EAST INDIA (LEGISLATION).

COPIES of certain LEGISLATIVE DESPATCHES, and of a MINUTE by Mr. *John Stuart Mill.*

(*Lord George Hamilton.*)

Ordered, by The House of Commons, *to be Printed,*
13 *March* 1876.

102.

Under 2 oz.

INDIA (MR. FULLER AND MR. LEEDS).

RETURN to an Address of the Honourable The House of Commons, dated, 13 April 1877;—*for*,

"COPIES of all CORRESPONDENCE relating to the Case of Mr. *Fuller* and the Case of Mr. *Leeds*."

"And, of the OPINIONS and DISSENTS of any of the Members of the Indian Council."

India Office, 17 April 1877.

GEORGE HAMILTON, Under Secretary of State.

(No. 37 of 1876.)

Government of India.—Home Department.—Judicial.

To the Most Honourable the Marquis of *Salisbury*, Her Majesty's Secretary of State for India.

My Lord Marquis, Simla, 12 October 1876.

WE have the honour to forward the correspondence noted in the margin* with the Government of the North-Western Provinces and the High Court at Allahabad, on the subject of the criminal trial of Mr. Fuller by the Joint Magistrate of Agra, Mr. Leeds, in November 1875.

* Letter to the Government, North-Western Provinces, No. 116, dated 20th January 1876.
Letter from the Government, North-Western Provinces, No. 313A, dated 18th May 1876, and Enclosures.
Letter to the Government, North-Western Provinces, No. 1093, dated 7th July 1876.
Letter from the Government, North-Western Provinces, No. 610A, dated 15th August 1876, and Enclosure.
Letter from the Government North-Western Provinces, No. 647A, dated 31st August 1876, and Enclosure.

2. Briefly stated, these are the facts on which Mr. Fuller was tried. He had, on account of some unpunctuality on the part of his syce, assaulted the man by striking him on the head and face, and pulling him by the hair. Under this assault (which Mr. Fuller alleges to have been committed with the open hand, and not with the fist), the man fell down, then rose, ran into an adjoining compound, and died almost immediately. A *post-mortem* examination proved that the man had died from rupture of the spleen, for which, in the diseased condition of that organ, the violence he had suffered was sufficient cause. For this assault, Mr. Fuller was indicted by Mr. Leeds, under Section 323 of the Indian Penal Code, on a charge of "causing hurt to his syce," tried on that charge, and sentenced to a fine of 30 rupees.

3. Certain notices in the vernacular press drew the attention of the Government of India to the case, and on the 20th January last we requested the North-Western Provinces Government to furnish us with information respecting the alleged inadequacy of the sentence passed on Mr. Fuller. This information was given by that Government, in its Letter, No. 313A, dated 18th May, and it was fully reviewed in the Letter of this Government, No. 1098, dated 7th July.

4. From these two papers, your Lordship will perceive that the case had apparently passed without notice from the Local Government previous to its receipt of our communication. Thereupon, however, the Lieutenant Governor called the attention of the High Court at Allahabad to the case, and obtained from them an intimation that, though the sentence awarded by the Joint Magistrate was, in the opinion of the High Court, perhaps inadequate, yet that it did not seem to the Court specially open to objection. The Lieutenant Governor, in

forwarding the Court's answer, stated that, in his Honour's own opinion, the case did not call for further action.

5. In that opinion we are unable to concur. It appears from Mr. Leeds' judgment that Mr. Fuller is an European British subject, and a magistrate of the rank of Mr. Leeds cannot inflict on an European British subject any sentence heavier than a fine of 1,000 rupees and three months' imprisonment; whereas the punishment allowed by law for the offence of simple hurt is a fine of 1,000 rupees and one year's imprisonment, to say nothing of that which may be awarded for the graver offences suggested by an illegal act resulting in death. We also thought that the occasion more especially called for the notice of superior authority, because the case was not an isolated case, but one of several in which very insufficient sentences had been passed for similar offences. It seemed to us that the course adopted by the Joint Magistrate was open to two serious objections. We believed, in the first place, that Mr. Leeds had shown a grave want of discretion in dealing with the case himself, and that he might and ought to have remitted to a superior tribunal the questions both of the legal degree of guilt attaching to the acts of the accused, and of the proper degree of punishment applicable thereto. We considered, in the first place, that, even supposing Mr. Leeds had acted rightly in dealing with the case himself, the penalty which he inflicted on the accused was scandalously inadequate, and, in fact, purely nominal.

6. We accordingly intimated our regret that the Government of the North-Western Provinces had allowed the case originally to pass without notice, and that the High Court had deemed their duties and responsibilities adequately discharged by such a mere expression of opinion as the case had called forth from them. We at the same time censured Mr. Leeds for his want of judgment and judicial capacity, and desired that he should not be employed in any higher office for at least a year.

7. We have since received, as will be seen, a letter from the High Court at Allahabad, and a Minute written by the Honourable Chief Justice, Sir Robert Stuart, which deal with our observations and orders, and raise certain objections of a legal or constitutional character, on which we will comment after dealing with some separate matters.

8. Apart from their legal objections, the Court observe that the case of Regina *v.* Fuller was never fully laid before them, and express regret that the Government of India, by challenging their view of the case before they had arrived at a matured and deliberate judgment on it, should have virtually censured the Court on an informal expression of opinion which they had no opportunity to explain or reconsider. Inasmuch, therefore, as the Court themselves imply that some more satisfactory result might have followed further reference to them, it must be regretted that the formal and precise character of the reply given by the Court to the inquiry of the Local Government left us no reason to suppose that it did not express their deliberate and final opinion, and, in fact, that opinion now appears to stand unchanged in all material points.

9. In their 8th paragraph, the Court, while they admit the authority of the Executive to censure or punish misconduct on the part of an officer of a subordinate Court, express an opinion that this authority would ordinarily be more fairly exercised after reference to the Court to which that officer is subordinate. We do not dispute this position; on the contrary, we have usually, on such occasions, sought the assistance of the High Courts, and gladly acknowledge the aid we have received from them. We may say, in fact, that such a reference is almost invariably our practice. Certainly, in the present case, we should have been very glad if the Court had seen their way to interpose by the exercise of either their judicial or their executive functions, that is, either by calling up the case, or by rebuking the Magistrate. If the Court had so acted we should have been relieved from the duty of reproving the Magistrate ourselves. But, as before pointed out, we had every reason to believe that the Court, having had their attention called to the case, had declared an opinion which we were unable to accept.

10. In their 10th paragraph the Court express apprehension that our Resolution may impair their authority. We, however, are anxious that they should exercise their authority in such cases; and we think that our expression of

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regret that they have not done so is calculated rather to strengthen than to weaken their hands whenever they put in action those functions of reproof and advice which are involved in their general duty of superintendence.

11. So far as their 15th paragraph is concerned, we concur in the general expediency of the course recommended by the Court, though there are some practical difficulties in the way of always adopting it. In the present instance it was quite within the competence of the Court to have required a more formal procedure. We are willing, however, that, as far as possible, the course which the Court indicate should be adopted in similar cases for the future, and will gladly avail ourselves of any suggestion from the Court for rendering that course more generally practicable.

12. By far the most important portion of the remonstrance addressed to us by the Court lies in paras. 2 to 10 of their letter; and inasmuch as we cannot resolve in the sense suggested and desired by the Court the questions raised in this part of their letter, though we do not conceive that we have in any way encroached on their authority or independence, we refer them to your Lordship in accordance with their wishes. Whilst so doing, we are glad to acknowledge the temperate and dispassionate manner in which the Court have stated their views concerning their relations to other parts of the Indian system of government.

13. The arguments on which the Court and Chief Justice rely, in claiming for the High Courts entire independence of the Executive, may be briefly stated as follows:

In establishing the old Supreme Courts of Judicature in the Presidency towns, the Crown, they say, delegated its inherent powers for the administration of justice to tribunals intended to be generally independent of the Executive in the discharge of their functions, and it was the intention of Parliament to invest the present High Courts with a similar independence. The Statutes under which these Courts were established declare that the Judges shall hold office during Her Majesty's pleasure, and only empower the Governor General in Council (or the Governor in Council, as the case may be) to receive their resignation, and make temporary appointments to vacancies on the Bench. The Courts were, by the Act, invested with such powers as the Crown might confer on them by Letters Patent, but, subject to these Letters Patent, and to the legislative action of the Governor General in Council, they were to possess the same powers as those of the Supreme and Sudder Courts which the Act abolished, as well as a general superintendence over the Courts subordinate to their appellate jurisdiction, although the rules made for this and other similar purposes were to be subject to the sanction of the Governor General in Council. The Letters Patent, moreover, only declare that the Courts should obey the requisition of the Government for such records, returns, and statements as the Government may require.

14. On these grounds, the Court question the right of the Governor General in Council to approve or condemn their action in any matter within the jurisdiction of the Court. The Court's letter also suggests that, in giving to the High Courts power and authority to administer justice and exercise superintendence over the subordinate tribunals, it was the intention of Parliament to exclude the Executive Government altogether from any share in such functions.

15. The Chief Justice carries his conclusions further. He contends that the Supreme Courts, in the exercise of their official and judicial powers, were amenable to no authority but that of the King in Council, and to this only in respect of judgments, decrees, and orders appealed from; that the power of the Supreme Courts, limited only by the Letters Patent, has descended intact to the High Courts; and that no authority anywhere exists competent to review the action of the High Courts except in those cases in which appeals are preferred to the Privy Council from their decrees. The Chief Justice also goes on to compare the relations existing in India and in England respectively between the judiciary and the executive.

16. We do not think it necessary to follow the learned Chief Justice into his comparison of Indian with English arrangements, nor to inquire how far the various

various ranks of the Magistracy in England may be subjected to comment or correction from Her Majesty's Executive Government, or from the Houses of Parliament which influence the Executive. We have simply to inquire whether, Indian arrangements being what they are, it is beyond the province of the Governor General in Council to reprimand or to punish an Indian Magistrate whom he considers to have erred in the discharge of his duty, or to remark on what he believes to be the shortcoming of a High Court.

17. For the same reason, we do not enter upon any inquiry how far the High Courts stand in the position of the Supreme Courts, and how far in that of the Sudder Courts, nor stop to point out the extremely limited jurisdiction of the Supreme Courts. The High Courts Act established machinery compounded of various pre-existing elements and some new ones, but forming a new and different whole, and the question what part it plays in our system should, we conceive, be decided on other grounds than those of inheritance or tradition.

18. By Act of Parliament the Governor General in Council is charged with the "superintendence, direction, and control of the whole Civil and Military Government" of British India, subject in turn to the control of the Secretary of State in Council. The Governor General in Council is, therefore, the only authority in British India invested with the entire responsibility of every department and function of Government. There can be no question that the administration of justice is one of the most important functions of Government. Misbehaviour in the charge of judicial functions, from whatever cause proceeding, brings the administration of justice into contempt, and nothing is more calculated to derange the social order which it is the especial duty of the Government to preserve.

19. Each of the High Courts in India is invested with some important executive functions within its own province. The High Courts Act gives to them the superintendence over all subordinate Courts; with power to call for returns, and, subject to the control of Government, to make rules for practice, besides performing other acts of supervision. They have also been invested by Acts of the Indian Legislature with divers controlling powers, and, in the case of some minor Civil Judges, with powers of punishment. They are, therefore, an important portion of the executive administration of the country.

20. We are quite unable to find in the High Courts Act, or in any Charter, an intention to substitute the High Court for the Government of India in that portion of the administration which consists of reviewing or controlling the acts of the magistracy. There is no power there given to them of appointing, promoting, removing, suspending, or in any way punishing (except that reproof may follow upon superintendence) any subordinate Magistrate whatever. It can hardly be supposed that the Legislature meant to leave the whole power of reward and punishment in the hands of one authority, and the whole power of commendation, reproof, and advice in the hands of another.

21. We are equally unable to see how, in the Acts or Charters relating to the High Courts, anything can be found to show that their executive action enjoys immunity from comment, whether by the Governor General in Council, as contended by the Court, or by all other authorities, as contended by the Chief Justice. If it were so, there might be any degree of supineness on the part of a High Court, or refusal to use the powers committed to them, and yet not a word could be said, according to one view, by the authority responsible for the whole Civil Government of India, and, according to the other view, by any authority at all. With regard to the language of the High Courts Act respecting the appointment of Judges, on which the Court seem disposed to lay stress, we should rather say that, if it has any bearing at all on the present question, it would, when read by the light of the history of the English judicature, lead to a conclusion very different from that drawn by the High Court.

