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Confidential

[Despatch Abstract.]

High Court Sessions – Trial by Jury – Soldiers of the 18th Hussars for murderous assault Committed at Bangalore – Letter to Government of India

BACK PAPERS.

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Proceedings of the Madras Government, Judicial Department,
3rd February 1875.

High Court—Sessions.

No. 42. Read the following letter from the Hon. H. S. CUNNINGHAM, Advocate-General, to the Hon. D. F. CARMICHAEL, Acting Chief Secretary to Government, Fort Saint George, dated Madras, 1st June 1874:—

I have the honor to submit a report on the trial at the recent Sessions of the High Court of five soldiers, of the 18th Hussars, for a murderous assault committed at Bangalore on the evening of December 25th last, which resulted in the death of two persons and the infliction of serious injuries on several others.

2. The jury before whom the case was first tried were unable to agree on a verdict, and were, after being locked up for some hours and on their announcement that there was no prospect of their coming to an unanimous opinion, discharged by the Judge. A new trial was then granted and the proceedings commenced *de novo.*

3. The material facts of the case were as follows:—On the afternoon of Christmas day the troop F of the 18th Hussars to which four of the prisoners—Weatherspoon, Shean, Atkins, and Lawler—belonged gave a troop dinner. It lasted some hours; large quantities of beer and spirits were consumed and drunkenness was very general.

4. In the course of the afternoon a private named Young, who was among the diners, sent out a dhobee with a rupee for some beer; and on the man's not returning, Young started to see after him. He got near a dhobees' village, about 1100 yards from the barracks, and was then attacked by Natives, who speedily reduced him to insensibility. A soldier named Fitzpatrick started in search of him, found him about half-way to the dhobees' village, beaten, bleeding, insensible, and brought him in this condition into the barrack-room of the 18th Hussars at about 7 o'clock P.M.

5. The men gathered round their bleeding comrade; great indignation was expressed at the rough usage which he had experienced; and threats of vengeance on the dhobees were uttered.

6. While this was going on the second prisoner was proved to have been within twenty yards of Young's bed, and both he and the prisoners, Weatherspoon, Lawler, and Atkins, were seen in the barrack-room about this time, though there is no evidence of their having been among the men who gathered round Young's bed, or that they uttered or even heard the threats of vengeance on his assailants.

7. About half an hour after Young was brought in, Weatherspoon was seen to go to his bed, take his sword from its scabbard, and with it in his hand to leave the barrack-room, either in company with Shean, who also had a naked sword in his hand, or so nearly simultaneously as to leave little doubt of concerted action. Lawler was also seen to go out a few minutes afterwards, with, as the witness believed, a stick in his hand. Atkins was seen by the same witness about the same time, but as to whether he saw him go out or not the witness gave a confused and apparently contradictory account.

8. The evidence as to Weatherspoon, Shean, and Lawler having gone out, the two former armed with swords and the latter with a stick, was given by a lad named Thomson, the son of the Serjeant-Major of the regiment, and for the last few months a private in the regiment. He spoke with great reluctance, with

obvious pain, and I think that no one who heard him can have entertained the slightest doubt that he was telling the truth.

9. Within a few minutes of this time there commenced a series of assaults on persons in the dhobees' village and in the Artillery horse-keepers' lines, which lay between the 18th Hussars' barracks and the dhobees' village, close to the latter. One man was cut down, slashed and hacked in such fashion that he died a few days after: an old woman of about seventy was cut, beaten, and left with, among other serious injuries, a badly broken arm: others received cuts of a less serious character. The most serious assault, however, took place in the house of a man named Venkiah; it stood first on the road for a man coming from the Hussar barracks through the Artillery horse-keepers' lines. A very determined attack was made on the house: two soldiers forced open the door, entered with swords, cut down Venkiah with a blow, which left him insensible, and inflicted mortal wounds on his mother, an aged woman, of which she expired very shortly.

10. There was a concurrence of testimony, which the cross-examination in no material degree shook, that these attacks took place on the night in question about 7½ o'clock, that they were made by men dressed in white, two of whom were armed with swords, and whom the witnesses considered from their appearance to be Hussars. The different witnesses spoke to seeing different numbers, some two, some three, another four, another five: this, of course, was highly probable from the nature of the proceeding.

11. About 25 minutes past 8 on the same evening Serjeant-Major Saunders and Serjeant Brady of the Royal Artillery were proceeding from the Artillery canteen, when they were summoned in the direction of the dhobees' village. At about 500 yards from the dhobees' village, and close to one of the routes from the dhobees' village to the Hussar barracks, they met a party of men dressed in white and apparently Hussars. The accounts given by Saunders and Brady varied in some minute and unimportant particulars; but there is not the slightest doubt that they were telling substantially the truth. Saunders asked the first of the party, who had a naked sword in his hand, what he was doing; to which the man replied that he was out for a walk, and ran away, leaving his sword in Saunders' hands. This proved to be Shean's sword. Brady took the second of the party prisoner: he too had a sword in his hand, and turned out to be Weatherspoon; the rest of the party, who numbered from four to six, and who were dressed in white, then made off.

12. Brady then took Weatherspoon to the Artillery guard-room: his sword, when Brady examined it a few minutes later, was bent, scratched, and bloody: the bend was so considerable that it would not without force go into its scabbard. The sword which Saunders had taken, *i.e.*, Shean's, was also bloody; but as he had taken it into a house where some of the wounded people lay, it is just possible (though he does not allow that this was the case), that the blood may not have been on it when he took it. There is no doubt, however, as to the condition of Weatherspoon's sword when taken.

13. The next piece of evidence in the case is a conversation which is spoken to by the lad Thomson and a private named Price as having taken place between Atkins and himself, at about 8½ that night, *i.e.*, almost immediately after the arrest of Weatherspoon and the flight of his companion. The account given by Price is that Atkins talked to him as he lay on his bed, and said that "he had been out and beaten some blacks; that Shean had left his guard, came to the bungalow, changed his jacket, put on a white jacket, and taken a sword blade with them; that they had been to the dhobees' village."

14. Thomson's account of what he heard Atkins say is to this effect:—"Atkins told Price that Weatherspoon had killed a woman; he said he had thrown his sword down to an Artillery Serjeant; that he had tapped the Artillery Serjeant on the shoulder, and asked him if he could run." This conversation took place within a very few minutes of Weatherspoon's arrest, and was of course of the utmost importance as bringing Atkins into connection with Weatherspoon and Shean.

15. The fact that some such conversation took place is rendered more probable by the fact that portions of Atkins' statement were repeated the same night to another witness. Fitzpatrick states that Atkins told him that there had been "a row at the dhobees' village or grass-cutters' lines; that he had heard that there had been an old woman killed, and that Weatherspoon was in the Artillery guard-room."

16. The men on being questioned by their officers, and Weatherspoon especially having been urged to explain the serious fact of his having been found with a sword in his hands, made the following statements:—

Weatherspoon.—"On Christmas night, about 7-30, I heard that Private Young had been ill-used by Natives near the dhobees' tank, and that he was lying in a nullah. I, Atkins, Shean, and Lawler went to look for him. We found him senseless and smothered in blood, and left him in a nullah. There were a number of Natives near him with long bamboo sticks, who threw bricks at us. We then distributed ourselves, and on my way back I picked up the sword which I gave to the Serjeant-Major of Artillery."

17. Before the Magistrate the following statements were made:—Atkins at first said that he was not there and knew nothing about it. On being told that there was no use his denying, he said: "On Christmas night Young was brought to barrack-room and washed; he was covered with blood. The other men went down. I don't know their names; I went down afterwards and met them there; by 'there' I mean a place by the grass-cutters' lines in the corner. I saw a number of Natives throwing stones at the other men. I meant to say I had heard that the men had come down, not that I saw them. I did not know who they were."

Lawler also denied at first. On being told there was no use, he said, "The men of my troop heard that Young was down by dhobees' tank, and had been very much ill-treated. We then went down. By we, I mean myself, Atkins, Shean, Weatherspoon, and a man of D troop, I think Scott. We all went down together; I had a cane, but two swords were taken, one by Weatherspoon and the other by Atkins or Shean; I am not sure by whom. I was dressed in blue overalls and white jacket, and Shean in same manner. We did not see Young on our way down, and I did not know whether he was in Bangalore when I left. When we got near dhobees' tank, we found a number of Natives, who attacked us with sticks and stones."

