a lawyer or other competent person of experience accustomed to deal with legal investigations and well acquainted with the rules of evidence, whose finding or verdict of guilty might with safety be regarded as sufficient to place the implicated party on his trial direct before the Grand Jury or public prosecutor, as the case might be, as in ordinary cases. This would prevent the conflict as to jurisdiction which sometimes occurred between the coroner and the ordinary magistrate, and the general public would be spared the spectacle of seeing one body acquitting an accused person or finding him guilty of manslaughter, while another brought in a verdict of manslaughter in the first case or one of murder in the other.

The methods occasionally adopted in some parts of Ontario a few years ago, when rival coroners vied with each other in their unseemly efforts to be first in the field to hold inquests in cases of homicide will not soon be forgotten. When such disgraceful tactics were possible it was high time for the Ontario Legislature to pass a preventive measure. While objections are sometimes heard as to the manner in which the law is administered under this statute to the effect that undue economy is often practiced, and cases are passed over which the public have considered gravely suspicious, it may safely be assumed that a responsible officer like the county attorney will scarcely decline, when called upon, to issue the necessary certificate unless he has good grounds for doing so. At all events, the act requiring this certificate has withstood the objections to it and has never been repealed.

In the Canadian Criminal Code introduced this year by Sir John Thompson, and which is to become law on and after the first of July, 1893,

some changes have been made touching the proceedings in cases of murder and manslaughter before a coroner. Section 568 of this code, which is called "The Criminal Code, 1892," enacts as follows:

"Every coroner, upon any inquisition taken before him whereby any person is charged with manslaughter or murder, shall (if the person or persons, or either of them, affected by such verdict or finding be not already charged with the same offence before a magistrate or justice) by warrant under his hand, direct that such person be taken into custody and be conveyed, with all convenient speed, before a magistrate or justice; or such coroner may direct such person to enter into a recognizance before him with or without a surety or sureties, to appear before a magistrate or justice. In either case it shall be the duty of the coroner to transmit to such magistrate or justice the depositions taken before him in the matter. Upon any such person being brought or appearing before any such magistrate or justice, he shall proceed in all respects as though such person had been brought or had appeared before him upon a warrant or summons."

Section 642 enacts that "after the commencement of this act no one shall be tried upon any coroner's inquisition."

After the 1st of July 1893, therefore, when the new code comes into force, the procedure with regard to the inquisition taken in cases of homicide by a coroner will be changed by the 568th section. Hitherto, the coroner has acted in his judicial capacity quite independently of the magistrate and the magistrate of the coroner, and a suspected person might be dealt with by either or both. This section, however, provides that if such person has not been already charged with the offence before a magistrate or justice, and the verdict of a coroner's inquest implicates him so that he is charged with manslaughter or murder, the coroner is required to issue his warrant directing that the accused be arrested and conveyed before some magistrate or justice to be named by him, or direct that he enter into a recognizance before himself to appear before such magistrate or justice, because section 642 provides that no one shall be TRIED (meaning, of course, in cases of this character by a jury) upon any coroner's inquisition.

So that, 1st, the coroner, instead of committing to the common gaol a person charged with manslaughter or murder by the inquest to stand his trial for the offence charged, as heretofore, issues his warrant directing that the implicated person shall be taken into custody and conveyed before some magistrate or justice to be named in the warrant; 2nd, the coroner is deprived of his former judicial authority to commit; 3rd, the coroner is authorized, in a proper case, to direct such person to enter into a recognizance to appear before a magistrate to be named, to be dealt with by him; 4th, the coroner is required to transmit the depositions taken at the inquest to the magistrate, and 5th, the magistrate proceeds with the case when brought before him without the further intervention of the coroner, in the same way as if the person had been accused before him in the first instance, and as such a person may now be dealt with, notwithstanding the finding of a coroner's inquest.

It should not be overlooked, however, that the coroner's inquest will still be valuable, if not indispensable, for the purpose of ascertaining how a person found dead came to his death, and whether by foul means chargeable to the crime, or default of same other person or persons known or unknown.

If the verdict of the coroner's jury was one of acquittal, and if the plea of *autrefois acquit* could be pleaded to any indictment afterwards which charged the prisoner with the same offence, I could see some use in having an accused person brought before a coroner, viz., on the chance of such an acquittal, but as an investigation before that officer is merely in the nature of a preliminary inquiry and does not prevent the matter being brought before a magistrate and a Grand Jury and being tried by a petit jury, I can see no object in continuing the functions of the coroner or his jury in cases of homicide, because

no matter what may be the issue of an inquiry before him the case must afterwards come before a magistrate or justice as no doubt the code contemplates it should.

Again, the county attorney will doubtless soon see the inconsequent nature of the proceedings before coroners and will withhold the necessary certificate in cases where it is required, and the matter will then come before a magistrate without a certificate being needed and in the usual way.

The duties of the coroner apart from those just detailed, which, as already mentioned will practically cease after the first of July, 1893, will still consist of those devolving upon him under any act of any of the provinces of the Dominion requiring him to hold investigations in cases of accident by fire (in Ontario, R. S. O , Cap. 217.) Also the services anciently required of him in those very rare civil cases when just exception can be taken to the sheriff for suspicion of partiality (as that he is inte ested in a suit or of kindred to either plaintiff or defendant) or in proceedings against the sureties of a sheriff (as in Ontario R. S. O., Cap. 16, Sec. 24) or under the Anatomy Act, R. S. O., Cap. 149, Sec. 7, or under the acts of any other provinces of the Dominion wherein any duty is cast upon him.

As stated in a former part of this review, there are no coroners in Scotland ; in that country the duties which devolve in Canada upon coroners and coroners' juries are performed by the procurator fiscal.

In the event of the Grand Jury being abolished in Canada the public prosecutor could, with great advantage, perform the functions of the coroner and the magistrate respectively in cases of homicide, as set forth in the new code and as near as possible in accordance with the Scottish practice. Provision could be made for dispensing with the certificate of the county attorney and making the public prosecutor competent to inquire in the first place whether it was proper to hold an inquest at all, and on considering there was evidence to justify it then to take charge of the subsequent proceedings.

If this were done the duties hitherto performed by the ancient coroner's inquest would, in cases of homicide, be altogether abolished, the matter to be inquired into would come before the public prosecutor alone, there would be no coroner's jury, no Grand Jury. the case would be the same as any ordinary inquiry into suspected wrong-doing, as why should it not ? Ample publicity would be given, a competent tribunal would be at hand expedition would be assured, innocence established and at once relieved and guilty persons committed to stand their trial before a jury of their peers as in other cases of crime.

Up to the present time the sight has occasionally been witnessed in cases of homicide of an inquest before a coroner and an inquiry before a magistrate over one and the same offence. The accused, in the event of a committal by either or both of these tribunals had next the luxury of having his case presented before a Grand Jury, and if a true bill was returned then of going finally before a petit jury and after all that circumlocution emerging possibly with a verdict of acquittal. It would appear that after running through such a fiery ordeal it is rather a rich joke for the law to say that a man is always presumed to be innocent until he is proved to be guilty ; having made four assaults upon his liberty, and perhaps upon his life, the prisoner, if eventually acquitted, might well rejoin, " thank you for nothing "

A person should scarcely be consi'ered as sympathizing unduly with crime or criminals if he were to say that there ought to be a remedy for such a state of things as this. even improved a little as it will be under certain circumstances after the first of July next. All that would appear to be necessary to add to these cumulative delights in order to make a prisoner superlatively happy would be to go back to the old law and deprive him of his

benefit of clergy or, his mind having been sufficiently tortured, sentence his body to undergo the horrors of

> "The lifted axe, the agonizing wheel,
> Luke's iron crown and Damiens bed of steel."

Shakespeare surely was mistaken when he made Portia say that mercy "is an attribute to God himself, and earthly power doth then shew likest God's when mercy season's justice."

## CRIMINAL INFORMATIONS, ETC.

Some of the opinions pronounced adversely to the abolition of the Grand Jury have been manifestly in forgetfulness that at the present time it is not in every case an essential that a presentment should be made by a Grand Jury, and that in some other cases specified by statutory enactment preliminary proceedings must be taken, before a Grand Jury is permitted to deal with them. By way of reminder, I would mention what I find laid down in Chitty's Criminal Law and other authorities—that parties suspected of crime may be brought to justice either by a previous finding of a fact by an inquest of Grand Jury, or without this preliminary sanction, so that it may be by indictment, presentment by a Grand Jury of any offence from their own knowledge or observation without any bill of indictment laid before them, or by coroner's inquests in case of homicide and the verdict of a jury in a civil case. Then there is the criminal information before the high court of justice by the attorney-general *ex-officio*, or by leave of the court, which can be filed for misdemeanors only. No man can be put on his trial for a capital offence or for misprision of treason without the accusation against him being found sufficient by twelve of his countrymen by some of the methods before enumerated. No such information could be filed without previous leave of the court in which it is exhibited, because instead of being presented on the finding of twelve men, it is merely the allegation of the officer. (See Bac Ab, Information A ; and Burn J. Information).

In substitution for all this, an officer whose special duty it would be and whose trained mind and long practice would peculiarly fit him for the work, it is submitted, would be a far preferable and in the interests of public justice and of the accused, a safer mode than that of having minds totally inexperienced brought to bear upon subjects beyond the range of the average Grand Juror and especially so in view of the serious allegations and damaging suggestions that have been made quite recently as to the conduct of the Grand Jury, who ignored certain bills of indictment on state prosecutions in the Province of Quebec.

Candor requires at my hands the presentment of the condition of things in two States of the American Union. During the course of my numerous enquiries I have found to exist in that country as there does here a diversity of opinion, and a lawyer of eminence thus states the case: "My native "State, Michigan, has no Grand Jury. There all examinations are public, "before a justice of the peace, who can bind over the accused for trial as "at circuit. This course is often expeditious. But crime is so secret that I "am inclined to think it wise that it should also be investigated under the "secret garb of the Grand Jury.

"In New York our Grand Juries frequently make investigations into "public scandals that would be quite impossible in public before our police "justices, who are the creatures of the corrupt rings that are themselves "frequently investigated by the Grand Jury. Our police justices are "frequently ignorant, vicious and lazy, and would never hold for trial a "confederate charged with peculation of public funds. The politics of New "York City is such a perfect machine that any criminal that [illegible] w "votes can go to his district leader, who will intercede f[illegible] the "police justice, and justice is the merest mockery." A[illegible]lent "goes on to describe what may strikingly be the [illegible]gs [illegible]een "the Province of Quebec and the other Provinces [illegible] Dom[illegible] for[illegible]ays: "You will please remember, however, in forming [illegible]our jud[illegible]ent, that the "conditions in Michigan are widely different from those in New York City "and Brooklyn. Here a majority of the voters do not spe[illegible]k English, or, at "least, do not *think* in English, while in Michigan we have a native American "population."

## THE CONSTITUTIONAL QUESTION.

"Law is law, provided always, and unless as hereinafter mentioned, in anywise whatsoever; but forasmuch, and whereas, except as aforesaid, therefore, consequently and as herembefore provided, law is law, notwithstanding and nevertheless."

In the year 1877, the Honorable Attorney-General (now Sir Oliver) Mowat and the Honorable Mr. Lafiamme, then Minister of Justice for the Dominion, engaged in a correspondence concerning the right to legislate with reference to Grand Juries, each agreeing about the propriety of obtaining a judicial opinion from the supreme court. In the year 1879 the Ontario government submitted certain questions for that court to Mr. Lash, the deputy minister of justice, and shortly afterwards Mr. Lash agreed to the proposed questions.

On January 20th, 1880, Mr. Lash wrote, desiring to know if the Ontario government would be ready to go on at the ensuing sittings of the supreme court, and on the 10th of the following March he again wrote that as Mr. Mowat had not been able to argue the question and as the time of disallowance was near at hand the Ontario Government should "send a formal communication to this government stating it is not the intention of your government to bring the (Local) Act into force" until a decision is arrived at in the supreme court upon the question and "that if the decision be adverse to the legislature the Act will be repealed."

On the 10th of March, 1880, an order-in-council was forwarded to the lieutenant-governor of Ontario concerning local legislation; with regard to the question of the Grand Jury Act, the order-in-council set out the agreement referred to, and then went on: "I recommend that if the Ontario government will agree not to put it in operation and to repeal it if it be *ultra vires*, the power of disallowance be not exercised, otherwise that it be disallowed, and that the lieutenant-governor be so informed"

On the 18th March, 1880, the Honorable D. A. Macdonald, lieutenant-governor of Ontario wrote that "with a view of enabling the Dominion government to dispose of the matter without embarrassment, my government will not issue the proclamation which is necessary in order to bring the Act into effect without either the assent of the government of Canada or the decision of the supreme court or the privy council, that the subject matter of the said Act is within the authority of the legislature of this province."

In May, 1880, Mr. Lash telegraphed Mr. Mowat to know if he desired to have the case brought before the supreme court.

In September, 1880, Mr. Mowat raised the objection that as a case for the supreme court prevents an appeal he could not consent to the case going to the supreme court.

Shortly after this correspondence was commenced, the Ontario legislature, by 42 Vic., Cap 13, Sec. 1 (Ontario), enacted that "the precepts to the sheriff for the return of Grand Jurors for the sittings of the courts of Oyer and Terminer and general jail delivery should command the return of fifteen of such Grand Jurors and no more."

By section 3 it was provided that the Act should not come in force until a day to be named by the lieutenant-governor by his proclamation.

This Act was assented to by the lieutenant-governor on the 11th of March, 1879, but no proclamation ever issued declaring it to be law.

By 55 Vic., Cap. 12, Sec. 1 (Ontario) the last-mentioned statute was repealed, and by section 2, thirteen Grand Jurors, instead of fifteen, as in the former Act, were required to be summoned.