22. Unless, therefore, we are otherwise instructed by your Lordship in Council, we shall continue to act on the principle that it is our duty in the ultimate resort, and in adequate cases, to censure and to punish flagrant miscarriages of justice, and to comment, when necessary, on the course of the administration of justice in India. We are sensible of the delicacy of this power.

power, and we feel assured that the Government of India will never use it wantonly or indiscreetly.

23. We have dealt with the subject in its broadest aspect, because we think that the question is distinctly so raised by the letter and minute under review. But the Court, as distinguished from the Chief Justice, do not press to its full extent the principle on which they rely. Seeing that the power of reward and punishment resides with the Executive alone, they draw a distinction between the present case and other cases which they do not specify; and they suggest (in their paragraph 8) that, though the Government of India may interfere sometimes, it is not right for anybody but themselves "to instruct the subordinate Courts touching the conduct of their judicial duties," and that the Government of India should avoid any declaration "as to the law which should have been administered, or procedure which should have been adopted, in a particular instance."

24. Upon that distinction we have to observe that, in the present instance, we have carefully guarded ourselves from expressing any opinion on the substantive law of the case; that is to say; we have expressed no opinion as to what was the legal nature of the offence of which Mr. Fuller should have been found guilty upon the evidence ultimately received by the Court. The learned Judges have bestowed some attention on that question, but we do not consider it relevant to the discussion.

25. The overt and undisputed facts of the case are that Mr. Fuller committed an act of illegal violence, and that it caused death. Between those two facts is comprehended a whole series of offences ranging from simple hurt to wilful murder. Such an act, with such a result, may amount to either of those crimes, or to culpable homicide, grievous hurt, or rashness causing death. The degree of criminality depends on the intention.

26. Now there may be cases of offences triable either by a Magistrate or the Court of Sessions, according to the magnitude of the crime involved, in which the intention is so clear, and the lighter character of the offence so palpable, that a Magistrate may properly take them as established on preliminary inquiry, and deal with the case himself. But in cases of homicide this is rarely proper. The question of intention is usually one of nicety, and not so plain as to be decided on a preliminary inquiry.

In the present case there was some evidence given at the trial which, if believed (the Joint Magistrate did not believe it, and we have assumed that he was right), would have given to Mr. Fuller's offence a much graver complexion than Mr. Leeds considered it to possess, and we think that both the evidence and the legal definition of the offence ought to have been left to the judgment of the higher Court. Moreover, the act of illegal violence committed by Mr. Fuller belonged to a class of offences which ought, for obvious political reasons, to receive the fullest, the most public, and the most authoritative examination, whenever they occur, by a tribunal competent to inflict upon any offender, whatever his nationality, such sentence as may be found to be appropriate.

27. We, therefore, censured Mr. Leeds, not for an error in law, but for an error in conduct. We consider that the Joint Magistrate having, for the trial of this case, an option between two tribunals, evinced a culpable want of discretion in selecting that one before which evidence either of the graver class of crime, or of an aggravated instance of the lighter class, would be useless for want of jurisdiction. We consider further that this primary error was seriously augmented by the passing of a sentence which, if regarded only in reference to the evidence received and the indictment framed by the Joint Magistrate, was still so inadequate as to constitute a mockery of justice.

28. If we are right Mr. Leeds has been justly censured, and we are not to be debarred from censuring him because his faulty act was a judicial act. The position taken by the Court would shut us out from noticing all judicial acts, however corrupt, however arbitrary, however perverse, however calculated to bring obloquy on our administration. Such a position cannot, as we conceive, be maintained.

29. It is true that the Court seem to suggest, in their 17th and 18th paragraphs,

graphs, that the circumstances of the case were such as, under the 196th Section of the Code of Criminal Procedure, left no discretion whatever to the Magistrate, and that he was bound to try the case himself on the lightest charge consistent with the undisputed facts. We have, however, much difficulty in ascertaining the precise meaning of the Court, for in their paragraph 18 they apply the reasoning of paragraph 17 to the facts actually disclosed by credible evidence; whereas the question is, what facts appeared on preliminary inquiry, and what facts should have been taken, when such grave results had happened, as fairly likely to be disclosed before a competent tribunal. To the principles expressed in paragraph 17 we take no exception: The action of the Magistrate is to depend, according to those principles, on his being satisfied, and on his own opinion. But a man may be satisfied on reasonable or unreasonable grounds, and may form his opinion with or without care and judgment. A certain degree of irrationality or carelessness is visitable with censure, and we think that such a case occurred here.

30. If, indeed, we thought that the law compelled a Magistrate on preliminary inquiry to ascertain precisely the legal character of the offence, we should at once propose to alter the rule of procedure, for the result would be to confine to the lower and least experienced Court the decision on all delicate questions of law and evidence, and to refer to the superior and more experienced Court, which moreover alone has the assistance of a jury or assessors, only those cases in which there could be little or no possible question either of law or of fact, and every such case would thus be twice fully investigated, once by the Magistrate and once by the Judge. We feel assured that the intention of the framers of the Code of Criminal Procedure was very different from that involved in this view, and that the clause in question is calculated merely to assist the discretion of the Magistrate, and to indicate the point to which he is bound to carry his investigation before relegating a case to the Sessions Court for complete trial.

31. With reference to the case mentioned by the High Court in paragraph 9 of their letter, and again by the Chief Justice, we have only to remark that this case had nothing to do with the misconduct of a Judge, and has no bearing on the present question.

32. Your Lordship will observe that both the High Court, the Chief Justice, and the Lieutenant Governor unite in recommending that our order suspending Mr. Leeds from the exercise of his magisterial functions may now be withdrawn, in consideration of that officer's general character for ability and diligence. We are glad to receive testimony so favourable to Mr. Leeds. But our order was not passed on any consideration of his general character. It was passed with exclusive reference to what we considered to have been a flagrant miscarriage of justice in this particular case. The facts on which that opinion was founded remain unchanged. If the order we passed upon them was at any time a just one, its justice cannot now be impugned; and we are of opinion that the revocation or reversal of it would destroy the good it was intended to effect.

33. In conclusion, we observe that the High Court seem somewhat out of order in addressing their letter (though it was forwarded to us through the Government of the North-Western Provinces) direct to the Government of India instead of to the Local Government. But the subject matter of the correspondence is so important that we do not consider it right to delay the transmission of it to your Lordship in Council for the rectification of a mere error in form.

We have, &c.

(signed) *Lytton.*
H. W. Norman.
Arthur Hobhouse.
E. C. Bayley.
W. Muir.
Alexr. J. Arbuthnot
A. W. Greene.

No. 116, dated Fort William, 20 Jannary 1876.

From *Arthur Howell*, Esq., Officiating Secretary to the Government of India, Home Department, to the Secretary to the Government of the North-Western Provinces.

WITH reference to the first entry in page 632 of the Selections from the Vernacular Newspapers published in the Upper Provinces between the 10th and 15th ultimo, I am directed to inquire whether there is any foundation for the statement that a Mr. Fuller, a pleader at Agra, killed a syce and was fined 30 rupees for the offence. If the case has been in any way before the North-Western Provinces Government, the Governor General in Council would be glad to see a copy of the final orders passed on it.

No. 313 A., dated Naini Tal, 18 May 1876.

From *B. W. Colvin*, Esq., Officiating Secretary to Government, North-Western Provinces, to the Officiating Secretary to the Government of India, Home Department.

IN reply to your letter, No. 116, dated 20th January last, I am directed to say that the first extract on page 632 of the Selections from Vernacular Newspapers of the 20th December 1875, regarding an assault committed by a Mr. Fuller, of Agra, upon his syce, resulting in the death of the latter, for which Mr. Fuller was fined 30 rupees, is founded on fact.

2. The case has not been directly before the Local Government, but the opinion of the High Court of these Provinces has been taken respecting the adequacy of the sentence. I am to forward a copy* of that opinion and of the judgment of the Joint Magistrate of Agra, Mr. R. J. Leeds, upon which it was based, and to say that, as the High Court do not think the sentence especially open to objection, no further action appears to the Lieutenant Governor to be necessary.

* No. 1338, dated 27 April last.

No. 1338, dated Allahabad, 27 April 1876.

From *W. Tyrrell*, Esq., Registrar, High Court of Judicature, North-Western Provinces, to the Officiating Secretary to the Government of the North-Western Provinces.

I AM directed to acknowledge the receipt of the demi-official letter from your office, dated the 31st ultimo, forwarding the record of the case indicated in the margin, and requesting an expression of the Court's opinion as to the propriety of the sentence passed upon the accused.

Regina v. Fuller. Charged under section 323, Indian Penal Code, and sentenced to pay a fine of 30 rupees by the Joint Magistrate of Agra.

2. In reply, I am desired to observe that the Joint Magistrate considered the evidence given by Saikoo, coachman, to be the most reliable. According to his statement, the accused was annoyed because the deceased, a syce, did not attend when his carriage was brought round to the door; he sent for him, struck him twice with his open hand, and seized him by the hair of his head, whereupon the deceased fell.

The medical evidence shows that the spleen was in a diseased condition, that death was caused by the rupture of the spleen, that this injury might have been caused by moderate violence or by a fall, and that there were no external marks of injury on the body.

3. Under these circumstances it appears that no great violence was used, and that the accused neither contemplated nor could have foreseen that severe hurt would have resulted from the degree of violence exerted by him, much less that it should have been followed by the lamentable result of death.

4. On these facts, as found by the Joint Magistrate, the sentence, though perhaps lighter than the Court would have been disposed to inflict under the circumstances, does not appear to be especially open to objection.

5. The record of the case received from your office is herewith returned.

Government *v.* R. A. Fuller.

THE accused is charged under Section 523, Indian Penal Code, with causing hurt to one Katwaroo, his syce. It appears that, on the morning of 31st October last, the accused and his family were about to proceed to church, and that the accused, annoyed at the non-attendance of the syce, sent for him, struck him with his open hand on the head and face, and pulled his hair, causing him to fall. The syce immediately got up and ran across the road into the adjoining compound, where he fell in front of the kitchen, and died shortly after.

In the meanwhile the accused and his family drove on to the cathedral, whence they were summoned by a neighbour, who informed them of what had happened. The medical evidence shows clearly that Katwaroo, the deceased, died from rupture of the spleen, which was much enlarged, and that very slight violence, either from a blow or a fall, would be sufficient to cause the injury.

Three out of the four eye-witnesses declare that the deceased was kicked in the stomach, but I see no ground for believing the statement. In the first place, the coachman, Saikoo, who was the only one of the witnesses in a position to see well what passed, makes no mention of the kicking.

2ndly. The accused himself, who at once reported the occurrence to the Magistrate, and made a detailed statement before me within two hours of the event, emphatically denies having kicked the deceased.

3rdly. There were no external marks of injury whatever, and it is on evidence that the rupture of the spleen which caused Katwaroo's death may have resulted from very slight violence, either in the shape of a blow or a fall.

4thly. The three grass-cuts were, by their own showing, at some distance and in positions which make it doubtful whether they really saw what passed.

5thly. The grass-cuts are more or less prejudiced witnesses from their relationship and connection with the deceased.

6thly. It is *primâ facie* improbable that a European would kick his servant in the stomach. On these grounds I decline to accept a statement which, if true, would greatly aggravate the character of the offence, and render a committal necessary.

The coachman, who was close by when the assault took place, appears to have given a very fair account of what passed; and accepting the facts deposed to by him, it does not seem to me that the offence was other than one of causing hurt, as defined in Sections 319 and 321, Indian Penal Code.

I have accordingly framed a charge under Section 323, to which the accused pleads guilty. Before the charge had been drawn up, Mr. Beddy, for the accused, contended,—

1st. That no offence had been committed, as the law authorized a master to inflict moderate chastisement on his servant.

2nd. That no offence had been committed, as there was an implied contract on the part of the deceased as a servant to submit to such moderate chastisement.

