(49)

NOTES

ON

Madras Judicial Administration.

BY

WILLIAM HOLLOWAY, ESQ.

MADRAS CIVIL SERVICE.

MADRAS:

PUBLISHED FOR J. HIGGINBOTHAM,

BY C. M. PEREYRA, AT THE PRICE CURRENT PRESS, ARMENIAN-STREET, NO. 61, BLACK-TOWN.

1853.

NOTES
ON MADRAS JUDICIAL ADMINISTRATION.

Mr. NORTON's work on "The administration of Justice in Southern India" produced at the last moment, is doubtless intended by its author, and hailed by its admirers, as the last link wanting in the chain of proofs, that the Civil Service is palpably unworthy of the trust reposed in it, that it is the great obstacle to Indian prosperity, and that more especially as Judges, its members are so inefficient, that insecurity of life and property naturally results. Mr. Norton has the advantage of assailing a large system doubtless offering many salient points. He has selected for remark such cases as have been the subject of an appeal to the Higher Court, has carefully excluded from view the unexampled difficulties, under which our judicial system is administered, and has with exemplary disingenuousness, told his readers to learn it from its acknowledged blemishes. His opinions too are developed with much pomp and circumstance. He announces his titles to be heard. He is a member of a high and honorable profession, a firm believer in the destiny of the bar, connected with that mysterious metaphysical abstraction, the unbroken succession of English Judges, to which the administration of Justice owes all its purity. Further he has practised for ten years in a Court which with the united assistance of Judges and Barristers, has been able to pass decisions, which the most enlightened English Lawyer in existence has in his place in the House of Lords called the worst in the world. He is moreover well acquainted with Mofussil practice, has examined witnesses through the medium of an interpreter, and has seen a Mofussil Judge in his shirt sleeves.

Our task is not an easy one. It will be our endeavour to shew that the sweeping deductions of Mr. Norton, are not correct;

that imperfect and incomplete truths, are in his case, as in all cases, the most dangerous of fictions. We shall endeavour to separate the accidental from the essential, to show how far the defects noted are due to the inefficiency of the Judges, and how far to the position in which they are placed. Assault is always easier than defence, more especially where defence can only be made by a view of many and complex considerations. The task too has fallen upon an insignificant member of a large service. It is not to be hoped that the harassing round of official avocations will leave to men of enlarged knowledge and experience the necessary leisure for the work, but surely the task should be performed. No class of men has a right to expect its individual interests to triumph over the general good, but all men have a right to protest against condemnation without a hearing. The press, as it calls itself, is filled day after day with abuse of the exclusive service. The style is of course profitable, and the writers cannot be blamed. Until human nature greatly alters, it will never be an unpleasant thing to see pungent abuse of a few men, to whom accident or interest, or any other of the causes which give rise to different ranks and orders, has placed in an advantageous position.

We cannot complain that Mr. Norton is an anonymous writer. He has raised several important questions which we shall endeavour to discuss temperately and candidly. We may fairly complain however that he has endeavoured to place his opponents in an invidious position. Not satisfied with his natural advantages, he has presented his work to the world not as a mere weapon of controversy. It is an articulate expression of the evils which millions endure, although haply without knowing their source. It has given sleep to the learned philanthropist, has suspended those painful vigils, which he has disinterestedly kept for Hindoo development. There is moreover a deep interest in the reflection, that without any motives of a personal nature, he should thus have striven for the welfare of a great and ancient people; and an undescribable pathos in the thought that he courts from a powerful and dominant service that crown of martyrdom, which in the shape of torture bodily or mental, has so often, especially in our persecuting times, been awarded to the greatest and best of the sons of men. If Mr. Norton's own estimate of the nature and char-

acter of his performance is the correct one, the controversialist should approach it as he would the hallowed tombs of Clarkson or of Howard. It is to be regretted that the author's language has not been such as to sustain the impression which his professions would convey. We rapidly descend from this lofty eminence, when we actually breathe the spirit of his pages. His language at once reassures us. It is bitter, personal, and less adapted for calm discussion, than for the browbeating of some refractory but timid witness. It smacks strongly of the lower class of Old Bailey practice. It deals much in insinuations, and now and then, under the affectation of candour, in very nasty ones too (P. 64), but we have no right to complain. The privilege of counsel even in England covers much, and considering the relative character of the practitioners, it may in India be fairly expected to cover more.

The proposition which he intends to establish from a review of certain cases Civil and Criminal, is that the Indian Judges are grossly unfit for the performance of their duties, and that the most serious calamities are likely to ensue unless some sweeping reform is adopted. It was our intention to comment at some length upon the Civil Cases, which Mr. Norton has quoted, and to show that they are not so bad as he represents. That there are very bad cases among them we do not and cannot deny, but admitting all that he would assert, his data are so palpably insufficient to establish his point, that we prefer showing to what his assertions really amount. It is to be remembered that with the exception of one or two cases the Court of Review has corrected all these errors, that the Hindoos are the most litigious people in the world, that nearly every doubtful case is appealed, that the facilities given are very great, that the expense is comparatively small, that many Vakeels in India proceed on the no win and no pay system, and it will be then perceived that for once tables of decisions will afford a pretty fair estimate of the nature, as well as of the amount, of the work performed.

In the 3½ years over which the reports extend, about 10,000 cases were decided by the European Mofussil Courts. Of these we find that 249 were appealed to the Sudder. In 51 the decisions of the lower Courts were reversed. In 17 modified. In 68 confirmed, and in 111—remanded. So that the appeals to the Sudder are in the proportion of rather less than one in 40; the reversals, one in 200; and

taking as Mr. Norton wishes us to do, the remands as reversals, a most unfair method, they will amount to less than one in 60. It is to be remembered that the proceedings of the Sudder Udalut do not represent the operations of one Court, but the known erroneous operations of more than twenty Courts, each doing now about ten times the amount of business done by the Supreme Court with its two overpaid Judges and enormous establishments.

Perhaps we shall be forgiven if we endeavour to substitute for the caricature which Mr. Norton has produced a slight sketch of the real state of Judicial Administration. Native agency is very largely employed. Like every other department of the Government, the Judicial Administration is emphatically Native agency with European superintendence. The European Judges are for the most part hard-working and intelligent men, well acquainted with the native customs and native character. We can fearlessly assert from our own observation that they possess in a very high degree the confidence of the people. They from long experience adjudicate with great success upon questions of fact, and with tolerable success upon the questions of law, that occasionally and very rarely arise. They are neither Tindals nor Denmans, but considering the difficulties under which they labour, their performance of their tasks is creditable. They would be the better for a more complete training, and now that so much attention has been for the first time turned to the subject, that training will be gradually obtained. In practice our judicial system is yet in its infancy. In its nature it is like our system of Government—an anachronism and an anomaly. It ignores the centuries of developement which interpose between England and India. Whether it is not far too cumbrous, whether it is not inferior to the justice administered at the side of a hill and under a tree by a vigorous and able officer, are still questions with many able men. In truth however they are no longer open questions. For good or for evil it has been decided that Courts on the present system are desirable, and it only remains to render their procedure as little cumbrous and as applicable to the condition of society as possible. The administration of justice is now very speedy when the mode of carrying on suits is considered. They do not come up ripe for decision and the parties are constantly applying for postponement to admit of the calling of some witness or

the procuring of a copy of some document, and it is the practice and is in a great measure necessary to allow such indulgences. Yet with all this taken into account the average duration of original suits is one year and that of appeal suits rather more, and it is upon such data as these that men are represented as spending a life time in defending their property. The learned Barrister even thinks it doubtful whether the effect upon the natives is not as pernicious as the Mussulman cruelty. No finer illustrations can be found of his accuracy of observation and scrupulousness of assertion. To say nothing of the fact that even in this litigious country, it is a very small fraction of the people who frequent the Courts, we have seen that of those who do about one in forty considers himself injured and one in two hundred is found to be so.

So far then is Mr. Norton from having established his proposition, that the very propounding of such a thesis upon data so insufficient, is a proof that whatever he has learned, and he has learned much, the nature and meaning of a sufficient induction are yet to be acquired by him. The shallow pretence of appealing to facts scarcely deserves exposing. This is the stock fallacy of the mob orator. A few, and in this case how few, isolated facts, are put forward, and from them the hearer or reader is invited to deduce a general rule. In acknowledged errors we find errors, therefore all not so acknowledged are errors too. The ghost of Aldrich seems to shudder at the legal logic. But it is curious how seldom the errors even in the controverted cases have depended upon ignorance of law. Many decisions have been reversed because it was not noticed that the suit was barred by the statute of limitations, which must be pleaded specially in England or the fact will not be noticed. It may be remarked also that the fact of such bar does not always lie upon the surface. Much evidence is frequently taken as to acknowledgement or part payment within the necessary time. We observe* too a curious and not creditable case in which the Supreme Court of Bengal had to be informed by the Privy Council that in an action for breach of contract the period of limitation was to be calculated from the *actual breach*, and that the breach of contract is the cause of action in Assumpsit. The knowledge is at any rate elementary. Many of them are remanded because the Judges have

* E. I. Company v. Oditchurn Paul.

not stated with sufficient explicitness their reasons for discrediting certain evidence.

The number of times of trial of several of the cases has arisen from the desire to admit further evidence, wherever there has been a chance of its conducing to the ends of justice. This is undoubtedly carried to a pernicious extent. There are among them several very bad cases, but the great majority do not depend upon legal knowledge. For the most part the questions at issue in Indian trials are questions of fact, and Mr. Norton's wonderment at the number of times that such cases have been tried, only shows that he is yet unaware how difficult plain questions of fact are really made by the nature of Indian evidence. As the inferior Courts will naturally derive their character from the highest, the nature of its decisions deserves a little examination. Mr. Norton has pointed out a few trivial mistakes which he admits to be of no great importance. The general character of the decrees of the Sudder Courts, has already been stated by Lord Brougham to be very high, and a view of the Privy Council appeal cases fully bears out his statement. Mr. Norton does not attempt to controvert his judgment, but to explain it away by the statement that owing to a watchful bar only the bad law of the Supreme Courts comes before the Privy Council. This of course is no answer at all. No appeals are ever made from the Sudder decrees without legal advice, and we have only to say that the plenitude of leisure enjoyed by the Supreme Court Judges and the great advantages of their position, ought to have secured them if they understood law, from uttering any that is bad.

The first decision on the list, and the one on which most stress is laid, is a case in which the Sudder Court rule "that a merchant's accounts, if satisfactorily proved, constitute documentary evidence sufficient to establish a claim for goods sold and delivered," and that "the account book was clearly an admissible document." We do not observe any reference here to the English law: the statement is merely that the books of a merchant are admissible, and if satisfactorily proved, establish a claim for goods sold and delivered. The Sudder finally and very properly lay no stress upon the evidence, because from the character of the entries, there was no guarantee that they were made at the time at which they purported to have been made. The learned writer desig-

nates this as an extraordinary decision, and thinks that no man would be safe if a plaintiff might thus make evidence for himself. It is almost useless to point out that a long series of accounts regularly kept, carried on from day to day, affords a strong presumption of the truth of their contents. We will only remark that in America, in Courts of the very highest authority, such accounts are constantly received, provided that they appear free from fraudulent practices. The party then makes oath not of the truth of the demand, but that the accounts are those in which his ordinary transactions are kept, and they are admitted. If the party is dead his books are even admitted, although entitled to less weight, upon the oath of the Executor, that they came into his hands as the regular books of the deceased. In the Civil Law such books constituted "Semiplena probatio." Both the account books and credibility of the party are to be weighed, as they were by the Civil Judge and the Sudder in this case, but the books are to be admitted in evidence. The party's suppletary oath is received both in France and Scotland, and with the account books, if kept with a reasonable and satisfactory degree of correctness, constitutes full proof of the demand. We consider the countrymen of Kent and Story at least as able to estimate the probable danger of such evidence as any of the Judges of England, and need hardly add that we do not therefore consider this case any imputation upon the Sudder Judges. They did not assert the books to be conclusive, but only receivable evidence. A learned English lawyer * and elegant writer on the Law of Evidence considers that the English practice might well be amended in this particular. Mr. Norton has given a whole page to the case and has, as usual, various suppositions as to the ground of the Sudder's error. It of course arose from ignorance or mistake. They were perhaps thinking of a party refreshing his memory from the accounts, perhaps of the admissibility of entries against interest, perhaps of entries by a deceased Clerk in the ordinary course of business. The most natural supposition appears to us that they were not thinking of the English Laws of Evidence at all, but that they meant by applicable evidence simply that which has a tendency to raise a reasonable presumption of the truth or falsehood of the fact in dispute. We are of opinion that a merchant's accounts are of such a nature, and would

* Taylor's Law of Evidence Vol. I. p. 446 and note.

therefore admit them without reference to any laws, and only bring forward the practice of the American and Civil lawyers as enforcing the correctness of our theoretical view. We may remark in passing that it would be rather difficult to reconcile the English cases* on the subject of the admissibility of entries in the course of office and business. In Chambers v. Bernasconi the question at issue was the *place* of arrest of the plaintiff. The memorandum of the deceased Bailiff who arrested him, stated the time and place of the arrest. It was shown that both these particulars were required by the course of the Sheriff's office; yet the Court excluded the entry as to the latter point on the ground that it reported facts not necessary to the performance of his duty. Mr. Smith very justly remarked that it is difficult to see how an entry which a man is required by his employer to make, can be more collateral to his duty than the entry of a service of notice to quit by a Clerk was in Doe v. Turford. The service of the notice was the Clerk's duty, the entry only his duty in as far as required by his employer, in fact as far as certifying the *place* of caption was the Sheriff's officer's duty. We may make the same remark upon the English rule as to the admissibility of declarations against interest. The antagonism to pecuniary interest, however small, is supposed sufficient to remove the objection to secondary evidence. It is curious that in the leading case upon this subject† the fact as to which the entry was received, was not against the interest of the party making it, and that in many of the cases the interest is merely nominal, while it is actually yet a mooted point whether when the entry of a discharged payment, is the only evidence that it was ever due, it can be reasonably considered as against interest and therefore admissible as proof of the facts which it embodies. It is plain that if the fact of antagonism to interest and not the extreme improbability of false entries in tradesmen's books is the reason for admission, all such entries should be rejected. There is an amusing diversity of opinion on the subject‡ and the cases afford another illustration of the certainty of the common law. They shew how

---

Compare * Doe v. Turford, and Poole v. Dicas. } with Chambers v. Bernasconi, and Davis v. Lloyd.

† Highan v. Ridgway.

