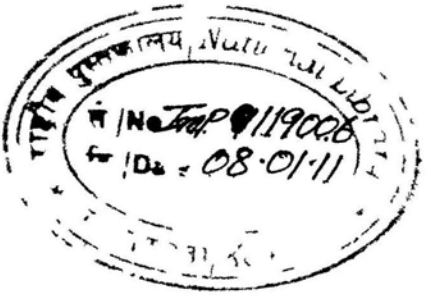
ESSAYS ON INDIAN AFFAIRS

1892-1895

N.B.—These Essays contain authentic information which may prove useful when Administrative Reform is undertaken.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THE FUSION OF EXECUTIVE AND JUDICIAL POWERS IN INDIA

Reprinted from THE LAW MAGAZINE AND REVIEW, No. CCLXXXIV., *for May*, 1892.

A REFORM, long needed in India, is the complete separation of the Executive from the Judicial functions of the State—in other words, the abolition of the practice of vesting Executive officers with Judicial powers, whereby they are often called to adjudicate in suits in which their own acts or those of their subordinates, done in their Executive capacity, are the very cause of complaint. So long ago as the year 1793, this blot on our Indian administration forcibly struck Lord Cornwallis, then Governor-General, and he accordingly inserted the following passage in the Preamble to Regulation II. of that year, with reference to the practice which had previously obtained, of empowering Revenue officers to preside as Judges in Courts where complaints in Revenue matters were adjudicated :—

"It is obvious that, if the regulations for assessing and collecting the public Revenue are infringed, the Revenue officers themselves must be the aggressors, and that individuals, who have been wronged by them in one capacity, never can hope to obtain redress from them in another. The Revenue officers must be deprived of their Judicial powers. All financial claims of the public, when disputed under the Regulations, must be subjected to the cognizance of Courts of Judicature, superintended by Judges who,

from their official situations and the nature of their trusts, shall not only be wholly uninterested in the result of their decisions, but bound to decide impartially between the public and the proprietors of land, and also between the latter and their tenants. The collectors of Revenue must not only be divested of the power of deciding upon their own acts, but rendered amenable for them to the Courts of Judicature, and collect the public dues subject to a personal prosecution for every exaction exceeding the amount which they are authorised to demand on behalf of the public, and for every deviation from the regulations prescribed for the collection of it."

It was under the *régime* then established that Bengal recovered from the wretched state of destitution in which that province, now so prosperous, had remained plunged ever since it came under British rule in 1757; and the subsequent establishment, in other provinces, of Law Courts to which Revenue officers were made amenable, produced likewise the most beneficial effects. A large division in the Presidency of Bombay may be cited as an example. The condition of the Deccan in the years 1840-50, was thus represented in the Settlement reports:* "The over-estimate of the capabilities of the Deccan, acted upon by our early collectors, drained the country of its agricultural capital, and accounts for the poverty and distress in which the cultivating population has ever since been plunged. Even now, little more than a third of the arable land is under cultivation." In 1864, however, industry, encouraged by less oppressive assessments and better protection of private rights, had developed with such marvellous rapidity, that the Government of Bombay wrote on the 26th July of that year:—"There never was a time during the known history of Western India when

* *Blue Book on the Deccan Riots Commission*, 1878, paragraph 33.

land suitable for the growth of grain was in greater demand. It may be said with almost literal truth that not a thousand acres of land which had been cultivated during the memory of man, are now to be found uncultivated in the Deccan and the Konkah."*

This fair condition of things, however, was not destined to last under the irresponsible form of government imposed on India in 1858. The prosperity of the agricultural classes attracted the attention of the Revenue authorities; and extravagant assessments imposed on land soon stripped the cultivators of the savings they had laid by in prosperous years, and reduced them to the state of destitution in which they were overtaken by the drought of 1877, when millions of persons perished from want of food, and upwards of two million acres of land fell out of cultivation. Vainly had the people protested against the oppressiveness, and even the illegality of the new rates, and when, on appeal to the High Court, a cultivator shewed that the assessment of his field greatly exceeded the limit of one-sixth of the gross produce laid down in the Government regulations, and obtained a decree in his favour, a Bill was introduced in the Legislative Council withdrawing all disputes regarding Revenue and the conduct of Revenue officers from the cognizance of the Civil Courts. This measure, which was passed in 1875 as the *Bombay Revenue Jurisdiction Act*, was as complete a repudiation as can be imagined, not only of the pledge implied in the Preamble to Regulation II. of 1793, but of the plainest principles of justice.

The retrogression involved in this action of the Indian Government, together with other steps taken in the same direction, has had a very deteriorating effect on the character of our Indian administration. The anomalous

* *Blue Book on the Deccan Riots Commission*, 1878, paragraph 66.

Courts of Law, presided over by Executive officers, which are established throughout India, clearly afford undue facilities for the enforcement of arbitrary demands on behalf of the State, and have wrought much injustice. A striking instance of the evil thus produced has recently come to light through a Judgment of the Judicial Committee of the Privy Council, delivered on the 21st November, 1891.*

The owner of the Singampatti estate in the Presidency of Madras was, during his minority, deprived in the following remarkable manner of 48 square miles of mountain land belonging to that estate. The management of the property had been taken over by the Government through its Court of Wards, on the plea of protecting the interests of the owner during his long minority; soon afterwards doubts were suggested on behalf of the Government as to the validity of the Infant's title to the mountain tract in question. Later, a Survey officer, vested with Judicial powers under a Government enactment known as the *Boundary Act*, was directed to adjudicate in the matter, and he decided that the mountain tract was State property. Thereupon the Government kept possession of the land, and appropriated its produce.

The owner of Singampatti, when he had attained his majority in 1880, appealed from the decree of the Survey officer to the Civil Court of Tinnevelly, adducing a grant of the estate made to his ancestor by Lord Clive in 1803, and full evidence as to its extent for a period beyond living memory. The Judge of Tinnevelly, who is a member of the Government Civil Service, partially admitted the owner's claim, but the High Court of Madras (which is presided over by a member of the English Bar) reversed his decree on appeal, and granted the fullredress prayed for. Against

* *The Times*, Law Report, Nov. 21, 1891. *The Secretary of State for India in Council v. Nallakutti Sivasubramania Tevar* [*sic.* Qy. *Aiyar.*—Ed.]

this decision the Secretary of State for India appealed to the Queen in Council, but the decree of the Madras Court was fully affirmed by the Judicial Committee, and it was shewn at the same time that, so far back as 1843, and again in 1857 and 1858, the Government were aware that the land they claimed was part of the Singampatti estate, and that it had been dealt with as such by their own officers in the years just mentioned.

The public in this country will doubtless be startled at the revelation of such proceedings under the "paternal" administration of the Government of India, which has generally been credited with fair intentions. In this instance, however, the intention itself seems to be the weak point; and, unfortunately, the case is by no means an isolated one. Instances of deliberate injustice have occasionally come to light, betraying a degree of boldness and systematic combination, which could scarcely have been attained without habitual practice; and, when the difficulties, dangers, and expense of contending with a Government (virtually despotic) are considered, the conclusion seems inevitable that the cases which have come to the knowledge of the public form but a small fraction of the number of those which have actually occurred. A few of the known instances may perhaps be usefully cited here.

In the *Koth Succession* case a landowner in the Bombay Presidency died, leaving a widow pregnant at the time of his death. The Government, on the plea that the deceased had left no heir, seized his lands and personal property. The unfortunate widow soon afterwards gave birth to a male child, and, as his guardian, claimed her late husband's property; but every obstacle was placed in the way of her getting it. She succeeded in obtaining from the Civil Court of Ahmedabad a certificate of facts which established her right, but the Government ordered the Judge to revoke that certificate. The widow then

appealed to the High Court of Bombay, when every effort was made by the Government to set aside the jurisdiction of that Court; and the spoliation would have been complete, had not the High Court vindicated its right, and firmly performed its duty. In the course of the Judgment, delivered in 1874, the Chief Justice of Bombay said:—

"I have met with no other case in the course of my long experience, which bore plainer marks of falsehood and fabrication. . . . One most extraordinary circumstance is that, after a long contest in the Courts, the Government, through their officers, requested the Judge at Ahmedabad to revoke that certificate, and the Judge was weak enough and ill-advised enough to suspend it. . . . Furthermore, there was a hue and cry throughout the country, raised through the officers of the Government, to destroy the woman's credit, in order to prevent her fighting her own and her son's battles. That was a very extraordinary course for Government officers to pursue. . . . The conduct of the Government necessarily protracted the proceedings. . . . Under all the circumstances judgment must go for the plaintiff with costs."