On these objections being overruled, and the accused formally charged, Mr. Beddy urged in extenuation,—

1st. That the hurt voluntarily caused was slight.

2nd. That it was inflicted by way of correction.

3rd. That it was inflicted under provocation.

4th. That the offence was a compoundable one.

Taking

Taking all the circumstances fully and fairly into consideration, I am of opinion that the accused is guilty of voluntarily causing what distinctly amounts to hurt, in the ordinary as well as the technical sense of that word, and thus the illegality of his conduct must be marked by a fine which shall be something more than nominal.

I accordingly find Robert Augustus Fuller guilty of voluntarily causing hurt to one Katwaroo, an offence punishable under Section 323, Indian Penal Code, and sentence him to pay a fine of 30 rupees, or in default to undergo 15 days' simple imprisonment.

Under Section 308, Act X. of 1872, I direct that the amount of the fine be paid to the widow of the deceased.

R. J. Leeds,
Joint Magistrate and Justice of the Peace.

Agra, 6 November 1875.

(No. 1098.)

Home Department, Judicial.

From *Arthur Howell*, Esq., Officiating Secretary to the Government of India, to the Secretary of the Government of the North-Western Provinces.

Simla, 7 July 1876.

I AM directed to acknowledge your Letter, No. 313, dated the 18th May last, forwarding, at the request of the Government of India, copy of the judgment of Mr. Leeds, Joint Magistrate of Agra, in the case of The Crown *versus* R. A. Fuller, together with a letter from the High Court of the North-Western Provinces, expressing the Court's opinion on the sentence inflicted on Mr. Fuller by the Joint Magistrate.

2. The facts of the case are as follows: One Sunday morning, Mr. Fuller, an English pleader at Agra, was about to drive to church with his family. When the carriage was brought to the door, the syce failed to be in attendance, but made his appearance when sent for. For this cause Mr. Fuller struck the syce with his open hand on the head and face, and pulled him by the hair, so as to cause him to fall down. Mr. Fuller and his family drove on to church; the syce got up, went into an adjoining compound, and there died almost immediately.

3. The Joint Magistrate of Agra, before whom Mr. Fuller was placed to take his trial, framed the indictment, under Section 323 of the Indian Penal Code, for "causing hurt to one Katwaroo, his syce;" and it appeared, from the evidence of the medical officer who had conducted the *post-mortem* examination, that the man had died from rupture of the spleen, which very slight violence, either from a blow or a fall, would be sufficient to cause, in consequence of the morbid enlargement of that organ. The evidence in the case does not show any other assault; at least, the Joint Magistrate disbelieved (apparently on good grounds) all that portion of the evidence which referred to any other assault. The Joint Magistrate found Mr. Fuller guilty of "voluntarily causing what distinctly amounts to hurt," and sentenced him to pay a fine of 30 rupees, or, in default, to undergo 15 days' simple imprisonment; directing the amount of the fine to be made over to the widow of the deceased. At the request of the Local Government, the High Court expressed an opinion on the case, which was to the effect that the sentence, though perhaps lighter than the High Court would have been disposed to inflict under the circumstances, was not especially open to objection.

4. The Governor General in Council cannot but regret that the High Court should have considered that its duties and responsibilities in this matter were adequately fulfilled by the expression of such an opinion. He also regrets that

the Local Government should have made no inquiry, until directed to do so by the Government of India, into the circumstances of a case so injurious to the honour of British rule, and so damaging to the reputation of British justice in this country.

5. The Governor General in Council cannot doubt that the death of Katwaroo was the direct result of the violence used towards him by Mr. Fuller. He observes that the High Court assumes the connection between the two events as being clear. Yet, on reading Mr. Leeds' judgment, he does not find that that gentleman ever considered the effect or even the existence of this connection. Mr. Leeds did, indeed, consider whether Mr. Fuller ought not to be subjected to a more serious charge, but only because there was evidence given of further violence used by him, which evidence Mr. Leeds rejected, on grounds which are here assumed to have been sufficient. He seems, however, to have viewed an assault resulting in the death of the injured man in just the same light as if it had been attended by no such result.

6. The class of misconduct out of which this crime has arisen is believed to be dying out; but the Governor General in Council would take this opportunity of expressing his abhorrence of the practice, instances of which occasionally come to light, of European masters treating their native servants in a manner in which they would not treat men of their own race. This practice is all the more cowardly, because those who are least able to retaliate injury or insult have the strongest claim upon the forbearance and protection of their employers. But, bad as it is from every point of view, it is made worse by the fact, known to all residents in India, that Asiatics are subject to internal disease which often renders fatal to life even a slight external shock. The Governor General in Council considers that the habit of resorting to blows on every trifling provocation should be visited by adequate legal penalties, and that those who indulge in it should reflect that they may be put in jeopardy for a serious crime.

7. The Governor General in Council cannot say whether Mr. Fuller would have been convicted of a more serious offence, such as that of causing grievous hurt, or that of culpable homicide, had he been charged with it. But this he can say with confidence, that, in consequence of Mr. Fuller's illegal violence, his servant died; and that it was the plain duty of the Magistrate to have sent Mr. Fuller to trial for the more serious offence, a course which would not have prevented him from being punished (indeed he could thus have been more adequately punished) for the lesser offence, if that alone had been proved.

8. But, besides his error of judgment in trying this case himself, the Governor General in Council thinks that Mr. Leeds has evinced a most inadequate sense of the magnitude of the offence of which Mr. Fuller was found guilty. The offence was that of "voluntarily causing hurt." That is an offence which varies infinitely in degree, from one which is little more than nominal, to one which is so great that the Penal Code assigns to it the heavy punishment of imprisonment for a year *and* a fine of 1,000 rupees. The amount of hurt and the amount of provocation are material elements in determining the sentence for such an offence. In Mr. Fuller's case, while the provocation was exceedingly small, the hurt was death. For this, Mr. Leeds, while saying that he intends to inflict a punishment something more than nominal, inflicts only a fine of 30 rupees. The Governor General in Council considers that, with reference either to the public interests, or to the compensation due to Katwaroo's family from a person in Mr. Fuller's position (and it does not appear from the papers that Mr. Fuller has made any other compensation), such a sentence is wholly insufficient. He considers that Mr. Leeds has treated the offence as a merely nominal one, and has inflicted a merely nominal punishment; and that to treat such offences with practical impunity is a very bad example, and likely rather to encourage than repress them.

9. For these reasons, the Governor General in Council views Mr. Leeds' conduct in this case with grave dissatisfaction. He should be so informed, and should be severely reprimanded for his great want of judgment and judicial capacity. In the opinion of the Governor General in Council, Mr. Leeds should not be entrusted, even temporarily, with the independent charge of a district,

until

until he has given proof of better judgment, and a more correct appreciation of the duties and responsibilities of magisterial officers, for at least a year.

I have, &c.
(signed) *Arthur Howell,*
Officiating Secretary to the Government of India.

No. 610 A, dated Naini Tal, 15 August 1876.

From *B. W. Colvin*, Esq., Officiating Secretary to the Government of the North-Western Provinces to the Officiating Secretary to the Government of India, Home Department.

WITH reference to your letter, No. 1098, dated 7th July last, I am directed to forward the enclosed letter,* addressed by the High Court of Judicature, North-Western Provinces, to the Government of India, regarding the case of Regina *versus* Fuller.

* No. 2431, dated 5 August 1876.

2. With advertence to its paragraph 35, I am desired by the Officiating Lieutenant Governor to say that he has reason to believe that the favourable opinion of Mr. Leeds' general character and qualifications which is expressed by the High Court was also held by his predecessor.

3. Mr. Leeds has already during the present month been once passed over for the charge of a district, in compliance with the instructions conveyed in your letter under reply.

In view of this, and of the recommendation in his behalf which has been submitted by the High Court, Sir George Couper would be glad if his Excellency the Governor General in Council should see fit to reconsider the orders which have been passed regarding him, and to relieve him of the disqualification which, at present, operates as a bar to his promotion for the next year to come.

(No. 2431 of 1876.)

From *William Tyrrell*, Esq., Registrar, High Court, North-Western Provinces, to *Arthur Howell*, Esq., Officiating Secretary to the Government of India, Home Department; dated Allahabad, 5 August 1876.

THE High Court of Judicature for the North-Western Provinces has observed in the "Gazette of India" a letter addressed by you to the Secretary to Government, North-Western Provinces, dated Simla, 7th July 1876, of which it has recently been favoured with a copy through the Local Government.

2. In that letter you inform the Local Government that his Excellency in Council has been pleased to pass a grave censure on the High Court, and to condemn and visit with a severe punishment a Magistrate subordinate to the Court. You point out, at the same time, the course which in the discharge of his judicial duties the Magistrate should have pursued, and thus suggest the inference that the High Court is blameable for its omission to issue similar directions.

While it entertains all due respect for the high authority you represent, the High Court desires to submit the following observations for the consideration of his Excellency in Council.

3. The procedure adopted by his Excellency in Council gives rise to most important questions touching the position of the High Courts of Judicature in reference to the executive authority of his Excellency in Council.

4. In establishing Supreme Courts of Judicature in the Presidency towns, the Sovereign delegated his inherent powers for the administration of justice to

tribunals which, in the exercise of the functions committed to them, were to be generally independent of the Executive.

5. When Parliament empowered Her Imperial Majesty to substitute for the Supreme and Sudder Courts High Courts of Judicature, it was its intention to provide for the creation, in those parts of British India to which Her Imperial Majesty might be advised the privileges could be conceded, of independent tribunals, similar to those which had theretofore exercised jurisdiction in the Presidency towns.

The Statute 24 & 25 Vict. c. 104, which gave effect to this purpose, declares that the Judges of the High Courts shall hold office during Her Majesty's pleasure; and confers on the Governor General in Council, or the Governors in Council, as the case may be, no other powers in respect of the appointment or removal of Judges than the power to receive their resignations, and to make temporary appointments to vacancies in the Court until Her Majesty's pleasure be known.

The 9th section enacts that each of the High Courts to be established thereunder shall have and exercise all such civil, criminal, &c. jurisdiction, and all such powers and authority in relation to the administration of justice, as Her Majesty may by her Letters Patent direct, but subject to such limitations as are prescribed thereby; and that, save as by her Letters Patent may be otherwise directed, and subject and without prejudice to the legislative powers of the Governor General in Council, &c., the High Courts shall have and exercise all jurisdiction and every power and authority whatsoever in any manner vested in any of the Courts abolished under the Acts, &c. By the 15th section of the same Statute, it is declared that the High Court shall have superintendence over all Courts which may be subject to the appellate jurisdiction, and power to make general rules for regulating practice and procedure of the subordinate Courts, to prescribe forms, and to settle tables of fees, provided that such general rules, forms, and tables are not inconsistent with the provisions of any general law in force, and shall before they are issued have received the sanction of the Governor General in Council.

6. The Letters Patent creating the High Court for the North-Western Provinces do not subject the High Court to the executive power of the Governor General in Council, further than by declaring Her Majesty's pleasure that the Court shall comply with such requisitions as may be made by the Government for records, returns, and statements in such form and manner as the Government may deem proper.

7. Seeing, then, that the Judges of the High Court derive their powers immediately from Her Imperial Majesty and from Parliament, and are directly responsible to the supreme authority of Her Imperial Majesty for the proper discharge of the functions committed to them, the first question that arises is, whether they are subject to the executive power of his Excellency in Council further than is declared by the Statute or by the Letters Patent, and whether it is within the province of his Excellency in Council in a published resolution to approve of or condemn the action of the Court in any matter which falls clearly within the functions committed to the Court.

8. The next question that arises is, whether, in distinctly conferring on the Court all such powers and authority for and in relation to the administration of justice within the territory subject to its jurisdiction, as Her Majesty might by her Letters Patent direct, save as might be thereby expressly limited, and subject to the legislative powers of the Governor General in Council, and in committing to the Court superintendence over all Courts subordinate to its appellate jurisdiction, it was not the intention of Parliament to exclude the executive authority from such functions, and consequently whether it is not beyond the competency of any authority other than the High Court to instruct the subordinate Courts touching the conduct of their judicial duties.