This Act also was not to come into force until proclaimed by the lieutenant-governor. As no proclamation has yet been issued, as required by the Act, and as the matter has never been before the supreme court, the constitutional question as to whether or not the subject is or is not *ultra vires*, the provincial legislature is still unsettled, although, reading between the lines, it would appear from the fact of the legislature adding the clause that the Acts were not to become law until the issue of a proclamation, there were and are doubts as to their constitutionality.

The legal journals of Ontario, in exhaustive articles, refute the idea of provincial jurisdiction, holding that all legislation in the matter of criminal procedure lies with the federal parliament. Even were the provincial right concurrent the federal parliament, for the sake of uniformity of procedure throughout the Dominion, ought, it is submitted, to be the proper body to legislate on the subject.

Sir John Thompson, the able minister of justice, in moving the second reading of his bill respecting the criminal law in the House of Commons on the 12th of April, 1892, is reported in *Hansard* to have said: "The proposition has been mooted long ago, that this matter may be beyond the control of this parliament, and may be more properly exercised by the provincial legislators. When we come to deal practically with the matter, that difference seems to me to vanish. It is not a question after all of whether the Grand Jury forms a part of the organization of the courts or not, and, therefore, is under provincial control. It is a question whether, in criminal procedure, it is desirable to continue the exercise of functions by the Grand Jury. And in adopting an amended criminal procedure, I take it to be beyond doubt that the question as to whether we should or not dispense with the services of the Grand Jury, is one which is included in that division of the criminal law."

Sir Oliver Mowat, on the other hand, says that "the Ontario government claims that the abolition of Grand Juries is not within the authority of the Dominion parliament; that the Grand Jury is a part of the constitution of the court, and is not a matter of mere procedure."

He further says: "If the change provided by the Provincial Act should commend itself to the minister of justice, he might introduce into his intended bill, clauses corresponding with 42 Vic., Cap. 13 (for which might now be substituted 55 Vic., Cap. 12, as the former Act has been now repealed by the latter) in case he approves of these. Or if he should prefer any variation we might have simultaneous legislation, so as to avoid any question of constitutionality. I do not recollect that any objection was made to the change proposed, except as regards the jurisdiction of the legislature to make it."

Some of the judges, whose attention has been drawn to the subject, agree with Sir John Thompson, while the late attorney-general of British Columbia agrees with Sir Oliver Mowat.

## THE GRADUAL DIMINUTION, BY DIFFERENT STATUTES, OF THE DUTIES OF GRAND JURORS.

The duties of the Grand Jury have been very seriously curtailed by modern legislation It has been considered that not more than one-fourth of the cases, which formerly came before them, are now heard by that body.

The *Empire*, in a recent issue, says that "in the earlier stages of English and colonial history the Grand Jury fulfilled very important functions, such as the institution of proceedings for the abolition of nuisances, the care and safety of jails and public buildings, and the finding of bills of indictment against persons accused of crime But in consequence of the establishment of municipal institutions, boards of health, police magistrates and other judicial officers somewhat versed in law, by whom accused persons are committed for trial, the benefits which were formerly secured by the Grand Jury are attained by these other means and particularly by municipal machinery." His Honor Judge Hughes remarks, under this head. as follows: "By the passing of the Speedy Trials Act, in 1869, the legislature not only, in certain cases, did away with the Grand but also with the Petit Jury. and since then the Act conferring a like jurisdiction upon police and stipendiary magistrates, the Juvenile Offenders Act and the Summary Trials Act, it has been found that fully one half, if not more, of the trials for criminal offences are, by consent of the persons accused, never brought before a jury; and it is found also that those who are innocent of crime prefer not to be tried by jury, but by the judge or magistrate alone, and that those who are guilty, demand a trial by jury, in the hope that between the shiftings and shufflings and prejudices and chances of the jury system, they may escape "scot free," and thereby defeat the ends of justice, which has been too often done by the jury shielding a criminal with whom they have strong political or social sympathies."

## CONCERNING THE PRESENTMENTS OF GRAND JURIES.

As very forcibly put in the *Law Journal*, of January, 1892: "To obtain a proper and unbiased opinion regarding any subject it is surely not necessary or safe to extract information from those whose existence is imperilled by the discussion. We must, therefore, look for our facts and information outside the Grand Jury room. . . . In addressing Grand Juries, judges almost invariably point out to them the necessity for the system being continued, the grand old historic character of their body is eulogised to the highest degree, and the jurors have it strongly impressed upon their minds that they stand as a bulwark against oppression and tyranny, and constitute the most important factor in the administration of the criminal law. After being addressed in this way for half an hour or more, the good and true yeomen and squires, constituting the Grand Jury, are naturally filled with strong ideas of their own greatness, and are convinced, when told of their importance by a high judicial authority that the constitution would be imperilled if the shutters were put up and the doors of the Grand Jury room closed. We may also point out that in several instances Grand Juries themselves have favored a change taking, perhaps, in such cases, something of the spirit in which they were addressed by a judge opposed to their continuance. On the whole, therefore, we say that the opinions of Grand Juries are not entitled to the weight which should be attached to them in dealing with a question so personal to themselves as this undoubtedly is, and we venture the opinion that by taking a certain course, one way or the other, in his charge,

the judge would obtain a reply which would be but the reflex of his own views delivered at the opening of the court."

The Dundas *True Banner*, of the 25th February, 1892, thus trenchantly deals with this view of the question, and is, perhaps, too severe: "What seems to be the most absurd idea in connection with the discussion, is the attempt to elicit from Grand Juries a prayer and a plea for their continued existence. One judge made constant appeals in this way and then gave the hot-bed productions, stimulated by himself, as evidence in favor of the continuance of the Grand Jury system."

The following from the Dundas *True Banner*, of October 2nd, 1890, may also be quoted: "The Grand Jury that was asked the other day what it thought about the Grand Jury system, responded that it thought it should not be abolished, and its response is a very natural one. It is not an easy matter for a body like the Grand Jury to admit that it has survived its usefulness, and ask for its own decapitation, although even this has occurred. It seems strange that opinions should be asked from Grand Juries on a subject of this kind. They have not the knowledge or the experience that would make their opinions valuable, many jurors serving perhaps only once in a life-time; yet it is done. We can understand addresses to juries being used as almost the only occasion when judges can call attention to the need for some reform in administration, and giving reasons for it, but it looks like a confession of weakness to endeavor to prop up the Grand Jury system by obtaining evidence from changing bodies that their continued existence is desirable. Important changes, like the abolition of the Grand Jury system, take time to accomplish. We shall probably have to wait for the occurrence of some glaring instance of failure of justice before much headway is made—something that will appeal to the general public. At present the matter is assigned to the technical. But those who have experience in the administration of the law must feel that the Grand Jury is a fifth wheel to the judicial coach, and that the Scotch system, where the Grand Jury is unknown, is more desirable."

Sir John Thompson, speaking on this point in the House of Commons in April last, said: "The circulars which were addressed to the judges and the prosecutors and the attorneys-general throughout the country, had, as one result, the effect of calling the attention of the Grand Juries themselves to the question, and even from them diverse opinions have come. The criticism to which I refer is this that it was most unreasonable to expect from the Grand Jurors any expression of opinion favorable to the discontinuance of their functions, and that it would be practically like consulting parliament as to whether parliament should be abolished or not. Speaking from my own experience, which has been pretty general in the province in which I practiced (Nova Scotia) the contrary is the fact. The Grand Jurors of that province have nearly always been in favor of the discontinuance of their services, because those services they consider onerous and unimportant."

As corroborating the view set forth in the above newspaper extracts and in Sir John Thompson's remarks confirming them on the main point, I desire to say that I have had the curiosity to examine, at random the presentments of thirteen Grand Juries of different counties of the Dominion, and find that, out of that number, only two had the courage to differ from the views expressed by the presiding judge. One of these presentments, made to Mr. Justice McMahon (who opposes abolition) was to the following effect: "In accordance with Your Lordship's wishes, we have carefully considered the Grand Jury system as at present existing, and are of the unanimous opinion that the interest. . . justice will in no way be endangered by its abolition, and that some other system, less cumbersome and expensive, be adopted in its place."

Another paper says: "It is a pleasant little episode for a man once in a life-time to be on a Grand Jury. He has a nice time at the county town; the expenses of his journey to and fro are liberally paid; he gets his meals at the hotel for nothing, the bill being paid by the county. It is really expecting too much to ask Grand Jurors to forego all these advantages, How could Grand Jurors, under the circumstances, doubt their being 'bulwarks of the consti ution' and 'defenders of the liberties of the people?' How, indeed?"

## THE USELESSNESS OF GRAND JURIES IN EXAMINING INTO THE CONDITION OF JAILS, HOUSES OF INDUSTRY, ETC.

One of the functions of the grand inquest is to examine into and report upon the condition of jails, houses of industry, insane asylums and other public institutions, and some people lay considerable stress on the importance of these duties.

It is rather significant that of the ninety-seven judges who sent replies to the Minister of Justice in response to his circular, only eight make any reference to this branch of the subject. Of these Judge McRae, of Algoma, says: "As to their other functions of visiting jails and other public institutions, I have never known their reports to be of much, if indeed of any, use. They are generally looked upon pretty much as a matter of course."

Judge Fralick says: "The appointment of provincial inspectors makes their supervision of jails, etc., unnecessary."

Judge McDonald says: "Lastly, I believe the Grand Jury have not that weight or influence in the community which it might be supposed to have. It has been more or less my practice in addressing the Grand Jury to deal with it as composed of representative men drawn from different sections of the united counties, and to call attention to local matters in reference to which it seemed desirable action should be had—such as the provision of a poor house, so that persons innocent of crime, but unable to support themselves, should not be committed to jail. I have had every reason to be satisfied with the response made by the Grand Jury to my suggestions, as embodied in its presentments. But although copies of these presentments, or of such part of them as seemed needful, have been from time to time directed to be forwarded to the county council little or no influence appears to have been exercised by them upon that body, and the representations or recommendations made have been useless or comparatively so in procuring such legislation as it was aimed to obtain. From this I am led to the conclusion that the Grand Jury, as a representative body, has little or no weight in the community."

On the other hand Chief Justice Hagarty says: "It has many useful functions besides the presenting or ignoring of indictments."

Mr. Justice Rose: "Through them the body of the people can be reached and a healthy public tone created whenever in the public interest the judges feel called upon to direct attention to new legislation, or evils requiring redress or legislative interference; or when dangers threaten our system by the combination of forces, political or otherwise, a wise deliverance on the subject in charges to the Grand Jury does much to awaken interest, remedy abuses, explain fallacies, and generally assist in the proper administration of public affairs. Through the Grand Juries we are able to press upon the public the necessity for various reforms, such as prison reform, care of non-criminal poor, improvements in the court houses, jails, etc., etc., and to receive from them many suggestions indicating the trend of outside thought and opinion."

Judge Reynolds, junior judge of Leeds and Grenville, says: "The Grand Jury is a great educator of the people. Selected as its members are from all parts of the county and representing all shades of public opinion, they discuss the several topics which from time to time are so lucidly laid before them by the judges of assize and sessions, such as the necessity for properly-

treated, well-ventilated and thoroughly drained jails, court houses and public offices, suitable provision for the indigent, idiotic, lunatic and incurable, the establishment and carrying out of needful sanitary regulations, etc., etc., and on their return to their homes, they take with them the ideas they have acquired, and thus public opinion is moulded, the reeves of the several municipalities are instructed, and the hands of the county councils are strengthened when the time comes to make an appropriation for any of the objects above named."

Judge Wood says: "I think the reference frequently made to the good effect of visits by Grand Juries to jails and other public institutions, and the dangers that would ensue if these acts were discontinued by reason of the abolition, can be met. No doubt these visits do good, both directly and indirectly, and may be continued by taking thirteen or more or less from the panel [of petit jurors] either by special selections or indifferently, and swearing them to make the enquiries and present the result."

Mr. Justice Peters, of Prince Edward Island, says: "I need not remark that the duty of a Grand Jury is not confined to the investigation of charges for crimes which may be brought before them at the sittings of a court. But their duty is also to visit public institutions such as prisons, lunatic asylums, etc., to examine into the manner in which the officers and keepers of said institutions perform their several functions, and to examine the sanitary condition of such institutions and present their report thereon to the court. In my long experience as a judge I have met with many cases in which the exercise of this visitorial power of the Grand Jury has been the means of exposing great dereliction of public duty."

It is not a little singular that only these eight judges should have considered the duties of Grand Juries, as to this branch of the subject, of sufficient importance to be alluded to; three of these being of opinion their services were valueless, one suggesting a substitute, and that therefore only four should say these duties were important.

I think Judge McDonald has hit the nail squarely on the head when he says he has had every reason to be satisfied with the response made by the Grand Jury to suggestions made by him in his charges to them, but that little or no influence appears to have been exercised by them, and that their representations and recommendations were useless, or comparatively so, in procuring such legislation as it was aimed to obtain.

As a rule I think it will be found that the preparing of the presentment is left in the hands of the foreman, and that this document simply echoes the charge of the presiding judge in a stereotyped and formal fashion, makes certain recommendations and suggestions, and there the matter ends. As a rule, also, county councils rather resent the interference of "the fifth wheel to the judicial coach" as an unwarrantable usurpation, and will simply not legislate at all if they are asked to do so by that body.

As the country already pays high salaries to prison inspectors whose duties cover the ground much more satisfactorily, the prison authorities never having notice of the coming of these officials, it may be considered conclusive with reference to this matter that the services of the Grand Jury might easily and profitably be dispensed with.

The Toronto *Mail* of March 5th, 1889, says: "In that they visit public institutions, such as prisons and asylums, they do perform some of the old duties. Their work, however, so far as this feature is concerned, is merely a duplication of the labors of the inspectors. It discovers no wrong and produces no results beyond a prefunctory report upon the condition of the institutions examined."

