

II.—*On the Expediency of the Total Abolition of Grand Juries in Ireland.* By George Orme Malley, Q.C.

[Read Tuesday, 14th February, 1871.]

PUBLIC interest in this important question has during the last twenty years been increasing each year in intensity, and within the last four or five years it has become almost irresistible. The advocates of the old regime are startled at the levelling tendency of such an innovation, and exclaim against the destructive principle involved in its agitation. They dilate on the expediency of upholding the power and usefulness of the aristocracy, the propriety of bringing the influential territorial classes together at stated periods twice a year, to consider and discharge the duties of country gentlemen in disposing of the financial affairs of their respective counties, thereby strengthening the ties which bind them to the soil, and increasing their interest in the welfare and progressive improvement of the country. The force of their argument though undoubtedly strong, is in my opinion founded on fallacious principles. If the more influential classes can only be induced to take an interest in their country's welfare by perpetuating an attraction which is in itself an evil, then I am disposed to consider their motives unjustifiable; and that they should reconcile themselves in time to a change which must inevitably follow the beneficial innovations which recent legislation and the irresistible force of public opinion have produced.

The grand jury is the only public institution now in existence which on a large scale controls and administers taxation without representation. The grand jury is selected by one individual irresponsible to all authority, except public opinion, and the occasional and ineffectual remonstrance of the judge of assize. The high sheriff, in obedience to the precept, summonses a panel of country gentlemen giving precedence as a matter of courtesy to the county representatives, who are generally absent on parliamentary duty; selecting after them certain customary baronial representatives; and then such landed proprietors as favour, friendship, political influence, or relationship, may induce him to prefer. Generally, the consciousness of responsibility and a sense of high honour, not unusual amongst his class, restrains a high sheriff from abusing his privilege, but the exceptions are frequent, and public dissatisfaction is often produced by the cliqueism which preponderates in the grand jury room. Sometimes large absentee proprietors are represented by agents, whose professional calling or status elicits the condemnation of the judge, and frequently grand jurors of wealth, respectability, and integrity, are displaced by unknown or unworthy competitors. This state of things is not always attributable to the high sheriff. The sub is frequently allowed to assume the responsibility of the selection, and his superior when remonstrated with or condemned, shifts the blame from his own shoulders to those of his more patient and less scrupulous inferior. When this state of things does not exist, an evil of a contrary character is likely to be the rule. The

grand jury becomes a permanent body, certain of re-election and possessing a perpetual monopoly of power and patronage. This leads to corruption, manifested in the unfair election or rejection of presentments, or the appointment or dismissal of county officers. As an aristocratic assemblage calculated to maintain and extend the influence of cliques among the higher and wealthier classes in a county, the grand jury system is unapproachable. A few leading men who perhaps can *talk* well and command a few adherents to applaud them, generally control the entire business at the assizes. Instances have been known of a few magnates dining at the residence of one of their number and arranging over their wine the business in which each was interested. Alliances of a give-and-take character have been contracted on those occasions, and presentments in which each individual was interested rendered secure by his undertaking to give others a like support to that which he was desirous of obtaining for himself. Thus the public purse has often contributed to the private wants of individuals; districts have been *improved* by roads innumerable, whilst others have been left neglected and unapproachable; defending walls have been built along demesnes and grass farms, whilst deep rivers and morasses have been left neglected—yawning for their victims in fearful proximity to much frequented roads; bridges have been built on dry land, and the beds of rivers changed to supply their useless arches with an excuse for their construction. The jobbery of the grand juries has been a bye-word in many counties, and men who in other conditions and relations of life were honour and honesty personified, have not thought it necessary to assume even the appearance of purity or disinterestedness when engaged in voting for the misappropriation of public money.

One of the strongest arguments used by the advocates of the present system is, that it gives the circuit judges an opportunity in open court of addressing the grand juries upon the state of their respective counties, and thus affording the public, through the medium of the press, information the most valuable and authentic, from a source the best informed and least capable of being influenced by private or political bias. No doubt this is a valuable, a time-honoured, an important, and a very imposing ceremony, but I do not see why that opportunity may not be equally as well and as conveniently afforded by requiring the attendance of the county board, hereinafter suggested, on the first day of the assizes, and by substituting them as a select audience, and instituting the practice that, at the commencement of the sittings the list of criminals should be read out by the clerk of the crown, and the presiding judge empowered to comment as before on the calendar thus published. It is not necessary that he should be obliged to address Mr. Foreman and Gentlemen of the Grand Jury. He could state his opinions without having recourse to that stereotyped form, and he could be equally as eloquent or impressive when addressing a county board and the assembled body of stipendiary magistrates, and through them the public at large, as if he was honoured by the silent attention of twenty-three gentlemen in the box.