The Court must not be understood as questioning the competency of his Excellency in Council to notice and punish misconduct on the part of an officer of a subordinate Court, though it ventures to think this power might be more fairly exercised after reference to the High Court to which the officer is subordinate; but it is submitted that, in the exercise of this power, regard should be had to the peculiar functions committed to the High Court, and any declaration

avoided

avoided as to the law which should have been administered or procedure which should have been adopted in a particular instance, seeing that, proceeding from so high an authority, any such declaration could not but influence the subordinate Courts in other cases.

If it be competent to any other authority than the High Court to exercise such functions, conflicting directions may confuse the subordinate Courts, and impede the administration of justice.

9. The Court believed that this important distinction between the functions of the Executive Government and the High Court had in a measure been recently recognised by the Governor General in Council, in the sense for which it now contends, on the occasion of a reference made, at the instance of the Court, by the Honourable Sir William Muir, when holding the office of Lieutenant Governor of the North-Western Provinces.

10. But, assuming that the action of his Excellency in Council is within his high prerogative, the Court cannot but regret that no intimation was conveyed to it of the intention of his Excellency in Council to take action, and no opportunity afforded it for explanation or statement before the publication of your letter in the "Gazette." The course pursued has obliged the Court to invest the vindication of its office with an appearance of protest, which the high respect it owes to his Excellency in Council would have induced it on any less grave occasion to avoid. Having regard to the source from which its functions are derived, the Court submits it was entitled to expect an opportunity of addressing his Excellency in Council before the publication of a resolution which cannot but impair its authority.

11. The case of The Crown *v.* Fuller was, it is believed, first brought to the notice of the Government of India by the published translation of extracts from the vernacular press. These translated extracts are not furnished to the Court, and the first intimation which the Court received of the proceedings in The Crown *v.* Fuller was contained in two letters from the Secretary to the Local Government. In the first letter it was mentioned that the case had attracted the attention of the Government of India, and it was suggested that the Judges might wish to see the papers; and in the second letter the record was enclosed, and the opinion of the Judges requested by his Honor the Lieutenant Governor as to the adequacy of the sentence.

12. Some of the Judges doubted whether they ought to express an opinion on a question which it was competent to the Government to bring formally before them by motion in Court. But as a matter of courtesy, and in the belief that the Local Government was acting in concert with the Government of India, the record was submitted to each of the five Judges who constitute the Court, and an unanimous opinion was recorded that the sentence, though lighter than the Court would have been disposed to inflict, was, under the circumstances, not specially open to objection, and therefore did not call for interference. This opinion was communicated to his Honor the Lieutenant Governor.

13. His Excellency in Council expresses his regret that the Court should have considered its duties and responsibilities in this matter were adequately fulfilled by the expression of such an opinion.

14. The Court may allow it would more properly have discharged its duty had it pointed out to the Government that, if doubt were entertained of the propriety of the sentence, it should be moved to exercise its powers of revision by one of the three law officers appointed to represent the Government in the High Court. The procedure adopted deprived the Court of the advantage of hearing the arguments of the law officers of the Crown.

15. It is doubtless within the competency of the Court, of its own motion, to call for and revise the proceedings of the subordinate Courts, and it not unfrequently exercises this power, although, for reasons which are obvious, it is at all times chary of interfering to enhance sentences passed by the subordinate Courts, but it also permits parties to the proceedings to move it to exercise its powers of revision. It is submitted that it would be more convenient if, when the Government, which is a party to every criminal proceeding, is alive to any apparent defect in the administration of criminal justice, it moved the Court,

through its law officers, to call for the proceedings, and, if necessary, to correct them in revision.

16. When, however, the Court, at the instance of the Government, had perused the record, and had arrived at the opinion that, on the facts found by the Magistrate (facts which his Excellency in Council admits to have been correctly found), the sentence was inadequate, but not so inadequate as to call for interference, the Court fails to perceive that, in abstaining from further action, it showed itself insensible of its duties or responsibilities.

Whilst giving, as it is at all times prepared to do, the fullest consideration to the opinion of his Excellency in Council on the adequacy of the punishments awarded by the Courts in any class of cases, the Court is assured his Excellency in Council will admit that any Court (superior or subordinate) would violate its duty if in any particular case it suffered its own convictions as to the sentence which the ends of justice required it to pronounce or affirm to be overridden by any other consideration.

17. In view of the stricture publicly passed on the course pursued by the Court, the Court feels it due to itself to explain its opinions as to the duties of a Magistrate, and the law which in such cases as that of The Crown *v.* Fuller he is bound to administer.

The 196th Section of the Code of Criminal Procedure declares in what cases a Magistrate is to make a commitment. The Court reads this section, and instructs the subordinate Courts, that a Magistrate is to commit an accused person only when *he is satisfied*, from evidence which appears to him fairly trustworthy, that there is a *primâ facie* case against the accused, that he has committed an offence triable exclusively by the Sessions Court or High Court, or an offence which, *in the opinion of the Magistrate*, he himself is not competent to visit with an adequate sentence. Where, then, a Magistrate, acting in good faith, gives effect to his own convictions, he simply does his duty, however unwisely, in dealing with the accused himself. If a Magistrate were to commit an accused person without being satisfied there were grounds or cause for the commitment, he would be guilty of a breach of duty, and of an injustice for which there is no remedy. On the other hand, if he has, through an error of judgment, failed to commit an accused person when he should have committed him, or passed on an accused person an inadequate sentence, the law provides for the revision of his proceedings.

18. But the Court is constrained to inform his Excellency in Council it could not direct the subordinate Courts that, on the facts disclosed by credible evidence in Fuller's case, it would be the duty of a Magistrate to commit an accused person either on a charge of culpable homicide or of voluntarily causing grievous hurt.

19. With some additions, and one slight alteration, those facts are correctly stated in the second paragraph of your letter. Kutwaroo, the deceased, was a well-developed and muscular man. Fuller struck him twice on the head and face with his open hand, and seized him by the scalp-lock. Kutwaroo fell to the ground, whether of his own accord, or by reason of force exerted by Fuller, the evidence leaves doubtful. He then rose and ran into an adjoining compound, a distance of two hundred or three hundred yards, where he again fell down. In the report of the *post-mortem* examination, Dr. Christison records that there were no external marks of violence, that the spleen was ruptured on its inner surface, and that "the cause of death was probably a fall or a blow over the spleen," and that a slight injury might be sufficient to cause this result. On cross-examination in the Magistrate's Court, Dr. Christison deposed that, in his opinion, a man receiving so serious an injury of the spleen as that he had described would have been unable to do anything in the way of exertion afterwards, as he would be rapidly weakened by the loss of blood, and that he should not have expected a man to be able to run two hundred or three hundred yards after receiving the injury described.

20. It also appears from the record that the Magistrate was careful to inquire of all the witnesses whether Fuller was in the habit of striking his servants. The coachman, who had been in Fuller's service for fourteen months, swore that

Fuller

Fuller had not during that period on any other occasion beaten any of his servants.

21. On referring to the Court's letter in answer to the Secretary to Government, North-Western Provinces, it will be seen that the Court so expressed itself as to leave it open whether the fall in Fuller's compound, which the Court considered the more probable cause of death (for it was not shown that Fuller had struck the deceased over the spleen), was the direct or indirect result of the assault, and that the Court adverted to the medical evidence, showing that the injury might have been occasioned by moderate violence or by a fall. But, assuming the injury to the spleen was the direct result of the act of Fuller, the Court would be unable to hold that, under the circumstances, Fuller could by the law of India have been convicted, or properly placed on his trial, for either of the grave offences suggested in the 7th paragraph of your letter.

22. The law of India relating to offences against the person differs materially from the law of England. Under the law of England, a man who commits an unlawful act, and in the commission of such act involuntarily causes death, is guilty of murder, if the unlawful act be a felony, or what is known to the law as a *malum in se*; and he is guilty of manslaughter if death ensues from any other wrongful act committed without justification or excuse.

The framers of the Indian Penal Code denounced these principles of the law of England as unworthy of enlightened legislation. Speaking generally (for there are exceptions), they proceeded on the principle that a man should be held criminally responsible only for such results of his act as he intended or knew to be probable.

23. To take the case suggested by Lord Macaulay: If a man, while stealing a handkerchief from a pocket, accidentally caused the explosion of a loaded pistol which the owner of the handkerchief carried without the knowledge of the thief, and in consequence of such explosion the owner was shot and died, the thief would by the law of England be punishable for murder, while by the law of India he could only be convicted of theft. To take another case: If a man, while shooting deer without leave in another's park in sport—without any felonious intent, and after having taken every reasonable precaution to avoid injury to bystanders,—by his shot kills a bystander and a deer, he is by the law of England amenable to a charge of manslaughter, whereas by the law of India he is amenable only to a charge of mischief in killing the animal.

24. By the law of India, as by the law of England, a person causing bodily injury to another who is labouring under a disorder, disease, or bodily infirmity, and thereby *accelerating* the death of that other, is deemed to have "caused his death." Nevertheless, every causing of death does not amount to the offence of culpable homicide. Unless it be proved that a person who has caused the death of another caused death with the intention,—

(1.) To cause death;

(2.) To cause bodily injury likely to cause death;

(3.) To cause such bodily injury as he knew to be likely to cause death to the person to whom the harm is done; or,

(4.) To cause bodily injury to any person, sufficient in the ordinary course of nature to cause death;

or with the knowledge—

(5.) That he was likely by his act to cause death; or,

(6.) That his act was so eminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death,

the person who has caused death cannot, by the law of India, be convicted of culpable homicide of either description. [*Note on the Amendment of the Penal Code by the Hon. J. F. Stephen.*]

25. Nor can a person be convicted of the offence of *voluntarily* causing grievous hurt, unless it be proved that he caused one of the descriptions of hurt defined in the Code as "grievous" hurt either by means whereby he intended to cause

cause such hurt, or by means which at the time of employing those means he knew or had reason to believe to be likely to cause it. (Indian Penal Code, Section 39.)

26. In Fuller's case there was no evidence that he had committed any of the kinds of hurt defined in the Code as "grievous hurt," and although a person is by law presumed to know and to intend the ordinary and probable result of his acts, the result could hardly be declared ordinary or probable, while the circumstances rebutted the presumption of intention or knowledge to commit either culpable homicide or grievous hurt.

27. If it be held that, because disease of the spleen is not uncommon in this country, and because, when persons are afflicted with the disease in a particular form, death may result from very slight violence, therefore, every person must be presumed to know that in striking a Native he is likely to cause death, it follows that every person, as well Native as European, who strikes a Native is amenable to a far more serious charge than that under which such offences are now usually punished.

The Court, in view of the consequences, does not find itself justified in directing the subordinate Courts to adopt a presumption which the infrequency of a fatal result does not appear to warrant.

28. Your letter contains no allusion to the 304th section of the Indian Penal Code, enacted in 1873, which renders a person criminally responsible when death results from his rash or negligent act. It is presumed that this provision of the law did not appear applicable, and with this view the Court is disposed to agree.

29. A section drafted in 1870, which provided for the punishment of illegal killing, and defined that offence as the causing of death by an illegal act in cases other than those which constitute culpable homicide, would have met the circumstances assumed in Fuller's case; but the section was withdrawn or rejected in Committee, and it is clearly opposed to the principles on which the Code was framed.

30. In the opinion of the Court, Fuller, although he caused hurt, and more than hurt, only intended to cause hurt, and only used means which he knew or had reason to believe to be likely to cause such hurt. He was therefore properly convicted of voluntarily causing hurt without adequate provocation.

31. In the view taken by the Court of the law it is bound to administer, that ordinarily an accused person is liable to punishment only for such results as he intended or knew to be probable, the Court could not direct the subordinate Courts that on such facts as were disclosed in Fuller's case a heavier sentence should have been imposed than a Magistrate is competent to pass on a European British subject, namely, rigorous imprisonment for three months and a fine of 1,000 rupees, nor that a much lighter punishment than a Magistrate is competent to inflict would not have satisfied justice.

32. Furthermore, the Court would be unable, in the view it entertains of the law, to direct the subordinate Courts that, in awarding the punishment of fine, they should regard the compensation due to those who are indirectly injured by the commission of an offence.

