force guided the hand to write the signature, such a signing was an execution in law; and there is no difference between the two cases. We think, therefore, that the appeal must be allowed. We cannot conclude this judgment without expressing our unqualified disapproval of the conduct of Mr. B. in this matter, as disclosed in his own evidence; his novel but apparently illegal method of replenishing the Lady Dufferin Fund is not before us, and we say nothing about it. A copy of this judgment will be forwarded to the Local Government."

As stated above, the Judges forwarded the papers of the case to the Lieutenant-Governor of Bengal for such notice as the Government might be induced to take regarding the unwarrantable conduct of Mr. B., but Sir Charles Elliott, then Lieutenant-Governor, unlike his predecessors in that office, refused to take any action and declared in the Bengal Council in answer to a question that he had sent a copy of the judgment to Mr. B., but after a careful consideration of the whole case he had come to the conclusion that it was not necessary for him to interfere further in the matter. The facts of the case were all admitted by Mr. B. himself in his evidence given before the Subordinate Judge of Pubna, and it was perfectly clear that Mr. B. threatened to make improper use of his judicial powers in order to force Chandra Kishore Munshi to execute the deed, and also to extort from him, as admitted by Mr. B. himself, a large sum of money as a subscription to the Lady Dufferin Fund. The evidence of Mr. B. upon this point was in these words:—"Both sides promised in writing to pay a subscription of Rs. 1,000 each to the Lady Dufferin Fund if they would leave Serajgunge without my permission. In my previous deposition I said:—"I took recognisance bonds from Dinendra Nath Sanyal and Chandra Kishore Munshi for Rs. 1,000 each to be forfeited to the Lady Dufferin Fund."

Supporters of the present system of combining executive and judicial authority in the District Magistrate naturally apprehend that such a hold as Mr. B. possessed over the Zemindars of his district would be weakened by a separation of the two functions, and herein lies the secret of their

strenuous opposition to the proposed separation. This case further illustrates what is really meant by those who insist upon the prestige of the District Magistrate being upheld by investing him with judicial powers.

CASE NO. 18

The Sararchar Case—1892

The proceedings in this case were published in pamphlet form by Mr. H. N. Morison, barrister-at-law in Calcutta, in May 1893, under the title of "Official prestige *versus* the Liberty of the subject:—A case illustrative of the danger of investing District Magistrates in India with judicial powers." The facts as summarised from the evidence were as follows:—One Sarat Chandra Ray was a landholder in the village of Sararchar in the district of Maimensing; he had been once a wealthy landlord but was in reduced circumstances at the time of the occurrence. In January 1892, Mr. P., the District Magistrate of Maimensing, went out on tour in the interior of the District. One morning about 2 o'clock, a bullock cart containing various articles belonging to Mr. P. arrived at the Sararchar Bazar, in charge of a cartman. The cart was left in the middle of the road and the man in charge was apparently asleep; about an hour after Sarat Chandra Ray, accompanied by some men came to the Bazar while under the influence of liquor, and happening in the dark to stumble against the cart fell down. Enraged at this Sarat Chandra Ray struck the cartman with a cane and asked him why he had kept the cart in the road. The man replied that the cart belonged to the Magistrate of the District; the drunken man thereupon made use of some contemptuous epithets with reference to the District Magistrate, and went to the house of a woman named Shyama, where he misbehaved himself by breaking the mat wall of her house and assaulting her; in the morning, however, he himself caused the mat wall to be restored. His companions, however, did nothing during the

night and his servant, one Peer Mohamed, merely carried a lantern. The woman Shyama did not at first, think it worth while to prefer any complaint against Sarat Chandra Ray.

The next morning Mr. P. arrived and was informed of the occurrence during the night, and especially of the fact that Sarat Chandra Ray had spoken contemptuously of the District Magistrate. At the same time it was reported by one of his servants that a tin box which had been tied to a table on the cart was missing. The possibility of the box having fallen off an open cart while in motion when the men were probably asleep, did not suggest itself to Mr. P. in his then excited state of mind. On hearing of the occurrence he at once proceeded to record the depositions of his servants and immediately issued a warrant for the arrest of Sarat Chandra Ray and his unknown companions, on charges of rioting, hurt, and theft. He also directed that the woman Shyama who had made no complaint, should be sent up to him. The evidence, however, did not in the least justify the arrest of Sarat Chandra Ray's companions or of the man who happened to carry the lantern. Instead of preferring any complaint himself and appearing as the prosecutor before the Police officer, Mr. P. proceeded to vindicate his dignity and prestige, which he imagined had been set at defiance by the drunken man, by himself issuing the warrants of arrest. Not content with issuing the warrants Mr. P. without a particle of evidence, issued a second warrant directing the Police to enter the house of Sarat Chandra Ray and search his premises "using reasonable force if necessary," and he further declared that Sarat Chandra Ray's house was used for receiving stolen goods. The house was searched by the Police, but nothing was found. On the next day, namely, 29th January, one Nazu Sheikh brought to Mr. P. his tin box with all its contents (two or three books, some stationery, &c.), and stated that a chaukidar or rural watchman named Umed Ali had picked it up very early in the morning of the previous day on the road, where it might

have fallen off the cart at night. On finding his box Mr. P. evidently wavered in his mind as to whether the charge of theft against Sarat Chandra Ray could be maintained and accordingly he proceeded to give the following direction:— "As to the theft of the box I do not think there is sufficient evidence to submit *A* form,* the case must be fully investigated. The Police have got the clue. Umed Ali, chaukidar, left the box at the house of Nazu Sheikh. The chaukidar has not been produced." Later in the day the chaukidar appeared before Mr. P. and gave his deposition, to the effect that he had picked up the tin box on the road, and he was corroborated by the *Panchyet* or head man of the village. Mr. P. without any grounds professed to disbelieve the chaukidar's evidence and directed the Police to enquire if he could not be made an accused, remarking that his case would fall under section 414 of the Penal Code, namely, assisting in concealing stolen goods. At 3 P. M. on the 27th January, the Police recorded two complaints one by the cartman and the other by the woman Shyama, who in the meantime had been induced by the Police to come forward and complain. The Indian Procedure Code requires that the Police should proceed to investigate a case after the receipt of a complaint called the First information. In this case however, the Police had been directed to make the investigation by the real complainant Mr. P., the day before any formal complaints were lodged, but before the Police had recorded any formal complaint Mr. P. gave them this direction: "Police to submit *A* form,* sections 147 (rioting), 379 (theft), 457 (house-breaking by night), 457 (house-breaking by night after preparation to cause hurt). Sarat Babu and Govind Singh to be shewn as absconders." The Head Constable of Police to whom the search warrant had been directed by Mr. P. on the 26th January, lost no time in reporting on the same day that he was unable to find Sarat Ray in his house and on the next day

* An *A* form is a form sent by the Police when the case is said to be in their opinion proved.

the 27th, Mr. P. issued a proclamation calling upon Sarat Ray to appear within 31 days, and in the same breath he directed that his house and all movable property in it should be attached. The result of this extraordinary proceeding was that on the evening of the 27th January, a large Police force went to Sarat Ray's family residence and took possession of all articles including those for domestic use such as bedding, &c., and the wearing apparel of the ladies of the family as well as the jewellery on their persons. The report of the Sub-Inspector of Police, who made the attachment, showed that 181 articles were removed from the house to the Police Station, a distance of four miles, and that the only properties not removed were of an immovable character, even the cows were taken away to the pound. Similar action was taken with regard to the articles found in the house of Govind Singh, then supposed to have been an accomplice of Sarat Ray. From the various orders passed by Mr. P. in connexion with the case, it was evident that the Police were acting entirely under his directions. Umed Ali, chaukidar, was at once arrested and sent up in custody charged as suggested by Mr. P. under section 414 of the Penal Code, the servant who had carried the lantern was also, under Mr. P.'s orders, taken into custody and sent up by the Police, although he was accused of doing nothing more than merely carrying the lantern. Having got the Police to submit A forms for offences which were all unbailable (except rioting and hurt) in the two cases ostensibly instituted by the cartman and the woman Shyama, and having got them also to remove every household article from the premises of Sarat Ray, Mr. P. now proceeded to choose his own tribunal for the final disposal of the two cases. Ordinarily they would have been triable by a Bengali gentleman, the Sub-divisional Magistrate of Kisoregunge, within whose jurisdiction Sararchar lay. He happened, however, to be a Magistrate of the first class and though fully competent to try the charges, an appeal from his decision would by law lie not before Mr. P. but before the

Sessions Judge. Mr. P. would not trust that magistrate, or any other magistrate with first class powers, but without assigning any reason whatever as required by law and in the exercise of his powers as District Magistrate ordered, on the 1st February, that "the cases will be tried by Mr. H." then an Assistant Magistrate exercising only second class powers and the before subject to the appellate authority of Mr. P. himself. The result of this order was that the case was removed from Kisoregunge Sub-divisional Court to a distance of about 40 miles, and this order was deliberately passed although Mr. P. knew that one of the charges which he had himself made against the men was for an offence under section 458 of the Penal Code, which was unbailable and could not legally be tried by Mr. H. or by any second class magistrate.

On the 5th February, one of the alleged companions of Sarat Ray appeared before Mr. H. and prayed that a month's time might be given to enable the accused person to move the High Court in Calcutta to transfer the case to another district. As under the law Mr. H. could not refuse this application, he adjourned the hearing of the case to the 4th March. Sarat Chandra Ray evidently was afraid to appear before Mr. P. or his subordinate Mr. H. until he felt sure he would be allowed an opportunity of moving for a transfer of the case to a district where the magistrates would not be under the influence of Mr. P., and accordingly he appeared before Mr. H. on the 8th February, two days after he learned that he had got that opportunity. On his appearance Mr. H. ordered the release of the attached properties, which were returned to him on the 16th February. Sarat Chandra Ray engaged a Pleader to defend him who happened to be the Vice-Chairman of the District Board under Mr. P. who was the Chairman, and this Pleader advised him to abandon his intention of moving the High Court for a transfer. On the 4th March, however, Sarat Chandra Ray objected to Mr. H. trying the case on the ground that the charge under section 451 was by law not triable by him. The case was therefore

adjourned to the 8th March and submitted by Mr. H. to Mr. P. for orders. On the morning of the 8th March, Sarat Ray's Pleader had a private interview with Mr. P. What passed at this interview was not disclosed on the record, which only shows that the Pleader agreed to waive the objection to the jurisdiction of Mr. H. and gave Mr. P. to understand that he had advised his clients "to throw themselves on the mercy of the Court." Mr. P. now found that there was no chance of the case going to the High Court, and after Mr. H. had gone through the form of recording the depositions of the witnesses for the prosecution, Mr. P. sent a note to his subordinate Mr. H., in which he stated, "I have no objection to the Assistant Magistrate giving consideration to such plea (accused to throw themselves on the mercy of the Court) and dealing with the case leniently; of course if they do not care to do so the case will be tried out. Babu Ishan Chandra Chakravarti, the Pleader, tells me he has instructed his client to this effect, and I have told him I will record what I have said to him, and write to the Assistant Magistrate to place it on the record." On the same day Sarat Ray under the advice of his Pleader, made a statement in which he admitted that he had given one cut to the cartman, but went on to say that he did not beat any woman and that coming in contact with the bullock cart he had, being drunk, fallen down, adding, "I did not run away but went to make arrangements for my brother who was sick." This statement was described by Mr. H. as "a confession" and Sarat Ray was sentenced to a fine of Rs. 120, Mr. H. rightly remarking "that the disturbance was more a drunken freak than anything else." There being no evidence against Umed Ali, chaukidar, the man who had picked up the tin box and had the honesty to return it to Mr. P., he was discharged after having been detained in custody from the evening of the 27th January to the 5th February Similarly the man who carried the lantern was also discharged having remained in prison for the same period.

Perhaps a "drunken freak" like the one in which Sarat

Chandra Ray had indulged on the night of the 25th January deserved some notice, but it is clear from the beginning Mr. P. must have known that the man had been guilty of nothing more than a "drunken freak ;" and it is open to considerable doubt whether if Sarat Chandra Ray had not had the misfortune to stumble over a cart belonging to the District Magistrate, the ladies of his family would have been subjected to all the indignity and harassment to which they were forced to submit.