In the foregoing remarks I have referred to only a few of the ob-

jections which are entertained to the continuance of the grand jury system. There are many others which were deposed to by the witnesses who were examined before the select committee on grand jury presentments in 1867, of which The O'Connor Don was chairman, and to whose proceedings I shall hereafter refer, but as I do not desire to strengthen my argument by what might be considered an unnecessary detail of objections, I refer those of my hearers who take a pleasure in perusing blue books, to the information which that voluminous body of evidence contains.

It is now several years since Sir William Somerville brought this matter under the notice of the legislature in a bill which he introduced for the abolition of the fiscal powers of grand juries. That bill was thrown out or withdrawn in consequence of the prejudice which a body constituted like the House of Commons at that period naturally entertained against a measure which affected themselves in their capacities as country gentlemen. As a rule, almost every county member is a grand juror of greater or less standing, either wedded to the system from prejudices fostered by time and agreeable associations, or charmed by the novelty of recent experience. The agitation was not revived until the session of 1861, when Colonel French introduced a bill proposing a reform in the mode of election of the associated cess-payers at presentment sessions from the general body of baronial cess-payers, by substituting voting papers to be filled up by the general body of cess-payers according to the poor-law system, and substituting same for the selection by the grand jury, and subsequent ballot at presentment sessions, authorised by the Grand Jury Act of 1836, 6 and 7 Wm. IV. c. 116. But this trifling and unimportant attempt at introducing representation into fiscal matters was unsuccessful, and the bill was withdrawn.

In 1864, the question was again revived by Mr. Gladstone, then Chancellor of the Exchequer, and Mr. F. Peel, one of the Secretaries to the Treasury, who introduced a bill similar to Sir William Somerville's, proposing to abolish the fiscal powers of the grand jury, but it was not proceeded with in that year, and in 1865 it was again taken up by Mr. Blake, the present Commissioner of Fisheries, Mr. McMahan, and Mr. Maguire, who seemed to have had no better success than their predecessors, as nothing more was done until the year 1867, when The O'Connor Don obtained a committee, consisting of fifteen experienced grand jurors, who proceeded to take evidence and sat for several months, and whose report after so much labour is suggestive of very little deserving of notice or approval.

The report, after referring to the well-known constitution of grand juries and presentment sessions, states that the committee "does not consider it necessary to recommend the total abolition of the existing system, believing that it can be so far modified as to do away with all the just objections raised to it."

The modifications they suggest are the division of the baronies into electoral districts, each of which should elect a representative to sit at the baronial sessions, election to be on the poor-law system, in preference to being taken by ballot, which they condemn; that the

elected representatives should be associated with an equal number of magistrates qualified by residence or property in the barony.

The county at large sessions to consist of delegates selected equally from these two classes by the baronial session.

The committee do not think it advisable to do away with the fiscal powers of the grand jury or to alter materially its constitution, "because they think it essential that the sessions should be controlled by some superior body."

Now if that be the case for the defence, I confess I think it a very weak one. If the only recommendation for the continuation of the existence of one body, is, that it is a check upon the delinquencies of another, I think the sooner both are abolished the better.

They recommend property or residence in the county as an essential qualification for all future grand jurors, a recommendation which would be likely to exclude non-resident land agents and parliamentary representatives of *foreign domicile*.

They then recommend the appointment of a permanent committee like that existing in the county of Dublin, which could make advances, check accounts, and deal with urgent matters in the intervals between the assizes. This would be a poor and very insufficient remedy for the inconvenience occasioned by the non-existence of the grand jury for eight months of the year, which I shall presently refer to.

They make an important suggestion, that the tedious and expensive process of trying malicious injuries before three successive tribunals should be abolished, and that they should be tried before the chairman or judge of assize.

They then proceed with a few minor suggestions, such as that the lowest tender should be accepted; facilities given for more effectually suing contractors; and conclude with a recommendation to embody the several grand jury acts in one.

As the principle of Mr. Blake's bill seemed to have engaged the attention of the committee, and to have directed the course of their enquiry—although I cannot find that it was in terms referred to by them—I think a short summary of its provisions and defects necessary.