The Court admits that a Magistrate may properly consider whether compensation has been voluntarily made by the offender, because such an act is an indication of contrition. But, even in this respect, the Magistrate must exercise judgment, otherwise it would be competent for the rich to secure a partial immunity from the consequences of their offences. But where no compensation has been voluntarily made, it is the duty of the Magistrate in imposing a fine to have regard only to the ends of justice (that is to say, the deterring others from the commission of the offence) and the means of the offender. The 308th section of the Code of Criminal Procedure does not convert a court of criminal justice into a forum for granting civil relief. When the Magistrate has determined the amount of the fine he should impose in view of the considerations above mentioned, he is empowered to order the payment "to the complainant or the party injured," or both, of the whole or a part of the fine as compensation for the

the expenses of the prosecution, or for the offence, and "in any subsequent civil proceedings relating to the same matter" the Court must take into account the sum so awarded.

33. But the relations of Katwaroo were not left without a remedy, inasmuch as the Indian Act XIII. of 1855 allows the wife, husband, parent, and child of a person whose death has been caused by a wrongful act to maintain a suit and recover damages in respect thereof.

34. In determining what degree of punishment is required in the interest of the public, the Court is accustomed to consider whether an offence is increasing or decreasing in prevalence. The circumstance that the class of offence which evoked the indignation of his Excellency in Council is dying out argues that the sentences heretofore awarded by the Courts have not proved insufficient for the ends of justice. The Court desires to assure his Excellency in Council that it views such offences with as much abhorrence as has been expressed by the Government of India, and that should necessity be shown, it will not be slow to avail itself to the utmost of the powers confided to it for their repression, and to point out to the subordinate Courts that severity has become a duty.

35. The Court is constrained to express its apprehension that the imposition on a magistrate of a severe penalty, for what in any view was a mere error of judgment in a single instance, is calculated to deter from the impartial discharge of their duty all those officers who are dependent on the Executive for their advancement. The Court therefore ventures to solicit his Excellency in Council to reconsider the orders passed on the Joint Magistrate, Mr. Leeds, an officer who during a long service has, by his ability and diligence, earned the respect of the High Court, and, it is believed, the confidence of the Local Government, and whose action could not but have been influenced by the views of the law entertained by the Court to which he is subordinate.

36. Should his Excellency in Council be unable to resolve the questions suggested in the 2nd to 10th and 15th paragraphs of this letter in a sense favourable to the independence and authority of the High Courts, the Court prays that the points raised may be referred for the consideration and orders of the Most Noble the Principal Secretary of State for India.

I have, &c.
(signed) *W. Tyrrell*, Registrar,
High Court, North Western Provinces.

No. 647A, dated *Naini Tal*, the 31st August 1876.

From *B. W. Colvin*, Esq., Officiating Secretary to the Government of the North Western Provinces, to the Officiating Secretary to the Government of India, Home Department.

IN continuation of my letter, No. 610A, dated 15th August, I am directed to forward, for the consideration of his Excellency the Governor General in Council, the accompanying Minute* recorded by the Honourable the Chief Justice of the High Court of Judicature for the North Western Provinces regarding the case of *Regina* v. *Fuller*.

* Dated the 18th of August.

MINUTE by the Honourable Sir *Robert Stuart*, Chief Justice, North Western Provinces, respecting the Resolution of the Government of India in the Case of *Regina* v. *Fuller*.

THE terms of the Court's letter to the Government of India on the published resolution in *Regina* v. *Fuller* were carefully considered by me, and, in full concurrence with my colleagues, had and have my entire assent. But the matters embraced in that letter have suggested to my mind considerations, my views as to which I desire to record in this form.

2. That letter by the Court raises and determines four very serious questions. The first relates to the authority and powers of this High Court; the second has regard to the relative authority and powers of his Excellency the Governor General in Council; the third deals with the merits of the case of *Regina* v. *Fuller*; and fourth, and in connection with these merits, and generally, the position of Mr. Leeds, who tried, convicted, and sentenced Fuller.

3. It results from the examination afforded by paras. 4, 5, and 6 of the Court's letter, that the High Courts of Judicature in India are not the Courts, in any sense, or in any degree, of the Government of India, or of his Excellency the Governor General in Council, but the Courts of Her Majesty the Queen, constituted and established by Her Majesty, not arbitrarily or for any undisclosed reasons, but constitutionally, on the public grounds and conditions, and for the purposes and with all the rights and privileges with which Her Majesty has thought fit to invest them: the principal of these being that the High Courts, or any of the Judges thereof, were not to be answerable for any act of duty done in virtue of their office to any authority whatever, save that of Her Majesty herself in Council. This distinctly and sufficiently appears from the express terms of the Charters of the several High Courts; and with respect to the High Court Act, 24 & 25 Vict. chap. 104, such characteristic quality and position of the High Courts is one of the provisions applicable to the old abolished Supreme Courts, which, by Sect. 11 of the said Act, are revived and applied to the substituted High Courts, as will presently appear.

4. The 9th section of the Statute 24 & 25 Vict. chap. 104, referred to in para. 5 of the Court's letter, further provides that "the High Court to be established in each Presidency shall have and exercise all jurisdiction, and every power and authority whatsoever, in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last-mentioned Courts;" and by Section 10 of the same Act, it is provided that "all jurisdiction now exercised by the Supreme Courts of Calcutta, Madras, and Bombay respectively over inhabitants of such parts of India as may not be comprised within the local limits of the Letters Patent to be issued under this Act establishing High Courts at Fort William, Madras, and Bombay, shall be exercised by such High Courts respectively." Section 11 provides that all laws then in force applicable to the abolished Supreme Courts, or to the Judges of those Courts, "shall be taken to be applicable to the said High Courts and to the Judges thereof respectively, so far as may be consistent with the provisions of this Act and the Letters Patent to be issued in pursuance thereof, and subject to the legislative powers in relation to the matters aforesaid of the Governor General of India in Council; and Section 12 saves all proceedings pending in the abolished Courts, and provides that "such proceedings, and all previous proceedings in the last-mentioned Courts, shall be dealt with as if the same had been had in the said High Court, save that any such proceedings may be continued, as nearly as circumstances permit, under and according to the practice of the abolished Courts respectively."

5. By Section 16 of the same Act Her Majesty is empowered by Letters Patent to erect and establish a High Court of Judicature for the North Western Provinces, with the like jurisdiction, powers, and authority as were conferred on the other three Courts, as far as circumstances may permit; and this intention has been fully carried out by the Court's charter, issued by Her Majesty's warrant under the Great Seal of England on the 17th day of March 1866, in the 29th year of Her Majesty's reign.

6. In order adequately to apprehend and appreciate the full force of these provisions of the High Court Act, it is necessary to advert to the terms of the charters of the abolished Supreme Courts. They are all three to the same effect, but that of Calcutta may be selected for the purposes of this Minute. This charter, after reciting the Act of Parliament under which it was granted, and stating the names and position of the Judges who were to compose the Court, goes on to provide as follows:—"And it is Our further will and pleasure that the said Chief Justice and the said Puisne Justices shall severally and respectively be, and they are, all and every of them, hereby appointed to be justices

justices and conservators of the peace, and coroners, within and throughout the said provinces, districts, and countries of Bengal, Behar, and Orissa, and every part thereof; and to have such jurisdiction and authority as Our justices of Our Court of King's Bench have, and may lawfully exercise, within that part of Great Britain called England, by the common law thereof;" and it is further and subsequently provided in the same charter that "the said Supreme Court of Judicature at Fort William in Bengal should also be a Court of Equity, and shall and may have full power and authority to administer justice in a summary manner, as nearly as may be, according to the rules and proceedings of Our High Court of Chancery in Great Britain; and upon a bill filed, to issue subpœnas and other process, under the seal of the said Supreme Court of Judicature at Fort William in Bengal, to compel the appearance, and answer upon oath, of the parties therein complained against, and obedience to the decrees and orders of the said Court of Equity, in such manner and form, and to such effect, as our High Chancellor of Great Britain doth, or lawfully may, under our Great Seal of Great Britain." And it was also provided by the charter that the Supreme Court, besides being a Court of Common Law, like the Court of Queen's Bench in England, and a Court of Equity, like the Court of Chancery in England, should be a Court of Oyer and Terminer and Gaol Delivery, and "shall have the like power and authority as Commissioners or Justices of Oyer and Terminer and Gaol Delivery have or may exercise in that part of Great Britain called England, * * * * and to proceed to hear, examine, try, and determine indictments and offences, and to give judgment thereupon, and award execution thereof, and in all respects to administer criminal justice in such and the like manner and form, or as nearly as the condition and circumstances of place and persons will admit of, as Our Courts of Oyer and Terminer and Gaol Delivery do or may in that part of Great Britain called England, * * * * and to all other acts which shall be necessary for the due administration of criminal justice in such manner and form, or as nearly as the circumstances and condition of the case will admit, of Our Courts of Oyer and Terminer and Gaol Delivery may do in that part of Great Britain called England." And there are various other provisions of the same nature, all showing that the Supreme Court established by the charter was not only to be modelled in the English form in all respects, but to have its jurisdiction and authority protected and enforced on the same constitutional principles as those recognised in the case of the English Courts, the only difference being that, instead of proceeding by appeal and error in Parliament, the appeal from the Supreme Court was to be to the King in Council.

7. The charter of the Supreme Court contains anxious provisions where the old East India Company is a suitor before it, and for compelling the Company's appearance and their pleading where necessary; and with respect to the Governor General and his Council, the only provision which the charter contains relates to the safety of their persons and exemption from arrest, although in this respect the Chief Justice and Judges of the Supreme Court are placed on the same footing, and are similarly exempted.

8. The Supreme Court was thus thoroughly independent, and amenable to no authority whatever in the exercise of its official and judicial powers, save and except only to the King in Council, and even then in regard only to "judgments, decrees, orders, or rules."

9. Such were the character, authority, and powers of the old Supreme Courts; and if there was nothing else on which to base the complete independence of the High Courts as the successors of the former, in the exercise of their functions, the above recitals would surely be enough, showing, as they do, not only that the Supreme Courts enjoyed the independent authority and prestige of English Courts, but that they were judicially answerable solely and only to the King in Council. The express words of the charters of the High Courts, however, in which there is not the slightest recognition, directly or indirectly, or by any kind of implication, of any authority over, or right of interference with, these Courts by the Governor General in Council, or any other prerogative authority whatever in India, leave no doubt on the subject.

10. Irrespective, however, of any such provisions of the law, the reasons and

the policy which determined Parliament and the Crown to invest Her Majesty's Courts and Her Majesty's Judges in India with such official and judicial independence are very apparent.

11. In the first place, the investment of the Courts with such independence exceedingly increases and magnifies the responsibility of the Judges to Her Majesty for any errors, misconduct, or misfeasance with which they might be chargeable. In the second place, there are no persons or authorities in India possessed of qualifications which could fit them to supervise or in any way control Her Majesty's Courts; for, I say it with all respect, his Excellency and his Council, with one exception, are not, legally and technically, learned persons. They have not within themselves as a body, necessarily and intrinsically, any official, forensic, or judicial training or experience in matters of law, and they could not, however justly disposed (and they could not be otherwise than justly disposed), satisfactorily perform the duties of directors or superintendents of the Courts. I say with one exception, although even my honourable and learned friend Mr. Hobhouse, who so ably fills the place of Legal Member of Council, would not, I am sure, maintain that he is either entitled himself to exercise, or that, by force of his great knowledge and position, he can impart to his Excellency and the other Members of Council any Pretorian powers in the way of supervision, direction, or control over these Courts. And, in the third place, any such authority on the part of the Governor General in Council would lead to the anomaly of the Crown acting inconsistently with, if not contradicting, not only its own Royal Charters, but the legislative enactments of the Imperial Parliament itself. His Excellency the Governor General in Council in India acts in a purely delegated character, and exercises delegated authority, and not independently of Her Majesty the Queen and her Government, as represented by her Secretary of State; and all his acts, resolutions, and proceedings are subject to Her Majesty's allowance or disallowance; and any resolution, therefore, of his Excellency at variance with, or purporting to be at variance with, the prerogatives and independence of the Queen's Courts, would impose on Her Majesty and her Ministers the painful and anomalous duty of considering whether they would treat the Indian Courts in a manner different from, and other than, the consideration and respect which, in a similar or corresponding issue, would undoubtedly be shown by another Department of Her Majesty's same Government to the Courts and Judges in England. But this I hope I may believe could not possibly be. No Home Secretary in England would dream of interfering, by the expression of regrets, or of opinions of approval or disapproval, with the manner in which the English Judges discharge their duties and responsibilities; and it appears to me difficult, if not impossible, to understaad that Her Majesty's Secretary of State for India would be otherwise disposed in the case of Her Majesty's Indian Courts.