Scott said, "I have no recollection of having been down at dhobees' tank with the four other prisoners." In reply to a remark of the officer interrogating him, "If the others say you were there, is it a lie? He said, "If they say I was there, I might have been there, but I don't recollect. I was in F troop dining with Atkins and Barton earlier in the evening. I have no recollection of being there afterwards. I was very drunk on Christmas evening."

18*a*. These statements were at a later stage repeated before the Magistrate who was inquiring into the case.

18. The evidence and statements above recorded would appear to leave little room for reasonable doubt as to the prisoner's guilt. I now proceed to notice the topics urged for the defence.

19. As to the statements made to the officers and also before the Magistrate, it was contended that they were inadmissible under Section 24 of the Evidence Act, as having been obtained by an "inducement, threat, or promise" within the meaning of that Section. This view was adopted by the Judge in the second trial, though not on the first, on the ground that considerable pressure had been put on the men by their officers; that the relative position of an officer and private rendered it unlikely that any thing which passed between them could be spontaneous or voluntary; that pressure had been afterwards used by the Police to induce the statements made before the Magistrate. Against this view was the emphatic statement of the officers, that they had used no pressure; that they had warned the men not to criminate themselves; and the Colonel's evidence, that he had expressly told the men that they might speak or not as they chose.

20. The learned Judge's direction appears to me to have been right on the first occasion and wrong on the second. There was, as I view the evidence, no "inducement, threat, or promise" within the meaning of Section 24. There had certainly been in the case of Weatherspoon pressure put upon him to explain facts that raised a most serious presumption against him, viz., his being found with a bloody sword within two or three minutes' run of a series of assaults committed just before with a cutting instrument by a person of the same appearance as himself; and he had been told that, unless he could explain them, his position was a serious one; and this advice may have led him to make his statement, which is really no confession at all, but an explanation. But this seems to me something altogether different from the "confessions induced by inducement, threat, or promise" contemplated in Section 24. To say to a man, "The facts look black against you. Can you offer any explanation?" seems to me perfectly distinct from saying, "I recommend you to *confess* in order to improve your position."

21. The ruling of the learned Judge on this point made it necessary to drop the case against Scott, as there was no evidence against him except his own and his companions' *confessions*.

22. For the same reason, at a later stage, I also abandoned the case against Lawler. The only direct evidence against him, besides the confessions, was the fact of his having been seen to go out shortly after Weatherspoon and Shean; this was evidently insufficient ground upon which to go to the jury.

23. The acquittal of these two men made it necessary to give up the charge of rioting, five persons being necessary for the commission of that offence, and the evidence as to numbers not being sufficiently strong, independent of the confessions.

24. As to Shean, the topic principally relied on for the defence was the fact that he was on guard that night, and so could not and, as his comrades swore, as a fact, *did* not leave the guard-room on the evening in question. It was proved pretty clearly that he mounted guard at 8½, *i.e.*, about five minutes after Weatherspoon's arrest; but this was quite reconcileable with his having been one of the party; and Atkins' statement to Price that it was *he* who gave up Shean's sword, seems to favor the idea that Shean, having to be back on guard at 8½ (for which his sword would be unnecessary, and would consequently arouse suspicion), gave Atkins the sword and went himself to the guard-room. The *alibi* attempted to be set up for Shean was supported by evidence of a very contradictory and unsubstantial character, and certainly gave me and, I think, the jury no impression of its truthfulness. It was proved beyond doubt that so far as his official superiors were concerned Shean might have been away quite long enough to take part in the fray without their being any the wiser.

25. Another topic urged for the defence was that no blood was proved to have been found on Weatherspoon's clothes, and only an infinitesimally small spot on Shean's. This, of course, but for the fact of Weatherspoon being actually taken sword in hand, would have been a valuable piece of evidence in his favor.

26. Another matter urged on the prisoners' behalf was that other persons besides the prisoners might have committed the offence; that there was evidence to show that other persons were seen in the neighbourhood, and that there was evidence from which it might be inferred that the attack on Venkiah's house took place later than 8½, and therefore after Weatherspoon was arrested. These topics do not call for serious consideration. They are as mere feathers in the balance compared with the weighty and conclusive evidence of the prisoners' guilt.

27. I now proceed to point out the causes which, in my opinion, served to produce a result which the Government will, I fear, consider a grave and mischievous miscarriage of justice.

28. I have already indicated that the learned Judge's ruling, excluding the statements of the men made before the Colonel, and afterwards before the Magistrate, made the case hopeless as against two of the prisoners; it is needless to point out that it rendered it infinitely weaker against the rest.

29. In the next place the learned Judge ruled that Atkins' statement to Price was admissible only as against himself, and was not admissible under Section 10 of the Evidence Act against the other conspirators, on the ground that the conspiracy *had ended when the statement was made.* No warrant whatever, in my opinion, is found in the Section for such a restriction of its import, and the language of the illustration seems to me conclusively to show that no such restriction was intended. The English law on the subject is, that in order for the act or statement of a conspirator to be admissible against other conspirators, the act or statement must have been "*in pursuance*" of the object of the conspiracy. This restriction, which often excludes most valuable evidence, it was considered desirable to remove in the Indian Evidence Act, and this was done by substituting for the words "in

pursuance of" the words "in reference to" the common object of the conspiracy. But for the learned Judge's ruling I should not entertain the slightest doubt on the points, and even now I cannot bring myself to think that he is right. This case, however, having proved that the meaning of the Section is doubtful, the matter ought, I think, to be brought to the notice of the Government of India in the Legislative Department. The effect of the learned Judge's ruling on this point was to shut out the valuable corroborative evidence of Atkins as to Shean and Weatherspoon.

30. Another point on which I feel a strong opinion that the learned Judge put an erroneous interpretation of the Evidence Act, is as to Section 30, viz., in ruling that a "confession," in order to fall within the scope of the Section, must be a confession before a Magistrate taken in compliance with the formalities prescribed by the Criminal Procedure Code. The context makes it, in my opinion, highly improbable that this should be the meaning, and the illustration makes it certain that it is not. This point also ought, I think, to be referred to the Government of India for such legislative changes as it may seem to suggest as necessary.

31. Another matter in which I venture to think that the learned Judge was wrong is in excluding evidence of the statements made in the barrack-room about Young, the vows of vengeance, &c., on the ground that it was not proved that the prisoners were present, though one of them at least was within twenty yards, four of them were shown to have been in the barrack about the time, and three of them to have left the barrack-room shortly afterwards. In my opinion these statements were admissible (as they were, of course, in the highest degree material) under Section 6 as being so closely connected with the facts under inquiry as to have formed part of the same transaction; under Section 7 as supplying occasion or constituting the state of things under which a fact in issue happened; under Section 9 as explaining and introducing the prisoners' conduct and showing the relation of the parties to it. The effect of this ruling was to shut out almost all evidence as to the state of feeling existing in the barrack-room at the very time when the men started, which supplied a natural motive, and would have fully explained their subsequent proceedings.

32. Another point as to which I was unable to obtain the learned Judge's concurrence at the first trial, though he reluctantly adopted my view in the second, was as to whether the prisoners' conduct, if proved, admitted of being regarded as culpable homicide. The view which I endeavoured, and till the second trial continued unsuccessfully to urge upon the Court was this. The first and obvious view of the case is that there was intention to kill, or to inflict injuries likely to result in death, and in that case the offence was murder; but there is another aspect of the case, viz., that it was a brutal, thoughtless riot by men who were using their swords recklessly, slashing and cutting about in the dark, but with no intention to cause death or deadly wounds. If the jury chose, therefore, to leave the question of *intention* aside, and to look only to the knowledge with which the act was done, then it becomes a question of the amount of knowledge with which they acted. If, intention apart, the act was done merely with the knowledge that it was likely to cause death, the offence is culpable homicide under Section 299; if it was done with the knowledge that it was so imminently dangerous that it must in all probability cause death or deadly injury, then the offence is murder under Section 300, § 4. This is the view of the law propounded by the late Chief Justice of Bengal (1. R. C. C. R.), and it was, of course, of great importance to the prosecution as enabling the jury, if their view of the case was that there was no murderous intention, to return a verdict for the lesser offence. The fact, however, that the law is so obscurely expressed, that on the first occasion the Judge refused to put this view of it to the jury, and did so at the second trial, only on my strong and repeated representation and the high authority of Sir Barnes Peacock, shows, I think, that these Sections require amendment or elucidation.