An editorial in the Toronto *Week* of November, 1890, says: "Among the functions of the Grand Jury, Senator Trudel once pointed out what

seemed to him to be a most useful one, viz., that it is a kind of commission of general enquiry into the workings of prisons, asylums, and other public institutions, in which its usefulness is specially seen. But to those who know anything of the practical working of the Grand Juries in such cases, it is known that the institutions which they inspect are always prepared and clean-swept for the occasion, while the inspection consists of a run through the building at the heels of the warden or superintendent. The best proof of the inutility of such visits of inspection is to be found in the fact that the government has inspectors of its own, who officially inspect the public institutions, and on their reports, not on the recommendation of Grand Juries, improvements are made and changes carried into effect."

## THE GRAND JURY A SUPERFLUOUS COURT OF APPEAL.

The primary duty of the Grand Jury, now, is to determine whether the magistrate who has committed a prisoner to jail on a criminal charge (in the very few cases wherein the accused has not elected to be tried at the county judge's criminal court), after hearing the evidence against him, had any justification for subjecting the prisoner to trial, in other words whether the committing magistrate had or had not perverted his duty and committed him upon a charge even by *prima facie* testimony. Thus a large body of men is summoned from the various parts of their county to see whether the committing magistrate, who is supposed to have been appointed to his office for his efficiency and ability, knew his business, or performed, or violated his duty.

Mr. Justice Gwynne, of the supreme court, says on this subject: "The provisions of the act formerly known as the Vexations Indictment Act, now embodied in section 140 of chap. 174 of the Revised Statutes of Canada, and the provisions of sections 69 to 73 and 80 to 82 of the same chap. 174, regulating the proceedings before justices upon criminal charges, are all framed with the most anxious solicitude to prevent persons being put upon trial upon frivolous or unjust accusations. These provisions, if they are not already, can be made abundantly sufficient to dispense altogether with the services of Grand Juries, whose functions are now reduced to an enquiry, more ludicrous than real, whether the evidence upon which the justices had, after careful investigation into the charges, as provided for in these sections, committed the accused parties to jail to stand their trial, was sufficient to warrant the proceedings taken, and to justify the putting the accused persons upon their trial. To me it has always appeared marvellous that the persons who are called upon to serve as Grand Jurors in this country have endured, without vigorous protest, the inconvenience to which they have been subjected in being taken from their business for the purpose of discharging such useless functions; the pay, however, which they receive affords, I presume, the explanation of their forbearance."

## THE LAW'S DELAY.

In the event of the abolition of the Grand Jury and the substitution of a public prosecutor it might not be amiss to consider whether this official should not either make periodical visits to the different counties in his judicial district or else hold himself in readiness to go there on receiving an official intimation from the sheriff that he was required, in the same manner that the county judges now do when prisoners are first brought to the county jail. As the law now is, any person committed to jail who refuses to be tried at the county judge's criminal court, and who at the same time may be unable to furnish bail, and who may be entirely innocent, is obliged to languish in the common jail pending the holding of a court, which may not be held for five or six months. Surely the jurisprudence of the age should be equal to the task of preventing the possibility of so flagrant a wrong. Simple justice demands

that there ought to be some tribunal which could at once, or within a reasonable time, investigate such cases and prevent as far as possible the law's intolerable delay in the case of men whose innocence may be established by a preliminary inquiry.

The same reason which now prevents such an inquiry, viz., the great inconvenience of summoning a large body of busy men from their occupations, except at considerable intervals of time, would not obtain under any of the new modes which have been suggested.

## THE ABSENCE OF THE RIGHT OF CHALLENGE.

When an accused person appears before a Petit Jury he is entitled to this valuable right of challenge. He is brought face to face with the jurymen who are to be his judges. He can, according to the nature of the charge, challenge peremptorily a certain number of jurors, and also challenge for cause *ad libitum* after his right to challenge peremptorily has become exhausted.

Before the Grand Jury, on the other hand, he is not allowed to appear at all, nor has he the right to be represented by counsel, to guard his interests, to cross-examine witnesses, or challenge, possibly for good cause, a single juryman. As an integral part of the secret tribunal, which is to pass upon his guilt or innocence, there may be enemies of an innocent man, persons who hold and have expressed strong opinions on the case in hand, men who will do their best, under the guise of justice, but in a covert and unsuspected way, by the adroit examination of witnesses and in a seemingly ingenious, but at the same time, cunning manner, to cause their fellows to bring in a true bill; or there may be personal, political or religious sympathizers of a guilty man upon the jury, even relatives or close connections or persons who have a pecuniary interest in the matter to be dealt with, who will urge every possible plea in a similarly covert but ostentatiously open manner to ignore a bill. Such persons, every one will admit, ought not to have a place on the Grand Jury, but who is to say them nay or penetrate their disguise? Certainly not, in the first-named case, the absent victim or his friends or counsel. Whether the Grand Jury is to exist henceforth or not this flagrant injustice, born of ancient necessities, should not be tolerated in this free country any longer.

## THE MODUS OPERANDI IN THE GRAND JURY ROOM.

"While words of learned length and thund'ring sound
Amazed the gazing rustics 'ranged around."

*The Canada Law Journal*, of January, 1891, contains a long and able article dealing, among other things, with the proceedings which may naturally be expected to take place in the Grand Jury room at an assize or sittings of the general sessions of the peace. The above branch of the subject is so forcibly, and yet so fairly put, that I copy it entire as a contribution to what has already been said in other parts of this review on this point. The *Journal* says. "What is the practical experience in regard to the system? We have no hesitation in alleging that there are very few Grand Juries that will not find a bill at the instance of the crown prosecutor, and there are fewer still who will not ignore a bill on the intimation of the court in charging the Grand Inquest. This is natural. The jurors are principally farmers, with occasionally one or two business men on the panel. They implicitly allow those skilled in the law to guide them, when they think it proper to make enquiries on legal matters. They ask questions, the answers to which materially influence their judgment. But they are not bound to seek for any information, and a friend of the accused on the panel, with a little shrewdness, a little manipulation, may readily succeed in having a bill thrown out which ought to be presented. The evidence may be ingeniously extracted one way or the other, as the examiner is friendly or hostile to the prisoner. There is no limit set upon the mode of conducting a prosecution in the Grand Jury room. No evidence is allowed to be disclosed outside its sacred precincts. The *modus operandi* remains as if it were a confessional secret. The very oath taken by the jurors protects them, as they are in effect sworn to keep secret what transpires within their chamber. Only one witness is allowed to be present at one time. There is no record made of the evidence given. It is true that witnesses are sworn by the foreman; but if the witness swear to what is untrue, his perjury is practically protected and safely guarded by the veneration which the law has for the system which we are opposing. It is true that if a man swore to a fact in the Grand Jury room and directly opposite in the witness box an hour afterward there is a way of prosecuting him, but it would be so beset with legal points and hoary-headed objections that a conviction would be almost impossible. Bills are presented to the Grand Jury on the last day of their session. The jurors are anxious to return to their homes. It is difficult to keep them together when their sitting is prolonged. They are to a great extent an independent body. What is the result? A hurried examination of a witness or two, not one-fourth of the facts elicited, a suggestion by an impatient "good and true man" that another day will be lost unless the business can be finished at once, a finding of the bill, and some unfortunate individual is subjected to the caprice of "the strong god, circumstance," put upon his trial, muleted in heavy counsel fees for his defence, and acquitted very often before the Crown has completed its case! Surely these are matters which ought to weigh heavily in considering the advisability of retaining this adjunct to our criminal procedure. A grave objection to the system is undoubtedly that the jury is a secret tribunal. The proceedings are, as is well known, not only conducted in private, but the privacy is sanctioned and bound by an oath which each juror takes after the foreman has been sworn. No question can be raised as to the sufficiency of evidence, or whether there is any evidence at all against the accused. All other findings of every court or functionary can be reversed if there is no evidence to support them. The Grand Inquest alone stands in this respect

unique and beyond the reach of the law, and occupies the high position of being amenable to no power, no court, and no parliament of the State. Its mistakes cannot be rectified. The affidavits or statements of Grand Jurors are not, as a rule, allowable to correct the simplest error or remedy the gravest miscarriage of justice, and the court that tries the case cannot assist by way of amendment, except in matters of mere form. The *prima facie* evidence of a man's guilt is weighed by laymen in secret conclave, the examinations are conducted no one knows how, and the finding is arrived at almost necessarily on facts which are only a small part of the truth, and all this without the assistance of the court or counsel, because the general directions given by the court, useful as they must always be, manifestly fall short of any practical service in hearing and considering the evidence in detail. There is no public sitting in judgment on their actions. That guardian of private rights and public interests—the press—is helpless. There is no fierce "white light" to terrify and hold in check any juror concerned in wrong-doing. All the restrictions and safeguards which the law has thrown around criminal prosecutions are wanting. And worse, perhaps, than all, a man may be put in peril of his life upon hearsay testimony, the mere rumors of the neighborhood, the idle gossip of his friends, or the vindictive insinuations of his enemies, for no wise judicial hand is raised to prevent the admission of this evidence, which the law says shall not be evidence at all. The accused is not allowed to be represented. That a person charged with an offence shall have the benefit of counsel is one of the fundamental principles of our modern practice. A preliminary examination before a magistrate may be, it is true, a secret enquiry, and is such in theory. But what magistrate would dare to exclude a prisoner's counsel? And even if he did, the accused is himself present, and may ask such questions as he thinks proper, questions which often tend to throw a very different light on the evidence already given. The result is that the finding of a magistrate is really a far greater protection to the public and the accused than are the proceedings before a Grand Jury. The magistrate is generally a man having more or less experience in dealing with criminal cases, and in this respect has a great advantage over the jurors. His committals often end in acquittals, but at least there is something apparent on which they are based. We have only to look at the cases which are presented to the court at the Toronto sittings of Oyer and Terminer to see how little ground there could have been in many cases for finding a bill. Case after case has been thrown out by the trial judge before it reached the petit jury, and men have been put upon their trial and have undergone the humiliation of being placed in the dock as felons, without the slightest particle of legal evidence against them. In fact, we doubt if a single case can be named where a Grand Jury has protected either the interests of the Crown or the legal rights of a person by its finding; and further, we do not believe that there is any instance where a better result has been accomplished by reason of the intervention of a Grand Jury than would have been gained by the magisterial enquiry alone."

Add to the above the fact that those composing the Grand Jury are not men of judicial experience, or accustomed to the examination of witnesses, or the investigation of facts, It is quite possible for an unwilling or partial witness appearing before a number of unskilled laymen, to suppress important facts, and to color statements so as to avert a trial, or to connive with the accused or his friends, and thus to cause injustice to be done. The possibility also of mistakes without corrupt motives, is of frequent occurrence, much more so than would be the case were the investigation in the hands of a trained legal mind.

Again, the Grand Jury is a changing body. A juryman at an assize or sessions may never meet more than one or two of the same men at any subsequent court in a whole lifetime.

We have in our literature "Tales of the Jury-room." It is needless to say that, for obvious reasons, these are not tales of the Grand Jury room. Occasionally, however, one hears something of the proceedings in that secret and profound chamber.

Only two of these can I at this moment recall. On one occasion the jurors were an unusually mediocre and dull lot of the bone and sinew. They had chosen as their foreman a merchant, who was considered one of the brightest lights. This gentleman, in administering the oath to the witnesses, in the most solemn and *ore rotundo* manner, always concluded that proceeding with the words, "So help *your* God!" in the absolute, and apparently unchallenged belief, that he was indeed a model foreman.

At another time a conscientious and remarkably silent Scot, unwilling to allow his light to shine entirely under a bushel, propounded to each witness the query, "What is your occupation?" and appeared perfectly satisfied he had done his whole duty to man when the question was answered. It was noticed also that if the witness was a farmer, the juryman was more than usually alert and attentive, but said no more, and that he paid but slight attention to the testimony of anybody who followed any other calling *Ab uno disce omnes.*

And, to think of it, this is the system which possesses such wonderful educational advantages! a mode of trial which, born "in the dim vister of the past" (as Artemus Ward would have said) has survived the decline and fall of empires and the collapse and disintegration of kingdoms; a system which, flourishing before Hastings was fought and won, before Blenheim, Oudenarde and Malplaquet gave to Marlborough and to England imperishable renown, has yet in such a remarkable manner resisted, to this day, the improving hand of the jurist, the legislator and the law-reformer.

I will not charge to the Grand Jury, or hold them responsible for the happening of, the following rather laughable incident which I can personally vouch for as having occurred in a county town not more than three hundred miles from the city of Toronto some years ago, As, however, it could not have taken place had there been no Grand Jury, it may not be considered unfair to relate it as it is somewhat *germane* to the subject in hand.

On the occasion of the first visit of the late Chief Justice Harrison to the county town referred to the Grand Jury had duly selected their foreman, and had also been regularly sworn. The crier of the court, clad in his official robe of office then solemnly arose, and, in a voice which could be distinctly heard in every part of the large court room, made the following astounding proclamation: "O yes! O yes!! O yes!!! All manner of persons are strictly enjoined to preserve silence while his Lordship the chief justice delivers his charge to the Grand Jury. On pain of—death!" Had a dynamite bomb suddenly appeared coming through the ceiling it could scarcely have created greater surprise for the moment, but, when people could catch their breath, surprise gave place to laughter, long and loud, which the high bailiff and his constables (not counting the discomfited crier, who was of course *hors-de-combat*,) had considerable difficulty in quelling. His Lordship, when quietness was restored, turned to the sheriff, who was seated at his side, and quietly remarked, while amusement twinkled in his merry eyes, "Mr. Sheriff, your penalties are rather severe; don't you think so?" to which the sheriff as merrily assented. Whether the befogged crier was overcome with the extra importance attaching to his position in consequence of having a real live chief justice to preserve order for, or had been reading up some old book of forms containing proclamations, and had got mixed, I will not say.

