(1869) 05 CAL CK 0039

Calcutta High Court

Case No: None

In Re: Banks and Fenwick — APPELLANT

Vs

RESPONDENT

Date of Decision: May 5, 1869

Judgement

Barnes Peacock, C.J.
An advertisement publislied in a newspaper for a demonstration against a Judge for acts done in Court may be a contempt of Court as well as defamation, although it cannot be said that in every case a demonstration got up in order to obtain an expression of public opinion concerning the acts of a Judge would bo a contempt, [p. 125, col. 1.]

2. If anonymous letters are sent to the press containing false statements), the press is responsible for them if the name of the author is not given up. [p. 144, col. 2.]

3. To say that a sentence is "cruel" may be a con-tempt of Court, though it would be no contempt if the remark is merely that, the sentence is a severe one. [p. 142, col 2; p. 143, col. 1.]

4. Per Macpherson, J.--The High Court has power to proceed by way of contempt oven when the contempt is not committed in Court or during the pendency of a suit. [p. 145, col. 2.]

5. Per Curiam.--The fact of his making an apology does not entitle the person charged with contempt of Court to hisdischarge as a matter of right, [p. 137, col. 1.]

6. Charges of contempt against the Printer and Publisher of the Englishman, Calcutta. Upon this case being called on--

7. Mr. Kennedy stated that he appeared for Mr. Banks, Printer of the Englishman, with Mr. Evans and Mr. Paul. There was one point in which a little difficulty had occurred with res-peot to the form in which the affidavit of Mr. Banks was to be drawn up. It was stated

that the Court was sitting in its original jurisdiction, but it did not appear which jurisdiction, whether civil or criminal.

8. The Chief Justice.--The Court is Hitting in its original civil jurisdiction, The matter is not on the Crown side of the Court.]

9. Mr. Kennedy stated he would then proceed to put in the affidavit of Mr. Banks.

10. [The Chief Justice.--I suppose there is no doubt as to the signature of Mr. Banks to that document.]

11. I believe the affidavit has been sworn before an officer of the Court. I will read the affidavit.

12. [The Chief Justice.--An office copy of Mr. Banks" declaration has been put in under the seal of the Court, but there is no evidence to show whose signature it is.]

13. The first paragraph of the affidavit removes all difficulty about that, wherein be states:

I am the printer and publisher of the ''Englishman.''

14. [The Chief Justice.--Very well; but there is one other matter which I wish to mention before going on to the affidavits. I want to see the subscription list which Mr. Clarke has beea subpoenaed to produce. I do not wish to see the names of the persons who have subscribed, but I wish to see for what purpose the subscription was raised If the gentlemen who subscribed prefetred that their names should not be knoin, I have no wish to make them known, but I want to know whether they subscribed to th it fund in order to assist Mr. Tayler, or whether it was with the view of denouncing the judgment of the Court.]

15. Mr. Kennedy stated that the subscription list had no particular heading stating for what purpose the subscription was being raised.

16. [The Chief Justice.--I want to know whether they came in in pursuance to the advertisement or whether they were accompanied by letters stating the reason for which the money was sent.]

17. In many cases letters accompanied the subscription.

18. [The Chief Justice.--If the gentlemen who have subscribed will come forward and acknowledge having done so, they may do so with perfect freedom so far as any proceedings against them are concerned. If they like to avow having subscribed, they may do so; if not, I have no wish to enquire into the matter]

19. I have a copy of a list headed, List of subscribers to the Tayler fund who agree to their names being given up.'' Application was made to the subscribers of the fund, and every

one applied to consent to give up his name. I don''t know whether there was any particular beading to the list when it was first started, but there are many gentlemen in Court who are prepared to state the circumstances under which they sent in their subscription.

20. [The Chief Justice.--I do not wish to press for the names of those gentlemen, but if they like to give them up themselves they may do so.]

21. Captain Fenwick (Editor of the Englishman) is in this position. He is not justified in refusing to produce the list of subscribers which he has been required to produce by a subpoena of the Court, and it could not be any breach of faith on his part, as it was originally intended to publish the names. After, however, the observations of your fjordships, it was considered that to publish their names would be to place them in a somewhat invidious position, and they were accordingly written to and requested to be allowed to give up their names, and to which all who have replied have consented. As I understand, it was not merely their rupees that these gentlemen were sending in, but an expression of the opinion.

22. [The Chief Justice.--I propose to put in the "englishman" newspaper of the 21st instant merely to show a report of what took place with regard to Mr. Tayler''s case, and merely for the purpose of the proceedings. I do not propose to treat this as a contempt of Court, but merely as explana-tory of other parts of the proceedings. There is another paper of April 16, which contains an article with reference to an article which has appeared in the "Pioneer." I do not wish to put this as forming part of the contempt, as I have already expressed in my judgment in Mr. Tayler''s case my willingness to allow, this to pass, and I will not now go back from what I before stated, and treat it as a contempt. I merely put this paper in for the purpose of showing, with reference to the subsequent articles, what was the object of those subsequent articles. The words: "We suspect that Sir Barnes, if he attempts to carry out his dictum too far, will raise a storm not easy to quell. There are many people who do not care for the grievances of Mr. Tayler, but who will not brook an encroachment upon their right of appeal to the press concerning the public acts of public men. A Judge''s acts are no more exempt from public criticism than those of a Chairman of the Justices" were merely to be read as introductory to and explanatory of the other articles.]

23. I will read the affidavit of Mr. Banks in the first instance, and probably after reading it, your Lordships may be induced to take another course in the matter.

24. Mr Kenned, then read Mr. Banks'' affidavit as follows:

In the High Court of Judicature at Fort William in Bengal.

([In the matter of Alexander Banks.)

I, Alexander Banks, of Hare Street, in Calcutta, Printer, make oath and say:

First.--I am the printer and publisher of the "Englishman" newspaper.

Second.--That George Roe Fenwiok is the Editor of the said newspaper, and without his orders and directions no articles are inserted therein.

Third.--That the said George Boe Fenwiok has signified to me his intention to appear before this Hon''ble Court and admit that the articles and advertisements, referred to in the Rule nisi herein, were inserted in the said newspaper by his directions.

Fourth.--That I exercise no control whatever over the contents of the said newspaper.

Fifth.--That, although I read some of the said articles when handed to me for publication as aforesaid, I did not in any way consider their meaning or purport, but inserted the same simply en the direction of the said George Boe Fenwick, as is my habit.

Sixth.--That in inserting the said articles, notices and advertisements, I did sobonafide not actuated from any improper feeling or motives towards the Hon''ble The Chief Justice or any of the Judges of this Hon''ble Court, nor did I intend by such insertion in any way to excite contempt against the proceedings of this Hon''ble Court.

A. Banks.

Sworn this third day of May 1869 before me.

A.L. Piddington, Commissioner.

25. Mr. Kennedy--Captain Fenwiok, is now present in Court. Of course, if, in the strict principle of law, Mr. Banks has been guilty of contempt in what he has done, I do not put this forward as any ground for his discharge, but Captain Fenwick is in Court, ready to bear the brunt of what was in reality done by him, or by his order, and not leave it to others to bear.

26. [The Chief Justice.--Captain Fenwiok, in doing that, has only done that which every honourable gentleman who fills an editor''s chair would do, in not allowing a publisher of a paper to take the consequence of articles written and published by his orders, by not coming forward to avow the authorship. Sir Barnes went on to state that he was prepared to withdraw the tnile as against the printer, and treat Captain Fenwiok as the person against whom the Rule was issued. The argument might go on, however, on the printer''s Rule.]

27. Mr. Kennedy said that what he thought the Court might do, would be to make a fresh order returnable immediately in order that there might be no delay. Captain Fenwick was in Court and the case might be allowed to proceed as against him, but there would be this difficulty, that Captain Fenwick wished to explain some matters and had expected to have the opportunity of doing so as he had been called on a subpoena.

28. [The Chief Justice--Captain Fenwick might put in an affidavit for any purpose the pleased, the arguments might be proceeded with and the affidavit put in at some fucure time.]

29. Mr. Kennedy remarked that, as he would probably have to occupy the Court for a long time, the affidavit could be sworn in the meantime. Captain Fenwiok authorised him to say that he admitted having published the articles in question.

30. [The Chief Justice.--Then a new order for a Rule can be made out, similar to the one made in the case of Mr. Banks, (To Captain Fenwiok) I believe I understand that you admit your responsibility.]

31. [Captain Fenwick.--Certainly, my Lord.]

32. Mr. Kennedy in proceeding to address the Court against the Rule spoke as follows: This is a case in which I appear with very great pain and anxiety, because it is hardly possible to conduct it properly without appearing to be guilty of a thing--contempt of your Lordship--which would be the last I should wish.

33. [The Chief Justice.--I shall, of course, understand all you say, Mr. Kennedy, as only said in the discharge of your duty as an Advocate.]

34. Thank you, my Lord; but at the same time I would wish it to be understood that in any remarks that may fall from two I do not desire that they should appear to 10 addressed to the same Chief Justice as the Chief Justice of whom I speak.

35. The Chief Justice.--I think, Mr. Kennedy, that it is a pity to resort to any fiction in the case (a laugh)].

36. I shall be obliged, then, to criticise the judgment of the Chief Justice, I hope, without exceeding the limits of discretion. The first question is whether, whatever the former state of the law was with respect to contempts of Court or matters of defamation of Judges or their judgment, it now applies, or can be applicable, to your Lordships. I understand this Rule to ba issued under the civil jurisdiction of the Court and yet it appears to me that a case of contempt of Court should be tried under the criminal jurisdiction.

37. [The Chief Justice.--I am quite ready to admit that, if yon please; it is quite indifferent and immaterial at which side of the Court the case is tried.]

38. I submit, my Lord, that yon have only the power of committing a prisoner for contempt of Court under the criminal jurisdiction. In the case of Wellesley v. Duke of Beaufort (1831) 2 R.M. 639 : 39 E.R. 538 : 34 R.B. 159 it is clearly shown that contempts of this class are criminal offences and are so dealt with by the Court. By thi.s, it is quite clear that, by trying contempt under the criminal jurisdiction, your Lordships are only exercising jurisdiction under the Indian Penal Code, Act XLV of I860. No Court can exercise

jurisdiction with respect to contempt, except it is contempt by that Code. Cases, if they amount to infraction of that Code, must be tried and punished by that Code, as is mentioned in the 50th Section of the Letters Patent: "All persons brought for trial before the said High Court of Judicature at Fort William in Bengal, either in the exercise of its original jurisdiction or in the exercise of its jurisdiction as a Court of appeal, reference or revision, under the Indian Penal Code, charged with any offence, for which provision is made by Act XLV of 1860, called the Indian Penal Code, or by any Act amending or extending the said Act which may have been passed prior to the publication of these presents, shall be liable to punishment under the said Act or Acts and not otherwise.

