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A.H.

GOVERNMENT OF MADRAS.

JUDICIAL DEPARTMENT.

25th September 1877, No. 2235.

Jury System.

Read the following paper :—

No. 176. *Extract from the Proceedings of the Government of India in the Home Department (Judicial), under date Simla, the 24th August 1877, No. 1286.*

Read again.—

Home Department Circular, Nos. 1740 to 1744, dated 1st November 1876, in regard to the working of the present jury system under Act X of 1875.

Read also the following replies :—

From G. C. WHITWORTH, Esq., Acting Under Secretary to the Government of Bombay, to the Officiating Secretary to the Government of India, Home Department, dated Bombay Castle, 27th November 1876, No. 7x2.

I am directed to acknowledge the receipt of your letter, No. 21—1741, dated the 1st instant, with accompaniment, and in reply to state for the information of the Government of India, that the Honorable the Chief Justice and Judges of Her Majesty's High Court of Judicature are of opinion that there has not been sufficient time, or anything like it, to come to any satisfactory conclusion as to the working of the new jury system under Act X of 1875.

From Government of Madras, No. 2673, dated 20th December 1876.

From R. BELCHAMBERS, Esq., Registrar, High Court, Calcutta, Original Jurisdiction, to the Officiating Secretary to the Government of India, Home Department, dated Fort William, 19th April 1877, No. 157.

With reference to a letter (a) from the Under Secretary to the Government of Bengal in the Judicial Department, No. 3579, dated 21st November last, and its enclosures, being the documents (b) noted in the margin, I am directed to forward, herewith, a paper containing the opinions of Mr. Justice Macpherson, Mr. Justice Markby, Mr. Justice Pontifex, and Mr. Justice White as to the manner in which the jury system is conducted in Calcutta.

(a) Copy annexed.
(b) Letter from the Secretary to the Government of India in the Home Department, No. 21—1742, dated 1st November 1876.
Extract from the *Pioneer* newspaper, dated 9th August last, containing remarks made to the jury by Mr. Justice Turner of the High Court in Calcutta.

of competent ability and impartiality beyond suspicion, I believe few failures of justice are pointed out.

Calcutta recollection I can point to but one, and even in that case the Judge was not free from the responsibility.

Remember well also, in the first case, in which I presided as Recorder of Rangoon in a court, being astounded at the acquittal of a murderer seized red-handed. He was a poor murdered man was a Eurasian, and the majority of the jury European or Eurasian. There was a failure of justice, and at first I thought the verdict perverse, but from afterwards discovered I have no doubt that it arose entirely from the imperfection of my evidence. There was no evidence of any one who had seen the murderer strike the blow, and tautal evidence being overwhelming, I had laid it before the jury very shortly without that direct evidence was unnecessary.

case in which an European British subject was the defendant, and that the Lieutenant-Governor will be glad to be favored with an expression of the opinion of the Honorable Judges as to the manner in which the new jury system under Act X of 1875 worked in these Provinces.

OPINION OF THE JUDGES ON NEW JURY SYSTEM UNDER ACT X OF 1875.

to find with the working of the new jury system under Act X of 1875. It is, however, objectionable that when the jury is in favor of a conviction, it is practically left to the Judge whether a verdict of a "guilty" shall be recorded or not.

"The almost complete exclusion of Native jurors" mentioned by Mr. Justice Turner is seldom experienced in Calcutta. It would be entirely prevented if the number of peremptory challenges allowed were reduced. But this matter was fully considered by the Legislative Council, when the present bill was prepared.

As regards juries in Calcutta generally, I see no reason for being dissatisfied with them. Their verdicts are usually sound and good, and in the twenty-four years during which I have been connected with the courts, there have (so far as my memory goes) been scarcely any verdicts which could be said to be really perverse.

The 18th December 1876.

A. G. MACPHERSON.

As regards the working of the new jury system, I do not see that matters are either better or worse than they were before. But there has not been time yet to form an opinion.

As regards the general question of trial by jury, I know of nothing which would justify the total abolition or further modification of that system in Calcutta.

There is no doubt that when an European is being tried, the right of peremptory challenge is sometimes used to keep off Native jurors. But this is not, I think, so much resorted to as formerly, nor do I believe that much is gained for the prisoner by the operation.

I have noticed that when the prisoner is defended by counsel of experience and standing it is less resorted to than in other cases. I should be therefore not disposed again to disturb the procedure of the Court on this account.

The 22nd December 1876.

W. MARKBY.

I quite agree with what Mr. Justice Macpherson has written. My experience is that the right of peremptory challenge is seldom resorted to.

The 3rd January 1877.

CHARLES PONTIFEX.

My experience of the new jury system under Act X of 1875 is confined to the Ninth Criminal Sessions held in Calcutta last November. In the course of the Sessions I tried about thirty charges, and on the whole found the system to work well.

As regards the objection of my brother Macpherson, based on the 97th Section of the Act, I can pronounce no opinion founded on actual experience, for in all the cases which I tried the jury delivered unanimous verdicts. It appears to me, however, that the section may prove useful in enabling a Judge sometimes to prevent the miscarriage of justice where the evidence sways him that there ought to be a conviction, but by reason of caste or class feeling, or from the accused having seated some friends on the jury, more than two-thirds of their number cannot make up their minds to convict. Speaking for myself, I should regret to see the section removed from the Statute Book.

With respect to the general merits of the jury system, I think it is more likely to be used with greater proportion with the men in the lower grades of life than is now the case.

From C. ROBERTSON, Esq., Officiating Secretary to Government, North-Western Provinces and Oudh (Judicial Department, Criminal), to the Secretary to the Government of India, Home Department, dated Naini Tal, 28th December 1876, No. 811-A.

In reply to your letter, No. 21-1743, dated 1st November last, I am to submit, for the information of His Excellency the Governor-General in Council, an enclosed copy of a letter from the Registrar to the High Court of North-Western Provinces, dated 14th instant.

caste operates as a disturbing element of great force which popular bodies like juries find it very difficult to resist, and seldom succeed in resisting, and yet those offences belong to a class which the interests of all persons in this country, whether governor or governed, peculiarly require should not go unpunished, but should, with all reasonable certainty, be followed by a conviction, wherever the evidence is sufficient to satisfy an impartial mind that the offence has been committed.

I may observe, however, that upon charges framed under Chapter XVI of the Penal Code a failure of justice is of much less frequent occurrence where the opposing parties are Hindu and Mussulman, or Mussulman and Parsi, because on such trials the European element generally prevails in the constitution of the jury. Where such is the case, the trial is had before a tribunal largely composed of comparatively impartial persons. Where however the jury principally consists of men of the same race or caste as the accused, and the European element is either not represented at all or only by one or two members, justice is as likely to miscarry between these rival nationalities as between an Englishman and a Native.

Mr. Justice Turner in his address to the jury in *Regina versus Kelly* applies his remarks to all trials where the offender is a European British subject and the witnesses against him are Natives. Though I have certainly witnessed some failures of justice to take place upon the trial of a European on other charges than those against the person, yet the failures have not been so frequent or glaring as to warrant my expressing an opinion that the jury system breaks down when dealing with such charges.