CASE NO. 19

The Maimensing Case—1892

Raja Surya Kant Acharya Bahadur, one of the wealthiest landholders in Bengal, was in 1887 on account of his public charity, invested by the Government with the title of Raja Bahadur. Among his numerous public donations may be mentioned a sum of Rs. 1,12,500 (one lakh twelve thousand five hundred) almost equal to £10,000 to the Municipality of Maimensing for the introduction of water-works into the town. In February 1891, Mr. P. of the Bengal Civil Service, took charge of the office of District Magistrate and Collector of Maimensing and soon discovered the great influence which the Raja by reason of his wealth and position exercised in the district. In a short time the Raja happened to incur the displeasure of Mr. P. who began to prefer a variety of complaints against him to the higher executive authorities. In November 1891, Mr. P. suggested that the Raja's name should be removed from the list of members of the Maimensing District Board, on the ground that he had absented himself from six or more consecutive meetings. The Lieutenant-Governor however declined to accede to this recommendation on the ground that "the Raja is the chief landowner of the district and has contributed largely to the improvement of the town, and it is desirable that he be retained on the Board, and as long as he wishes to continue to be a member, the Lieutenant-Governor would not derprive him of his membership."

As regards the municipal administration of Maimensing, Mr. P. soon after his arrival expressed his dissatisfaction with the manner in which the Local Municipalities managed their affairs and complained of the Raja's influence over the Municipal Commissioners in Muktagacha his native village, as well as over the Municipal Commissioners in the town of Maimensing. About the year 1886, the Raja had begun to build a palace on a plot of land in the town of Maimensing. Immediately to the east of this plot were the houses or huts of some four or five tenants of his, separated by a footpath, which existed chiefly for the use of those tenants. The Raja induced these tenants to remove from the locality on receipt of compensation, and a few years later obtained the permission of the Local Municipality, who had claimed the footpath as their property under the Municipal Act, to include the site in his premises, when the footpath or bye-lane should no longer be required by the tenants. After the removal of the tenants the Municipality allowed the Raja to take possession of the bye-lane on his making over to them without compensation two other strips of land which they wanted for public purposes. In August 1891, while the Raja's engineer was building an enclosure wall round the grounds, the Municipal overseer complained of what he then imagined was a slight encroachment by the wall, and of some accumulation of rain-water in the drain at the foot of the wall. This led to a deputation of two Commissioners, one a Deputy Magistrate, the other a District Engineer, to wait upon the Raja, who did not think there had been any encroachment, and after remarking that he would do nothing under compulsion agreed to remove all possible grounds of complaint by building at his own cost a masonry drain outside the wall, or, in other words, to help the Municipality to improve their own roadside drains round his palace, so that the rain-water might not stagnate anywhere or be absorbed in the soil. Owing to this offer the Municipal Com-

missioners took no further notice of the supposed encroachment and pending the construction of the masonry drain, the Raja's Manager caused a suitable ditch to be dug in order to let off any water that might have accumulated there. This ditch however was subsequently closed by the Municipality, apparently without any reason. From the middle of November 1891, to the end of April 1892, the Raja was absent from Maimensing on shooting excursions, but before leaving he had left instructions with his agents to construct the drain before the ensuing rainy season. About the end of April, 1892, Mr. P., the District Magistrate, happened to visit the locality and finding, as he alleged, some rain-water accumulating in the Municipal drain outside the Raja's wall after a heavy shower, learned on enquiry of the complaint regarding the alleged encroachment and also of the offer made by the Raja to construct a masonry drain round his palace. On finding however that the promised masonry drain had not been constructed, Mr. P., on the 30th April, called for all the papers of the Municipality to consider what he should do. The Raja returned to Maimensing early in May and immediately wrote to the Municipality requesting their permission to begin the work, which permission however was withheld by the Municipal Commissioners on the ground that Mr. P. was then considering the matter. The Raja thereupon wrote to Mr. P. in order to avoid further delay, but was informed in reply that fitting orders would be passed. On the 18th May Mr. P. recorded an elaborate proceeding or complaint in his capacity as District Magistrate, instituted a criminal prosecution against the Raja, and made over this proceeding to Mr. H., his Assistant Magistrate, for trial. In this complaint Mr. P. accused the Raja of having committed the offences of public nuisance and mischief and under other sections of the Penal Code, and ordered the Raja to be tried under these sections "or any other law which might be applicable." The prosecution had reference to two distinct matters, first the supposed encroach-

ment on the drain abovementioned, and second the filling up the ditch or drain which existed by the side of the footpath or bye-lane regarding which no complaint had ever been made by the Municipality. Having regard probably to the Raja's position, Mr. P. instead of leaving it, as the law required, to the discretion of the trying Magistrate, took upon himself to order that the Raja's personal attendance during the trial should be dispensed with by Mr. H.. On the 17th June, the Raja's Counsel from Calcutta telegraphed to Mr. H. for two days' postponement of the case on grounds of personal inconvenience, and at the same time asked the real prosecutor, Mr. P., to consent to the adjournment. Mr. P. the complainant and prosecutor, replied as follows:—"Case must be commenced Monday, but have directed trying Magistrate to postpone for your argument," thereby showing that Mr. H. was merely to carry out the orders of the prosecutor. On the 18th June after receipt of the counsel's telegram, Mr. P. of his own motion recorded a further proceeding offering to withdraw the case if within a week, the Raja would demolish his wall, &c. On arrival at Maimensing on Monday, the 20th June, the two Counsel whom the Raja had engaged, saw Mr. P. and suggested that so trivial a matter should be settled amicably. In the conversation which ensued Mr. P. according to the statement of both Counsel, described Mr. H. as his "post office and conduit pipe." The Counsel asked for a day's postponement to enable the Raja to come to Maimensing and arrange about an amicable settlement. At Mr. P.'s suggestion a petition, asking for time, was presented the same day to Mr. H., who forwarded it to Mr. P. for orders. Mr. P. requested, that the case might be postponed till the next day when the Counsel's proposals for a settlement would be recorded by Mr. H. and forwarded to Mr. P. The Raja reached Maimensing the same evening, and the next morning at 9-30 one of his Counsel wrote a courteous letter to Mr. P. asking for an interview with a view of discussing the proposed terms. In this letter the Counsel stated that they did not see their way to advise the Raja to plead

guilty to any criminal charge or "to consent to any arrangement which would in the least savour of any admission of guilt." This letter seemed to give great offence to Mr. P. who within half an hour sent a reply in which he declined to have any further communication, written or verbal, with the Counsel and concluded with the needlessly offensive sentence, "I shall be compelled to return any further written communication." At the sitting of the Court of Mr. H. at 1 P.M. on that day, the 21st June, the senior Counsel for the Raja stated to Mr. H. his counter proposals and took care to add that the Chairman of the Municipality was willing to accept either of his proposals as effective if Mr. P. as District Magistrate, would allow him to do so. Mr. H. who evidently knew the nature of Mr. P.'s intention took upon himself to say that these were "perfectly useless," and without communicating with Mr. P. remarked in open Court "My instructions are to go on with the case." On the Counsel begging that in accordance with Mr. P.'s written instructions of the day before, the proposals should be sent for his consideration, Mr. H. forwarded them to Mr. P. On the same afternoon while Mr. H. was engaged in recording the examination-in-chief of the witnesses for the prosecution (the cross-examination having been reserved till the next day by arrangement), Mr. P. sent the District Superintendent of Police with about 20 constables, armed with rifles, and some coolies to break down the Raja's wall and to cut a drain through his land. Accordingly the Raja's palace was invaded, his wall was broken and a drain cut through his grounds even before the expiration of the week allowed by Mr. P. in the order he had originally issued on the 18th June. This action of Mr. P. was followed by a prohibitory injunction issued by him, prohibiting the Raja from rebuilding the wall, at the risk of being prosecuted for disobeying the lawful order of a public servant. On the same afternoon shortly after the wall had been broken, Mr. H. called upon the Counsel for the defence to produce the Raja in Court the next day, remarking that "the Raja must stand in the prisoner's dock like any other man." The Counsel repeatedly

protested against this order as unnecessary and calculated needlessly to disgrace the Raja, but Mr. H. declined to cancel his order, and the Court adjourned at that stage till noon of the next day. Mr. P. as well as his subordinate Mr. H. probably anticipated that the Raja would abscond according to the practice of people in his position in Bengal, in order to avoid the indignity of standing in the prisoner's dock, and that his disappearance would be followed by the issue of warrants, attachment of property, proclamations, &c. The Raja however was better advised and, instead of following the usual custom, resolved to appear the next day and despatched a telegram to the Lieutenant-Governor at Darjeeling, detailing what had happened.

On Wednesday, the 22nd of June, the Raja appeared at noon and at once stood in the dock. Mr. H. who knew him personally looked at him, and then called up a low class Mahomedan prisoner, who was made to stand by his side, and sentenced by Mr. H. on a charge of house-breaking by night. After this the Raja's Counsel mentioned to Mr. H. that the Raja had been suffering from fever. Upon this Mr. H. remarked, "If you like, Sir, you may take a seat in the body of the Court." The Raja, keenly feeling the indignity of his position declined the offer, adding, "I can stand like any other man." At the close of the cross-examination of the witnesses on that day, Mr. H. called upon the Raja to give substantial bail and to execute a personal recognisance for his appearance the next day, in spite of the protests of Counsel that these were wholly unnecessary and unusual under the circumstances. The Raja left the dock on signing the recognisance bond and giving the required bail. On the evening of the same day after Court hours, Mr. P. and Mr. H. had a consultation, and Mr. P. then hit upon the idea of writing a letter to the Counsel for the Raja, with whom he had the day before declined to hold any further communication, throwing the whole responsibility of the Raja's appearance in the dock upon his Counsel. This letter was sent at 10-30 P. M. on the

22nd of June and a reply was returned the next morning quoting Counsel's notes, showing that it was in consequence of an express order from Mr. H. that the Raja had been advised to appear and stand in the dock. The next day, the 23rd June, the Raja again appeared in Court and this time he was advised to avail himself of the offer made by Mr. H. the day before and to take a seat. On this occasion the attitude of Mr. H. was altogether different as he, without any request or application being made on behalf of the Raja, cancelled the bail bond and recognisance given the day before and intimated to the Raja that his attendance was no longer necessary. This was done, there are grounds for believing, by reason of telegraphic instructions which had been sent by the Lieutenant-Governor from Darjeeling on receipt of the Raja's message the day before.

The case proceeded on the 23rd June, and the prosecution being closed, the defence prayed that the prosecutor Mr. P. might be called or tendered for examination, but this application was refused by Mr. H. Mr. P. ordered his subordinate Mr. H. to file on the records of the case a copy of his own letter addressed to the Counsel for the defence, and this order was at once complied with by Mr. H. who over-ruled Counsel's objection, on the ground that he had been ordered by Mr. P. to file the document, but he declined to receive a copy of the reply which Counsel begged him in fairness to receive, in case he felt bound to admit the copy of Mr. P.'s letter containing statements the correctness of which had been challenged in the reply. The case was again taken up on Saturday, the 25th June, after certain adjournments at the instance of Mr. H., who then called upon the defence to meet two charges, namely, one of mischief under the Penal Code, and the other a breach of a bye-law. The Pleader for the prosecution pressed Mr. H. to convict the Raja of the offence of public nuisance, but his application was not entertained. On the 9th June, Mr. H. gave judgment convicting the Raja of the offence of mischief and acquitting him of the breach

of the bye-law, holding that the encroachment alleged had not been proved by the evidence. The sentence passed on the Raja was a fine of Rs. 500 or in default 20 days simple imprisonment. Mr. H. having been invested with first class powers during the trial, the sentence became appealable to the Sessions Judge of Maimensing, but the Raja was advised, under the peculiar circumstances of the case, to move the High Court direct to interfere, on the ground that no offence had been disclosed in the case. The High Court however refused to interfere until the Raja had exhausted his right of appeal. The Raja was thus forced to appeal to the Sessions Judge of Maimensing and his appeal was heard on the 6th August. At the hearing of the appeal the Judge handed down to the Raja's Counsel a letter which Mr. P. had addressed to him on the merits of the appeal and also a printed note which he had received from Mr. P., at the same time remarking that, in his opinion, it was improper on the part of Mr. P. to have written to him. The Judge also intimated to the Counsel that he did not wish any of the grounds of appeal reflecting upon the conduct either of Mr. P. or Mr. H. to be argued, the argument was thus confined to the legality of the conviction only. Judgment however was not delivered for nearly three weeks, after which time the Judge acquitted the Raja of the offence of mischief but public nuisance had been committed by the Raja, but that he did not like to convict him on that charge thereby giving the Raja no possible means of redress before the High Court, as that court could not be moved against a verdict of acqittal. The whole of the nuisance complained of consisted of the accumulation of two feet of pure rain-water in a public drain in front of the Raja's palace, whereas the evidence showed that other municipal drains in the town had a great deal more water in them at the time. The whole correspondence between Mr. P. and the Raja's Counsel, and the orders passed by Mr. P. from time to time, clearly shew that Mr. H. was from the beginning acting under Mr. P.'s "advice and instructions." Mr. P. boldly

attempted to justify his action by reference to an old circular order of the High Court which laid down that District Magistrates were required to "maintain a watchful and intelligent control over the proceedings of their subordinates." On a perusal of the whole circular it is clear that it referred purely to executive matters such as the making and preparation of returns, &c.

