

# MADRAS RECORD OFFICE.

Government of Madras.

*Judicial* DEPARTMENT.

|                                        |              |
|----------------------------------------|--------------|
| G.O. No. <i>1595</i>                   | Press<br>Mis |
| <i>7-76</i><br>Dated <i>10-11-1865</i> | 19           |

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Not to be folded or roughly handled

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*Proceedings of the Madras Government, Judicial Department,*  
10th November 1865.

Read the following papers:—

No. 74. From the Session Judge of Tanjore; to the Chief Secretary to Government, Fort Saint George, dated Tanjore, 13th October 1865, No. 702.

Viewing the Orders of Government, No. 1430 of the 5th October 1865, as mandatory and not permissive, I have the honor respectfully to submit the doubts I entertain as to the legality of the procedure therein directed, with reference to the detention of Jurors during the night in cases when the trial extends beyond a single day.

2. It cannot be questioned that the measures adopted by the Session Judge of Cuddapah are most desirable, but without legal sanction for the detention of the Jurymen at night, in premises in or near the Court, I doubt whether their confinement will not be "wrongful," therefore "illegal," and beyond the powers of the Judge to enforce, save at his own personal risk and peril.

3. The Code of Criminal Procedure, Chapter 23, clearly does not directly give the authority; but rather from Section 330, it would appear to contemplate that, except when sitting, the members of the Jury are voluntary agents, having the power, voluntarily, "to absent themselves" during "the course of a trial." Further, where so carefully framed a law as the Criminal Procedure Code is silent on so important a point as the confinement of five or more men against their will, for one or more nights, in a public building under guard, it must be presumed (I would suggest) that the Legislature never intended Jurors in India, at present, to be confined at night, as, for obvious reasons, it is expedient they should be.

4. Under the circumstances, I would beg for a re-consideration of the orders in question, if they are meant to be followed in all Courts of the Presidency where the system of trial by Jury is established, and that the measures prescribed may be directly sanctioned by the law, before being put into execution.

No. 75. From the Agent to the Governor, Vinsagutam; to the Chief Secretary to Government, Fort Saint George, dated Vinsagutam, 17th October 1865, No. 324.

I have the honor to acknowledge the receipt of G. O., Judicial No. 1430 of 5th October, instant, in which the Governor in Council desires that the measures taken by the Session Judge of Cuddapah (as described in Mr. Child's letter, copy of which was attached to the foregoing G. O.) to prevent access to Jurymen during the progress of a trial, be generally adopted in all the Courts into which the system of Jurors has been introduced.

2. The Government are not, perhaps, aware that Chapters XXIII and XXV of the Code of Criminal Procedure are expressly devoted to the conduct of trials before the Court of Session by Jurors and Assessors. Mr. Child says that his custom at Cuddapah was this—"When the trial lasts more than one day, the Jury are not allowed to return to their homes, but are compelled to sleep in the Jury room." He thinks so highly of this precaution that were it neglected, he is prepared immediately to recommend that trial by Jury should cease; and he instances the isolation during a Criminal trial of a Jury in England.

3. Now it will be allowed, I suppose, that the framers of the Code of Criminal Procedure were perfectly familiar with the Criminal Procedure of the Courts in England, and as the Code nowhere contains any provision for legalising in India the established practice of the Courts in England in this matter, but on the contrary by implication prohibits it, the Government will no doubt see the expediency of recalling the order under notice. The spectacle of a Judge restraining and confining the Juries, apart from the authority given him by the Law, cannot for a moment be supposed to have entered the mind of the Governor in Council as a desirable proceeding.

4. The leading case given in Stephens' Blackstone Volume IV, page 431, for keeping the Jury together, when the trial runs to such a length that it cannot be concluded in one day, is that of William Stone, who was tried for high treason before the King's Bench, A. D. 1735. It is to be found in the 21st volume of Howell's State Trials; and if the remarks of Lord Kenyon, in adjourning the trial at 10 o'clock on the evening of the first day, be read in connection with the observations which fell from the Judges who presided at the trial of Horne Tooke, p. 128, et seq. of the same volume, it will be clear that any adjournment whatsoever of a criminal trial is opposed to the general rule of English practice. The Jury ought not to go out of the Court at all, and probably no jury did so for the first five centuries after the conquest, during the period in which a trial by jury was a trial by witnesses; *per juramentum vicinorum*. The practice of adjourning and of suffering the Jury to retire in the custody of sworn bailiffs to an adjoining tavern where accommodations are prepared for them, arose from the extraordinary length to which cases have grown in modern times, and "necessity justified what it compelled."