‡ *For Rejection.* Doe v. Sowles. and Doe v. Burton. — *For Reception.* R. v. Henelon. and R. v. Lower Heyford.

easily lawyers are led wherever there is a decision on a point. They seldom trouble themselves with the reason upon which it is based. There are a few clap trap words, "policy of Law," "the cases have gone far enough," which may be lawyers' reasons, but are queer ones for shutting out the means of arriving at the truth. It is to be observed also that these cabalistic words are only dragged in where no real reason offers itself.

There is another case of remand upon a collateral point which we regard as the worst of the collection. It is unfortunately too an example of the errors most commonly committed in the Sudder. They are too anxious to elicit the whole truth of a case, to exhaust an investigation, and do not take sufficient pains to set aside points which are not material. Taking however the amount of business performed, their work, except in the composition of the reports, which are slovenly to the last degree, is most creditable. They have truly found all the wind for the Nortonian trumpet. His own discoveries have been few and not valuable. The erroneous decisions quoted have all been corrected and their authors often severely chastised by the Court. Mr. Norton's book is very like that of the German of whom it was said, "What is true is not new and what is new is not true." The language is all his own, and he is so impressed with the importance of the office of reproducing what the Sudder had already done with, that we have several pages of self-gratulatory discussion. We are told of his state of mind when he promulgates his great discoveries (107) and of the proper spirit for receiving them. There is much too about the point of view from which he has been able to compile some selections from the Sudder reports and for the most part translate their remarks into his words. We are glad to know the external influences under which the Paradise Lost or the Principia were written, but there is nothing so swan-like in this Lawyer's notes, nothing so deep in his philosophy as to render the information of any interest. Living as the oracle of small societies tends even more than solitude to give a man an exaggerated idea of his own importance. As to his point of view, it is that of a man who lives by his gun, looking upon the unexhausted lands of his neighbours, after he has by sharp practice destroyed the game in his own preserves. Every man has a right to promulgate his views, and the proper mode of meeting them is by fair

argument upon their merits, and we should never have pointed out that Mr. Norton's remarks are not those of a disinterested spectator, if he had not himself invited the discussion.

Among the miscellaneous specimens of Mr. Norton's candour and logical power we may notice his answer to the stinging remark of Mr. Macaulay that the Supreme Courts had fulfilled their mission, ruined the people of India, and might be abolished. The answer is that in Madras wealth is not, as formerly, concentrated in the hands of a few powerful families, but is more generally diffused and that native agency houses are rising in all directions which could not have arisen under the system of Mofussil law. Mr. Macaulay neither imagined that those who did not resort to the Supreme Court were ruined by it, nor that the enormous fees and costs paid by those who did, were swallowed by the recipients. It would be naturally expected that the lawyers and officers of the Court would prove better customers in Europe articles than their wretched clients, and it does not appear particularly astonishing on the ordinary principles of supply and demand, that wealth and agency houses abound most in that town which is the seat of the largest and richest European population, the resort of large ships, and the residence of the innumerable native and East Indian employés in our public offices. Agency houses and Supreme Courts are there together and this connection is quite enough for Mr. Norton. Nothing like leather to the currier: nothing like Law to the Lawyer.

Another of the charges against the Sudder Judges is that their judgments have made no attempt to lay down any broad principles, in fact that they have confined themselves to their actual duties, instead of taking upon themselves that which belongs to the legislature. Mr. Norton points out several parts of Hindoo Law, which afford a tempting field for the manufacture of "Common Law." We are told too that the result of uniting the Supreme Court Judges with those of the Sudder would be the attaining of this end. Lord Mansfield's decisions upon the Commercial Law of England are given as instances of what may be done in this way. In the first place we protest against any such proceedings. No Court should ever be allowed to tamper with the legislative will. If the law has any deficiencies they should be supplied by the Legislature alone. This feeling is now gradually making its way in England. Codifica-

tion is becoming the universal cry, not only of those who live under the Law, but of those who administer it; and it is just when the quantity of Law manufactured, has become quite unmanageable in England, and it is universally felt that the legislature should come forward, and digest and declare the Law, that it is gravely proposed to commence the making of Common Law in this country. We should indeed have wild work if Supreme Court, and Sudder Judges, were permitted to indulge in such a pastime. Even the genius of Mansfield afforded a poor substitute for a system of Commercial Law falling into its proper place in a well digested code. Some of the ablest of his successors, have dissented from the boldness of his innovations, and it is certain that they have not attempted to follow in his steps. There is something truly ludicrous in the idea, that such powers can safely be committed to their Indian namesakes. It is natural to enquire why when the Supreme Courts have been for so many years administering the Hindoo Law in questions of inheritance, we have not been favoured with a few of these promised philosophical results? We are told indeed of one improvement, which would *probably* be found, if the opportunity should arise. It is well known that the distribution of property, and its descent, are determined in the Hindoo Law, upon settled rules, and that no testator is empowered to vary by will, the prescribed order. Mr. Norton *thinks* that a decision which should declare the invalidity of wills, on the ground of antagonism to the Hindoo Law, would not now be upheld in the Supreme Court. In other words he believes that they are prepared, without any lawful authority, to overrule the Law upon which they are directed to decide. There is nothing, be it observed, absurd in the mode of distribution. It is well adapted to the opinions and harmonizes with the feelings of the people. It prevents much fraud and intrigue, is no more absurd than the French Law of property, or the English custom of Gavelkind, but because freedom of testamentary dispositon is the spirit of English legal enactments, it is to be introduced into this country too. No advantage is proposed, no reason is given. In this country from the condition of its people, and the prevalence of fraud and intrigue, some restraint upon the disposition of property is both necessary and desirable. One result of this proposed piece of common Law will be the virtual repeal of the liberty of conscience act, which pre-

tented any man from being stripped of his property because he changed his religion, and against which the liberal and enlightened Calcutta Baboos have, we believe, petitioned the House of Commons.

Truly this is a lame and impotent conclusion. A scanty harvest from the tempting field—a fair specimen of what we should obtain as the real fruit of the grandiloquent promises at page 138. The result too would be less satisfactory still; for a decision of this kind would certainly be reversed by the Privy Council, because in questions of inheritance the Indian Courts are bound by the Hindoo Law. A code is what India requires. It must be a collection not merely of enactments, but of principles. The complexity of landed tenures and the variety of local customs will require great care and tact. A Civil Code will demand for its successful execution a union of enlightened Jurists with men of large revenue experience. The work will be difficult but it is not impossible. As a specimen of arrangement, which is a very important point, we may refer to the admirable sketch which Professor Austin has affixed to his "Province of Jurisprudence determined." The sketch of a Criminal Code promulgated by the Indian Law Commissioners, is principally defective in the chapter of punishments. We protest strongly against the abolition of flogging. This punishment is both repressive, inexpensive and popular. Inflicted as it is, only for theft or for heinous offences, the refined objections made by the Commissioners are quite inapplicable. Were this the time, we would point out other matters which deserve consideration, but we earnestly hope that nothing will prevent the speedy promulgation of a code. We sincerely hope that it will not be confined to mere enactments, but that it will really convey instructions from the legislature to the Judge, that it will set forth the principles upon which it is based. For this country it should not draw too rigidly the boundary between private and public injuries. Immense advantage now results from investing the Magistrates with power of punishing petty cases of tresspass, slander &c. and of awarding the damages to the injured, instead of referring the parties to civil actions. In the Penal Law should be included nearly all those private injuries which are the subjects of an action on the case in England, and as now, besides punishing the offenders, the Court should be invested with the power

of granting pecuniary compensation to the injured. The speed of the procedure in such cases, would astonish those who have had to vindicate their character in an English Court of Law. In cases of tresspass the possession of such authority by the Magistracy is peculiarly beneficial to the people. Land is, especially in this district*, so very valuable, and the subject of such fierce contention, that it is most necessary that the right of possession should be immediately settled. For the disposal of such cases the Magistracy have peculiar advantages. They are on the spot, can make a personal examination, have the case before them before it can have been much polished, and cruel injustice is frequently prevented by their interposition and confirming of the possession in the rightful claimant. Water disputes are another example of the same kind. The right to a channel is settled, and punishment awarded to him, who infringes the right, and damages to the injured, within a week of the injury. Something too must be conceded to the feelings and even to the prejudices of the people, where they are not plainly at variance, with those humane principles, which an English Government is bound to support.

It is to be remembered that the Indian Law Commissioners' draft was the first attempt of Englishmen to produce a Penal Code. It has been the subject of Mr. Norton's delicate irony. The learned Lawyers who were engaged in the task of reporting upon the consolidation of the English Penal Law, constantly referred to it with high approbation. Perhaps Macaulay, Amos and Cameron will remember this and be comforted.

We cannot at all admit that the mode of appointment of the Law Commissioner has been a mere job of the Home Government. A Lawyer of large practice is not required for the purpose. The great quality of a Nisi Prius Lawyer is a capacity of discerning minute and subtle distinctions; the quality of a great legislator is that very enlargement of mind, which much dealing with minutiæ tends to impair. We consider therefore that men of Mr. Macaulay's class of mind are much more likely to prepare a good code than even such aLawyer as Sir W. Follett. We have now got a great Lawyer, and we believe, a man of liberality of mind too. There is a sort of implication (page 128) that the legislative members should be chosen from Lawyers in India, or what is the meaning of the objection that they come

* Tanjore.

outignorant of native customs and native character? We are of opinion that even if men of the right sort could be found at the Indian bar, the slight knowledge which they can possibly have obtained of the real state of the country, would be but a poor compensation for the loss of that European spirit, enlargement of view, and liberality of mind, which are likely to characterize men of intelligence from England. We want the union of great Jurists imbued with European civilization, to men of sound practical acquaintance with the people. It is not the best writer or the best talker in the service, who should be chosen to assist the English Commissioners, but that man who has lived most among natives, and is best acquainted with their feelings, manners, and character. From such men, and they are not few, the English Commissioners would acquire a body of information, which would enable them to proceed with some certainty in their great task. It will be sad indeed, if after the manner in which the principles of jurisprudence have been developed during the last forty years, England cannot find a Tribonian for India. The fame of the Indian Codifier will be higher, as his task will be more difficult than that of Tribonian. He must emancipate himself from the prejudices of class, of nation and profession, must possess a constructive intellect which the Roman Lawyer did not require.

Mr. Norton represents, that he has, when commenting upon decisions peculiarly bad, been met by members of the service with "that Judge is mad" or "he is drunk." It is unfortunately true that there are men, allowed to remain in their appointments, who are from indolence, incapacity, or dissipation, quite unworthy of them. We will remark too that among no class of men does this culpable neglect excite more bitter regret and indignation than in the Civil Service itself. Such men are very few and are daily becoming fewer. They are known to all, but the Government instead of branding them as they deserve to be branded, issues orders reflecting upon every member of the service to which they belong. Such orders wound deeply the feelings of honest and hard working public servants, who find themselves thus unjustly classed with such blots and blemishes. Mr. Norton in his remark, we believe unintentionally, leads a reader to imagine that such cases are of common occurrence. He would, we believe, freely admit that such is not the case.

There is much more of Mr. Norton's book which in-

vites remark, but we prefer showing, as we hope to do, from a plain and faithful record of the circumstances under which the judicial work is performed, that his representations are incomplete, unfair, and one-sided to the last degree. The collation of his own pages, would in several instances refute some of the boldest of his assertions. His delight is to hold out that the dread of a wigging prevents any independent expression of opinion by the Judges. He presents the Government, as highly delighted with the proceedings of the Collector and Special assistant in the Masulipatam case, as having minuted their approbation, and then informs us that the Sudder Court, to whom this approbation was well known, delivered a strong opinion in direct opposition to their views. He shows how litigious natives are, that they will spare no expense to obtain revenge, and with his customary candour, attributes the excessive litigation to the inefficiency of the Judges. So long as this is the feeling of the people, Courts can do little in the way of restraint. How many families are there in England, whose resources have been cramped and substance wasted through the dishonest litigiousness of one of their members. Here the love of litigation is the feeling of a whole people. We make one suggestion, which we think would do much to check the interminable appeals, which are certainly productive of great mischief. The execution of a decree should not under any circumstances be suspended during the appeal against it. Let the party whom it benefits give sufficient security to cover usufruct, costs, and interest, in the event of the reversal of the decree in his favour. Many appeals are made simply to gain time and to protract the appellant's enjoyment. They are carried on too, actually at the expense of the man who is thus deprived of what the Lower Court has awarded to him. By the course which we propose, one great and most dishonest inducement to appeals, would be removed. The course in the English action of Replevin is an instance of what we mean. There are other points, which might well be considered, but we leave them to wiser heads than ours and proceed to offer some general remarks, applicable to the whole judicial system, which indeed are the main object of this Essay.

The position of the Indian Judges, must be taken into account, before we can fairly apportion the amount of demerit, attaching even to these few decisions. We have endeavoured to shew that Mr. Norton's view is a grossly exaggerated one,

but we cannot, and do not, deny, that many of these decisions could not have emanated from men of ordinary juridical attainments. One great reason for this has been the painful truth, that until lately it has been the custom of the Indian Government to select the most inefficient members of the Civil Service for Judicial appointments. So well was this understood formerly, that a well known Collector in the South of India, whose independent assertion of the rights of the people was very distasteful to the Revenue Board and Government, is said to have remarked, "By Jove, I am afraid they will degrade me into a Circuit Court." At this time the Circuit Judges were nominally some of the most dignified persons, in the country. This has applied equally to the lower, and to the highest Court. A supine and inefficient Collector or Magistrate, will speedily derange a whole district, endanger the public revenue, and the security of property and life. The true interests of the people have often therefore been sacrificed to a narrow policy, and because evil results are more tardy in exhibiting themselves, they have been utterly disregarded. This however cannot endure much longer. It is even now mending. The publicity now given to the proceedings of all the Courts of justice offers the certain prospect of a speedy remedy. There is no Court in the world, of which the proceedings are so exposed to the public eye. Even the decisions of our English Courts are reported by others. The Judges are here compelled to write and to publish their own decrees monthly. It only requires that the Calendars of the Session Judges be also published monthly in the same manner, to enable the public to judge of the whole administration of Civil and Criminal Justice by the Session Courts, and of the nature of the superintendence which is likely to be exercised by them over the inferior tribunals.

Another cause is a want of judicial training. To this we shall recur, as the matter is of immense importance, because we know the training which Haleybury offers, and know to whom the fact of its not having been obtained is entirely owing. The first great difference between the position of the English and the Indian Judge is the difference of the preparation of the cause for the Court. All the facts and arguments in the case are in England, presented to the Judge, without any effort of his own. The pleadings plainly set forth the question at issue. It is laid down with the utmost dis-

tinctness what averments are put in issue by each particular plea. If the defendant pleads the general issue, what points of the plaintiff's declaration are traversed by it, what points not, and to these last evidence is not allowed to be adduced.