In the *Oudh* case it was again a woman who was selected for spoliation. The seclusion of females in the upper classes of Oriental society places them at a great disadvantage in protecting their property. After the Mutiny of 1857, a Hindu lady of Oudh, Thâkuráin Sukrâj Kuar, was forcibly dispossessed of her lands on the plea of her disaffection to the British Government, and she was, at the same time, allowed no opportunity to justify herself. She laid her complaint before the Assistant Commissioner of the province, who exercised both Executive and Judicial functions; and a full investigation having proved the charge of disaffection to have been groundless, a decree was given for the restoration of her lands; but the Government stopped the execution of that decree, and ordered the case to be

tried by a superior officer, the Deputy Commissioner of Oudh. This second trial resulted likewise in favour of the lady, when the Government, loth to give up the property, once more suspended the execution of the decree, and ordered that the case should be taken up by the Chief Commissioner. This officer, who held the highest post in the province, simply reversed the judgments of his subordinates, without assigning any ground for his decision. Thus the widow was left bereft of her property. There was no Tribunal in India to which she could appeal from this last decree: but her friends assisted her in laying her case before the Queen in Council, and, after long years of anxiety and privation, the appellant obtained, in 1871, an order for the restitution of her estate of which she had then, for fourteen years, been iniquitously deprived. The following passage in the Judgment of the Judicial Committee will show the sense which the Privy Council entertained of the conduct of the Government in this lamentable case:—

"It would be a scandal to any Legislation if it arbitrarily, and without any assignable reason, swept away such rights; and in this very painful case it is, at all events, agreeable to their Lordships to find that no such scandal attaches to the Laws in force in Oudh, and that the cruel wrong of which this lady has been the victim is due to the misapprehension* of the law by the Chief Commissioner. Their Lordships cannot but express a hope that, by an act of prompt justice and a liberal estimate of what is due to this lady, the Government will relieve her from further litigation. She had two decisions in her favour carefully and correctly adjudged, which, as they were consistent with the plainest principles of justice, it should have been

* For the delicate term "misapprehension" some might be inclined to substitute *disregard*.—J. D.

the effect of an appellate tribunal, unless the law controlled it, to maintain."

A matter for deep regret, in connection with these cases, is that the officers, whose conduct aided in the perpetration of such glaring injustice, were visited with no public signs of displeasure by either the Viceroy or the Secretary of State for India. And when it is remembered that the Government of India is responsible to no authority except Parliament, where India is not represented, it will be seen that the *régime* of 1858-61, by which India is being ruled, has provided no remedy or protection whatever against abuse of the extraordinary powers which it intrusted to the Government of that country. Can any doubt be entertained as to the issue, if this perilous situation be prolonged?

J. DACOSTA.

P.S.—Since this article was written, another case of spoliation has been brought to light in a Judgment of the Judicial Committee of the Privy Council, delivered on the 6th February, 1892.* In this instance, the Government having become possessed of the Bhaunandpur estate in Monghyr, claimed a slice of the neighbouring estate of Ishakpur, and took forcible possession of the land, without submitting their claim to any Judicial decision whatever. The owners of Ishakpur filed, in 1862, a suit for the recovery of their property; but owing to the obstacles which they encountered, it was not until 1870 that a decree for its restoration could be obtained. In 1883 the Government again claimed the same tract, and filed a suit for its

* *Times*, Law Report, Feb. 6, 1892. *The Secretary of State for India in Council v. Durbijoy Singh and others.*

possession, without, however, shewing any new ground for their action; previously to 1862 they had acknowledged and dealt with the land in question as belonging to the Ishakpur estate; and the ordinary law of limitation would have debarred their renewed claim after so long a period; but they had taken care to exempt themselves, by legislative enactment, from the operation of that law.

In order to place the respective positions of the contending parties in a clear light, it is necessary to remind English readers that the Courts which have jurisdiction in the first instance in such suits in India, are presided over, not by independent Judges or trained lawyers, but by members of the Indian Civil Service, whose advancement depends in no small measure on the satisfaction which they afford to the Government, and who, on the other hand, may, at any time, be removed to a distant part of the country, if they incur the displeasure of the Authorities. Under such circumstances, their anxiety to avoid causes of displeasure to the Government becomes quite intelligible. Indeed, there seems no other rational way of accounting for the frequency with which wrong decisions are delivered by provincial courts in India, in suits in which the Government have an interest. In the present instance, the Subordinate Judge decreed partly in favour of the Government; but the High Court of Bengal, on appeal, reversed his decree and dismissed the Government suit with costs. This Judgment has now been affirmed by the Judicial Committee of the Privy Council.

J. D.


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JUDICIAL INDEPENDENCE IN INDIA

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A MILLION of Englishmen, at home and abroad, have doubtless read, with feelings of satisfaction, the following sentences in a leading article in the *Times* of May 23rd last:—"There is nothing in all our institutions of which we are more justly proud than the absolute independence of the Judicial Bench, and there is none of our traditions which we would more gladly see reproduced and perpetuated in the great communities which it has been our destiny to found in distant lands." At the same time, the following question must have arisen in the minds of many readers, viz.:—"What have we done towards perpetuating that glorious tradition in India, among the largest community that Providence has placed under British rule?"

Judicial independence in India is to be found only in the four Presidency High Courts, which exercise a limited original jurisdiction, and are open to appeals from the Provinces. In the rest of the Indian Empire such independence is rendered simply impossible by the tribunals being presided over by members of the Government Civil Service, who are subject to the immediate control of the Executive. In certain Provinces the Judges are actually Executive officers vested with Judicial powers; and the result of this anomalous system is that appeals from decisions given under official pressure are obstructed by the Executive, and prevented for years from being heard and determined in a

High Court. Authentic illustrations of this state of things will be found in the *Law Magazine and Review*, No. CCLXXXIV., for May last, under the heading of "*The Fusion of Executive and Judicial Powers in India.*"

Under such circumstances it will easily be understood that the right of appeal to a High Court is held in the highest estimation by the people of India, who look to it, not only for an impartial and enlightened decision of their suits, but also for a wholesome control over the proceedings of the subordinate tribunals throughout the country. Unfortunately, such control is seriously impeded by the action of the Executive in the manner just alluded to, and by the numerical disproportion existing between the High Courts and the establishments which they are expected to control. For example, in the Bengal Presidency in 1889-90, the District and inferior Courts determined 491,298 cases, while the High Court disposed of 4,636 appeals and applications, leaving 3,654 cases pending. (*Blue Book* 250 *of* 1891.)

That so unsatisfactory a state of things as has been mentioned above should prevail in a country where we have long prided ourselves on having gained the confidence of the people by our impartial administration of justice, is due to causes which a short retrospect into the history of our Judicial administration in that country may suffice to explain.

In 1726 Mayor's Courts were first established by Royal Letters Patent at Calcutta and Bombay, and the Regulating Act of 1772 constituted the Supreme Court of Bengal for the purpose of affording to British subjects in India the protection which the East India Company's Courts, founded on native law and native procedure, were incapable of providing. Later, Supreme Courts were established in Madras and Bombay, and these, with the Supreme Court at Calcutta, always remained Crown Courts, their Judges being members of the English Bar, nominated to the Bench by the Crown.

On the other hand, the Native system of administration, adopted by the East India Company, was based on the union of all authority—Judicial, Fiscal, and Military—in the same hands; a system which is said to have worked successfully while the rulers and the people were of the same races, spoke the same languages, and obeyed the same code of morality, but which was unsuitable for an alien Government on whom the restraining influences of race and education were entirely wanting. Modifications in the Company's system were introduced from time to time. Under Warren Hastings, an English Collector of Revenue, aided by a Native assistant, dispensed in each District both Civil and Criminal Justice, and appeals lay from these so-called "District Courts" to two *Sudder* Courts, the one in Civil, the other in Criminal cases. In 1774 Provincial Councils or Courts, presided over by three Judges, were created with appellate jurisdiction, and further changes were introduced later; meanwhile a conflict arose between the Civil and the Judicial authorities in Calcutta, and the 21 Geo. III., c. 70, which settled the contentions, constituted a Court of Record, with appeal to the King in Council. In the East India Company's Courts, however, no important departure from the native system occurred until 1793, when Lord Cornwallis effected a separation of the Judicial from the Executive functions of the State, by depriving Executive officers of their Judicial powers, and rendering them amenable to Courts of Judicature, which he then created and placed under the superintendence of Judges wholly uninterested in the result of their decisions.