33. All these causes may have rendered a conviction more difficult to obtain, even with a case as clear as the one in question; but the main cause, I have no doubt, is the deep, settled, immovable determination of juries in this country not to convict in capital cases where the case lies between an European assailant on the one hand and a Native victim on the other. It was impossible not to feel that the warm sympathy of the great mass of the community was with the European prisoners, and the earnest wish that, be the rights of the case what they might, an acquittal might be obtained. We learnt before the trial that several of the jurors had openly expressed their determination to acquit, and I challenged them in consequence; but as the trial went on we heard that on the jury, as it was, there were several persons whose presence rendered every result but one impossible, and the whole of the proceedings because accordingly a solemn farce. The depth of this feeling, its almost universal prevalence, the complete oblivion of fair play, justice, and humanity which sets in the moment the prejudice of Englishmen is aroused on behalf of an English wrong-doer as against the Native inhabitants of the country, is a truth to which, from some years' experience as a Crown officer, I can give my testimony, and it is my duty to warn the Government, that so long as the present system of trial is maintained, the attempt to visit offences of this character with punishment will invariably end in a disgraceful miscarriage. Again and again have I seen juries, with evidence of guilt as clear as the sun at noonday before them, unhesitatingly, shamelessly, almost triumphantly acquit when the interests of their countrymen were at stake. That they will continue to do so is certain, and the only question would appear to be whether a tribunal which results in failures of justice so complete, so politically dangerous, so disgraceful to our national reputation, ought any longer to be maintained.

34. As it is, the trial by jury is confined to a small section of the community and a small class of cases. And who are these privileged few? The highest, noblest, wealthiest, and most influential Native prince or gentleman in the empire cannot claim it. An escaped felon from Australia, the English loafer, with perhaps a dozen convictions already recorded against him, can. It is a class distinction of the most odious description, maintained to gratify the pride of the English, and maintained with the knowledge that, whenever prejudice is aroused, a miscarriage of justice is the certain result. Can we doubt that every Native in the Presidency viewed the result of the late trial with deep indignation, and that they should regard our protestations of equality as a polite fiction so long as so gross an inequality as this is allowed to continue?

35. To the criminal or criminally inclined classes it is, of course, a direct incentive to crime. Every European soldier in India is now assured that if, in

some moment of drunken ferocity, he perpetrates a series of assaults as cruel, dastardly, and murderous as those in question, he has nothing to do but to put himself into the hands of an Advocate sufficiently noisy and unscrupulous to ensure an acquittal amid the plaudits of his countrymen.

36. When the late Criminal Procedure Code was passed the exemption of Europeans from the ordinary tribunals of the country was very much curtailed, and the jurisdiction of the Session Judge and the Magistrate over European British subjects largely and most usefully increased. But the more enlightened Natives petitioned the Viceroy on the glaring irregularities which still existed in the administration of criminal justice as affecting Europeans and Natives. I do not know what view the Government took of the matter, but supposing His Excellency's view to be on the whole favorable to the views expressed in the petition, I would venture to suggest whether, in the new Bill to regulate the Criminal Procedure of the High Courts, the Governor-General in Council might not be invested with the same power as the local Government has, as to ordinary trials, viz., to direct whether trials shall be by jury or not. The Bill might provide that, if they were not by jury, they might be by a full Bench. No one can pretend that such a tribunal would not be in every way more qualified to do justice than a jury; matters of law would be adjudicated with all the authority of the Bench instead of the impressions of a single Judge, and we should know that, whatever conclusion was arrived at, all parties concerned had been alike aiming at a pure administration of justice. I venture most respectfully to lay this suggestion before His Excellency. My opinion on the subject has been formed slowly by the experience of a large number of prosecutions, and I believe that the change would be of immense importance in convincing the Native community of our real desire that justice should be done, and acts of violence, by and on whomsoever committed, be punished as they deserve.

No. 43. Minute by the Hon. W. ROBINSON, C.S.I., dated 9th June 1874.

I think that the Advocate-General's letter should be communicated to His Excellency the Commander-in-Chief, in hopes that these murderers may be removed from Her Majesty's Service. Irrespective of the terrible thought which attaches to their position, I think that the spirit manifested in Bangalore amongst the class to which they belong claims some such measure at the hands of Government.

The letter should clearly be communicated to the Government of India and Secretary of State, without delay. To the latter with reference to the political bearings of this grave miscarriage of justice—to the former with reference to the Judge's interpretation of the law.

The protest (A D. 1859) of the Government in the case of Smith deserves imitation in this case for the assurance of our Native fellow-subjects

W. ROBINSON.

No. 44. Minute by the Right Hon. the PRESIDENT, dated 9th June 1874.

I infer from what is stated in these papers that, in a case of murderous assault by a European upon a Native, the law is now such, that the European is tried by a jury, of which the majority invariably consists of his own countrymen; whereas (except where the offence is committed in the Presidency Town) in case of a similar assault by a Native upon a European, the Native is tried, not by a jury at all, but by a Judge without one. This arrangement would be unjust, and therefore reprehensible, even if the jury, of which the majority is European, could be relied on to act to the best of its judgment in such cases: for it would be impossible, even on that supposition, that the sympathy of race should not more or less affect their decisions. In the actual state of the case it appears to be nothing less than a flagrant iniquity. For, as a matter of fact, it seems to be perfectly well known that no jury so constituted will convict a European of the murder of a Native, however strong may be the evidence against him; and, assuming that this is the case, the system amounts, in effect, to a declaration on the part of the English Government of India, that whereas a Native who murders an Englishman will be punished, an Englishman may murder a Native with impunity. That this should have been hitherto tolerated by a Government which has fair claims to be considered just and humane as well as enlightened, seems inexplicable; that it ought to be tolerated no longer is a self-evident proposition. I am rather doubtful whether the precise remedy suggested by the Advocate-General is the best that could be applied: but it would certainly be one cure for the evil, and should be brought under the consideration of the Government of India.

I would send the Advocate-General's letter to His Excellency the Commander-in-Chief, in case it should be possible to remove these men from the service. There seems to be no doubt whatever of their guilt.

HOBART.

No. 45. Minute by His Exc. the COMMANDER-IN-CHIEF, dated 9th June 1874.

We must, I think, proceed with great caution in recommending any modification of the law of trial by jury. I shall be prepared to deal with the case of the men of the 18th when the papers are referred to me in the Adjutant-General's Department.

F. P. HAINES.

No. 46. Minute by the Hon. J. D. SIM, C.S.I., dated 10th June 1874.

The legal doubts mentioned by the Advocate-General, Mr. Cunningham, should be duly made known to the Supreme Government.

2. There certainly has been, to *my* apprehension, a failure of justice in this case, but I cannot concur with the Advocate-General in attributing the acquittal of the prisoners to dereliction of duty on the part of the jury. The jury empanelled to try the case was an excellent one, it included four Native members, and I cannot see the slightest ground for believing that the verdict—erroneous though *I* think it—was other than honest. The evidence had certain weak points, of which the able counsel for the defence made the most, and the Advocate-General admits that the rulings of the Judge materially weakened his case. I see no occasion to seek further for reasons for the acquittal, and I decline to brand the very respectable jury that tried the case as perjurers at Mr. Cunningham's instance. I likewise dissent altogether, so far as Madras at least is concerned, from Mr. Cunningham's assertion that there is a "deep, settled, immovable determination of juries * * * not to convict in capital cases, where the case lies between an European assailant on the one hand and a Native victim on the other." I regard this as an unfounded

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and unwarrantable aspersion. I do not hesitate to declare that such feelings have no longer any existence in this Presidency.

3. Mr. Cunningham's description of trial by jury as an odious class privilege is misleading, to say the least of it. In every case in which an European is so tried at Madras, a Native is also so tried. In the Provinces it is otherwise, but from no fault of ours. The law requires that *all* trials before Courts of Sessions shall be by assessors or by jury. We have tried, unfortunately without success, to introduce the jury system, and, having failed, we have fallen back on the next best measure, the system of Native assessors. The time is not distant, I hope, when we may procure a sufficient number of qualified and intrepid Native gentlemen to enable us to introduce the jury system universally, and so to extend to all classes of Her Majesty's subjects in India the privilege which is now necessarily enjoyed by one class only. I am strongly in favor of trial by jury in all grave cases, and instead of withdrawing the Englishman's privilege—all over the world—of such a trial, I desire to see it extended to Her Majesty's Native subjects as soon as possible. I altogether repudiate the Advocate-General's assertion that Englishmen desire the jury system "maintained with the knowledge that whenever prejudice is aroused a miscarriage of justice is the result." I consider this to be a simple mis-statement of fact, and a grievous misconception of motives. The policy I advocate is to raise the Native to the status and privileges of Englishmen—not to reduce the Englishman to the level of the Native.