39. I think, my Lord, this must be, a misprint as to the word extended, which should be "excluded". Chaptsr 10 defines the offences which shall be deemed contempts of Court. As a general rule the heading is not part of an Act, but in this case it is different, inasmuch as the body of the chapter acknowledges and incorporates the different headings as in Section 6--"Throughout this Code every definition of an offense, every penal provision, and every illustration of every such definition or penal provision, shall be understood subject to the exceptions contained in the chapter entitled general exceptions", though those axeeptions are not repeated in such definition, penal provision or illustration." I think that this marks intention to include the headings or titles in legislation as part of the Act. Not the same is the case of the marginal notes, which are added afterwards, subsequently to the Act being passed. Then we find in that chapter certain definitions most important here. In Section 21 we find that public servants" include a Judge, and the whole of Chapter 10 is a code to guide the Court in breaches of duty to public servants, and provides for that class of contempt most generally dealt with by the Courts; that is, for the most part known in Chancery and Common Law. There it is stated that contempt consists in disobedience to the laws of the Court, obstruction of its business or interference with, or prejudice to, its decisions and judgments.

40. Those are the classes of acts, which are punishable as contempts under the provisions of the Code of Criminal Procedure, and none of these come up to, or in any way near, the matter in respect of which Mr. Fen wick is now charged. There is an additional provision in this matter in the 228th Section of the Penal Code, which enacts as follows:

Whoever intentionally offers any insult or causes any interruption to any public servant, while such public servant is sitting in any stage of a judicial proceeding, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

41. And in the 499th Section of the Code the following words occur:

42. "Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person, intending to harm, or knowing or having reason to believe that such imputation will harm, the

reputation of such person, is said, except in the cases hereinafter accepted, to defame that person". Now, as far as I understand it, the accusation which is made against Captain Fenwick--the contempt of Court which he is now called upon to answer-is a contempt of haviag defamed a person, but there is an exception with respect to that class of defamations.

43. [The Chief Justice.--You must not understand that we assent to all you are saying, Mr. Kennedy.]

44. No, my Lord, I don"t assume assent from yonr Lordships" silence. I am grateful for that silence for the case is one of peculiar difficulty, and which might be rendered more so if I were to be interrupted.

45. [The Chief Justice.--Pray don"t understand that because the Court is silent, it agrees with all you are saying.]

46. No, my Lord. I perfectly understand that.

47. Mr. Kennedy then went on to say that the second exception to the 499th Section of the Indian Penal Code was as follows:

It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears" in that conduct, and no farther.

48. Now, what I sumbit is this, that a case having occurred, in which certain matter published amounted to defamation--and defamation of acts done in the capacity of a Judge--that defamation, being a defamation on the acts of a Judge, becomes of itself included in the exception which I have just read. It must be defamation within the terms of the Penal Code, and no defamation which was not punishable under the provisions of the Penal Code as defamation is punishable by this Court in any other way; for it is clearly laid down in the 2nd Section of the Code, as well as by the 30th Clause of the Charter, that every person shall be liable to punishment under this Code, and not otherwise, for every act or omission contrary to the provisions there of, of which he shall be guilty within the said territories on or after the said 1st day of May, 1861.

49. It is clearly stated in the Penal Code what is punishable as defamation, and with regard to the exception to which I have referred, your Lordships are bound to read it as if the word "Judge" is substituted, for public servant"; and nothing expressed in good faith on the public functions of a Judge could be punishable as defamation. It seems to me that it is impossible, without destroying the utility of the Penal Code--without making it a trap--to hold that the license of Legislature has been given to the Court, empowering it to say that though this charge against Captain Fenwick may not be tried in the ordinary course of law by an indictment for defamation, yet that it may be dealt with in an extraordinary way, and under a course which does not give him the ordinary protection of

a Jury--the protection of the ordinary Tribunals--and a scale of ascending Tribunals, with an appeal from each, but leaves him wholly at the mercy of the person on whom the defamation has been uttered. I do not contend that any defamation which does not come within the 499th section, as explained and limited by the exception to which 1 have just referred, can be such an offence as to empower the Courts to deal with it either by its ordinary procedure or in an extraordinary way, by treating it as a contempt of Court. That explanation must be given by your Lordships to the language of the Legislature in its description of what it calls and deems to be contempt of a public servant--among whom are included Judges--and that of itself would limit the operation of the Court dealing with such contempts as would come within that part of the Statute, as offences punishable only as defamation under the ordinary provisions of law.

50. Therefore, my Lord, if jurisdiction can be exercised, it can only be exercised when the Court comes to the conclusion as to the expression. I mean when that expression is not in good faith. Even so 1 would tub mil that the power to punish summarily, in a case under the former law, for contempt has been taken away by the express language of the Legislature. Whether that jurisdiction ever existed or whether it be taken away, I contend that it was never imperative for the Court to exercise it, even in those worst of times when newspapers were considered as vermin, to be hunted down as pests, and marks for scorn; instead of, as they are now considered, members of society, important members to be protected instead of arraigned before a Tribunal, considered as the 4th estate of the realm. Even then it was a discretionary matter with the Court how to deal with libels which were likely to bring into contempt the proceedings or judgments of that Court. Your Lordship has recently delivered a judgment [William Tayler, In the matter of 44 Ind. Cas. 930 : 26 C.L.J. 345 : 19 Cri .L.J. 402 in respect of the same question. No doubt that any authority that could be produced from the proceedings of any English Court would not be unknown to your Lordship, yet no exercise of such a power is in that judgment shown to have occurred. I have also carefully searched the reports and text books, but am unable to find a single instance of a Court in England having exercised such a jurisdiction, by way of trying or punishing contempts of Court, which were merely defamatory libels on the Court or the Judges, when no proceedings were pending and which, therefore, could in no way prejudice or influence the Court in such proceedings. The observations with which your Lordship finds fault, were published by Captain Fenwiek subsequent to the proceedings against Mr. Tayler. These proceedings were concluded on the 23rd April, Saturday, and, as I understand, your Lordship is not now proceeding against Captain Fenwiek for those articles published on or before the 16th April. Even in those, I am sure, you do not attribute to Captain Fenwiek the folly of supposing you weak or wicked enough to alter your judgment in the pending case for fear of an article in the newspaper.

51. [The Chief Justice.--Although it is not so material to the present portion of your argument, I want to call attention to thE explanation in Section 52. You must, I think, import that explanation of "good faith" into the construction of this exception--where it speaks of opinions in good faith, it must mean, in order to express an opinion in good

faith the person who hold it must have taken care and attention in forming it.

52. I think, my Lord, that if he truly holds the opinion he is justified in expressing it. Care and attention in expressing an opinion are different from the care and attention demanded in forming that opinion, and the words "good faith" are only connected with the expression.

53. [The Chief Justice.--I understand you to say that a person may express an opinion in good faith, though care and attention have not been taken in forming that opinion.]

54. That is the only construction which can reasonably be given to the language. The power of proceeding by summary powers for contempt, even if vested in the Court, is a discretionary one. There are other courses, than the one now adopted, open for vindicating the integrity of the Courts and the honour of the Judges, and I submit that the discretion which is vested in your Lordships is not properly exercised by proceeding in a summary way for contempt of Court. The discretion, properly exercised by the Court, would be to fall back on the long list of precedents brought forward in the judgment in William Tayler''s case 44 Ind. Cas. 930 : 26 C.L.J. 345 : 19 Cri .L.J. 402 and if the dignity of the Court has been in any way brought into contempt, to direct an officer of the Court to file a criminal information. In every case in England which 1 have been able to discover since the earliest period of any reference respecting contempts of this class, that course has always been adopted. No doubt the Courts in England are vested with a summary power to treat certain cases of contempt, without which, indeed, it would be impossible for the ordinary course of justice to be proceeded with--without which no regularity could be observed--and to shield the officers of the Court in the execution of their duty. The power even went so far that where contemptuous words were used towards the Court, or the writ of the Court, at the time the writ was being served, punishment, for contempt was inflicted; but from the earliest time do in to the spresent, I am not aware of one single case where a person has been punished, as for a contempt of Court, for a libel referring not to a suit then pending, but subsequent to its termination. It is stated by Chief Justice Campbell in a well-known book--but I could hardly call it an authority, "Campbell''s Lives of the Chief Justices, Vol. II, page 293, note", that if a prosecution for a libel on Judges be necessary, the preferable course is to proceed by information or indictment so as to avoid placing them in the invidious situation of deciding when they may be supposed to be parties". He says, this is in reference to a judgment written but not delivered, in which Chief Justice Wilmot had laid down the existence of this power, but it would seem that this only states that there, may be cases where it may be necessary to exercise this summary jurisdiction in order for the safety of the Courts.

55. Mr. Kennedy then referred to the case of the King v. Faulkner (1835) 2 Montague and Ayrton 311 at p. 330 and continued: I do so merely to show that there has been, so far as the memory of the Courts at home reaches, no exercise of its jurisdiction in this manner. Baron Park, whose name stands as high as any who have ever worn the ermine in the Courts of Westminster, in the course of the argument in King v. Faulkner (1835) 2 MA

A311 at p. 330 was unable to refer to any case of it save that of Reg. v. Almon (1765) Wilm. 243 : 97 B.R. 94 but in that case of Reg. v. Almon (1765) Wilm. 243 : 97 B.R. 94 referred to there, no judgment was ever given, and in no case can it be shown that, when the Courts proceeded for contempt against a person subsequent to the termination of the proceedings, they did so summarily;but there are many such cases cited, and they have all been proceeded against by information.

56. I would submit that there is no analogy between this case and the cases where a person brought himself into contempt by direct communication, whether oral or written, with the Court, or an officer, as in the case of Mr. Lechmere Charlton''s case (1837) 2 My and Cr. 316 : 40 E.R. 661 : 45 R.B. 68. I submit there is a great difference between writing outside the Court and coming into the presence of the Court and insulting it, or using improper language, or being guilty of improper behaviour there. There is no case in England where contempt has been noticed after the close of the proceedings. As to the propriety of your Lordships exercising a jurisdiction which Courts in England have never exercised for the last 100 years, I may refer to the case of Birch v. Walsh (1846) 10 Ir. Eq. 93.