5. We see, therefore, that the immovability of the Jury from the beginning to the end of the trial is a fundamental principle of the English system. The Judge no less than the Jury is compelled to stay. "If the jury," says Horne Tooke in his preliminary address to the Court, "go unshaved and unshirted, so must the Judge;" and it was only the frequent miscarriages of justice incidental to such a state of things that brought in the present modifications.

6. But in the Code of Criminal Procedure (and no general rule of practice inconsistent with its provisions is valid—vide Section 443), it is expressly laid down (Sections 377 and 378) that the Court of Session may adjourn the trial from time to time, as in its discretion may be necessary, and that the Jury shall be required not to sleep in the Jury room, but to attend at every subsequent sitting. It is obvious, therefore, that in the intervals between one sitting and another, the Jury are free to go anywhere they please, and while the Law remains as it is (and I for one see many reasons, which it is not now necessary to obtrude, for departing in the strongest manner any change in this direction), I feel it impossible to comply with the order of Government elicited by Mr. Child's reference; not to say that all general rules for regulating the practice and proceedings of any Criminal Court must be made and issued by the High Court only (Section 443, Code of Criminal Procedure).

7. Under these circumstances, I respectfully suggest that the Proceedings of Government in this matter may be recalled from circulation, or if the Government

should be of opinion that I have failed in showing that the course directed in their order is unauthorized by Law, and the promulgation of the Rule by Government equally so, that they will be pleased to refer these questions for the consideration of their Legal Advisers.

No. 76. Ompex runnor, 10th November 1865, No. 1595.

In their letters recorded above, the Session Judge of Tanjore and the Agent in Vinagiputnam submit their doubts as to the legality of the course which the Government directed to be adopted in their Order of the 5th ultimo, No. 1430, with the view of preventing access to Jurymen during the progress of trial of Session cases.

2. It is observed that the matter to which these papers relate has been recently referred for the opinion of the Honorable the Judges of the High Court; and, pending the result of that reference, the Governor in Council resolves to inform the several Session Judges to whom the order quoted above was communicated, that the arrangements sanctioned therein may, for the present, be considered as suspended.

(True Extract).

*Chief Secretary.*

|                                   |
|-----------------------------------|
| To the Session Judge of Cuddapah. |
| " " of Chittoor.                  |
| " " of Cuddalore.                 |
| " " of Tanjore.                   |
| " " of Rajahmundry.               |
| " " of Tanjore.                   |
| " Agent in Vinagiputnam.          |

When the Supremacy Court is the only one to the honor to me there is express  
warrant in the Act for so acting in the interest of the country, and  
in the land - I don't put persons in a hurry, would be minded by  
declaiming on the order, for amidst it only and not compel us to  
the 5th day - for example - persons to do that when it is done

1 x3  
A. 702  
San Jose  
13th Octob. 1875  
From  
J. W. Bird & Equine  
Superior Judge of  
San Jose  
The Hon. J. Arthur Hunt  
Chief Secretary to Govt  
Fort Saint George

Cor, Viewing the order of  
Government No. 1431, of the 6th  
Octob. 1875, as mandatory  
and not permissive, I have  
thereon respectfully submitted  
no doubt & entertain as to  
the legality of the procedure,  
therein directed, with reference  
to the detention of juries during  
the night in cases when the  
trial extends beyond a  
single day.

2. It cannot be questioned  
that the measures adopted  
by the Superior Judge of San Jose  
are most desirable, but  
without

without legal sanction for  
the detention of the Jurymen,  
at night, in premises in, or  
near, the Court, I doubt  
whether their confinement  
will not be "unlawful",  
therefore "illegal", and beyond  
the powers of the Judge to  
enforce, save at his own  
personal risk and peril.