12. The only element in the High Courts which might be supposed to favour, however covertly, any opposite contention might perhaps be imagined to be the presence in the High Courts of Judges who are the representatives and successors of the old Sudder Courts, which undoubtedly were to a great extent under the influence and control of the Government of India, and even of the Local Government. But the Sudder Courts were entirely abolished by the High Court Act, and it is important to observe that it is *after*, and not before, the section abolishing these Courts that its provisions determining the independent character of the Court and the appeal to Her Majesty in Council are to be found. Nor, unlike the provisions relating to the old Supreme Court, to which I have referred as having been revived and made applicable to the High Courts, is there a single word or expression in the Act, or in any of the High Court's charters, saving or continuing any portion, feature, or quality of the Sudder Courts. The independent character, therefore, of the High Courts is wholly unaffected by the presence, if any, in its constitution of the Sudder Court element.

13. The ninth paragraph of the Court's letter states that the distinction between the functions of the Executive Government and the High Court have, in a measure, been recently recognised by the Governor General in Council, on the occasion of a reference made by the Hon. Sir William Muir, now a Member of Council, but then Lieutenant Governor of these Provinces. But it appears to me that

that it would be useful to advert more fully to the circumstances of that case, showing how completely justified the Court is in referring to it.

14. That was the case of Girdhari Lal *v.* Hearsey, and the question which was ultimately referred for consideration to the Government of India arose in this way. While at Dehra Dún in camp, in the cold season of 1872 and 1873, the Lieutenant Governor paid a visit to the jail, and found there Girdhari Lal, the plaintiff in the suit, who ultimately, by reason of the defendant's plea of minority, lost his case in the High Court with costs, and it was for these costs, which he was unable to pay, that he was in jail.

15. The man being in prison under such circumstances excited the Lieutenant Governor's sympathy, and his Honor had recourse to the expedient of drawing up a resolution, dated 23rd January 1873, the third paragraph of which was as follows:

"The Lieutenant Governor accordingly thinks that the Subordinate Judge should take the earliest opportunity of proceeding under Sections 280 and 281 of Act VIII. of 1859, and calling on the prisoner to file a list of his property, against which proceedings may be taken; and in default of any further means of payment being shown to exist, that the Subordinate Judge should consider whether, under the provisions of the law, he should not be released from further imprisonment." It will be observed that there is here, directly from the Lieutenant Governor to the Subordinate Judge, what is neither more nor less than a judicial order that certain procedure should be adopted for the prisoner's release from jail, and it was ordered by his Honor that a copy of this resolution should be sent to the Subordinate Judge at Dehra and to the High Court.

16. The irregularity of this proceeding on the part of his Honor at once attracted the attention and action of the High Court; and a correspondence ensued, in which the Court pointed out to the Lieutenant Governor the error he had committed, under a mistaken view of his position and duty, by interfering, as he had done, with the Court's process, informing him distinctly that "it was the interference with a judicial officer's procedure in his Court that the Court thought it necessary to notice. It regrets to see, from the concluding portion of the 2nd paragraph of your letter, his Honor still justifies his action." The correspondence ended by the Court's requesting that a complete copy of it should be forwarded to the Government of India.

17. In due time the Government of India communicated its opinions on the case, and there is now before me the letter from the Government of India (marked Home Department, Judicial, dated the 20th March 1874), in which these opinions are explained. In this letter, his Excellency in Council points out a misapprehension on the part of the Lieutenant Governor of the precise question for the determination of which the High Court had requested that the correspondence might be forwarded to the Government of India, and correcting that misapprehension, his Excellency proceeds to remark as follows:—"But the matter upon which the High Court throughout this correspondence have laid stress relates, not to the tenor of these instructions, given on the spot after a visit to the jail, but to the form and substance of the instruction contained in the resolution, which was published and communicated to the Court and to the Subordinate Judge of Dehra, in which the Subordinate Judge was prompted to proceed under certain sections of the Civil Procedure Code, and to call on the prisoner to file a list of his property. * * * * And what the High Court contend is, that instructions and suggestions, such as those contained in this resolution of the 23rd January, as to the course which they should pursue in the discharge of their judicial duty, should not be communicated to judicial officers subordinate to the Court. Upon this point I am to say that his Excellency the Governor General concurs with the opinion expressed by the High Court, and considers that it is undesirable to issue such instructions, or to publish them in a resolution. And though his Excellency in Council is by no means prepared to lay down that the chief executive authority of a province may not properly and usefully admonish Judges in other departments of action, still less that he may not see that all remedies which the law permits are fully applied to remove unnecessary hardships in the law's operations, yet I am to

observe that functions of this kind should be exercised with caution, especially having regard to the statutory powers of superintendence vested in the High Court;" and the letter of his Excellency ends thus:—"Though of opinion that the terms of the resolution in question have been justly objected to by the High Court, the Government of India wish at the same time to express their entire approval of the object which the Lieutenant Governor sought to attain by the instructions of December 1872, and with the tenor of those instructions." This letter from the Government of India appears to be conclusive as to its understanding of the distinction between the functions of the Executive Government and the High Court.

18. The independence of the High Courts in relation to the Executive Government being thus thoroughly established, and also fully recognised by the Government of India itself, we were scarcely prepared for the communication from the same quarter which, to our extreme surprise, we have received, and which has occasioned this discussion. For that such a communication at least purports to, and shows a disposition to, invade the Court's independence is clear, even if it actually and legally does not and cannot have that effect; and the Court is entitled to complain of, and to remonstrate against, such an attitude on the part of the Executive Government towards it, as relatively an independent institution.

19. The "regret" expressed by the Governor General in Council in the fourth paragraph of the letter referred to is really a judgment by his Excellency, arrived at by his mind being judicially exercised, and after calling the High Court to his bar. Now, the mere statement of such a view of the matter, a statement which, however apparently extravagant, is nevertheless, with reference to the scope of the paragraph, a perfectly correct one, is almost enough to show how untenable is the position taken by the Government of India towards the High Court. But this false position (if I may, without disrespect, say so) on the part of the Government towards the Court will further appear from what actually occurred in the case of Regina *v.* Fuller, so far as the Court is concerned.

20. That case was first brought to the knowledge of the Court by a demi-official letter from the present Local Government of these Provinces to Mr. Tyrrell, the Court's registrar, dated the 31st of March last, enclosing the record of the case, and begging that it might be laid before the Judges, and asking their opinion as to the adequacy of the sentence. This was the first time the case came before the Court at all, and it will be observed that, however judicially the Court may be supposed to have been consulted by the Local Government, the case did not come before the Court in the form of of an appeal, or by way of revision, or by any method or proceeding which necessitated or involved any hearing *in foro*, with a judicial determination thereon. The Court's opinion was simply asked as a matter of courtesy, and in accordance with a practice on the part of the Local Government of consulting the Court simply by letter, where any legal difficulty was experienced in its administration —a practice, however, which I have often felt was open to many objections. Of course the Court is not bound to answer such inquiries, but the disposition of the Judges is always, if possible, to assist the Government, although they generally keep in view the possibility of the matters so submitted to them being brought before them in their proper judicial capacity.

21. On this subject the observations in the Court's letter leave nothing material to be added, and they ought, I think, to be conclusive, to the mind of any one of judicial experience in criminal cases in India, as to the position in which the High Court was placed, not by any act of its own, but on the unanticipated invitation of the Local Government.

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spect he is amenable only to the High Court, and it is not even usual to entertain complaints against subordinate judicial officers without communication and consultation with the High Court as the legally constituted superior authority.

23. Respecting Mr. Leeds' conduct, however, it does not appear to me that he was guilty of any serious error of judgment; and I humbly venture to think that, having regard to the principles of culpability recognised by the criminal law, Mr. Leeds' comparative immunity from error is shown in the manner in which the facts are referred to in the letter of the Government of India itself. It is there stated that Mr. Fuller struck the syce with his open hand on the head and face, and pulled him by the hair, so as to cause him to fall down. Mr. Fuller and his family drove on to church; the syce got up, went (it would have been more correct to have said ran) into an adjoining compound, and there died almost immediately. It would appear from the medical evidence that the spleen of the deceased was in such a diseased state that very slight violence, either from a blow or fall, would have been sufficient to have caused death. Indeed, it is plain that a mere accident to the man, such as his tripping while walking or running, might have had this fatal result, but that there is nothing in the case to show that such extreme and perilous sensibility of body was known to, or could have been reasonably suspected by, Mr. Fuller; and his guilt or criminal responsibility would have been the same, and neither more nor less, if Katwaroo had not died. The letter of the Government of India goes on to state that "the death of Katwaroo was the direct result of the violence used towards him by Mr. Fuller," and his Excellency in Council observes that "the High Court assumes the connection between the two events as being clear," but adding, "yet, on reading Mr. Leeds' judgment, he does not find that that gentleman ever considered the effect, or even the evidence, of this connection." The portion of the Court's letter thus referred to is in these terms:—

"The medical evidence shows that the spleen was in a diseased condition; that death was caused by the rupture of the spleen; that this injury might have been caused by moderate violence, or by a fall; and that there were no external marks of injury on the body. Under these circumstances, it appears that no great violence was used, and that the accused neither contemplated, nor could have foreseen, that severe hurt would have resulted from the degree of violence exerted by him, much less that it should have been followed by the lamentable result of death."

It will be observed that Mr. Fuller's not very violent blow and Katwaroo's death are here stated as connected facts, but not in such a way as to show Mr. Fuller's culpability in regard to the death. In fact, it is unnecessary to dwell on the mere fact of the connection between the two circumstances, the material and vital question being, not whether the death did in fact result from the blow, but whether Mr. Fuller had such a guilty knowledge of the probable consequences as to make him really responsible for the fatal occurrence. But there is nothing in the record to show any such guilty knowledge on his part, or that he intended to occasion a hurt which would ordinarily or probably cause death, and every circumstance ought to have been distinctly proved, not left to any kind of inference or suspicion. With respect to Mr. Leeds' judgment, I must really venture to differ from his Excellency in Council, and suggest that that judgment proceeds on the evidence before the magistrate; that it distinctly states the fact of the blow or assault, as it may be called, and also Katwaroo's ultimate death; but it does not state, and, with great respect and deference, I submit it very properly does not state these as necessarily connected facts against Mr. Fuller in the way of measuring his culpability. Mr. Leeds was trying the case under Sections 319 and 323, Indian Penal Code, and, with the judgment now before me, I cannot see that he omitted any material consideration in any way arising out of the evidence.

24. Mr. Leeds cannot be charged with any mistake or error of judgment in taking a faulty view of the case before him under Sections 319 and 323, and it is correctly stated in the Court's letter that he could not have committed Mr. Fuller for trial on a charge of culpable homicide, or of voluntarily causing grievous hurt. But if, by any straining of any section of the Penal Code, Mr. Fuller had been

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22. As stated in the Court's letter, any fault that could be imputed to Mr. Leeds was at most an error of judgment, and in a single instance, and to punish him in the manner intimated in the Government's letter appears to me to be not only unjust and unreasonable, but also contrary to law. For Mr. Leeds, however amenable in a general sense, personally and socially, to the Government of India and their subordinate Governments, was not in any way answerable to any Government authority for his *judicial* conduct. In that respect,

spect he is amenable only to the High Court, and it is not even usual to entertain complaints against subordinate judicial officers without communication and consultation with the High Court as the legally constituted superior authority.

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24. Mr. Leeds cannot be charged with any mistake or error of judgment in taking a faulty view of the case before him under Sections 319 and 323, and it is correctly stated in the Court's letter that he could not have committed Mr. Fuller for trial on a charge of culpable homicide, or of voluntarily causing grievous hurt. But if, by any straining of any section of the Penal Code, Mr. Fuller had been

been committed for trial before the Sessions Court or the High Court, the result would in all probability have been, and, I think, must have been, the same—if, indeed, the fine might not have been even less, for the syce had violated his duty and disobeyed his master's orders, and had incurred at least a severe reprimand, under which he might have equally taken to his heels, as Native servants often do when they are scolded, and thus ruptured his diseased spleen; for, on the evidence, it is not at all improbable that the running into the contiguous compound, ending with the fall there, caused the injury to the spleen and the death, or at least materially contributed to these two results.