The learned Judge would attribute the numerous acquittals of Europeans in the cases he refers to, to other causes than the nationality of the offender, and chiefly to the undue weight which a European jury gives to the discrepancies that are found in the testimony of Native witnesses. His remarks on the subject of those discrepancies are excellent and deserving of the greatest attention. The maxim that a witness who is mistaken or deposes untruly in one particular however unimportant is to be considered as mistaken or deposing untruly in all particulars, and therefore to be wholly disbelieved is, as the learned Judge truly observes, a most misleading maxim, and especially so in this country. If acted upon, it would lead to an acquittal in almost ninety-nine cases out of a hundred; in fact, in nearly all cases except those against which we have particularly to be on our guard in India, viz., where there is a conspiracy to bring a false charge and the witnesses are tutored to speak with marvellous precision and consistency. The maxim has also this mischievous tendency, that it induces the jury to afford the accused the benefit of giving effect to their prejudices in favor of the accused without violating, or at least in their own opinion violating, the letter of their oaths. I would go a step further than the learned Judge and venture to say that the undue weight which he considers European jurors give to the minor discrepancies apparent in Native testimony when a fellow-countryman is on his trial is attributable to the antagonism of race which predisposes, than instead of dealing with the charge on its merits, to treat it as a contest between a Native and an Englishman, which they are bound, if possible, to decide in favor of the latter. The reason for my opinion is this, that similar discrepancies are perpetually occurring in the evidence offered against Native offenders, and yet the same jurors, when no question of race arises to disturb their judgment or impartiality, exhibit no reluctance to convict, nor experience any difficulty in forming a sound opinion upon the evidence and returning a proper verdict.

I think that a trial before a special jury affords the best chance of justice being done in these cases where the antagonism I have alluded to is likely to operate. In proportion, as men are superior in "property, character, and education," to which, under Section 42 of Act X of 1875, regard is to be had in selecting special jurors, the prejudices of race become weakened and subjected to the control of reason and the sense of justice. The Act directs (Section 38) that all offences punishable with death shall be tried before special jury; and as regards all other offences under Chapter XVI of the Penal Code with which there is good reason to believe that the question of nationality may be mixed up, I think that they also might, under the discretionary power lodged with the Judges by the same section, be properly submitted to a similar tribunal. I may observe, however, that Section 38 is confined to persons tried in Calcutta, Madras, or Bombay.

The 10th January 1877.

J. SEWELL WHITE.

From S. C. BAYLEY, Esq., C.S.I., Secretary to the Government of Bengal, Judicial Department, to the Officiating Secretary to the Government of India, Home Department, dated Darjeeling, 16th May 1877, No. 75-T.

I have laid before the Lieutenant-Governor your letter, No. 21-1742, dated the 1st November last, enclosing a copy of remarks made by Mr. Justice Turner of the High Court, North-Western Provinces, regarding the working of the jury system in that Court in cases brought against European British subjects, and I am now to

comply with your request that the Lieutenant-Governor will submit a report and an expression of opinion as to the manner in which the new jury system under Act X of 1875 has worked, and as to the merits of the system itself.

2. The Lieutenant-Governor consulted the Standing Counsel and the Commissioner of Police, and I am directed to submit, for the information of the Governor-General in Council, the accompanying copy of letters* containing the opinions of Mr. Kennedy and of Mr. Metcalf on the subject. Both these officers, who from their official position and close connection with the working of the juries of the High Court of Calcutta have had special opportunities of watching the system and of forming a correct opinion as to its success or otherwise, state that the new jury system has been working successfully. Besides these opinions the Lieutenant-Governor has had the advantage of perusing the remarks of the Honorable Judges of the High Court of Calcutta contained in their Registrar's letter, No. 157, dated 19th ultimo, to the Government of India in the Home Department, a copy of which has been forwarded to this Government by the Court. Mr. Eden finds that there is a strong consensus of opinion on the part of those most qualified to judge in favor of the existing system of juries under Act X of 1875. So far as Calcutta is concerned, the objections taken by Mr. Justice Turner are not found to exist, and whatever may have been the case in years gone by, there has been no recent case of failure of justice which can be attributed either to race, antagonism, or to the perversity of juries; nor is the power of challenging frequently exercised. Accepting, therefore, the unanimous testimony of the Barrister Judges of the High Court, who alone hold the Sessions under that Act; of the Standing Counsel, who appears as the Government Prosecutor at each Sessions; and of the Commissioner of Police, whose administration would be discredited by frequent failures of justice in

moreover, has only been in force for two years, and Mr. Eden considers that it should not be altered unless abundant proof of its inefficiency is manifested.

ENCLOSURE No. 1.

From J. P. KENNEDY, Esq., Standing Counsel, to the Under-Secretary to the Government of Bengal, dated Calcutta, 23rd December 1876.

I have to acknowledge the receipt of your letter, No. 3577 (Judicial), bearing date the 21st November 1876, and to apologize for my delay in replying thereto, caused principally by the unprecedented duration of the Criminal Sessions which, indeed, have not yet concluded, though they commenced the day before the date of your communication.

In reply to your letter, I have to state that in my opinion the new jury system under Act X of 1875 has been working most successfully; that the possibility of taking the verdict of a majority has been useful in the few cases in which it has come into operation; and that the diminution of the number of the jury has also been beneficial by reducing the pressure on the persons held to serve. In the great Sessions very considerable relief has been afforded; calculating

few men in this country can work more than a few hours a day, and a half of a man's working time, public to be more than six months and a half of a man's working time.

I presume, in asking my opinion as to the merits of the system, reference was not made to trial by jury in general, but merely to the new system in particular; if that be so, I have already sufficiently stated my opinion; but Mr. Justice Turner's extrajudicial utterances have a wider scope. If I be required to add my feeble testimony to the long concurrence of statesmen and jurists—English and Foreign—who have deemed it the most valuable of all safeguards of individual rights, I am happy to have the opportunity of expressing faith in its purity. This faith I hold, both to the administration of justice and the general confidence in its purity. This faith I hold, though in the earlier part of my professional career when I confined myself to Courts of Equity I had acquired the contempt for the exercise of judicial functions by men chosen at hazard from the mass of the community frequently entertained by theorists, and especially by those lawyers who, practicing in courts from which juries are excluded, are practically ignorant of their true

working. When, however, I determined to seek for practice in the common law courts, and thus became acquainted with the actual effects of trial by Judge and jury (for there is no trial by jury alone), my former prejudices were rapidly dissipated, and I became fully convinced of its good practical working whenever the qualification of the jurors is not reduced so low as to admit into the box men entirely illiterate and of social position beneath the influence of healthy public opinion. In this country, at least in Calcutta, this is not the case, and I am bound to say that I have never seen elsewhere juries so intelligent and respectable as those in India. Indeed, it could hardly be otherwise; the Native juror must have an education of a rather high order if he sufficiently understands English to be eligible, and the European in this country generally has his intelligence developed by the change of domicile, while, in fact, there does not exist in India any class of Europeans at all representing the lower class of jurors admitted to the box in Ireland under Lord Hogan's Act.

I may further observe that my admiration for the trial by jury, created, as I say, by experience, has been fostered and strengthened by my observation of the courts in this country where juries are exceptional, there being none in civil cases, and many districts being without them in criminal trials. Possibly the districts in which there are no juries do not furnish materials for a good panel; but where, as in Calcutta, such materials exist, any alteration is much to be deprecated.

As, however, my views both on the general and particular question appear to differ from those of Mr. Justice Turner expressed in the paper accompanying your letter, I think myself bound to give some reasons for my divergence in opinion from him. The address was made, I believe, to a jury after it had delivered its verdict, and when Mr. Turner was *factus officio*, and thus would seem to have been really not judicial, still, in deference to the high position he holds, one ought not unduly to dissent from him nor to abstain from giving reasons for dissent when it cannot be avoided.

Mr. Justice Turner speaks of a "failure of justice" which occurred in this Court (the High Court, North-Western Provinces) following too many instances of the same nature. With the particulars of those cases I am not acquainted, and therefore cannot say that Mr. Justice Turner was unwarranted in using the very strong language I have quoted; but I cannot say that my experience as Crown Prosecutor either here, or in an Irish County (Tyrone), in which race and religious hostility were too prevalent, permits me to say that such failures of justice are frequent, certainly not sufficiently frequent to warrant the threat of a great constitutional change and the destruction of a principle which has been one of the chief safeguards of liberty in England, and recognised as such and adopted by the great majority of European nations.