This was the first attempt at fostering Judicial independence in the Courts of the East India Company; and its success was both rapid and far-reaching. The change, however, was most distasteful to the Executive, whose power it curtailed and regulated; and as the Indian Legislature was then, as it still is, entirely in the hands of

the Executive, new changes were enacted after Lord Cornwallis's retirement, which completely subverted the sound principles of his legislation. The Civil Jurisdiction of the Provincial Courts was abolished, Criminal Jurisdiction was conferred on the Civil District Judges, and Magisterial authority on the Collectors of Revenue. Great confusion and uncertainty arose soon afterwards from the multiplicity of the enactments, and an Indian Law Commission, with the late Lord Macaulay as its President, was appointed under 3 & 4 William IV., c. 85, for recommending reforms in the administration of Justice in India.

The first Report of the Indian Law Commission, with a Penal Code drafted by it, was submitted to the Government of India in 1837. The work was not considered satisfactory, and was recast by Mr. Drinkwater Bethune, who succeeded Mr. Macaulay as Legislative Member of Council in India.* This second edition, however, was not more successful than the first, and the projected Code remained shelved until 1853, when a new Council of the Governor-General, of which the Chief Justice of Bengal was an *ex-officio* member, having been constituted by 16 & 17 Vict., c. 95, the work of Judicial reform was resumed and successfully concluded, through the labours of that eminent lawyer, the late Sir Barnes Peacock. The Penal Code, on the revision of which Mr. Peacock bestowed years of the most devoted attention, was read for a third time and passed in 1860, when it was declared in the Council *nem. con.* that "the Code could be safely adopted as the universal law of India." It may be said that our Judicial administration in India had then attained its highest level.

* It would be a mistake, no doubt, to ascribe the failure alike of Lord Macaulay and of Mr. Bethune in framing a Penal Code, to any want of legal acumen, seeing that they had to perform their task, not as independent

Meanwhile the aggressive policy of annexation pursued by the Government against our Indian allies and feudatories, resulted in the lamentable disasters of 1857-8, and eventually in the transfer of the Government of our great dependency from the East India Company to a member of the British Cabinet. The virtually irresponsible system of administration, which was then adopted for India, struck a heavy blow at Judicial independence. The Secretary of State for India, in whom were centred all the powers that had been exercised by the Court of Directors and the Board of Control, was made responsible only to Parliament, where India has no direct representation; and the "Indian Councils Act, 1861," by removing the Chief Justice from the Governor-General's Council, left the Legislature entirely under the control of the Executive. The 24 & 25 Vict., c. 104, which abolished the Supreme and *Sudder* Courts, and conferred their jurisdiction on the present High Courts, struck another blow at the independence of the Judicial Bench in India, by ruling that, while one third of the Judges of a High Court may be English Barristers, the remaining two-thirds may consist of Civil servants of the Government and of Pleaders of Courts where the law administered and the procedure in use differed materially from those of Crown Courts. It must be admitted, however, with regard to the civilian Judges appointed under that Act, that the healthy atmosphere, which they breathed in their new sphere of action, soon revived that spirit of fairness and independence which is innate in the great majority of Englishmen. Unfortunately, however, some of the number seemed unable to throw off the trammels of

lawyers, but in consonance with the views, and subject to the influence, of the Government of which they were the servants; while Sir Barnes Peacock's independent position as Chief Justice placed him beyond the reach of all such influences.

their previous official training, an evil which was aggravated by the allurement of promotion in the Executive service, which was, at the same time, held out by the Government. An unseemly conflict then ensued between the Executive, who seemed determined upon arbitrarily interfering in the proceedings of the Law Courts, and a number of the High Court Judges, who stood up for the supremacy of the Law.

The Criminal Code and the Code of Criminal Procedure, as revised by Sir Barnes Peacock, proved invaluable instruments in the hands of the High Courts, for redressing wrong decisions on appeal, and for guiding Sessions Judges and Magistrates, who labour under special difficulties in the due discharge of their functions, owing to the following circumstances connected with the Police. In a country where the rulers and Englishmen generally hold no social intercourse with the Natives, the Police have exceptional opportunities, through misrepresentation, threats, and violence, to extort money from the ignorant, the timid, and the unprotected; and a great proportion of this nefarious income is derived from witnesses in Criminal cases. The Police are allowed to arrest all persons as witnesses whom they may believe to be possessed of information regarding the case in hand. Murders and minor crimes, and even accidental deaths, thus furnish particular opportunities for extortion. Among the persons taken up as witnesses, all who have any pecuniary means willingly pay to escape the usual ordeal, which consists in witnesses being, at the discretion of the Police, marched in custody to the nearest Magistrate's Court (which may be ten miles away), and thence to the Court of Sessions, their incarceration often lasting several months. The recalcitrant and the poorest, who remain in the hands of the Police, are then tutored (and tortured when necessary) as to the evidence required of them. The Police generally being the prosecutors, are interested in procuring a conviction, and this they have

little difficulty in accomplishing, so long as their criminal methods of producing evidence are not interfered with.

Those unacquainted with India, to whom the above statement may seem to require confirmation, will find such confirmation in the Administration Reports of the Government itself, no less than sixteen police officers having been found guilty of inflicting torture in the Province of Bengal, as stated in the Administration Report of that Province, published in 1878. When it is considered that a well-grounded fear of revenge has raised almost insuperable difficulties in the way of evidence being produced against the Police, the legitimate inference is, that the cases in which police officers have been convicted of torture, form but an insignificant fraction of those in which they have been guilty of the practice. The following are among the proved instances recorded in the above-mentioned Report. In Midnapore two constables were sentenced to five and two years' imprisonment respectively for crushing a woman under a heavy stone to extort a confession of guilt. In Hooghly two police officers got a year's imprisonment for torturing a woman to obtain evidence against her husband. In Nuddea a woman was so ill-treated that she killed herself, the constable present having been sentenced to imprisonment for a twelvemonth only, as evidence of his having taken an active part in the crime was not produced. In Mymensing a police officer and two constables tortured a man to death, and were sentenced to fourteen years' rigorous imprisonment. A remarkable case is that of a sub-inspector in Midnapore, tried for torture and let off by the Court, but departmentally degraded, whereby it became evident that his departmental superiors believed him to be guilty; a case in which one would think that he ought to have been dismissed from the Service. This is one of the many instances that have come to light of the extraordinary influence which the Police exercise over the [illegible] of

the Department, and over Magistrates and Judicial officers generally.

Sir Barnes Peacock's Codes, which were framed with a knowledge of the practices just mentioned, inaugurated a new era in the administration of Criminal justice in India, with the result that trials began to shew an abnormally small proportion of convictions.

Now, the Indian Government, in the person of the Secretary of State for India, relies on favourable Administration reports for obtaining countenance and support in Parliament and with the public at home; and when the criminal statistics and the judgments of the High Courts exposed the hideous blots which disfigure the administration of Justice in India, the Executive became alarmed, and diligently set themselves to the task of satisfying the requirements of the Government regarding the tenor of the official reports. The blots complained of having come to light through appeals made to the High Courts, it was deemed expedient to prevent such appeals as much as possible. A "Criminal Procedure Amendment Bill" was accordingly introduced in 1870, which provided (in Section 5) that an Appellate Court should have power to enhance a sentence, and (in Section 272) that the Government may appeal from an acquittal, without limitation of time; that is, that a man may, for instance, twenty years after his acquittal, be re-arrested, tried and executed for murder. This was, indeed, holding an uneven balance between the Crown and the subject, seeing that the latter is limited to ninety-nine days for appealing from a conviction. A native Association thereupon represented in a Memorial to the Government that "they were not aware of any peculiarities in the constitution of Indian society which required this exceptional and almost vindictive power in the hands of the Government; that an acquittal was an acquittal, and that the order of the Court ought to receive the respect of the

subject and the Crown alike; that such legislation had the tendency to place the Executive in antagonism with the Judiciary, and to prove subversive of public morality and Judicial independence." Then, with regard to Section 5, the memorialists submitted that "the object of an appeal was to secure the ends of justice, and would be frustrated when the applicant was restrained from seeking the desired redress by a fear of the enhancement of his sentence."