25. Stated, however, at its worst, Mr. Leeds was guilty of nothing except a mistake or error of judgment, and if such mental shortcoming is to be visited with not merely judicial correction, but with personal punishment to the erring officer, there is not, I will undertake to say, a single magistrate of any grade, European or Native, in these Provinces—I might venture to say in all India—who could pass scatheless through such an ordeal. My experience, indeed, as a Judge of a High Court, does not point to any particular tendency on the part of magistrates to adopt a lenient view of cases on trial before them, whether the accused persons are Europeans or Natives, but quite the reverse; and I have been particularly struck with the severity which Native magistrates sometimes evince in these cases. Nor can I for a moment believe that, in his investigation of Mr. Fuller's case, Mr. Leeds was in any degee actuated, either in favour of Mr. Fuller or against Katwaroo, by any feeling relating to their being of different races. There is not the slightest indication, either in his judgment or in the record of Mr. Fuller's case, to indicate the existence of such a feeling, and I cannot appreciate the reasonableness of visiting Mr. Leeds with penal consequences, simply because he performed his duty according to the light of his intelligence, and with no improper or corrupt motive. He has always borne the highest character for industry and care, and no officer subordinate to the High Court has been held in higher esteem by the Judges. I find he has been in the Civil Service of India for about 15 years, and that he has actually served for about 12, and during the whole of that time no fault of temper or conduct has been entertained or recorded against him. I trust, therefore, that the reconsideration of this matter, as requested in the Court's letter, may have its intended effect, and that the penalty recommended to be inflicted on Mr. Leeds may be cancelled. Should this not be conceded, my fear is that the moral effect of such a state of things on the young magistracy of the country may be not such as the Government of India would desire. Already there have been indications of this, and I myself have recently had occasion to repress the undue zeal of some young magistrates.

26. In a previous part of this Minute I have referred to the regret expressed by his Excellency in Council respecting the conduct of the High Court in this matter, as being a judicial opinion which invaded the Court's independent authority; and it is, I think, scarcely too much to say that, if the power to administer such a censure could be justified, there is not a prosecution, suit, appeal, or any other judicial proceeding of the High Court with which the Government of India could not similarly interfere, not even excepting cases in which the Government of India itself is a party, and it is frequently a litigant. The very case under consideration is that of Regina v. Fuller, and his Excellency in Council might have been reminded that he himself, and not the friends of the deceased man, was the real and legal prosecutor, and, in that sense, Mr. Fuller's litigious adversary.

27. The Court's letter expresses regret on the Court's part that no intimation was conveyed to it of the intention of his Excellency in Council to take action, and no opportunity afforded it for explanation or statement before the publication of his Excellency's letter in the Gazette; and the Court further states that Fuller's case was, it is believed, first brought to the notice of the Government of India by published extracts from the vernacular press, and that these published extracts were not furnished to the Court; and the course thus pursued towards the Court does not appear from the Government of India's letter itself to have been, nor has it been in any way, explained, and this I deeply regret.

28. In

28. In some European countries the judicial office is not held in the high esteem with which it is regarded by the Government of Her Majesty the Queen and by the English Parliament, but is made subordinate to a Minister, who may, to a large extent, control the action of the Courts. But it is otherwise with regard to Her Majesty's Courts of Judicature, and Her Majesty's judges holding their commissions, as they do, direct from the Queen herself. These Courts and judges can even entertain and decide questions relating to the impugned validity of acts and proceedings of the Crown itself, and in India the High Courts can call in question the validity, and if necessary declare to be invalid, all acts, proceedings, and measures on the part of the Government which can be shown to be *ultra vires* of their province. And, so commissioned, this High Court will go on in the discharge of its duties and responsibilities, uninfluenced by any consideration other than the true exposition of the law and the sound administration of even-handed justice.

29. I have now, and only, in conclusion to assert, which I do most confidently, that no Court, body, or constituted authority could treat the natives of this country with greater consideration on all suitable occasions than this Court invariably does, never allowing any opportunity to pass of rebuking any misconduct towards them.

R. Stuart.

High Court, Allahabad,
North Western Provinces,
18 August 1876.

EXTRACT from MINUTES of a Meeting of the Council of *India*, held on Tuesday the 20th March 1877; the Marquis of *Salisbury* in the Chair.

THE two Despatches to India in the Judicial Department, reviewing and commenting on the proceedings in the case of Mr. Fuller, which were laid before Council on the 13th instant, were read, and, after long discussion, were, on the Question, approved, with certain alterations; Sir E. Perry being dissentient.

Ayes, 11; viz.:	No, 1; viz.:
Cassels, A., Esq.	Sir Erskine Perry.
Drummond, Hon. E.	
Ellis, Sir Barrow.	
Halliday, Sir F.	
Maine, Sir Henry.	
Montgomery, Sir R.	
Muir, Sir W.	
Strachey, Lieutenant General.	
Wilde, Major General Sir A.	
Wolseley, Major General Sir Garnet	
Yule, Colonel Henry, C.B.	

DISSENT by Sir *Erskine Perry*.

I MUCH regret that I feel compelled to record a dissent to these Despatches which in effect express approval of the proceedings of the Government of India in the Fuller case.

Every one must appreciate the motives which induced Lord Lytton's Government to denounce the practice of English gentlemen assaulting their native servants. If that practice is prevalent, which, however, I entirely disbelieve, Lord Lytton was not only justified, but highly to be commended, for expressing his strong personal disapprobation of it; but between such course and the Executive Government taking it upon itself to expound nice questions of criminal law and procedure, to find fault with the highest judges of the land because they differ from them, and to visit with a "severe penalty" a judge of

high character for ability and of long standing, because he has given a judgment that the Government disapproves, is a very wide gulf.

I have carefully examined the law and the proceedings in this case, and I am clearly of opinion with the High Court of Agra that no fault is imputable to the magistrate who pronounced the decision.

The real question before us is not whether the Government has the *right* to censure the decisions of the Supreme Courts of Justice, or to punish inferior judges for judicial indiscretion. Instances may readily suggest themselves of a "miscarriage of justice," or of "judicial corruption," such as is indicated in the Government Despatch (para. 28), where the right of criticism which belongs to every member of a free community can certainly not be denied to the Government with respect to the inferior judges, and in a country like India, the Executive is compelled to take notice of any gross incapacity in its magistrates, even to the extent of removal from office.

But the questions to be determined in this case are whether the Government has displayed a wise discretion in their interference with the decisions of the legal tribunals, and whether they have treated Mr. Leeds, the magistrate, with justice.

The first is a constitutional question of the very gravest character; the second is a purely legal one.

On the former of these subjects I will be very brief. Government in India, as in other Asiatic countries, is necessarily despotic, but it is made reconcilable to the conscience of a free country like England, by the existence of two considerable checks; first, the power of appeal to this country against every act of injustice or caprice on the part of Government; and, second, the existence in India of an independent judiciary. It is, no doubt, inconsistent with the theory of despotic rule that independent tribunals should exist, with the power to set aside acts of Government as illegal; and the slavish Roman lawyers invented the convenient doctrine "*quod principi placet legis vigorem habet.*" It is also apparent that a well-meaning, paternal Government, may be often thwarted by the decisions of judges, who consider themselves bound to administer the law set before them, without reference to political considerations. Temporary evils, even, may occur under this head, whilst confused or imperfect laws are allowed to remain on the Statute Book; but the remedy is simple. Strafford probably thought he was administering perfect justice when he took upon himself to decide cases in Ireland, and sneered at the lawyers who thought that England should be governed by their Year Books; but the good sense of England has rejected this pretension, and holds, as the cardinal article of its political faith, that nothing short of glaring misconduct will justify the interference of Government with the Bench. No one can impute such misconduct to the Agra High Court in the present case; and I doubt greatly the expediency of reminding the Judges of India, who are claiming immunity from Government interference, that they hold their offices by the tenure which produced the most shameful subserviency to the Government, on the part of judges, that is recorded in history.

With respect to the decision pronounced by Mr. Leeds, a minute examination of the Indian law is required. Rightly or wrongly, but after great deliberation, the Indian Legislature has altered the law of England which makes every case of homicide, resulting from an illegal act, a felony, triable before a superior judge and jury. Such a course may be well calculated to promote the sanctity of human life. But Lord Macaulay and his colleagues thought it very unjust that, where death occurred as a mere casualty, or misadventure from a slight blow or push, it should be punishable as a crime; and they framed their law accordingly.

The effect of that law is to eliminate the fact of death altogether from the offence, in a case such as is above suggested. When then, on the facts proved before Mr. Leeds, it appeared that the defendant had only struck the deceased twice with his open hand, and that death ensued from the rupture of a diseased spleen, which might have been occasioned by a slight blow or fall, Mr. Leeds was quite justified in keeping the fact of death out of his consideration. The exact question for him to determine was the amount of penalty to be inflicted for the offence proved before him, and this is a matter which the law of India, like the law of England, leaves greatly to the discretion of the judge; such discretion is governed by many circumstances, which most frequently are known only to the presiding judge; the frequency of the offence, the necessity of

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making an example, &c., &c.; but it would be a difficult task for any criminal judge, if he were called upon to prove in every case that the exact amount of punishment he had fixed upon, during the excitement of a criminal session, was the most fitting. If I had been the presiding judge in Fuller's case, I think that I should have inflicted a larger penalty, for I should have considered the civil injury sustained by the family of the deceased. But it would have been a stretch of the law to have done so, and an assumption of the powers of the Civil Court, and a judge is certainly not to be blamed for being too logical in administering criminal law. But the chief fault imputed to Mr. Leeds is that, on the evidence before him, he undertook to dispose of the case himself, instead of committing it to the Sessions. An examination of the Indian law and Indian law books, shows that this charge is not only unsustainable, but that he would have proceeded contrary to the direct orders of his superiors if he had done so. What is aimed at in Indian Administration is that magistrates should exercise their summary powers of conviction, and not commit to the Sessions, except in cases where their powers of punishment do not suffice to meet the offence. The Penal Code is framed on this view. The High Court of Bengal, in a Circular Order of 1865, expressly ordered magistrates not to commit to the Sessions unless he "finds, from aggravated circumstances, that higher punishment is required than he can award."

The High Court of Agra inform us that the magistrates in their jurisdiction are instructed to commit to the Sessions only, "when, in the opinion of the magistrate, he himself is not competent to visit (the offence) with an adequate sentence."

If Mr. Leeds was of opinion that his powers to inflict 1,000 rupees penalty and three months' imprisonment were ample, and more than ample to meet the case proved before him, he would have been liable to the censure of the High Court if he had committed to the Sessions. Moreover, the High Court have deliberately decided in this case with all the evidence before them, that it was not the duty of Mr. Leeds to commit. The Government of India, without apparently having this evidence before them, and the Secretary of State, certainly without it, decide to the contrary.

But it is also said that as there was conflicting evidence, and as three out of the four eye-witnesses gave a graver character to the charge than which Mr. Leeds considered proved, it was his duty to send the case for trial before a jury. Such a canon of procedure cannot hold good with those who have experience of Indian Courts of Justice. The facility with which native witnesses can be got together to swear anything, the tendency of low castes to uphold one another by unblushing mendacity, is so well known, that any judge who committed a case for trial because a lot of witnesses deposed to facts that he wholly disbelieved, would be justly visited with the censure of the High Court. On the whole, I am of opinion that, in reply to the Despatch now before us, great praise should be attributed to Lord Lytton for his desire to protect the natives from oppression; the claims of independence by the High Court should be placed on a right basis, and the decison as to Mr. Leeds should be modified, so as, if possible, to do him justice.

(signed) *E. Perry.*

21 March 1877.

(Judicial, No. 5.)

To His Excellency the Right Honourable the Governor General of India in Council,

My Lord, India Office, London, 22 March 1877.