Mr. Justice Turner states an explanation given to him of the alleged failures of justice, involving a grave charge against the European community in India. In words indeed he repudiates his concurrence in these views, but expresses his difficulty in finding any other explanation for certain verdicts, and tells a story of some unnamed and unknown juror who to some unnamed and unknown person had stated that in giving a verdict he had not done his duty, and in certain circumstances never would do it. If this anecdote has relevance at all it can only be as supporting the views which Mr. Justice Turner repudiates, though even in that view how the grave misconduct of an individual which may possibly have been rightly reported to Mr. Turner supports the general indictment against an entire community I fail to see.

A later passage in Mr. Justice Turner's statement probably suggests the true solution of the failures of justice (if failures these were) to which he refers. He says he attributes by far the larger number of them to "the inability of jurors to sift evidence, and to discover what should be rejected and what accepted." This, however, is a general charge against the system of constituting untrained men Judges of fact, and, if it were well founded, would be a conclusive objection to the intervention of a popular element in the decision of causes. The truth, however, is that this objection really is one to the competency of the Judge who presides at the trial. It is his duty to sift the evidence for the jury; it is his duty to point out the grounds upon which evidence ought to be rejected or to be accepted, to supply from the resources of his education, and training the defects of the untrained jury, and when this is done, the limited experience which I have as yet acquired here the much wider experience which I had previously gained in Western India whilst holding the appointments of the Clerk of the Crown of the late Supreme Court at Bombay and subsequently of Advocate-General at that Presidency, and also during the course of a somewhat lengthened practice at the Bar there.

My opinion founded upon such experience as I have mentioned is that the jury system works well in all ordinary cases, which means the large majority of cases, but is very liable to break down, and frequently, in point of fact, does break down in those cases where the accused and prosecutor belong to opposite and rival races, castes or classes, and the nature of the charge is such as arouses the slumbering antagonism that subsists between them. The cases which afford the most conspicuous instances of the break-down that I refer to are those when the accused and the prosecutor are, respectively, Englishman and Native, Hindu and Mussulman, or Mussulman and Parsi, and where the charge is one under Chapter XVI of the Indian Penal Code which relates to offences affecting the human body. In administering justice in these cases, the antagonism of race or

In cases of this kind, and when the jurors make such errors as are attributed to them by Mr. Justice Turner in his catalogue of the causes of their mistakes, it seems to me that we ought to be slow to cast upon the jurors the entire onus of erroneous acquittals.

Again, the ignorance of the native languages attributed by Mr. Justice Turner to the European jurors is by no means so general or so extensive as he seems to think. It is true that very many of those who arrive from Home late in life find it difficult to acquire any of the Native languages, and that if they are brought out expressly to fill dignified positions, they have not the stimulus of self-interest engaging them to overcome that difficulty, but the great majority of the class from whom jurors are drawn, at least in Calcutta, are persons who have early in life adopted an Indian career, whose daily avocations force them into communication with Natives, and who, if they do not speak very fluently, are at least conversant with the language.

much more general acquaintance with the language in the North-Western Provinces—interpreter and not to miss many niceties of expression.

The suggestion that European jurors would receive assistance from their having Native colleagues also seems to me not quite correct. Even if the European jurors were so ignorant of Native customs and manners as is alleged, they would not be justified in taking evidence on that in open court. The danger of a different course would be extreme, and it may be doubted whether even such evidence would in many cases be of much use. Those who are obliged to manners; and the restless spirit of inquiry which so generally distinguishes the European is the more easily gratified the less distinguished his position. The Asiatic will seldom talk freely with the representatives of supreme power, but he is much less reticent to those who only meet him in business, while his own strong caste feeling tends to make him careless, indifferent, and ignorant of the ways, if any, save his own narrow body. I remember one of the most intelligent Native gentlemen I ever knew, an Interpreter of the High Court, who could not be persuaded that Moslems could be induced to become the table servants of Europeans and thus run the risk of contact with the flesh of the unclean animal. When one remembers the numerous and heterogeneous classes from the Afghan to the Bengali, and again to the Bhil or Soda, all of whom are supercilious classes under the word "Native," I think that it would hardly be deemed safe to have this class of evidence of skilled witnesses taken without the test of publicity and cross-examination.

The above are the observations which occur to me as justifying me in dissenting from the remarks of Mr. Justice Turner as I understand them, and in believing that sufficient grounds have not been made out for legislative interference with trial by jury or with the new procedure respecting it.

From C. T. METCALFE, Esq., Officiating Commissioner of Police, Calcutta, to the Secretary to the Government of Bengal, Judicial Department, dated Fort William, 12th January 1877, No. 78.

In reply to your letter, No. 3578, dated 21st November last, on the working of the jury system under Act X of 1875, I have the honor to report that no failure of justice has resulted in any case committed by the Calcutta Magistrates owing to any defect in the intelligence of the jury. I have also made careful inquiries among the higher grade Police officers entrusted with criminal prosecutions, and the provisions of the Act, so far as they have fallen under observation, appear to have worked satisfactorily.

2. I have, however, to remark that the class of jurors is inferior to what I had expected to have found in so large a city. The jurymen are chiefly clerks. Many of them on low salaries selected from the Merchantile and Government offices.

ENCLOSURE No. 1.

From J. CRAWFORD, Esq., Under Secretary to the Government of Bengal, to the Registrar of the High Court in its Ordinary Original Jurisdiction, dated Calcutta, 21st November 1876, No. 3579.

I am directed to forward, herewith, copy of a letter noted on the margin from the Secretary to the Government of India in the Home Department, together with its enclosure, being a report of the remarks made to the jury by Mr. Justice Turner, of the High Court in the North-

of the North-Western Provinces communicating the opinion of the Honorable Judges on the working of the jury system under Act X of 1875.

ENCLOSURE No. 1.

From G. T. SPANKIE, Esq., Officiating Registrar, High Court of Judicature, North-Western Provinces, to the Officiating Secretary to Government, North-Western Provinces, dated Allahabad, 14th June, 1877, No. 1930.

I am directed to acknowledge the receipt of your letter, No. 825-A, dated the 20th November last, in the Judicial (Criminal) Department, forwarding copy of a letter from the Government of India in the Home Department, No. 1743, dated the 1st November, 1876, with enclosure, and requesting a report on the working of the jury system under Act X of 1875.

2. The Honorable the Chief Justice is not prepared to say that the law needs amendment. Much depends on the nature of the case to be tried; and he would leave a large discretion to the court and to the parties. It might be undesirable that Natives should be on particular juries, and there should be no absolute rule.

In his opinion a further experience of the existing system is necessary before coming to any safe conclusion as to any alteration of the law on the subject.

3. Mr. Justice Turner offers the following observations. It was the design of the Legislature to associate educated Natives with Europeans in the administration of criminal justice. To the European British subject the privilege is retained that he may insist on being tried by a jury of whom a majority are Europeans or Americans, but it was clearly intended that some of the jurors should be Natives, if their names are drawn.