These representations, supported by strong expressions of local public opinion, led to amendments prohibiting the enhancement of punishment on appeal, and limiting to six months the period in which the Government may appeal from an acquittal. The first of these two amendments was subsequently withdrawn, and protests against other objectionable features in the Bill were unheeded; finally, a new Criminal Procedure Code was passed in 1872, with many provisions which can be justified by no acknowledged principle and which all tend to prevent appeals from reaching a High Court. Section 64A empowers the Government to transfer any Criminal case from one Court to another Court of equal or superior jurisdiction; and Section 249 provides that when a witness is produced before a Court of Sessions, the evidence given by him before the committing Magistrate may, in the discretion of the presiding Judge, be treated as evidence in the case. Now, it should be borne in mind that the evidence produced in the Magistrate's Court is given when the witness has been, and still remains, in the custody and power of a notoriously corrupt Police.

The worst feature in the new Code is perhaps its system of summary trials. Under Chapter XVIII., Part V., a Magistrate is not hampered by any form; he may take whatever evidence he thinks fit, and then give his Judgment; he is not bound to record his reasons, and Section 227 provides that, in cases where no appeal lies (*i.e.*, where the

sentence is not more than imprisonment for three months, or 200 rupees fine), the Magistrate need not record the evidence of witnesses, his reasons for passing Judgment, or draw up a formal charge. Now, Magistrates have, not unfrequently, been found to have summarily disposed of cases which did not come under that Chapter: at the same time the right of appeal became nugatory, seeing that no records had been kept.

The Right Hon. Sir Richard Garth, late Chief Justice of Bengal, who zealously strove to raise the administration of Justice in that country from the low moral condition into which it had been allowed to sink, has recorded his opinion on the subject in a small book,* from which I take the liberty of quoting the following sentences, as they succinctly represent the actual state of things in India:—

"When the functions of a Policeman, a Magistrate, and a Judge are all united in the same officer, it is vain to look for justice to the accused. Imagine an active young Magistrate, having heard of some daring robbery, taking counsel in the first place with the police, with a view of discovering the offender. After two or three vain attempts he succeeds, as he firmly believes, in finding the right man; he then, still in concert with the police, suggests inquiries, receives information and hunts up evidence through their agency, for the purpose of bringing home the charge to the suspected person. He next proceeds to inquire, as a Magistrate, whether the evidence which he himself has collected, is sufficient to justify a committal; and having come to the conclusion that it is, he tries the prisoner in his Judicial capacity without the assistance of a jury, and convicts him. The Police, upon whom the Magistrate is obliged to depend very much for his facts and information, are neither honest nor reliable. There is

* *A Few Plain Truths About India.* W. THACKER & Co. 1888.

always the fear that the charge against the prisoner may be the work of some wicked conspiracy. It sometimes happens that the Police themselves are engaged as the chief actors in making these abominable charges. To be tried by a man who is at once the judge and prosecutor is too glaring an injustice; and it is only wonderful that a system so indefensible should have been allowed to prevail thus long under an English Government."

Under the circumstances described in the foregoing pages it would be vain to look for Judicial independence in our Indian Provinces. Nature abhors vacuum less than Despotism hates independence on the Judicial Bench; and despotism of the worst type has been imposed by us on our fellow subjects in India. An Oriental despot is restrained in his rapacity by the fear of rebellion; no such fear can affect the ruler whom we have invested with despotic power, seeing that the whole military and naval forces of the British Empire stand at his back ready to crush any insurrectionary manifestation in India. Oriental despotism is mitigated by the sympathy which a common origin and a common faith create between the ruler and his subjects; no such sympathy can exist between our Secretary of State and the two hundred millions of Indians whom we have placed under his despotic rule. In Oriental Principalities and Kingdoms the fundamental laws of society and the principles on which they are based have descended from time immemorial, and are acknowledged as immutable by the sovereign and the subject alike; the *régime* imposed by us involves, on the contrary, an incessant change of legislation both in principle and in form; a condition of things which fills the popular mind with doubts, suspicions, and deep anxiety.

Lord Cornwallis's Regulations and the Codes of Sir Barnes Peacock, which were based on principles of equity, were received with gratitude and acclamation, and

awoke in the people a feeling of confidence in the intentions of their rulers; but those laws were soon blotted out of the Statute Book to make room for enactments which no principle of equity can defend, and which were obviously dictated by stringent fiscal exigencies. A single illustration may suffice to shew the nature of the enactments alluded to.

A landowner in the Presidency of Bombay, having appealed against the assessment imposed on his fields as exceeding the sum exigible under the regulations of the Government, and having obtained from the High Court a decision in his favour, the Government introduced a Bill, entitled the Bombay Revenue Jurisdiction Bill, removing from the cognizance of the Law Courts throughout that Presidency all matters relating to the land-revenue and the conduct of Revenue officers, and empowering the Revenue officers themselves to adjudicate in all such matters. The member in charge of the Bill urged, in defence of the measure, that "if every man is allowed to question in a Court of law the incidence of the assessment on his field, the number of cases which might arise is likely to be overwhelming." The Bill was passed in 1875 in spite of the protests entered by the people, and landowners have thus been deprived of the means of obtaining redress for illegal exactions of Fiscal officers.

It might appear superfluous to add that a most perilous situation has thus been created, were it not for the heavy calamities which ensued from a similar situation thirty-five years ago, and for the unpreparedness in which the Government and the public were overtaken by the catastrophe on that momentous occasion. The policy of spoliation, euphemised under the name of annexation, was allowed its course unrestrained by protest or remonstrance until we were startled by its results, and horrified by the massacres and outrages committed on Englishmen and Englishwomen, and by the amount of blood and treasure

that had to be expended before British rule could be restored in India. The authors of that policy, unfortunately, escaped punishment; they succeeded in averting the wrath of their countrymen from themselves to those fiends in human shape whom their action had evoked—to the Nana Sahib and others whose worst passions were called into play by the thirst for revenge which our adoption of an unprincipled policy had kindled in India.

JOHN DACOSTA.

Postscript.—The scope left for Judicial independence in India is, we are sorry to find by recent news from India, threatened with further contraction by a measure which the Government has been elaborating for two years, and is about to bring forward for enactment. A Bill (bearing the remarkably vague title of "The Madras City Civil Court Bill") proposes to transfer, from the High Court to the Small Cause Court, jurisdiction over all suits up to a certain limit of pecuniary value, which may arise within the local limits of the High Court's original jurisdiction, except Testamentary, Matrimonial, and Maritime suits; and it empowers the Government, at the same time, to raise the pecuniary limit to any larger amount, by notification in the Official Gazette. This proposition assumes that the Indian Legislature (which is, in fact, the Executive) can lawfully deprive the High Court of a jurisdiction conferred upon it by Letters Patent, granted under an Act of Parliament; and it accordingly places the jurisdiction of that Court at the mercy of the Government.

The Judges of the High Court of Madras have protested against this design of the Government to interfere, indefinitely and whenever it may see fit, with powers and

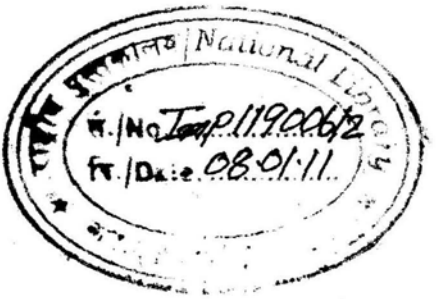
privileges conferred by Royal Letters Patent; and their Minute, in conclusion, strongly "condemns the proposals to place the continued existence of the original side of the High Court at the discretion of the Executive Government, and to limit the liberties and privileges of suitors in Madras, and to deprive them of the right they possess of suing in the High Court."