## THE SECRET AND IRRESPONSIBLE CHARACTER OF THE GRAND JURY.

A very serious objection to the system, and one of the worst features about it, is its secret and practically irresponsible character, every member of the body being sworn to secrecy before he is admitted to act. The best guarantee of civil liberty—the open administration of justice—is wanting, and publicity,—the very essence of confidence in judicial proceedings, the greatest security for good conduct,—is strictly guarded against.

A secret tribunal of this kind, where a majority decides, is practically irresponsible, and may be made to serve as a block to a proper prosecution, a screen for an offender who has been sent up for trial by a magistrate after an open enquiry.

Again, the crown counsel has access to the Grand Jury, and here crops up another objection to that body being a secret one; this gentleman has necessarily great influence with the Grand Jury, and frequently controls their actions. At the same time he is not personally responsible, nor is he amenable to public opinion.

Possibly, he may not intend to act at all improperly, but "trifles light as air" to him are tortured by the unskilled jurymen into "confirmation strong as proofs of holy writ." A few words from a gentleman supposed to "know the law" are quite sufficient to cause the jury to decide in favor of that learned gentleman's view, who thus practically decides the case without shouldering the responsibility.

His Honor Judge Hughes says on the subject of secrecy and embracery: "I know for a fact that oftentimes the Grand Jury has been composed of men, who, regardless of the solemn obligations of the oath they have taken, have allowed themselves to be approached and talked to on the subjects to be laid before them and others on the Grand Jury; that the enjoined secrecy of the Grand Jury room has been oftentimes violated. I may say times and ways without number, and that even at the very threshold, and within the precincts of the Grand Jury room itself, men of position have been known to intrude themselves, intercede with and address the Grand Jury in order to prevent a presentment of matters which should and would have been made subjects of presentment but for the button-holing and importunity amounting to nothing short of embracery."

In a case which came before Mr. Justice Burton at Cornwall some time ago, he referred to the fact that scarcely any greater contempt could be offered to a court of justice than tampering with a jury. He was thereupon assured by one of the learned counsel before him, that scarcely anything was more common. In cases of this character it is of course very difficult to get at the bottom, as great care is taken to cover up any tracks. The tendency of recent legislation has been to take the trial of offences out of the hands of juries and put it in the hands of judges, with beneficial results. Judges are a great deal more likely to be unsympathetic than jurymen, and are certainly less likely to be got at. Nobody ever hears of corrupt practices being made to a judge, at least not in Canada.

## AS A CONSEQUENCE OF THE ABOLITION OF THE GRAND JURY, THE PETIT JURY WOULD BE IMMENSELY IMPROVED, INTELLECTUALLY.

"A good, contented, well-breakfasted juryman is a capital thing to get hold of. Discontented or hungry jurymen always find for the plaintiff. DICKENS.

Judge F. Miller, one of the nine judges of the supreme court of the United States, in an able article which appeared in the *American Law Review* for January, 1888, says that before his elevation to the bench, the impression on his mind was, that in civil suits petit juries were of doubtful value. At that time he would have preferred a court composed of three or more judges (so selected from different parts of the circuit as to prevent any preconcerted action or agreement of interest or opinion) to decide all questions of law or fact. He now thinks, however, that this preference was largely owing to the popular and frequent election of the judges of the court in which he was practising and to their insufficient salaries. They were neither very competent as to their learning, nor secure in their positions. They could not, therefore, exercise that control over the proceedings, in a jury case, and especially in instructing the jury upon the law applicable to it, which is essential to a right result in a jury trial. A case left to the unregulated discretion of a jury, without that careful discrimination between matters of fact and matters of law which it is the duty of the court to lay before them, is little more than a popular trial before a town meeting. The judge should clearly and decisively state the law, which is his province, and with equal precision point out to the jury the disputed questions of fact which it is their duty to decide."

These remarks of the learned judge are undoubtedly sound. They commend themselves to one's understanding, and as they are based on a state of things, the very antipodes of those upon which Mr. Justice Stareleigh proceeded in his famous charge in the great case of Bardell vs. Pickwick, I am tempted to quote the latter entire in order to contrast the two systems. Mr. Justice Stareleigh (as most people know, this learned judge was really Mr. Justice Gaselee) "summed up in the old established and most approved form." He read as much of his notes to the jury as he could decipher on so short a notice, and made running comments on the evidence as he went along. If Mrs. Bardell were right, it was perfectly clear that Mr Pickwick was wrong, and if they thought the evidence of Mrs Cluppins worthy of credence they would believe it, if they didn't, why, they wouldn't. If they were satisfied that a breach of promise of marriage had been committed, they would find for the plaintiff with such damages as they thought proper; and if, on the other hand, it appeared to them that no promise of marriage had ever been given, they would find for the defendant with no damages at all." To the credit of the bench, be it said, that this style of charge to a jury is now obsolete.

Judge Miller, above mentioned, further says that an experience of twenty-five years on the bench had convinced him that when the principles already stated by him as above, are faithfully applied, a jury is in the main as valuable as an equal number of judges would be, or any less number. His experience in the conferences of the United States supreme court is that the nine judges come to an agreement very readily upon questions of law, while they often disagree in regard to questions of fact which are as clear as the law. His conclusion is that judges are not pre-

eminently fitted, over other men of good judgment on business affairs, to decide upon mere questions of disputed fact.

Now, I think this emphasizes the point which I have elsewhere in this review endeavored to make, viz., that by abolishing the Grand Jury a large number of more intelligent men would be rendered available for service on what would then become THE jury, and these men being more intelligent than the ordinary petit jurymen would be more likely than they to arrive at a proper verdict. They are not required where they now are, and they are badly needed in the sphere to which they would be removed, which would thus become, undoubtedly, improved by their presence. The poorer material would be eliminated and left at home, and all those who would have been otherwise on the Grand Jury would be summoned in their stead.

Again, the invidious distinction between the grand and petit jury, which now prevails, would be swept away, the jury would vastly increase in respectability, and it would no longer be considered almost a reproach to be drafted to serve in a position which should certainly be considered a most honorable and responsible one.

In a discussion of the Grand Jury system it will, perhaps, be considered out of place to refer to the proceedings of the petit jury, but I think that as I may anticipate events a little and be considered as addressing myself to the new order of things after the "improved" jury shall have come into existence, it will not be improper to say that in civil cases the rule that there must be entire unanimity, undoubtedly works great injustice to suitors. These cases are decided by the preponderance of evidence and upon the balancing of the weight of testimony. With a much more intelligent jury created by the new state of affairs, why would it not be safe to do away with the ancient rule requiring the whole twelve to agree upon a verdict? Why would not nine or ten be sufficient to concur? As it is now, one or two obstinate, partial, interested or ignorant men may and often do effectually block and make abortive a costly trial.

On a certain occasion a jury had been unable to agree, and after being sent back once or twice they were asked by the judge what the difficulty was, whereupon one of their number, an elderly man, replied: "My lord, it is impossible for us to agree; these *eleven men* are so obstinate that they won't listen to reason!" It is not recorded whether or not the judge took the jury with him to the next assize town in the historical cart in order that the *eleven obstinate* men might have an opportunity of seeing the error of their ways.

Criminal cases, of course, stand upon a different footing. Here, unanimity should be, as it is, required. In these cases it is not a matter of preponderance of evidence, but of reasonable certainty. The old rule should therefore be observed, that it is better that nine guilty men should escape than that one innocent person should be found guilty.

To return to the Grand Jury proper: it is a well ascertained fact that they are very apt to overstep their province and to assume to try cases, instead of confining themselves to the simple question whether a *prima facie* case has been made out or not. Placing them on the jury would give them ample scope to indulge their ambition in this respect, and to hear both sides, and thus this objection would thenceforth cease to have any weight.

In my study of this subject I have only come across one writer who belittles the intelligence of the Grand Jury at the expense of their brethren of the other jury. This writer says: "Strange as it may seem the class of men on Grand Juries in Ontario are, as a rule, inferior even to those on the petit juries." Now, I think this writer has overlooked two things viz., first, that the statute clearly contemplates the selection of a more substantial and a more intelligent body of men to serve on the former than on the latter, and, second, that as a matter of fact that form of selection is actually always made, In nominating the different boards of selectors the statute has chosen

men who from their prominent position and knowledge of the locality are the most likely to be cognizant of the qualifications of the respective bodies of jurymen. I know this has been my own personal experience as a county selector for a number of years; and as a practising barrister for twenty-five years my observation of the men on the different panels as they have appeared in the jury box, convinces me that invariably the more capable men in every way will be found on the Grand Jury, such as magistrates, county and township councillors, city aldermen, physicians, merchants, manufacturers, etc., etc. The learned writer referred to is therefore either not sufficiently acquainted with the *personnel* of the respective jurymen, or the selectors in the locality for which he speaks must either be very remiss in their duties or ignorant of matters about which the law requires them to have some knowledge. In either case it does not affect the general experience of those observers of the subject in hand.

## THE GRAND JURY ALMOST SUPERCEDED BY THE PASSING OF THE PETTY TRESPASS AND SPEEDY TRIALS ACTS, ETC.

About sixty years ago the proposal to try certain offences by the introduction of what was called, "The Petty Trespass Act," aroused a very strong and stormy current of remonstrance, as being an invasion of the liberty of the subject, because it sought to deprive men of their constitutional right of trial by jury, and to confide too much power to the hands of the magistracy. The example was, however, set by the Imperial Parliament, and the wisdom of it was proved by the readiness of its administration, its economy, and the speedy disposal of a class of cases which had incumbered the courts and flooded them with cases of trifling consequence to the delay and prejudice of important matters.

After the discussion at the different elections, and pointed allusion to the subject being made in the published addresses of parliamentary candidates soliciting support both pro and con, the right of trial by jury was, by legislative enactment, seriously curtailed in cases in which complainants might pray the magistrate to proceed summarily, but a defendant had a right of appeal against an adverse decision, notwithstanding, under certain conditions. In all these cases whilst the right of trial by a petit jury was preserved the functions of the Grand Jury were dispensed with.

Who can count the number of acts of parliament which have been since passed from time to time, both by the imperial and colonial parliaments, in the same line, whereby this "palladium" of the liberties of the subject in the matter of the intervention of the Grand Jury has been dispensed with, and the right of trial by jury altogether abrogated. The climax as regards appeals against the summary jurisdiction of magistrates has surely been reached when the Dominion Parliament and the Local Legislature of Ontario have passed acts altogether dispensing with both the grand and petit jury. Where is the complaint existing against it? What has become of the cry, "It is better to leave well enough alone," which met the propasal of sixty years ago?

The Speedy Trials Act, alluded to elsewhere, was passed in 1869 on the introduction of the late Honorable John Sandfield Macdonald, then attorney-general for Ontario, in his place in the Dominion parliament. [He evidently did not think the latter was acting *ultra vires*.] And although the trial by jury was preserved to a person accused of crime which involved the necessity of an indictment by a Grand Jury and a trial by a petit jury, it is the fact that the vast majority of cases were summarily dealt with by the county judge. By subsequent legislation this right was extended, giving a like jurisdiction to police magistrates, since which last change most of the cases are disposed of at the police court. Where is this complaint of? Has injustice been done? Have not all reasonable doubts arising on the trials of cases under this non-jury system been considered and given effect to in favor of the accused by the judge or police magistrate in the same manner and to the same extent as a jury would or ought in all reason have done?

Whilst the system under the Speedy Trials Act was new, it was the habit of some lawyers in defending prisoners to advise their clients to demand a trial by jury. It was soon found, however, that as fair a trial and as satisfactory results followed an election to be tried without a jury, as might be expected from the latter, and so the rule now is, for a person accused, who has been brought within the provisions of the act, to elect to be tried by the judge, and the exception is for him to demand a trial by jury.

## HINDRANCES TO THE EFFECTIVE WORKING OF THE RECENT ONTARIO ACT REDUCING THE NUMBER OF GRAND JURORS.

Besides the practical hindrances which would prevent the enforcing of the recent Ontario Act, to say nothing of the constitutional objections alluded to elsewhere, there is the want of provision for contingencies which are not only possible, but obvious and probable. It was always an anomaly in the provincial legislation of Ontario that the courts should issue their precepts for the summoning of twenty-four Grand Jurors, when it was required that the Grand Jury must consist of twelve at least, and might contain any greater number, not exceeding twenty-three, in order that twelve might form a majority of the jurors.

On one occasion one of the chief justices of the Queen's bench division in Ontario, presiding at the assizes, finding that twenty-four Grand Jurors answered to their names rebuked the sheriff for summoning more than twenty-three persons, quoting Chitty's Criminal Law to the official. The sheriff meekly appeased the judicial but injudicious and forgetful fault-finder by shewing him the precept issued by the judges (signed and sealed by himself) commanding the sheriff (upon certain pains and penalties) not to fail of summoning twenty-four Grand Jurors for the occasion.

There must be twelve at least because the concurrence of that number is absolutely necessary in order to put the accused person on his trial, and there must not be more than twenty-three, because otherwise there might be an equal division and thus two full juries, who might differ in opinion, but if the recent act should become law and the Grand Jury system be retained it will be found much more difficult to find twelve men to agree amongst thirteen than amongst twenty-three, as heretofore. There must be twelve to find a true bill or twelve to ignore a bill, and it is quite probable that amongst the kind of men who sometimes get placed upon the Grand Jury it would be found impossible to find twelve out of thirteen to agree to either the one or the other, and a "dead-lock" would be the consequence unless provision was made for a majority ruling in either event. If that were to be once established then the principle of a man being presented for crime on the oaths of the ancient number "twelve at least of his peers" would necessarily fall to the ground.