After the case was over, the Raja submitted a memorial to the Lieutenant-Governor containing a summary of the facts set forth above and impugning the *bona fides* of Mr. P.'s proceedings on various grounds. This memorial resulted in a very feeble resolution from Sir Charles Elliot, then Lieutenant-Governor of Bengal, who while mildly censuring Mr. P. for his indiscretion, defended his good faith and *bona fides*. As regards Mr. H.'s proceedings Sir Charles Elliott's resolution was absolutely silent. The attention of Parliament was drawn to the facts of this case by Lord Stanley of Alderley in the House of Lords on 8th May 1893; during the debate which followed the Earl of Kimberley then Secretary of State for India, in the course of remarks said :—"I agree entirely with Sir Richard Garth, that it is highly undesirable that the Judicial and Executive powers should be united in one person * * * * (but) I can in no way admit that the union of those two powers is maintained in India for the purpose of enhancing the prestige of the officers of the Indian Government." Viscount Cross, Lord Kimberley's predecessor in office, also condemned the system; he said :—"It is a matter of the greatest importance in regard to the main principle involved, that is uniting the Executive and Judicial functions. It is a matter which I was anxious to deal with myself. What the noble Earl opposite has said is perfectly true, that in the present state of the finances of India it is quite impossible to carry out this improvement, which would be of vast benefit to India if it could be effected. I hope when the noble Earl has discovered some means of improving the finances of India

that matter will be taken in hand. I think in this case the censure of the Lieutenant-Governor was entirely deserved, and that it is very unfortunate that Magistrates should treat men as this Raja was treated, because it is absolutely essential these Rajas should know that at the hands of the English Government they will always receive justice, and that they will not be insulted."

The Government having taken no notice of Mr. P.'s conduct, the Raja was compelled to bring a civil suit, claiming heavy damages against Mr. P. and malicious prosecution, &c., but was subsequently advised to withdraw the suit on Mr. P. making an apology and expressing his regret for what he had done. The suit was accordingly withdrawn.

CASE NO. 20.

The Khulna Assault Case.—1892.

The Khulna assault case illustrates in a very remarkable manner the utter helplessness of Deputy Magistrates in Bengal, and their subserviency to District Magistrates under the present system. The Deputy Magistrates in Bengal are chiefly Bengali gentlemen who have to depend for their promotion, and prospects in life upon the good will of the District Magistrate under whom they serve. Mr. B. happened to be District Magistrate of Khulna and subordinate to him was Babu S. C. B., a Deputy Magistrate of several years standing. On the 19th July 1894, one Keshub Lal Mittra, a writer in the employ of a zemindar in the interior of Khulna, was informed that at about 10-30 the next morning, the Magistrate and Collector of the District, Mr. B., would be passing through the village, and Keshub Lal Mittra was instructed to keep ready certain provisions in the shape of fowls, eggs, and milk for the Collector, and to provide also food for his horse and groom. Keshub Lal Mittra according to custom and without expecting any payment, procured fowls and eggs for Mr. B. and secured two milch cows, so that Mr. B. on his arrival might be supplied with fresh milk. The next morning

Mr. B. arrived a couple of hours earlier than was expected and walked up to the zemindar's house of which Keshub Lal Mittra was in charge, looked at the poultry and eggs and enquired where the *naib* or head officer of the zemindar was. Keshub Lal Mittra replied, that the *naib* had gone to Khulna. Mr. B. then asked: "Who are you?" Keshub replied, "I am a *mohurir* (writer)," and immediately Mr. B. struck him with a cane drawing blood. The man then asked what his offence was, whereupon he received about 14 cuts on his person, the result of which was that he fell down in a swoon. Mr. B. walked out of the place without taking any notice of the injured man, who placed himself under the treatment of a medical practioner and suffered from fever as the consequence of the assault. As soon as he recovered from the fever he went straight to Khulna by boat and on Monday, 30th July, presented a petition before the Deputy Magistrate, Babu S. C. B., who was then in magisterial charge of Khulna, charging Mr. B with having caused hurt and with criminal trespass. The Deputy Magistrate thereupon examined the man on oath, according to law, putting a few questions to him and made a note to the effect that the marks on the petitioner's person appeared dry. This petition was presented at noon; an hour afterwards Babu S. C. B. dismissed the complaint on two grounds, firstly that the case was one of too trivial a nature, and secondly that it was upon the face of it, manifestly false. At 1-15 Keshub Lal Mittra applied for copies of the Deputy Magistrate's order with what is usually called the "expedition fee," on the payment of which the petitioner is entitled to get the copies on the same day. such applications for copies may be presented as a matter of right till 2 P.M. everyday, but after 2 P.M. it is always discretionary with the presiding magistrate to grant such copies or not. But in this instance, the application had been presented before 2 P.M., and it was not till 2 o'clock that the applicant's agent was told that there was a technical omission in the application, in as much as the name of the trying officer had not been given. The officer of

the Court further reported that the record of the case could not be traced as the name of the trying officer had been omitted! A subsequent petition for copies was presented to the same Deputy Magistrate supplying the omission at 2-45 P.M., but the Deputy Magistrate recorded an order that as it was then after 2-45 P. M., the application could not be granted. The applicant was therefore unable to obtain copies on the day. The next day the man presented another application with a further expedition fee at 12-26 P.M. This presistent action on the part of Keshub Lal Mittra, which must have considerably irritated the Deputy Magistrate, elicited the information that the latter had decided to prosecute the applicant for preferring a false charge against the Magistrate of the District, and therefore no copies could be given, as the matter was not then final. In consequence of this refusal on the part of the Deputy Magistrate, Keshub Lal Mittra applied on the 1st of August to the Sessions Judge of Khulna, for an order that copies might be furnished to him forthwith, and this order was granted by the Judge. In the meantime Mr. B. who was then in the interior, having heard of the proceedings in the Deputy Magistrate's Court and of the intention on the part of Keshub Lal Mittra to move the Sessions Judge, wrote a private letter to the latter of which the following is a copy :—

MY DEAR P., "BAGIRHAT, *31st July*, 1894.

I am just informed that a Zamindar's *Mohurrir*, whom I struck the week before last, brought a case of assault yesterday against me before the Deputy Magistrate in charge; that the Deputy Magistrate (wrongly and foolishly) dismissed the case, and that a motion has been made before you. If this is so, please set aside the order under section 203, and order a retrial anywhere you want. I quite admit striking the man; I was in the middle of a 40-mile ride and had sent word a day before to the Zamindar's Cutchery (estate office) to have a glass of milk for me (which I would have paid for several times over if desired. I did actually give an old woman 10 miles further on, a rupee for a glass of milk). I found no milk and being very hot and thirsty, and having a little cane in my hand, I regret to say that I lost my temper and struck the *Mohurrir* several times. Any man might have done the same; though I freely admit I was wrong. I hear they have

petitioned the L. G. If that is so, I shall tell him the real facts as soon as he comes here to-morrow. You may file this in the record.

Yours sincerely,
N. D. B. B."

The Sessions Judge having granted copies of the Deputy Magistrate's proceedings, Keshub Lal Mittra at once proceeded to Calcutta and moved the High Court,—firstly, to set aside the order of the Deputy Magistrate dismissing the complaint; secondly, to set aside the order calling upon him to show cause why he should not be prosecuted under section 111 of the Penal Code for bringing a false charge; and thirdly, that the petitioner's complaint should be transferred to some other district for trial, in as much as it was impossible for him to obtain justice in the court of any magistrate at Khulna, as all the magistrates there were subordinate to the District Magistrate, Mr. B. The High Court, consisting of the Chief Justice and Mr. Beverley, issued a rule why the orders prayed for by Keshub Lal Mittra should not be made. In the meantime the Deputy Magistrate, Babu S. C. B., having heard that Keshub Lal Mittra had proceeded to Calcutta to move the High Court, and having also been informed of the contents of Mr. B.'s letter to the Sessions Judge, thought it best himself, of his own motion, to quash the order he had made calling upon Keshub Lal Mittra to show cause why he should not be prosecuted for bringing a false charge. On the hearing of the rule before the High Court, Mr. B. expressed his regret for having assaulted the complainant and apologised to him, and no cause being shown in answer to the rule, it was made absolute and the case transferred to the Court of the District Magistrate of Alipore, one of the suburbs of Calcutta. Keshab Lal Mittra, however, after the apology tendered by Mr. B. and under the advice of his Counsel thought fit not to press the charge against Mr. B., and the case was accordingly withdrawn. On behalf of the Deputy Magistrate, however, it was put forward, and the plea was accepted by the Lieutenant-Governor, that previously he had been suffering from a disease of the brain, but

within two months however, Sir Charles Elliott, the then Lteutenant-Governor of Bengal, promoted him to a higher grade in the service and notified such promotion in the *Government Gazette*. Facts however came to light which showed that from the very beginning Sir Charles Elliott was anxious to defend both Mr. B. and the Deputy Magistrate who had so misconducted himself. The latter did not hesitate to admit in a private conversation with Keshub Lal Mittra's Counsel in Calcutta, that he had been placed in a position of great difficulty, thereby implying that he had not the courage to issue a summons against his official superior, the District Magistrate. His misconduct in this matter went wholly unpunished, and the obvious result of the action of the Bengal Government was to make other Deputy Magistrates feel that if placed in similar circumstances they must not assert their independence.

PART IV

Mr. R. C. Dutt's Scheme and Lord Hobhouse's Memorial

SEPARATION OF JUDICIAL AND EXECUTIVE SERVICES.

[Memorial submitted to the Secretary of State for India on July 1, 1899. This document is included in the present collection as it refers to and supports Mr. Romesh Dutt's scheme of the separation of the services published in 1893. Mr. Dutt's scheme is appended to the Memorial.]

MY LORD,

We the undersigned beg leave to submit to you, in the interests of the administration of justice, the following considerations in favour of the separation of judicial from executive duties in India. The present system, under which the chief executive official of a District collects the revenue, controls the police, institutes prosecutions, and at the same time exercises large judicial powers, has been, and still is, condemned not only by the general voice of public opinion in India, but also by Anglo-Indian officers, and by high legal authorities. The state of Indian opinion with reference to the question is so well known as to require neither proof nor illustration. The separation of judicial and executive functions has been consistently urged throughout a long series of years alike by the Indian press and by public bodies and individuals well qualified to represent Indian public opinion. We propose, however, to refer briefly to some of the numerous occasions upon which the principle of separation has been approved by official authorities; next, to explain the nature of the existing grievance, and the proposed remedy; and finally, to discuss objections which have been or may be advanced against alteration of the present system. This Memorial, therefore, consists of three sections, which it may be convenient to indicate as follows:

(*a*) AN HISTORICAL RETROSPECT (Paras. 2 to 10);
(*b*) THE EXISTING GRIEVANCE, AND THE REMEDY (Paras. 11 to 14);
(*c*) ANSWERS TO POSSIBLE OBJECTIONS (Paras. 15 to 18).

(*a*)—AN HISTORICAL RETROSPECT.