4. With reference to the Advocate-General's statement of Native feeling on the subject of this trial, I may state that, excepting "*Native Public Opinion*," no organ of the Natives has made any allusion whatever to it, and private sources of information satisfy me that the Native community have never thought of regarding it in the view of our Advocate-General. In fact, the common report is that the Native jurors were most emphatically in favor of acquittal; and, knowing the Native distrust of circumstantial evidence, and misappreciation of constructive crime, I can quite understand this.

5. Differing from Mr. Cunningham, I believe that the Native community of this Presidency are thoroughly convinced "of our real desire that justice should be done, and acts of violence, by whomsoever and on whomsoever committed, be punished as they deserve." They know us far too well to believe for an instant that we have any other desire than to do equal justice, or that a jury—on which their own countrymen sit with equal rights and privileges—is perjured and prejudiced whenever it acquits an European of a murderous assault on a Native.

J. D. SIM.

No. 47. ORDER THEREON, 3rd February 1875, No. 230.

Resolved that the Advocate-General's letter be communicated to His Excellency the Commander-in-Chief, with an expression of the opinion of the Governor in Council that the offenders should be removed, if possible, from the service.

2. Resolved that the following letter be despatched to the Government of India, Legislative Department.

(True Extract.)

Acting Chief Secretary.

High Court - Sessions

High Court House, Madras
1st June 1874

From
The Honorable H. S. Cunningham
Advocate General.

To
The Honorable D. F. Carmichael
Chief Secretary to Government.

Sir,

I have the honor to submit a report on the trial at the recent Sessions of the High Court of 5 Soldiers, of the 18th Hussars, for a murderous assault committed at Bangalore on the evening of December 25th last, which resulted in the death of two persons and the infliction of serious injuries on ~~of~~ several others.

2. The Jury before whom the case was first tried were unable to agree on a verdict, and were, after being locked up for some hours and on their announcement that there was no prospect of their coming to an unanimous opinion, discharged by the Judge. A new trial was then granted and the proceedings commenced de novo.

3. The material facts of the case were as follows. On the afternoon of Christmas Day the troop F of the 18th Hussars to which 4 of the prisoners Weatherspoon,

Shean, Atkins, and Lawler, belonged gave a Troop Dinner. It lasted some hours, large quantities of beer and spirits were consumed and drunkenness was very general.

4. In the Course of the afternoon a private named Young, who was among the diners, sent out a Dhobee with a rupee for some beer; and on the man's not returning, Young started to see after him. He got near a Dhobee Village about 1100 yards from the Barracks, and was then attacked by natives, who speedily reduced him to insensibility. A Soldier named Fitzpatrick started in search of him, found him about half way to the Dhobee Village, beaten, bleeding, insensible and brought him in this condition into the Barrack room of the 18th Hussars at about 7 O'clock P.M.

5. The men gathered round their bleeding comrade, great indignation was expressed at the rough usage which he had experienced; and threats of vengeance on the Dhobees were uttered.

6. While this was going on the 2nd prisoner was proved to have been within 20 yards of Young's bed,

and

and both he and the prisoners, Weatherspoon Lawler and Atkins, were seen in the barrack room about this time, though there is no evidence of their having been among the men who gathered round Young's bed or that they uttered or even heard the threats of vengeance on his assailants.

v from 31

7. About half an hour after Young was brought in, Weatherspoon was seen to go to his bed, take his sword from its scabbard, and with it in his hand to leave the barrack room, either in Company with Shean, who also had a naked sword in his hand, or so nearly simultaneously as to leave little doubt of concerted action. Lawler was also seen to go out a few minutes afterwards, with, as the witness believed, a stick in his hand. Atkins was seen by the same witness about the same time, but as to whether he saw him go out or not the witness gave a confused and apparently contradictory account.

8. The evidence as to Weatherspoon Shean and Lawler having gone out, the two former armed with swords and the latter with a stick was given by a lad named Thomson, the son of the Serjeant Major of the Regiment and for the last few months a private

in the Regiment. He spoke with great reluctance, with obvious pain and I think that no one who heard him can have entertained the slightest doubt that he was telling the truth.–

9. Within a few minutes of this time there commenced a series of assaults on persons in the Dhobee Village and in the artillery Horse Keepers' Lines, which lay between the 18th Hussars' barracks and the Dhobees' Village close to the latter. One man was cut down, slashed and hacked in such fashion that he died a few days after: an old woman of about 70 was cut, beaten and left with, among other serious injuries, a badly broken arm: others received cuts of a less serious character: the most serious assault, however, took place in the house of a man named Venkiah; it stood first on the road for a man coming from the Hussar Barracks through the artillery Horsekeepers Lines; a very determined attack was made on the house: two soldiers forced open the door, entered with swords, cut down Venkiah with a blow which left him insensible, and inflicted mortal wounds on his mother, an aged woman, of which she

expired

expired very shortly.–

10. There was a concurrence of testimony, which the cross examination in no material degree shook, that these attacks took place on the night in question about 7½ o'clock, that they were made by men dressed in white, two of whom were armed with swords, and whom the witnesses considered from their appearance to be Hussars. The different witnesses spoke to seeing different numbers, some two, some three, another four, another five: this, of course, was highly probable from the nature of the proceeding.

11 About 25 minutes past 8 on the same evening Serjeant Major Saunders and Serjeant Brady of the Royal artillery were proceeding from the artillery canteen, when they were summoned in the direction of the Dhobees' Village. At about 500 yards from the Dhobees' village, and close to one of the routes from the Dhobee Village to the Hussar Barracks they met a party of men, dressed in white and apparently Hussars. The accounts given by Saunders and Brady varied in some minute and unimportant particulars; but there is not the slightest doubt

that they were telling substantially the truth. Saunders asked the first of the party, who had a naked sword in his hand, what he was doing; to which the man replied that he was out for a walk, and ran away, leaving his sword in Saunders's hands. This proved to be Shean's sword. Brady took the 2nd of the party prisoner: he too had a sword in his hand, and turned out to be Weatherspoon; the rest of the party who numbered, from 4 to 6, and who were dressed in white, then made off.

12. Brady then took Weatherspoon to the artillery Guard room: his sword, when Brady examined it a few minutes later, was bent, scratched and bloody: the bend was so considerable that it would not without force go into its scabbard. The sword which Saunders had taken i.e. Shean's was also bloody: but as he had taken it into a house where some of the wounded people lay, it is just possible (though he does not allow that this was the case) that the blood may not have been on it when he took it. There is no doubt however as to the condition of Weatherspoon's sword when taken.

13. The next piece of evidence in the case is a

Conversation

conversation which is spoken to by the lad Thomso and a private named Price, as having taken place between Atkins and himself, at about 8½ that nig i.e almost immediately after the arrest of Weathersp and the flight of his companion. The account given by Price is that Atkins talked to him as he lay on hi bed and said that "he had been out and beaten some blacks, that Shean had left his guard, came to the Bungalow, changed his jacket, put on a white jacke and taken a sword blade with them, that they had been to the Dhobee's Village."

14. Thomson's account of what he heard Atkins say is to this effect: "Atkins told Price that Weatherspoon had killed a woman: he said he had thrown his sword down to an artillery Serjeant. that he had tapped the artillery Serjeant on the Shoulder and asked him if he could run." This conversation took place within a very few minutes of Weatherspoon's arrest, and was of Course of the utmost importance as bringing Atkins into connection with Weatherspoon and Shean.

15. The fact that some such conversation took place is rendered more probable by the fact that portions of Atkins' Statement were repeated the same night to another witness Fitzpatrick states that Atkins told him that there had been "a row at the Dhobees' Village or Grasscutters lines that he had heard that there had been an old woman killed, and that Weatherspoon was in the artillery Guard Room."