## THE OBJECTIONS TO THE GRAND JURY SYSTEM.

On the occasion of King James once making a Royal progress through England he was met outside the town gates of a certain borough by the mayor and aldermen. The mayor, on approaching the king, humbly apologised to His Majesty for not having had the bells rung as he neared the place, stating there were seven reasons for the apparent slight. "In the first place, my liege," he said, "we have no bells." The king thereupon was graciously pleased to remark that that reason was quite *sufficient* and that he *needn't* state the others.

As gleaned from different sources the objections to the Grand Jury system may shortly be stated as follows :

1. It is enormously expensive.

2. Better material would be rendered available to serve on the petit jury.

3. At times unnecessary and vexatious delay is caused.

4. It is exposed to outside influences.

5. It is unskilled in the examination of witnesses.

6. Contrary to the spirit of the age, it is a secret tribunal, and experience teaches, that a secret body can easily screen an offender. Its very secrecy is an invitation to covert approach.

7. As at present constituted property qualification is a prime necessity and this is a poor guarantee of either good sense, honesty or intelligence.

8. It can be made the instrument of oppression.

9. Prejudice and not justice may prevail at its hands.

10. There is the constantly recurring danger of serious miscarriage of justice through mistakes in procedure, or the incapacity of unaccustomed jurymen to determine the value of evidence, or what is evidence.

11. No right of challenge can be had like that in a petit jury.

12. Friends or foes of a prisoner may be placed on the jury.

13. No rules of evidence govern.

14. It is very easy for a partial or unwilling witness to suppress or color his evidence in the secret examination,

15. It is a constantly changing body.

16. Social and political considerations often control jurors' minds and cause partial justice.

17. Each jury is swayed by one or two of the most clever or most aggressive of its members.

18. It is an anomalous and circumlocuting tribunal.

19. It has little or no weight in the community, and county councils, judges and governments practically ignore its representations and recommendations.

20. It gives criminals too many chances to escape and does not protect the innocent to a greater extent than could be done by a more inexpensive and less cumbersome tribunal.

21. The prejudices of local jurors may prevail against evidence.

22. Not the Grand Jury, but the petit jury, constitute, under the direction of our independent Canadian judiciary, the true protection of the subject against unjust or frivolous prosecution.

23. Its abolition would relieve a large number of the most substantial men of each county from the performance of an onerous duty and burden cast upon them, frequently at most inconvenient seasons.

24. It has not a single attribute with which a public criminal prosecutor could not be more advantageously clothed.

25. The appointment of provincial inspectors makes its supervision of jails, houses of refuge and asylums unnecessary. This branch of its functions was at all times valueless, as jailers and keepers always had ample notice of its visits and could govern themselves accordingly.

26. Possible injustice may accrue from the one-sided free access of the crown counsel, and an unscrupulous man could covertly wield immense influence to suit his views.

27. It is only potent to help a criminal by shielding him from a searching examination in open court where the public ear is ready to detect and the public tongue to censure everything savoring of partiality or injustice,

28. At one time it was necessary in the absence of police in bringing offenders to justice, but that reason is now effete.

29. Its inherent power of indictment and exercise of presentment could be effectually transferred to a public criminal prosecutor.

30. The long term of imprisonment of possibly innocent persons, unable to procure bail in the interval between a committal by a magistrate and the meeting of the Grand Jury, may in the interests of humanity, be urged as a very good reason for its abolishment.

31. It has been charged that even the church and the lodge are sometimes made use of in the interest of an accused person.

32. It would long since have been a thing of the past if its decisions were in any sense final or conclusive against an accused person.

33. The tendency of the Grand Jury to usurp the functions of the petit jury and actually try the case instead of confining themselves to the simple question whether a *prima facie* case had been made out, and ignoring the directions of the court is another very serious objection to the system.

34. The extended jurisdiction given to county judges and police magistrates has reduced the labors of Grand Jurors to a minimum, and accused persons declining to be tried before these tribunals do so because they desire to be tried by a petit jury.

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There can be no question that this is a formidable array of reasons in favor ofabolitjon. I venture to say that some of them are new to many who are opposed to a change. I think none of them are frivolous or overstated.

## THE POWER OF THE PRESS.

"If there's a hole in a' your coats,
I rede ye tent it,
A chield's among ye takin' notes,
And, faith, he'll prent it."
— BURNS.

Speaking of the power of the press, the Honorable Mr. Laurier, the leader of Her Majesty's Opposition in the House of Commons, when addressing himself to the question of the abolition of the Grand Jury is reported in *Hansard* of April 12, 1892, to have said, among other things, "In an earlier period of history the function of the Grand Jury was to review the state of affairs in any county and point out any abuses that existed. This function is now largely performed by the press of the country."

As showing that the press has not been remiss in its duty in pointing out an abuse in this respect, the following is a partial list of newspapers, Conservative and Reform, which, within the last few years, have had vigorous editorials advocating the abolition of the system in Canada:

Montreal Herald
Toronto Mail
Toronto Empire
Toronto Telegram
Toronto Week
Toronto Bystander
Hamilton Banner
London Free Press
Halifax Morning Herald
Ottawa Citizen
Ottawa Evening Journal
New York Times
Detroit Free Press
Law Journal
Scottish American
Vancouver News
Vancouver World
Dundas True Banner
Barrie Advance
Barrie Journal
Barrie Gazette
Barrie Examiner
Orillia Times
Orillia Packet
Collingwood Enterprise
Chatham Planet
Penetanguishene Herald
St. Thomas Times
St. Thomas Journal

About three years ago, His Honor Judge Macdougall, of Toronto, is reported to have said, in an address to a Grand Jury, "If the people accept the views of the newspapers on the subject of Grand Juries they are apt to be misled, as most of the newspapers treat the matter from a partisan standpoint."

Even assuming that this was true at the time His Honor made the remark, I think it scarcely can be said to be so now, because in the above list will be found journals from both sides of politics, which goes to show that the feeling in favor of abolition must be spreading.

His Honor can scarcely charge the bench with being partisan, and yet he will find a very large majority of his brethren of the county court in favor of doing away with the system.

For many years the *Canada Law Journal*, one of the best legal periodicals in America, has had able editorials on the subject of the abrogation of the Grand Jury system.

It will be noticed that I have taken the liberty in the course of this review to take extracts from some of these editorials. In the issue of that journal for January last there appeared the following exhaustive article on the

subject, which covers so much ground that I copy it entire. It is as follows:

"The attention of parliament and of the public has lately been called to the question of abolishing the Grand Jury system, by reason of the publication of replies of judges and others to a circular letter of the Minister of Justice asking for information on the subject. The result is given in the following summary: Forty-eight in favor of doing away with Grand Juries, forty-one against, and twelve doubtful. Substantially this is the verdict, although the classification as regards one or two of the opinions given may be considered a little defective. The officials consulted embrace nearly all the superior and county court judiciary, and it goes without saying that the views and arguments of these gentlemen are entitled to great weight. Notwithstanding this, it may be considered fairly open to discussion that some of them have had little or no experience of the working of the system, and that the arguments of several, although plausible, do not reach the practical test of every-day contact with Grand Juries With due deference to the contention of those in favor of the continuance of the present order of things, we propose to briefly analyze the return and enquire whether, after all, any sound, practical reasons have been advanced for the retention of the Grand Jury as part of our system of administering criminal justice.

"One feature of the enquiry is rather ludicrous. To take the opinion of a body as to the necessity of putting itself out of existence, is very near the line of the humorous, and certainly is not the safest method of getting reliable information. We suppose if the question were put to the judges composing the high court of justice for Ontario, 'Are you in favor of being abolished with all the privileges and emoluments of your high office?' we would not require to wait very long for an answer. Ask the members of the Local Legislature or of the Dominion Parliament if they are in favor of doing away with half their number, and the reply would be sharp and short, although it may be fairly argued that a deliberative body one-half the size numerically, would be cheaper, better, and infinitely more expeditious in the despatch of business. If we make tender enquiries regarding the number of cabinet ministers, either in the provinces or at Ottawa, and, in our solicitude for their and their country's good, mildly suggest that one-half might be abolished, the answer would be in the shape of legislation to prevent the spread of dangerous ideas subversive of good government. We frankly admit that our answer would very largely partake of the same character as those of the classes to whom we refer for the sake of argument, if we were placed in their position, but it would be the answer and judgment of an interested party, and of no value whatever in determining the point in question. To obtain a proper and unbiased opinion regarding any subject, it is surely not necessary or safe to extract information from those whose existence is imperilled by the discussion. We must therefore look for our facts and information outside the Grand Jury room. One thing more in this connection might be profitably added to what we have said In addressing Grand Juries, judges almost invariably point out to them the necessity for the system being continued, and the grand old historic character of their body is eulogized to the highest degree, and the jurors have it strongly impressed upon their minds that they stand as a bulwark against oppression and tyranny, and constitute the most important factor in the administration of the criminal law. After being addressed in this way for half an hour or more, the good and true yeomen and squires constituting the Grand Jury are naturally filled with strong ideas of their own greatness, and are convinced, when thus told of their importance by a high judicial authority, that the constitution would be imperilled if the shutters were put up and the doors of the Grand Jury room closed. We may also point out that in several instances, Grand Jurors themselves have favored a change, taking, perhaps, in such cases, something of the spirit in which they

were addressed by a judge opposed to their continuance. On the whole, therefore, we say that the opinions of Grand Juries are not entitled to the weight which is attached to them in dealing with a question so personal to themselves as this undoubtedly is, and we venture the opinion that by taking a certain course, one way or the other in his charge, the judge could obtain a reply which would be but the reflex of his own views delivered at the opening of the court.

"Dealing now with the return, we point out that the answer of the attorney-general of this province does not contain any reasons for his views, but simply states that he and the majority of his colleagues are of opinion that Grand Juries should not be abolished. The opinion of himself and colleagues is entitled to the gravest consideration, but it might be that his objections could be fairly met by both argument and facts If we were in possession of the reasons which induced him to come to his conclusion, we might be in a position to speak more definitely with reference to his reply, and modify, if not completely answer, the objections to a change of system.

"His Lordship Chief Justice Hagarty feels it would not be safe to leave the functions of the Grand Jury to be performed by an official like the present county attorney owing to pecuniary and professional interest, but suggests only that until something clearly better and more effectual can be substituted for it, the grand inquest ought to be retained. In this we readily concur, but he does not say that the duties could not be performed by some other means.

"His Lordship Chief Justice Armour declines to discuss the question, and His Lordship Chief Justice Galt is strongly of opinion that the Grand Jury system should be retained.

"His Lordship the Chancellor takes very strong ground, and whilst it may be urged that his professional and judicial experience has not extended to criminal matters, we think, it will be fairly admitted that there are few men more competent to pronounce an opinion upon any subject connected with the administration of justice, civil or criminal. He says: 'I have long been of opinion that the time has come to abandon the expensive, anomalous, and circumlocutory process.'

"Their Lordships Justices Falconbridge and McMahon are in favor of the system. Both these judges have had wide experience in matters pertaining to this question. Mr. Justice McMahon has, perhaps, more than any other judge on the bench, had that experience which is necessary to form a practical judgment relating to this question.

"The Honorable Justices Ferguson and Street both argue in favor of the Grand Jury, but at the bar they were not engaged in that class of work which brings men into close connection with the administration of criminal justice, where a practical knowledge of the working of the Grand Jury system can only be obtained.

"His Lordship Mr. Justice Rose reasons upon the question at length, and puts the case very strongly. He places the matter largely upon the ground that grand jurors are not subject to the bias of a criminal prosecutor, and agrees with Mr. Justice Falconbridge and several of the other judges that the function of the Grand Jury as an educator is most important. We are free to admit that his answer contains all the arguments that can reasonably be advanced in favor of his views. They are clearly and forcibly put and deserve special attention.

"His Lordship Mr. Justice Robertson, who had, at the bar, a wide experience in criminal matters, bases his views largely upon the fact that the grand inquest is an educator of the people and inspires confidence in constituted authority. He also puts his case very strongly.

"We have referred more particularly to the opinions of our superior court judges because they demand serious consideration from those who are discussing the question. The real point, however, we submit with all deference, has not been touched upon, except by Mr. Justice Rose, namely, that the work could be done more efficiently, with greater protection to the public and to the individual, and at a much less expense than by Grand Juries, if responsible officers, specially qualified for the position, were appointed by the crown. We agree with all that has been said with reference to the county attorneys, and without reflecting in any way upon these gentlemen We also readily admit, and there can be no doubt of the correctness of the position, that Grand Juries could not be abolished without some officer or other tribunal to take their place, and the real question seems to us to be: 'Would an officer such as we have suggested in former issues be a good and sufficient substitute, and be eminently more satisfactory than the present system?' This question has not been answered.

"The result of this analysis of the opinions of our judges here is, therefore, that as regards the bare issue of doing away with or retaining Grand Juries, they favor their retention. This, after all, is not capable of receiving any other satisfactory answer. It has never been pretended that the abolition of the Grand Jury without other provision being made would result in a satisfactory state of affairs. Every one knows that as matters stand at present—with an unprofessional and comparatively untrained magistracy dealing with preliminary investigations, with county attorneys, very frequently appointed on purely political grounds without reference to mental or legal qualifications, and, in addition to this, with a nefarious system of paying crown officers by fees unfortunately in existence—it would be madness to do away with the only safeguard, however slight, against the petty importance of some of our justices of the peace, or the maudlin condition and intense cupidity of some needy county attorney. Assuming, however, that an officer, like a procurator fiscal, were appointed for each circuit at a salary, say, of five thousand dollars a year, and that, as the chief justice of the court of appeal suggests, he should not be allowed to practise in contentious business, and assuming still further that the other duties of this officer would embrace all that a Grand Jury does in criminal matters, and would bring to bear on the cases submitted to him, what the Grand Jury never can or will, namely, a calm, deliberate, trained judgment, with no local feelings, no helping a neighbor out of a hole, no vindictive punishment of a personal enemy of one or more of the jurors by sending him for trial to take his chance in the felon's dock—under such conditions, with the details carefully considered and strict provision made against anticipated evils, would the answers of those of our judges of professional and judicial experience in criminal proceedings still be in favor of retaining a secret inquisition in this country? We believe if the question had been submitted in the way we indicate it should have been, every answer of practical value would have been for abolition.