57. Here was clearly a case of oomtempt, yet the Court exercised a discretionary power. There is an enormous difference between proceedings pending in a Court, such as the Court of Chancery, and a Court where a Jury might be influenced, or witnesses deterred, or the course of justice paralysed by the publication of such libels. The jurisdiction is given for the purpose of protecting the Court, parties, and suitors when the ordinary remedy might be too slow, This difference is, as I say, most material, and in the enormous lapse of time there is not one case, like the present, in which the English Courts have proceeded as for a contempt. There have, however, been cases in which the smaller Courts in the Colonies have adopted severe measures with regard to contempts, and in which this summary jurisdiction has been exercised. In a case which came before the Privy Council in 1866 reported as McDermott, In re (1866) 1 P.C. 260 : 4 Moor. P.C. 110 : 17 W.R. 352 : 16 E.R. 258, an appeal by one Lawrence Macdermott, the Court which had punished him, gave him leave to appeal against the sentence of six months'' imprisonment and a fine, for an article inserted in a local journal. When McDermutt''s case (1866) 1 P.C. 260 : 4 Moor. P.C. 110 : 17 W.R. 352 : 16 E.R. 258 came before the Privy Council, it was held that there was no jurisdiction to interfere with the decision of the Colonial Court, but the permission to appeal marked the disapprobation of the Privy Council.

58. The Chief Justice.--I believe another case is reported as Rainy v. Justices of Sierra Leone (1853) 8 Moore P.C. 47 : 14 B.R. 19 : 97 R.B. 26, where the Privy Council, although deciding that they could not interfere in such a matter, yet reduced the amount of fine from ï¿½150 to ï¿½60, not as an Appeal Court, but as a mere matter of finance, I looked into McDermott''s case (1866) 1 P.C. 260 : 4 Moor. P.C. 110 : 17 W.R. 352 : 16 E.R. 258 before passing sentence in William Tayler''s case 44 Ind. Cas. 930 : 26 C.L.J. 345 : 19 Cri.L.J. 402 in order that the fine might be below that which the Court allowed in

that case.]

59. In McDermott"s case (1866) 1 P.C. 260 : 4 Moor. P.C. 110 : 17 W.R. 352 : 16 E.R. 258 one of the contempts for which he was charged was with reference to matters past and gone. It appears from the report that on the 2nd April an ex parte order was obtained against Mac-Dermott for publishing certain scandalous articles reflecting on the administration of justice in the Colony of British Guiana. On the 5th April another article appeared which was also treated as a contempt which might be held to refer to a pending proceeding, but the first article, which appeared to be one of a highly defamatory nature, wholly referred to past proceedings. The ultimate decision of the Privy Council on appeal was that it had no power to interfere. The mere fact that there is no appeal to the Privy Council against an order for contempt, ought to itself make your Lordships feel that it is not exercising a proper discretion on your part in proceeding in the matter of an article defamatory of your Lordship the Chief Justice himself by a summary jurisdiction in a Court from whose decision there is no appeal, and in a Court in which the Chief Justice"s opinion, even if differing from the rest of the Court, must prevail. Unless it appeared that there was likely to be the gravest possible consequences to the administration of justice, the proper course to be adopted would be, not to have proceeded by a summary process for contempt, but by proceeding, if the Court came to the conclusion that this case is one whicb calls for animadversion, against Captain Fenwick in a constitutional way, when Captain Fenwick would be brought before a Jury, and if any questions of law arose, they might be reserved for the consideration of a higher Court. That is a point which I have felt in duty bound to bring before your Lordship"s notice, and no doubt it would have due weight. Here, in this Court, Captain Fenwiok is brought forward to answer a charge of contempt, the nature of which is that he is likely to brinsr the administration of justice iu this country into contempt--that he is likely to weaken the faith of the people in the due and true administration of justice. This case is one which must go to the public as a matter of fact. I am unable to see any reasons which lead to the conclusion that a summary proceeding should be used instead of the constitutional one. There may be such reasons, but it will be difficult to induce the mass of the people to believe in them. If the Court were to exercise this jurisdiction, it will go forth to the world that a Court, from whose decision there ia no appeal, has held that these articles of Captain Fenwick were not written in good faith. Would that be satisfactory to the public? Will a decision like this strengthen the faith of the public in the administration of justice in the same way as a decision of a Jury will. The Courts of law in this country are held in too high estimation by the people for any newspaper article to have any damaging effect on that estimation. Whether a Jury convicted or acquitted Captain Fenwick of defamation, or of not having written those articles in good faith, would have very little effect upon the public mind, but the case of a Judge, from whose decision there is no appeal, deciding a case in which he is a person interested, must have the effect of shaking the confidence of the public in the Tribunals of the country. I much regret that it should have this effect, but I fear that it is an almost necessary consequence. If no other course was open to the Court, if it was imperatively necessary for the Court to proceed in the manner it had done, I would be the

first to say, regardless of any outside opinion which might be entertained outside,--"Go on, and exercise your jurisdiction". The jurisdiction is vested in the Court for the benefit of the mass of the subjects and must be exercised. It is, however, not a necessary jurisdiction, but a discretionary one, and one which should be exercised with the greatest care, especially when in the course of upwards of 100 years not a single case can be cited to show that the Court at Westminster had exercised this jurisdiction. That is the most elementary feeling and principle that has been engrained into the minds of all people which prevents Judges from decid-ing in cases in which they are directly interested In the case of Dimes v. Grand Junction Onal (1852) 3 H.L.C.759 : 17 Jur. 73 : 10 E.R. 301 : 88 R.R. 330 Lord Cottenham''s judgment was held by the House of Lords not capable of being supported merely because he had an infinitesimal interest as a shareholder.

60. [The Chief Justice.--The same thing would apply if the same were said to the Judge in Court.]

61. No, my Lord, I think not. I do not think so; for when an insult is offered m Court, it calls for summary proceed-ings and instant animadversion, in order to preserve order and regularity, but even then discretionary power is used. What can the Judge do but use summary administration; but even then the offender is in general only put in prison until he submits, or until the rising of the Court Cases of contempt of this character pertain more to disturbance than defamation, as in case of mad people in the presence of the Court who use insulting and defamatory language. They are not cases in which the Judge is seeking to vindicate his own character; they are not personal matters, but are analogous to cases of writ serving, where the served occasionally use bad language. Could the Judge have personal motives there in punishing such an offender P I think not. I would ask now, what reason can there be in not using criminal information or to what reasons will the adoption of this course be attributed The Court cannot wish to punish Captain tenwiek if he has not done wrong. Has the Court no confidence in the administration of justice by a Jury who have taken an oath of impartiality P Is it impossible to obtain a Jury from among the community of Calcutta who are to be relied on when they have taken a solemn oath to convict the offender, should they find him guilty? Surely their verdict would be satisfactory to the ends of justice. On the other hand, the fact of the Court faying a case in which the Judges were personally interested, would have a more important effect on the mind of the public than could be possibly produced by any newspaper articles or writings. In the case of a great personage in Her Majestys dominions, which I dare say your Lordships remember, when he tried a person against whom he had brought accusation, the case created a sensation not easily forgotten. I cannot forget the expression of public opinion on that occasion. When your Lordship wishes to preserve the dignity and character of the Court, I conceive that in the wording of the Rule the words "to be dealt with in such other way" mean criminal information and trial by a Jury.

62. The Chief Justice.--I did not mean that.]

63. Mr. Kennedy quoted the case of Dimes v. Grand Junction Gitnal (1852) 3 H.L.C.759 : 17 Jur. 73 : 10 E.R. 301 : 88 R.R. 330 as to the undesir-ability of a Judge trying his own case. In the case of the Rex v. Justices of Tyrone (1860) 12 Ir. C.L. R. 91 Judge Fitzgerald made some very strong observation as to the impropriety of Judges trying cases in which they had the slightest interest.

64. This is an undoubted and an unquestioned principle. This is not a case like that of Lord Cottenham and Grand Junction Company (1852) 3 H.L.C.759 : 17 Jur. 73 : 10 E.R. 301 : 88 R.R. 330, in which it was supposed that an animus existed in the mind of the Judge from the trivial interest he held in the matter as a shareholder in the Company. There are two cases which I have discovered, in which it is laid down that a Judge cannot take part in the trial of any case in which he was an interested party. One of these cases is reported in Coke upon Littleton, page 3776, in which a Judge named Richel wished to decide a case in his own favour, but was overruled by three other fudges. And so the case was dismissed "ex assensu omnium justiciariorum prcetor qwerentem Richel." Leaving then this Judge, who had tried his own case, to be a warning to others, as Coke puts it, he came to a very interesting case, if authentic, but he got it from a high authority, (8th Henry VI, page 18). That was an action against one Chase, the Chancellor Of Oxford, for trespass, where the defendant pleaded in abatement that he was Chancellor of Oxford, and Clerk of Oxford, and that by Letters Patent the case oould only be tried in his own Court. Upon demurrer the plea of abatement was overruled. In that case the Counsel for the defence, being much pressed by the Court to produce a precedent for a man sitting as Judge in his own case and giving judgment against himself, replied he knew of but one. It was that of a Pope, who had committed a grievous crime, and the Cardinals came and said to him Peccasti," and he answered Judicate me" and they said, Non possumus: tu es caput ecolesice Judica teipsum." And the Pope gave judgment "judico me ipsum cremari et fait combuitus." So having sentenced himself to be burnt, he was burnt and became a saint, and so it clearly appears that a man may be a just judge in his own case. In the present case there certainly is that enormous objection--which I have tried to impress upon the Court--that, however it may be, it will be impossible for the public to divest its mind of the fact, that where a course like this has been adopted from the wish that the trial might be withdrawn from that more proper tribunal--the consideration of a Jury.

65. There was another point of jurisdiction to which he wished to draw the Court"s attention, and that was that the whole law of commitment for contempts had arisen antecedent to what he might call the Magna Charta of the English Press, Sometime ago it made little difference whether a person charged with libel was tried by a Judge alone, or by a Judge and Jury, as it was the Judge alone who was to determine whether the article was defamatory or not, and the Jury were obliged to confine themselves to the simple issue as to whether the person charged did or did not publish the defamatory matter. That, however, was not the law now. One must look to the present state of the law with respect to libels, and must consider that1 the whole jurisdiction has been withdrawn from

the Court. To the Jury, and the Jury alone, is submitted the power, but the Court may interfere if the Jury decides to be libal that which is clearly not libel, or it can mitigate, but not increase, the punishment with which the Jury visits such libel. Newspapers are no w-a-days looked upon as thenatural and proper correctors of those who are high in power. All hold that in England we have one broad principle on which, in a great measure, rests our superiority. I mean the liberty of the press, which does not exist elsewhere. In England the press acts as the hand and eye to the public and to the executive. I refer now to Wason v. Walter (1868) 4 Q. B. 73 : 8 B. and Section 671 : XXXVIII L.J.J. 34 : 19 L.T. 109 : 17 W.B. 169.