16. The men on being questioned by their Officers, and Weatherspoon especially having been urged to explain the serious fact of his having been found with a sword in his hands, made the following statements.-

Weatherspoon.- "On christmas night about 7.30. I heard that Private Young had been ill used by natives near the Dhobees Tank, and that he was lying in a nullah. I, Atkins, Shean and Lawler went to look for him. We found him senseless and smothered in blood and left him in a nullah. There were a number of natives near him with long bamboo sticks who threw bricks at us. we then distributed ourselves and on my way back I picked up the sword which

I gave to the Serjeant Major of Artillery.-

17. Before the Magistrate the following statements were made. Atkins at first said that he was not there and knew nothing about it. On being told that there was no use his denying, he said: "On Christmas night Young was brought to barrack room and washed. He was covered with blood.- The other men went down. I don't know their names. I went down afterwards and met them there. By "there" I mean a place by the grass cutter's lines in the corner. I saw a number of natives throwing stones at the other men. I meant to say I had heard that the men had come down, not that I saw them. I did not know who they were".-

Lawler. also denied at first. On being told there was no use, he said "The men of my troop heard that Young was down by Dhobees tank and had been very much ill-treated. we then went down. By we I mean myself Atkins, Shean, Weatherspoon and a man of D Troop, I think Scott. We all went down together. I had a cane but two swords were taken one by Weatherspoon and the other by Atkins or Shean I am not sure by whom, I was dressed in blue overalls and white jacket and Shean in same manner. We did not see Young on our way down and I did not know whether he was in Bangalore when I left. When we got near Dhobees Tank we found a number of natives who attacked us with sticks and stones.-

Scott said "I have no recollection of having been down at Dhobees Tank with the four other prisoners". In reply to a remark of the Officer interrogating him "if the others say you were there, is it a lie? he said, "if they say I was there I might have been there but I don't recollect. I was in F. Troop dining with Atkins and Barton earlier in the evening. I have no recollection of being there afterwards. I was very drunk on christmas evening."

18.a These statements were at a later stage repeated before the Magistrate who was inquiring into the case.

18. The evidence and statements above recorded would appear to leave little room for reasonable doubt as to the prisoner's guilt. I now proceed to notice the topics urged for the defence.

19. As to the statements made to the Officers and also before the Magistrate, it was contended that they were inadmissable under section 24 of the Evidence Act as having been obtained by an "inducement, threat or promise" within the meaning of

of that section. This view was adopted by the Judge in the second trial, though not on the first, on the ground that considerable pressure had been put on the men by their Officers, that the relative position of an Officer and private rendered it unlikely that any thing which passed between them could be spontaneous or voluntary: that pressure had been afterwards used by the Police to induce the statements made before the Magistrate. Against this view was the emphatic statement of the Officers that they had used no pressure, that they had warned the men not to criminate themselves and the Colonel's evidence that he had expressly told the men that they might speak or not as they chose.

20. The learned Judge's direction appears to me to have been right on the first occasion and wrong on the 2nd. There was, as I view the evidence, no "inducement threat or promise" within the meaning of Section 24. There had certainly been in the case of Weatherspoon pressure put upon him to explain facts that raised a most serious presumption against him viz his being found with a bloody sword within 2 or 3 minutes run of a series of assaults committed just before with a cutting instrument by a person of the same appearance as

himself: and he had been told that unless he could explain them, his position was a serious One: and this advice may have led him to make his statement, which is really no confession at all but an explanation. But this seems to me something altogether different from the "Confessions induced by inducement threat or promise" contemplated in Section 24. To say to a man "The facts look black against you. Can you offer any explanation"? seems to me perfectly distinct from saying "I recommend you to *Confess* in order to improve your position".

21. The ruling of the learned Judge on this point made it necessary to drop the Case against Scott. as there was no evidence against him except his own and his Companions *Confessions*.

22. For the same reason, at a later stage, I also abandoned the Case against Lawler. The only direct evidence against him beside the Confessions, was the fact of his having been seen to go out shortly after Weatherspoon and Shean. This was evidently insufficient ground upon which to go to the Jury.

23. The acquittal of these two men made it necessary to give up the charge of rioting, five persons being necessary for the Commission of that offence, and the

evidence

evidence as to numbers not being sufficiently strong, independant of the Confessions.

24. As to Shean the topic principally relied on for the defence was the fact that he was on guard that night, and so could not and, as his comrades swore, as a fact, *did* not leave the guard room on the evening in question. It was proved pretty clearly that he mounted guard at 8½ i.e about 5 minutes after Weatherspoon's arrest; but this was quite reconcileable with his having been one of the party: and Atkins statement to Price that it was *he* who gave up Shean's sword, seems to favor the idea that Shean, having to be back on guard at 8½ (for which his sword would be unnecessary and would consequently arouse suspicion,) gave Atkins the sword and went himself to the guard room. The alibi attempted to be set up for Shean was supported by evidence of a very contradictory and unsubstantial character and certainly gave me and, I think, the Jury no impression of its truthfulness. It was proved beyond doubt that so far as his official superiors were concerned Shean might have been away quite long enough to take part in the fray without their being any the wiser.

25. Another topic urged for the defence was that no blood was proved to have been found on Weatherspoon's cloths and only an infinitesimally small spot on Shean's. This,

of course, but for the fact of Weatherspoon being actually taken sword in hand, would have been a valuable piece of evidence in his favor.

26. Another matter urged on the prisoners behalf was that other persons besides the prisoners might have committed the offence; that there was evidence to show that other persons were seen in the neighbourhood and that there was evidence from which it might be inferred that the attack on Venkiah's house took place later than 8½ and therefore after Weatherspoon was arrested. These topics do not call for serious consideration. They are as mere feathers in the balance compared with the weighty and conclusive evidence of the prisoner's guilt."

27. I now proceed to point out the causes which, in my opinion, served to produce a result which the Government will I fear, consider a grave and mischievous miscarriage of justice.

28. I have already indicated that the learned Judge's ruling, excluding the statements of the men made before the Colonel and afterwards before the Magistrate, made the case hopeless as against two of the prisoners: it is needless to point out that it rendered it infinitely weaker against the rest.

29. In the next place the learned Judge ruled that Atkins statement to Price was admissible only as against himself and was not admissible under Section 10 of the Evidence Act against the other Conspirators, on the ground that the Conspiracy had ended when the statement was made. No warrant whatever, in my opinion is found in the section for such a restriction of its import, and the language of the illustration seems to me conclusively to show that no such restriction was intended. The English law on the

subject

subject is that in order for the act or statement of a Conspirator to be admissible against other Conspirators, the act or statement must have been "in pursuance" of the object of the Conspiracy. This restriction, which often excludes most valuable evidence, it was considered desirable to remove in the Indian Evidence Act and this was done by substituting for the words "in pursuance of" the words "in reference to" the common object of the Conspiracy. But for the learned Judges ruling I should not entertain the slightest doubt on the points, and even now I cannot bring myself to think that he is right. This case however, having proved that the meaning of the section is doubtful, the matter ought, I think to be brought to the notice of the Government of India in the Legislative Department. The effect of the learned Judge's ruling on this point was to shut out the valuable corroborative evidence of Atkins as to Shean and Weatherspoon

30. Another point on which I feel a strong opinion that the learned Judge put an erroneous interpretation of the Evidence Act, is as to section 30, viz. in ruling that a "Confession" in order to fall within the Scope of the Section must be a Confession before a Magistrate taken in compliance with the formalities prescribed by the Criminal Procedure Code. The Context makes it, in my opinion, highly improbable that this should be the meaning, and the illustration makes it

certain that it is not. This point also ought, I think to be referred to the Government of India for such legislative changes as it may seem to suggest as necessary.

2

31. Another matter in which I venture to think that the learned Judge was wrong in excluding evidence of the statements made in the barrack room about Young, the vows of vengeance &ca., on the ground that it was not proved that the prisoners were present, though one of them at least was within twenty yards, four of them were shown to have been in the barrack about the time and 3 of them to have left the barrack room shortly afterwards. In my opinion these statements were admissible (as they were, of course, in the highest degree material) under section 6 as being so closely connected with the facts under enquiry as to have formed part of the same transaction; under section 7 as supplying occasion or constituting the state of things under which a fact in issue happened: under section 9 as explaining and introducing the prisoners conduct and showing the relation of the parties to it. The effect of this ruling was to

v. para 6

shut

shut out almost all evidence as to the state of feeling existing in the barrack room at the very time when the men started which supplied a natural motive and would have fully explained their subsequent proceedings.