4. By reason, however, of the large number (eight) of peremptory challenges allowed to the prisoner in a jury of nine, he can in these provinces ensure that the jury shall be comprised solely of Europeans, and respectable Native gentlemen whose names are drawn, are one after another peremptorily challenged and are told to stand aside. This they not unnaturally regard as an indignity. The law in this respect requires amendment. Either Native gentlemen should not be required to serve, or the power of peremptory challenge, which is perverted to an end it was never intended to serve, should be curtailed. The exceptional cases to which His Honor the Chief Justice refers might be met by a provision that in any particular case in which the Judge might be of opinion that it would be more conducive to the ends of justice that the jurors should be composed only of Europeans or Eurasians, he might, after recording his reasons for that opinion, direct the Registrar to exclude the names of Native jurors from the ballot box. These observations, it will be seen, are confined to the working of the jury system in the High Court. The observations which evoked this reference to the High Court obviously covered a much larger ground.

5. As neither Mr. Justice Pearson nor Mr. Justice Spankie are in a position to express an opinion based on experience, they have no remarks to offer on the working of the jury system in the High Court.

From C. L. TUPPER, Esq., Officiating Under Secretary to the Government of the Punjab, to the Officiating Secretary to the Government of India, Home Department, dated 9th February 1877, No. 499.

In reply to your letter, No. 1744, dated 1st November last, calling for a report on the working of the new jury system under Act X of 1875, I am desired to intimate that, since the passing of the Act, the Chief Court in this Province have not held any Sessions on the Original Criminal Side, and that His Honor is therefore not in a position to furnish the report required.

RESOLUTION.

In 1876 certain remarks were made by a Judge of the North-Western High Court to a jury present before him on the operation of the system in cases in which a Native was the accuser and a European the accused. The Judge expressed disapproval of those provisions of 1875 which practically admit of the entire exclusion of Native jurors from the privilege of eight peremptory challenges among a jury of nine.

2. These remarks attracted the attention of the Government of India, and a circular was issued on the 1st November 1876, forwarding them and asking for a report showing how the new jury system had been working, and what opinion the High Court of Fort William, the High Courts of Madras, Bombay and Allahabad, and the Punjab High Court entertained of the merits of the system. The replies to this circular have now been received and considered by the Government of India.

3. The Bombay High Court are of opinion that there has not yet been sufficient time for forming any satisfactory conclusion on the subject. His Excellency the Governor of Bombay is therefore unable to furnish the required information.

4. The Madras Government forward opinions recorded by four Judges of the High Court. These Judges remark that the new system works satisfactorily, and that juries perform their work properly. Mr. Justice Holloway says that the system has not affected juries, and that he has had few absolutely wrong verdicts, and no absolutely perverse. At the same time he observes that there are certain cases of cases in which it is difficult to procure an absolutely dispassionate jury.

5. The Calcutta High Court four Judges have submitted opinions. They all believe themselves satisfied with the existing jury system. Mr. Justice Macpherson adds that the evil of excluding Natives altogether from juries, although not felt in Calcutta, may be removed by reducing the number of authorised peremptory challenges. Mr. Justice Markby, however, points out that there is no doubt that when a Native is called to try a case, the right of peremptory challenge is sometimes used to keep the jury from doing what this is not done so frequently as before the introduction of the new system. Mr. Justice White remarks:—

"That the jury system works well in all cases, which means the large majority of cases, but it does break down, and frequently, in point of fact, does break down, in those cases where the accused and the prosecutor belong to opposite and rival races, castes or classes, and the nature of the charge is such as to excite the clamorous antagonism that subsists between them."

Mr. White advocates the larger employment of special juries. The Commissioner of Police, Calcutta, as also the Standing Counsel, who were consulted by His Honor the Lieutenant-Governor, approve the new system. The Commissioner of Police, however, remarks that jurors are drawn from a class inferior to what would be expected in so large a city, and he thinks that men in a better position of life should be more frequently called upon to sit on juries with men in the lower ranks of life. His Honor the Lieutenant-Governor states that the remarks made by a Judge of the North-Western Provinces High Court do not apply to Calcutta; that there has been no recent case of failure of justice which can be attributed either to race or to caste. The Lieutenant-Governor observes that the power of challenging is not often exercised. The Lieutenant-Governor observes that the law has only been in force for two years, and that it should not be altered unless abundant proof of its necessity is manifested.

6. The North-Western Provinces High Court is of opinion that the need of alteration of the existing provisions as to peremptory challenge is not so much required in the provisions as to peremptory challenge as to the Native gentlemen being called in and then rejected one after another. European prisoners to secure juries composed solely of Europeans. The papers before the Government of India are not sufficient to justify any immediate alteration of the law, which, on the whole, may be working well. It would, perhaps, be beneficial if special juries were employed at Allahabad and Lahore. The suggestion of the necessity for improving the character of the juries seems to be to enlarge the special jury list.

of the ordinary jury list. This, however, is a matter for the consideration of the High Courts rather than of the Legislature.

No. 13-1287.

ORDER.—Ordered that this Resolution, with the replies quoted in the preamble, be forwarded to the Governments of Madras, Bombay, Bengal, North-Western Provinces and the Punjab, to the High Court at Calcutta, and to the Legislative Department, for information.

(True Extract.)

(Signed) A. HOWELL,
Offg. Secy. to Govt. of India.

No. 177.

ORDER THEREON, 25th September 1877, No. 2285.

From Government of India, 1st November 1876,
No. 21-1740.
To the High Court, Madras, 13th November
1876, No. 2341.
From Do. 6th December 1876, No. 2854, in
G.O., 20th December 1876, No. 2677.

Copy of these papers will be furnished for the information of the Honorable the Judges of the High Court, with reference to the correspondence noted in the margin.

(True Extract.)

D. F. CARMICHAEL,
Chief Secretary.

To the Honorable the Judges of the High Court, Madras.

Exd. J. W. Fischer.

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JUDICIAL

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THE LON'DLE THE MUGGS
of the HIGH COURT,
MAY 1872

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Index

22) South Africa

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JUDICIAL.

From
The Government of Bombay.

Dated 27th November.

Recd. 2nd December.

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PROGS. {
No.

Acknowledges receipt of letter No. 21-1741, dated 1st instant, and states that the Honourable the Chief Justice and Judges of Her Majesty's High Court of Judicature are of opinion that there has not been sufficient time, or anything like it, to come to any satisfactory conclusion as to the working of the new jury system under Act X. of 1875.

L. J. 12689/77

No. 157, dated Fort William, the 19th April 1877.

From—R. BELCHAMBERS, Esq., Registrar, High Court, Calcutta, Original Jurisdiction.

To—The Offg. Secretary to the Government of India, Home Department.

WITH reference to a letter (a) from the Under Secretary to the Government of Bengal in the Judicial Department No. 3579, dated 21st November last, and its enclosures, being the documents (b) noted in the margin, I am directed to forward herewith a paper containing the opinions of Mr. Justice Macpherson, Mr.

Justice Markby, Mr. Justice Pontifex and Mr. Justice White as to the manner in which the new jury system under Act X. of 1875 has worked, and as to the merits of the system.

No. 3579, dated Calcutta, the 21st November 1876.

From—J. CRAWFORD, Esq., Under Secretary to the Government of Bengal.

To—The Registrar of the High Court in its Ordinary Original Jurisdiction.

I AM directed to forward herewith copy of a letter noted on the margin from the Secretary to the Government of India in the Home Department, together with its enclosure, being a report of the remarks made to the jury by Mr. Justice Turner, of the High Court in the North-Western Provinces, in a case in which an European British subject was the defendant, and to say that the Lieutenant-Governor will be glad to be favoured with an expression of the opinion of the Honourable Judges as to the manner in which the new jury system under Act X. of 1875 has worked in these Provinces, and as to the merits of the system itself.

OPINIONS OF THE JUDGES ON NEW JURY SYSTEM UNDER ACT X. OF 1875.

I HAVE no particular fault to find with the working of the new jury system under Act X. of 1875, which seems to me to work easily and well. It is, however, objectionable that when the jury are not unanimous, but six agree in favour of a conviction, it is practically left to the Judge to say whether a verdict of "guilty" shall be recorded or not.