66. Lord Chief Justice Oockburn there says:

The law of libel has only gradually developed itself into a satisfactory state: for the liberty of a public writer to comment upon the conduct and motives of public men has only recently been recognised. Comments on Government, on Ministers and Officers of State on Members of both Houses of Parliament, on Judges and other public functionaries are now made every day, which, half a century ago, would have been the object of ex officio informations, and woald have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change, and that though injustice may often be done, and though public men may often have to smart uqder the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties?

67. This shows what a change has taken place in the state of the law and public opinion. Lately the Governor-General or Lieutenant Governor, whose conduct has been subjected to severe and even hostile criticism, especially on the subject of the Orissa famine, took no notice of such criticism. Had they done so, the writers of such criticism would have been equally liable with the present offenders on a criminal information. Is it wise for the High Court to object to criminal information, and to claim for itself a higher prerogative, when it is perfectly clear that other functionaries had not that right? These are all the observations I wish to make on this part of the case, and I will now shortly proceed to call your Lordships attention to another point, and ask whether there is sufficient authority for saying--especially having regard to the then state of the law with regard to indictments for libels, that the Court has ever had jurisdiction to treat as contempts of Court matters which have occurred outside the Court after the termination of the case, which brought no one into personal collision with the Court, and which are in no way injurious except in being in some way defamatory. All the cases cited on the point are cases which have been actually decided in England, and in all these cases criminal informations have been issued I have not been able to discover a case in which an English Judge has exercised this jurisdiction, although there have been cases of Colonial Judges having done so In the case of King v. Faulkner (1835) 2 Montague and Ayrton 311 at p. 330 alluded to before, and reported in Montague and Ayrton it is held that, whatever might be the right or the power of attachment, the Jcdge who professed to exercise the power had not the power. In examining the law in this matter it strongly recalls to my mind the observation of Lord

Denman in the case of O''Connell v. Reg. (1884) 11 Clause and Fin 155: 9 Jur. 25 : 1 Cox C.C. 413 : 7 Ir. L.R. 261 : 5 St. Tr. N.S. 1 : 8 E.R. 1061 : 65 R.R. 59:

That there were three kinds of law: Common Law, Law by Statute, and Law taken for granted and that the amount of accepted legal opinion which fell under the last head far exceeded the amount comprised under the two first heads.

68. The law could not be better expressed than it was there, in one of the greatest judgments which have ever been delivered by anv member of the House of Lords.

69. [The Chief Justice.--Buy it was proved that the law taken for granted was not good Law.]

70. It was proved to be irreconcilable to clear Jegal principles.

71. The Court then adjourned for a quarter of an hour for refreshment. Upon its ressembling--

72. Mr. Kennedy proceeded with his argument. I refer the Court to the judgment of the Lord Chancellor in St. Jome''s Evening Post case (1742) 2 Atk. 469 : 26 E.R. 683 and will now ask your Lordships to direct your attention to the case of Brich v. Walsh (1846) 10 Ir. Eq. 93 in which the Master of the Rolls in ireland adopted the language of Lord Hardwicke end went through the who e of the classes of contempts punishable by the Court in its high prerogative power.

73. Mr. Kennedy again quoted (he class of contempts referred to, and proceeded to speak with regard to the third point--that of an inference of an intention to obstruct the course of justice This, I submit, could not be called scandalising the Court. The term "scandalising," as I understand it, is a part of the class of contempt in which, when the process of the Court was served, opprobrious language of some description was used. It does seem to me that in cases of this description, where the contempt consists of an attack on the Judges, that the Court invariably ought to proceed on criminal information.

74. Mr. Kennedy then quoted the case of the King v. Watson (1788) 2 T.R. 199 : 100 E.R. 108 and went on to say.--I do not think that any Court at this day would proceed against a man for expressing an opinion even if it were expressed without forethought. There are several cases in which criminal informations have been brought against persons for libels upon persons filling high judicial positions, but if a shorter and more simple remedy had been open to them, that course would certainly have been pursued. In your judgment your Lnrdship starts with that case St. James''s Evening Post case (1742) 2 Atk. 469 : 26 E.R. 683--which lays down three different kinds of contempt. That is exhaustive of contempts which are liable to punishment, and yet the Judge is not in favour of public rights to the exclusion of rights of the Court. It is hardly possible to put any other construction on that judgment. I think the only other case having any bearing on the present is Van tiandan''s case (1846) 1 Ph. 605 : 4,1 E.R. 763--which is alluded to in the

course of Mr. William Tayler''s case. 44 Ind. Cas. 930 : 26 C.L.J. 345 : 19 Cri.L.J. 402--in which the contempt was actually committed in the presence of the Court, and the summary jurisdiction was resorted to for the purpose of preserving order.

75. The two cases referred to by Sfcarkie, page 481, are stated to be libels on the Court of the Queen''s Bench; whereas it would appear, on looking into them, that they had nothing to do with the Court of the Queen''s Bench at all, but it was a libel on Dr. Middleton. How it occurred that the King''s Bench could be mixed up with a Doctor of Divinity I am at a loss to comprehend. We find in Fortescue 201, that the libel was a libel on a Doctor of Divinity, and that the libel was contained in the dedication of a book. 1 have heard that "divinity doth hedge a King" but here the "King''s Bench" seems to hedge a Doctor of Divinity (a laugh). Then the only other case was in Starkie, 584. These are the only two cases which state that such jurisdiction has never existed. In more modern times we find a case in the Queen''s Bench. Now in this case it appears on the face of the report, Crawford''s case (1849) 13 Q.B. 613 : 18 L.J.Q.B. 225 : 13 Jur. 955 : 116 E.R. 1397 : 78 R.R. 479, that Crawford attended the Court as a spectator and auditor and that he commented in the Mona newspaper, and then it appears the Court was adjourned and the man was committed.

76. [The Chief Justice.--That case appears to be a libel out of Court]

77. It does not appear that the suit was not still pending. It appears that the article was contemptuous, and that its publications were calculated to paralyse the proceedings of the Court, I believe your Lordship was personally present, but it appears to me that as it is reported that appears to be the gist of the affair. Next I come to Wallace''s case (1866) I.P. 283 : 4 Moore P.C. (N.S.) 140 : 36 L.J.P.C. 9 : 15 W.R. 533 : 16 E.R. 269, which was a letter directed to the Judge for the purpose of influencing him in the discharge of one of the duties of the Court. This letter was most insulting, and accused him of altering minutes of the Court (here Mr. Kennedy quoted the case). This was clearly during a pending suit. I forgot to remind your Lordships that in the Moffussil, except in those Courts established by Royal Charter, they would have no power to exercise such a jurisdiction as I mentioned before, as the administration has oarefully withdrawn all such power--Act XXV of 1861, Section 1863.

78. No Court except those established by Royal Charter has any jurisdiction, and when so established it has only that power to a similar extent of Rs. 200 fine. Yet they would want it more than this Court, in fact one would have thought it would have been necessary in those Courts. Assuming that your Lordships are rot convinced on the points on which I have argued, I will go on to prove that your Lordships oannot treat this case as one of contempt, that is to say, as a case punishable summarily, hut that you can only try it by Jury as a case of defamation under the Penal Code.

79. [The Chief Justice--If the contempt is one which does not come under the provisions of the Penal Code, there is nothing to prevent the Court dealing; with it as a contempt and

if it is contempt punishable under the Penal Code, the Court can try it itself, but upon the understanding that the punishment to be inflicted will in, no case exceed that provided in the Penal Code.]

80. What is the charge against Captain Fenwick in the present case?

81. [The Chief Justice.--He is charged with having published certain letters and advertisement in the newspaper, and that in doing so he has been guilty of a contempt of Court.]

82. What I want to know is whether I am to direct myself to the question as to whether the articles in question were calculated to do harm or to injure the reputation of the Judge.

83. [The Chief Justice.--Not alone that. The advertisement for a demonstration against a Judge for acts done in Court if, in my view, a contempt.

84. [Macpherson, J.--I think, Mr. Kennedy, you may argue first as to whether the letters, etc., written come within the meaning of the word defamation according to the Penal Code, and then whether they are a contempt of Court.]

85. [The Chief Justice.--I put it that the advertisement calls for a demonstration of public opinion, and is a defamation as well.]

86. With respect to the defamation, I want to understand what your Lordships hold.

87. [The Chief Justice.--If it is a criticism for which, within the meaning of the Penal Code, he could not be indicted, it is not a contempt. Any fair criticism is justifiable and is not a contempt, if expressed in good faith. According to the 52nd Section of the Penal Code, a bona fide criticism is not a contempt.]

88. There may be some difference between the words expression of opinion" and the word "criticism", although perhaps the simple meaning of the word "criticism" is nothing but an expression of opinion, but if any person were to say, "So and So"s judgment was wrong", that could hardly be called a fair criticism.

89. [The Chief Justice.--I call an expression of opinion in good faith a criticism.]

90. If writers in the discharge of their public duty were to be obliged to support every portion of what they wrote with reasons, they would be in a hard case.

91. [The Chief Justice.--I don"t mean with their own reasons, but it would not do for a writer, in the case of a man convicted of murder, to say, without giving the evidence, that Judge and Jury had convicted an innocent man.]

92. Suppose it was not in a newspaper, but an ordinary person had said so.

93. The Chief Justice.--If he said so in Court that would be a contempt of Court. I am willing to hear you if you wish to argue that would" be an expression in good faith on the conduct of a public servant. Suppose in a case in which there was a conflict of evidence, a newspaper was to say that "the Judge and Jury have convicted an innocent man; the man has been hanged and it is a cruel injustice", would that be justifiable?]

94. If made in good faith, it would. Suppose the case of a person who had been in Court and paid great attention to the case and came to that conclusion, or suppose that ore of a minority of a Jury, as in the Moffussil, where a unanimous verdict is not required, differed from the other jurors, and the man tried was condemned to death, could it be said that, although he did not give his reasons, yet that if he said, in my opinion that man is as innocent as any in Court, and yet he has been sentenced to death, that the statement was not made in good faith?