32. Another point as to which I was unable to obtain the learned Judges' concurrence at the first trial, though he reluctantly adopted my view in the second, was as to whether the prisoner's conduct, if proved, admitted of being regarded as culpable homicide. The view which I endeavoured, and till the second trial continued unsuccessfully to urge upon the Court was this. The first and obvious view of the case is that there was intention to kill, or to inflict injuries likely to result in death, and in that case the offence was murder: but there is another aspect of the case, viz. that it was a brutal, thoughtless riot by men who were using their swords recklessly, slashing and cutting about in the dark, but with no intention to cause death or deadly wounds. If the Jury chose, therefore to leave the question of intention aside, and to look only to the knowledge with which the act was done, then it becomes a question of the amount of knowledge with which they acted. If, intention apart, the act was done merely with the knowledge that it was likely to cause death, the offence is culpable homicide under Section 299: if it was done with the knowledge that it was so imminently dangerous that it must in all probability cause death or

deadly injury, then the offence is murder under Section 300 §4. This is the view of the law propounded by the late Chief Justice of Bengal, (1. R. C. C. R.) and it was, of course, of great importance to the prosecution as enabling the Jury, if their view of the case was that there was no murderous intention to return a verdict for the leſser offence. The fact, however, that the law is so obscurely expreſsed that on ~~one~~ the first occasion the Judge refused to put this view of it to the Jury, and did so at the 2nd trial only on my strong and repeated representation and the high authority of Sir Barnes Peacock, shows, I think, that these Sections require amendment or elucidation.

33. All these causes may have rendered a conviction more difficult to obtain, even with a case as clear as the one in question: but the main cause, I have no doubt, is the deep, settled, immovable determination of Juries in this Country not to convict in Capital cases where the Case lies between an European assailant on the one hand and a Native victim on the other. It was impoſsible not to feel that the warm sympathy of the great maſs of the community was with the European prisoners, and the earnest wish that be the rights of the Case what they might, an acquittal might be obtained. We learnt before the trial that several of the Jurors had openly expreſsed their determination to acquit and I challenged them in consequence: but as the trial went on we heard that on the Jury, as it was, there were several persons, whose presence rendered every result but one impoſsible, and the whole of the proceedings became accordingly a solemn farce. The depth of this feeling, its almost universal prevalence, the complete oblivion of fair play, justice and humanity which sets in the moment the prejudice of Englishmen is aroused on behalf of an English wrongdoer as against the Native inhabitants of the Country, is a truth to which from some years experience as a Crown Officer I can give my testimony, and it is my duty to warn the Government that so long as the present system of trial is maintained, the attempt to visit offences of this character with punishment will invariably end in a disgraceful miscarriage — again and again have I seen Juries with evidence of guilt as clear as the Sun at noon day before them, unhesitatingly shameleſsly almost triumphantly acquit, when the interests of their Countrymen were at stake. That they will continue to do so is certain and the only question would appear to be whether a Tribunal which results in failures of justice so complete, so politically dangerous, so disgraceful to our national reputation, ought any longer to be maintained.

34. As it is, the trial by Jury is confined to a small Section of the Community and a small Claſs of Cases; and who are

these privileged few? The highest, noblest, wealthiest and most influential Native Prince or Gentleman in the Empire cannot claim it. An escaped felon from Australia the English loafer with perhaps a dozen convictions already recorded him, can. It is a claſs distinction of the most odious description, maintained to gratify the pride of the English, and maintained with the knowledge that, whenever prejudice is aroused, a miscarriage of justice is the certain result. Can we doubt that every Native in the Presidency viewed the result of the late trial with deep indignation, and that they should regard our protestations of equality as a polite fiction so long as so groſs an inequality as this is allowed to continue?

35. To the criminal or criminally inclined claſses it is, of course, a direct incentive to crime. Every European Soldier in India is now aſsured that if, in some moment of drunken ferocity, he perpetrates a series of aſsaults as cruel, dastardly and murderous as those in question, he has nothing to do but to put himself into the hands of an advocate sufficiently noisy and unscrupulous to ensure an acquittal amid the plaudits of his countrymen.

36. When the late Criminal Procedure Code was paſsed the exemption of Europeans from the ordinary tribunals of the Country

was

was very much curtailed, and the jurisdiction of the Seſsion Judge and the Magistrate over European British subjects largely and most usefully increased — But the more enlightened Natives petitioned the Viceroy on the glaring irregularities which still existed in the administration of criminal justice as affecting Europeans and Natives — I do not know what view the Government took of the matter but supposing His Excellency's view to be on the whole favorable to the views expreſsed in the petition, I would venture to suggest whether in the new Bill to regulate the Criminal Procedure of the High Courts, the Governor General in Council might not be invested with the same power as the Local Government has as to ordinary trials, viz: to direct whether trials shall be by Jury or not. The Bill might provide that, if they were not by Jury, they might be by a Full Bench — No one can pretend that such a tribunal would not be in every way more qualified to do justice than a Jury: matters of law would be adjudicated with all the authority of the Bench instead of the impreſsions of a single Judge, and we should know that, whatever conclusion was arrived at, all parties concerned had been alike aiming at a pure administration of justice. I venture most respectfully to lay this suggestion before His Excellency. My opinion on the subject has been formed slowly by the experience of a large number of prosecutions, and I believe that the change would be of immense importance in convincing the Native Community of our real desire that justice should be done and acts of violence by whomsoever and on whomsoever committed, be punished as they deserve.–

I have the honor to be
Sir,
Your most Obedient Servant,

H. S. Cunningham
Advocate General.–

Minute 10 June 1874

The legal doubts mentioned by the Advocate General, Mr Cunningham, should be duly made known to the Supreme Government.

There certainly has been, to my apprehension, a failure of justice in this case, but I cannot concur with the Advocate General in attributing the acquittal of the prisoners to dereliction of duty on the part of the Jury. The Jury empanelled to try the case was an excellent one, it included 4 native members - and I cannot see the slightest ground for believing that the verdict - erroneous though I

Legal (1874) Depts.
From
The Advocate General
Dated 1 - 6 - 4
Recd. 6 -
Reporting on the trial of the Hussars - & making certain suggestions.

No. 1181.

I think the [illegible] should be left [illegible] the men have been acquitted by [illegible]
JH

Order 8/3d February 1875. No. 230.

Read also Minutes of Members of Govt

Resolved ~~that~~ the Adv. Genl's letter be commund. to H.E. the C. in C. (with an expression of the opinion of the G. in C. that the offenders shd. be removed, if possible, from the service.)

Resolved ~~that~~ the following letter be despatched to the Govt. of India, Legislative Depts.

To Advt. Genl. - one copy. 8/2/75.

22/6/2

I think it was other than honest. The evidence had certain weak points, of which the able Counsel for the defence made the most, and the Advocate General admits that the rulings of the Judge materially weakened his case. I see no occasion to seek further for reasons for the acquittal, and I decline to brand the very respectable Jury that tried the case as perjurers at Mr Cunningham's instance. I likewise dissent altogether, so far as Madras at least is concerned, from Mr Cunningham's assertion that there is a "deep, settled, immovable determination of Juries xxxx not to convict in capital cases, where the case lies between an European assailant on the one hand and a native victim on the other". I regard this as an unfounded and unwarrantable aspersion. ~~[illegible]~~, I do not hesitate to declare that such feelings have no longer any Existence ~~[illegible]~~ in this Presidency.—

Mr Cunningham's description of trial by Jury as an odious class privilege is misleading — to say the least of it. In every case in which an European is so tried at Madras, a Native is also so tried. In the Provinces it is otherwise, but from no fault of ours. The law requires that *all* trials before Courts of Seſsions shall be by Aſseſsors or by Jury. We have tried, unfortunately without succeſs to introduce the Jury system, and, having failed, we have fallen back on the next best measure – the system of Native Aſseſsors. The time is not distant, I hope, when we may procure a sufficient number of qualified and intrepid native gentlemen to enable us to introduce the Jury system universally, and so, to extend to all claſses of H. M's subjects in India the privilege which is now neceſsarily enjoyed by one claſs only. I am strongly in favor of trial by Jury in all grave cases, and instead of withdrawing the Englishman's privilege – all over the world – of such a trial, I desire to see it extended to H. M's Native subjects as soon as poſsible. I ~~indig~~ altogether ~~[illegible]~~ repudiate the Advocate General's aſsertion that Englishmen ~~those who are in favor~~ desire ~~of~~ the Jury system, ~~acce~~ ~~condemn it~~ "maintained with the knowledge that whenever prejudice is aroused a miscarriage of justice is the result." I consider ~~declare~~ this to be a simple misstatement of fact, and a grievous misconception of motives. The policy I advocate is to raise the Native to the status and privileges of Englishmen – not to reduce the Englishman to the level of the Native.

With reference to the Advocate General's statement of Native feeling on the subject of this trial, I may state that ~~[illegible]~~ Excepting "Native Public Opinion" – ~~[illegible]~~ ~~[illegible]~~ no organ of the ~~[illegible]~~ Natives Papers has made any allusion whatever to it, and private sources of information satisfy me that the Native Community have never thought of regarding it in the view of our Advocate General. In fact the common report is that the Native Jurors were most emphatically in favor of acquittal, and, knowing the ~~[illegible]~~ Native distrust of

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of circumstantial evidence, and misappreciation of constructive crime, I can quite understand this.