"Talk of protection to the accused! Every assize judge knows that Grand Juries present for trial at every court in the country men against whom there is not a particle of legal evidence of crime, nay, not even a shred of suspicion, and that cases are frequently withdrawn from the petit jury by reason of the judge holding that no crime appears either by the indictment or by the evidence for the crown. Every judge, we say, knows this to a greater or less degree according to his experience; but the judges do not, and, by reason of their position, cannot possibly know how many guilty men are protected and relieved from the penalty of their crimes by a *Grand Jury trial!*

"County judges, by reason of their local knowledge, are specially fitted to speak upon this matter, and they are well aware of this blot on the administration of justice, and it is a significant fact that they stand *twenty-two* to *nine* in favor of abolition, notwithstanding the bald way in which the question

was put to them. Add to this majority, Judge Wood, who favors abolition as regards the sessions, and apologetically pleads for a compromise, and the minority is a very small one. The point we make is this: The county court judges are thrown into very close contact with the workings of all institutions in their districts. They mix more frequently with the people than do the superior court judges, and in consequence they have a fuller knowledge of matters like the workings of the Grand Juries, and are more in touch with the way the ordinary man transacts his affairs than judges whose time is spent almost wholly in an atmosphere of law. They understand, from the very nature of their localized position, what influences have been at work when there is an evident miscarriage of justice. Most of the county judges have been practitioners and politicians in their respective counties. They know the factions and local jealousies and family differences of half their constituency. They know most of the men on the grand inquest at each court, and when some failure of justice as regards either the innocent or guilty occurs, they can put their finger on the weak spot and say from what cause the innocent was presented for trial or the morally and legally guilty man allowed to escape. We need not individualize, but our readers will at once recognize the fact that there are a number of the county judges who have had very wide experience and have given the matter special attention, and it is not saying anything disrespectful to the superior court bench, that the opinion of such men must, from their surroundings, personal observation, and local knowledge, be the very best evidence we can get on the subject. Senator Gowan, from his long judicial experience, and from the special attention he has given to this matter, is surely entitled to speak with weight, and taking his arguments and views in favor of abolition, one naturally asks, 'Are they reasonable and right?' It must be admitted they are, and more than this, they have never been successfully controverted.

"Assuming his estimate of the cost of Grand Juries to be correct, let us look for a moment at the results which might be obtained from a judicious application of the fund. Five crown officers could be appointed for the province, one for each circuit, and might be paid a salary of $5,000 a year each, and then the province would be a gainer to a considerable extent financially. It costs for crown counsel about $10,000 per annum out of the provincial treasury, so that the change we suggest would require only $15,000 additional, and the country would thereupon be relieved of the whole cost of the present system, And it occurs to us that the suggestion that an official like a circuit crown officer would be more subject to bias and partiality than the Grand Juries are, is entirely gratuitous. The same remark would apply to the judges themselves, if there was anything in it, but the fact that the judges are not influenced is a convincing reason for believing that a crown officer, paid a salary equivalent to that of a superior court judge, and selected not on political but on meritorious grounds, would be just as respectable, just as unapproachable, and just as pure as the purest judge on the bench.

"We desire, before concluding, to refer to one or two of the arguments of those opposed to abolition. The remarks as to the bloodthirstiness of crown officials would apply, in a less degree of course, to judges. Meaning no offence, and frankly stating the case, is it not the fact that some of the assize judges are looked upon as acquitting and some as convicting judges? Does this make them any less efficient officers? Some men are naturally merciful, others naturally severe, in their private as well as public rules of life. Some detectives are eminently fair, some the reverse. Some crown officers press for conviction as they would for a verdict in a civil suit. Some, again, handle the crown prosecution with kid gloves These anomalies are due largely to the fact that the men themselves are by nature inclined one way or the other, as the case may be, but, on the whole, a crown officer, experienced and capable, is just as likely to be a fair man as the judge before whom he appears as prosecutor. It is a well-known fact that the longer the experience of a

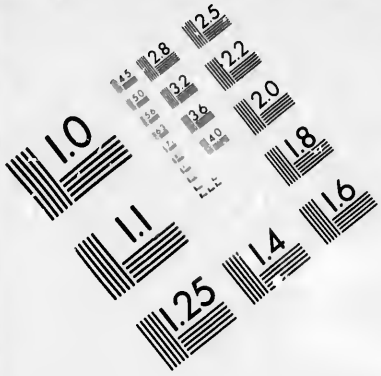
crown counsel, the more careful he is in conducting crown business, and the faults complained of are more apparent the more inexperienced the crown counsel is. This is surely a strong argument in favor of permanent, trained men to fill the responsible position of prosecutors. We believe a judge, if he had his choice, would prefer an old experienced counsel in criminal prosecutions to one of less practice in these matters, given the same ability and discretion in both.

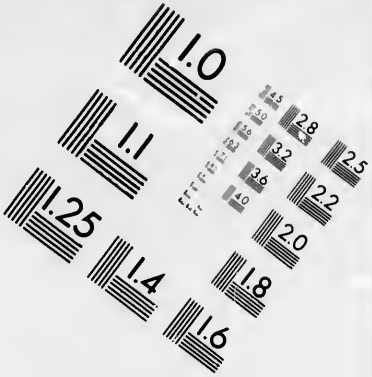
"Then, as to the educator features of Grand Juries, advanced by some of the judges, we need only glance at the actual facts to see what weight this has in the discussion. The Grand Jurors are called at the opening of the court. They are addressed by the presiding judge and dismissed to their duties; from that time until they draw their indemnity, they are a secret conclave or a visiting body at the public institutions. They are rarely present in court except when they return their bills. They do not enjoy the advantages of a petit jury, who are engaged day after day in hearing evidence, weighing facts under the careful supervision and direction of the court, listening to able speeches by the counsel, gaining a useful knowledge of law and business, and performing their duties under the censorship of the press and the public. To say that two or three days' attendance as a Grand Juror at an assize, once perhaps in every six or seven years, and often only once in a lifetime, is an educator, is not the kind of argument that would weigh with the very men who use it as such if advanced in the trial of an ordinary action before them. The visit to the public institutions is also introduced as an important feature. This could be done by appointing a few of the petit jurors to do the same work at no expense, and with an equally good result. The fact that these institutions are under the control of a government responsible to the people and subject to the supervision of competent inspectors, is sufficient guarantee that the public interest in that respect is well guarded. Besides, it is scarcely necessary to point out that fifteen or twenty Grand Jurors, attending in a body in a prefunctory sort of way, would be the least likely of all men to have abuses thrust under their notice, or to ferret them out if they existed.

"Again, as to influence from outsiders, is a well-paid, able, and carefully chosen crown official more likely to be swayed one way or the other in the discharge of his duties than is the judge who tries the case? We do not believe that either would be affected, and the only fact which could give rise to such a suspicion, is the present system of making appointments on political grounds.

"Let a good man be appointed for each circuit, and let his salary be sufficient, and he will also be beyond the reach of influence. Work which is only half done now, would be carefully and honestly performed, and instead of counsel getting his facts as the case progresses, he would come into court as a faithful guardian of public interest, and be of valuable assistance to the bench in clearing the innocent of imputation, and punishing the guilty for their crimes. The police officers would not be, as they are now, left to grope in the dark, to find that much of what they have done is discarded, and that their theory is entirely opposed to that of the crown counsel, when it is too late to overcome the difficulty. The fact that for the past two or three years in Toronto alone, the court and all its officials, the Grand Juries, counsel, and witnesses, have been kept for days in the performance of laborious and important duties with scarcely a single conviction, shows that something is wrong in the administration of criminal justice and requires a speedy and effective remedy. We believe that the appointment of a public prosecutor for each circuit, whose duty it would be to make the most searching enquiries into every criminal prosecution, to throw out all charges which are not well founded, to direct the police properly in the discharge of their duties, to keep a careful watch over the criminal elements in their district, to see that every case which is brought to trial is thoroughly prepared, to guard against loose-

ness on the one hand and unscrupulous zeal on the other, would be a blessing to the government, the judges, and the public, and would be preferable in every way to the irresponsible, untrained, and too often prejudiced body which stands in the way of this being done. Theoretically, the grand inquest is a noble and dignified old institution, hoary with age and fossil respectability—practically, as an instrument in the punishment of the guilty, or the protection of the innocent, there is, to use the historic words of a well-known politician, 'nothing to it.'"

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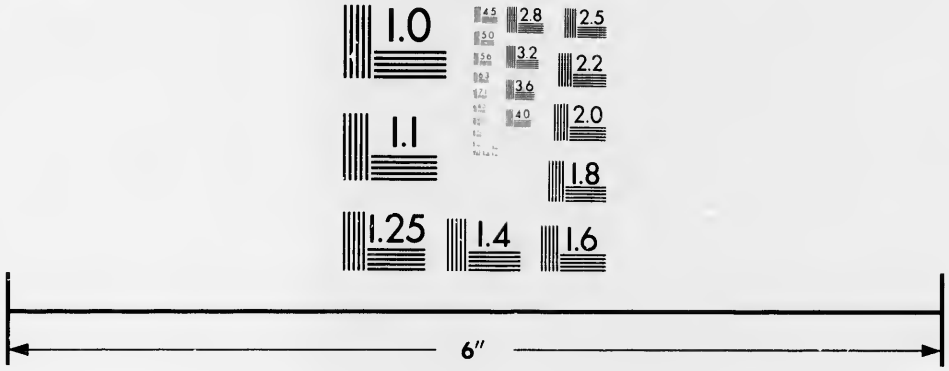


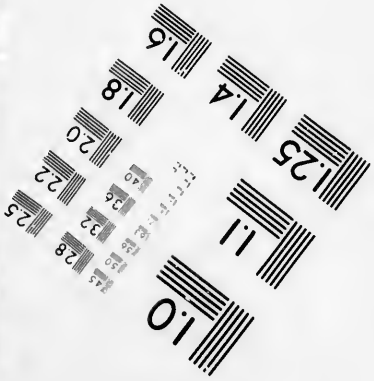


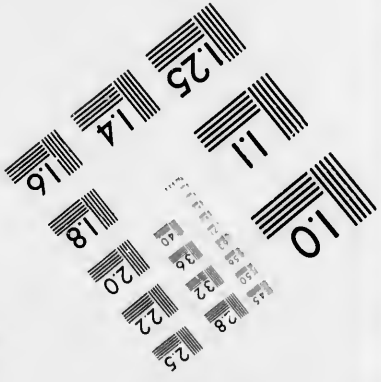


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## OPINIONS OF JUDGES, ETC., WHO FAVOR ABOLITION, CONDENSED FROM REPLIES MADE IN ANSWER TO THE CIRCULAR OF THE MINISTER OF JUSTICE.

### SUPREME COURT OF CANADA.

Mr. Justice Gwynne, a very able criminal lawyer, engaged for many years, before his elevation to the Ontario bench, as crown counsel, and who is now one of the justices of the supreme court at Ottawa, says: The idea that the Grand Jury system constitutes in the present day the palladium of British liberties and serves as a shield interposed between the subject and the crown necessary for the preservation of the liberties of the former from the tyranny, injustice and oppression of the latter, partakes altogether of too mediæval a character to justify its receiving a moment's consideration. No perils to the due administration of criminal justice can in his opinion nowadays arise from any interference on the part of the crown. In some few state prosecutions Grand Juries may have intervened as a shield between the subject and the crown, or courts subservient to the crown, but since judges have been rendered independent of the crown, such a scandal has been effectually removed. It is the petit jury, and not the Grand Jury, which has always constituted, and still constitutes under the direction of independent judges, the true protection of the subject against unjust and frivolous prosecutions, whether instituted on behalf of the public or by wicked and maliciously disposed persons making false or frivolous accusations for the gratification of their own selfish, vindictive and malignant purposes. His Lordship gives other weighty reasons in favor of abolition, but space will not permit their being even referred to, except to say that the system might be abolished not only without detriment but with positive advantage to the due, speedy and inexpensive administration of the criminal law.

Mr. Justice Taschereau: This learned gentleman, a colleague of Mr. Justice Gwynne on the supreme court bench, and the author of the famous work on criminal law which bears his name, also comes out in a most decided manner against the Grand Jury. He refers to the work of the criminal law commissioners of England, and shews that the weight of opinion preponderated against the maintenance of the Grand Jury. In refuting the arguments as to its antiquity, he cites the following from the celebrated John Pitt Taylor: "There is an instinctive tendency in the minds of most men to admire and reverence the wisdom of bygone ages, and to cling with affection to those institutions which have stood the test of centuries, Such feelings are natural, nay, laudable, but they may be indulged too far. There is no doubt that in the days of the Tudors and the Stuarts, the Grand Jury was the bulwark of English liberty. In those unscrupulous times, the judges, being removable at the pleasure of the crown, and petit juries being subjected to imprisonment and fine if they dared to find a verdict contrary to the direction of a sycophantic bench, a party who had become obnoxious to the reigning power could only hope for security through the medium of the Grand Jury; but at the present day, when the judges are actuated by no personal fear or hopes, when petit jurors are at least as independent as the members of the grand inquest, and when an enlightened press promulgates, and by promulgating controls the proceedings of courts of justice, it is idle to suppose that the intervention of a Grand Jury is any longer necessary to protect the defendant from oppression and injustice."