95. Mr. Kennedy continued.--The offences charged against Captain Fenwick are two; first, in having consented to act as treasurer to the fund, and in having given notice of the formation of a fund, intended to offer an opportunity to people who entertained an adverse opinion to the Court in William Tayler]In the matter of 44 Ind. Cas. 930 : 26 C.L.J. 345 : 19 Cri.L.J. 402 of giving an expression of their opinion by paying their rupee. Possibly the law of conspiracy still prevails in the country, and after the case of O''Connell v. Reg. (1844) 11 Cl.& Fin. 155: 9 Jur. 25 : I: 8 E.R. 1061 : 65 R.R. 59. it is hard to say what is not conspiracy.

96. [The Chief Justice.--But those counts were held to be bad.]

97. I will not state what is and what is not of the nature of a conspiracy, as that is an offence not triable under this particular jurisdiction; and since the introduction of the Penal Code I doubt whether it is triable at all in India. The paragraph which I presume to take as the contempt of Court was this:

During the whole of Sunday and yesterday great excitement prevailed throughout Calcutta at the severe sentence pronounced by the Chief Justice on Mr. W. Tayler. We understand that a public subscription has been opened to pay the amount of the fine, subscriptions being limited to one rupee each. We shall be happy to take charge of any subscriptions to such a fund--the demonstration not being at all intended to express any justification of Mr. Tayler''s conduct, but to show rather the sentiment which exists in the breasts of all Englishmen against a too severe use of power. Precedents in law and the forms of justice may be cited in favour of Sir Barnes Peacock''s action in the matter, but the universal shout of indignation with which His Lordship''s sentence, sitting as he was as Prosecutor, Judge and Jury upon his own wrong, has been received, sufficiently justifies an appeal to the public. Five hundred men having the pluck to put down their rupee each, in proof of their protest against the cruel sentence awarded by the Chief Justice, and as an earnest of their determination to support their right of appeal to a free press, will be a lesson which Sir Barnes Peacock will not be likely soon to forget.

98. I confess that I can find nothing there that amounts to a contempt of Court. I find a desire rather to find out what public feeling really was in the matter. In your judgment your Lordship said, "I am a servant of the public. If public opinion is unmistakeably expressed I will bow to it. But I will not take the voice of a few papers for the voice of the public." It really seems difficult to ascertain how public opinion could be better expressed than by this rupee sub-noription. It was your Lordship"s/and not Captain Fenwiek"s suggestion as to the expression. The proposal for subscription did not ccme from Captain Fenwiek, as I Seam; on the contrary, he has been led into it. This appears on the faoe of the notice itself.

99. From this it is clear that the suggestion was made to him, as he had taken great interest in William, Tayler"s case 44 Ind. Cas. 930 : 26 C.L.J. 345 : 19 Cri.L.J. 402, and surely this could not be taken as a contempt of Court, when his action was merely the result of your Lordship"s challenge of the public opinion of the community in Calcutta fortified by a threat.

100. [The Chief Justice.--I used no threat. I said I shall be happy to lay down.]

101. Yes, my Lord, it is a threat when you speak of depriving the community of your deep learning and the brilliancy and impartiality so long the brightest ornament of the Bench. This subscription may be regarded as an indication that public opinion thought your Lordship was in error. This public opinion may be very wrong, but still the feeling existed, as it would amongst all Englishmen and I believe it also existed here amongst the members of the Bar, that it would have been better had Mr. Tayler been tried by a Jury. In one word, there was a feeling of dissatisfaction at the proceedings against Mr. Tayler and the severity of h"is punishment. Tour Lordship thought that the sentence of the Court was a fit award, and this judgment had been to some extent challenged by an expression of public opinion on the subject, and it was difficult, under the circumstances, to-see how else that expression of public opinion could have been conveyed. Calling a public meeting for the purpose would have been a much graver offence as well as more insulting, and was a course which I would have been very sorry to have seen adopted. The way of enabling the people to oome forward and give their opinion as expressed by their rupee was about as mild a form of expressing an opinion as could well be adopted. I have known of many such similar cases, but have never known of one in which any particular proceedings were taken as in this case.

102. [The Chief Justice--This subscription was not intended for the purpose of paying, off Mr. Tayler"s fine.]

103. Cases of paying off a person"s fine for charity are never noticed by the Court, and indeed are very seldom done; but in most cases where subscriptions are raised for the purpose of paying off fines, it is in order to mark public disapprobation at the course adopted. It will doubtless be remembered that when the Nil Durpan prosecution (1862) 1 Celebrated Trials 36 was successfully carried out, a wealthy native, named Kali Prosunno

Singh, actually threw the amount of the fine on the table of the Court. In McDermott''s case (1866) 1 P.C. 260 : 4 Moor. P.C. 110 : 17 W.R. 352 : 16 E.R. 258 there was also a fine, and this was also raised by subscription.

104. [Macpherson, J., said that it must be remembered that the article in the paper of the 16th April was to be read in connection with the other articles, although there was no charge of contempt in respect of that particular article.]

105. It appears to me that this is a mere expression of opinion if it has been given bona fide and with reasonable care, and if there is no reason why the expression of opinion should not be given in this way, and why persons who really have been challenged to come forward and give an expression of their opinion should not do so, then it would seem a monstrous thing that it should be made a matter of contempt on the part of Mr. Feriwick to give them an opportunity to do so. Another paragraph states as follows:

Notwithstanding yesterday having been mail day and a day of considerable business in Calcutta, subscriptions towards the fine imposed upon Mr. Tayler have been pouring in. Our notice yesterday must have been carelessly read by many, as individual subscriptions of 100 rupees and upwards have been offered. The limit proposed was cne rupee. Again we have to remark that the demonstration is in no way intended as a vindication or approval of Mr. Tayler''s conduct, but as an independent expression of opinion regarding an overexercise of power on the part of Sir Barnes Peacock, and as a legitimate protest against undue interference with the right of appeal to the Press.

106. [The Chief Justice.--Mr. Tayler''s second apology had been put in the day before the second notification.]

107. Mr. Tayler, in his second apology, admitted himself to be altogether in the wrong, Fnd the article in the Englishman does not vindicate Mr. Tayler''s conduct, but merely says:

There are many people who do not care for the grievances of Mr. Tayler, but who will not brook an encroachment upon their right of appeal to the Press concerning the public acts of public men.

107. I confess my belief that, on investigation, that these proceedings are an encroachment on the liberty of the Press, the opinion would be discovered to prevail extensively among the members of the Bar. This prevails also among Captain Fenwick and many others who are not at all defective in intelligence, who were present and read the proceedings without reference to Mr. Tayler, whom many think to have acted in a very shabby way. Many also entertained an opinion against Mr. Justice Mitter. I will here read the letters that were sent with these subscriptions.

108. [The Chief Justice.--Are these all the names, or are they only of those who consented to have their names published?]

109. These are all the names, my Lord except those of some ladies and those "who are in the Moffussil, and have, therefore been unable to send in their consent as yet.

110. [The Chief Justice.--I see here "Inigo or Jingo and three friends, H.B. and 10 others, residents of--"]

111. Those are all ladies, my Lord (laughter).

112. Here Mr. Kennedy read the letters which caused much amusement. One letter being anonymous and of a libellous nature was not read.

113. Mr. Kennedy continued--Although, after your Lordship issuing the Rule, Captain Fenwick published a statement to the effect that he would receive no more subscriptions, yet many further subscriptions came in There were also many other subscribers who have not sent letters, but who are men of high education and strong feelings as to the rights of Englishmen, which they feel in the present case have been infringed and attacked I don"t know how it was that the subscription came to take place. It has been shown that Captain Fenwick was not the originator of it but merely agreed to act as treasurer, and the part he has taken was done by no means with the intention of committing a contempt of Court. One of the advantages we enjoy from a free press is that the expression of public opinion whieh it allow, prevents the breaking out of conspiracies. The greatest means of keeping our country free from outbreaks is that every person is able to bring his opinion before the public, when it can be confirmed or refuted by those who have the power and ability to show what is right and what is wrong. The preventing of the expression of public opinion such as this, by the dread of being punished for contempt of Court, appears to me to be about as wise as placing a weight on a safety valve to keep a boiler from explosion. Captain Fenwick has probably high ideas of the press and the duties of an editor, they may be erroneous ideas, and he may perhaps have gone beyond what he ought to have done in the matter of criticism. The first of the incriminated articles, seems to me to be one of the 26bh April and with regard to the first passage which states:

The extraordinary severity of the sentence was much commented on in and out of Court." That I take it, my Lord, is a mere matter of fact. I believe Captain Fenwick in his affidavit states it as such and I will be able to procure other viva voce evidence of persons who were present to verify that statement, that there was much comment on the sentence and that the public expected that after what had occurred on Tuesday morning, they understood that Mr. Tayler would be, to use a Police Court phrase, warned and disaharged upon his making an apology. The letter went on: "There was not a listener in Court on Tuesday last to Mr. Tayler"s offer of apology, who did not consider, from what fell from the Chief Justice, that his Lordship was prepared to accept his apology, provided it obtained the same publicity as had been afforded to the letters complained of.

114. The words "there was not a listener in Court", etc., might be difficult to prove, but what I am prepared to prove, is that a large number of persons in Court did come to the conclusion that your Lordship did not intend to proceed to punish Mr. Tayler in case he published an apology, and included in it a retraction suggested by your Lordship. The article goes on to say that the Ranee of Ticaree''s unprotected position was feelingly dwelt upon, and Mr. Dwarkanath Mitter was extolled in such a manner that he must have blushed, although like Gray''s flower, it was ''unseen.''"

115. That may perhaps be a somewhat irreverent joke at the Hon''ble Mr. Justice Mitter, but I cannot think it amounts to anything like a contempt, or calls for any necessity for measures such as have been adopted.

116. [The Chief Justice.--No proceedings would have been taken for anything like that.]

117. Then the letter goes on--

118. [The Chief Justice.--There is a quotation at the commencement of the articles which you have not read, Mr. Kennedy.]

119. Mr. Kennedy read the following:

Calendaro.--Will he be punished?

Bertuccio.--Yes.

Calendaro.--With what? a mulct or an arrest?

Bertuccio--With both:

Calendaro.--Now you rave, or must intend revenge.