"Differing from Mr. Cunningham, I believe that the Native Community of this Presidency are thoroughly convinced "of our real desire that justice should be done, and acts of violence, by whomsoever and on whomever committed, be punished as they deserve." They know us far too well to believe for an instant that we have any other desire than to do equal justice, or that a jury – on which their own countrymen sit with equal rights and privileges – is perjured and prejudiced ~~[illegible]~~ whenever it acquits an

European of a murderous
aſsault on a Native.

J. D. Sim

Minute by the Honorable W. Robinson C.S.
dated 9th June 1874.

I think that the Advocate General's letter should be communicated to His Excellency the Commander in Chief in hopes that these murderers may be removed from Her Majesty's Service. Irrespective of the terrible thought which attaches to their position I think that the spirit manifested in Bangalore amongst the class to which they belong claims some such measure at the hands of Government.

The letter should clearly be communicated to the Government of India and Secretary of State without delay. To the latter with reference to the political bearings of this grave miscarriage of justice — to in the former with reference to the Judge's interpretation of the law.

The protest (A.D. 1859) of the Government in the case of Smith deserves imitation in this case for the assurance of our native fellow subjects.

Signed) W. Robinson

Minute by the Hon.
W. Robinson. C.S.I.
9 June 1874.

Minute by the Right Honorable the President, dated 9th June 1874.

I infer from what is stated in these papers that, in a case of murderous assault by a European upon a Native, the law is now such that the European is tried by a jury, of which the majority invariably consists of his own countrymen; whereas (except where the offence is committed in the Presidency Town) in case of a similar assault by a native upon a European, the native is tried, not by a jury at all, but by a judge without one. This arrangement would be unjust and therefore reprehensible, even if the jury of which the majority is European could be relied on to act to the best of its judgment in such cases: for it would be impossible, even on that supposition, that the sympathy of race should not more or less affect their decisions. In the actual

p. 9

actual state of the case, it appears to be nothing leſs than a flagrant iniquity. For, as a matter of fact, it seems to be perfectly well known that no jury so constituted will convict a European of the murder of a native, however strong may be the evidence against him - and, assuming that this is the case, the system amounts, in effect, to a declaration on the part of the English Government of India that whereas a native who murders an Englishman will be punished, an Englishman may murder a native with impunity. - That this should have been hitherto tolerated by a Government which has fair claims to be considered just and humane as well as enlightened, seems inexplicable, that it ought to be tolerated no longer is a self evident proposition. I am rather doubtful whether the precise remedy suggested by the Advocate General is the

best

best that could be applied: but it would certainly be one cure for the evil, and should be brought under the consideration of the Government of India

I would send the Advocate General's letter to His Excellency the Commander in Chief in case it should be poſsible to remove these men from the service. There seems to be no doubt whatever of their guilt.

Signed/ Hobart.

Minute by the Rt. Hon.
the Governor
7/9 June 1874.

2

Minute by H.E. the Commander-in-Chief
7/9 June 1874

We must, I think, proceed with great caution in recommending any modification of the Law of trial by Jury. I shall be prepared to deal with the case of the men of the 18th [illegible] when the papers are referred to me in Adjutant General's Department.

Fred. P. Haines.

Minute by H.E.
the Comr.-in-Chief.
29 June 1874.

[illegible]
[illegible]

I have no objection to pass the first 3 Paras of this Draft as part of a letter to the Government of India submitting the Advocate General's Communication for such Consideration as the Legislature may accord to his views at this time. But I do not see that the proposed remedy would answer.

The case was, I think, lost through misdirection of the Judge on points of the Law of Evidence and there was apparently no material difference between the Judge and jury as to the general propriety of the verdict. The Judge merely remarked I believe that the jury had taken a "merciful view" of the case. The jury was as good a jury as could be impanelled in Madras for such a trial. I do not see that the proposals would meet the difficulty.

The real question at issue is "jury or no jury".

If the latter change be expedient Mr Cunningham's tribunal is the best by far that could be devised and possibly a discretion might be left to the Government – with or without previous consultation with the

judges

judges – to adopt this tribunal as he suggests when class distinction is likely to run high and endanger the course of justice, but I do not believe that any adjustment to our Mofussil practice, such as that suggested, would really get over this dilemma

I avow great distrust as to the verdicts to be expected from European or East Indian jurors in charges of a capital nature against Europeans in this country. But I do not on calm consideration think that we can constitutionally do away with juries *in toto* – if at all; I think the system proposed in the Bill now before the Legislature is as good as can be devised.

24/6

Note by Mr R—

his minute is in margin of my memo.

Letter from Advocate General

D/1-6-4.

Mr Cunningham here reports how the case against the 5 men of the 18th Hussars fell through —

After setting out the evidence & the topics relied on for the defence, he mentions certain Rulings of the presiding Judge, (Kernan J.) putting, as he submits, erroneous interpretations on the words of the Law. So far as the meaning of the Sections quoted is doubtful, the Adv. Genl. proposes that the matter shall be brought to the notice of the Govt. of India in the Legislative dept —

2. But, after all, such failures of justice "will continue" so long as the present system "of trial by Jury" obtains. If a Native had killed a Hussar, anywhere out of the jurisdiction of the High Court, there wd. have been no Jury — It is a class distinction, invariably grossly abused. He suggests, therefore, "that in the new Bill to regulate "the Criminal Procedure of the High Courts, "the G. G. in C. might be invested with the "same powers as the Local Govt. has, as to "ordinary trials, viz, to direct whether trials "shall be by Jury or not — if not — they might "be by a full Bench of Judges"

3. I have got up & put up, with this letter, the papers relating to a very similar case, wh. I remember occurred a month or

I think that the Adv. Gl's letter should be communicated to H.E. the C. in C. in hopes that these murderers may be removed from the Br. service — irrespective of the terrible thought which attaches to their position I think that the spirit manifested in Bangalore amongst the class to which they belong claims some such measure at the hands of Govt.

The letter should clearly be communicated to the Govt. of I. and Legisl. Dept. without delay. To the ~~former~~ letter with reference to the political bearings of this grave miscarriage of justice — & the ~~con-fession~~ with reference to the ~~conduct of the~~ Judges in ~~regard to~~ the interpretation of the Law ~~and the present & prosecution difficulty in the administration of~~ I fear ~~from the class feeling which sustained the conduct~~ of ~~this case throughout~~ —

The ~~noble~~ protest (as 1859) of the Govt. in the case of Smith deserves imitation in this case for the assurance of our native fellow subjects —

Robinson

9/6.

See my minute

What is this power, & how exercised?

Mr [illegible] I think viewed with great caution the recommending any modification of the Law of trial by Jury — I shall be prepared to deal with the case of the men of the 18th when the papers are referred to me in LG. Dept.

two or after Sir C. Trevelyan assumed the office of Governor. This record shows how the man was punished, though acquitted by a Madras Jury. The Commander in Chief, H.E. Sir Patrick Grant – vide his d/o note to the Governor, appears to have dismissed Corporal Smith from the Army, as a disgrace to the service. I gather from the Adjutant General's note, Col Woolds, to the Chief Engineer, Col. Bell – the man Smith being at the time employed on Public Works – that Smith was put on board ship & then granted his discharge.

D.G. 7/6/4

Mr R. Herbert
Refer for Ad. Genl

I infer from what is stated in these papers that, in a case of murderous assault by a European upon a Native the law is now such that the European is tried by a jury, of which the majority invariably consists of his own countrymen; — whereas (except where the offence is committed in the Native Territory) in case of a similar assault by a Native upon a European, the Native is tried, not by a jury at all, but

X Mackenzie's offence here.
June 9/79

by a judge without one. This arrangement would be unjust, & therefore reprehensible, even if the Jury of which the majority ~~are~~ is Europeans could be relied on to act to the best of its judgment in such cases: for it would be impossible, even on that supposition, that the sympathy of race should not more or less affect their decisions. In the actual state of the case, it appears to be nothing less than a

flagrant iniquity. For, as a matter of fact, it seems to be perfectly well known that no jury so constituted will convict a European of the murder of a Native, however strong may be the evidence against him: and assuming that this is the case, the system amounts, in effect, to a declaration on the part of the English Govt. of India that whereas a Native who murders ~~murderously~~ ~~assaults~~ an Englishman will be punished, an Englishman may murders of Natives with impunity: That this should have been hitherto tolerated by a Govt. which has fair claims to be considered just and humane as well as enlightened, seems inexplicable; but it ought to be tolerated no longer is a self-evident proposition. I am rather doubtful whether the precise remedy suggested by the Advte. General is ~~that which ought~~ the best that could be ~~be~~ applied: but it would certainly ~~[illegible]~~ ~~[illegible]~~ be one ~~[illegible]~~ cure for the evil; and ~~[illegible]~~ should be brought under the considn. of the Govt. of India.