Mr. Justice Taschereau also states that as late as the year 1872 a learned judge in England held that a Grand Jury is not bound by any rules of evidence. He also points out that it is undoubted law that a Grand Jury may present an indictment upon their own knowledge, and then asks, if a Grand Jury acts arbitrarily where is the remedy? His Lordship also cites the remarks of the late Chief Justice Harrison, in Ontario, who, quoting Lords Brougham and Denman in support of his views, called the Grand Jury an expensive nuisance; and the opinion of Lord Chelmsford, who often endeavored to improve them out of existence.

ONTARIO.

Hon. J. A. Boyd, the learned chancellor, of Ontario, says he has "long been of opinion that the time has come to abandon this expensive, anomalous and circumlocuting process."

The late Judge Sinclair: This gentleman (the author of many valuable legal works, and recently deceased,) after careful consideration, thought no harm could befall the country by the abrogation of the system. He states he was formerly of a different opinion, but that a number of cases coming within his experience, in which some remarkable failures of justice had resulted from the habit which Grand Juries not infrequently use of usurping functions not belonging to them, and assuming those of the judge and the petit jury as well as their own, and of trying cases given to them for consideration in direct opposition to the express instructions of the court had weakened his faith in their utility; and he considered that other and much more reliable means might be found for the protection of the individual from malicious and unfounded prosecution, as well as for bringing offenders to justice. He considered that the extended jurisdiction given to county judges and police magistrates in criminal matters had been productive of much good and had a tendency to diminish the number of offences by furnishing the means of prompt conviction and punishment of offenders, and that, while on the one hand persons charged with offences are not so liable to be improperly convicted, if innocent, on the other the chances of escape are lessened in case they are guilty.

Judge Ross considers at considerable length the great costliness of the system, and shews who are pecuniarily interested in maintaining it. He says: "Grand Juries are worked to clear the guilty and condemn the innocent." That the Grand Jury can be packed, that it is a relic of mediæval times, a star chamber, capable of gross abuse, but with little capacity for good, that it is an English institution composed of high-caste people, members of the so-called county families, very useful for the protection of such families, and for smothering scandals in high life, as well as for doing strict and impartial justice to the poor, especially where the interests of landlords and poachers come in conflict.

Judge Lazier: "They could very well be dispensed with, particularly at the general sessions. Since the establishment of the county judge's criminal courts and police magistrates' courts, having concurrent jurisdiction with the sessions, when parties elect to be tried by these tribunals, the greater part of the criminal business disposed of at the sessions has been, and is, being disposed of at these courts without any complaint being made of the absence of a preliminary investigation before a Grand Jury. This, added to the fact that nearly all committals to jail for trial by jury are now made by police magistrates (usually lawyers by profession) renders the intervention of the Grand Jury less necessary than formerly. Their presence of late at the sessions is little more than a form, by reason of the little business requiring their attention, although involving very considerable expense. The experiment might well be tried of dispensing with the Grand Jury, and their duties be left to be performed by the police and other magistrates and the county attorneys or other public prosecutor.

Judge Price: "If some satisfactory official board could be named, before whom the complaint and evidence could be laid, and no indictment proceeded upon, except such as such board should advise, I think Grand Juries might be dispensed with and money be saved."

Judge Deacon, during a judicial life of over twenty-four years, during which he has annually assisted in the selection of persons to serve on both the panels of the Grand Jury, and having had frequent opportunities of observing the working of the system, is of opinion that the abolition of the system would be in the public interest. In selecting the juries it has often been remarked that it would be much more desirable to place the men now selected for Grand Juries upon the petit jury list, where they could be of some use, and where they are most wanted; and all the selectors agreed as to the soundness of the observation. It is a venerable institution which did good service in by-gone years, but it was always a piece of machinery which, in the hands of unscrupulous men, was capable of doing mischief and defeating the ends of justice. If the evidence laid before them could always be presented by a competent officer, and under the direction of a judge, there would then be some reasonable certainty that it was fairly put before them and their action upon it being open to public criticism, there would be more confidence in the fairness of their finding, and their practical review of the committing justice's decision. But as it requires at least twelve to agree, in order to find a bill, how often has it happened that when the panel in attendance was not full, five or six men, and sometimes fewer, have been able to control the ten or eleven who were in favor of finding the bill—the majority for the time being controlled by a mere fraction of their number. This has always been a dangerous weakness in the system, and will always be so. His Honor says that the Grand Jury was brought into existence for the protection of innocent citizens from interference by the crown or by powerful subjects causing unjust prosecutions, but as these proceedings have long become things of the past, the Grand Jury as an institution is no longer necessary, and has outlived its usefulness, and he agrees with the views presented by the Hon. Senator Gowan in his address to the Senate.

Judge Ardagh, after seventeen years' experience, thinks that the usefulness of Grand Juries has borne but a very small proportion to the expense involved in connection with them. He admits that if they still served the purpose for which they were originally created the expense ought not to be taken into consideration. He asks: 1st. Does the Grand Jury not serve as a protection to the subject as against the crown? and answers that in this country and at the end of the nineteenth century such a question hardly requires serious consideration. 2nd. Does the Grand Jury serve as a safeguard against unjust and oppressive prosecution? He answers by saying that in his experience its powers have for such a purpose never been really called into play, and that on the contrary he knows them to have been used to interfere as a shield to the guilty. He says that Grand Juries are now open to the influence of the counsel for the crown and depend much upon them for advice—though, theoretically, they are supposed to be an entirely *independent* body. He does not insinuate that crown counsel ever knowingly exceed their duties, but they have opportunities for influencing them which in the nature of things they make use of, albeit prior to the actual trial of the prisoner. No responsibility (beyond that of their own consciences) is cast upon either Grand Juries or crown counsel, or are their conduct, actions or motives ever inquired into, nor can they be.

Judge McDonald has been brought officially into contact with the workings of the Grand Jury for fifteen years as county judge of Leeds and Grenville. He considers the Grand Jury may very well be dispensed with. A majority of the cases which formerly came before the Grand Jury are now removed from them. And while quite agreeing that there is much—even though it be perhaps merely a sentiment—in the principle that no man may

be convicted for an indictable offence unless twenty-four men – his peers — have pronounced him guilty, it is seen that a great many do not avail themselves of this palladium, but elect to be tried by a judge or a magistrate without the intervention of a jury. His Honor does not believe there would be practically any injustice done an accused person if he should, at the sitting of the court, be placed upon his trial before a petit jury without a previous investigation being had. The efficiency of the jury system would be increased by the abolition of the Grand Jury for then the best material would be available for service upon what is now called the petit jury. For a matter of sentiment, on account of its being a historical institution, the public should not be put to a great expense without any commensurate return.

Judge Boys favors the abolition of the present Grand Jury, and says they have outlived their usefulness. He heartily endorses Senator Gowan's remarks, when introducing his motion before the Senate, and suggests the appointment of three officials as a substitute for the present system. His remarks will repay perusal.

Judge Upper is of opinion that the time has arrived when the functions of Grand Juries can be safely dispensed with. Whatever reasons may have existed ages ago for establishing the system as a part of the machinery of criminal justice no longer exist.

Judge Robinson, after long experience, favors abolition. He says he never knew them do any good, and has known them do harm, some instances of which he gives, and refers to the case of Governor Eyre, where two Grand Juries refused to allow that individual's conduct to be tried.

Judge Lacourse says that in consequence of the passing of different acts of parliament since 1857 he is of opinion that the system has become practically unnecessary, except, perhaps, in large cities: He thinks the Grand Jury system has become a thing of the past.

Judge Fralick says that in all cases where a prisoner elects to be tried by the county judge the services of the Grand Jury are dispensed with. Their chief functions are therefore to revise the work of the convicting magistrate, who has sent a prisoner up for trial. By far the larger number of criminal informations come before a police magistrate, generally a legal practioner, who is paid by the county for his services. His Honor is of opinion Grand Juries are unnecessary, and recommends a substitute, as will be noticed in another part of this review.

Judge Ermatinger is of opinion the Grand Jury has survived its usefulness and should be abolished. He would not advocate abolition if committals for trials could be made by the magistracy, as it at present exists in Ontario. He recommends that the present magistrates be given power only to issue summonses and warrants in cases other than trivial offences triable by themselves, and that the county judges should hear the evidence and commit for trial, or that stipendiary magistrates be appointed in each county for the same purpose. The county judges would be the cheaper, as no doubt they would be willing to act, on a reasonable addition being made to their present salaries for the extra work. His Honor's contribution to the discussion is valuable, and should be carefully considered.

Judge Hughes says that the Honorable Senator Gowan, from a long experience of nearly forty years, and his own observation, after an experience of thirty-seven years, has given each of them a wide field of observation, and he entirely affirms all that Senator Gowan has advanced on the subject of abolition. In speaking with men of long experience he has, with few exceptions, found an almost unanimous conclusion that the functions of the Grand Jury are an expensive relic of times which have now no parallel and that there exists not the semblance of a necessity for the continuance of a system which was once a useful one. His Honor enters into a consideration of what should be substituted for the Grand Jury, and his remarks

will be found under the head of "A Crown Prosecutor" in another part of this work.

Judge Senkler: It is a great expense without adequate results. If abolished, the men relieved as Grand Jurors would be available as petit jurors and the result would be a better class of men for the latter, an end much to be desired.

Judge Davis: After an active life of thirty years as crown attorney, crown prosecutor and judge, "I have come to the conclusion that the Grand Jury system is cumbrous, insufficient and needlessly expensive."

Judge McRae: The chief objection is that it is a secret institution, and having to deal with matters of public concern, individual jurors do not feel that responsibility to the public which they would if they were acting openly. With an intelligent magistracy and our system of crown attorneys there would be no fear of any person being put upon trial without cause.

Judge Robb: I believe the change would tend to simplify and expedite the administration of criminal justice, would set free a desirable class of men as petit jurors, and would be a saving of expense. As against these I know of no evils that could not be guarded against by proper legislation.

Judges Kingsmill and Barrett consider that the only reason for the continued existence of Grand Juries is the protection they afford to the individual against the ignorance or malice of a justice of the peace. They think the usefulness of the Grand Jury was undoubted when first instituted, but that these days have passed, and they now cost more than any benefit derived from them justifies, and they have frequently in past years not found indictments on evidence which would have warranted it, and because, as commonly believed, of undue influence. They are averse to the present power of Grand Juries to find a bill without the case having been first before a justice of the peace What their Honor's say on the subject of a substitute for the present system will be found under its proper heading.

Judge Wood says that if it is the intention to leave the jurisdiction of the general sessions of the peace as it is, he is of opinion that as to them, Grand Juries might well be abolished. In the assize courts this would hold good in the majority of cases, but in treason and some other cases he would not advocate the total abolition of the Grand Jury until satisfied that whatever was substituted for it would be likely to command public confidence. Doubtless a beneficial result would be the improved character of what would then be the jury. He suggests the taking of thirteen men from the panel to do certain special work, and upon that being done, they could fall back into the panel again.

Judge Woods considers that modern society in its new elements and agencies is too advanced and complex for the faithful and efficient working of this branch of our criminal system. The considerations under which it found its usefulness no longer exist. The lodges and brotherhoods are an element in every community which do not hesitate to interfere with the administration of justice in order to the immunity of its members, nor even are the clergy free from the reproach of giving countenance to petitions for the release of criminals. His Honor has no doubt that Grand Jurors are subjected to a heavy pressure from these classes, and too often to the obstruction and perversion of justice. He also refers to the great expense of bringing in four sets of Grand Jurors every year, and to the successful working of the Speedy Trials Act. He considers that two things are desirable in a criminal prosecution: 1st. That there should be as few persons connected with it as possible. 2nd. That local partialities, prejudices or influences should be controlled by an outside supervision. He concludes that there is no better way to secure the effectual prosecution of all offenders than by the appointment of police magistrates and strengthening the hands of the crown attorney, and giving him supervision of every case coming before the magistrates.

Mr. Justice McCarthy thinks the time has arrived for abolishing the Grand Jury, 1st, because of the very large number and intelligence of magistrates; 2nd, the right so frequently taken advantage of by prisoners of being tried before the county judges, and 3rd, the expense.

QUEBEC.

Chief Justice Johnson says that where there is a system of paid, professionally trained and competent police magistrates, the abolition of Grand Juries is desirable in certain cases, but not in matters of a more or less political complexion, such as seditious libel. In another place the learned judge's remarks as to a substitute will be found under the proper head.

Mr. Justice Pagnuelo says that the inconvenience resulting from the system are manifold and the manner it is enforced adds to its inherent defects. Jurors lack that practical knowledge which a trained judicial officer or a judge possesses for the discovery of crimes. They are liable to surprises, and their feelings will often be appealed to and abused; in political, religious and racial trials a condemnation is often next to impossible against a partisan, a co-religionist or a countryman, and criminals escape. Juries are often found fault with as giving criminals too many chances to escape; but it is rare that they are suspected of condemning innocent persons. The secret and *ex parte* proceedings before Grand Juries add considerably to the inconveniences of the system, especially where the standard of jurors is low. He is under the impression that cases are not sufficiently considered by Grand Jurors and that they are too easily approached, challenges being unknown, and impossible opinions are often found before Grand Jurors meet together in their room. Suspicions of this kind are, by themselves, a great drawback in this mode of administering justice. Jurors owe their existence in England to the desire of providing a guarantee against the undue influence which the then organization of society and of the government, and former abuses by persons high in authority justified the people to fear from permanent judges or officers appointed by the Crown. They are now no longer a bulwark of personal or political liberty. Their main office is now to control the decision of the magistrate or that of the judge and to guard against persecutions from motives of revenge, bias or interest. His Lordship's opinion is a very lengthy and able one. I have extracted here and in another place all I can find space for.

Judge Taschereau considers the Grand Jury an evident failure, and as far as the large centres are concerned, sees no difficulty in abolishing it, the Crown being always well represented, and the preliminary investigations being properly conducted. In several districts the same guarantees do not exist, but this could be overcome with a proper system of preliminary examinations under the responsibility and supervision of officials *ad hoc*.