120. Slightly altered from Marion Faliero.

121. I do not see how that can be considered as applying to the Court. I suppose your Lordship remembers the original quotation, and yon will see that the alteration is a very slight one. The joke may not be a very good one, but it is hard to see how it could be applied to the Court. The word in the original quotation is "death". I take it that quotation is only meant as a sort of expression of opinion, that the imposition of both fine and imprisonment for such an offence was a singularly severe one. Now surely that is a matter in which a journalist is capable of forming a bona fide opinion, having seen Mr. Tayler in Court and heard the proceedings. What he says of your Lordship, if it is not in good faith, then it is not justifiable. Your Lordship''s judgment was one of singular power and of deep research, most clearly bringing before the public that which to other Judges would not have occurred. Your Lordship in exercising your real powers did bring an enormous amount of evidence to bear against Mr. Tayler, against whose acts yon had formed a very strong opinion. So, surely, there is no dispraise in saying that yon had

turned every point against Mr. Tayler. The word "bitterness" cannot be construed into contempt of Court. It merely applies to your Lordship"s mariner. It may not be fair to criticise your Lordship"s manner, nor perhaps in good taste, but really your Lordship"s manner is sometimes very forcible, very forcible indeed. You did say that Mr. Tayler"s apology did aggravate his offance, for the apology in the affidavit was but an echo of the other. Yet when it was read in Court you did not intimate that it was improper or objectionable. Your Lordship intimated that it was insufficient, because it contained no retractation. The general opinion then was, that your Lordship had no further intention to punish, but that as the affidavit contained no retractation it was insufficient. Yet, surely, pity for Mr. Tayler would not overrule the anxiety in the minds of the public for the honour of the Court.

122. The case was then adjourned till the following day.

123. Mr. Kennedy resumed his argument on May 4th, He said I shall again draw your Lordship"s attention to the exceptions contained in the Penal Code. Your Lordship seemed to think that the expression of opinion WHS equivalent to criticism. I confess I hardly think that is the true construction. Expression of opinion is a much wider phrase than criticism. The framers of the law evidently held that fair criticism was certainly not libel. When they used such a wide term as expression of opinion, they must have meant something very different from the existing state of the law, or they would not have gone to the trouble of defining what good faith was. I think here that there is an invitation in the Statute for the expression of opinion in good faith, which is totally exempt from punishment, otherwise the Legislature is merely laying a trap. I cannot think this to be the case. In a recent calamity, public opinion ran very strongly against the highest officials; in fact, it was said that they were indifferent about the death of thousands of people at the time of theOrissa famine which was attributed to their negligence and want of knowledge. The same opinions prevailed at home, although I understand that human means would have been totally unavailing to prevent the calamity, but yet a strong opinion was expressed that this was caused by the culpable neglect of the officials. There was even a suggestion that this province should have a separate Governor from home, as the existing Lieutenant Governor was the cause of the evil. I think that was singularly unjust. Yet there was no explanation, no giving of reasons; still it was not punishable because it was in good faith. The case put yesterday of a Judge and Jury finding a man guilty of murder, and thereupon being accused of having condemned an innocent man, would be an expression of opinion. Might not that be perhaps in good faith, although the reasons did not appear? Perhaps they might be very weak. But yet that would not imply a doubt as to the speaker"s good faith. The 52nd Section does not imply that every one must be completely master of his subject, or that his reasons must be sufficient and good, and that else he is liable to punishment, although such expression was made in good faith. Again, the publication of defamatory words is extended towards words "either spoken, or intended to be spoken or said." It is not at all an unfre-quent occurrence to hear defeated Counsel expressing strong opinions against the judgment which has overthrown them.

Yet, surely, that cannot be defamation, though perhaps erroneous and not fulfilling such demands as "care and attention." Surely the 52nd Section does not say that good faith must be applied in forming opinions, but only in expressing such opinions. Of course, if a man has no opinion, if he knows nothing whatever of the case, what he expresses cannot be in good faith. On the other hand, if he has an opinion, this section gives him the liberty of expressing it. The intention of the Penal Code is to extend this liberty of expression, yet if no opinion may be expressed save after careful study, it only misleads the public and contracts their liberty. I now think it right to read Captain Fenwick''s affidavit (Here Mr. Kennedy put in and read the affidavit, which stated that, the articles complained of were inserted bona fide, and as a fair expression of public opinion. Then an article from the Friend of Indian, April 29). Here the writer appears to have been in Court and seen the reports, and he says that the opinion was shared by all in Court, that nothing further than the apology, which Mr. Tayler afterwards published in the newspaper, would be required of him.

124. And now this brings me to a very painful portion of my subject. I must say that your Lordship''s language on that occasion would raturally lead to the supposition that if Mr. Taylor made the apology required by your Lordship, your Lordship would be satisfied, and that no further proceedings would be taken against him. Mr. Tayler did make an affidavit which he read to your Lordship and he also read the case of Fletcher, Ex parte (1841) 2 Ment. D. De G. 129, a very gross contempt, when the Court intimated that they would be satisfied with an apology. This was read to your Lordship, and yet yon expressed no dissent from such an opinion. Of course that was a matter for your Lordship''s discretion, but still I submit that many would think that, as you expressed no dissent, you consented to the contents of that affidavit. I presume myself that the apology you referred to was that incorporated in the affidavit. The affidavit was then before your Lordship. Any one might think that you meant the apology contained in this affidavit. You further said: "I leave this remark to Mr. Tayler''s consideration."

125. [The Chief Justice.--I did mean the affidavit.]

126. Under those circumstances, my Lord, it does seem that it was not natural to presume that upon a retractation published as the letters were published, it would be accepted as sufficient, for although your Lordship did not pledge yourself [having Van Sandau''s case (1846) 1 Ph. 605 : 4,1 E.R. 763 in your mind] that if Mr. Tayler published his apology and retractation it would be sufficient, yet the supposition was that nothing further would be wanted. Of course you did not say so; and people may be to blame for thinking so: still that was their opinion. This is what Captain Fenwick says in his affidavit, and if that is not sufficient, I can give the evidence of several most respectable gentlemen whose opinions were identically the same, and who will testify that that was the state of public opinion. I mean that if Mr. Tayler published the apology as he had published the offence, he would be visited with no other punishment, I don''t myself like to give evidence, but really there was a great discussion hero amongst the members of the Bar, and here that was the general opinion as is also in the outside world. The reflections on

your Lordship in "Bystander"s" letter are very strong, but then what you have to consider is, whether that was the prevalent opinion caused by what you said or by what you did not say. Of course, if it had been brought to your Lordship"s notice you would have spoken more fully upon the matter. But with that we have now nothing to do. What did occur did very naturally give rise to the general belief that the publication of the apology was all your Lordship required. I submit, my Lord, that the thing for you to consider is, whether such opinion might not be held bonafide. The question is whether the course taken in Court may not have induced people in Court, who had not the same means as we had of forming an opinion of your Lordship"s judgment, to have taken such a view perfectly bona fide. I can"t help impressing upon your Lordship the opinion, which could most naturally occur to the minds of such persons, was that a gentleman of your Lordship"s ability would not allow such an impression to arise without intending that it should arise. I know that your Lordship did not intend such an impression to arise, but the question is whether it did not arise bona fide and that this letter was the bona fide and legitimate expression of the opinion of the person who wrote it. If so, I submit the subsequent remarks were not beyond the limits of free expression, even though the opinion was founded in error. The latter part of the letter is written in a sort of flourishing style and is to ine quite unintelligible and I am unable to put any construction upon it. In that part of the letter he says: "there is a marked difference between the dulcet though powerful tones of the British lion and the arriere pensee gamut of the Bengal tiger." What the meaning of these words is, or what construction is to be put upon them, I certainly cannot understand. The other inculpated letter is, I take it one published in the Englishman of the 28th April, in which a short extract is given from Sutherland"s Weekly Reporter, showing that Mr. Justice Dwarkanath Mitter appeared as Counsel for the Ranee in a case against Mr. Tayler Ranse Usmut Roowar v. Tayler 2 W.R. 307 and the last part of the letter stated what was erroneous as well as ungram-matical. The sentence is as follows: "By this you will perceive that Mr. Justice Dwarkanath Mitter, who held a brief for the Ranee in this case, afterwards sat as a Judge in a cause between the same parties." This is erroneous, because Mr. Justice Mitter did not sit as a Judge in a cause between the same parties. But of what consequence is it? Is it unprofessional or contrary to precedent that a gentleman of the Bar holding a brief should afterwards sit as Judge in a different suit between the same parties? It is only a rule of etiquette and nothing more that where an Advocate taking part in a suit, which afterwards comes before the Court when he is on the Bench, takes no part in the case. Certainly, the suggestion that he sat as Judge in a different suit between the same parties was no imputation on Mr. Justice Dwarkanath Mitter.

127. Macpherson, J.--The whole point of the letter is that Mr. Justice Mitter, having been Counsel for one of the parties, had been guilty of unfair and improper conduct in taking part in the case. That was the innuendo contained in the letter--or why was it published?]

128. Well, I don"t see why it was published.

129. Macpherson, J.--There is a misstatement in the letter, which any one may see.]

130. Yes, and it parries its contradiction on the face of it.

131. [Macpherson, J.--But the letter is nonetheless an offence for all that, when the manifest object with which it was written is considered.]

132. It is hard to see how the letter can amount to defamation. There had been a great deal of excitement about the matter and--

133. [Macpherson, J.--The letter itself is of no value one way or the other, except that it goes to show the object with which it was written, in imputing improper conduct to Mr. Justice Dwarkanath Mitter.]

134. There had been a good deal of excitement about this matter, and this letter came to Captain Fenwick''s hands, and he published it with a perfectly innocent intention. It is a very foolish letter, but nothing more. It does not implicate Mr. Justice Dwarkanath Mitter or any other person and is perfectly immaterial one way or the other. That there was and is a great deal of excitement about these cases, can hardly be doubted. These cases have excited a great deal of interest, and your Lordships need hardly have looked around the Court yesterday or to-day to see that this is the case. In spite of the heat of the weather the Court has been much crowded during the last two days, and this shows the enormous interest and excitement felt about this case as a sequel to the case of Mr. Tayler. The public of Calcutta, not only Europeans but natives, had become impressed with the value of the principles of English Jurisprudence, and an idea had been engendered that some of these principles were endangered by the aotion taken by the Court in Mr. Tayler''s case 44 Ind. Cas. 930 : 26 C.L.J. 345 : 19 Cri.L.J. 402. In times long gone by a very summary course was adopted towards the public in matters which affected the dignity of the Courts. In times long gone by, the person of the Crown was protected with equally stringent prerogatives, The same with regard to Ministers of State, and remarks upon persons holding high offices of State were prosecuted and dealt with almost as treason. He would remind the Court of a case in the reign of Edward IV, where a man''s deer was killed, and he wished that the horns of the deer were in the belly of the man who advised the King to do this. That was held to be high treason, Those days, however, have gone by, and the rights of free speech and free discussion have been gradually widened down to the present day. The greatest change is that in the free discussions on the doings of public men public men have now learned to view their safety, and men now see that it is good for the commonwealth and for the good of all that there should be free discussion, and that if it overstepped the proper bounds it should be punished by constitutional means. As I have shown, the discretionary power of exercising a summary jurisdiction in the case of libels upon the Court published out of Court, and after the termination of a case, has never for the last 100 years been exercised in England, it was a power to be exercised with the most guarded discretion--a discretion which has been so guarded in England, that in the whole history of English Law, not one case could be found in which English Judges had used this power, The only cases in which this power is shown to have been used are cases from the Colonies and the Isle of

Man. Under these circumstances it is not astonishing that it has caused great public excitement, and it is not astonishing that the Court should have been crowded as it was yesterday and to-day. I have now, my Lords, only to close by repeating what I said before, that I can hardly feel the administration of justice and the respect felt for this Court could receive a heavier blow than they have received by these proceedings of your Lordships, when it is remembered that these proceedings of your Lordships may give rise to an impression that your Lordships consider a Jury cannot be safely entrusted with the administration of the law.