"The almost complete exclusion of Native jurors" mentioned by Mr. Justice Turner is seldom experienced in Calcutta. It would be entirely prevented if the number of *peremptory* challenges allowed were reduced. But this matter was fully considered by the Legislative Council, when the present bill was prepared.

As regards juries in Calcutta generally, I see no reason for being dissatisfied with them. Their verdicts are usually sound and good, and in the 24 years during which I have been connected with the courts, there have (so far as my memory goes) been scarcely any verdicts which could be said to be really perverse.

The 18th December 1876.

A. G. MACPHERSON.

As regards the working of the new jury system I do not see that matters are either better or worse than they were before. But there has not been time yet to form an opinion.

As regards the general question of trial by jury I know of nothing which would justify the total abolition or further modification of that system in Calcutta.

There is no doubt that when an European is being tried, the right of *peremptory* challenge is sometimes used to keep off Native jurors. But this is not, I think,

so much resorted to as formerly, nor do I believe that much is gained for the prisoner by the operation.

I have noticed that when the prisoner is defended by counsel of experience and standing it is less resorted to than in other cases. I should be therefore not disposed again to disturb the procedure of the Court on this account.

The 22nd December 1876.

W. MARKBY.

I quite agree with what Mr. Justice Macpherson has written. My experience is that the right of peremptory challenge is seldom resorted to.

The 3rd January 1877.

CHARLES PONTIFEX.

My experience of the *new jury system under Act X. of 1875* is confined to the Ninth Criminal Sessions held in Calcutta last November. In the course of the Sessions I tried about thirty charges, and on the whole found the system to work well.

As regards the objection of my brother Macpherson, based on the 97th Section of the Act, I can pronounce no opinion founded on actual experience, for in all the cases which I tried the jury delivered unanimous verdicts. It appears to me, however, that the section may prove useful in enabling a Judge sometimes to prevent the miscarriage of justice where the evidence satisfies him that there ought to be a conviction, but by reason of caste or class feeling, or from the accused having seated some friends on the jury, more than two-thirds of their number cannot make up their minds to convict. Speaking for myself, I should regret to see the section removed from the Statute Book.

With respect to the *general merits of the jury system* as applied to criminal trials within the Presidency towns of India, I should not venture to express an opinion unless I could add to the limited experience which I have as yet acquired here the much wider experience, which I had previously gained in Western India whilst holding the appointments of the Clerk of the Crown of the late Supreme Court at Bombay and subsequently of Advocate General at that Presidency, and also during the course of a somewhat lengthened practice at the Bar there.

My opinion founded upon such experience as I have mentioned is that the jury system works well in all *ordinary cases*, which means the large majority of cases, but is very liable to break down and frequently in point of fact does break down, in these cases where the accused and prosecutor belong to opposite and rival races, castes or classes, and the nature of the charge is such as arouses the slumbering antagonism that subsists between them. The cases which afford the most conspicuous instances of the break down that I refer to are those when the accused and the prosecutor are respectively Englishman and Native, Hindu and Mussulman, or Mussulman and Parsi, and where the charge is one under *Chapter XVI. of the Indian Penal Code* which relates to offences affecting the human body. In administering justice in these cases the antagonism of race or caste operates as a disturbing element of great force which popular bodies like juries find it very difficult to resist, and seldom succeed in resisting, and yet those offences belong to a class which the interests of all persons in this country, whether governor, or governed, peculiarly require should not go unpunished, but should with all reasonable certainty be followed by a conviction, wherever the evidence is sufficient to satisfy an impartial mind that the offence has been committed.

I may observe, however, that upon charges framed under *Chapter XVI. of the Penal Code* a failure of justice is of much less frequent occurrence where the opposing parties are Hindu and Mussulman, or Mussulman and Parsi, because on such trials the European element generally prevails in the constitution of the jury. Where such is the case, the trial is had before a tribunal largely composed of comparatively impartial persons. Where however the jury principally consists of men of the same race or caste as the accused, and the European element is either not represented at all or only by one or two members, justice is as likely to miscarry between these rival nationalities as between an Englishman and a Native.

Mr. Justice Turner in his address to the jury in *Regina versus Kelly* applies his remarks to all trials where the offender is a European British subject and the witnesses against him are Natives. Though I have certainly witnessed some failures of justice take place upon the trial of a European on other charges than those

against the person, yet the failures have not been so frequent or glaring as to warrant my expressing an opinion that the jury system *breaks down* when dealing with such charges.

The learned Judge would attribute the numerous acquittals of Europeans in the cases, he refers to, to other causes than the nationality of the offender, and chiefly to the undue weight which a European jury gives to the discrepancies that are found in the testimony of Native witnesses. His remarks on the subject of those discrepancies are excellent and deserving of the greatest attention. The maxim that a witness who is mistaken or deposes untruly in one particular however unimportant is to be considered as mistaken or deposing untruly in all particulars, and therefore to be wholly disbelieved is, as the learned Judge truly observes, a most misleading maxim, and especially so in this country. If acted upon, it would lead to an acquittal in almost 99 cases out of 100; in fact in nearly all cases except those against which we have particularly to be on our guard in India, viz., where there is a conspiracy to bring a false charge and the witnesses are tutored to speak with marvellous precision and consistency. The maxim has also this mischief attached to it, that, if adopted by juries, it affords them an easy means of giving effect to their prejudices in favour of the accused without violating, or at least in their own opinion violating, the letter of their oaths. I would go a step further than the learned Judge and venture to say that the undue weight which he considers European jurors give to the minor discrepancies apparent in Native testimony when a fellow countryman is on his trial, is attributable to the antagonism of race which predisposes, than instead of dealing with the charge on its merits, to treat it as a contest between a Native and an Englishman, which they are bound, if possible, to decide in favour of the latter. The reason for my opinion is this, that similar discrepancies are perpetually occurring in the evidence offered against Native offenders, and yet the same jurors when no question of race arises to disturb their judgment or impartiality, exhibit no reluctance to convict, nor experience any difficulty in forming a sound opinion upon the evidence and returning a proper verdict.

I think that a trial before a *special jury* affords the best chance of justice being done in these cases where the antagonism, I have alluded to, is likely to operate. In proportion as men are superior in "property, character and education", to which, under Section 42 of Act X. of 1875, regard is to be had in selecting special jurors, the prejudice of race become weakened and subjected to the control of reason and the sense of justice. The Act directs (Section 38) that *all offences punishable with death* shall be tried before special jury; and as regards *all other offences under Chapter XVI. of the Penal Code*, with which there is good reason to believe that the question of nationality may be mixed up, I think that they also might, under the discretionary power lodged with the Judges by the same section, be properly submitted to a similar tribunal. I may observe, however, that Section 38 is confined to persons tried in Calcutta, Madras or Bombay.

The 10th January 1877.

J. SEWELL WHITE.

Ed.—D. N. M.

Register No. 3171.

HOME

1877

DEPT.

Judicial.

From

The Registrar, High Court, Calcutta

D. 19th }
R. 24th } APRIL

No. 157.
enclosures.
spare copies.

D. No. 731.

L. No. 731.

PROGS. } No.

Forwards a paper containing the opinions of certain Judges of the High Court as to the manner in which the new jury system under Act X. of 1875 has worked, and as to the merits of the system.

L. J. 11-2682/11

No. 75-T, dated Darjeeling, the 16th May 1877.

From—S. C. BAYLEY, Esq., C. S. I., Secretary to the Govt. of Bengal, Judicial Department.

To—The Offg. Secretary to the Govt. of India, Home Department.