2. So long ago as 1793 the Government of India, under Lord Cornwallis, recognised the dangers arising from the combination, in one and the same officer, of revenue with judicial duties. Section 1 of Regulation II., 1793, contained the following passage:

"All questions between Government and the landholders respecting the assessment and collection of the public revenue, and disputed claims between the latter and their rayats, or other persons concerned in the collection of their rents, have hitherto been cognizable in the Courts of *Maal Adawlut*, or Revenue Courts. The Collectors of the Revenue preside in these Courts as Judges, and an appeal lies from their decision to the Board of Revenue, and from the decrees of that Board to the Governor-General in Council in the Department of Revenue. The proprietors can never consider the privileges which have been conferred upon them as secure whilst the revenue officers are vested with these judicial powers. Exclusive of the objections arising to these Courts from their irregular, summary and often *ex parte* proceedings, and from the Collectors being obliged to suspend the exercise of their judicial functions whenever they interfere with their financial duties, 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 can never hope to obtain redress from them in another. Their financial occupations equally disqualify them for administering the laws between the proprietors of land and their tenants. Other security, therefore, must be given to landed property and to the rights attached to it before the desired improvements in agriculture can be expected to be effected. Government must divest itself of the power of infringing in its executive capacity the rights and privileges which, as exercising the legislative authority, it has conferred on the landholders. 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 the 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 the 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. No power will then exist in the country by which the rights vested in the landholders by the Regulations can be infringed, or the value of landed property affected."

3. These observations aptly anticipated the basis of the criticisms which during the succeeding century have so often been passed, as well by individuals as by public bodies of the highest authority, upon the strange union of the functions of constable and magistrate, public prosecutor and criminal judge, revenue collector and Appeal Court in revenue cases. In 1838 a Committee appointed by the Government of Bengal to prepare a scheme for the more efficient organisation of the Police, issued its report. As a member of that Committee Mr. F. J. Halliday (afterwards Sir Frederick Halliday, some time Lieutenant-Governor of Bengal and Member of the Council of the Secretary of State) drew up an important Minute in which, after citing at length the considerations that had been urged in favour of separating police from judicial duties in London, he stated that they applied with double force to India. The passage quoted with approval by Mr. Halliday declared that there was no more important principle in jurisprudence than the separation of the judicial from the executive ministerial functions; that a scheme to combine the duties of Judge and Sheriff, of Justice of the Peace and constable in the same individuals would be scouted as absurd as well as mischievous; that a magistrate ought to have no previous knowledge of a matter with which he had to deal judicially; and that the whole executive duty of preventing and detecting crimes should be thrown upon the police. In support of the proposition that these remarks applied with double force to India, Mr. Halliday wrote :—

"In England a large majority of offenders are, as here, tried and sentenced by the magistrates: but in the former country the cases so tried are comparatively of a trivial and unimportant nature. In India the powers of the Magistrates are much greater; their sentences extend to imprisonment for three years, and their jurisdiction embraces offences which, both for frequency and importance, are by far the weightiest subjects of the criminal administration of the country. The evil which this system produces is twofold: it affects the fair distribution of justice and it impairs at the same time, the efficiency of the police. The union of Magistrate with Collector has been stigmatised as incompatible, but the junction of thief-catcher with judge is surely more anomalous in theory, and more mischievous in practice. So long as it lasts, the public confidence in our criminal tribunals must always be liable to injury, and the authority of justice itself must often be abused and misapplied. For this evil which arises from a constant and unavoidable bias against all supposed offenders, the power of appeal is not a sufficient remedy:—the danger to justice, under such circumstances, is not in a few cases, nor in any proportion of cases, but in every case. In all the Magistrate is constable, prosecutor and judge. If the appeal be necessary to secure justice in any case, it must be so in all: and if—as will follow—all sentences by a Magistrate should properly be revised by another authority, it would manifestly be for the public benefit that the appellate tribunal should decide all cases in the first instance. It is well known, on the other hand, that the judicial labours of a Magistrate occupy nearly all his time, that which is devoted to matters strictly executive being only the short space daily employed in hearing *thana* reports. But the effectual management of even a small police force, and the duties of a public prosecutor, ought to occupy the whole of one man's time, and the management of the police of a large district must necessarily be inefficient which, from press of other duties, is slurred over in two hasty hours of each day. I consider it then an indispensable preliminary to the improvement of our system that the duties of preventing crime and of apprehending and prosecuting offenders should, without delay, be separated from the judicial function."

4. Mr. Halliday's opinions on this subject were substantially approved by two other members of the Committee appointed by the Government of Bengal—Mr. W. W. Bird and Mr. J. Lowis. Mr. Bird, who was president of the Committee, stated that he had no objection to the disunion of executive from judicial functions. He added that he had invariably advocated the principle alike in the Revenue and the Judicial Departments, but as it was at that time pertinaciously disregarded in one department it could not very

consistently be introduced in the other. Mr. Lowis characterized Mr. Halliday's proposals as "systematic in plan, complete in detail, and sound in principle." With reference to Mr. Bird's observations, just cited, Mr. Lowis said that it was fallacious "to aver that a departure from right principle in one branch of administration requires, for the sake of consistency, a departure from it in another." It is true that Mr. Halliday, eighteen years later, held a different view, and thought that British administration should conform to the oriental idea of uniting all powers into one centre. But his personal change of opinion does not affect the force of his former arguments.

5. Again, in 1854, in the course of a letter to the Government of India, Mr. C. Beadon, Secretary to the Government of Bengal, wrote:

"The only separation of functions which is really desirable is that of the executive and judicial, the one being a check upon the other: and if the office of Magistrate and Collector be reconstituted on its former footing I think it will have to be considered whether . . . . the Magistrates should not be required to make over the greater portion of their judicial duties to qualified subordinates, devoting their own attention chiefly to police matters and the general executive management of their districts."

In November of the same year, as a member of the Council of the Governor-General, the Hon. (afterwards Sir) J. P. Grant recorded a Minute in which he said that the combination of the duty of the Superintendent of Police and Public Prosecutor with the functions of a Criminal Judge was objectionable in principle, and the practical objections to it had been greatly aggravated by the course of legislation which had raised the judicial powers of a Magistrate six times higher than they were in the days of Lord Cornwallis. "It ought," Mr. Grant continued, "to be the fixed intention of the Government to dissever as soon as possible the functions of Criminal Judge from those of thief-catcher and Public Prosecutor, now combined in the office of Magistrate. That seems to me to be indispensable as a step towards any great improvement in our criminal jurisprudence."

6. Two years later—in September, 1856—a Despatch of the Court of Directors of the East India Company (No. 41, Judicial Department) on the re-organisation of the Police in India pointed out that "to remedy the evils of the existing system, the first step to be taken is, wherever the union at present exists, to separate the police from the administration of the land revenue. . . . . In the second place, the management of the police of each district should be taken out of the hands of the magistrate."

7. In February, 1857, a further Minute was recorded by the Hon. J. P. Grant, member of the Council of the Governor-General, upon the "Union of the functions of Superintendent of Police with those of a Criminal Judge." Mr. Grant, whose opinions Mr. (afterwards Sir Barnes) Peacock generally concurred, wrote:

"The one point for decision, as it appears to me, on which alone the whole question turns, is this—in which way is crime more certainly discovered, proved and punished, and innocence more certainly protected—when two men are occupied each as thief-catcher, prosecutor, and judge, or when one of them is occupied as thief-catcher and prosecutor, and the other as judge ? I have no doubt that the principle of division of labour has all its general advantages, and an immense preponderance of special and peculiar advantages, when applied to this particular case; and I have no doubt that if there is any real difference between India and Europe in relation to this question, the difference is all in favour of relieving the Judge in India from all connexion with the detective officer and prosecutor. The judicial ermine is, in my judgment, out of place in the bye-ways of the detective policeman in any country, and those bye-ways in India are unusually dirty. Indeed, so strongly does this feeling operate, perhaps unconsciously, upon the English minds of the honourable body of men from whom our Magistrates are chosen, that in practice the real evil of the combination is, not that a Judge, whose mind has been put out of balance by his antecedents in relation to the prisoner, tries that prisoner, but that the Superintendent of Police, whose nerve and honesty are indispensable to the keeping of the native police officers in order, abandons all real concern with the detection of crime, and the prosecution of criminals, in the mass of cases and leaves this important and delicate duty almost wholly, in fact, to the native *darogahs*. . . . . If the combination theory were acted upon in reality—if an officer, after bribing spies, endeavouring to corrupt accomplices, laying himself out to hear what every tell-tale has to say, and put-

ting his wit to the utmost stretch, for weeks perhaps, in order to beat his adversary in the game of detection, were then to sit down gravely as a Judge, and were to profess to try dispassionately upon the evidence given in court the question of whether he or his adversary had won the game, I am well convinced that one or two cases of this sort would excite as much indignation as would save me the necessity of all argument *a priori* against the combination theory."

Unfortunately the theory has been acted upon in reality. Actual cases—more than one or two—have excited the vehement indignation against which Mr. Grant sought in 1857 to provide. Mr. Grant added that the objections to separation of judicial and police functions seemed to him, after the best attention he could give them, to be founded on imaginary evils. He refused to anticipate "such extreme antagonism between the native public officer and the native Judge as would be materially inconvenient." "Under a moderately sensible European Magistrate, controlled by an intelligent Commissioner, who would not talk or act as if police *peons* and *darogahs* were infallible, and dispassionate judges were never right, I cannot see why there should be any such consequences."

8. These, and similar, expressions of opinion were not lost upon the Government of India, as the history of the legislation which was undertaken immediately after the suppression of the Mutiny shows. In 1860 a Commission was appointed to enquire into the organization of the Police. It consisted of representative officers from the North-West Provinces, Pegu, Bengal, Madras, the Punjab, and Oudh—"all," in the words of Sir Bartle Frere, "men of ripe experience, especially in matters connected with Police." The instructions issued to the Commission contained the following propositions:

"The functions of a police are either protective and repressive or detective, to prevent crime and disorder, or to find out criminals and disturbers of the peace. These functions are in no respect judicial. This rule requires a complete severance of the police from the judicial authorities, whether those of higher grade or the inferior magistracy in their judicial capacity. When, as is often the case in India, various functions are com-

bined in the hands of one Magistrate, it may sometimes be difficult to observe this restriction; but the rule should always be kept in sight that the official who collects and traces out the links in the chain of evidence in any case of importance should never be the same as the judicial officer, whether of high or inferior grade, who is to sit in judgment on the case. . . . It may sometimes be difficult to insist on this rule, but experience shows it is not nearly so difficult as would be supposed; and the advantages of insisting on it cannot be overstated."

Again:

"The working police having its own officers exclusively engaged on their own duties in preventing or detecting crime, the question is, at what link in the chain of subordination between the highest and lowest officers in the executive administration is the police to be attached, and so made responsible as well as subordinate to all above that link in the chain? The great object being to keep the judicial and police functions quite distinct, the most perfect organization is, no doubt, when the police is subordinate to none but that officer in the executive Government who is absolved from all judicial duty, or at least from all duty involving original jurisdiction, so that his judicial decisions can never be biassed by his duties as a Superintendent of police. . . . . It is difficult to lay down any more definite rule as to the exact point where the subordination should commence than by saying that it should be so arranged that an officer should never be liable to try judicially important cases got up under his own directions as a police officer. . . . . This raises the question—Who is to be responsible for the peace of the district? Clearly that officer, whoever he may be, to whom the police are immediately responsible. Under him, it is the duty of every police officer and of every magisterial officer of whatever grade, in their several charges, to keep him informed of all matters affecting the public peace and the prevention and detection of crime. It is his duty to see that both classes of officers work together for this end; as both are subordinate to him, he ought to be able to ensure their combined action. The exact limits of the several duties of the two classes of officers it may be difficult to define in any general rule; but they will not be difficult to fix in practice if the leading principles are authoritatively laid down, and, above all, if the golden rule be borne in mind that the judicial and police functions are not to be mixed up or confounded, that the active work of preventing or detecting crime is to rest entirely with the police, and not to be interfered with by those who are to sit in judgment on the criminal."

9. The Police Commission in their Report (dated September, 1860) expressly recognised and accepted this "golden rule." Paragraph 27 of their Report was as follows:

"That as a rule there should be complete severance of executive police from judicial authorities; that the official who collects and traces out the links of evidence—in other words, virtually prosecutes the offender—should never be the same as the officer, whether of high or inferior grade, who is to sit in judgment on the case, even with a view to committal for trial before a higher tribunal. As the detection and prosecution of criminals properly devolve on the police, no police officer should be permitted to have any judicial function."