The bill proposed to abolish the fiscal powers of grand juries, but to leave their criminal powers untouched. It then provided that two classes of boards should be formed—one to be called the baronial boards, which were to be substituted for the presentment sessions; and the other the county boards, which were to be substituted for the several grand juries.

The lists for forming the baronial boards, instead of being selected from the largest cess payers as at present, were to be elected in the first instance by the general body of the ratepayers, on the poor law system of voting; which list should be submitted to the Lord Lieutenant, who was to be empowered to select not less than six or more than nine, to be associated with an equal number of magistrates, making not less than twelve or more than eighteen for every baronial board in Ireland.

Now, I object to this mode of *selection* for two reasons. First, I

do not think that everything should be referred to the Lord Lieutenant; the Castle departments are already sufficiently numerous and extensive, and if the powers to be conferred by the local government acts now in contemplation, be added to those with which His Excellency is supposed to be already onerated, and if every statute that is proposed contains a clause referring every "Gordian knot" to his unravelling, I fear his hands will soon be inconveniently full of difficulties. Secondly, I think the selection could be more conveniently made on the principle of every scrutiny, and that a smaller number than twelve would be a more efficient minimum.

The county boards who were to be substituted for the grand juries were to consist of one representative to be taken from each of the baronial boards, to be associated with an equal number of magistrates paying county cess. Peers to be members *ex-officio*. The board to go out annually by rotation, but to be eligible for re-election. The county board to be a corporation. Quarterly meetings to be held by the baronial boards in the first week of each month, pursuant to public notice. The powers of grand juries to be transferred to the board, and special powers given in drainage, lunatic asylums, bridge tolls, and other matters.

I consider the baronial distribution contemplated by this bill an inconvenient one. The area in some counties is very large and the inconvenience of travelling long distances would prevent many associated cess-payers from attending. I think either the union or electoral district system preferable. It has the recommendation of supplying the poor-law machinery ready at hand, and as that system of election seems to meet with the approval of every witness, I think the constituency in each case should be the same although the representatives may be different. I think the minor board intended to supplant the presentment sessions should be a corporation consisting of resident and qualified magistrates and associated cess-payers, each to be elected by the ratepayers from the lists to be furnished with the voting papers, a standard of valuations to be adopted as a qualification for the associated cess-payer alone. I think the minor boards should be either union or electoral boards, distinguished by name from boards of guardians, holding their meetings at different times and places; but one of those meetings should be a fixed monthly ordinary meeting, and all extraordinary meetings should be convened at any time by any two or more associated cess-payers or *ex-officio* magistrates, for the effectual despatch of business all through the year.

The average area of the unions in Ireland is about 120,000 acres each. The population in each union about 50,000. In some instances the unions would require to be divided (as the area would be inconveniently large, in the county of Carlow, for instance, the union is co-extensive with the county) but these are matters of detail. The union boards thus created would supplant the presentment sessions, and be elected for the discharge of their fiscal business. The county board should be composed of peers *ex-officio* having property in the county; of the chairmen of the minor boards also *ex-officio*, and of either one or two of the general body of the said

minor boards to be elected by the majority of the members. The county boards thus elected would be a quasi court of appeal from the union boards, and should have the power of fiat or rejecting presentments which had been passed by the latter, and should also have the power of entertaining all presentments affecting the county at large or more than one union in the county. The county board should also be a corporation, holding four ordinary meetings in the year, and extraordinary meetings when authorized by a suitable requisition from two or more of the minor boards.