The history of the last thirty years does not encourage the hope that the Government will recede from the illegal position which it has taken up in the above matter; but the same time, it should not be forgotten that the remedy for the evil lies in the hands of the High Court itself, and, in a measure, in the support it receives from the Public, who are deeply interested in keeping our Judicature free from the control of the Executive It may be remembered that, some thirty years ago, an India Viceroy presumed to direct that a certain order issued by the Chief Justice of Bengal should not be executed. Sir Barnes Peacock, the Chief Justice referred to, lost no time in issuing a proclamation closing the Law Courts throughout the Presidency, on the ground that the Government had illegally interfered with the course of Public Justice. The ill-advised step taken by the Viceroy was speedily retraced.

J. D.

[It will, we trust, be obvious to our readers that both the present Article and its predecessor from the same pen deal with questions of the gravest importance from the point of view of Constitutional Law, affecting the inhabitants of the United Kingdom no less than their fellow-subjects of the Indian Empire, and it is from this point of view that we have been glad to give them the

prominence which they deserved. The student of Constitutional History can scarcely fail to remember how intimately the question of the Independence of the Judicial Bench was bound up with the whole body of Constitutional questions at issue between the Crown and the Nation during the Stuart Period. The dismissal of Coke, C.J., was directly due to his resolute maintenance of the principle of Judicial Independence, and although the nominal issue raised in the Ship-money case might at first sight have seemed but a question of £. s. d., it involved, in point of fact, the same question as that of the "auricular" taking of the minds of the Judges before the delivery of their Judgment in Court, which Sir Edward Coke so strenuously resisted as absolutely fatal to the Independence of the Judicial Bench It is not necessary to suppose any design on the part of the Government of India to revive, in the Indian Empire of Her Most Gracious Majesty, Jacobean and Caroline modes of Government, such as might have been suitable enough for it under a Mogul Emperor. It is only necessary to point out what a long and disastrous conflict such courses led to in this country, and what a perpetual protest against those courses has been, thanks to Sir Edward Coke, enshrined among the great Landmarks of our Constitution.—ED.]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"JUDICIAL INDEPENDENCE IN INDIA."

LETTERS TO THE EDITOR

FROM HON. SIR ALEXANDER EDWARD MILLER, Q.C., MEMBER OF THE GOVERNOR-GENERAL'S COUNCIL, AND RIGHT HON. SIR RICHARD GARTH, M.A., Q.C., LATE CHIEF JUSTICE OF BENGAL.

We have received letters on the subject of the two Articles contributed to this *Review* for May and August last, on the inter-related questions of the *Fusion of Executive and Judicial Powers in India*, and *Judicial Independence in India*, from two very high authorities, each most competent to pronounce upon the value of those Articles. We think it only due alike to Sir Alexander Miller and Sir Richard Garth, as well as to Mr. Dacosta himself, to print these letters in our current number. They would afford the best justification, if we felt that any were needed, for having published contributions to the discussion of important questions in Constitutional Law, from the pen of a writer in no way connected with the Legal profession. We ourselves felt no doubt on this point, for Sir Richard Garth exactly expresses our own view that, as regards India at least, it was best for such subjects to be raised for discussion in our pages by a disinterested layman. The interest with which such highly trained legal minds as those of Sir Alexander Miller and Sir Richard Garth both look upon Mr. Dacosta's Articles, is the best possible

testimony to their value as contributions to the oldest English Quarterly Review of Jurisprudence.

On the main point raised by way of criticism by Sir Alexander Miller, we think it only right to point out that the words in the note to Mr. Dacosta's Article on *Judicial Independence in India*, to the accuracy of which Sir Alexander takes exception, are not Mr. Dacosta's words at all, but are an extract from the *ipsissima verba* of the Judges of the High Court of Madras. Whether the learned Judges themselves were right or wrong in their view, we must leave to them to say, and we should be happy to receive any communication with which we may be favoured on that point from any members of the Bench of the High Court, Madras, who may feel their accuracy impugned.

We now leave the letters of our two distinguished correspondents to speak for themselves.—ED.

TO THE EDITOR OF THE *Law Magazine and Review*.

Simla, 25th September, 1892.

SIR,—I have read with much interest Mr. Dacosta's articles in your *Review* on the subject of "Judicial Independence in India," and I agree most cordially with their general scope and tenor; but in his note at the end of the last one he has fallen into an error, which is calculated, if uncorrected, not only to mislead persons who may naturally rely on him for their facts, but also—which is of more consequence—to deprive Mr. Dacosta's other representations of much of their legitimate weight in the minds of those who are better informed in this particular, and who may not unnaturally discredit all his statements, on the principle of "*Ex pede Herculem*."

The Madras City Civil Court Act expressly avoids any interference with the Jurisdiction of the High Court, and even the clause limiting the plaintiff's right to costs in

actions brought in the High Court which might have been brought in the Civil Court—a clause closely modelled on the provisions of the County Courts Act, 1888—only comes into operation when *in the opinion of the* (High Court) *Judge who tries the case*, it ought to have been brought in the Civil Court.

I take the liberty of appending an extract from the official report of my speech in Council on the occasion: the speech has, of course, no authoritative weight whatever, but it may be, I think, accepted as evidence that no such insidious designs against Judicial Independence as suggested are entertained by the present advisers of the Government of India.

I have the honour to be,

Your obedient servant,

ALEX. EDW. MILLER.

Extract.

"The Hon. Sir Alexander Miller said: 'When this Bill was first introduced it contained a provision applying s. 15 of the Civil Procedure Code to the Court about to be instituted. I confess that it appeared to me—apart from the very doubtful question whether it is or is not within the authority intrusted to this Council to interfere with the original jurisdiction of a chartered High Court—at any rate, a proposition which involved very important and, as it seemed to me, very serious consequences. But my difficulty was entirely removed when my Hon. friend, Sir Philip Hutchins, agreed to assent to a clause which expressly preserves all the jurisdiction of the High Court, and merely establishes along side of it a Court having a more limited jurisdiction, and to which the judges of the High Court may themselves, if they think fit, refer cases which otherwise come within their jurisdiction. Strange

to say, the only body which has expressed any wish that the concurrent jurisdiction of the High Court should be taken away are the judges of the High Court themselves. The majority of the judges of the Madras High Court have expressed a wish that the concurrent jurisdiction should be abolished, and that the City Court should be made the sole Court to have cognizance of cases which come within the jurisdiction given to it.

"'I certainly for one could not, with the views which I hold, have assented to that course; but it is rather singular that the Trades Association and the Chamber of Commerce, who now treat this Bill as an attempt to destroy the independence of the High Court, are more anxious for the retention of the High Court jurisdiction than the judges of the High Court themselves.'"

". . . . . Even if there had been no question of the right of this Council to interfere with the jurisdiction of the High Court—if the terms of the Act of Parliament had been so clear that no question could possibly arise—I, at any rate, should have thought it very much better to retain the concurrent jurisdiction. . . . . .'"

"'Under this bill any party who pleases is at liberty to bring in the High Court any suit which he might have brought if this bill had never been introduced; and it is entirely in the discretion of the Judge of the High Court himself, before whom the case is tried, to say whether it is a case which has properly been brought in the High Court or which ought to have been brought in the City Court; and what they call the "penal" consequences mean nothing more than this, that the plaintiff, if he wishes for the luxury of an expensive Court, when in the opinion of the Judge who tried the case he had an adequate remedy of a less expensive kind, should pay for that luxury himself; while, on the other hand, the defendant has no cause of complaint at having to pay the full costs if the Judge, who

tries the case, thinks that it was a proper one to be brought before the High Court. So far, indeed, from interfering with the independence of the Judges, we are entrusting to them a new and independent discretion It is not a new thing either, for this is exactly the discretion which late County Courts Acts have given to the Judges of the High Court in England, and I have never seen it suggested that the independence of that Court has been in any way interfered with by modern legislation.' "—From the *Gazette of India*, Pt. VI., August 13th, 1892.

TO THE EDITOR OF THE *Law Magazine and Review*.

Brockham Green, Betchworth, Surrey,
2nd November, 1892.

SIR,—The Indian Public is, indeed, much indebted to Mr. Dacosta and yourself, for the two very able Articles which that gentleman has lately contributed to the *Law Magazine and Review*, upon "The Independence of the Judicial Bench in India."