I would send the Advte. Genls. letter to H.E. the Commander in Chief, in case it shd. be possible to remove these men from the service. There seems to be no doubt

The Advocate General
on the acquittal of five
men of the XVIII Hussars

Special

all members

Confidential

Special

Note
In all previous cases the accused have got off by challenging all Native Jurors – Here 4 were natives & they agreed with the 8 Englishmen – So that the old cases stand on a different footing – We can only say that if Jurors are not to be trusted in the Mofussil neither are they to be at Madras. Let the procedure be the same in both places. –

27/6

(but see my note on para 4)

Misdirection of the Judge was probably the cause of ~~the~~ non conviction, or at least gave a way of escape from that unpopular duty.

Jud'l Dept.

To the Secy. Govt. of India
Legislative Dept.

Sir,

I am directed by the Govr. in Council to submit for the information of the Govt. of India copy of the Adv. Genl's report d/ 1st June instant on the result of the trial of five men of the 18th Hussars for a murderous assault on certain natives of India, charged to have taken place at Bangalore on the evening of Christmas Day last.

2. It will be observed that after setting out the evidence, & the topics relied on for the defence, the Adv. Genl. mentions certain rulings of the presiding Judge of the High Court (Kernan J.) putting, as he submits, erroneous constructions on the law. So far as the meaning of the Sections of the Acts referred to is doubtful, the Adv. Genl. proposes that the matter shall be brought under the notice of the Govt. of India for such legislative changes as may be thought necessary. Three instances of this kind are

specified by Mr Cunningham, and will be found clearly stated in paras 29, 30 and 32 of his letter.

3. But, after all, the main cause of the acquittal of these men, he has no doubt, "is the deep, settled, im-"movable determination of Juries "in this country not to convict in "capital cases where the case lies be-"tween a European assailant on "the one hand and a native victim "on the other". Such failures of justice 'must' the anticipated always be looked for so long as the present system of trial by Jury obtains. [It is a class distinction invariably grossly abused]: he suggests therefore that "in the new "Bill to regulate the Criminal Proce-"dure of the High Courts, the G. G. in C. "might be invested with the same power "as the Local Govt. has, as to ordinary "trials, viz, to direct whether trials "shall be by Jury or not — if not, "they might be by ~~a~~ full Bench of "Judges".

The H. G. in C. observes that some considerable modifications as to the conclusive effect of a verdict

Instead of para 4 they I wd. merely say

"The Govt. in Council desire to bring this subject, together with the abovementioned suggestion, under the careful consideration of the G. G. in C. with reference to the Criminal Procedure Bill now before the Legislative Council of the G. G. — ~~with~~ W.W.

There was no difference in this case between the Judge & Jury — appear that would require further

[With reference to this suggestion H. E. in C. observes that 4. In the Mofussil, under the Code of Criminal Procedure as revised on the ~~two~~ last two occasions, the practical difference where the Judge ~~differs~~ disagrees with the Assessors and where he disagrees with the verdict of the Jurors or of a majority of them, is very small. In the first case he can act on his own opinion at once, while in the second the High Court, on his reference, may convict or acquit on the facts, non obstante verdicto. At present, at a trial in the High Ct. in its original jurisdiction, the verdict of the Jury is final; so it is by the new Bill now before the G. G.'s Council when the Jury are unanimous in opinion; but where six out of the nine are (say) for acquittal and the Judge disagrees with them — all that he can do is to discharge them and, if he is further of opinion that the case shd. be retried, direct another jury to be summoned.

5. The G. in C. would go a step further, and assimilate the practice to that enacted for the Mofussil — the reference by the Judge, when he disagrees with the verdict of the Jury or of the majority of them, being made to a full Bench of the High Ct., with a casting vote to the Chief Justice. Or, if the alternative be preferred, ~~let~~ a Bench of three Judges be substituted for a Jury in all trials where the accused person is liable on conviction

[illegible] of the A. G. is [illegible] expressed

to be sentenced to death or to transportation for life under the Indian Penal Code.}

6. I am directed, in conclusion, to submit copies of the Minutes recorded by the Members of Govt., & to ~~state that~~ the Adv. Genl's letter has been commd. to the Commr. in Chief with an expression of the opinion of the G. in C. that the offenders shd. be removed, if possible, from the service.

Dr. 22/6/74

C23/6

High Court - Sessions.

Judicial DEPARTMENT.

Despd. 5/2/75.

No. 231.

To

The Secretary to the Government of India,
Legislative DEPARTMENT.

Sir,

Pro. d/ 3d Feby. 1875. No. 230.

I am directed by the Governor in Council to submit for the information of the Govt. of India copy of the Advocate General's report d/ 1st June 1874 on the result of the trial of five men of the 18th Hussars for a murderous assault on certain natives of India, charged to have taken place at Bangalore on the evening of Christmas Day 1873.

2. It will be observed that after setting out the evidence, and the topics relied on for the defence, the Advocate

General mentions certain rulings of the presiding Judge of the High Court (Kernan J.) putting, as he submits, erroneous constructions on the law. So far as the meaning of the Sections of the Acts referred to is doubtful, the Advocate General proposes that the matter shall be brought under the notice of the Govt. of India for such legislative changes as may be thought necessary. Three instances of this kind are specified by Mr Cunningham, and will be found clearly stated in paras 29, 30 & 32 of his letter.

3. But, after all, the main cause of the acquittal of these men, he has

no

no doubt "is the deep,
"settled, immovable deter-
"mination of Juries in
"this country not to con-
"vict in capital cases
"where the case lies between
"a European assailant
"on the one hand and a
"native victim on the other."
Such failures must, he anticipates, always be looked for so long as the present system of trial by Jury obtains. He suggests therefore that "in the new Bill
"to regulate the Criminal
"Procedure of the High
"Courts, the Governor
"General in Council
"might be invested with
"the same power as the
"Local Govt. has as to
"ordinary trials, viz, to
"direct whether trials
shall

"shall be by Jury or
"not" — if not, "they
"might be by a full
"Bench of Judges."

4. H. E. in C. observes that, from exceptional causes, the Adv. Genl's paper has been for several months under disposal, and the Bill to regulate the Criminal Procedure of the High Cts is now about to become law. He therefore deems it unnecessary to do more than bring the Adv. Genl's remarks on this head to the notice of the Govt of India. He notes that, under the new law, while the verdict of the Jury is to be final when they are unanimous, the Judge is empowered to discharge the Jury & to direct another Jury to be summoned, when the ~~[illegible]~~ verdict of as many as six out of the nine appears to him to be wrong.

5. I am to submit, in conclusion, the Minutes of the Members of Govt, ~~& to state~~ that the Adv. Genl's letter has been furnished to the C. in C. with an expression of the opinion of the G. in C. that the offenders shd be removed, if possible, from the ranks of the army.

D. G. 2/2/5

Fort St George
3rd February 1875

2310

18 [illegible]
Confidential

Pro. 3 Feby 1875
Nos 42—48

No orders.

[illegible]

Judl. 1875 DEPARTMENT.

No. 251

To
The Secretary to the
Government of India
Legislative Department.

Dated 3d February 1875

42—8

High Court Sessions. Regarding trial by Jury.

Bangalore "Hussars" Acquittal

Dear Robinson

My draft has been ages in circn. - How Sam's minute got, by itself, to you, I can't say -

I sh'd be very glad to get the papers again - so that the question may be sent up to Calcutta.

yours ty

D Carmichael

22-8-4.

My dear Sir
Have you the
papers – if so kindly
send to yours truly
D. Robinson

23/8.

now for Members to send papers sent to them under Covers to each other, without passing thro' the Office, as formerly.

Mr Lowe's Minute, which is put upon the last [illegible] of the papers connected with the subject. His rough draft was sent to the Office to be printed – but no other papers were received with it.

4/9/74.

No. 4

Professor Card papers

Nothing has yet been heard — Can you trace anything — this very strange?

Sir, The papers were sent out in a Cover marked "Special" on the 23rd June — to their destination — The Cover went, in the usual course, first to the Admiralty — But its subsequent progress cannot be traced, & from the Custom