3 The Code of Criminal  
Procedure, Chapter 23, clearly  
does not, directly, give the  
authority, but rather from  
Section 330, it would appear  
to contemplate that, except  
when sitting, the members  
of the Jury are voluntary  
agents, having the power,  
voluntarily, to absent them-  
selves during the course  
of a Trial. Further, where  
so carefully framed a Code  
as the Criminal Procedure  
Code is silent on so important  
a point as the confinement

does not sanction - The Mr. Phillips suggests, at the end of his  
note, would be some by law must be difficultly, but would be correct when  
taken into account the C.P. Code, S 322 of the Code, in power,  
the fact is under that the trial of all offences is of any particular class  
by the jury, that is by law - but not that some offences shall be tried  
by jury and others not - I think this is true by the law.

of 6 or more men, against  
their will, for one or more  
nights, in a public building  
under guard, it must be  
prevented (I would suggest)  
that the Legislature never  
intended Juries in India,  
at present, to be confined  
at night, as for obvious  
reasons, it is expedient  
they should be.

Under the circumstances,  
I would beg for a reconsidera-  
tion of the orders in question  
if they are meant to be fol-  
lowed in all Courts of the  
Presidency where the system  
of Trial by Jury is established,  
and that the measures pro-  
posed may be directly  
sanctioned by the Law,  
before being put into  
execution.

I have the honor to be,  
Sir,  
Your most obedient  
servant,  
E. M. Kirk  
Circuit Judge



submitted to a jury. A smaller case shall  
be tried by one. The fact is, that the framers of  
the Code have not provided for the possibility of a  
trial lasting for more than a day, and in making  
our own arrangements for securing justice we may  
be going beyond the present law. But I feel  
sure that there is a great deal of sympathy  
in the predicaments predicted by  
both Mr. Merd & Mr. Carmichael.

As, however, the Sup: Court in their com: to this  
fact have accepted as correct the position taken  
by the Gov: of Bengal, that legislation is required  
to keep from "fire & candle" the members of our  
juries as now framed, it may perhaps be  
better to sanction no new arrangements of the  
Cuddapa kind before we learn the result of  
the reforms usually made to the High Court  
and intimate to the Secy of the Govt the order  
of 5 cents, 10 15 20 cents. (Two last about)  
that the arrangements of the order mentioned  
will for the present be suspended. -

I am nevertheless strongly of opinion that  
by far the better course that should be  
taken is to amend the order of 1850. It is a small  
amendment that by law in a few districts,  
for I consider there cannot be the shadow  
about that if in England, the violation of a jury  
during a trial be thought necessary, it is nearly  
impossible to isolate him who in this country

of trying, trying & trying may be so  
employed - where isolation cannot be  
secured there might be no trial by jury.

31 Oct. 63

W.D.

It seems to me doubtful whether the ad-  
justments started in Section 377 & 378  
were more than the adjustments such as obtaining  
a day of a trial, though of course  
with leave to make on their side in the Sections  
the adjustments may be of a day, a month or a  
year. It is generally known that a case is not  
committed to a High Court for trial until  
it is complete in all respects both of papers &  
process & then for the defence - I am not  
satisfied also that the High Court would look  
upon the papers & papers of jury men sitting in  
a jury box as a matter of course that they  
could be called on to make a rule according  
to the power given them in Section 443 and  
Carmichael has a point. W.D.

Judicial Department

PROCEEDINGS of the MADRAS GOVERNMENT.

Read the following letter.

From the session judge of Tanjore No. 13 October 1865 No 792  
 "Agent in Tirunelveli" 17-10-1865

Order No. 10 November 1865 No 595

In this letter, recorded above the session judge of Tanjore and the agent in Tirunelveli submit their doubts as to the legality of the course which the Government directed to be adopted in this Order of the 8<sup>th</sup> ultimo No 502, with the view of preventing access to juries during the progress of trial of session cases.

It is shown that the matter to which these papers relate has been recently referred for the opinion of the Honble the Judges of the High Court, and pending the result of that reference, the Government in Council wishes to inform the several session judges to whom the Order quoted above

W.D.

Order No. 10  
 November 1865  
 No 595  
 In this letter, recorded above the session judge of Tanjore and the agent in Tirunelveli submit their doubts as to the legality of the course which the Government directed to be adopted in this Order of the 8<sup>th</sup> ultimo No 502, with the view of preventing access to juries during the progress of trial of session cases.

Nov 27/5