In England, the independence of the Judges is a fact so generally recognised that we are, perhaps, too apt to treat it as a matter of course, and hardly to appreciate its value. But in India, it is very different. We have there a despotic Government, extremely jealous of all authority which can in any way conflict with or control its own; and although theoretically it professes to concede to the Courts of Law, that right of independent action, to which they are justly entitled; yet, practically, the Government officials do often exercise a powerful and sometimes unjust influence over the proceedings of the Courts, especially those of the inferior magistracy; and, although the High Courts do their best to correct any injustice of that kind, the influences which are at work are so subtile, and the miscarriage of justice so often resolves itself into a question of fact, that the judges find it difficult to interfere. At the same time,

the very circumstance of the High Courts having the power to supervise and control the proceedings of the magistracy, and that those Courts are looked upon by the public, and especially the *native* public, as their best and, indeed, their only bulwark against arbitrary and illegal conduct on the part of Government officials, has had the effect in India (strange as it may appear to us in England), of fomenting an unhappy feeling of jealousy on the part of Government against the High Courts, which has been productive of many mischievous consequences, has greatly diminished the efficiency of the Courts themselves, and has been the means of preventing many wholesome and much-needed reforms, which might and ought to have been effected long ago.

I need hardly say, that this subject is a very large one; and I have not sufficient time now to offer you anything like a worthy Article for insertion in your next publication; but if you will kindly allow me space at some future time, I will endeavour to do justice to the cause, and to enlist the sympathies of your English readers.

Meanwhile, I am extremely glad that the criticisms which have already appeared in your *Review*, have been written by a gentleman, against whose disinterestedness and impartiality I should hope that not a word can be said. Mr. Dacosta is neither a judge, nor even a lawyer. He occupied in his time a prominent position in the mercantile world at Calcutta; and whilst there he took an active part in public affairs, and wrote upon some of the leading topics of the day. Since his return to England he has continued to take a lively interest in Indian matters; and if I may presume to say so, he has (in my humble opinion) only dealt too leniently with the abuses, which he has so ably brought to the notice of the English public.

I am, dear Sir, faithfully yours,

RICHARD GARTH.

OUR INDIAN TRANS-FRONTIER EXPEDITIONS

THEIR AIM AND THEIR RESULT.

BY

J. DACOSTA.

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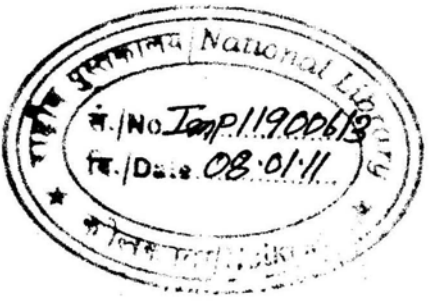
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OUR INDIAN TRANS-FRONTIER EXPEDITIONS:

THEIR AIM AND THEIR RESULT.

By J. Dacosta.

I.

NEWSPAPER articles of a semi-official character, published during the last few months, have created the impression that the recent collision between Russian and Afghan soldiers at Somátash, is likely to involve us in war with our great northern ally. The *Times* of August the 25th contains a leading article in which it is said: "When we had established the present ruler of Afghánistán upon the throne of Kábul, we undertook the obligation of defending him against foreign aggression. That engagement we are bound scrupulously to observe; and should the Russians resolve to encroach upon territories which belong to Afghánistán, it will be our duty to repel them."

Now it is well known that *we neither established the present Amir on the throne of Kábul, nor undertook any unqualified obligation of defending him against foreign aggression.* In support of this negative statement, it may suffice to remind the reader of the following incidents connected with the present Amir's accession to the throne.

In the spring of 1880, when we sent a mission to Abdar Rahman, offering to acknowledge him Amir of Kábul on condition of his renouncing sovereignty over Kandahár and Herát, he simply ignored our condition and intimated that, as the heir of Dost Mahomed, he claimed sovereignty over

the entire kingdom that had been ruled by his grandsire. When later, our offer, somewhat modified, was pressed for his acceptance, he clearly gave us to understand that he neither desired nor needed our sanction to his installation on the throne which was his by right. Lastly, when our conditions were communicated to him in the stern language of an ultimatum, requiring his absolute renunciation of Kandahár and the Kuram valley, our conditions were once more ignored, and we were left in the unenviable position of having dictated terms which we were powerless to enforce.

Meanwhile our Kandahár army was defeated with great loss by Ayub Khán at Máiwand, and we saw no prospect of our being able to relieve the remnant of that force, unless we received immediate assistance from Abdar Rahman. The pick of the troops we then had at Kábul, was required to march to the relief of our besieged garrison in the South, a distance of 316 miles; but the risk of being delayed by hostile clans on the road, made it hopeless for the relieving force to reach Kandahár before the place had fallen. Already the tribes around Kábul were assuming a threatening attitude, and our scouts reported that a Jehád, or religious war for the extermination of the "infidel," was about to be proclaimed. In these difficulties we negotiated with Abdar Rahman, and prevailed on him to use his influence in restraining the tribes who were likely to oppose our progress; and, at the same time, to detain near his person the chiefs of the Ghilzái tribes, through whose territories the remainder of our Kábul army was to return to India. This device of temporarily depriving the Ghilzáis of their leaders, prevented them from carrying out the traditional Afghán policy, of exterminating to the utmost a hostile army on the retreat—a policy which was ruthlessly executed against us after our first invasion of Afghánistán.

The timely aid thus received from the new Amir, enabled us to effect our immediate purpose; but it had to be paid for by a heavy sacrifice of national pride. We had to revoke our imperious ultimatum, to acknowledge Abdar

Rahman's sovereignty over Afghánistán without limitation of territory, to renounce the fine we had imposed on the city of Kábul for its connivance at the murder of our Envoy, to pay ten lakhs of rupees to the new Amir as *an earnest of British friendship*, and to refund the value of the treasure we had seized in Kábul during the invasion. We had moreover to give up a number of our guns, and to leave intact the defensive works with which we had strengthened the position of Kábul.

To bring these harrowing reminiscences to mind, is certainly not a grateful task; but it becomes a duty, when it is sought, through misleading statements, to deprive us of the fruit of dearly bought experience, and to expose us to fresh calamities which, in the light of that experience, might successfully be averted.

As regards the alleged obligation of defending the Amir's territories, no treaty binding us absolutely to perform that service has, as far as it is known, been subscribed by any authorised servant of the British Crown; and, in the absence of such an instrument, we must hold ourselves free to act, in each case, as its circumstances render advisable. In the present instance, at all events, no obligation of the sort can exist, seeing that we have come to no definite understanding with Russia or with the Amir, as to the north-eastern line of the Afghán frontier, and are, therefore, not in a position to contend that such frontier has been violated in the Pamirs.

Under all these circumstances, the scare about a war with Russia arising out of the Somátash incident, must be dismissed as groundless; while the motive for having raised it in the present conjuncture, may not be difficult to surmise.

II.

Another serious danger, however, is also foreshadowed in the newspaper articles referred to above; namely the danger of a third Afghán war, or British invasion of Afghánistán. This danger, looking at existing circum-

stances, is not only real, but seems imminent. A leading article in the *Times* of September the 12th refers in the following terms to the cause of our present dispute with the Amir:—"The turbulent population of the Zhob valley has been pacified by us.—At Chaman we have built a railway station on land which the Amir claims as within his territory. —We have no aggressive intentions towards him; but he takes a different view of the situation." The significance of these sentences will more fully appear when they are considered in connection with the following events which brought about the present situation.

Numerous expeditions, as it is well known, have been employed during the last sixteen years for the subjugation (or "pacification" as it is officially termed) of the border-tribes of Afghánistán, and the construction of roads through their territories. Among those expeditions, the following were charged specially with the "pacification" of the country between Gomul, a village on our frontier at the foot of the Sulimán mountains, and our railway from Quetta to Chaman; a tract which extends in a south westerly direction through the Zhob valley to Pishin.