Para. 1. I HAVE received and considered in Council your letter of the 12th October 1876, No. 37, together with the letter of the Registrar of the High Court of the North West Provinces, and of the Chief Justice of that Court, enclosed therein.

2. These papers record the circumstances under which it seemed proper to your Excellency in Council to censure Mr. Leeds, Joint Magistrate of Agra, for

his proceedings in the case of Mr. Fuller, who was accused before him of an assault upon his servant, resulting in the death of the latter.

3. Your orders in this case have been commented upon at much length, both by the Court of the North West Provinces collectively, and by the Chief Justice of that Court separately. Exception is taken in these criticisms, both to the justice of the sentence passed upon Mr. Leeds, and to the propriety of any interference on the part of your Excellency's Government with the proceedings of the High Court, or of the tribunals subject to its jurisdiction. On the present occasion I will consider the first point only, reserving for another Despatch the grave constitutional questions raised by the protest of the High Court.

4. Two points in Mr. Leeds' conduct of this case are, in your judgment, open to censure. It was open to him to deal with the case himself, or to refer it to a higher Court. He decided to deal with it himself. When he had come to this decision, and had formed his judgment as to the precise legal character of the offence, it was open to him to inflict the full penalty within the scope of his powers, or to inflict a mitigated penalty. He decided to inflict a penalty so mitigated that, as you observe, it was merely nominal.

5. There can, I think, be no doubt that, upon these two points, Mr. Leeds possessed entire discretion to act according to his judgment, and for the mode in which that discretion was exercised he is, of course, responsible.

6. The fact that Mr. Fuller's violence resulted in the death of his servant, should, in your judgment, have led Mr. Leeds to remit the matter to a higher Court for trial, both because such a Court would have been more competent to sift the evidence on which the character of the offence depended, and also because, even if no graver offence had there been brought home to Mr. Fuller than that of which he was actually convicted, the higher Court would have possessed a far larger latitude of punishment. The same consideration should also, in your view, have induced Mr. Leeds, after he had decided to deal with the case himself, to have inflicted a severer penalty.

7. The High Court, on the other hand, dwells on the well-known departure of the Indian law from its English model in determining the effect of fatal consequences upon the criminal character of the illegal act.

"The law of India relating to offences against the person differs materially "from the law of England. Under the law of England, a man who commits "an unlawful act, and in the commission of such act involuntarily causes death, "is guilty of murder, if the unlawful act be a felony, or what is known to "the law as a *malum in se;* and he is guilty of manslaughter, if death ensues "from any other wrongful act committed without justification or excuse.

"The framers of the Indian Penal Code denounced these principles of the "law of England as unworthy of enlightened legislation. Speaking generally "(for there are exceptions), they proceeded on the principle that a man "should be held criminally responsible only for such results of his act as he "intended or knew to be probable."

And the Court developes this consideration at some length.

8. I infer from the pains which the Court have taken to expound the Indian law upon this point, that in their view your Government has censured Mr. Leeds for not taking the fatal issue into consideration in deciding on the quality of Mr. Fuller's offence. If you had done so, your orders, certainly, could not have been upheld. But I do not see how any such construction can be put upon your words. You confine yourself to those parts of the magistrate's duty which were undoubtedly matter of discretion, his resolution to decide summarily, and the nominal amount of his sentence. Upon these points I agree with you in thinking that Mr. Leeds, having a discretion, was bound so to exercise it as to discourage the employment of violence to servants, and to uphold in the public mind the sacredness of human life. He exercised it in a manner likely to bring about exactly opposite results, and in so doing became justly obnoxious to your censure.

9. The indiscretion of disposing by summary hearing of an offence which had caused a sacrifice of life was enhanced by the fact that the evidence upon the question of intention was certainly conflicting; while upon the intention depended the question whether the offence was trivial, and falling within the cognisance

cognisance of the magistrate, or a much graver offence, reserved for the superior tribunal. Three witnesses swore that, in addition to the blow with his hand, Mr. Fuller kicked his servant in the stomach. One witness "made no mention" of this circumstance, and the accused denied it. If the three witnesses were correct, there can be little doubt that Mr. Fuller was guilty of a more serious offence, which Mr. Leeds had no authority to dispose of summarily. Mr. Leeds believed the accused, supported by the silence of one witness, and disbelieved the three who testified against him. Some of the reasons he gives for this view are certainly open to serious criticism; yet it is quite possible he may have been right as to the facts. But this conflict of evidence very much adds to Mr. Leeds' responsibility in deciding, as he practically did, that the Superior Court could not have convicted Mr. Fuller of the graver crime.

10. The fatal consequence of Mr. Fuller's violence did not, according to Indian law, increase its criminal character; but it did increase most materially the importance of ascertaining the exact nature of the crime committed, not only accurately, but in such a manner that the accuracy of the decision should be generally recognised. When death has been caused, it is of the utmost importance to satisfy the community that impartial justice has been done, and this necessity is specially urgent where the deceased is dependent and helpless, and the person causing death belongs to a superior class of society. In Western countries public feeling has been dangerously moved in such instances by the suspicion that an undue leniency was likely to be exercised on account of the difference in position between the deceased and the accused. Perhaps no such danger is to be apprehended in India; but the duty is not less imperious of guarding against a misconstruction which would be dishonouring to the law and would diminish the security of life.

11. It was, doubtless, not without pain that your Excellency inflicted a censure upon an officer to whose general conduct so many high authorities have borne favourable testimony. I do not doubt that you gave, and will continue to give, full weight to such important recommendations. But I am of opinion that the inadequate condemnation of misconduct such as that of which Mr. Fuller was guilty is likely, especially in India, to be attended with great public mischief, and therefore I think that you were fully justified in severely noticing Mr. Leeds' treatment of the case.

12. In conclusion, I must express my conviction that, in your course throughout this difficult case, your Excellency has been guided by an anxious care for the more helpless classes under your rule, and have to assure you of the warm sympathy of Her Majesty's Government with the feelings by which your conduct has been inspired.

I have, &c.
(signed) *Salisbury.*

(Judicial, No. 6.)

To His Excellency The Right Honourable The Governor General of India in Council.

My Lord, India Office, London, 22 March 1877.

Para. 1. I HAVE made some observations in Despatch No. 5, of this day's date, upon your Excellency's orders in regards to Mr. Leeds, so far as they concerned the conduct of that magistrate.

2. Before any notice of it was taken by your Government, your predecessor had directed the attention of the Government of the North West Provinces to the case. Under the Indian Law, the High Court possesses the power of their own motion of calling up and re-hearing criminal causes disposed of by the subordinate Courts, and, if need be, of revising their sentences. Having regard to this power, the Government of the North West passed on the inquiry of your predecessor to the High Court; and received from them a reply, stating that "the sentence, though perhaps lighter than the High Court would have been "disposed to inflict under the circumstances, did not appear to be specially open

"to objection." In reference to this reply, your Excellency observes, "the "Governor General in Council cannot but regret that the High Court should "have considered that its duties and responsibilities in this matter were "adequately fulfilled by the expression of such an opinion."

3. The High Court conceived that in this passage of your Secretary's letter, as well as in the censure passed upon Mr. Leeds, your Excellency had exceeded your province, and dealt with matters which were not within your competence. The Court, in expressing this opinion, further requested that, in case you should feel yourself unable to accede to their view, the points raised by them should be referred for my consideration and orders.

4. I have carefully considered in Council the matters so referred to me, and have now to make the following observations upon them. The judges of the High Court, in discussing the action of the Executive Government, rely partly upon the language of the Act and Letters Patent by which the High Court has been established, partly upon the independence of the Executive, which, according to the general intention of English legislation, is accorded to Courts of Justice. The Chief Justice, in a separate Minute, holds similar, though stronger language.

5. The material question raised is, whether your Excellency, in the measures you have taken, has exceeded the province which, either by law or by practice, has been assigned to the Executive Government. In considering this point, it is material to bear in mind that some of the functions exercised by the High Courts in India are, according to the practice of this country, strictly executive functions. The supervision of the subordinate Courts, so far as any means exist of exercising it at all, is here confided to officers who form a portion of the Executive Government, and, in respect to the tenure of their office, possess no judicial independence. Unpaid magistrates who misconduct themselves are reproved, or, if need be, removed by the Lord Chancellor. In the case of stipendiary magistrates, a similar duty devolves upon the Home Secretary. The review of the decisions of subordinate tribunals belongs, of course, to superior Courts; but the action by which they are submitted to the consideration of a superior Court, so far as it is exercised by any public authority at all, is initiated by the Attorney General or at the instance of an Executive Department.

6. In this case, therefore, it appears to me that the question of the relations between the Judicial and Executive authorities is not in reality raised. In censuring Mr. Leeds, and in expressing your regret that the authority responsible for doing so did not bring his proceedings under judicial review, your Excellency was dealing with purely executive functions, which it is your special province to control. The fact that these functions are, by an exceptional arrangement, partially committed to the High Court does not, in my judgment, alter their executive character, or withdraw them from the superintendence of the Executive Government.

7. The peculiar character of the duties, however, in respect to which your opinion was expressed, has escaped the notice of the judges of the High Court, and they have conceived themselves bound to raise the much wider question whether, and how far, the mode in which their judicial duties is performed is a proper subject for the animadversion of the Government of India. The question is not in my view raised by these papers. It is, therefore, now, and I trust will long remain, purely speculative. If, therefore, the judges had not distinctly requested my opinion on the point, I should have preferred to reserve the consideration of it till the necessity for a decision practically arose.

8. The question the judges of the High Court have, however, formally submitted for my decision, is whether "they are subject to the executive authority "of your Excellency in Council, further than is declared by the Letters Patent, "and whether it is in the province of your Excellency in Council, in a published "Resolution, to approve or condemn the action of the Court in any matter "which falls clearly within the functions committed to that Court." The Chief Justice, in the Minute appended by him to the letter of the High Court, lays down in support of this view, "that the Indian High Courts enjoy the indepen-"dent authority and prestige of the English Courts."

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9. It seems to me that in this contention the vital difference between the tenure of English and Indian judges is overlooked. Until the Act of Settlement all English judges held their office, as Indian judges do now, during Her Majesty's pleasure. When Parliament desired to assure their independence and to withdraw them from the authority of the Executive, it enacted that their Commissions should be made "during good behaviour." But when Parliament set up the existing High Courts of India in the year 1861, it did not think fit to adopt towards them the same policy which had been adopted and maintained towards the Courts in England. On the contrary, it was specially enacted that the judges in all the Courts established under the Act of 1861 should "hold "their offices during Her Majesty's pleasure."

10. It appears to Her Majesty's Government impossible to treat this difference, deliberately established between the Indian and the English Courts, as accidental and inoperative. In withholding from the Indian judges the independence of the Executive, which had been on a solemn occasion formally conferred upon the English judges, Parliament must be taken to have fully intended the consequences of the important distinction which it was sanctioning.

11. The right to dismiss any person holding an office carries necessarily with it a right to indicate the conduct which may, if persisted in, incur dismissal. In other words, it involves the right to approve or condemn the action of the officer who is so liable to be dismissed.

12. I gather from some phrases used by the Court, and in his Minute by the Chief Justice, that a distinction is drawn in their minds between the powers vested in Her Majesty, and those vested in your Excellency. This distinction may be sustained when applied to any act of a formal character. A judge might obviously decline to accept his dismissal from your Excellency alone, and might ask to be assured that Her Majesty's pleasure had been taken; but in any case it could be only through you that such an intimation could be conveyed. The expression of approval or disapproval on Her Majesty's behalf to Her servants who hold office at Her pleasure, is one of the most important functions with which you are charged. You fulfil it in conformity with your instructions and subject to your responsibility to the Crown. But it does not appear to me that any person holding Her Majesty's Commission can claim to be informed of Her pleasure in any more direct or authoritative way than by a communication from the Viceroy.

13. This appears to me to be in strict right the relation subsisting between your Government and the judges in India. But it is not necessary for me to state to you that, as a matter of policy, any executive action trenching on the independence of judges in the exercise of their purely judicial functions, could only be justified by reasons of extreme necessity. Your Excellency is as deeply impressed as Her Majesty's Government with the importance of maintaining intact that confidence in the impartiality of the law Courts which any interference of the Executive, except under pressure of such reasons, would destroy.

I have, &c.
(signed) *Salisbury.*