But although the Commission adopted without question the general principle that judicial and police functions ought not to be confounded, they proposed, as a matter of practical and temporary convenience, in view of "the constitution of the official agency" then existing in India, that an exception should be made in the case of the District Officer. The Commission did not maintain that the principle did not in strictness, apply to him. On the contrary, they appear to have stated expressly that it did. But they recommended that in his case true principle should, for the time being, be sacrificed to expediency. They reported:

"That the same true principle, that the judge and detective officer should not be one and the same, applies to officials having by law judicial functions, and should, as far as possible, be carefully observed in practice. But, with the constitution of the official agency now existing in India, an exception must be made in favour of the District Officer. The Magistrates have long been, in the eye of the law, executive officers, having a general supervising authority in matters of police, originally without extensive judicial powers. In some part of India this original function of the Magistrates has not been widely departed from; in other parts extensive judicial powers have been superadded to their original and proper function. This circumstance has imported difficulties in regard to maintaining the leading principle enunciated above, for it is impracticable to relieve the Magistrates of their judicial duties; and, on the other hand, it is at present inexpedient to deprive the police and public of the valuable aid and supervision of the District Officer in the general management of police matters."

The commission recognised that this combination of judicial with police functions was open to objection, but looked forward to a time when improvements in organisation would, in actual practice, bring it to an end:—

"That this departure from principle will be less objectionable in practice when the executive police, though bound to obey the magistrate's order

quoad the criminal administration, is kept departmentally distinct and subordinate to its own officers, and constitutes a special agency having no judicial function. As the organization becomes perfected and the force effective for the performance of its detective duties, any necessity for the Magistrate to take personal action in any case judicially before him ought to cease."

10. The recommendations of the Police Commission were adopted by the Government of India and, in accordance with them, Sir Bartle Frere introduced in the Legislative Council on September 29, 1860, a Bill for the Better Regulation of Police. The debate on the second reading of this measure, which afterwards became Act V. of 1861, and is still in force, is important as showing that the Government of India regarded the exceptional union of judicial with police functions in the District Officer as a temporary compromise. Sir Barnes Peacock, the Vice-President of the Council, stated that he " had always been of opinion that a full and complete separation ought to be made between the two functions," while in reply to Mr. A. Sconce, who had argued that some passages in the Report of the Police Commission were at variance with the principle of separation, Sir Bartle Frere said:—

" It was one thing to lay down a principle and another to act on it at once and entirely when it was opposed to the existing system, to all existing forms of procedure, and to prejudices of long standing. Under such circumstances, it was often necessary to come to a compromise. . . . . He hoped that at no distant period the principle would be acted upon throughout India as completely as his hon. friend could desire. The hon. member had called the Bill a 'half and half' measure. He could assure the hon. gentleman that nobody was more inclined that it should be made a whole measure than he was, and he should be very glad if his hon. friend would only induce the Executive Governments to give it their support so as to effect a still more complete severance of the police and judicial functions than the Bill contemplated."

The hope expressed by Sir Bartle Frere in 1860 has yet to be fulfilled. It might have been realised in 1872 when the second Code of Criminal Procedure was passed. But the Government and the Legislature of the day were still under the dominion of the fallacy that all power must be centred in the District Magistrate, and the opportunity of applying the sound

principle for which Sir Bartle Frere had contended was unfortunately rejected. In 1882 the Code of Criminal Procedure was further revised, and the Select Committee, in their report on the Criminal Procedure Bill, said:—

"At the suggestion of the Government of Bengal, we have omitted section 38, conferring police powers on Magistrates. We consider that it is inexpedient to invest Magistrates with such powers, or to make their connexion with the police more close than it is at present."

(b)—THE EXISTING GRIEVANCE, AND THE REMEDY.

11. The request which we have now the honour of urging is, therefore, that—in the words used by Sir J. P. Grant in 1854—the functions of criminal judge should be dissevered from those of thief-catcher and public prosecutor, or—in the words used by Sir Barnes Peacock in 1860—that a full and complete separation should be made between judicial and executive functions. At present these functions are to a great extent combined in India, especially in the case of the officers who in the Districts of Regulation Provinces are known as Collector-Magistrates, and the non-Regulation Provinces are known as Deputy Commissioners. The duties of these officers are thus described by Sir W. W. Hunter:*—

"As the name of Collector-Magistrate implies, his main functions are twofold. He is a fiscal officer, charged with the collection of the revenue from the land and other sources; he also is a revenue and criminal judge, both of first instance and in appeal. But his title by no means exhausts his multifarious duties. He does in his smaller local sphere all that the Home Secretary superintends in England, and a great deal more; for he is the representative of a paternal and not a constitutional government. Police, jails, education, municipalities, roads, sanitation, dispensaries, the local taxation, and the imperial revenues of his District, are to him matters of daily concern." It is submitted that, just as Lord Cornwallis's Government held a century ago that the proprietors of land could never consider the privileges which had been conferred upon them as secure while the revenue officers

* "The Indian Empire," p. 513 (3rd edition).

were vested with judicial powers, so also the administration of justice is brought into suspicion while judicial powers remain in the hands of the detective and public prosecutor.

12. The grounds upon which the request for full separation is made are sufficiently obvious. They have been anticipated in the official opinions already cited. It may, however, be convenient to summarize the arguments which have been advanced of late years by independent public opinion in India. These are to the effect (i) that the combination of judicial with executive duties in the same officer violates the first principles of equity; (ii) that while a judicial officer ought to be thoroughly impartial and approach the consideration of any case without previous knowledge of the facts, an executive officer does not adequately discharge his duties unless his ears are open to all reports and information which he can in any degree employ for the benefit of his District; (iii) that executive officers in India, being responsible for a large amount of miscellaneous business have not time satisfacforily to dispose of judicial work in addition; (iv) that, being keenly interested in carrying out particular measures, they are apt to be brought more or less into conflict with individuals, and, therefore, that it is inexpedient that they should also be invested with judicial powers; (v) that under the existing system Collector-Magistrates do, in fact, neglect judicial for executive work, ; (vi) that appeals from revenue assessment are apt to be futile when they are heard by revenue officers; (vii) that great inconvenience, expense, and suffering are imposed upon suitors required to follow the camp of a judicial officer who, in the discharge of executive duties, is making a tour of his District; and (viii) that the existing system not only involves all whom it concerns in hardship and inconvenience but also, by associating the judicial tribunal with the work of the police and of detectives, and by diminishing the safeguards afforded by the rules of evidence, produces actual miscarriages of justice and creates,

although justice be done, opportunities of suspicion, distrust and discontent which are greatly to be deplored. There is, too, a further argument for the separation, which arises out of the very nature of the work incidental to the judicial office, and which of itself might well be regarded as conclusive in the matter. It is no longer open to us to content ourselves with the pleasant belief that to an Englishman of good sense and education, with his unyielding integrity and quick apprehension of the just and the equitable, nothing is easier than the patriarchal administration of justice among oriental populations. The trial in Indian courts of justice of every grade must be carried out in the English method, and the judge or magistrate must proceed to his decision upon the basis of facts to be ascertained only through the examination and cross-examination before him of eye-witnesses testifying each to the relevant facts observed by him, and nothing more. It is not necessary for us to dwell on the importance of this procedure, nor is it too much to say that with this system of trial no judicial officer can efficiently perform his work otherwise than by close adherence to the methods and rules which the long experience of English lawyers has dictated, and of which he cannot hope to acquire a practical mastery, unless he makes the study and practice of them his serious business. In other words it is essential to the proper and efficient—and we might add impartial—administration of justice that the judicial officer should be an expert specially educated and trained for the work of the court.

13. In Appendix B to this Memorial summaries are given of various cases which, it is thought, illustrate in a striking way some of the dangers that arise from the present system. These cases of themselves might well remove—to adopt Sir J. P. Grant's words—"the necessity of argument *a priori* against the combination theory." But the present system is not merely objectionable on the ground that from time to time it is, and is clearly proved to be, responsible for a particular case of actual injustice. It is also objectionable

on the ground that, so long as it exists, the general administration of justice is subjected to suspicion, and the strength and authority of the Government are seriously impaired. For this reason it is submitted that nothing short of complete separation of judicial from executive functions by legislation will remove the danger. Something perhaps, might be accomplished by purely executive measures. Much, no doubt, might be accomplished by granting to accused persons, in important cases, the option of standing their trial before a Sessions Court. But these palliatives fall short of the only complete and satisfactory remedy, which is, by means of legislation, to make a clear line of division between the judicial and the executive duties now often combined in one and the same officer. So long as Collector-Magistrates have the power themselves to try, or to delegate to subordinates within their control, cases as to which they have taken action or received information in an Executive capacity, the administration of justice in India is not likely to command complete confidence and respect.

14. It would be easy to multiply expressions of authoritative opinion in support of the proposed reform. But, in view of the opinions already cited, it may be enough to add that, in a debate on the subject which took place in the House of Lords on May 8th, 1893, Lord Kimberley, then Secretary of State for India, and his predecessor, Lord Cross, showed their approval of the principle of separation in no ambiguous terms. Lord Cross said, on that occasion, that it would be, in his judgment, an "excellent plan," to separate judicial from executive functions, and that it would "result in vast good to the Government of India." It was in the same spirit that Lord Dufferin, as Viceroy of India, referring to the proposal for separation put forward by the Indian National Congress, characterised it as a "counsel of perfection." Appendix A to the present Memorial contains, *inter alia*, the favourable opinions of the Right Hon. Sir Richard Garth, late Chief Justice of Bengal, the Right Hon.

Lord Hobhouse, Legal Member of the Viceroy's Council, 1872-77, the Right Hon. Sir Richard Couch, late Chief Justice of Bengal, Sir J. B. Phear, late Chief Justice of Ceylon, Sir R. T. Reid, Q. C., M. P., Attorney-General, 1894-5, Sir William Markby, late Judge of the High Court, Calcutta, and Sir Raymond West, late Judge of the High Court, Bombay. These opinions were collected and compiled by the British Committee of the Indian National Congress, and, among other important indications of opinions prevalent in India, we beg to refer you to the series of resolutions adopted by the Indian National Congress—which Lord Lansdowne, as Viceroy, referred to in 1891 as a "perfectly legitimate movement" representing in India "what in Europe would be called the more advanced Liberal party." In 1886 the Congress adopted a resolution recording "an expression of the universal conviction that a complete separation of executive and judicial functions has become an urgent necessity," and urging the Government of India "to effect this separation without further delay." Similar resolutions were carried in 1887 and 1888, and the proposal formed in 1889, 1890, and 1891 the first section of an "omnibus" resolution affirming the resolutions of previous Congresses. In 1892 the Congress again carried a separate resolution on the question, adding to its original resolution a reference to "the serious mischief arising to the country from the combination of judicial and executive functions." In 1893 the resolution carried by the Congress was as follows :—

"That this Congress, having now for many successive years vainly appealed to the Government of India to remove one of the gravest stigmas on British rule in India, one fraught with incalculable oppression to all classes of the community throughout the country, now hopeless of any other redress, humbly entreats the Secretary of State for India to order the immediate appointment, in each province, of a Committee (one-half at least of whose members shall be non-official natives of India, qualified by education and experience in the workings of the various courts to deal with the question) to prepare each a scheme for the complete separation of all judicial and executive functions in their own provinces with as little additional cost to the State as may be practicable and the submission of such schemes,

with the comments of the several Indian Governments thereon, to himself, at some early date which he may be pleased to fix."

A similar resolution was carried in 1894, 1895, and 1896. During recent years, also, practical schemes for separation have been laid before the Congress.

(*c*)—ANSWERS TO POSSIBLE OBJECTIONS.

15. The objections which, during the course of a century, have been urged against the separation of judicial and executive functions are reducible, on analysis, to three only: (i) that the system of combination works well, and is not responsible for miscarriage of justice; (ii) that the system of combination, however indefensible it may seem to Western ideas, is necessary to the position, the authority, and, in a word, to the "prestige" of an Oriental officer; and (iii) that separation of the two functions, though excellent in principle, would involve an additional expenditure which is, in fact, prohibitive in the present condition of the Indian finances.