I HAVE laid before the Lieutenant-Governor your letter No. 21—1742, dated the 1st November last, enclosing a copy of remarks made by Mr. Justice Turner of the High Court, North-Western Provinces, regarding the working of the jury system in that Court in cases brought against European British subjects, and I am now to comply with your request that the Lieutenant-Governor will submit a report and an expression of opinion as to the manner in which the new jury system under Act X. of 1875 has worked, and as to the merits of the system itself.

2. The Lieutenant-Governor consulted the Standing Counsel and the Commissioner of Police, and I am directed to submit, for the information of the Governor General in Council, the accompanying copy of letters* containing the opinions of Mr. Kennedy and of Mr. Metcalfe

* Letter from J. P. Kennedy, Esq., Standing Counsel, dated 23rd December 1876.
Letter from the Commissioner of Police, Calcutta, No. 78, dated 12th January 1877.

on the subject. Both these officers, who from their official position and close connection with the working of the juries of the High Court of Calcutta have had special opportunities of watching the system and of forming a correct opinion as to its success or otherwise, state that the new jury system has been working successfully. Besides these opinions the Lieutenant-Governor has had the advantage of perusing the remarks of the Honourable Judges of the High Court of Calcutta, contained in their Registrar's letter No. 157, dated 19th ultimo, to the Government of India in the Home Department, a copy of which has been forwarded to this Government by the Court. Mr. Eden finds that there is a strong consensus of opinion on the part of those most qualified to judge in favour of the existing system of juries under Act X. of 1875. So far as Calcutta is concerned, the objections taken by Mr. Justice Turner are not found to exist, and whatever may have been the case in years gone by, there has been no recent case of failure of justice which can be attributed either to race, antagonism, or to the perversity of juries; nor is the power of challenging frequently exercised. Accepting, therefore, the unanimous testimony of the Barrister Judges of the High Court, who alone hold the Sessions under that Act; of the Standing Counsel, who appears as the Government Prosecutor at each Sessions; and of the Commissioner of Police, whose administration would be discredited by frequent failures of justice in such cases, Mr. Eden is satisfied that the procedure under Chapter V. of the Act works well in Calcutta, and that no present alteration is called for. The act, moreover, has only been in force for two years, and Mr. Eden considers that it should not be altered unless abundant proof of its inefficiency is manifested.

Dated Calcutta, the 23rd December 1876.

From—J. P. KENNEDY, Esq., Standing Counsel.

To—The Under Secretary to the Government of Bengal.

I HAVE to acknowledge the receipt of your letter No. 3577 (Judicial), bearing date the 21st November 1876, and to apologize for my delay in replying thereto, caused principally by the unprecedented duration of the Criminal Sessions which indeed have not yet concluded though they commenced the day before the date of your communication.

In reply to your letter I have to state that in my opinion the new jury system under Act X. of 1873 has been working most successfully; that the possibility of taking the verdict of a majority has been useful in the few cases in which it has come into operation; and that the diminution of the number of the jury has also been beneficial by reducing the pressure on the persons liable to serve. In the present Sessions very considerable relief has been afforded, calculating that the daily sitting is about six hours, that two juries are required to be in attendance, that 30 week days have already been consumed in trying persons who claim to be tried, and that few men in this country can work more than eight hours a day, I may estimate the saving to the public to be more than six months and-a-half of a man's working time.

I presume, in asking my opinion as to the merits of the system, reference was not made to trial by jury in general, but merely to the new system in particular; if that be so, I have already sufficiently stated my opinion; but Mr. Justice Turner's extrajudicial utterances have a wider scope. If I be required to add my feeble testimony to the long concurrence of statesmen and jurists—English and Foreign—who have deemed it the most valuable of all safeguards of individual rights, I am happy to have the opportunity of expressing faith in its great advantages, both to the administration of justice and the general confidence in its purity. This faith I hold, though in the earlier part of my professional career when I confined myself to courts of equity I had acquired the contempt for the exercise of judicial functions by men chosen at hazard from the mass of the community frequently entertained by theorists and especially by those lawyers who, practising in courts from which juries are excluded, are practically ignorant of their true working. When, however, I determined to seek for practice in the common law courts, and thus became acquainted with the actual effects of trial by Judge and jury (for there is no trial by jury alone), my former prejudices were rapidly dissipated, and I became fully convinced of its good practical working whenever the qualification of the jurors is not reduced so low as to admit into the box men entirely illiterate and of social position beneath the influence of healthy public opinion. In this country, at least in Calcutta, this is not the case, and I am bound to say that I have never seen elsewhere juries so intelligent and respectable as those in India. Indeed it could hardly be otherwise; the Native juror must have an education of a rather high order if he sufficiently understands English to be eligible, and the European in this country generally has his intelligence developed by the change of domicile, while in fact there does not exist in India any class of Europeans at all representing the lower class of jurors admitted to the box in Ireland under Lord Hogan's Act.

I may further observe that my admiration for the trial by jury, created, as I say, by experience, has been fostered and strengthened by my observation of the courts in this country, where juries are exceptional, there being none in civil cases, and many districts being without them in criminal trials. Possibly the districts in which there are no juries do not furnish materials for a good panel; but where, as in Calcutta, such materials exist, any alteration is much to be deprecated.

As, however, my views both on the general and particular question appear to differ from those of Mr. Justice Turner expressed in the paper accompanying your letter, I think myself bound to give some reasons for my difference in opinion from him. The address was made, I believe, to a jury ~~which~~ had delivered its verdict, and when Mr. Turner was *functus officio*, and thus would seem to have been really not judicial, still, in deference to the high position he holds, one ought not unadvisedly to dissent from him nor to abstain from giving reasons for dissent when it cannot be avoided.

Mr. Justice Turner speaks of a "failure of justice which occurred in this Court (the High Court, North-Western Provinces) following too many instances of the same nature". With the particulars of those cases I am not acquainted, and therefore cannot say that Mr. Justice Turner was unwarranted in using the very strong language I have quoted; but I cannot say that my experience as Crown prosecutor, either here, or in an Irish County (Tyrone) in which race and religious hostility were too prevalent, permits me to say that such failures of justice are frequent, certainly not sufficiently frequent to warrant the threat of a great constitutional change and the destruction of a principle which has been one of the chief safe-guards of liberty in England, and recognized as such, and adopted by the great majority of European nations.

Mr. Justice Turner states an explanation given to him of the alleged failures of justice involving a grave charge against the European community in India

In words indeed he repudiates his concurrence in these views, but expresses his difficulty in finding any other explanation for certain verdicts, and tells a story of some unnamed and unknown juror who to some unnamed and unknown person had stated that in giving a verdict he had not done his duty, and in certain circumstances never would do it. If this anecdote has relevance at all, it can only be as supporting the views which Mr. Justice Turner repudiates, though even in that view how the grave misconduct of an individual which may possibly have been rightly reported to Mr. Turner supports the general indictment against an entire community I fail to see.

A later passage in Mr. Justice Turner's statement probably suggests the true solution of the failures of justice (if failures these were) to which he refers. He says he attributes by far the larger number of them to "the inability of jurors to sift evidence, and to discover what should be rejected and what accepted". This, however, is a general charge against the system of constituting untrained men Judges of fact, and, if it were well founded, would be a conclusive objection to the intervention of a popular element in the decision of causes. The truth, however, is that this objection really is one to the competency of the Judge who presides at the trial. It is his duty to sift the evidence for the jury; it is his duty to point out the grounds upon which evidence ought to be rejected or to be accepted, to supply from the resources of his education and training the defects of the unlearned jurors, and when this is done by a person of competent ability and impartiality beyond suspicion, I believe few failures of justice can be pointed out.

In my Calcutta recollection I can point to but one, and even in that case the Judge was not altogether free from the responsibility.