It will have been seen that many decisions have been remanded and reversed, because the Judge has not noticed that the suit was barred by the statute of limitations. In England this could never occur, because unless specially pleaded, no notice would be taken of it. The evidence must be confined to the matter at issue; and the matter at issue is not all such matter as may have induced the plaintiff to seek legal redress, or the defendant to deny his right to it, but only so much, as the pleadings have placed in issue between them. Even when in the proof of his case, the plaintiff proves matter, which by Law would nonsuit him, if the defendant has not properly pleaded such matter of avoidance the plaintiff will have a verdict. In the common action of assumpsit whether special or general, fraud, release, illegality of consideration, &c., must be specially put in issue, or they will not serve for a defence. The English system of pleading as now in force, is certainly an admirable aid, to the administration of justice. It puts both parties beyond the reach of surprize, and places the Court in possession, of a logical synopsis of all the evidence adduced. Such a system has been wisely devised in compassion to the human intellect, which even when most powerfully developed, is scarcely capable of grappling with the complicated relations of human society. As to Indian pleadings, they deserve all that Mr. Norton has said of them. They are designedly framed, so as to produce obscurity and perplexity and to prevent the Court from discovering the questions really at issue. They are filled with the most groundless imputations of fraud. There is scarcely ever a defendant, in an action for money lent, who does not state that the plaintiff is really indebted to him. The object of the plaintiff is not to show what his claim really is, but to make such a statement of his case, as will enable him to establish the liability of the defendant by any means. On the other hand, the defendant's effort, is to render his defence equally plastic, so as to meet any of the protean forms and modifications of perjury, which it may suit him to exhibit in the course of the trial. One leading design of each is to imply so much,

and express so little, that there may be always ground for appeal under the pretence that material points have not been considered.

An attempt has been made by the legislature to confine these pleadings, by compelling the Judge to record points for proof drawn from a view of them. It is of course intended that these shall furnish for the special facts of each case something like the assistance which the 2nd Volume of Starkie (2nd Ed.) furnishes for actions in general. With the pleadings described this is no easy matter. Even performed with the utmost care, it will perhaps leave some mere inuendo in them unnoticed. When judgment is given, an application for review is made upon this ground. Mr. Norton considers in one part of his book that the permission of these irrelevant pleadings is a result of judicial inefficiency; and in another inconsistently, but very justly, remarks, that this reform so much needed, can only be effected by the legislature. When the case comes up before the European judge, it is generally upon appeal, after the mischief has been done, the evidence upon record, and he has to make the best of the matter. It is plain that some talent is required to set forth concisely the real matters in issue on a complex state of facts, and that injustice might and would be committed if we bound illogical natives with the strictness with which we might fairly bind a Chitty or a Stephen. Mr. Norton has expressed his opinion that oral pleadings could not be introduced with advantage. We think that they might be taken in the form of depositions by a skilful officer, well acquainted with the language, and a good jurist, with every prospect of success. He might then, as Mr. Norton proposes, put them into form for the consideration of the Judge. Let there be a literal altercation between the parties; it is astonishing how much of the truth of a case is obtained by this means. Even after the pleadings are closed, let a liberal power of amendment be given, and we feel certain that the greatest advantage would result from a system of pleading differing in a few unimportant particulars from the English. Forms might be circulated in the native languages, and under the authority of the legislature, and the officer referred to might be held responsible for them. His official character and standing in the service depending upon the judicious performance of this important duty, a vast improvement would soon be seen in the judicial administration,

As observed both in the Courts of Scotland and of the continent, the absence of a proper system of pleading, leads to extraordinary errors, and we can scarcely be astonished that the miserable mockery, which passes under that name, in the Mofussil Courts, has led to the same results.

The absence of pleaders and of pleading is the first disadvantage of our Mofussil Judges—a disadvantage which has led to many errors even in the practice of Courts which are in other respects, placed in a much more favorable position, than those of British India. This is a matter well deserving of the attention of the great lawyer who is now the legal adviser of the Supreme Council. To it he may well devote his great talents and experience. In England when the cause is set down for trial, counsel appear on both sides. By adverse interrogation, the evidence is fully elicited. The facts of the case are set forth by able and experienced men, well acquainted both with them, and with the legal incidents annexed to them. Objections are taken to evidence, principles discussed, and the Judge has only to decide after hearing every authority, and every weapon of logic, exhausted by the ingenious minds, which are thus helping him to a decision. It will not of course be supposed that we venture to underrate the immense ability of the English Judges. Truth and national pride equally call forth our admiration of those distinguished persons. Every man who has attempted to think out the simplest question, knows how difficult it is to carry on a controversy within his own mind, to set forth with impartial strength, the arguments on each side of the question, to pass them in review, and decide judicially upon them—yet this is the task which the Indian Judge has to perform, throughout a long and difficult enquiry, without the advantage of the case having been carefully brought before him, by those who have studied it in all its bearings. He has literally to be counsel for each side, to elicit the evidence of the witnesses, to cross examine them as to improbabilities and discrepancies, to extract by his own efforts, a consistent story, from the masses of fraud, falsehood, and perjury, which every case presents to his notice. He has to perform this task too in a foreign language, under the great disadvantages of a climate, which has often enfeebled his body and unbraced his mind. The labour thus thrown upon the Judge, will

be well appreciated by those who have had themselves to perform the task. We are confident that no Judge in Westminster Hall would underrate the difficulty. The most cursory perusal of an English law-book, will show how often opinions and cases are said to be of less authority "because the point was not much argued"—and Lord* Brougham has pointed out, that injustice is likely to result from a case not being fully argued owing to certain arrangements of counsel, and it is manifest that no language can be too emphatic for the greatness of the benefit which a tribunal derives from an intelligent, independent, and zealous bar. It must however be remembered that it is an institution liable to much abuse, and which can only exist with advantage where restrained by a wholesome public opinion, and that it can only exist at all, where the society is sufficiently rich to recompense its services. Moreover it is to be remembered that the mere imbuing of natives with legal knowledge will never produce it; although undoubtedly it would work some slight improvement in the present system.

The subject of evidence is one of immense importance, and the nature of Indian evidence, is one of the greatest difficulties with which Indian Judges have to contend. They are Judges of the facts, as well as of the Law; and it will be long before the country will arrive at a condition in which the establishment of juries will be possible. Mr. Norton justly remarks, that in the present state of the Natives a jury system would be an engine of frightful oppression. One difficulty with Native witnesses is their great defect in narrative power. It is really surprizing what difficulty even an intelligent Native finds in giving an orderly and correct narrative of even a simple occurrence. Where the event is one of a startling or awful nature, his transposition of facts, the contradictions into which he is betrayed without a fraudulent motive, will sometimes lead even the officer who is examining him, and would certainly lead one who merely perused the record, to conclude that either he had not witnessed the occurrence at all, or was wilfully misstating what he had seen. This is of course still more conspicuous with ignorant witnesses. It is truly painful to see the difficulty of drawing their attention to the most simple question asked. The plan which we are compelled

* Life of Lord Ellenborough.

to adopt, is to place some leading idea plainly before their mind, pause while they dwell upon it, and then proceed to elicit their knowledge by questions. The officer acquainted with the language, and who has the witness before him, is able to make allowances for the errors of such a witness, and will very generally be able to ascribe the contradictions to the real cause; but the perusal of even the most carefully written deposition, will not convey that instruction; and the result is not unfrequently a very improper estimate, of the evidence, by an appellate Court, and a condemnation of the Judge who tried the case, upon very insufficient grounds.

Another difficulty is the utter demoralization of the people, high and low, rich and poor. Perjury and forgery are regarded, not only as no crime, but as a perfectly commendable means of gaining a cause. In every judicial proceeding, and more especially in criminal cases, the mind of a Magistrate or a Judge is constantly on the stretch to determine the exact amount of truth contained in the statement which the witness is delivering. Strange to say, that however strong the case of a plaintiff or a prosecutor, he seldom contents himself with the support of really genuine evidence. There is almost always a most perplexing mixture of facts with fiction. There generally is a substratum of truth. There are very few cases without it, but it is so curiously overlaid with foreign matter, that it requires acute perception, sharpened by experience, to distinguish them. These mixed statements are of course the most difficult to estimate—and they occur in every civil suit, and every criminal case. We can never in this country confidently take the testimony of one particular witness as a starting point, and say 'here at least we have the truth, here is something solid to rest upon.' Even men who pass for the best of men, will never hesitate at colouring the facts, and very rarely hesitate in making a purely false statement in aid of the person for whom they are called. Let our countrymen at home imagine a respectable country gentleman with perhaps 1400 acres of land placed in the witness box. They would feel satisfied that there was no reason prima facie to distrust the testimony of such a man, but on the contrary every reason to rely upon it. In India we always feel perfectly satisfied, that such a man will perjure himself immediately, either in his own cause or that of his relatives or friends. After committing

a gross act of perjury, he does not sink, in the least, in the eyes of his countrymen. Far from it; the whole transaction is regarded as perfectly legitimate, and if the cause is gained, or the obnoxious individual punished, he will be decidedly raised in their estimation.

It is this utter perversion of public opinion, which renders the case so hopeless. Further, Police Officers who are by no means unfavorable specimens of the native character, are no more inclined to corruption than other men of their class, than for example the men of young India, whose impertinent language in their petition to the House of Lords seems to have created some surprize and who are incorruptible, because the opportunity for corruption has never been given to them, are fully imbued with the same sentiments. The very best of them will not hesitate at strengthening a case by a little perjury. Various motives concur in animating them to such courses. It is most desirable that crime should be detected. He who catches criminals and pursues them to a conviction, is considered an efficient officer. Even the best of these men, feels that he is only shewing a fit regard to his own character, and to the interests of Government, by obtaining as many convictions as possible. When he sees a man of whose guilt he is satisfied, he feels no compunction whatever in completing the chain of evidence by perjury. He rather congratulates himself that he is *not* as other men are, if he refuses to seize a man of bad character, but not connected with the particular crime, and endeavour to prove, that he committed it. Nor is this the only difficulty which Judges experience from the native character as it displays itself, in the officers of Government. As might be expected native inaccuracy of mind, is equally conspicuous in Police officers. They seem utterly incapable of comprehending the vital importance of taking down the deposition of a witness as he actually delivers it. When an offence is under investigation they carry on a sort of conversation with the witnesses who appear, get what they consider an accurate version of the story, and immediately proceed to write all the depositions after the pattern which they have laid down. They strike out all discrepancies, and the result is a case which on the surface is overwhelming. Of course when the matters goes up to Court, the results are often startling. The witness then comes to state what he really knows of the matter, and of course the deposition will pre-

sent striking deviations from the stereotyped story that the Police have prepared for him. We have often read over the papers taken before a Head of Police, which appeared most satisfactory, and upon coming to examine the witnesses have found, that although their depositions were those of eye witnesses, they had really spoken merely from hearsay. Yet with a full knowledge of this, the Higher Court in deference to a spurious public opinion, will make the most stinging remarks upon the discrepant statements made before the Police and before the Court and discredit a witness on the ground of those discrepancies. The result is the trying of a witness's trustworthiness by a perfectly false standard. The only radical remedy for all this is a perfect change in the morale of the people. The present, and immediate remedy, a most vigilant superintendence on the part of the European Magistracy, and a far greater active interference in the preparation of cases for Court, than it has been the custom to exercise in this Presidency. These public officers are from the people and of the people; their character is neither better nor worse than that of the mass of their countrymen, yet with ludicrous inconsistency, the very men who are cruelly lauding the efficiency and excellence of the young men at Madras, are the loudest in their abuse of the very able men who compose the body of our native public servants, and who are drawn from precisely the same class as these model youths, and who in every quality but that of vaunting their own capabilities, are superior to them.

The view of a suit entertained in England and India renders the position of the Judge one of considerably greater difficulty here. In England there is a dramatic unity, which does not exist here. By the case as it is on the day of trial the parties must stand or fall. Even where defendant's counsel and attorney were too late in arriving, although they had every reason to believe from the position of the cause, that they would be in time, the case was heard exparte, a verdict given for plaintiff, and a new trial refused.* The view in India is, that every effort must be used to get at the merits. There is a great unwillingness to exclude parties from the benefit of any thing, which can tell in their favour. Two instances are quoted by Mr. Norton, in which the Sudder Court have ruled that although the statute of limitation was not pleaded, yet if the

* Earl v. Dowling.

suit was plainly barred by it, the Judge should have taken it into account. He quotes also a decision of the Privy Council, which decides otherwise. We have only to say that although the convenience of the course may well be doubted, the decision of the Sudder is plainly in accordance with the Regulation, which forbids the Court's entertaining suits so barred, while there is no restriction as to the mode in which the fact is to come to their knowledge. Further in Ghindharee Singh v. Koolahal Singh* the Judicial committee laid down the broad principle, that they will not look strictly at matters of form in appeals from the Indian Courts, but at the essential justice of the case, and in this case they upheld a decision passed against the appellant, who was strictly not before the Court and which would in English law have been "res inter alios acta." Whether the Privy Council or the Sudder is right in policy, is another matter. The practice of noticing matters not pleaded, is fully established, and the neglect to do so has led to the remanding of many of the cases, upon which Mr. Norton has remarked. We may also complain that the Indian Judges have been tried by a standard which it was never intended to apply to them. Their decisions are right or wrong now as they coincide or not with the doctrines of the English Law. Now where, we ask, have the Indian Judges been instructed that this is to be the standard by which their efficiency was to be tried? It is only of late years, that this doctrine has been promulgated, and we know not now upon whose authority, most certainly not upon that of the legislature. Further the standard itself is constantly shifting. Even in our short experience of it evidence has become admissible, at which Kenyon would have shuddered, and Eldon predicted, an eternal setting of the sun of England.