In 1888 an expedition was sent to survey the Gomul pass which opens into the Zhob valley; but as its mission was frustrated by the opposition of the Makhind tribe, a considerable force was organised the following year, which entered the Zhob country from Baluchistán, accompanied by the late Sir Robert Sandeman as Political officer. The Kidarzáis arrested the progress of that force, and it was only in 1890, that our agent succeeded, by diplomacy and subsidies as well as by military force, in establishing a post at Apozái, and in obtaining promises from the Mashud Waziris, the Shiránis and the Darvesh Khel of Wána, that they would keep the Gomul pass open, in consideration of certain sums of money to be annually paid to them by the British Government. Surveys were then made for a projected railway through the Gomul pass and the Zhob valley on to Pishin, to serve as an alternative line to our Bolán

Railway which has been found unreliable, owing to the autumn floods, by which it is annually destroyed.

The chiefs in the Zhob valley, who have been receiving subsidies from us, are said to have maintained a friendly demeanour up to the present time; but their tribesmen never ceased to manifest their objection to our presence, by night-shooting into the British agent's camp, and by cutting off our sepoys within a few hundred yards of their lines. These hostile manifestations latterly became more active; a circumstance which we ascribed to the presence of an official of the Amir. We threatened, therefore, to send an expedition for subduing the clans, unless the official was removed; and the Amir informed us that, in compliance with our request, he had ordered him to retire, pending the conference we had proposed, and an understanding as to the boundary of our Empire.

Now, this suggestion of the Amir for the delimitation of our frontier, is most inopportune and embarrassing for the British Government, seeing that it has, for many years, been striving to advance our frontier into Afghánistán, and is still struggling for that end. On the other hand, our Government contends that the Amir's kingdom does not include the territories of the border-tribes, and that we are consequently at liberty to conquer and incorporate those territories in our Indian Empire. In support of this view, a new map of Afghánistán has been brought out, in which the green border defining the limits of that country, and the red line marking our frontier (as laid down in all our maps until 1890) have been removed, and nothing has been left to show where our territory ends and Afghánistán begins. Furthermore we have assumed the character of protector, and almost that of Suzerain, over the tribes whom we subsidise, and from among whom we have induced a number of men to engage in our service. To entertain the Amir's

Simultaneously with the new map of Afghánistán, a chapter was published on the "North-West Frontier of India," in which the author, the Hon. George Curzon, late Under Secretary for India, significantly remarked:

suggestion for a delimitation of the British frontier, would, therefore, interfere with our scheme and our pretensions; and this will probably account for the blustering language and the threats that were subsequently resorted to. The *Times* of November the 2nd contains a leading article in which it is said:—"We hope that the Amir is wrongfully charged with an attempt at evasion, which, if really made, might compel the Government to modify the benevolent and friendly attitude it is desirous of maintaining towards the Amir and his kingdom.—The Government will not be lightly turned from its settled policy; it possesses the means of bringing considerable pressure to bear upon its ally in a disciplinary way.—The Government can do without the strong and independent Afghánistán it strives to maintain: but whenever it shall cease to struggle for that end, Afghánistán as a kingdom will disappear."

III.

After a threat so clearly and loudly proclaimed, the British Government is not likely to recede from the position it has assumed. On the other hand it is equally improbable that the Amir would agree to territorial concessions, when his doing so is certain to destroy his power and influence over the tribes; and, as regards the latter, we well know that they will not submit to the rule of the "infidel" without a hard struggle. Under these conditions war seems imminent, and it behoves us to estimate its probable issue. For estimating that issue we have invaluable

"The attitude of the border-tribes has, in recent years, become much more friendly towards England than towards Afghánistán . . . they are gradually being transformed into an irregular frontier guard of the Indian Empire." Then, Mr Curzon, assuming the border-lands to have actually become British territory, says: "It is the forward move from the old Indus valley line across the Middlebelt, and the relations entered into with its occupants, that have, during the last five years, transformed our unscientific frontier into the scientific frontier which I will now proceed to delineate." In his delineation Mr. Curzon includes Lundi Kotal, Peiwar Kotal, the Gomul Pass and Chaman, but the conduct of the tribesmen shows that they take a different view of the matter.

data for our guidance in the history of the last fifty-five years; as, within that period, we twice invaded Afghánistán in circumstances similar to those of our present situation. On both occasions the war was unprovoked; it had been secretly schemed by the British Cabinet, and its object was simply to acquire control over the government of Afghánistán.

Of the final results of the war commenced in 1838 we have a succinct record in the following passages of the "Greville Memoirs":—

"1842. Sept. 10th.—A few days ago I met Sir Charles Metcalfe, the greatest of Indian authorities. He was decidedly opposed to the expedition originally, and said he could never understand how Auckland could have been induced to undertake it. Nov. 30th.—In the midst of all our military success, the simple truth is that Akbar Khan and the Afghans have gained their object completely. We had placed a puppet king on the throne and held military possession of the country. They resolved to get rid of our king and our troops, and to resume their independence; they massacred all our people, civil and military, and afterwards put the king to death. Our recent expedition was undertaken merely to get back the prisoners who had escaped with their lives from the general slaughter, and, having got them, we have, once for all, abandoned the country, leaving to the Afghans the unmolested possession of the liberty they had acquired, and not attempting to replace upon their necks the yoke they so roughly shook off. There is after all no great cause for rejoicing and triumph in all this. 1843. Jan. 16th.—The circumstances attending the termination of the war in Afghanistan have elicited a deep and general feeling of indignation and disgust. Ellenborough's ridiculous and bombastic proclamations, and the massacres and havoc perpetrated by our armies, are regarded with universal contempt and abhorrence. . . . Our greatest military successes have been attended with nearly as much discredit, as our most deplorable reverses. . . . On the whole it is the most painful chapter in our history for many a long day."

IV.

Now, if we turn to the war commenced in 1878, we find that it not only failed in its avowed object, which was the acquisition of an advanced frontier* (in other words the annexation of a portion of Afghánistán), but that it ended, like the previous war, in disaster and humiliation. At its conclusion, and with the advice of the distinguished officer who brought it to an end, we reverted, in our policy towards Afghánistán, to the lines we had originally followed, ever since the two territories became conterminous. Writing from Kábul on the 29th May, 1880, Sir Frederick Roberts said:

"We have nothing to fear from Afghánistán, and the best thing to do is to leave it as much as possible to itself. Should Russia in future years attempt to conquer Afghánistán or invade India through it, we should have a better chance of attaching the Afgháns to our interests, if we avoid all interference with them in the meantime."

This obviously sound policy, proclaimed under official responsibility by our highest authority on the subject, was nevertheless discarded suddenly in 1885, while public attention was diverted to the troubles in Ireland, and measures were immediately adopted for once more attempting the execution of the "forward frontier" or annexation scheme of 1876. A slight modification, however, was introduced in the plan of campaign; it was considered advisable, before marching our armies into the heart of Afghánistán, to invest the eastern and southern portions of the country. Numerous expeditions were accordingly employed for the subjugation of the border-tribes, and the construction of military roads across their country; but these operations completely failed in their object, and our frontier has not been advanced a single day's march from our Indian boundary.

* At the opening of Parliament in February, 1879, Lord Beaconsfield said: "We are now in possession of the three great highways which connect Afghánistán and India. We have secured the object for which the expedition was undertaken. We have secured that frontier which will, I hope, render our Empire invulnerable."

Disappointing and inexplicable as this result might appear to those who have only taken a distant and partial view of the operations, it is simply the effect of causes which have long been known to exist. Those who looked for a successful issue to our frontier expeditions, founded their hope on the superiority of our weapons and discipline, on the proximity of our base, and on the wealth of our material resources. But experience has conclusively shown that, in a barren and mountainous country like Afghánistán, those advantages are neutralised by the absence of roads, the scarcity of fodder and grain, and the fanaticism of the inhabitants; whereby the movement of artillery and cavalry is seriously impeded, and the transport of ammunition, stores and baggage is rendered slow and uncertain; while the proclamation of a Jehád, or religious war, is certain to gather overwhelming numbers of armed men, ready to lay down their lives in the defence of their faith and their traditional independence. The annals of the late war furnish innumerable instances in support of the above statement, a few of which may be cited here. Mr. Howard Hensman, referring to Sir Frederick Roberts's retreat before the tribes led by Mahomed Ján in Decr. 1879, recorded the following remark on the 27th of the same month:—

'We may seem strong enough now when we have not an enemy within twenty miles; but we seemed equally safe three weeks ago, when we disbelieved in the possibility of 30,000 Afgháns ever collecting together."