I remember well also in the first case, in which I presided as Recorder of Rangoon in a criminal court, being astounded at the acquittal of a murderer seized red-handed. He was a poor Burmese, the murdered man was a Eurasian, and the majority of the jury European or Eurasian. No doubt there was a failure of justice, and at first I thought the verdict perverse, but from what I afterwards discovered I have no doubt that it arose entirely from the imperfection of my own charge. There was no evidence of any one who had seen the murderer strike the blow, and the circumstantial evidence being overwhelming, I had laid it before the jury very shortly without pointing out that direct evidence was unnecessary.

In cases of this kind, and when the jurors make such errors as are attributed to them by Mr. Justice Turner in his catalogue of the causes of their mistakes, it seems to me that we ought to be slow to cast upon the jurors the entire onus of erroneous acquittals.

Again, the ignorance of the Native languages attributed by Mr. Justice Turner to the European jurors is by no means so general or so extensive as he seems to think. It is true that very many of those who arrive from home late in life find it difficult to acquire any of the Native languages, and that if they are brought out expressly to fill dignified positions, they have not the stimulus of self-interest engaging them to overcome that difficulty, but the great majority of the class from whom jurors are drawn at least in Calcutta are persons who have early in life adopted an Indian career, whose daily avocations force them into communication with Natives, and who, if they do not speak very correct or grammatical Urdu, or Bengali, have a very clear understanding of what is said in one or both of these languages. If this be so in Calcutta where English education has spread so much amongst the Natives, one would expect a much more general acquaintance with the language in the North-Western Provinces—an acquaintance at least sufficient thoroughly to understand what is said when aided by an interpreter and not to miss many niceties of expression.

The suggestion that European jurors would receive assistance from their having Native colleagues also seems to me not quite correct. Even if the European jurors were so ignorant of Native customs and manners as is alleged, they would not be justified in taking evidence on that more than on any other subject from a colleague unless he were sworn as a witness and examined in open court. The danger of a different course would be extreme, and it may be doubted whether even such evidence would in many cases be of much use. Those who are obliged to have frequent business relations with Natives do learn a good deal about them; their ways and manners; and the restless spirit of enquiry which so generally distinguishes the European is the more easily gratified the less distinguished his position. The Asiatic will seldom talk freely with the representatives of Supreme power, but he is much less reticent to those who only meet him in business, while his own strong

caste feeling tends to make him careless, indifferent, and ignorant of the ways, if any, save his own narrow body. I remember one of the most intelligent Native gentlemen I ever knew, an interpreter of the High Court, who could not be persuaded that Moslems could be induced to become the table servants of Europeans, and thus run the risk of contact with the flesh of the unclean animal. When one remembers the numerous and heterogeneous classes from the Afghan to the Bengali, and again to the Bhil or Soda, all of whom are supercilious classes under the word "Native", I think that it would hardly be deemed safe to have this class of evidence of skilled witnesses taken without the test of publicity and cross examination.

The above are the observations which occur to me as justifying me in dissenting from the remarks of Mr. Justice Turner as I understand them, and in believing that sufficient grounds have not been made out for legislative interference with trial by jury or with the new procedure respecting it.

No. 78, dated Fort William, the 12th January 1877.

From—C. T. METCALFE, Esq., Offg. Commissioner of Police, Calcutta.

To—The Secretary to the Government of Bengal, Judicial Department.

In reply to your letter No. 3578, dated 21st November last, on the working of the jury system under Act X. of 1875, I have the honour to report that no failure of justice has resulted in any case committed by the Calcutta Magistrates owing to any defect in the intelligence of the jury. I have also made careful enquiries among the higher grade police officers entrusted with criminal prosecutions and the provisions of the Act, so far as they have fallen under observation, appear to have worked satisfactorily.

2. I have, however, to remark that the class of jurors is inferior to what I had expected to have found in so large a city. The jurymen are chiefly clerks. Many of them on low salaries selected from the mercantile and Government offices.

3. It seems to me that men in a better position of life should be called to sit on juries in greater proportion with the men in the lower grades of life than is now the case.

Exd.—D. N. M.

Register No. 3899.

HOME

1877

DEPT.

JUDICIAL.

From

The Government of Bengal.

Dated 16th

Recd. 22nd

May.

No. 75 T.
enclosures.
spare copies.

D. No. 904.

PROGS.

No.

L. No. 904.

With reference to this Office No. 21-1742, dated the 1st November last, submits for information copy of letters containing the opinions of Messrs. Kennedy and Metcalfe on the subject of the working of the jury system under Act X. of 1875; offers remarks; and states that the system should not be altered unless abundant proof of its inefficiency is manifested.

In final No. 2682/77

No. 811A. of 1877.

FROM

THE OFFG. SECRETARY TO GOVERNMENT,
N.-W. PROVINCES AND OUDH,
TO
THE SECY. TO THE GOVERNMENT OF INDIA,
HOME DEPARTMENT.

Dated Naini Tal, the 28th June, 1877.

SIR,

In reply to your letter No. 21-1743, dated 1st November last, I am directed to submit, for the information of His Excellency the Governor-General in Council, the enclosed copy of a letter* from the Registrar to the High Court of Judicature of the North-Western Provinces, communicating the opinion of the Hon'ble Judges on the working of the jury system under Act X. of 1875.

I have the honor to be,

SIR,

Your most obedient servant,

C. ROBERTSON,

Offg. Secretary to Government,
N.-W. Provinces and Oudh.

JUDICIAL DEPARTMENT.
(CRIMINAL.)

(COPY.)

No. 1930.

FROM

THE OFFG. REGISTRAR, HIGH COURT OF JUDICATURE,
NORTH-WESTERN PROVINCES,

TO

THE OFFG. SECRETARY TO GOVERNMENT,
NORTH-WESTERN PROVINCES.

Dated Allahabad, the 14th June, 1877.

SIR,

I AM directed to acknowledge the receipt of your letter No. 825A., dated the 20th November last, in the Judicial (Criminal) Department, forwarding copy of a letter from the Government of India, in the Home Department, No. 1743, dated the 1st November, 1876, with enclosure, and requesting a report on the working of the jury system under Act X. of 1875.

2. The Honorable the Chief Justice is not prepared to say that the law needs amendment. Much depends on the nature of the case to be tried, and he would leave a large discretion to the court and to the parties. It might be undesirable that natives should be on particular juries, and there should be no absolute rule.

In his opinion a further experience of the existing system is necessary before coming to any safe conclusion as to any alteration of the law on the subject.

3. Mr. Justice Turner offers the following observations. It was the design of the Legislature to associate educated natives with Europeans in the administration of criminal justice. To the European British subject the privilege is retained that he may insist on being tried by a jury of whom a majority are Europeans or Americans, but it was clearly intended that some of the jurors should be natives, if their names are drawn.

4. By reason, however, of the large number (eight) of peremptory challenges allowed to the prisoner in a jury of nine, he can in these provinces ensure that the jury shall be comprised solely of Europeans, and respectable native gentlemen whose names are drawn, are one after another peremptorily challenged, and are told to stand aside. This they not unnaturally regard as an indignity. The law in this respect requires amendment. Either native gentlemen should not be required to serve, or the power of peremptory challenge, which is perverted to an end it was never intended to serve, should be curtailed. The exceptional cases to which His Honor the Chief Justice refers might be met by a provision that in any particular case, in which the Judge might be of opinion that it would be more conducive to the ends of justice that the jurors should be composed only of Europeans or Eurasians, he might, after recording his reasons for that opinion, direct the Registrar to exclude the names of native jurors from the ballot box. These observations, it will be seen, are confined to the working of the jury system in the High Court. The observations which evoked this reference to the High Court obviously covered a much larger ground.