In these particulars I consider this proposed bill defective. Furthermore, it does not sufficiently define and distinguish the business of the county and baronial boards, and it does not provide an appeal for cases of malicious injuries, compensation, or the wrongful rejection or acceptance of any contract or presentment; but above all it only goes half way in dealing with the fiscal powers alone of the grand jury, and leaving their criminal jurisdiction untouched. The bill should distinctly confine the jurisdiction of each board to the territorial confines of its district. The bill should specify in detail and expressly re-enact the powers of the grand juries which are proposed to be transferred to the new tribunals. The concise clause enacting a transfer of the power which is proposed, will produce great inconvenience and difficulty in the application and administration of the law. These powers are contained in nine or ten distinct statutes, two of which, the 6 and 7 Wm. 4, ch. 110, and the 19th and 20th Vic., ch. 63, are voluminous, complicated, and obscure, and upon which a number of judicial decisions have from time to time been pronounced, explaining their meaning and intention, and which should be regarded in forming the new code. The remaining seven or eight refer to grand juries, in connection with the subjects of county gaols, lunatic asylums, bridewells, tramways, coroners, treasurers, weights and measures, &c. The inconvenience of referring to those statutes in connection with the duties of a new tribunal is obvious. The whole code should be swept away and a new comprehensive act passed, framed in accordance with the views now entertained in reference to future legislation for Ireland. It is plain that the principle of local government must in some shape or other be applied to Ireland. Mr. John Hancock and I brought this matter prominently before this society, in papers read by us in February, eighteen hundred and sixty-nine. Mr. Heron, Q.C., has recently taken up the same question in a practical manner, and has drafted a bill which he hopes to introduce during the present session; I hope that bill will be so framed as to enable the local authority which must be substituted for grand juries to avail themselves of its provisions. If grand juries be continued, they will be a drag upon the beneficial use and application of such a measure as that of my learned friend. During the interval of eight months which elapses between the summer and the spring assizes, the grand juries of Ireland are in a comose state—their existence is suspended; tramways, gas, water works, piers, and harbours, and all other public matters must wait until the galvanic wand of the high sheriff brings those bodies into life again, and if their tendencies be retrogressive or stationary, as they generally are, the most beneficial improvement

will be hopelessly thrown out, and once condemned it need never hope for mercy from a future body similarly constituted.

The precedent set in the county of the city of Dublin for transferring the fiscal duties of the grand jury to the corporation, may be advantageously followed in all corporate towns and districts in Ireland, thereby leaving only unincorporated districts to be dealt with by the proposed bill. In England steps are being taken for the formation of county boards which are intended to represent and control the county business; but, as the local government acts are in force for some time in that country, and as the fiscal duties of turnpike roads and other matters are essentially different from those hitherto discharged by presentment sessions in this country, I do not consider any proposed legislation for England calculated to throw much light on the subject as regards this country, and am inclined to suggest the propriety of considering the Irish grand jury system on a different basis altogether, and legislating for Ireland irrespective of English considerations, and on principles applicable to the existing state of things in this country.

So far I have dealt only with the fiscal powers of the grand juries. There remains the question of their criminal jurisdiction, whose origin is contemporaneous with our language, confirmed by *Magna Charta*, re-enacted by statutes of Henry the Fourth, Henry the Eighth, and Charles the First, and has been handed down to us with all the sanctity derivable from antiquity. In former times the grand jury was a valuable institution protecting the subject from being indicted tyrannically or unconstitutionally by the crown, or maliciously by the subject, unless a *prima facie* case sufficient to justify a verdict of guilty, if uncontradicted or unexplained, could be proved by the witnesses for the prosecution. Now in almost every case of an indictable offence, information must be taken before a justice or justices in the first instance, in the presence of the accused, read over carefully and signed respectively by the witnesses; the accused having the power of appearing by attorney and counsel, showing any cause why the information should not be returned for trial, cross-examining the witnesses, and making any defence in the first instance which he may consider necessary or advisable. After this ordeal, the informations are sent to Her Majesty's Attorney-General, who carefully reads them over, and if he finds they do not set forth a sufficient case to warrant a prosecution, he directs it to be abandoned, irrespective of and uninfluenced by the fact that the committing magistrate had returned the informations for trial; should he direct the prosecution, the informations are then submitted to the counsel, who prosecutes on behalf of the crown, and who also in his turn examines the evidence and the extent to which it is calculated to sustain the indictment. The indictment being drawn, the proofs are directed by the senior counsel for the crown; and after all this investigation the bills are sent up to the grand jury of twenty-three gentlemen unacquainted with the law, sitting with closed doors, who examine the prosecutor and his witnesses—only one being admitted at a time, the accused and his attorney being excluded. If twelve of the twenty-three consider that the evidence thus informally and

unfairly taken, establishes a *prima facie* case, a true bill is found and the indictment is submitted to the court for trial, if a contrary opinion is entertained, the bill is thrown out, and the prosecutors must abandon the charge.