Supreme Court Lawyers, should write with caution concerning the unchangeable fitness of the doctrines of the English Law. Ten years ago, Mr. Norton would undoubtedly have written with great asperity, of any Judge, who had ventured upon the principles of common sense, to examine the parties to a cause, or one convicted of crime, or one who had a pecuniary interest in the result. Yet these fearful innovations have been effected, not by unprofessional men, but by Brougham whose legal learning, is the least of his vast

* Moore vol. II. p. 344.

attainments, and whom for many years, the multitudes of the briefless deprecated, because they could not bear that a Lawyer's knowledge should go beyond the reported cases; and by that great Magistrate, who has for nearly twenty years, presided over the highest Court in the realm, whose masculine intellect, stern integrity, and dauntless courage, were felt, as a safeguard by the poorest and meanest of Englishmen. Another great disadvantage of the Indian Judges, is that their decisions are compared with those of such men, instead of with those of the Lawyers, whom we have seen, and are likely to see, in India. It is notorious that the Judges of the Crown Courts in India are never selected from the leading Members of the Bar. *They* would never accept the appointment, and if India gets a man of legal knowledge, she has reason to be thankful. As it seems the fashion of Indian Lawyers *to report conversations* I will just mention that I happened to be present on a public occasion on which some Law treatises were bought by one of the present Judges, and the remark of some Lawyer, who was present at the sale was, that the Judge was about to learn a little Law in his old age. The Supreme Court at Madras, seldom now has any decisions to pass. Of those passed by them, there is no authorized report, so that criticism is rendered almost impossible. When however they had something to do, their dicta used to create some astonishment. One Judge apparently thinking rather of the ethics of the midshipman's mess, than of Foster, Hale, or Russell, held that the punishment of a boy with the cane, at a sort of Military School, was a justification of his attempt to stab his superior. This case got into the English papers, and excited some remarks on the Judge's notions of the dignity of the human person. In another action for a violent assault, no justification, and nothing in mitigation was pleaded, but the Judge sagely observed, that the assault was so violent, that there must have been some strong grounds for it. These, we believe, to be only specimens of the curiosities to be found among the records of that court. No one takes the trouble to collect them, and these very men whom plenitude of leisure has not enabled to avoid gross absurdities of this kind, have the moral courage to comment with severity upon the errors of others, overwhelmed with the amount of work thrown upon them, and placed in a position in every respect more disadvantageous. There is too an amusing air about them when they do pass decisions. One

case which excited some notice was that of a Brahmin converted to Christianity. His relations endeavoured to deprive him of the Society of his wife, the Judge decided against them, the legality or illegality of his decision is not the present question. He apparently conjured up by the aid of an overheated imagination, an attempt to over-awe him, perhaps a lashing of the population of Madras to fury, at the decision which he was passing, and Roman-like, feeling ready to die at his post, informed his auditors, that they were not to be influenced *there* by any thought of the effects of the decision. Why without any such talk of independence, we constantly up-country pass decisions in much more irritating questions of cast, and *that* without the protection of a European Soldiery and the guns of Fort St. George. There is something singularly ungraceful in this attempt of Judges on the bench to put themselves forward as Gascoignes. Their object is to imply that they are the only Judges in the country, who are independent of the Government, and to insinuate, what they hesitate openly to state, that the English gentlemen who preside over the Mofussil Courts, will not pass decisions adverse to the Government. Every man who has watched the issue of suits in which Government or its officers are parties, knows that there is almost always an obvious leaning against them and that the impression which it is the wish of the Supreme Court, and its myrmidons to convey, is perfectly false. Mr. Campbell has indeed justly stated, that there never was a Government in the world, which has shown so little firmness in the protection of its own rights. It is always preparing to abandon something, at the suit of some truculent and impudent villain.

We should not have touched upon the Supreme Court, but for Mr. Norton's proposition to amalgamate it with the Sudder. It is certainly desirable that these gentlemen, should not draw their enormous salaries for nothing. Mr. Norton even does not hesitate to admit, that the experience of the Sudder Judges in the country is desirable. We confess that neither the character of the Madras Supreme Court Judges for legal knowledge, nor liberality of mind, leads us to be very hopeful of the result of the amalgamation. Bengal would indeed do well to secure the services of Sir Laurence Peel, either in the Supreme Council or in a High Court of appeal, to be constituted by the union of men experienced in the manners of

the people, with enlightened English lawyers. It is the case with the legal as with every other profession, that the lower a man stands in real scientific knowledge of the principles upon which it is based, the more pertinaciously he clings to its vicious technicalities, the more ready, he is to sacrifice substance to forms. If English law is to be introduced bodily into India, it would unquestionably be very advantageous, to have at least one sound English lawyer, in the Highest Court. More would be a useless expense, and men are only too much inclined to bow to a technical lawyer, and there would be no danger of insufficient weight being given to his opinion. I cannot however think, that it will be thought desirable to introduce the English law. The whole of the law of real property for example, would be utterly inapplicable, founded upon the feudal system, full of difficulty and found cumbrous, even in England, where the society is rich, and the means of applying it vast. In this country too there is already a vast body of customs in existence which would constantly clash with it. There is in truth a complication of tenures which would render the application of it quite impracticable. But there is the further objection that the Law of England itself is in a transition state. Little has yet been done for the substantive law. It is still scattered over 600 volumes of reports independently of the statutes at large. We have no doubt that the violent infliction of so vast a system, upon a country, with the peculiarities of which it has nothing in common, would be a grievous injustice. The great principles of jurisprudence, are of inestimable value, and measures should be taken for imbuing with them the mind of every Civil Servant of India; and we will point out what the Haileybury system properly administered, offers to the students. We venture to deprecate the thrusting of so large a number of subjects, and particularly the oriental languages upon them. History, Political Economy, Moral Philosophy and the principles of jurisprudence should be the great subjects of study. They are both of eminent practical utility and they are admirable instruments of mental culture, and they are part of the Haileybury course but not of that, of any other College in England.

These remarks forcibly recal the memory of one who has now passed to his reward. For twenty years it was his important task to train the future Magistrates and Judges of India. Even now before our mind's eye rises our first view of the well remembered

scene of his unobtrusive labours. We recal the brilliant eye, the feeble and emaciated body, the weakness of utterance, the affectionate earnestness, which ever distinguished him. He viewed those whom he instructed, not merely with a professional eye, not as ordinary students, but as those called upon to labour in the rich inheritance of our country, and to influence the destinies of millions of Asiatics. His enlarged benevolence, his Catholic sympathies, made him feel for millions whom he had never known, and never seen, whose gratitude could never be his, as intensely as for those among whom his life had been passed. The immense stores of his varied knowledge were poured out for the instruction of his hearers. His kindly advice and encouragement were never wanting. Those too, whose privilege it has been to be admitted into his domestic circle, will testify how beautiful was the commentary which his life afforded upon the doctrines which he taught. Many a Haileybury man now delights to dwell upon the splendid intellects of the Professors of his College, and although it is difficult to award the palm, he will perhaps linger longer, and with more pious fondness, upon the talents and virtues of the late William Empson.

We must not forget that our business is not with the teacher but with the lessons conveyed, and we will detail them because it appears to have been assumed that the opportunity even for legal instruction has not been given to the Civil Service of India, and some very ignorantly assert that Haileybury *has* done and *can* do nothing. At the opening of his course of instruction the student found himself in a new world. The principles of morals, the nature and ground of moral duties, the distinction between vices and crimes, why many moral duties cannot be made legal ones, the boundaries between private ethics and jurisprudence, the nature of acts, of intentions, of motives, the measure of the mischievousness of an act, of its demand for punishment, a comprehensive view of the law of status. Now surely this first course of lectures was a fit introduction to the study of particular jurisprudence. The student had presented to his mind the great leading doctrines of morals, the two principal systems by which they are respectively derived, that of Butler as explained by Whewell, and that of Paley and Bentham, both in their original works and in the admirable exposition of Professor Austin. Surely it is to the principles of human nature, and

to the springs of human actions, that we must thus descend for the philosophy of law. The second course was a fit continuation of the work. It embraced the doctrines of international law. The text books were Wheaton and the admirable lectures of Chancellor Kent, with a selection from the judgments of Sir W. Scott, as reported by Robinson. We should not be surprised at this being designated as a pure waste of time by the sages of the Supreme Court; yet a proper view of education will perhaps suggest, that the magnificent prospect of whole nations being thus guided by ethical principles, of physical force thus subjected to moral, is not unfitted to enlarge the minds of youths of eighteen; while as a science it certainly forms the most appropriate bond of union between ethics and positive law. It has something of the qualities of both.

For enlarged exposition of great principles, the great lawyers of America have no modern rivals, and the judgments of Sir W. Scott, unfettered as he was by cases, are models of judicial reasoning. The third course embraced a comparison of the leading doctrines of the Roman and English laws as to the nature of property, the titles to it, the modes of acquiring and of transferring it, as to the succession, obligations, the important right of Possession so clearly laid down by the Roman lawyers, and a matter of the utmost confusion to this day among the English. The contrast between the Roman and English law tended to fix the principles of both more firmly in the mind. The next course embraced the principles of the law of evidence, setting out with a slight reference to the grounds of human belief in testimony, using Dumont's Bentham and Phillip's law of Evidence as the text books, with reference to Starkie's 2nd and 3rd volumes for the proofs in particular issues. The Professor explained the nature and force of circumstantial evidence, the nature of unoriginal evidence, the causes of its inferiority to direct, the English laws of exclusion and their policy, documentary evidence, the extent to which parole evidence is admitted to explain it; in short a full exposition of the principles of the law of evidence, the actual rules of the English law and an examination of their policy were presented to the students.

The fourth and fifth courses embraced the important subject of Criminal law. The nature of rights public and private, and a sound exposition of the adjective law formed a natural introduction. These

lectures embraced not merely a meagre statement of English law doctrines, (these were also given,) but the doctrine of criminal responsibility and the modes by which it is impaired and destroyed; the definition of crimes and the amount and nature of the proof required to establish their commission; the manner in which crimes are viewed severally by the English and by Continental codes; constant reference to the reports of the English and Indian Law Commissioners. The text books were Blackstone's 4th vol., Russell on Crimes and Alison's Criminal Law of Scotland. The lectures too were not merely expositions of existing systems; they applied to these positive enactments the great general principles which we had already derived from Ethics. Bentham's Principles of morals and legislation and his principles of Penal Law where the great authority, and well do these works deserve the unremitting attention of every jurist, who wishes to penetrate beyond the surface. They are the first attempt at a real philosophy of the Criminal Law. It is difficult to conceive a more comprehensive course than that which we have thus feebly described. A man who had mastered it would have his mind stored with an amount of knowledge, which would quite ensure him against any palpable errors in the conducting of civil and criminal business. The amount of knowledge actually embraced is not small; and the mode of conveying it rendered the mind prepared to assimilate, in logical order, any additions which the student, felt inclined to make in private study. A ground plan of the science was laid down, and any student who had carefully mastered this course, would have been able to distribute any special branch of Law, under its appropriate head, and not only learn it but also its relation to its kindred branches.

As usual the fact that many entirely neglect this study, has been magnified into a statement, that none ever pursue it. We can testify that this is not the case. Within the last six years, legal studies have greatly increased, and it only rests with the authorities at home to demand from each student, a respectable amount of proficiency, as an indispensable condition for retaining his appointment. Nothing would be easier, and only the shameful supineness of the Board of Control, so omnipotent for mischief and hitherto found so powerless for good, has prevented the effecting of this great reform. We speak here only of jurisprudence, but we would demand at least as high

a proficiency in Political Economy and History. The preliminary examination for entrance to Haileybury, should embrace something like an Oxford examination for a degree, with the addition of elementary mathematics, De Morgan's work on logic, and Butler's anology, Locke, or any work which may serve to inure the mind to moral reasoning. All thought of Classics and Mathematics should then be laid aside, the oriental languages left for India, and the student's attention should be turned for two years, and busy years they might be made, to Moral and Political Philosophy, Jurisprudence, History and Political Economy. The system of instruction is already most admirable. It only requires that a really high proficiency should be demanded from every candidate. Such a change too in the College course would ensure several useful purposes. It would both arm the student at all points for his future career, and it would certainly exclude finally from the service, all men who either from indolence, or feebleness of capacity, are unfit to be admitted into it. Such men are not numerous, but they are able to cram up a Greek or Latin book and a little mathematics, and to pass muster ; while no mere cramming could enable them to get through a searching examination in the subjects which we have vindicated. Such a system would soon afford a body of well trained jurists who would amply meet the requirements of India. It only remains to make some slight effort to select the fittest men for the fittest places, and little will remain to be desired until that time, yet long distant, in which our mission will have been fulfilled.

Upon the subject of criminal law we propose to dwell at some length both on account of its intrinsic importance, and because its administration is, in our opinion susceptible of very great improvement. Mr. Norton after his kind, states a little, and insinuates much. His argument is, take the specimens which I have afforded you of the inefficiency of the Judges. Consider for an instant that only the happy accident of these cases being referrible ones has prevented cruel injustice. Remember that the majority of cases is not referred, and thence calculate the gross amount of injustice perpetrated. Such language as this, is well adapted to influence the minds of our countrymen, ever alive to generous impressions. They will summon up to fancy's view, a set of irresponsible prætors, capriciously and ignorantly depriving a helpless people of its liberty

and its property. They will suppose that decisions so passed, because not referred, are never supervised, that all is left to Mofussil judicial discretion, which they are taught on the word of a Supreme Court Barrister, to believe most indiscreet. Now how does the case really stand? Within 48 hours of the completion of a trial, the Session Judge is compelled to transmit to the Foujdarry Udalut a complete abstract of the evidence taken, to remark upon any discrepancies between the testimony delivered by the witnesses before himself, and before the lower court, to give his reasons for crediting or discrediting a particular witness, for inclining where witnesses disagree to one rather than another. This document is generally of great length, and always affords the means of discovering any patent defect, in the nature of the evidence of the crime charged. The remarks too upon the weight to be attached to such evidence are so numerous and minute, that the Court of Review is able to determine accurately whether the facts which the Judge supposes to be established, will satisfy the definition of the crime, and with tolerable certainty, whether the weight of the evidence is sufficient to sustain those facts. It is plain that legal education can guide the mind only to the first of these decisions. It will teach what enters into the definition of a crime, why certain classes of evidence are inferior to others, but it cannot and does not teach, what weight is to be given to the statement of each witness examined.