135. Mr. Paul then rose to address the Court. He said: May it please your Lordships. The duty, of showing cause against the Rule made by your Lordships which devolves upon me, imposes on me a task at once painful, delicate, difficult and em-barassing.

136. Painful, because I shall have to offer remarks upon the conduct of the Chief Justice, who is entitled, by his well known services and immense talents, to a respect which is acknowledged and felt by all who know him.

137. Delicate, because in my duty to the Court and my client I must be careful not to overstep the bounds of propriety on the one hand and must yet push every argument to the utmost limits on the other.

138. Difficult, because I have to contend against what may be considered to some extent a foregone conclusion in the minds of your Lordships, based upon mature judgment and reflection.

139. Embarassing, because it is clear that whatever arguments I may take up, have already been considered and weighed beforehand by your Lordships, besides which no specific grounds are laid down against which I have to combat.

140. The learned Counsel then proceeded to show how greatly indebted the community was and should be to the Chief Justice for having swept aside, the cobwebs of confusion, and for having substituted clear grounds of law in laying down the Penal Code, which existed only in this country.

141. Whatever accusation might be made against Captain Fenwick surely everybody would acquit him of malice, or of deliberately bad intentions. Whatever faults he had committed were errors of judgment. Steady justice was to be considered as much the indication of public liberty as the freedom of the press. From the earliest records of civilisation, authority and liberty had always been in contest. In order that the two may act in conjunction and harmony a line of definement must be drawn, a very difficult problem indeed, if it was to be governed by the precedent of cases which occurred in England 40 or 50 years ago. Some Judges have held very singular opinions on the subject, and, therefore, in that necessary definement one should rather be guided by the principles than the conclusions of those cases. It would, therefore, be better to confine the argument to the question of the law, as to whether the Court had the right to try a case in which it

was itself interested. Nothing published after the termination of proceedings could be held practically as contempt. Mr. Justice Wil mot''s opinions are often commented on, but they are not sound, because they will not accommodate themselves to the present times. He, however, was not, according to Lord Campbell, a very bright genius, and his opinions must be regarded as speculative opinions.

142. Whenever cases have come up of libels after the termination of proceedings the Judges have always refrained from exercising their rights of punishing. Sir Samuel Romilly at one time held a strong opinion on the existence of this power, but found he had gone too far, and he afterwards retracted. This retraction is a matter worthy of consideration, considering the eminence of his position, his learning, and the benefit ha conferred on society (13, Adolphus and Ellis). No case in England had gone to the extent that a contempt after proceedings could be punished summarily [Crawford''s case (1849) 13 Q.B. 613 : 18 L.J.Q.B. 225 : 13 Jur. 955 : 116 E.R. 1397 : 78 R.R. 479]. In that case it was considered there was no question to go to the Jury, for the publisher had admitted publication, and in those days before Fox''s Bill, the question of construction was one for the Judge.

143. Here was a manner of proceeding in which the whole argument was one of law. Therefore, trial by a Jury was absurd, as the fact of the publication and authorship was admitted, if the construction to be placed on a libel was for the Court to decide. Tn the judgment of Mr. Justice Patterson, it was stated that a case might be conceived, which would have the effect of paralysing the proceedings of the Court. I can conceive such a ease, but I thought it must be more than mere defamatory matter. If a threat were made that your Lordships would be resisted in going to Court, that would be a proceeding which would be likely to have the effect of paralysing the action of the Court, as it would be actively impending the administration of justice. If the world did believe your Lordship''s judgment to be severe, and Captain Fenwick said so, it would have no, effect in paralysing the action of the Court, and the equanimity with which your Lordships sat there would not be disturbed in the least. In no case in England had the Judges gone the length contended for. It was said that the Court could not properly punish as contempt anything which would not interfere with the working of the Court, and I can imagine many cases in which the Court might well exercise this power. In the case of the King v. Faulkner (1835) 2 Montague and Ayrton 311it was held that a Commissioner of Bankruptcy had not the power to punish for contempt. I contend that the letter reflecting upon the sentence of his Lordship as severe was not an obstruction in any way. In the case of Reg. v. Almon (1765) Wilm. 243 : 97 B.R. 94 Lord Campbell''s Lives of the Chief Justices, Volume?, page 297, the judgment of the Chief Justice Wilmot begs the question which it proceeds to prove. It says the Court has power because it has the power, but shows no instance of its exercise.

144. It is for the Court to say if they are satisfied with this judgment. The Judge does not know where the power comes from. Thought is here lost in language. (Here Mr. Paul read the note of Lord Campbell, to the effect that it was inexpedient for a Judge to exercise this

power, and that the proper way to proceed was by criminal information,).

145. The matters here complained of are pot scandalising to the Court. To think so would be to give the words too wide an interpretation. That is a question for a Jury. Van Sandau''s case (1846) 1 Ph. 605 : 41 E.R. 763 does not come within that class. Where the Court sees a direct attempt to obstruct the proceedings, then they are justified, but in Captain Fenwick''s case, the supposed obstruction is from some reasoning or some argument; and then the Chief Justice says the Courts had better be shut up, it is the inference of intention.

146. Times have changed and the severity of the law is now much mitigated. With regard to this, whole pages of legal literature teemed with cases of great injustice done by Judges under colour of law. I need go no farther than to instance the judgment of Sir John Finch in the case of Hampden (1640) How. St. Tr. 825, in which everything was exhausted to show that in that case the right way of proceeding had been adopted, and to uphold in the strongest manner the divine rights of Kings. I understand your Lordship to say that if the misrepresentations had been confined to misstatements without anything being based on them, no notice would have been taken of them. I understand that your Lordship considers the letter of "Bystander" to be a contempt as reflecting upon your Lordship''s character and also that the advertisement calling for subscriptions was also a contempt of Court, as being intended as a demonstration against the Court. I have already submitted, on the authority of a number of cases, that in cases of libel of this sort on a Judge, after proceedings had ended, the Court had no greater powers than an ordinary individual. There were other ways than the present course of proceedings by which the honour of the Court might be protected, and the menial capacity of a Judge ought to be of such a nature as to prevent him from placing himself in the position of Prosecutor and Judge in the same case. With regard to the animadversions in the letter of "Bystander", no doubt the word "ruse" is one calculated to annoy your Lordship, but I hope to be able to show to the Court, although the word was not one which I can approve of, that it was really intended to express an impression which had gone abroad that your Lordship had given Mr. Tayler to understand that his apology would be accepted, and had thus punished him severely without even mentioning the apology.

147. With regard to what was said to be the grossest libel--the opening of the subscription as demonstration against the Court--Mr. Paul mentioned that in olden times, the Judges had very ourious ideas upon the liberty of the subject and the firmness of the British constitution. If almost anything was done, it was given out that the constitution was in danger. Even in later times a great deal of en-enlightenment clung to Judges of high standing. In Lord Ellenborough''s speech on Sir Samuel Romilly''s Bill, reported in the 233rd page of the 3rd Volume of Campbell''s Lives of the Chief Justices, he strongly recommended that the punishment of death for felony to the amount of five shillings should not be abolished and so late as 1830, Lord Tenterden strongly opposed the abolishment of capital punishment for the offence of forgery. Mr. Paul then proceeded to read Sir A. Cock-burns''s remarks in the case of Wason v. Waller (1868) 4 Q. B, 73 : 8 B.

and Section 671 : XXXVIII L.J.J. B 34 : 19 L.T. 109 : 17 W.B. 169 already cited by Mr. Kennedy.

148. In modern days Judges do not go on the acts of their predecessors, they do not deliver judgments in such and such a manner, because others have been of a similar character (here Mr. Paul cited several cases of overruling). The law as it is written is adamantine and immovable, but the unwritten law is so elastic that it adapts itself to the present time and judgment can, therefore, be guided by proper discretion. If a dissent of opinion be contempt, then it is impossible to know what is nob contempt, and one is at a loss to discover what and where the bounds of contempt exist. The Earl of Macclesfield was fined ï¿½3,000 and because the King dissented from the opinion of the House of Lords, he ordered the fine to be paid from the Privy Purse. Suppose a case of a man who had been fined, and that fine were to be paid off by any one in Court, is this a case of contempt? There is the case of the Corporation of Yarmouth, in Dunsford and Eaat, on which the present case is judged. But surely that is carrying the law too far. When a man expresses his opinion that a verdict is wrong, or declares it to be so, it does not follow that he says it is infamously so or that he even thinks so. In the present case there has been no obstruction of justice, and he was at a loss to conceive how it could be construed into a contempt of Court except by a process of harsh reasoning. There are wrong verdicts every day. In times past perhaps Juries were more subservient to the Judges, and perhaps that was the reason there are so few cases on record of reversal of sentences, but that does not say that they were not unjust. Provided that they are deserved, animadversions on wrong judgments or on any public acts of any public men were of benefit to themselves and useful to the general community. If there were no liberty of the Press, then a Justice could say whatever he liked or pleased.

149. Even if their Lordships considered that Captain Fenwick cught to be punished, even then they would surely acquit him of any endeavour to sap the administration of justice. But it was submitted that the present case was one for a Jury who were uninterested.

150. (Court adjourned.) Upon the" re-assembling of the Court after a short adjournment for tiffin, Mr. Paul resumed his argument. He said that in the judgment of Mr. Justice Buller, that learned Judge seemed disposed to consider that all animadversions on the proceedings of Courts should ba prevented, He (Mr. Paul) submitted that an opinion pronunced adverse to the judgment of a Judge and Jury us perfectly justifiable if not of a calumnious nature.