16. It is obvious that the first objection is incompatible with the other two objections. It is one thing to defend the existing system on its merits; it is another thing to say that, although it is bad, it would be too dangerous or too costly to reform it. The first objection is an allegation of fact. The answer—and, it is submitted, the irresistible answer—is to be found in the cases which are set forth in Appendix B to this Memorial. The cases are but typical examples taken from a large number. It may be added that, among the leading advocates of separation in India, are Indian barristers of long and varied experience in the Courts who are able to testify, from personal knowledge, to the mischievous results of the present system. Their evidence is confirmed, also from personal knowledge, by many Anglo-Indian Judges of long experience.

17. The second objection—that the combination of judicial and executive functions is necessary to the "prestige" of an Oriental officer—is perhaps more difficult to handle. For reasons which are easy to understand, it is not often

put forward in public and authoritative statements. But it is common in the Anglo-Indian press, it finds its way into magazine articles written by returned officers, and in India it is believed, rightly or wrongly, to lie at the root of all the apologies for the present system. It has been said that Oriental ideas require in an officer entrusted with large executive duties the further power of inflicting punishment on individuals. If the proposition were true, it would be natural to expect that the existing system would be supported and defended by independent public opinion in India instead of being—as it is—deplored and condemned. It is not reasonable to assume that the Indian of to-day demands in the responsible officers of a civilised Government a combination of functions which at an earlier time an arbitrary despot may have enforced. The further contention that a District Magistrate ought to have the power of inflicting punishment because he is the local representative of the Sovereign appears to be based upon a fallacy and a misapprehension. The power of inflicting punishment is, indeed, part of the attributes of Sovereignty. But it is not, on that ground, any more necessary that the power should be exercised by a Collector-Magistrate, who is head of the police and the revenue-system, than that it should be exercised by the Sovereign in person. The same reasoning, if it were accepted, would require that the Viceroy should be invested with the powers of a criminal judge. But it is not suggested that the Viceroy's "prestige" is lower than the "prestige" of a District Judge because the Judge passes sentences upon guilty persons and the Viceroy does not. It is equally a misapprehension to assume that those who urge the separation of judicial from executive duties desire the suppression or extinction of legitimate authority. They ask merely for a division of labour. The truth seems to be that the somewhat vague considerations which are put forward in defence of the existing system on the ground that it is necessary to the due authority of a District Magis-

trate had their origin in the prejudices and the customs of earlier times, revived, to some extent, in the unsettled period which followed the Indian Mutiny. We venture to submit that these considerations are not only groundless and misplaced, but that the authority of Government, far from being weakened by the equitable division of judicial and executive duties, would be incalculably strengthened by the reform of a system which is at present responsible for many judicial scandals.

18. The financial objection alone remains, and it is upon this objection that responsible authorities appear to rely. When Lord Dufferin described the proposal for separation as a "counsel of perfection," he added that the condition of Indian finance prevented it, at that time, from being adopted. Similarly, in the debate in the House of Lords on May 8th, 1893, to which reference has already been made, Lord Kimberley, then Secretary of State, said:

"The difficulty is simply this, that if you were to alter the present system in India you would have to double the staff throughout the country."

and his predecessor, Lord Cross, said:—

"It [the main principle raised in the discussion] is a matter of the gravest possible importance, but I can only agree with what my noble friend has stated, that in the present state of the finances of India it is absolutely impossible to carry out that plan, which to my mind would be an excellent one, resulting in vast good to the Government of India."

The best answer to this objection is to be found in the scheme for separation drawn up in 1893 by Mr. Romesh Chunder Dutt, C. I. E., late Commissioner of the Orissa Division (at that time District Magistrate of Midnapur) and printed in Appendix A to this Memorial. In these circumstances it is not necessary to argue either (i) that any expense which the separation of judicial from executive duties might involve would be borne, and borne cheerfully, by the people of India; or (ii) that it might well be met by economies in certain other directions. Mr. Dutt shows that the separation might be effected by simple re-arrangement of the existing staff, without any additional expense

whatsoever. Mr. Dutt's scheme refers specially to Bengal, the Presidency, that is, for which the reform had been described as impracticable on the ground of cost. Similar schemes for other Presidencies and Provinces have been framed, but it was understood that the most serious financial difficulty was apprehended in Bengal.

19. In view of foregoing considerations we earnestly trust that you will direct the Government of India to prepare a scheme for the complete separation of judicial and executive functions, and to report upon this urgently pressing question at an early date.

We have the honour to be, Sir,

Your obedient Servants,

HOBHOUSE,
RICHARD GARTH,
RICHARD COUCH,
CHARLES SARGENT,
WILLIAM MARKBY,
JOHN BUDD PHEAR,
J. SCOTT,
W. WEDDERBURN,
ROLAND K. WILSON,
HERBERT J. REYNOLDS.

SCHEME (PRINTED IN "INDIA" FOR AUGUST, 1893) SUGGESTED BY MR. ROMESH DUTT, C.I.E., COMMISSIONER OF THE ORISSA DIVISION (AT THAT TIME DISTRICT MAGISTRATE OF MIDNAPUR).

The recent discussions on the subject of the separation of Judicial and Executive functions in India have given sincere gratification to my countrymen in India. They have read with satisfaction, and also with feelings of gratitude, the views expressed by Lord Stanley in the House of Lords, and the clear and emphatic opinion on the subject expressed by Lord Kimberley. They have learnt with sincere joy that the system of uniting Judicial and Executive functions in the same officer has been condemned by two successive Secretaries of State, Lord Cross and Lord Kimberley. And they entertain a legitimate hope that a policy which has been thus condemned by the highest authorities in Indian affairs will not long continue to be the policy of British rule in India.

Sir Richard Garth, late Chief Justice of the High Court of Calcutta, whose paper on this subject led to the discussions in the House of Lords, has since explained the history of the present system of administration in a clear, lucid, and forcible manner. He has shown that so far back as 1860 a commission appointed to report on the police declared that "the judicial and police functions were not to be mixed up and confounded." He has pointed out that the late Sir Barnes Peacock and other high authorities were against the union of these functions, and that the late Sir Bartle Frere, in introducing the Bill which afterwards became the Police Act of 1861, "hoped that at no distant period the principle (of the separation of Judicial and Executive functions) would be acted upon throughout India." Sir Richard Garth has also informed the public that between

1865 and 1868 the highest civilian authorities in India were again consulted on the subject, and, according to Sir James Stephen, the District Magistrates themselves were "greatly embarrassed by the union in their persons of Judicial and Executive functions." Sir Richard has further told us that under Lord Ripon's Government opinions were again collected, and the present system was only continued because the retention of Judicial powers in the hands of a District Officer was considered (and very wrongly considered, *vide* Lord Kimberley's speech) "essential to the weight and influence of his office." And, lastly, Sir Richard has quoted the words of the present Secretary of State that the present system "is contrary to right and good principle," and he has also quoted the words of the late Secretary of State, who concurs in this opinion with Lord Kimberley.

Such are the opinions of men most capable of forming a judgment on the present system of administration in India, and responsible administrators are anxious to effect a reform which will remove the evil without materially adding to the cost of administration. A practicable scheme of reform will be not unwelcome at the present moment, and many of my countrymen and some of my English friends have asked me to state my views on the subject, as I happen to be in England just now. I venture therefore to suggest the leading features of a scheme which has for many years appeared perfectly feasible to myself, and which I believe will meet the views and wishes not only of my countrymen, but of most Englishmen also, who are quite as anxious for wholesome reform on this point as my countrymen.

It is necessary for me to state that I have been employed on administrative work in Bengal for twenty-two years, and that I have had ample opportunities to observe the practical working of the present system of administration during this period. Within this period I have had the honour of holding charge of some of the largest and most important districts in Bengal—like Burdwan, with its population of a

million and a half, and Bakarganj, with its population of two millions, and Midnapur, with its population of two and a half millions, and Maimansingh, with its population of three and a half millions—which is equal to the population of many a small kingdom in Europe. In these extensive and thickly populated districts I have, for years past, combined in myself the functions of the head of the Police, the head Magistrate, the head Superintendent of Prisons, the head Revenue Officer, the head Tax Collector, the head of the Government Treasury, the head Manager of Government Estates, the head Manager of Minors' States, the head Engineer, the head Sanitary Officer, the head Superintendent of Primary Schools, and various other functions. I have, for years past, directed and watched police enquiries in important cases, had the prisoners in those cases tried by my subordinates, heard and disposed of the appeals of some of those very prisoners, and superintended their labour in prisons. And during all these years I have held the opinion that a separation of Judicial and Executive functions would make our duties less embarrassing, and more consistent with our ideas of judicial fairness; that it would improve both Judicial work and Executive work; and that it would require no material addition to the cost of administration.

Bengal is divided into nine Divisions, viz.: 1. Presidency. 2. Burdwan. 3. Rajshahi. 4. Dacca. 5. Chittagong. 6. Orissa. 7. Patna. 8. Bhagalpur. 9. Chutia-Nagpur. I think it is not feasible, nor desirable perhaps for the present, to effect a separation of Judicial and Executive functions in the Division of Chutia-Nagpur, which consists of Non-Regulation Districts. It is also, perhaps, undesirable to effect such separation in the Districts of Darjiling and Jalpaiguri in Rajshahi Division; in the Hill Tracts of Chittagong Division; and in the Santal Parganas of Bhagalpur Division. In the remaining portions of the Province it is possible to effect the separation at once.

The population of Bengal (excluding Tributary States and

the States of the Maharajas of Kuch Behar, Sikkim, Tipperah), is, according to the census of 1891, *seventy-one millions* in round numbers. The population of the districts alluded to in the last paragraph, in which a separation of Judicial and Executive functions is for the present impracticable, is *seven millions* in round numbers. In the remaining portions of Bengal, having a population of *sixty-four millions*, it is possible to effect the desired separation at once.

Generally speaking, there are two senior Covenanted officers in every Regulation District in Bengal, viz., a District Judge and a District Magistrate. The District Judge is the head of all subordinate judicial officers who dispose of civil cases, and he also tries such important criminal cases as are committed to the Sessions. The work of the District Magistrate is more varied, as has been indicated above. He is the head of the police, supervises prisons, collects revenue and taxes, sells opium and settles liquor-shops, constructs roads and bridges, regulates primary education, and combines with these and other Executive duties the functions and powers of the head Magistrate of his district.

My scheme is simple. The District Magistrate, whom I will henceforth call the District Officer, should be employed purely on executive and revenue work, which is sufficiently varied, onerous, and engrossing, and should be relieved of his judicial duties, which should be transferred to the District Judge. The subordinates of the District Officer, who will continue to perform revenue and executive work only, will remian under him; while those of his present subordinates who will be employed on purely judicial work should be subordinate to the Judge and not to the District Officer.

At present the subordinates of the District officer combine executive and revenue and judicial work. A Joint-Magistrate or Assistant-Magistrate (subordinate to the District Officer), tries criminal cases, and also does revenue and executive work. A Deputy-Magistrate (similarly subordinate to the District Officer) also tries criminal cases and does revenue

and executive work. This arrangement must be changed.

I will first take the case of Joint-Magistrates and Assistant-Magistrates, who are Covenanted officers. Young civilians, as soon as they arrive in Bengal, are posted as Assistant-Magistrates; they try criminal cases and also help the District Officer in his revenue and executive work. After they have had some experience in their work and learnt something of the people, and after they have passed two examinations in Indian law and accounts, and the languages of the province, they are promoted to be Joint-Magistrates. And the Joint-Magistrate tries all the more important criminal cases, and performs much of the important criminal work of the district. And in course of time he becomes a District Officer or a District Judge.

Referring to the Bengal Civil List for April, 1893, which is the last number that is available to me in London now, I find that the present number of Joint-Magistrates and officiating Joint-Magistrates in Bengal (excluding those acting in higher capacities, or on special duty) is only twenty-two. And the number of Assistant-Magistrates, after such exclusion, is also twenty-two. As there are over forty districts in Bengal, it is clear that on the average each District Officer has only one Covenanted Assistant (Joint or Assistant-Magistrate) and no more. In some districts there are more than one, in smaller districts there are none.

I propose that the Assistant-Magistrates should be employed purely on revenue, executive and police work, and should be subordinate to the District Officer. And when the Assistant-Magistrates are promoted to be Joint-Magistrates, they should be employed purely on judicial work, and be subordinate to the District Judge.