Judge Mathieu does not see why, when a preliminary examination has taken place and the justice of the peace or the police magistrate has found there is matter for trial, the same question should be submitted for the determination of the Grand Jury. It is true one can bring a bill of indictment before the Grand Jury, before holding a preliminary examination, but in this case, one might supplement the indictment before the Grand Jury by declaring that, whenever there is no preliminary examination, the trial of the prisoner cannot be gone on with without the permission of the court. He thinks that the preliminary examination, and in default of such, the authorization of the court, is a sufficient protection for the accused person, and with these provisions one cannot be subjected to vexatious trials at law. He says that this examination and one held in secret before the Grand Jury, is subject to many inconveniences, and the right of presenting indictments to the latter is often abused. He considers the Grand Jury might be abolished, after placing a safeguard, such as the above, to prevent vexatious trials at law.

Mr. Justice Gill would entirely approve of the abolition of the Grand Jury provided some modification of the preliminary examination as actually

practiced before the justices of the peace were made, they being, as a rule, in the rural districts, not sufficiently educated and free from prejudice as to always properly fulfil the office.

Mr. Justice Bourgeois has found occasionally that the functions of Grand Juries were useless and that their secrecy lead to treacherous prosecutions and gross injustice. "If the institution were abolished I think the statute ought to provide that nobody is to be arraigned or put on his trial before petty juries, *unless* a preliminary investigation has been made in his presence, by a competent officer."

Mr. Justice Larue considers they are too much exposed to outside influences and that the summoning them is very expensive and out of proportion with the services rendered.

Mr. Justice Loranger. His experience as attorney general and at the bar and as a judge has convinced him that the system could be replaced with advantage by a proper system of preliminary investigation coupled with the appointment of permanent crown prosecutors.

NOVA SCOTIA.

Attorney-General Longley says that any change looking to the abolition of the jury system will naturally meet with prejudice from many minds instinctively conservative in their tendencies. But the vital question is the practical utility of the system. He says the jury system in all British countries has been gradually undergoing a change for some time past. At one time no cause could be tried in the supreme court except before a judge and jury. The cumbersome and unsatisfactory character of the adjudication by unskilled men on points of a strictly technical character soon became apparent, and juries were dispensed with except in certain cases. He says: "No inconvenience, so far as I am aware of, resulted from this sweeping abolition of the functions of petit juries in civil cases. Indeed, it is the universal testimony of the bench and bar alike in this province that the administration of justice has been vastly facilitated by the change" He points out that originally all criminal matters in Nova Scotia, except petty cases, were adjudicated by the supreme court. Since the recent passing of the Speedy Trials Act a majority of all criminal cases are tried before county judges by the consent of the persons themselves. In these cases there is no Grand Jury, which body, in reality, passes upon but a percentage of the cases of alleged crime. The favorite argument for the maintenance of the system of Grand Juries has been that it was unfair to the citizen that he should be exposed to the odium of sitting in a criminal box under a charge of felony, if there was not a fair and reasonable case against him. "Speaking from my own experience in such matters in Nova Scotia. I have no hesitation in stating that it is but rarely that the exercise of the functions of Grand Juries have been of much value in this regard. In the first place, as a rule, justices of the peace do not send up for trial cases which are the result of personal malignity. The tendency of justices is to lean to the side of leniency rather than severity in the administration of criminal justice. So far as my experience goes juries have repeatedly failed to find bills against persons, not from lack of abundant evidence to justify and require the putting of the accused upon trial, but from considerations of a personal and unsatisfactory character." He sums up by saying that in Nova Scotia, at the present time, the Grand Jury is not a vitally important factor in the administration of criminal justice. Under the caption of "Criticisms of the Judges Reviewed," elsewhere, I have ventured to add an additional extract from the Hon. Mr. Longley's thoughtful and valuable opinion.

Judge Johnston says that some time ago he formed the opinion that in the present state of society Grand Juries are not required to the due administration of justice, and are not essential to the legitimate security of the party

charged, but that his interests would be sufficiently guarded and subserved were he to be tried on the commitment of the committing magistrate, with a limitation in cases of political offences or political libels.

Judge Desbrisay says: "I am convinced from the arguments of able men on the subject, and by observation, that the time has fully arrived when Grand Juries may well be dispensed with. The use of such a jury involves unnecessary delay and expense All the steps which precede trial in a criminal court could be as well taken before the time now fixed for the assembling of the Grand Jury, and if there was not sufficient evidence to place on trial the party accused, he would so much the sooner resume, with innocence established, his true position among his fellow men. All proceedings up to, and including prosecutions, should be taken by an officer appointed for each county, or given districts, a man of responsibility, knowledge and known integrity. His whole attention should be devoted to the duties so devolving upon him, and he should be paid a suitable salary. The money so expended would be much more than saved in the increased security against wrong-doing which must result from such appointments."

NEW BRUNSWICK.

Judge Wilkinson is classed as doubtful on the subject of abolition, but he says that the retention of the system is not so important now, when both the rights of the Crown and of the subject are so thoroughly understood and defined; when more reasonable distinctions are made in the nature and punishment of crime; when the judicial tenure of office is permanent and protected by safeguards; than in other days when confusion and uncertainty existed more or less in regard to the rights of the Crown and of the subject and the relative rights of subjects between themselves; when punishment of the subject for crime, and sometimes where there was little in the nature of crime, were too often arbitrary, cruel and sanguinary, and the judges themselves in the turbulent, stirring times referred to, were too often found to be pliant time-servers and cruel partisan oppressors.

Judge Steadman: I consider its abolition would be in the public interest and would relieve the people from the performance of a labor which they have long felt to be an unnecessary burthen.

Judge Landry: It would make the administration of justice less expensive, less cumbersome, more speedy and in many cases less likely to miscarry.

Judge Wedderburn: Considers it has outlived its usefulness, which opinion has been confirmed and emphasized by the passage of the Speedy Trials Act by the parliament of Canada.

PRINCE EDWARD ISLAND.

Judge Kelly is of opinion it would be desirable, in the public interests, to abolish the functions of Grand Juries in relation to the administration of criminal justice, and that their functions might be conveniently transferred to district and county court justices, before whom indictments and presentments could be submitted, and at briefer intervals of time than the present procedure permits, and thus when one was falsely accused, a speedy removal of the accusation would be accomplished.

MANITOBA.

Hon. Jos. Martin, Attorney-General: "I am very strongly in favor of entirely abolishing Grand Juries. It does not appear to me that they serve any useful purpose. In fact, my experience has been that the only occasions in which they make themselves felt at all is where they burk the administration of justice by throwing out bills. They are a very heavy expense, indeed, and I have no hesitation whatever in recommending that they should be

entirely abolished. As to this I express also the views of other members of the government."

Judge Ardagh: "I have long been of opinion that the Grand Jury system had outlived its usefulness in connection with the administration of criminal justice, and that a more suitable and economical way of accomplishing the main purpose which originally called it into existence might and should be devised and adopted."

Judge Bain: While expressing himself as being in favor of the retention of the system, this learned judge says: "I am inclined to think it is not necessary now that the cases of persons committed for trial for criminal offences should be re-investigated before they are put on trial before a common jury. The great majority of persons committed to jail for trial are committed for offences that can be tried by a judge under the Speedy Trials Act, and if anyone is committed without cause, he will, or at all events can, elect to be tried speedily, and will be acquitted and discharged. It seldom happens, I think, that justices commit anyone for trial for such offences as are not triable speedily, unless there is evidence that, at all events, raises a suspicion against the accused. Still it may happen that justices will make commitments on evidence that will not warrant them so doing; and if Grand Juries are to be done away with, it would be necessary that a means should be provided by which persons so committed could be discharged without having to wait for, and without having to prepare for a trial. . . . . "I think the secrecy of the investigation before the Grand Jury cannot well be defended; and if the investigations, such as they now make, were made publicly they would soon be felt to be superfluous. If their investigations were made public ones, they would necessarily tend to become regular trials."

Judge Ryan: It is a source of considerable expense, for which the community receives no adequate return. It is frequently made the instrument of injustice and spite by shielding from justice influential offenders and of incriminating innocent persons.

BRITISH COLUMBIA.

Attorney-General Davie is strongly of opinion that the Grand Jury should be abolished, as he thinks that their utility, however desirable in former times, and under other conditions, has now, so far as Canada, and particularly British Columbia, is concerned, wholly ceased. The summoning them occupies public time, and when they are brought from a distance, causes the waste of public money, to say nothing of private inconveniences and loss of time. Moreover, in sparsely-populated districts, especially considering the many exemptions from jury duty and disqualifications provided by the Jurors' Act, the summoning of Grand Juries materially reduces the roll from which common juries can be drawn, as in many parts of the province of British Columbia both grand and petit jurors have to be selected from the same class.

Mr. Justice Crease, for reasons set out at length, is of opinion that the Grand Jury in British Columbia might safely be abolished in certain cities which he names, but that they would still be necessary in the outlying districts of the country.

Mr. Justice Drake considers the abolishing of the Grand Jury will not in any way prejudice the administration of justice.

Judge Spinks, in all the cases where the Grand Jury have exercised their powers, ventures to think it would have been better if they had not done so.

Judge Harrison says that the plan adopted in British Columbia of allowing the government, as represented by the attorney-general, to assume the responsibility and pay the expenses of prosecuting offenders for indictable

offences is preferable to leaving criminal prosecutions to Grand Juries and private prosecutors. The learned judge gives other reasons for his opinion that the abolition of the Grand Jury would be advisable.

Judge Cornwall does not favor the absolute abolishment of Grand Juries, "but with reference to the one point of their investigation of the bills of indictment presented to them I think there would be nothing lost if they were relieved of such part of their functions."

NORTH WEST TERRITORIES.

(It will be recollected there is no Grand Jury in the North-West.)

Judge Richardson: The introduction of the system would be not only undesirable, but a misfortune.

Judge Wetmore: They are too often the means by which guilty persons improperly escape. The criminal laws can be more effectually administered without than with them.

Judge Rouleau has suffered no inconvenience for want of a Grand Jury. It is a worn-out machine without any good practical effect.

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The following judges expressed themselves as being in favor of abolition without giving any reasons:

ONTARIO.

Judge Chadwick.
Judge Hamilton.
Judge Lacourse.
Judge Pringle.
Judge McKenzie.

QUEBEC.

Mr. Justice Charland.
Mr. Justice Jette.

NOVA SCOTIA.

Mr. Justice Savary.

PRINCE EDWARD ISLAND.

Judge Kelly.

BRITISH COLUMBIA.

Judge Spinks.

## A SUMMING UP.

To sum up it would appear :

1st. That there is now a very considerable majority of the judges in favor of abolishing the Grand Jury.

2nd. That this majority would be largely augmented if a satisfactory substitute could be suggested.

3rd. That in the event of the abolition of the Grand Jury there is rather a strong feeling against the county crown attorneys being substituted, no matter how paid.

4th. That there is a similar feeling against the magistrates being considered sufficient.

5th. That if the Grand Jury is dispensed with a public criminal prosecutor should be substituted for that body.

6th. This official should be appointed by government, hold his office during good behavior, and be thoroughly competent for the position.

7th. That he should be a barrister of a number of years' standing.

8th. That the salary to be paid should be sufficient to induce capable men to accept the office.

9th. That the duties of the public prosecutor should, as nearly as possible, be analagous to those now performed by the Grand Jury.

And it is respectfully suggested :

1st. That, in order to make any reform in the Grand Jury system satisfactorily workable, there should be a final settlement of the constitutional question now causing friction on this subject, either, 1st, by an appeal to the supreme court or privy council ; 2nd, by concurrent legislation on the part of the Dominion and provincial governments respectively, or, 3rd, Dominion legislation to take effect in such provinces as shall adopt such legislation.

2nd. That in order to raise a proper and adequate amount to pay the salaries of the proposed public prosecutors three or more counties should be grouped.

3rd. That the public prosecutor should not be precluded from practising, if he desired it, in the civil courts, which would be an additional inducement for competent men to accept the position.

4th. That the public prosecutor should be required either to hold himself in readiness to travel into the different counties of his circuit when notified by the sheriff that there was business for him, or at certain stated advertised periods.

5th. That there should be such changes in the county attorney system of Ontario as the proposed new state of things would require.

6th. That in the event of the Grand Jury system being continued :

1st. The secret character of the proceedings before that body be done away with ;

2nd. An accused person should have an opportunity either in person or by his counsel (as may be considered expedient) to challenge for cause, as is the case with the petit jury, any number of the panel, even if he or his counsel should then be required immediately to withdraw, and

3rd. That there should be no change in the number of Grand Jurors, but that the ancient number be still summoned in order to prevent the dead-lock, which must occasionally inevitably ensue, if the number be reduced to that required by recent Ontario legislation.

## CONCLUSION.

"And so God save our noble King,
And guard us from long-winded lubbers."—GRAY.

In this, as in all matters of reform, it will be best not to hurry. The general public may not be quite ready for so radical a change, as they have not had much opportunity to discuss it. There must be a gradual, educating process, and the friends of the movement, while lamenting this state of things, and determined to remedy it, if possible, must "learn to labor and to wait." It will not be long before the force of public opinion will become irresistible.

Surely, with an improved magistracy, an educated, experienced and trained public prosecutor, a petit jury whose ranks had been enriched by new and improved blood from the ranks of the Grand Jury, and with a bench of which any country might well be proud, there should be no reason to fear that evil results would follow the abrogation of the grand inquest, with its serious defects, and the breaking over the land of a brighter day that shall usher in a system which, while effectively guarding the liberty of the subject, will at the same time possess the advantages of certainty and simplicity of procedure, promptitude, inexpensiveness and general utility.

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NOTE.—Since handing my MSS. to the printer I have ascertained that in addition to the countries referred to on page 8, the Grand Jury system does not exist in the Bahamas.

FINIS.