Human belief depends upon so many considerations, some of which are capable, some, and the larger number, incapable of record. Who can record the fleeting and ever varying lines of the human countenance? The most copious and perfect of human language, would even in the hands of Locke or of Bentham, of Dickens or of Thackeray, break down in the attempt to express a man's reason for concluding that the hesitation of one witness is that if an honest man scrupulously desirous of speaking the truth, and that the hesitation of another is that of a dishonest man, who is attempting to make the answer which he is about to give, agree with some false statement previously delivered by him. The first test, and in this country the most important test, to which we can subject a witness's testimony, is its probability, its agreement with the nature of things. It is plain that here our law books can give us no aid. The only volume which can avail us is that of human nature. The more acute our observa-

tion, the more intimate our acquaintance with the manner of life, habits of thought, and springs of action, of the Hindoo, the more likely are we to attach a just weight to the testimony delivered. In the long narrative of a witness against a criminal the attention is ever alive to the thought; "Is the situation described, the language "used, or the act committed such as my knowledge of the people "would lead me to expect"? The task of deciding such a question as this would be left in England to a common jury of unprofessional men, generally drawn from the lower part, of the middle classes. Here it is one of the accumulated difficulties of the Judge, and no part of his office is so difficult, and none affects him with a sense of so awful a responsibility. We consider it perfectly plain, that a man who has been in the habit of familiar intercourse with Natives for twenty years, will be likely to give a better opinion upon the credibility of Native testimony than all the Judges of Westminster Hall. We should not have thought so plain a matter deserving of so much remark, had not one of Mr. Norton's charges against the Indian Judges been that they are quite incapable of weighing evidence, and but for his opinion that sound legal grounding in Starkie is to afford the remedy. That eminently lucid writer, has it is true given some rules* for the weighing of the testimony of a witness, and the most important of them, is the consistency or inconsistency of it with experience, and no one of them depends, in the smallest degree, upon legal Education. We confess to some surprise at the language of the learned gentleman in this matter. He appears to think it astonishing, that the Native Judges, are able to weigh evidence better than the European ones; and seems to be for him, rather modest in suggesting, that it may arise from their better knowledge of the mazes of native character. Unquestionably they are more able to decide *instinctively* upon the credibility of a witness, with much greater accuracy than any European, however able, and simply because such decision does not depend in the least, upon legal education, but upon a knowledge of that complicated set of facts which constitute experience. Where the object of native officials, is to

*(1). Integrity of a witness and his willingness to declare the truth.
(2). His ability to do so.
(3). Number and consistency of witnesses.
(4). Conformity with experience.
(5). Conformity with collateral circumstances.

arrive at a correct appreciation of testimony, their knowledge of their countrymen gives them immense advantages. They fail in setting forth reasons for their belief, and in eliciting the evidence in a manner, which shall impress him who peruses the record, with their opinion, probably a just one, of its intrinsic worth. It would be highly presumptuous in us to suppose that this misuse of language has arisen from any other cause than the fact that the brief which Mr. Norton held, required the language of vituperation to be exhausted, and so that this end was attained, accuracy of thought and diction was of little consequence.

If we mistake not a moral necessity of the same description, once impelled this same gentleman, to argue before the Supreme Court, that "a ruby ring" in an auctioneer's catalogue implied merely a red ring, because Marc Antony is made by Shakspeare to describe the ruby lips of the wounds of Cæsar. We forget now whether the unhappy man who bought the ring as a ruby ring, brought an action of assumpsit upon the warranty, or an action upon the case for misrepresentation, with an averment of "a scienter." We remember that the Judges differed in opinion, and that the cause went in favour of the advocate with the poetical argument, which it is to be hoped was duly weighed. We will answer for it, that proper weight it would have had, in Westminster Hall.

We may remark, as it is a matter of great importance, that the incorrectness of native testimony depends as often upon deficiency in the intellectual, as in the moral causes of correctness. Accurate observation is very rarely found in any class of native witnesses. In the statement of time and distance, they are singularly and absurdly inaccurate. As to distance, the only mode in which their lax expressions can be corrected, is by causing them to compare the distance to which they are deposing, with some distance actually before their eyes, and even this from their habitual carelessness is a very inefficient check. Yet with a knowledge of this peculiarity, we find the finest arguments as to discrepancies upon such points, and the whole of a witness's evidence set aside as untrustworthy because he is not precise upon them. No doubt where the conviction of a prisoner, depends upon nice circumstantial proof of his presence at a particular place, at a particular moment, such proceed-

ings are intelligible; but where such circumstances are purely collateral, and merely used as a test of the witness's trustworthiness, or his means of knowledge, nothing can be more fallacious. Supposing that six English witnesses were asked to determine the distance from one point to another. It is probable that if taken at random, they would all give very different statements. If they were military witnesses, accustomed to calculate distances by the eye, there would probably be little variation. In applying correctly all such collateral tests of the trustworthiness of a witness, we should consider their applicability to the class to which that witness belongs. The attention of different men is directed to points so different. One will accurately relate a conversation after the lapse of years, while the face of the speaker will not be remembered after a few weeks. A man who mis-states, or affects ignorance upon points, to which his attention must from the nature of things be directed and which he is not likely to mistake, may be fairly regarded as an untrustworthy witness; but where the great inaccuracy of native witnesses is well known, it appears strange that the Foujdaree Udalut reports should be filled as they are with the acquittals of prisoners, on the ground, that the witnesses against them have been guilty of such discrepancies. An amusing air of self-gratulation pervades all proceedings which convey such decisions. A notorious criminal is upon such grounds let out upon society. The Native community wonders, and well it may, at the caprices of its rulers. What then is the origin of these proceedings? The Judges are at any rate, for the most part, able and experienced men. Where no personal interests interpose, their subordinates are generally selected for their ability, and yet acquittals on the most frivolous reasons are of daily occurrence. This is greatly owing to that habit of the human mind which renders it unwilling, to be behind hand in the race of subtlety. This has been frequently noticed in the case of our sensible countrymen, and the result has been their tolerance for several centuries of the iniquitous absurdities of the English Law. These things re-act upon Mofussil Jurisprudence. Every Judge knows that the most groundless acquittal of a prisoner, will be passed by without remark; while a conviction will frequently entail upon him, the labour of taking further evidence, long after all reasonable doubt upon the subject has left ordinary minds; and perhaps bring upon him a severe re-

buke for having believed the testimony of a particular witness, although he has scanned his demeanour, noted his expressions, and has arrived at his opinion after anxious reflection, and with all the aids that long experience can give.

The first criminal case quoted by Mr. Norton in proof of his proposition is that of an alleged murder at Tellicherry. A man is stabbed in his cot; the proof against the prisoners is composed of a statement by the son of deceased who slept beside him,—that awoke by his father's cries, he saw the prisoners running away and his father after them. As usual four witnesses were just coming to the place and also saw them, and two others saw them standing under a tree a hundred and fifty yards off, and upon going to the granary of deceased *heard him say* that prisoners had stabbed him.

The Session's Judge recommended the transportation for life of one, and the acquittal of the other prisoner. The grounds stated for the mitigation are the points for animadversion.

1st. The neglect of the Surgeon in not attending to the wound immediately and replacing the intestines.

2nd. The darkness of the night which rendered recognition difficult.

As to the first of these grounds, the statement of the case is hardly sufficiently explicit, to see how far the Session's Judge's recommendation differs from the practice of the English Law. If the mala praxis on the part of a Surgeon had produced death, where it was not likely to ensue, the act of the prisoner would not be murder. If death was merely hastened by the unskilfulness of the practitioner it would be murder.* It appears from the report, that there was at least a possibility of the man surviving, if the wound had been dressed immediately, but not only was this not done by the Surgeon, but he was removed to the hospital at Cannanore, a distance of many miles, where death took place. Now are we to say that a man's punishment is only to be mitigated where the death of his victim is produced by *actively* injurious applications. In a case of protrusion of bowels any delay renders mortification certain, while the constitution of Natives will survive injuries which would infallibly prove fatal to

* Charge of Baron Platt in Mr. Seton's case.

any European. If then it could be shewn that by the culpable neglect of the Surgeon in this case a wound, not necessarily mortal, became so, we question whether a sentence of death would have been passed in England, although the offence would undoubtedly be called murder.

As to the second ground we have only to say that Mr. Norton has not stated the Session's Judge's recommendation fairly. In the report he is stated to have commented "on the nature of the evidence in general, the darkness of the night" &c. The Judge no doubt felt great distrust of native evidence, and was unwilling to recommend an irrevocable sentence. Much has been written upon the impropriety, of such medium courses. It is said that there should be no alternative. A prisoner is charged with a certain crime. The punishment of death is that prescribed by the Law. It is argued that a doubt upon the evidence, should always acquit the prisoner, and should never be allowed to mitigate the punishment of death. To say that a man should not be found guilty upon insufficient evidence, is a self evident, and not instructive proposition, but the real question is—may there not be so much evidence against a man as to render his acquittal a grievous public wrong? May it not be so strong as utterly to forbid any conclusion, but that of his guilt? yet aware of the fallibility of human judgments, of the *possibility* of the innocence of the convict, even in countries where testimony is more trustworthy than in India, of the imperfect safeguard which even the most ably conducted cross examination can offer, if the facts lie within a narrow compass, unattended by many collateral circumstances, by which contradiction to a false statement may be established, may not, we say, a conscientious Judge reasonably hesitate, before recommending an irrevocable sentence, save where there is almost a mathematical certainty of guilt? It will be remembered that this objection applies to the single case of capital punishment, and that the only possible evil of the course, is the difference between the repressive influence of the punishment of death, and that of a secondary punishment. There will be various opinions upon this point, and we will not now enter upon the wide question of capital punishment; we will merely remark, that in the case of Kirwan, the Home Government, has indorsed with its approval, the doctrine which we are supporting. As to the guilt of this un-

happy man, we are hardly in a position to judge. Undoubtedly the evidence which has appeared in the public prints, left the question as to the commission of a murder at all, in some obscurity and there can be no doubt that if the trial had taken place before an Indian Judge, and he had recommended a conviction, he would have been severely rebuked by the higher Court, his sentence reversed, and it might even have cost the world a second edition of Mr. Norton, We will not pretend to impugn from a review of the proceedings, a verdict passed after a lengthy trial, and approved by two of the ablest Judges on the Irish Bench. It is much to be regretted that writers of Newspaper articles and pamphlets in India, do not also remember that no reading of the most carefully recorded trial, can compensate, for a personal examination of the witnesses and of the prisoner.

In the case under review the higher Court acquitted the prisoners, because they disbelieved and apparently, with propriety, the evidence as to their identity. The observation again occurs, that this was a reversal on no legal question, but because the higher Court thought it not unlikely that the prosecutrix had tampered with two of the witnesses. The case is valuable to an English reader, as one specimen of the difficulties which beset judicature in this country. When suspicion of crime falls upon a man, but the evidence is not strong enough to convict him of a crime of which he is believed to be the perpetrator, evidence is immediately prepared to shew his proximity to the scene of the offence, perhaps to relate conversations which are falsely alleged to have taken place, which dovetail into the scheme, and would if believed afford most pregnant inferences of his guilt. The preparation of knowingly false charges is comparatively uncommon in our criminal jurisprudence; but when a crime is committed, enquiries are instituted, suspicion is excited, a small portion of evidence exists against the suspected, and who is very generally the real criminal, he is then lucky if a jewel belonged to the murdered or the robbed is not thrust into his house. Witnesses will be quite prepared to prove, that about the time of the occurrence, he was seen proceeding in the exact direction of it. Luckily for human life and liberty such stories are generally well scrutinized and often contain the means of their own refutation. Improper convictions are scarcely ever obtained upon them, but many persons, unques-

tionably guilty, are acquitted, because in the course of the trial it becomes impossible to reconcile the really true story with the garnish laid upon it by the prosecutor or the police. The Session's Judge's feeling in the case under review was something of this kind. It is by no means impossible that the witnesses recognized the murderers as they allege. They swear to the fact most confidently, as well as to a declaration of the murdered man, but again I am quite certain that they would not in the least hesitate in swearing to the identity, whether they recognized them or not. I cannot acquit, but knowing the people, I am unwilling to pass a sentence which no subsequent information can correct. I have honestly striven to arrive at the truth, but knowing my liability to error, I prefer recommending a sentence, which shall not destroy life. Yet these are the grounds on which the Judge is pronounced, by the judicious critic, unfit to be trusted with the adjudication of cases to life and death.

In the next case three prisoners kick a woman to death on the order of the first prisoner; they are convicted of culpable homicide, because from throwing water on her to revive her, it did not appear that it was their wish to produce death. I confess that I cannot at all coincide with this reasoning, although the intention is the essence of the crime, and the custom of carrying knives, so prevalent on the Western Coast, affords a strong probability that logically speaking it was not the intention of the prisoners to produce death. The punishment inflicted was however 14 years in irons.

In the next case the prisoner was convicted on his own confession. The Judge held the offence to be culpable homicide, although some hours elapsed between the provocation and the act which produced death. The Court of Foujdaree Udalut very properly sentenced him to suffer death.

In the next case the Foujdaree commuted to transportation the proposed sentence of death, on a man who killed his concubine with a rice beater, because he saw her talking to a barber. He gives himself up to a peon and requests him to do his duty. As a proof of express malice Mr. Norton places in italics the fact of the man going into his house for the rice beater. Our countrymen will of course imagine a delay of about five minutes in this process, a full

reflection as to the best instrument to be chosen, whereas the whole matter most likely occupied about half a minute. The mere talking to a barber appears also a very small amount of provocation. It will be remembered however that native manners and ideas upon this subject are different from ours. In England a sentence of death would undoubtedly have been passed.

Mr. Norton considers it desirable, to sentence a man to death for murder, after a lapse of nineteen years, because it was necessary to show, that however long, crime is concealed, the concealment will afford no screen from punishment; but we think it very questionable whether such an execution would teach the lesson, and have little doubt that the apparent cruelty of executing a man who for nineteen years had been a well conducted member of society, would have been revolting to the feelings of the spectators, and have produced a hatred of the Law, which should be reserved for offenders. The prisoner was transported for life.

In another case a woman murders her own two children in revenge of her husband's gross abuse of her. She then goes to the river for the professed purpose of drowning herself. The Foujdaree Udalut commuted her sentence to transportation for life. Now here is a murder apparently without a motive. She wreaks her vengeance upon those who have not offended her. I feel a strong impression that if it had been this woman's fortune to have been tried at London at the Central Criminal Court, Dr. Conolly or Monro would have discovered certain traces of a homicidalmania and that she would have been acquitted on that ground, always providing that she luckily secured Counsel capable of bringing the matter out before the jury, and she would have escaped the transportation for life actually awarded to her.

The Hon. Ross Touchett tried in October 1844, chose to shoot at the keeper of a shooting gallery. There was no proof of aberration of intellect, he expressed his wish to be hanged, said that he had long thought of suicide, referred to the case of Laurence, who had killed a man at Brighton, and had been hanged; yet on the dictum of Dr. Monro who stated his opinion, that at the time of the commission of the act, he was insane an acquittal followed. On the other hand Laurence to whom Touchett referred (1844)

who took up a poker and killed an inspector of Police, whom he did not even know, admitted the act, said that he wished to be hanged, would have killed any other man in the same way, was convicted and hanged. Every man too remembers the case of Macnaghten, who for days dogged his victim, a most amiable and estimable gentleman, waited until his back was turned, and deliberately shot him in the public streets. Well do we remember the consternation of the public at the acquittal of this man on the ground of insanity. Most improper weight was undoubtedly laid by the Judge upon the scientific testimony, and few will coincide with him in stopping the case, and recommending an acquittal, without hearing the remarks of Sir W. Follett for the Crown. If Macnaghten and Touchett were properly acquitted, Laurence and Bellingham were judicially murdered. Yet we should not think it quite reasonable to conclude that because the Court erred in one or other of these cases, the late estimable and learned Judge Sir N. Tindal, was unfit for the bench, which he so long adorned. Such a case would be however quite sufficient for a reasoner of Mr. Norton's stamp. By way of testing his calm and considerate judgment, it will perhaps not be amiss to take some of his opinions upon evidence.