5. As neither Mr. Justice Pearson nor Mr. Justice Spankie are in a position to express an opinion based on experience, they have no remarks to offer on the working of the jury system in the High Court.

I have, &c.,

G. T. SPANKIE,

Offg. Registrar,

Regr. No.
HOME 1877 DEPT.

FROM
The Offg. Secretary to Government,
N.-W. Provinces and Oudh,
To
The Secy. to the Government of India,
Home Department.

Dated the 28th June, 1877. } No. 811A.
Received } Enclosures.
Spare copies.

D. L. No.
Progs. No.

In reply to his No. 21-1743, dated 1st November last, submits the opinion of the High Court, North-Western Provinces, on the working of the jury system under Act X. of 1875.

In reply to his No. 21-1743, dated 1st November last, submits the opinion of the High Court, North-Western Provinces, on the working of the jury system under Act X. of 1875.

No. 499, dated the 9th February 1877.

From— C. L. TUPPER, Esq., Offg. Under Secretary to the Government of the Punjab.

To—The Offg. Secretary to the Government of India, Home Dept.

In reply to your letter No. 1744, dated 1st November last, calling for a report on the working of the new jury system under Act X. of 1875, I am desired to intimate that, since the passing of the Act, the Chief Court in this Province have not held any Sessions on the Original Criminal Side, and that His Honor is therefore not in a position to furnish the report required.

Exd.—D. N. M.

Home Dept. Press—No. 315—30-5-77—15.

Register No. 1393.

HOME

1877

DEPT.

Judicial.

From

The Government of the Punjab.

Dated 9th }
Recd. 16th } February.

No. 499.
enclosures.
spare copies.

D. No. 351.

L. No. 351.

PROGS. { No.

In reply to his letter No. 1741, dated 1st November last, intimates that His Honor is not prepared to furnish the report called for on the working of the new jury system, as since the passing of the Act the Chief Court in this Province have not held any Sessions on the Original Criminal Side.

L J. N. 2682/11

No. 1286.

Extract from the Proceedings of the Government of India in the Home Department (Judicial),—under date Simla, the 21st August 1877.

READ again:—

Hon.

Circular Nos. 1740 to 1744, dated 1st November 1876, in re

From Government of Bombay, No. 7152, dated 27th November 1876.
From Government of Madras, No. 2678, dated 20th December 1876.
From High Court, Calcutta, No. 157, dated 19th April 1877.
From Government of Bengal, No. 75T, dated 16th May 1877.
From Government of the North-Western Provinces, No. 811A, dated 28th June 1877.
From Government of the Punjab, No. 499, dated 9th February 1877.

RESOLUTION.

In August 1876 certain remarks were made by a Judge of the North-Western Provinces High Court to a jury present before him on the operation of the existing jury system in cases in which a native was the accuser and a European the subject the accused. The Judge expressed disapproval of those provisions of Act X of 1875 which practically admit of the entire exclusion of native jurors by allowing the prisoner the privilege of eight peremptory challenges among a jury of nine members.

2. These remarks attracted the attention of the Government of India and a circular was issued on the 1st November 1876, forwarding them and asking for a report showing how the new jury system had been working, and what opinion the High Court of Fort William, the High Courts of Madras, Bombay and Allahabad and the Punjab Chief Court entertained of the merits of the system. The replies to this circular have now been received and considered by the Government of India.

3. The Bombay High Court are of opinion that there has not yet been sufficient time for forming any satisfactory conclusion on the subject. His Excellency the Governor in Council makes no remarks in the matter. On the original side of the Punjab Chief Court, there have been no sessions cases since the passing of Act X of 1875 and the Lieutenant-Governor is therefore unable to furnish the required report.

4. The Madras Government forward opinions recorded by four Judges of the High Court. Three Judges remark that the new system works satisfactorily and that juries perform their work properly. Mr. Justice Holloway says that the arithmetical change has not affected juries and that he has had few absolutely wrong verdicts and none absolutely perverse. At the same time he observes that there are certain classes of cases in which it is difficult to procure an absolutely dispassionate judgment.

5. From the Calcutta High Court, four Judges have submitted opinions. They all declare themselves satisfied with the existing jury system. Mr. Justice Macpherson adds that the evil of excluding natives altogether from juries, although not felt in Calcutta, may be removed by reducing the number of authorized peremptory challenges. Mr. Justice Markby, however, points out that there is no doubt that when a European is under trial, the right of peremptory challenge is sometimes used to keep off native jurors, but that this is not done so

frequently as before the introduction of the new system. Mr. Justice White remarks:—

that the jury system works well in all ordinary cases, which means, the large majority of cases, but is very liable to break down, and frequently, in point of fact, does break down, in those cases where the accused and prosecutor belong to opposite and rival races, castes or classes, and the nature of the charge is such as arouses the slumbering antagonism that subsists between them.

Mr. White advocates the larger employment of special juries.

Police, Calcutta, as also the State

His Honor the Lieutenant-Governor states that the remarks made by a Judge of the North-Western Provinces High Court do not apply to Calcutta, that there has been no recent case of failure of justice which can be attributed either to race antagonism or to the perversity of juries; and that the power of challenging is not often exercised. The Lieutenant-Governor observes that the law has only been in force for two years and that it should not be altered unless abundant proof of its inefficiency is manifested.

6. The Chief Justice of the North-Western Provinces High Court is of opinion that further experience of the system is necessary before any conclusion can be formed as to the need of alteration of the existing law. Mr. Justice Turner argues that some modification is required in the provisions as to peremptory challenge, which admit of respectable native gentlemen being called in and then rejected one after another thus enabling European prisoners to secure juries composed solely of Europeans.

7. The papers before the Government of India are not sufficient to establish the necessity for any immediate alteration of the law, which on the whole may be said to be working well. It would perhaps be beneficial if special juries could be more largely employed at Allahabad and Lahore. The suggestion of the Commissioner of Police, Calcutta, for improving the jury list at the expense of the ordinary jury list, is however a matter for the consideration of the High Courts rather than of the Legislature.

ORDER.—Ordered, that this resolution with the replies quoted in the preamble be forwarded to the Governments of Madras, Bombay, Bengal, North-Western Provinces and the Punjab, to the High Court at Calcutta and to the Legislative Department, for information.

(True Extract)

Arthur Hume

Offg. Secretary to the Govt. of India.

The Government of Madras

No. 7152, dated Bombay Castle, the 27th November 1876.

From—G. C. WHITWORTH, Esq., Acting Under Secretary to the Government of Bombay.

To—The Offg. Secretary to the Government of India, Home Dept.

I AM directed to acknowledge the receipt of your letter No. 21—1741, dated the 1st instant, with accompaniment, and in reply to state, for the information of the Government of India, that the Honourable the Chief Justice and Judges of Her Majesty's High Court of Judicature are of opinion that there has not been sufficient time, or anything like it, to come to any satisfactory conclusion as to the working of the new jury system under Act X. of 1875.

Recd. Govt. of Madras No. 2675, dated 22 Decr 1876

Exd.—D. N. M.

Home Dept. Press—No. 315—245-77—16.

1877
12/21/88
Jarl (1877) Sept

From
The United States

From Capt. J. B. ...
to the ...
1877

12/28/87

2285
25-9-77

Dated 24th
Recd 30 Sept 1877

✓ 5 Encl.

J. C. J. B.

12/82

25/9/87 - No 2285

Intimation that
there is no necessity for
any immediate attention
in the present - pay sep-
her.

With Order.

Copy of the papers will be furnished for the information of
the ... the ... the ...
see noted in the ...

to the ...
1877

11/11/87

Dr