This proposal will not only secure the separation of functions contemplated, but will secure two other distinctly beneficial results. In the first place, young civilians fresh from England, and wholly unacquainted with the manners

and habits, and even the colloquial language, of the people of India, will be stopped from trying criminal cases until they have acquired some local knowledge and experience by doing revenue and general executive work, and watching police cases and police administration. And in the second place, such young civilians will receive a more systematic and less confused training in their duties by devoting their attention during the first two or three years to purely executive and revenue and police work, and then employing themselves for some years on purely judicial work.

I next come to the Deputy-Magistrates, who are uncovenanted officers, and generally natives of India. They also combine judicial, executive, and revenue work, and are subordinate to the District Officer. The Civil List gives their number as 305 in all; but excluding those on leave, or employed on special duty, or in sub-divisions (of which I will speak later on), there are, on an average, only four Deputy-Magistrates in the headquarters of each district to help the District Officer. In small districts there are, perhaps, only two; in specially large districts there are as many as six.

I propose that in each district one-half of the Deputy-Magistrates may be employed on purely executive and revenue work, and be placed under the District Officer, and that the other half be employed on purely judicial work, and placed under the District Judge. In some districts, where the revenue work is particularly heavy, probably more than half the Deputy-Magistrates may be placed under the District Officer. And in other districts, where the criminal work is more important, the Judge may require more than half the Deputy-Magistrates. These details can be very easily settled. But in the main it is clear and self-evident that the officers who are able to cope with revenue and criminal work which is heaped on them in a confused manner will be able to cope with it better under the system of division of labour proposed above.

The results of the proposals made above will be these. The District Officer will still be the head executive officer, the

head revenue officer, and the head police officer of his district. He will collect revenue and taxes, and perform all the work connected with revenue administration with the help of his assistants and deputies. He will continue to perform all executive work, and will be armed with the necessary powers. He will watch and direct police investigations, and will be virtually the prosecutor in criminal cases. But he will cease to try, or to have tried by his subordinates, criminal cases, in respect of which he is the police officer and the prosecutor.

On the other hand, the District Judge will, in addition to his present duties, supervise the work of Joint-Magistrates and Deputy-Magistrates employed on purely judicial work. This work of supervision will be better and more impartially done by trained judicial officers than by over-worked executive officers, who are also vitually prosecutors. And the evil which arises from the combination of the functions of the prosecutor and the judge—of which we have had some striking illustrations of late—will cease to exist when the prosecutor is no longer the judge.

The transfer of all judicial work to the District Judge will give him some additional work; but he will easily cope with it with the additional officers who will be placed under him under the proposed scheme. In important and heavy districts the Judge will have a Joint-Magistrate under him, and the Joint-Magistrate may in exceptional cases be vested with the powers of an Assistant Sessions Judge to relieve the District Judge of his sessions work. In districts where there are no Joint-Magistrates, a senior and selected Deputy-Magistrate can do the Joint-Magistrate's work, and efficiently help the Judge in his duty of supervision of criminal work. With regard to criminal appeals, the District Judge now hears all of them from sentences passed by first-class magistrates. The few appeals from second and third-class magistrates which the District Officer now hears may also be heard by the Judge, and the addition will scarcely be felt. In exceptionally heavy districts like Maimansingh and Midnapur, criminal appeals

did not take more than three hours of my time in a week. A trained Judicial Officer, like the District Judge, would do it in less time, and if he required help in this matter also, his subordinate Joint-Magistrate or a selected Deputy-Magistrate might be empowered to hear petty appeals.

It only remains to deal with what are called sub-districts or sub-divisions in Bengal. The Bengal districts are generally extensive is area ; and, while the central portions are managed and administered from headquarters it is found convenient to form the outlying portions into separate sub-districts or sub-divisions, and to place them in charge of Sub-Divisional Officers. Such Sub-Divisional Officers (generally Deputy-Magistrates, sometimes Assistant or Joint-Magistrates) are also completely subordinate to the District Officer, like the assistants at headquarters.

In Bengal (excluding the backward districts in which the introduction of the proposed scheme is at present impracticable) there are seventy-five sub-divisions. There is only one Sub-Divisional Officer in each sub-division, and he performs revenue and executive and judicial work in his sub-division as his superior, the District Officer, does for the whole district. The question arises, how the scheme of separation can be introduced in these seventy-five sub-divisions.

There is a class of officers, called Sub-Deputy Collectors, who are generally employed on revenue work, but sometimes perform judicial work and try criminal cases. Some of them are employed at headquarters, while others are sent to important Sub-Divisions to help Sub-Divisional Officers. For many years past the work in Sub-Divisions has been increasing, and the demand for a Sub-Deputy Collector in every Sub-Division in Bengal has been growing also. It has been urged that Sub-Divisional Officers who are mainly employed on judicial work cannot find time to perform their revenue work without help. It has also been urged, with great force, that during the absence of Sub-Divisional Officers on their annual tours Sub-Divisional treasuries have to be closed, much to the

inconvenience of the Postal Department, the Civil Justice Department, and all Government Departments, as well as the public. To remove all this inconvenience, and to give the necessary help to Sub-Divisional Officers, it has been urged that a Sub-Deputy Collector should be placed in every sub-division. This should now be done.

The present number of Sub-Deputy Collectors (excluding those who are acting in higher capacities) is 97. Allowing for officers on leave, there will still be 75 officers always available for employment in the 75 sub-divisions. And when a Sub-Deputy Collector is thus posted in each sub-division, he can be entrusted with the revenue work of the sub-division, and be subordinate to the District Officer, while the Sub-Divisional Officer will be subordinate to the District Judge.

I make this proposal after a careful consideration of the nature of the revenue work which has to be done in sub-divisions. All important revenue work connected with Land Revenue, Cesses, Income Tax, Certificates, etc., is transacted in the headquarters of the district and the revenue work of sub-divisions is light and easy. Similarly, the work of control and supervision of the Police Department is done at head-quarters, and the Sub-Deputy Collector will have little to do in this line. The treasury work in sub-divisions is light, and is now often done by Sub-Deputy Collectors. On the whole, therefore, I am satisfied that a Sub-Deputy Collector will, under the instructions of the District Officer, be quite competent to manage the revenue and other work of sub-divisions, when the judicial functions have been separated and made over to the Sub-Divisional Officer.

There is only one objection which can be reasonably urged against this scheme. Many Sub-Deputy Collectors are now employed at the headquarters of districts, sometimes on important work, and to take them all away for sub-divisions may be impracticable. Some District Officers may reasonably urge that they require Sub-Deputy Collectors at the district headquarters also, and, where this is

satisfactorily shown, the requisition should be complied with. It may be necessary, therefore, to appoint twenty or thirty additional Sub-Deputy Collectors, and this is the only increase to the cost of administration which appears to me necessary for effecting a complete separation between Judicial and Executive functions in Bengal.

Even this additional cost may be met by savings in other departments. Special Deputy Collectors and Sub-Deputy Collectors are employed on excise work, and their special services are wholly unnecessary in this department. It has always appeared to me, and to many others, that the services of such trained and well-qualified officers are wasted in performing work which does not require officers of their rank. If these officers were withdrawn from the Excise Department, and if the work of that department were included in the general work of the district, as was the case some years ago, it would probably be unnecessary to appoint additional Sub-Deputy Collectors, as recommended in the last paragraph.

The scheme which has been briefly set forth in the preceding paragraphs is a practicable one, and can be introduced under the present circumstances of Bengal, excluding the backward tracts. I have worked both as Sub-Divisional Officer and as District Officer in many of the districts in Bengal, and I would undertake to introduce the scheme in any Bengal District, and to work it on the lines indicated above.

I have only to add that if the scheme set forth above—with such modifications in details as may be deemed necessary after a careful consideration of it by the Government—be introduced, it will be necessary to recast the Code of Criminal Procedure so as to relieve the District Officer and his subordinates of judicial powers in criminal cases, and to vest them in the District Judge and his subordinates. The police work, the revenue work, and the general executive work can then be performed by the District Officer with greater care and satisfaction to himself, and also to the greater satisfaction of

the people in whose interest he administers the District.

Mr. Romesh Dutt wrote in INDIA for October, 1893:—

My paper on this subject appeared in the August number of INDIA. The paper has been carefully read by many gentlemen interested in questions of Indian administration, and capable of forming a proper judgment on such questions. Their opinions will help the public in forming a correct opinion on this very important subject.

The Right Hon. Sir Richard Garth, Q.C., Late Chief Justice of Bengal, has given my views his qualified support from a judicial point of view. As his remarks have already appeared in the August number of INDIA it is unnecessary for me to do more than quote one or two sentences only.

"So far," he says, "as I am capable myself of forming an opinion upon his scheme, I entirely approve of it. It seems to me the most natural and obvious means of separating the two great divisions of labour, the executive and the judicial. . . It seems only in accordance with reason that magistrates who are employed upon executive work should be under the chief executive officer of each district, and that those who are employed in judicial work should be under the chief judicial officer."

These remarks are important, as there is no higher authority on judicial questions concerning Bengal than the late Chief Justice of that province.

In the same way there is no Englishman living who can speak with higher authority on executive and administrative questions concerning Bengal than Mr. Reynolds, late Secretary to the Government of Bengal. He passed his official life in that province, and rose from the lowest appointments in the Civil Service of Bengal to one of the highest. He held charge of some of the most extensive and important districts in Bengal, and performed those combined judicial and executive duties which a district officer in Bengal has to perform. He rose to be Secretary to the Bengal Government, and in that capacity presided over the executive administra-

tion of the province. His opinion, therefore, has a unique value and importance.

Mr. Reynolds has suggested one modification to my scheme, and subject to that modification has entirely approved of it. I proposed to contrast sub-deputy collectors with the revenue and executive work of Bengal sub-divisions. Mr. Reynolds thinks that in the more important sub-divisions a deputy collector, and not a sub-deputy collector, should be entrusted with these duties. A suggestion coming from such an authority is entitled to respect, and I accept it in its entirety. Let deputy collectors be employed in the more important sub-divisions to do the revenue and executive work and sub-deputy collectors in the lighter sub-divisions. This modification will require the appointment of twenty or thirty additional deputy collectors, instead of as many sub-deputy collectors, whose appointment I proposed. Thus modified my scheme has Mr. Reynolds' entire support and approval.

My scheme has been read and approved by other gentlemen, who are still in the Civil Service of Bengal. One of them made to me, independently of Mr. Reynolds, the same suggestion which Mr. Reynolds has made. On the whole, therefore, I believe, I am justified in stating that my scheme suggests a practicable way of separating the executive and judicial services in Bengal, without materially adding to the cost of administration.

I have purposely refrained from saying anything on the subject of the existing rules of promotion in the Civil Service. Whether these rules will require modification in some respects after the judicial and executive services have been separated is a matter on which the opinion of the Government of Bengal must be final and conclusive. When I joined the Service in 1871 members of the Service were promoted from the rank of joint magistrates to be district officers, and from the rank of district officers to the posts of district judges. It may be considered desirable and necessary to revert to this old rule of promotion after the district officers have been relieved of

their judicial duties. It may be also considered desirable to rule that an assistant magistrate will be entitled to rise to the rank and the judicial powers of a joint magistrate only after he has served as assistant for a certain number of years. Such a rule will ensure some degree of experience and local knowledge in judicial officers, and will also prevent frequent reversions from the post of a joint magistrate to that of assistant. These, however, are matters which can be best considered and decided by the Government of Bengal when the separation of the judicial and executive services has been decided upon. The Bengal Government will find no difficulty in shaping the rules of promotion in the Civil Service according to the exigencies of a just and proper system of administration.

With regard to the details of the administrative arrangements given in my previous paper, no modification except that of Mr. Reynolds has been suggested to me by my friends competent to form a judgment on the subject. I have no doubt that the scheme as modified and supported by the late Secretary to the Government of Bengal will receive the consideration which it deserves from the authorities, both in India and in England.

PART V

Sir Harvey Adamson's Scheme

THE SEPARATION SCHEME.

AS SKETCHED BY THE HOME MEMBER IN HIS BUDGET SPEECH, MARCH 27, 1908.