Sir Donald Stewart, on his march from Kandahár to Kábul in April 1880, telegraphed as under:

"On the 19th the division under my command encountered an armed gathering.—A body of some three thousand fanatic swordsmen poured down on our troops . . . the fighting lasted an hour, after which the entire body of the enemy spread broadcast over the country. The protection of the baggage prevented pursuit by the cavalry."

Mr. Hensman remarks, in his letter of the 26th of the same month, that the baggage train on that occasion was six miles long; and he adds, with reference to the fight at Charásiá:—

"At 9.50 Colonel Johnson heliographed that the enemy was reinforced, and that his troops were debarred from anything but acting on the defence, as their baggage would have had to be sacrificed, if an attempt had been made to storm the hills."

Then, Major Golquhoun, who was attached to the Kuram Field Force under Sir Frederick Roberts, records the following incidents:

"Novr. 29th 1878.—Owing to the exhaustion of the men and cattle, and *the impossibility of keeping up supplies with the troops*, it was decided not to attack to-day. Decr. 6th.—Only three guns and their ammunition were brought up the hill; the task was a severe trial. As there was no forage on the Kotal, the horses and drivers were sent down the hill again. 12th.—The Major General has decided to return to Kuram. . . . The baggage of the four regiments, even on the reduced scale, made a tolerably long column, and the Commissariat camels added to the length to be protected. 15th.—D. O. 347. Sick and wounded to be transported from Kuram to Kohát under escort of the 5th Punjab Infantry. Feby. 2nd 1879.—A convoy of sick men (including General Cobbe who has sufficiently recovered from his wound) proceeded to India under escort. The detachment was ordered to march *viâ* the Darwaza pass, as there was some chance that the Mangals might otherwise attack the party."

Turning now to the operations in Southern Afghánistán, we find the following entries in the diary of Major Le Messurier, Brigade Major of the Quetta army:

"January 10th 1879.—The prices we have to pay are startling; the forage for a horse costs 2 rupees a day. The Commissariat has only four days' supplies for Europeans and seven for natives; and yet there are only some 8,000 fighting men at Kandahár, out of the 13,000 which form the Quetta army. The mortality among the beasts of burden is very great. The want of camel carriage added to the fact that *we have outstripped our convoys of provision*,

is forcing itself to the notice of all. Jany. 18.—Marched 12 miles; the water all along is strongly impregnated with nitre. 29th.—Thermometer 25°. Increased mortality among the camels. No more tobacco."

At this time, Sir Donald Stewart, finding it impossible to feed his army, sent back the greater number to India. Meanwhile sickness broke out among the men and the cattle, as recorded in further entries of the same diary, as under:

"Feby. 4th.—The Commissariat are out of wood. 7th.—Black frost last night: increased mortality among the camels continues. 12th—The bread we have been having and the water combined will account for the sickness among the troops. April 6th.—The stench from the dead animals along the line was scarcely bearable. 24th.—Rode back into Kandahár and heard of Colonel Fellowes' death. He was as fine a looking man as any in the force, and most active. June 23rd.—The Colonel is laid up, and Rogers, Hawskin and Oliver are all down with fever. July 14th.—Cholera has appeared, ending fatally in 14 cases. 17th.—Cholera still busy at headquarters and the two squadrons. 18th.—A telegram came in saying that Nicholetts was dead, having been seized with cholera at 1 p.m. and died at 6 p.m. 21st—Hannel of the 1st Punjab Cavalry died of cholera. 29th.—Captn. Chisholme of the 59th was buried to-day. Augst 6th.—Major Pawis of the 59th was buried this evening—cholera. Anderson of the 25th N. I. buried to-day. Our doctor in the Sappers died last night, also Corporal Boon R.E. 23rd.—Heard that Stavely had lost four Europeans and two natives out of his battery, that Dr. Blanchard had died at Gatur, and Lieut. Campbell of the Baluchis at Chaman, all of cholera."

These diaries show how powerfully the food and transport difficulties, and the absence of practicable roads, interfered with our military operations in the late war, and how cruelly our officers and men were decimated by sickness and death, owing to bad food, want of shelter and the severity of the climate. They testify, at the same time, to

the imperative necessity under which the numerical strength of a British army in Afghánistán has to be limited by the scarcity of food, and show how its efficiency is further reduced by the detachments that have to be employed in guarding the baggage and ammunition, in escorting the sick and wounded to India, and in foraging for supplies. In any future campaign, the railway to Chaman, if not destroyed by the tribes, might facilitate the despatch of troops and stores from India; but it could not lessen the difficulties mentioned above, seeing that those difficulties arose only after we had penetrated into the interior of Afghánistán, while our railway scarcely goes beyond the border of the country. It should also be remembered that our railroad at Sibi was destroyed by tribesmen in 1880, as soon as our defeat at Maíwand became known.

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These considerations preclude any sanguine hope of our being able, in a future campaign, to contend successfully with the difficulties which caused our failure in the past. We might, as we did before, enter the country at the head of a victorious army, but our advance would, most probably, induce the Amir to retire beyond the Hindu Kush, as Shere Alí did in 1878; in which case we should be left to deal with the numberless tribes of the country, each jealous of its rights and interests and ruled by its own chiefs, but all united by a common faith, a strong love of independence and a fanatical hatred of the "infidel." Does experience warrant the slightest hope that we should succeed in concluding with those tribes any treaty which would secure the object of our invasion?—Supposing a treaty were obtained under the pressure of our arms, or purchased with our money; could we reasonably look for its fulfilment?—Have not faithlessness towards the "infidel," greed and treachery been repeatedly and advisedly declared by our officers to be prominent features in the Afghán character?—Have we forgotten how Pádshá Khan, whose friendship and loyalty

we so liberally paid for in the last war, fought against us in December 1879, when our fortunes were on the decline?—How, after being forgiven for that "breach of loyalty," and continuing to receive his subsidy, he once more collected his men and attacked our troops in April and May 1880, when our situation again became critical?—Have we also forgotten our embarrassing and undignified position, when our magniloquent proclamation of the 28th October, 1879 (evidently the work of one deplorably ignorant of Afghánistán and its people), calling on the tribal chiefs to come and consult with the British officials on the future government of their country, was treated with the most marked contempt?

After such experience—after sixteen years of unsuccessful warfare and an appalling expenditure of blood and treasure, what can justify the Government in once more plunging the nation into a war of conquest, in which the adverse chances would again preponderate, while even success would impair our present situation? The contiguity of our territory with that of Russia would afford facilities to our powerful rival, by an armed demonstration on our frontier, or by intrigue with our Indian subjects and feudatories, to disturb, at any time, the tranquillity of our Indian Empire.

If the fear of Russia, which has driven our Government to so many unprovoked attacks on the Afgháns, be well founded, and we eventually have to encounter a Russian advance, should we not be placed at very great disadvantage in having to fight a powerful enemy in a difficult country, far from our main resources, and amidst a hostile population thirsting for revenge, and ready to aggravate any reverse which may befall us in the contest?

As regards Chitrál and the surrounding countries, our diplomatic and military operations in those regions since 1886, seem to have been governed by the policy under which all our frontier expeditions of the last sixteen years were undertaken, namely, for bringing the territories which

separate India from Afghánistán under British control, in order to facilitate the long-desired conquest of the latter country. Hitherto those operations have not achieved success, and the recent fall of Afzul-ul-Mulk, whose accession to the throne of Chitrál received our support and countenance, is doubtless regarded by the people of the country and the neighbouring States, in the light of a British defeat. This circumstance realises the danger so clearly indicated in the following passage of Earl Grey's letter published in the *Times* in March 1887, warning us against mixing up ourselves with the politics of the Central Asian States: "I am persuaded that the only wise policy for this country to pursue is to keep absolutely aloof from all the quarrels of the Afghans and our other neighbours, and to avoid all meddling in their affairs, unless, by plundering our subjects or by other acts, they inflict upon us injuries which ought to be promptly punished."

"The British authorities cannot support the ruler of the Afghans for the time being without giving offence to all his competitors; and as it is in the nature of the half-barbarous States of Asia to be never long free from revolutions, their rulers are never secure from falling The fall of one who has been supported by the British Government, which may take place at any moment, will have the appearance of a reverse to that Government"