A charge of rape at a watercourse is brought by a woman before the Session's Court of Nellore. She swore that she had been fully raped. Her husband and two other witnesses, profess to have been attracted by her cries, and to have seen the prisoner running off, and depose that she immediately complained, that his purpose had been fully effected. His cloth was in her hand. The Session's Judge did not consider the penetration proved, but referred the trial to the Foujdaree Udalut, who found him guilty of assault with attempt. Mr. Norton quotes the case for the purpose of informing as that no better evidence of penetration, or the very essence of this offence than that of the woman, can be found. It is a great question among the best Medical *Jurists whether connection can be had with an adult woman without her consent except. 1st. When in natural sleep which is questionable. 2d. When in a state of syncope from terror or exhaustion. 3d.

* Taylor's Medical Jurisprudence, p. 557.

When several persons have combined. 4th. Under threats of death or duress. We should have thought that the author of such an opinion as this, could scarcely have read Lord Hale had not his sneer, at one of the Indian Judges convinced us to the contrary. That great Judge justly lays down, that although the testimony of the prosecutrix is indeed receivable, the concurrent circumstances must be carefully considered in determining its weight. He remarks that such a charge is easily made, but refuted with difficulty. It will be as well to indicate a few points which are desirable in confirmation of a woman's testimony that she has been raped. Such violence as is necessary to procure connection with a woman against her will, always leaves such marks upon the body, and extremities, as will clearly show that a severe struggle has taken place. Even in married women, it is considered that a rape will inflict some injury upon the pudendum. The Session Judge in this case merely states that he did not consider penetration proved.

If Mr. Norton only meant, that no person can possess better means of knowledge, then the prosecutrix, he might have spared us the remark, but if he intended to imply as he clearly does, that the error of the Session's Judge consisted in not believing the fact of penetration when deposed to by the prosecutrix, and that he was clearly wrong in even considering it doubtful, we can only say that although it would be highly unjust to suppose, that all men of Mr. Norton's profession are of the same stamp, it does afford a delicious foretaste of the kind of régimé which a Mofussil bench of Supreme Court Lawyers would produce. If Lord Hale had been a Mofussil Judge in India, he would probably have laid it down as an axiom that not only is the testimony of native women in a case of rape to be received with caution, but that it is the most untrustworthy of native testimony. There is no crime in Southern India, which occurs so rarely, and there is scarcely any heinous crime, so frequently charged. Native women are so ignorant, and so unaddicted to moral restraint, that conjugal infidelity, is lamentably frequent. A married woman perhaps for months has been in the habit of intercourse with her paramour. On some unlucky day, her husband discovers her. She instantly screams aloud, brings a charge of rape, in which she is backed by the husband, who partly in revenge, and partly because

he is unwilling to be lowered in public estimation, by such imputation on what he regards as his property, gives much such testimony as was given in this Nellore case, and which he hears, is requisite to bring home the crime. Luckily for human liberty, and for the preservation of the important distinction between vices and crimes, the Magistrate who hears the case, is not a Supreme Court Lawyer. He enquires minutely into the circumstances, estimates the probability of guilt, not by something which Lord Hale may have said, about a case which happened two centuries ago, but by what his experience of the natives, has taught him of the exact amount of truth, generally found in such charges. He perhaps even, irregular and illogical man, during a morning ride, takes the opportunity of casually enquiring on what terms the prisoner and prosecutrix have been in the habit of living. He knows by experience, that many a man will tell the plain truth, when thus unexposed to the public eye, who will either lie or be silent, when brought before him officially. The just and proper result in 99 cases out of 100 is that the Magistrate ends, by warning the prisoner, to keep a strict watch upon his conduct, tells him of the awful results of such a crime if proved, that luckily for him, a defect in the proof has led to his acquittal in this special case. Strange to say all parties go away well satisfied, with this decision. The man and his wife, seem to regard the acquittal as a perfect moral whitewashing, and probably live together as happily as ever. We do not recollect a single instance of an appeal against such acquittals, although they are most numerous in ordinary cases, whether the defendant is acquitted or not. In one case the prosecutor in the other the defendant very constantly appeals. Such charges as we have described are particularly common at the season of the year, in which the Dahl crop is reaped. The woman slips in among the Dahl and her paramour after her. If discovered the process just described is gone through before the Magistrate.

A cargo of Lawyers would probably give us an annual crop of rape, in addition to the other products of Tanjore. We regret the necessity of entering upon this detail. The system of demoralization which this too true story exhibits, is indeed mournful to behold, but it affords one out of a hundred instances of the vital importance of a knowledge of native customs, native dispositions, and native

manners. All sorts of charges are founded upon this too common adulterous intercourse. Many of them are collusive between the husband and wife. The woman gets disgusted with her paramour, agrees to invite him to the house, on a particular night. He comes. The husband and some other male relation, seize him, charge him immediately with house breaking and theft. The evidence on paper, would generally be sufficient to sustain the charge, which is however perfectly false. In such cases nothing but a most patient consideration of the circumstances, assisted by a knowledge of native customs prevents cruel injustice.

With very few exceptions all the cases noted by Mr. Norton are cases which have nothing to do with the definition of crime, or the admissibility of evidence. The remarks of the higher Court are confined to remarks upon the trustworthiness of this or that witness, upon the weight to be given to this or that piece of evidence, to comparisons between depositions before the Police, and depositions before the Court. It will never be forgotten by the English Judge, that this is a task which never falls upon him, that if it did, he would feel his responsibility greatly increased.

The majority of the cases quoted for reprehension, are cases in which the Courts have reduced cases of murder, to cases of culpable homicide or rather have inflicted a punishment short of the Supreme penalty. Mr. Norton's remarks of course assume the correctness of the doctrine of constructive malice. It is needless to point out, that the use of this word in English law writers, is a mere illogical subterfuge. They are unwilling to declare that the crime of murder is so injurious to society, that they are prepared, to dispense with proof of one element of crime, the intention of the perpetrator, and wherever death ensues upon the act of another, to conclude from the fact of killing, that malice was the motive principle, throwing the proof of all circumstances which tend to lower the offence, in the scale of crime, upon the prisoner. We believe the practice to be founded upon good policy, and are well aware, that in its operation, injustice is very rarely perpetrated. We refer to it, merely for the purpose of commenting upon some of the considerations, which in England, are allowed to negative the presumption of malice, with a view of pointing out some of

those diversities in the character and situation of the English and Indian peoples, which would perhaps lead to our attaching different weight, to the same set of mitigating circumstances.

Insanity as is well known, is a complete rebuttal of the inference of malice. Proof of the commission of the act during anger excited by sudden provocation, reduces the crime to manslaughter. The weight to be given to such a defence, of course depends upon the sufficiency of the provocation. It is evident, that, in different countries, the same sort of act, will produce this, in a very different degree. One striking instance has been before quoted, where a man killed his concubine, because she was talking to a barber. The Foujdaree Judges well knowing, the feeling of natives upon this point, mitigated the punishment, to transportation for life. As to the walking into the house, Mr. Norton even may have known, that the whole matter probably did not occupy half a minute. Further it is deserving of consideration whether if transports of anger are mitigatory circumstances, we ought not to take into account, the natural capacity for restraining it, which exists among the people for whom we are adjudicating, and perhaps even in the class to which the specific criminal belongs. It is certain that many men brought before our Courts of Justice, are completely the creatures of every fleeting impulse; moral and intellectual restraint are equally unknown. Beyond the power of speech, there is little which links them with humanity. It is certain that intention in the proper sense of the word has little place among them. There is no weaving of the mesh, in which their victim may be entangled, no careful and patient adaptation, of the criminal means, to the criminal end. A cause of anger arises. They measure not the punishment, by the injury, but in the transport of a passion, which neither religion, morality, nor intellectual culture, has taught them to restrain, they inflict mutilation, wounds, or death. With stolid indifference, they contemplate their ferocious act, go through the proceedings of their trial with an unmoved countenance, and meet their death with a firmness, which would be heroism were it not plainly, the result of mere thoughtlessness. The ground, upon which murder is reduced to manslaughter, is that the murderer from the occurrence some of incidental circumstances, ceased to be a perfectly intelligent agent, that he acted under the influence of a state of

mind, which if permanent, would be insanity, and that although his legal responsibility is not destroyed, it is impaired. What logical distinction can be drawn, between the case of a man of *greater* self command, so overpowered by circumstances *more* provoking, and that of a man of *smaller* self command, overpowered by a conjuncture of circumstances, less provoking. In both cases, the presumption of malicious intention, would be clearly negatived. It may be said, that the administration of Law, will not admit of these minute considerations. We are quite ready to allow, that it would be quite impracticable to enquire into the state of temper, disposition, and knowledge, of every man convicted of crime. It is not however impossible, and it is far more important, to make these allowances in the case of large classes of men: for how in fact can we determine upon the extent of provocation, unless we advert to the state of the mind, to which it is applied? We constantly do so in cases in which it has occurred to a mind labouring under mental or moral insanity, and what reason can be found for neglecting to do so, where we know from the class to which a man belongs, from the defects of his knowledge, from his grovelling condition, from his blinded ignorance, that his passions will be quickly aroused and that the power to restrain them has not been given? It appears to us to matter little if the power exists not, whether the want arises from some of those mental deficiencies or disorders, which have been the subjects of the refined classification of Esquirol or Prichard, or from inherent deficiencies of mind or culture. This is one of the grounds upon which our Judges are unwilling to inflict capital sentences, and for acting upon such considerations, Mr. Norton, has in the majority of the cases, which he has quoted, held them up to the ridicule of the world. He is particularly struck with one instance in which the Judge considered the fact of the criminal belonging to the Poonian or slave caste in Malabar a reason for commuting the punishment of death which the Foujdaree Court actually inflicted. It is much easier no doubt to lay down, that when certain facts, attended a particular act, *that* act shall be put in a certain place in the category of crime, and be visited by a certain punishment.

It is easier, to disregard all distinctions, and boldly to say, that, because in the state of culture of Englishmen, we may fairly conclude,

that certain facts, cannot exist without the policy of the Law requiring a malicious disposition, to be concluded, therefore no change of disposition, or of enlightenment, or of self control, can justify us, in considering the same facts under other circumstances, as proofs of sufficient provocation, to impair legal responsibility.

We have very great doubt however whether these views of the Indian Judges, will excite any great reprehension among the great statesmen, and lawyers in whose hands the future of India is now placed.

There are several other cases upon which we would remark, but we have already far exceeded our intended limits. The case of Vencatachellum Pillay tried for child murder and robbery is, as more than ordinarily atrocious entered in the appendix. The question as usual, is not one of law, but of the sufficiency of evidence. The discovery is as usual that of the Foujdaree Judge. We think, it may be reasonably questioned, whether the suspicious evidence of an accomplice, received sufficient confirmation in this case, although had we believed the testimony of the man, who heard the voice of the prisoner and the splash at the well, as the Judge appears to have done, we should have considered it as strong, as will usually be obtained in such a crime as murder. It will be noticed too that the principal infirmative circumstances noted, by the Judge, are in other parts of his minute, stated not to be proved, and are unquestionably ascribable to the love of garnishing a case which we have before described. We refer to the fact of leaving jewels to the value of Rs. 32 upon the body and taking Rs. 36 of jewels. The story of the jewels taken away was only trumped up, to give colour to the statement that the Coppu found in the prisoner's house was the property of the prosecutor. The discrepancies of the witnesses as to the direction in which the prisoner was seen proceeding, are entitled to no weight. The witnesses who deposed to it, probably never noticed the fact at all, but native witnesses never content themselves with this natural reply. They have an idea, that if they profess ignorance upon any point, their testimony will be diminished in value. As to the improbability of the prisoner taking the first witness (accomplice) into his confidence, it is difficult to see how he could have got the child into his power without doing so. On the whole with deference to the very able officer

upon whose opinion we are commenting, we consider that the probability is that the opinion of the Sessions Judge, was the correct one. The murder was not perpetrated as an English murder would have been. As to the taking through the village in broad daylight, it appears to be quite forgotten that this was clearly done by some one, and it is at least as improbable that the neck of the child was twisted by a girl of probably twelve years old, as that it was done in the mode described. We may add that the leaving the jewels on the body is a precaution which would not have been adopted by her. Mr. Norton's comments are in his usual trenchant style. He appears to be one of those men, to whom nothing is a difficulty when it has been solved. Whatever may be thought of the matter and we will venture to say that the opinion of those accustomed to native testimony, would differ much, the error of the Session's Judge is far from being of so grave a nature, as to exhibit "a total incapacity to weigh testimony." A thing highly improbable at the old Bailey, may be very probable in Salem. As to the Cockspur case while we cannot conceive how any one could ever have credited the story told, we do not see how any amount of legal learning would have afforded a remedy. The Tinnevelly case is a more difficult one: but it is certainly very extraordinary that it obtained credit so easily. To say that the falsehood of the story is transparent would be a gross exaggeration, but it undoubtedly bears upon its face the strongest marks of manufacture. Here we have a specimen of native Police. The whole of the false charge was unquestionably trumped up by the Head of Police (a native Magistrate.) It will not be forgotten that there have been in the English criminal annals, instances in which many men have been hanged upon charges made up by the lower Officers* of Police. The case affords another example of the great difficulties of Indian tribunals, and would by any candid man, be taken into account in determining their efficiency. One remark may be made, as to the existence of several serious irregularities on very obvious points in several cases quoted. The record is the sole means of judging as to the amount of proof. The depositions are written in the language of the country by native Officers attached to the Court, and

* See one of the Chapters in "Knight's London" for a curious account of these cases.

unless the attention of the Judge is most unremitting, entry of some thing said by a witness will be omitted. We have several times found that important points of a witness's statement which appeared in our own English notes, had been passed over in the Tamil deposition. If this had remained unnoticed, there would often have appeared a patent defect in the proof, which did not really exist. We are not vindicating Judges who are guilty of such carelessness, but we are satisfied that many errors, serious to appearance, may be so accounted for. Enough however of these cases. Of the whole number two or three only are erroneous in point of law. The remaining ones are quoted for their defects or supposed defects in the weighing of evidence, a process of remarkable difficulty. Few will consider that they establish Mr. Norton's proposition and there are few who will not be struck with the fact that the majority are quite irrelevant to his issue. Charity, in his own delicate language, compels us to believe that pure blessed ignorance, and not the utter absence of all candour, has led him to reject from an estimate of the Indian Judges' decisions all consideration of the circumstances under which they were passed. There are a few points of Indian criminal practice which invite remark as it is important that they should be amended. The mode in which confessions are estimated is the first which suggests itself.