I propose to say a few words on a subject on which volumes have been written during the past few years—the separation of Judicial and Executive functions in India. In 1899 the Secretary of State forwarded to the Government of India a memorial signed by ten gentlemen, seven of whom had held high judicial office in India, in which the memorialists asked that a scheme might be prepared for the complete separation of Judicial and Executive functions. They based their condemnation of the existing system largely upon notes illustrating its alleged evils, which were compiled by Mr. Manomohan Ghose, a barrister in large criminal practice. The memorial was referred to Local Governments and to high judicial officers in India for report, with the result that an enormous mass of correspondence has accumulated. This correspondence disclosed a decided preponderance of opinion in favour of the existing system, but whether it was the weight of the papers or the weight of their contents that has so long deferred a decision of the question is more than I can say. The study of the correspondence has been a tedious and laborious process, but having completed it, I am inclined to think that the consensus of opinion against a change may have been due in great measure to the faulty presentation by the memorialists of the case for separation, as well as to the obvious defects of the constructive proposals put forward by them, which were shown by the Government of Bengal to be likely to cost many lakhs of rupees in that province alone. The authors of the memorial, in my view, put their case very feebly when they rested it on a few grave judicial scandals which were alleged to have occurred from time to time. It was easy to show that many

of these scandals could have occurred even if the functions had been separated. Many who have reported their satisfaction with the existing system have followed the memorialists and been impressed by the comparative infrequency of grave judicial scandals in India having their cause in the joinder of functions, and by the certainty of their being exposed to light and remedied. Scandals may to some extent exemplify the defects of a system, but there can be no doubt that, whatever system be adopted, scandals must occur. Occasionally, very rarely I hope, we find the unscrupulous officer, less infrequently we find the incompetent officer, but not so seldom do we find the too zealous officer, perfectly conscientious, brimming over with good intentions, determined to remedy evils, but altogether unable to put into proper focus his own powers and duties and the rights of others. With officers of these types—and they cannot be altogether eliminated—occasional public scandals must occur, not only in India, but elsewhere, as a perusal of any issue of *Truth* will show. I see no reason for believing that they occur more frequently in India than England or any other country; but this at least may be said for the Indian system of criminal administration, but in no country in the world is so perfect an opportunity given for redressing such scandals when they occur.

But though the preponderance of opinion in the correspondence is as I have stated, a deeper search reveals considerable dissatisfaction with the existing system. This is expressed chiefly in the reports of judicial officers. The faults of the system are not to be gauged by instances of gross judicial scandals. They are manifested in the ordinary appellate and revisional work of the higher judicial tribunals. In one case a sentence will be more vindictive than might have been expected if the prosecution had been a private one. In another a conviction has been obtained on evidence that does not seem to be quite conclusive. In short, there is the unconscious bias in favour of a conviction enter-

mined by the Magistrate who is responsible for the peace of the district, or by the Magistrate who is subordinate to that Magistrate and sees with his eyes. The exercise of control over the subordinate Magistrates by whom the great bulk of criminal cases are tried is the point where the present system is defective. This control indirectly affects the judicial action of the subordinate Magistrates. It is right and essential that the work of the subordinate Magistrates should be the subject of regular and systematic control, for they cannot be relied on more than any other class of subordinate officials to do their work diligently and intelligently without it. But if the control is exercised by the officer who is responsible for the peace of the district there is the constant danger that the subordinate Magistracy may be unconsciously guided by other than purely judicial considerations. I fully believe that subordinate Magistrates very rarely do an injustice wittingly. But the inevitable result of the present system is that criminal trials, affecting the general peace of the district, are not always conducted in the atmosphere of cool impartiality which should pervade a Court of Justice. Nor does this completely define the evil, which lies not so much in what is done, as in what may be suspected to be done ; for it is enough that the administration of justice should be pure ; it can never be the bedrock of our rule unless it is also above suspicion.

Those who are opposed to a separation of functions are greatly influenced by the belief that the change would materially weaken the power and position of the District Magistrate and would thus impair the authority of the Government of which he is the chief local representative. The objection that stands out in strongest relief is that prestige will be lowered and authority weakened if the officer who has control of the police and who is responsible for the peace of the district is deprived of control over the Magistracy who try police cases. Let me examine this objection with reference to the varying stages of the progress of a com-

munity. Under certain circumstances it is undoubtedly necessary that the executive authorities should themselves be the judicial authorities. The most extreme case is the imposition of martial law in a country that is in open rebellion. Proceeding up the scale we come to conditions which I may illustrate by the experience of Upper Burma for some years after the annexation. Order had not yet been completely restored and violent crime was prevalent. Military law had gone and its place had been taken by civil law of an elementary kind. District Magistrates had large powers extending to life and death. The High Court was presided over by the Commissioner, an executive officer. The criminal law was relaxed, and evidence was admitted which under the strict rules of interpretation of a more advanced system would be excluded. All this was rendered absolutely necessary by the conditions of the country. Order would never have been restored if the niceties of law as expounded by lawyers had been listened to, or if the police had not gone hand in hand with the justiciary. Proceeding further up the scale we come to the stage of a simple people, generally peaceful, but having in their character elements capable of reproducing disorder, who have been accustomed to see all the functions of Government united in one head, and who neither know nor desire any other form of administration. The law has become more intricate and advanced, and it is applied by the Courts with all the strictness that is necessary in order to guard the liberties of the people. Examples would be easy to find in India of the present day. So far I have covered the stages in which a combination of magisterial and police duties is either necessary or is at least not inexpedient. In these stages the prestige and authority of the Executive are strengthened by a combination of functions. I now come to the case of a people among whom very different ideas prevail. The educated have become imbued with Western ideals. Legal knowledge has vastly increased. The lawyers are of the people, and they have

derived their inspirations from Western law. Anything short of the most impartial judicial administration is contrary to the principles which they have learned. I must say that I have much sympathy with Indian lawyers who devote their energies to making the administration of Indian law as good theoretically and practically as the administration of English law. Well, what happens when a province has reached this stage and still retains a combination of magisterial and police functions? The inevitable result is that the people are inspired with a distrust of the impartiality of the judiciary. You need not tell me that the feeling is confined to a few educated men and lawyers and is not shared by the common people. I grant that if the people of such a province were asked one by one whether they objected to a combination of functions, ninety per cent. of them would be surprised at the question and would reply that they had nothing to complain of. But so soon as any one of these people comes into contact with the law his opinions are merged in his lawyer's. If his case be other than purely private and ordinary, if for instance he fears that the police have a spite against him or that the District Magistrate as guardian of the peace of the district has an interest adverse to him, he is immediately imbued by his surroundings with the idea that he cannot expect perfect and impartial justice from the Magistrate. It thus follows that in such a province the combination of functions must inspire a distrust of the Magistracy in all who have business with the Courts. Can it be said that under such circumstances the combination tends to enhancement of the prestige and authority of the Executive? Can any Government be strong whose administration of justice is not entirely above suspicion? The answer must be in the negative. The combination of functions in such a condition of society is a direct weakening of the prestige of the Executive.

"On these grounds the Government of India have decided to advance cautiously and tentatively towards the separation of Judicial and Executive functions in those parts of

India where the local conditions render that change possible and appropriate. The experiment may be a costly one, but we think that the object is worthy. It has been consistently pressed on us by public opinion in India. I have had the pleasure of discussing the question with Indian gentlemen, among others with my colleagues the Hon'ble the Maharaja of Darbhanga and the Hon'ble Mr. Gokhale. Their advice coincides with my own view, that the advance should be tentative and that a commencement should be made in Bengal including Eastern Bengal. It is from Bengal that the cry for separation has come, and if there is any force in the general principles which I have expounded, it would appear that the need for a separation of police and magisterial functions is more pressing in the two Bengals than elsewhere. One cause may be found in the intellectual character of the Bengali, another in the absence of a revenue system which in other provinces brings executive officers into closer touch with the people, another in the fact that there is no machinery except the police to perform duties that are done elsewhere by the better class of Revenue-officer, another in the fact that there are more lawyers in Bengal than elsewhere, and another, I suspect, in the greater interference by the District Magistrate with police functions in Bengal than in other provinces. These may or may not be the real causes, but most certainly the general belief is that the defects of a joinder of functions are most prominent in the Bengals, and it is on those grounds that we have come to the conclusion that a start should be made in these two provinces.

"It is a very easy matter to propose as an abstract principle that magisterial and police functions should be separated, but in the descent to actual details the subject bristles with difficulties. A solution has been attempted, and it is being sent to the two Local Governments for criticism. It is desirable that it should be submitted to the criticism of the public at the same time. I may therefore now disclose the details. But in doing so I desire to state clearly that the

tentative solution is not a final expression of the decision of the Government of India, and that it is merely a suggestion thrown out for criticism with the idea of affording assistance in the determination of a most difficult problem. The general principle outlined is that the trial of offences and the control of the Magistrates who try them should never devolve on officers who have any connection with the police or with executive duties, while on the other hand the prevention of crime should be a function of the District Officer and his executive subordinates who are responsible for the preservation of the peace of the district.

The outlines of the scheme, stated badly, and without discussion, are as follows :—

(1) Judicial and Executive functions to be entirely separated to the extent that an officer who is deputed to executive work shall do no judicial work, and *vice versa*, except during the short period when he is preparing for departmental examinations.

(2) Officers of the Indian Civil Service to choose after a fixed number of years' service whether their future career is to be judicial or executive, and thereafter to be employed solely on the career to which they have been allotted. The allotment to depend on choice modified by actuarial considerations.

(3) Officers of the executive branch of the Provincial Civil Service and, if possible, members of the Subordinate Civil Service to be subject to the same conditions as in (2), though the period after which choice is to be exercised may be different.

(4) During the period antecedent to the choice of career officers of both services to be gazetted to Commissioners' divisions and to be deputed to executive or judicial duties by the Commissioner's order.

(5) During this period deputation from executive to judicial or *vice versa* must be made at intervals not longer than two years.

(6) High Courts to be consulted freely on questions of transfer and promotion of all officers who have been permanently allotted to the judicial branch.

(7) Two superior officers to be stationed at the head-quarters of each district, the District Officer and the senior Magistrate.

(8) The District Officer to be the executive head of the district, to exercise the revenue functions of the Collector and the preventive magisterial powers now vested in the District Magistrate, to have control over the police, and to discharge all miscellaneous executive duties of whatever kind.

(9) The magisterial judicial business of the district to be under the senior Magistrate, who will be an officer who has selected the judicial line—either an Indian Civilian or a Deputy Magistrate of experience. He will be the head of the Magistracy and his duties will be (1) to try important criminal cases (2) to hear appeals from second and third class Magistrates, (3) to perform criminal revision work, and (4) to inspect Magistrates' Courts. In districts where these duties do not give him a full day's work he may be appointed an additional District Judge and employed in civil work and in inspecting Civil Courts. If, where the senior Magistrate is an officer of the Provincial Civil Service, it is considered inexpedient on account of his lack of experience to give him civil work, he may be appointed Assistant Sessions Judge. In either capacity he would give relief to the District and Sessions Judge.

(10) At the head-quarters of districts, where there are at present Indian Civilians, Deputy Magistrates and Sub-deputy Collectors, a certain number to be deputed to executive and the remainder to judicial work.

(11) Sub-divisional boundaries to be re-arranged, and each district to be divided into judicial sub-divisions and executive sub-districts. The boundaries of these need not be conterminous. The area of a judicial sub-division to be such as to give the judicial officer in charge a full day's work, and

similarly with executive sub-districts. Boundaries to be arranged so as to disturb existing conditions as little as possible.

(12) Thus the whole district is divided into—

A. Executive—

(*a*) Head-quarters,

(*b*) Sub-districts,

and also into—

B. Judicial—

(*a*) Head-quarters,

(*b*) Sub-divisions,

and the staff is divided into—

A. Executive, under the District Officer namely :—

(*a*) The District Officer.

(*b*) A certain number of Indian Civilians, Deputy Collectors and Sub-deputy Collectors at head-quarters.

(*c*) An Indian Civilian or Deputy Collector for each sub-district.

B. Judicial, under the senior Magistrate, namely :—

(*a*) The senior Magistrate.

(*b*) A certain number of Indian Civilians, Deputy Magistrates and Sub-deputy Magistrates at head-quarters.

(*c*) An Indian Civilian or Deputy Magistrate for each sub-division.

(13) The District Officer to be empowered as a District Magistrate, and certain other executive officers to be empowered as first class Magistrates, solely for the performance of the preventive functions of Chapter VIII (omitting section 106) to Chapter XII of the Code of Criminal Procedure.