Contrasting the merits of the two tribunals and their mode of investigation, it is plain the first is infinitely superior. Generally speaking, stipendiary magistrates in the country and divisional magistrates in Dublin are lawyers, or persons trained in marshalling evidence; their decision is much more likely to be correct when checked and restrained by the presence of the accused, or his professional adviser, and the feeling of individual responsibility from which the grand jury are completely exonerated. The examination of the witnesses in private, is much calculated to encourage and facilitate fraud. A prosecutor may be deceived by a witness privately favourable to the accused, who, in the absence of any check or restraint, may, by an artful statement, throw such doubts on the case for the prosecution, as to induce the grand jury to throw out the bill. Other influences may exist which suggest themselves to the mind; but in its very nature a secret investigation is objectionable, and no precedent can be cited for such a practice, so inconsistent with the usual course of the administration of justice in this country, and so repugnant to the spirit of our constitution. It may be said that this secret investigation ensures protection to the innocent from groundless and vexatious prosecutions, and gives him the additional safeguard of the opinion of twenty-three independent gentlemen on the validity of the charge brought against him; but that protection, if it really is such, is always either extended or denied in the absence of those who, in total ignorance of its mode of application to their own particular instances, are said to be benefited by it.

The great inconvenience and expense imposed upon the grand jurors themselves without any advantage to the public is a frequent subject of complaint. In this city, men whose time and business engagements are pressing and important are frequently summoned on both grand juries, obliged to wait in the Four Courts for hours, until the judicial announcement is given that they have nothing to do and may go home. In the country this ceremony is not infrequent at quarter sessions, when the grand jury have no fiscal business to discharge; they are summoned in many large counties from long distances, at great expense, obliged to stay in small country towns for two or three days at their own charge, in order to find at the utmost a few paltry bills of indictment for those lesser crimes which are within the jurisdiction of the inferior courts, or to be discharged after the presentation of a pair of white gloves to the chairman.

The expense entailed upon witnesses, prosecutors, and accused, in attending on the first day of the assizes or sessions, and thence from day to day until the bills are found, remaining frequently in the custody or under the protection of the police for days in the vicinity of the grand jury room; the accused and private prosecutors obliged to employ counsel and attorney before the bills are sent up, in order that they may not be unprepared for the trial which, if



the bills are thrown out, never takes place ; all these evils would be averted and the criminal business of the assizes would flow on without check or uncertainty, if the following practice or something like it were adopted, and a much more effective, expeditious, and economical safeguard would be thereby substituted. Every person against whom informations may be sworn and returned for prosecution—either to the assizes or quarter sessions—should be empowered to serve notice of cause why an indictment should not be preferred against him, on the justice or justices who have taken the informations, and who should be required to transmit such to the crown solicitor, at least three days before the assizes or quarter sessions to which the informations shall have been so returned ; such cause to be allowed or disallowed, or the trial postponed on such terms as to the payment by the accused of costs, or otherwise as the court may think just ; and in the event of any person being desirous of proceeding with any private prosecution which the crown has refused to conduct, that he shall be at liberty to apply to a judge of one of the superior courts, or the chairman of quarter sessions sitting in chamber, for liberty to proceed with such prosecution, and prefer a bill of indictment for that purpose ; the judge or chairman, as the case may be, to be authorised to make such order upon such terms as to notices, the right of challenge, and the costs of the prosecution or the application, as to him shall seem meet.

I am indebted to my friend Mr. Hancock for the latter part of this suggestion, which has become necessary in consequence of the anomalous conditions frequently filled by the parties by whom informations are taken in times of political or religious excitement, or when in discharge of their judicial and ministerial duties they occupy the double capacity of judge and accuser ; on these occasions, a stipendiary magistrate may be in the command of police or military, who in too ardent or unrestrained zeal may rashly take the lives or injure the persons of unarmed citizens. It is often difficult to get an independent unpaid justice to act on such occasions, and the injured or their representatives are driven to the necessity of tendering their informations to the magistrate under whose directions or control the acts complained of have been committed. The difficulty of inducing the crown to keep pace with the notions of the private prosecutor frequently induces him to believe that he is not fairly dealt with. By giving the court the power of imposing terms on a private prosecutor, he would be deterred from using for the purposes of oppression, machinery which in the hands of the crown would tend to further the ends of justice. By accompanying the abolition of grand juries with a clause of this description, every protection would be given to the accused—every opportunity for defence before committal to the dock ; and the facility thus conferred for the attainment of justice at the hands of judges, whose independence of the crown and impartiality in holding the balance even between it and the subject has in modern times seldom been suspected, will more than counterbalance the loss that may be sustained by the extinction of a tribunal whose only recommendation is its antiquity.