In English law a system very favourable to the prisoner, convictions have been had even upon extrajudicial confessions very slightly confirmed. A confession* freely made before a Magistrate, when properly proved, is taken as full evidence of guilt. In Southern India a man makes a full and free confession before an European Magistrate. It embraces circumstances proveable aliunde and which are so proved, perhaps the names of unarrested accomplices, whose complicity is afterwards established, by independent testimony, after such a confession as this a criminal is allowed before the Session's Court to state that this full and free confession, thus authenticated, was elicited by the fear of torture, and is totally untrue. We are satisfied that nine Judges out of ten, would acquit him. They would all when questioned, say that they had no doubt of the prisoner's guilt, that their practice was quite indefensible,

* Treason, when the overt act is not an attempt upon the life of the Sovereign, is the only exception and arises from the statutory measure of proof.

but that if they convicted, their decision would be reversed by the Court of Fouzdaree Udalut. These doctrines of the higher Court are founded on the most benevolent motives. There have been cases in India, in which men have confessed the commission of crimes of which they were innocent. There have been such cases in Europe and America.

The remarkable case of the two Bournes who in the United States, confessed the commission of a murder supposed to have been committed, seven years before, is in point. They had acted upon the advice of mistaken friends who represented that from the strength of the case against them, confession offered the only hope of mitigation of punishment. They then retracted their confessions, and the man supposed to have been murdered, returned just in time to prevent execution. Such exceptional cases as these should not be allowed to reverse that universal law of human nature, which teaches us, that when a man makes a deliberate admission, clearly against his interest, he is to be believed. Confessions should indeed be received with caution, they should never be confined to a bare affirmation of guilt. The suspected criminal should be questioned minutely, as to all the circumstances connected with the offence, and his answers should be compared, with the result of other testimony, and with the probabilities of the case. When however a confession, so made is confirmed upon points only collaterally connected with the actual criminal act, a failure to convict upon it, is a tampering with the best interests of society. No confession taken before a native Police Officer is of much value, for very obvious reasons.

This rule of the Fouzdaree Court proceeds upon the assumption, that when before the Magistrate, the criminal is still under the control of the Police, and that they will use all means to extort a confession. We beg to remark that this assumption is purely gratuitous and is by no means in accordance with the fact. Even if it were, an order from the Court to the Magistracy to remove the prisoners from the custody of the Police Peons and place them, under their own, would be a more appropriate remedy, than the adoption of a rule of evidence, which tends to give impunity to guilt, and insecurity to life and property.

Another most essential innovation is the concession to the Courts

of the power of interrogating prisoners. Inquisitorial, unfair, and all those phrases which men employ so liberally, where no real reasons offer themselves, do not deter us from making this observation. There is no instrument so efficacious in the discovery of guilt; and we are quite satisfied that the fuller the statement, which a Court elicits from a really innocent man, the more clearly will his innocence appear. Nearly all the writers who have combated this practice, have had in view the state trials of the time of Charles and James, or the interrogations carried on over a series of years as is the custom in Bavaria.* We of course mean something very different. We would allow the Court to put to the prisoner, questions founded upon the evidence, and suspicious circumstances against him, so that he should be able to explain them away if innocent, and that he should not avoid adding to their force and cogency if guilty.

Mr. Phillips† in a note (if we remember rightly) to the trial of Elizabeth Garnet, discusses this question, but we think, that he has not done so, with his usual felicity. The picture which he conjures up, is a sort of investigation, which shall terrify the prisoner into a false confession, and give the appearance of a personal altercation between him and the Judge. Perhaps this may be true of the inhuman style of interrogation, which was there adopted, yet if the record even of this extreme case is regarded, nothing but the exact truth was established by the interrogation. The interrogation of the prisoner is associated in our minds with the venal Lawyers and wretched injustice of those bad times. It is so difficult in our consideration, of a principle, to separate it from the circumstances, which we have seen combined with it, although the combination may have been not consequential but a pure accident. The cruel injustice of this trial, will never be doubted, but it consisted not in the mode of proving the offence charged, but in the harshness of the law, and the severity with which the King and his legal tools, were prepared to execute it. The brow beating of the prisoner in this case, is no fair example of the interrogation, which should be allowed to a criminal Court, and neither could nor would be the subject of imitation, in any Court at the present day. In

* Fenerbach's remarkable trials.

† State Trials, vol. II.

our dread of convicting innocent men, the grievous injury inflicted upon society, by the acquittal of the guilty, appears to be quite disregarded. There is no country in which acquittals tend so greatly and immediately to multiply crime, as in India. The real state of the case is generally pretty well known at least to the criminal's own village. When people find that a man of whose guilt, they are persuaded, has escaped, their dread of the law immediately diminishes. What we recommend then, is the introduction of what all admit to be the most effectual mode of eliciting truth, the mild but searching interrogation of the man, who knows most about the matter. Of course before this is done there must be a primâ facie case, but when that exists, nothing will enable the Court to determine so accurately the weight to be given to the hostile evidence, as a consideration of it with the aid of the prisoner's explanations and his demeanour while delivering them. This will quite as frequently benefit, as injure the prisoner. When he is asked generally, what he has to say to the evidence adduced, he is perhaps unaware of the circumstances, which really press most strongly against him, which may be quite susceptible of a natural explanation, which he will give, when his attention is specially directed to them. Humanity, and sound policy, the security of innocence unjustly accused, and the righteous punishment of guilt, equally demand this reform from the legislature. The Fouzdaree Court have insisted with more than usual rigidity upon the abstinence from this most salutary practice, and we deeply regret that in their draft of a code of pleading and procedure, the Law Commissioners have not advocated it.

Another question of immense importance, is the immediate altering of the mode in which it has now become the custom to estimate the evidence taken in a case. If it is found, that the witnesses summoned, differ upon some points of time, distance, &c., arguments founded upon these diversities are allowed to overthrow testimony unquestionably true. In this country, the power of setting aside testimony as false, and of drawing an affirmative conclusion from contradictory statments, must be allowed. Pure truth is not be found. Falsehood mingles more or less, with nearly every case. Many a great offender has been allowed to escape by bribing one or two of the witnesses for the prosecution. These then purposely make false statements, a discrepancy is established, and

with a perfect consciousness of the real state of the case, the Judge is compelled to turn loose upon society, the man who has added subornation of perjury to his former offence. This mockery of justice, arises from the attempt to apply to this country, modes of estimating testimony which are quite inapplicable. From the conflict of lies, truth must be elicited. Are we to sacrifice the truth of a case to the harmony of the record, to set down the testimony of each witness examined at exactly the same value, to turn the administration of justice into a prize fight between the prosecutor and the prisoner and acquit the latter wherever it shall unfortunately have happened, that a false, inaccurate, or corrupted witness—has given contradictory testimony? This is the course in which criminal practice is now proceeding. Instead of adapting the rules for estimating testimony to the exigencies of the case, the highest Court now acts upon the principles which we have described. English vakeels are employed to point out discrepancies of the most trivial nature, and prisoners concerning whose guilt there cannot be a shadow of a doubt, are constantly acquitted on the most frivolous pretences. We fully admit the great difficulty of applying a remedy to this enormous and daily increasing evil. Judges have a morbid tendency to conjure up doubts and difficulties which arises in part from a view of the nature of Indian Evidence, but partly from a want of firmness in expressing their opinions upon the *real* weight of the evidence as their long experience has taught it to them. This is really one of the most important questions, which can engage the attention of the Judges, and we only regret that we have not been able to put it in a more forcible light.

There are many other questions of minor but of no small importance but we forbear. It will be enough if these remarks afford any assistance in estimating the real nature of the Madras Judicial system, if the detail into which we have entered, tends to give to men in England some clearer notions of the real state of things in this country.

The ignorance of India which pervades the best informed persons at home, is truly lamentable. That ignorance once led them to imagine every thing in Indian administration perfect; and appears to be now leading them to the conclusion that every thing is rotten.

From holding out the Sepoy as equalling in valour, the Peninsular veterans, and in fidelity the tenth legion, the Journalists at home have now passed to the opinion that he is ever ready for mutiny and that our empire consequently hangs upon a thread. We have heard several able Officers lament that it is too much the custom to slur over breaches of discipline, to keep up fair appearances, and that the Government are prone to lessen the authority of the regimental officers, as indeed they are that of every European officer, in every department of our administration. The Sepoy is like other natives. He is not a hero nor the moral phenomenon which our late Paladin Governor General must have imagined him, when he proposed that all Civil Officers should receive a military initiation, that they might be imbued with better opinions of the native character. He is a very tolerable soldier. His pay is superior to the income of men in his class of life. His conduct varies according to the Officers under whom he is placed, and he knows his own interests far too well to be so ready for revolt as our friends at home would imply.

The treatment by several journalists of the petitions sent home from Calcutta, Madras and Bombay, as expositions of the views of the people of India, afforded another delicious example of the same kind. The petitions were really composed by some young men in the Presidency Towns, who would no doubt be happy to assume the Civil administration of the country, leaving to the English the pleasing task of keeping military occupation, to sustain them in office. They are prompted by the Europeans at the Presidency unconnected with the Government, who are naturally desirous of seeing in uncontrolled authority, men, over whom they would be able to exercise such an influence as the strong mind has over the weak one. As to the mass of the people of India they would dread any enlargement of native authority. They have no confidence whatever in their own countrymen, and they have the most perfect reliance upon the well abused civil officers of government. Their prayer is always not "you are foreigners let us have our case heard by our own people" but "from Tamil people we cannot get justice, all we ask is that you will take up the case yourself." The argument then would appear to be because with European superintendence and controlling authority corruption cannot be prevented, corruption

will flourish less luxuriantly, if free scope is given to it and no check imposed.

The men whom the body of the people thus characterize, are very able men, in most respectable and responsible situations, are treated with kindness and consideration, are consulted as they deserve to be, but are closely and unceasingly watched by every European officer who is worth his salt. Perhaps no men are louder in their abuse of the corruption and oppressions of these able officers, than the few hundreds of young men, who compose the petitioning class. Each of them will intimate plainly, that his countrymen are not to be in the least trusted, that they will practise deceit on every opportunity, which is true; and will lead clearly to the inference that he may be trusted implicitly, which is not true. How often must it be pointed out, that the capacity of a people for self-government, does not depend upon intellectual attainments, that institutions cannot be framed upon papers and protocols, but upon centuries of trial, of suffering, and of self-control. The state of Europe in 1848 has written this truth in characters of blood, and yet the Hindoo, cannot for an instant be compared either in intellect or morality with the German Professors, who met at Frankfort. Moral qualities qualify men for Government. It is neither to the physical courage, nor the intellectual developement, but to the moral energy of the Anglo Saxon race, that the millions of India bow. The moral standard of a people, is that of the masses; it will fluctuate humanly speaking with the fluctuations of public opinion; and it is admitted on all hands that the state of public opinion in this country, is degradingly low. It would ignore all experience and all observation, if the reading of a few moral treatises and parts of the works of a few distinguished historians, conferred upon the students, a moral status so far above that of their countrymen, as to qualify them for independent office. We have great doubts as to the power of education in altering the *moral* character of a people, but it is quite plain that the education of a small fraction will not raise them to a higher moral condition than that of the masses. The men so educated will look to the opinion, of their own countrymen, and will naturally be little ashamed of doing any thing, which does not excite their reprobation. It may be said, that European public opinion, will act upon them. This is found quite insuffi-

cient now, that Europeans are placed in the predominant position, which gives weight to their opinions, and would of course be utterly powerless, the moment that their pre-eminence was destroyed. No—the truth must be told—the natives of India are not in any respect upon the same level as the European public servants of Government; and the attempt to place them in the same service, and to invest them with the same authority, would be a deep degradation to every European Gentleman and would justly and certainly shake the confidence of the people of India, in our administration. The only people to whom the measure would afford any gratification, would be perhaps 1,000 men in each Presidency town, who imagine that they will be the persons chosen to revel in uncontrolled office, and would even dissatisfy them, as soon as the selection had been made, and the small proportion of spoils to the number of spoilers, was at length discovered. We are no doubt in a peculiar position. Politically this country is in its early youth. The talk of its youthful patriots is a caricature of that of the countrymen of Hampden. They cannot be made to comprehend that acts of Parliament are not omnipotent, that they are not the *creators* of public virtue. They are ignorant that the individual freedom of the Hindoos, far exceeds that enjoyed by any nation of continental Europe, that they are allowed to abuse the Government in a manner which twenty years ago, would not have been permitted in England itself. Living under a despotic Government, but moulded in its views and controlled in its action, by the most enlightened representative assembly in the world, they talk of oppression, jabber the lessons which they have learned about checks and balances, and American taxation, and provincial assembles, without dreaming that in every quality, which can adapt a man for the Government of himself and others, in virtue, in self-restraint, in real political knowledge they are inferior, to thousands of English day-labourers. We remember being particularly entertained by a Tamil Newspaper. (Several of a most seditious character are constantly published in Madras.) In one column there were a few filtrations of this Hampden talk, and in another the real native character came out, in an article which pointed out what a worthless and foolish Government we had, that it actually pensioned sepoys, who were

past work, and strenuously recommended the immediate discontinuance of the foolish practice of keeping pledges. This is only a fair specimen of Madras mosaic patriotism. It is much to be lamented that these foolish weaknesses exist. They tend to throw ridicule upon what is most desirable, the Education of the people. We consider that the education which has at present been conferred, has been no benefit to them. It has put into the mouths of a few youths the talk which we have described, but upon the mass of the people, no effect has yet been produced. Education must extend into the interior, and be conveyed in the languages of the people. From the statements of Sir Erskine Perry and some other gentlemen, it would be thought that in a few years the English language will spread over the whole of India. This is very far indeed from being the case and to work any change in the people, we must operate upon them, through the medium of their own language. The over educating of a small number as has now been done, is purely mischievous. Reading, writing, and arithmetic should be taught to the millions, and they should then be supplied with works in their own tongue, which will soften the harshness of the purely material life, which they now lead. The misfortune is that the men who have received this pretentious education, are not generally the holders of property. Further, they are not youths of any experience up country, but by the influence of Gentlemen at the Presidency, they are getting thrust into high appointments in the Mofussil, for which, their want of experience renders them totally unfit, and the practice will certainly lower the efficiency of the public service. We have entered into this question, rather for the purpose of exhibiting its real conditions, than under any expectation that so fatal a measure will ever be even thought of by the Parliament of England. Very little enquiry will suffice to show that our statement of the case is a fair one, that native happiness, no less than European authority, calls for protection against the aspiring petitioners. The Government of India, as it now stands, is the greatest wonder of history. It is a Government not of one but of twenty races of men by themselves. The standard of excellence with which it is compared is the very highest. It is contrasted with that of England in all its branches. If it is found that native peons, are not so skilful as the London Detec-

tive Police, if they do not fight as bravely, the fault is that of the Government. This was beautifully exemplified in a charge delivered by one of the Supreme Court Judges* a very benevolent, and amiable man, but not noted for profundity of observation, or breadth of view. A gang robbery in the town of Madras itself, startled the good people from their proprieties. The Police is there at least twenty times as numerous as at any other place in the Presidency. The Chief Magistrate's ability and energy are well known, but he of course cannot infuse into natives a courage and self reliance which they do not possess, but these inherent defects were part of the accumulated sins of the Government. The Jemadar and Peons did not "collar their men" therefore the Government neglected the Police. A few speculations were then indulged in as to the awful state, in which things must be, in other places. It was purely a fancy picture in which judicial leisure may harmlessly indulge. Gang robberies are not as regular dishes in a native town, as the curry and rice. They do occur more frequently than we could wish, but not so frequently as English burglaries, and nothing keeps them within bounds, but the active interference and exertions of the European officers in charge of the Police. They will seldom return to the district of an officer, who has hunted out a gang robbery and convicted the ringleaders.

It is the same with every department of Government. The office of the English Government is merely to control, that of the Indian Government is to originate enterprise. It has done and is doing much. It is a Government which is never defended, and never defends itself, and the consequence is that before enquiry, men are disposed to believe that there are really some very fearful charges to be brought against it. It has perhaps acted wisely in determining to live down the abuse. So far as the characters of its revilers are concerned, the wisdom cannot be doubted, but constant repetition has unquestionably done it some injury with our countrymen at home. They are so accustomed to the attacks of the Times being answered by the Chronicle or the Post, that they can scarcely understand the existence of a press, which is without one single exception, hostile to the Government, and as the principal agents of that

* Charge to the Grand Jury April 1853.

Government, the hostility falls chiefly upon that service to which we have the honour to belong. Their enormous emoluments and inefficiency are the favorite themes for discussion. It is true that when their character is canvassed, even their enemies do not deny, that they are, with very few exceptions, laborious and intelligent men, that whatever may be the defects of its constitution in theory, the system has worked well. Considering too its limited numbers, its great men have not been few. Elphinstone, Metcalfe, Lawrence, Thomason, Frere, and other distinguished men living and dead, may be confidently appealed to. This however is not the sort of defence, which we would set up, for the service to which we belong. Unless its general character is good, it is to little purpose, that we repeat a few distinguished names. It is in their daily work, that the character of a service is to be learned. The Civil servants of India are represented by the Times as passing in three* years through the offices of Collector and political agent with uncontrolled authority over a large district. India is now no El Dorado. It offers to those who live to obtain it, a moderate competency after many years of toil, and after health, strength, and buoyant hopes, have long gone down before the tropical sun. Their vindication is to be found in their steady performance of their administrative duties. In these, there is nothing dazzling. They demand not brilliant attainments, but zeal, prudence, industry, integrity and firmness. Every Collector and Magistrate requires in a degree those qualities which will, in India, ever illustrate the honoured name of Robert Mertens Bird. They have secured to the Civil Service the confidence of millions of Hindoos. It is not in its dazzling men, but in its daily workmen, that its character is to be learned. It is not as political agents or as Governors of large provinces, but in their tents in familiar intercourse with the people, considering their wants, redressing their grievances, standing as a barrier between them and the oppressions of their powerful countrymen, that the ordinary duties of Civilians are to be seen. It is true that history has no page for these bloodless triumphs. The very unmarked manner, in which the work of large districts is carried on, is the very best proof of the efficient performance of important administrative duties. It is to such facts as these

* Twenty years are now occupied in reaching independent authority and from 7 to 8 years are passed in the lowest grade.

that the Civil Servants of India appeal, and invite the attention of their countrymen. Next to the confidence of the people actually under their charge, the approbation of those countrymen in England, is to them, the dearest of earthly triumphs. It is true that those who have had the means of judging, English statesmen of talent and large experience, have unhesitatingly borne their testimony, to the high character both for talent and integrity of the Civil Service of India. Lord Ellenborough himself has not been backward in affording that testimony, although clogged with some of those crotchets, which certainly disfigure the character of a most able and honest man.

We close these remarks, with the expression of an earnest hope, that our language has not been harsh or dogmatic. We have recorded the impressions derived from a short but not inactive experience, among natives of all classes. We have had at least the opportunity for observation and hope that we have been animated by higher motives than even the desire, to defend the members of our profession, from unfounded aspersions.

APPENDIX.

We have to correct an inaccuracy in our Report of the ruling of the Judge in the case of stabbing adverted to at page 25. The whole case is so extraordinary an example of obliquity of judicial view that it merits a detailed record.

The prisoner was a pupil. His articles bound him to serve as a pupil and subsequently when qualified for transfer, to the grade of an artificer, in the Company of Ordnance Artificers. He was in fact a pupil to all intents and purposes and therefore by the common law of England amenable to moderate personal correction. He was sentenced to stripes with a rattan, by the Superintendent of the body of pupils of whom he was one. He deliberately provided himself with a knife, kept it secreted until the period at which the chastisement was to be inflicted and then deliberately wounded the Duffadar who was entrusted with the execution of the duty. He further declared at the time of the wounding, that his object was to kill and this declaration with the previous circumstances was conclusive as to his intention.

He was indicted for feloniously assaulting the wounded man with intent to kill or inflict some grievous bodily harm. The Judges decided, the one without doubt and the other doubtingly that the act was unjustifiable in law. Then what was the character of the assault which they thus admit to be illegal?

Supposing that death had ensued upon the wound, can there be a shadow of a doubt that the offence would be murder? A youth deliberately prepares and secretes a deadly weapon for the purpose of stabbing with intent to kill the man who was ordered to flog him, by one, to whom he, (the convict) stood in the relation of pupil to master. He does not wait for the infliction of a blow, but executes his predetermined purpose, without warning his innocent victim of the consequences likely to result from the execution of his superior's orders.

Had the intended act been completed and death ensued, there cannot be a question, that the offence would have been a dastardly and deliberate murder and there cannot be a doubt that the act perpetrated with the intention of committing that murder, was a felonious assault. Under the mis-direction of the Judge, the jury found the prisoner guilty of a common assault, for which, he was finally sentenced to one month's imprisonment. After this verdict the Judge with ludicrous inconsistency reserved a point as to the legality or illegality of the Government order under which the superintendent of the military school inflicted the punishment. It is plain that the point was quite immaterial after such a verdict. It might have had some relevancy to the question of the felony, although there will be little question except in the Madras Supreme Court, that the attempt to inflict *illegal* chastisement would not negative the presumption of deliberate malice as exhibited by the diabolical calmness, with which the death of his victim was contemplated by the prisoner. This perfectly immaterial point was then argued in a full Court. Both Judges considered the order of Government illegal, in which they were unquestionably wrong and both expressed their approval of the verdict. The prudence of the chief (late) preserved him from the danger of attempting to give a reason for that approval.

The Puisne Judge illustrated his views by saying that the act was the result of sudden heat, (i. e. the concealment of a knife in cool blood and the production of it at the time of the attempt to chastise him) and that he and probably every other man in the Court would have done the same. Comment is needless. We can only congratulate the masters of Eton, Winchester and Rugby that they are not favoured with such Judges at the assize towns of their respective counties. Many an ornament of the episcopal bench might have been prematurely cut off, if such had been the case.

A post office peon was indicted under the provisions of Sec. XXXIII Act XVII of 1837 for stealing from a letter a 30 rupee note. Against *the Act* therein made and provided. Two objections were taken to the indictment the 1st. That it used the word Act instead of the word statute which as a term of legal import was indispensable. The 2nd. That the clause referred to did not allege any substantive offence, although it awarded a punishment of 7 years for the offence which it clearly defined and which the prisoner had as clearly committed. The Judge held both objections fatal but discharged the Jury on the first.

Now it is difficult to conceive how any mind of healthy constitution could allow itself to indulge in such subtleties. The enactment under which the prisoner was indicted, was known solely as an Act of the Government of India and had never been designated as a statute and the term would have been quite inapplicable. It may fairly be regarded as one of which the Courts are bound to take Judicial notice. It is quite certain that no stress would have been laid upon such an objection by any great Lawyer.

As to the second objection. The Section provides that any person who shall fraudulently appropriate the contents of any packet shall be punished with 7 years imprisonment. The forbidding of an Act and the annexation of a punishment to the commission of it appear to be a sufficient allegation of a substantive offence. It is difficult to conceive how any rational Judge could insist with such pertinacity upon the insertion of a word.

This case however affords a specimen of the manner in which the Supreme Court has, (as Mr. Norton, with professional gusto informed us) managed to drive a coach and horses through the Acts of the legislative Council. It affords also as good a commentary as we could wish upon our own statement that the lower a man's scientific knowledge, the more pertinacious his love for vicious technicalities. The merit of this and the previous decision but without the reasoning, belongs to the same Judge.

These few specimens are valuable as examples of the efficiency of the Supreme Court Judges in legal knowledge which is supposed to outweigh their utter ignorance of the language, habits and manners of the people. Removed from all sources of information, we were not able to obtain in time a larger collection which may however, hereafter be made.

Ignorance of the principles of evidence and of the nature of hearsay, is not confined to the Mofussil Judge.

If with the assistance of counsel, such rulings have taken place what would be the result if such powerful legal intellects had to perform the duties of counsel in addition to their own.

Let us see an authentic record of the rulings of the Supreme Court with their reasons for them and it will, we are convinced, be found that the counterpoise which their legal knowledge affords to their ignorance of the people is not of any great value.

Lord Brougham would, upon a closer acquaintance, have found that he had no reason to modify his previous opinion as to the character of the Supreme Courts. Had we seen that modification in time we should only have quoted his great authority to the sufficiently disgraceful fact that the decisions of these Courts reversed on appeal are in the proportion of 7 to 1 of those confirmed. Sir Erskine Perry's evidence as to the character of the Crown Courts and the confidence of the natives in them is utterly unfounded in fact. The natives of Madras, dread the very idea of resorting to the Supreme Court. Various reasons have combined to create this feeling in their minds.

Among the most obvious is the fact that the men whose all is at stake, are unable to understand one word of the proceedings know not whether their case has really reached the ears of those who are to decide it.

Another is the enormous expense of the procedure which cannot be materially diminished, because without counsel there could be no communication between the suitor and the Court, and the fees of counsel and the bills of attornies are of course large. The natives too have before their eyes, the instructive spectacle afforded by the ruin of nearly every wealthy family which has ever resorted to the Court. The following table of the sums expended by a few families, was published in one of the Madras newspapers in 1847.

HOUSE NAMES.	NAMES.	AMOUNT.
		Rupees.
Soonkoo	Kistnama Chitty	10,00,000
Thoudy	Mooneayapah Chitty	10,00,000
Smith	Vurdapah Pillay	7,00,000
Brody	Chengalaroy Moodelly	4,00,000
	Iya Pillay	7,00,000
	Chermayah Moodelly	4,00,000
	Moodookistna Moodelly	40,00,000
Connundan.	Teroomala Naick	2,00,000
Bombay	Chinna Pillay	4,00,000
	Canagaroy Moodelly	40,00,000
Rajah	Moodookistna Naick	7,00,000
Munro	Moodoo Moodelly	3,00,000
	Apparow Moodelly	1,00,000
Seetron	Nagapah Moodelly	2,50,000
	Davanatha Moodelly	1,00,000
	Moorooga Moodelly	1,80,000
Moodapakam	Vurdarajah Moodelly	4,00,000
Contract	Shasha Pillay	2,00,000
Poomba	Vessoovanadha Moodelly	2,00,000
Pearse	Patchyapah Moodelly	4,00,000
	Ramanjooloo Naick	4,00,000
Takara	Arnachellam Moodelly	4,00,000
Office	Moottiah Moodelly	1,00,000
Addapully	Balasoobaroy Chetty	7,000
Pungatoon	Chengalaroy Moodelly	1,00,000
	Teroovengada Moodelly	1,00,000
Mungatoor	Vencatachellum Moodelly	1,00,000
	Poonganum Maistry	1,00,000
	Shunmoogaroy Pillay	1,00,000
Munapaukum	Shunmoogaroy Moodelly	4,00,000
Pettoor	Ramalinga Moodelly	1,00,000
	Coinnasawmy Iyen	1,00,000
	Causy Chitty	10,00,000
	Sarasoovalee Ummal	1,00,000
Thotty Cully	Casa Moodelly	7,00,000
Binny	Vencatachella Moodelly	4,00,000
	Moodoocoomarapah Moodelly	1,00,000
	Total	1,99,37,000

Hence it appears that the price of obtaining or attempting to obtain Supreme Court Justice was to 37 individuals nearly two millions sterling.

The results are that at the beginning of last term the Court was adjourned because no cause was set down for trial, that they have killed the goose which laid the golden eggs, and that the Barristers have been compelled to transfer their services from litigation to philanthropy.

Among the extraordinary misapprehensions which have been circulated in England by the Leading Journal is the comparison of a Collector to an English taxgatherer by way of explaining the class, from which the administrators of justice are drawn. The error might have been corrected from the very work under review. Mr Norton has said very forcibly and very truly.

"The Collector of an Indian province is not as his name imports a mere Collector of Revenue. His office is one of a very high political character; the peace and well being of the whole district, rest mainly in his hands and a union of no ordinary talents, firmness, kindness, accessibility and sound judgment, must centre in him who fitly fills this important post."

We may add that no judge can in this country perform his duties with effect, without a sufficient acquaintance with the tenures of land, which can only be acquired by revenue experience.

Errata.

Page	2	line	34—for "undescribable" read "indescribable."
"	8	(Note)	—for "Sowles" read "Vowles."
———		(Note)	—for "Henlen" read "Hendon."
Page	15	line	8—for "presents" read "represents."
"	25	"	2—for "deprecated" read "depreciated."
"	29	"	19—for "Possession" read "Possessio."
"	30	"	13—for "where" read "were here."
"	31	"	21—for "vindicated" read "indicated."
"	32	"	25—for "language" read "languages."
"	32	"	28—for "i" read "of."
"	35	"	15—for "prisoner" read "prisoners."
"	41	"	31—for "as" read "as."
"	42	"	17—for "then" read "than."
"	44	"	16—for "Clarnet" read "Gaunt."

We deeply regret the number of typographical errors. There are several yet remaining but our effort has been only to correct those which created a doubt as to the meaning.