151. [Macpherson, J.--Surely that is not disputed.]

152. Mr. Paul said that was the decision of Mr. Justice Bailer in the case he had referred to. He (Mr. Paul) would only say that he was one of those who, when occasion required, expressed himself strongly in cases where he felt strongly. There had been cases of Judges of the High Court expressing themselves in strong language. Mr. Paul submitted that if an article was written and published bona fide, the reasons ought not to be tested

by the sevrest logic, for if so, the Government of the world would rest in the hands of two or three parsons. If that were so his Lordship the Chief Justice''s decisions could be never assailed, if the reasons of anything which was alleged against them were to be put to the severe test of logic. Mr. Paul then quoted the case of Hurra Chunder Roy Chowdry v. Shooro-dhonee Debia 9 W.R. 408 : B, L.R. Sup. 985 where the present Chief Justice had made use of strong language in expressing his opinion, and had said that to come to the conclusion come to by the majority of the Judges in that case would bring discredit upon the law and upon the administration of justice. Mr. Paul continued and contended that in cases of this kind it was nesessary that not only the words but their intent should be calumnious before it could be made an offence. Mr. Paul maintained that these articles did not come wthin the meaning of the word contempt, as the judgment of the Court in the case referred to was gone and final. He would now proceed to interpret the law with regard to the liberties of the press. It was a noble example that Lord Brougham showed when in trying a question relating to the privilege of members of the House of Commons, he did not hesitate to cast aside certain decided cases, when it behoved him to do so. He (Mr. Paul) asked their Lordships to do the same. Mr. Paul also read some passages from Mill on Liberty defining the right of criticism of public men.

153. He then summed up this portion of his argument by submitting that he was right in stating that with the exception of two Colonial cases, one of which was Crawford''s case (1849) 13 Q.B. 613 : 18 L.J.Q.B. 225 : 13 Jur. 955 : 116 E.R. 1397 : 78 R.R. 479, in which the details led him to believe that although the Court was not sitting, yet the proceedings were still pending, for in that case Mr. Justice Earle said that it was quite possible to ooneeive cases of contempt calculated to paralyse justice and, therefore, the Court would vindicate its administration, and that it was for the Court in eaoh case to decide whether it amounted to that. If the suit had been terminated these observations would not have been applicable.

154. Sir Samuel Hornilly, a great man and one who had done very much for the good of the country, and who was a great authority, gives an account of certain prooeedings before Lord Erskine. They are stated in 6 Lord Campbell''s Lives of the Chancellors, page 565. He states the facts and arguments in a case in which he had endeavoured to persuade Lord Erskine to exercise this jurisdiction, but Lord Erakine had declined to commit. Sir Samuel Romilly made some very harsh comments on Lord Erskine''s conduct but eventually he had himself retracted his arguments, and said he believed that a contempt of this kind ought to be prosecuted as a libel. And in McDermott''s case (1866) 1 P.C. 260 : 4 Moor. P.C. 110 : 17 W.R. 352 : 16 E.R. 258, the facts were open when leave to appeal was applied for. Lord Westbury saw the necessity and gave the leave to appeal, thus marking his disapprobation of the committal, and although subsequently that was rescinded, that proved nothing, because it was merely refused as there was no jurisdiction to entertain an appeal in the case.

155. In the case of Wallace, In re (1866) I.P. 283 : 4 Moore P.C. 140 : 36 L.J.P.C. 9 : 15 W.R. 533 : 16 E.R. 269, gross charges were made against the Chief Justice by letters

sent to him, and before the proceedings were terminated, and that of course came within the class of direct contempts, because the letters containing the insults were sent direct to the Chief Justice.

156. Therefore, the case was narrowed down to the case in Wilmot and a case which occurred in the Isle of Man, which shows that the power was doubtful and did not prove satisatisfactorily that a man could be punished for remarks made after the conclusion of the proceedings. The question seemed to be an open question, which, if properly considered, would show that no such power really did exist. The next subject was the mode of proceeding to be adopted, supposing this to be a case in which the Court still retains of the opinion that they have a right to punish. In order to show cases where that power clearly existed, Stockdale v. Hansard (1839) 9 Ad. Ell. 1 : 2 Starkic 204 : 2 P. and D. 1 : 3 St. Tr. 723 : 8 L.J.Q.B. 294 : 3 Jur. 905 : 112 E.R. 1112 : 48 R.R. 326 shows the general opinion that such cases ought to go before an impartial Jury. Then as regards Birch v. Walsh (1846) 10 Ir. Eq. 93 no grosser case could be conceived than this, and yet tha, Court thought that the safety of its honour was not impeached, and that the futile attempts would but recoil on the authors. Letters Patent, 1865, Section 3C, is already before the Court, and here if the offence does not come under the second exception, then it is plainly defamatory and consequently triable under the Penal Code la Long Wellesley''s case (1831) 2 Russ. and M. 639 : 39 E.R. 538 : 34 R.B. 159 Lord Brougham considers that the proceedings for contempt are criminal proceedings.

157. Here in the present case was no specific charge.

158. [The Chief Justice.--The charge is for publishing those letters and notices which are in themselves contempts of Court.]

159. Yes, but there is no specific charge.

160. [The Chief Justice.--Then how would it be in the case of an indictment which would only say: "That on a certain day he did publish and set forth certain articles?"]

161. Then, my Lord, there would be an innuendo.

162. [The Chief Justice.--If you are ignorant as to what I complain of I will tell you.]

163. In the case of indictment there would be a Prosecuting Counsel.

164. [The Chief Justice.--But if there were none?]

165. Then the defendant should be told.

166. [The Chief Justice.--The substance of the letters and the advertisement was to get up a demonstration to teach the Chief Justice a lesson, and the article stated that the Chief Justice would raise a storm which he would not find it easy to quell. Those were the

letters which formed the contempt. Do you wish an adjournment, Mr. Paul, to consider the charges as now explained?]

167. No, my Lord, but I submit that my client is prejudiced in not knowing the precise charge brought against him, and which he is expected to meet.

168. Mr. Paul went on to state that the course adopted by the Court had prejudiced his client, and was a course which ought not to be resorted to except where it was imperatively necessary. There was a deanite punish, merit provided for defamation in the Penal Code, and a definite way of trial provided for such cases. It was never intended that offences of this description should be dealt with in a summary manner. Mr. Paul then referred to the jurisdiction of the Sudder Court in cases of contempt, the punishment for which could not exceed a fine of Rs. 200, or a month''s imprisonment where the fine was not paid. In America, it was stated in Kent''s Commeiitiries, Vol. I, page 321, that the Courts could only summarily punish in those cases where the contempt was committed in the face of the Court, or was such as to obstruct the course of justice. This Court was precluded from punishing except by the Penal Code, and the Penal Code can only punish such offences as come under the sections in that Code, The question was whether what was printed as bona fide criticism might be a better kind of opinion but not necessarily more bona fide than the mere expression of opinion. The well-known case of a Judge in the Colonies who was told to give his opinions but not his reasons for those opinions is a matter of history.

169. On the 13th April a warrant was issued, and Mr. Tayler appeared in answer and admitted the authorship of those letters. In commenting on Mr. Tayler''s case 44 Ind. Cas. 930 : 26 C.L.J. 345 : 19 Cri.L.J. 402 his audacity and his carelessness were certainly indefensible. The Chief Justice, therefore, brought a strong artillery of argument to bear against him. On the other hand Mr. Tayler bad some reasons for complaining, although not sufficient to justify him, but still he felt mortified against Mr. Justice Milter. Yet this did not warrant his careless way and the style in which those letters were written. Mr. Justice Mitter might have retracted what he had said as to Mr. Tayler being directly guilty of fraud, a statement which there was not a tittle of eviderce to prove so far as it meant personal fraud. Therefore, Mr. Tayler had a grievance which might have been some extenuation of his conduct and have mitigated his offence and on those grounds his sentence might have been less severe, yet not one observation, not one remark, appeared in the long and carefully considered judgment pronounced upon him, to show that there was a single point in his favour. It did not say that he was galled or that he submitted at once--which he did without complaining of his arrest. His submission and his apology might have baen sufficient and could have been accapted. In the outside world his wrong was supposed to be true. Yet the Chief Justice went to work with all the zeal and labour for which his judgments are conspicuous to turn evary point against Mr. Tayler. It would be no compliment were one to say that the Chief Justice had been careful in preparing his judgment. Yet that judgment shows in no way that Mr. Tayler was suffering under irritation which might have given him some cause for his conduct. Mr. Paul then proceeded to refer

to the 3rd occasion when Mr. Tayler was brought up, when he presented a petition and made a further apology.

170. [Macpherson, J.--The fact of his making an apology did not entitle him to his discharge as a matter of right.

171. Mr. Paul said that it was a matter of expectation that if he did apologise he would not be subjected to any farther punishment. In the case in which Mr. Piffard and Captain Francis were tried for contempt of Court, the Court wai satisfied with an apology expressing sorrow for what had occurred in lien of all punishment.

172. [Macpherson, J.--All I meant is that a man cannot claim immunity from punishment from the fact of having made an apology for his offences.]

173. The Chief Justice.--Suppose a man were to knock another person down in the street, and on being arrested, make an apology. Would he be entitled to consider that sufficient amends?]

174. Mr. Paul said that in Van Sandau"s case (1846) 1 Ph. 605 : 4,1 E.R. 763, which was a very gross one, a simple apology was held to be sufficient and quoted Sir George Rowe"s remarks in that case, wherein he said he would be unwilling to inflict punishment if he could find a single expression of regret. Mr. Paul said that he considered Mr. Tayler"s first apology to have been a sufficient one, and that when he expressed his sorrow, that implied all retractations and he did not think it was neceseary for him to retract everything, and say in so many words that what he had said was false That apology appeared to him (Mr. Paul) to have been a sufficient and ample one and this formed one of the grounds for the writing of the letter of Bystander", Which had been referred to. When it was pointed out to Mr. Tayler that his apology contained no retractation, he made the only retractation he oould. Under the circumstances, nothing had been said to Mr. Tayler but that his letters were a contempt, and his apology was therefore a general one. He was not told of any particular contempt in any of the letters and when he begged to be allowed to retract everything which the Court considered to be a contempt, he (Mr. Paul) considered that to be quite sufficient. Another fact was that his. Lordship in his judgment on Mr. Tayler did not mention one word of his published apology, but after passing his sentence he said something about it. It might very naturally have happened that in a long and elaborate judgment like that, his Lordship might have forgotten to mention it, but outside people bad criticised the omission: and it had been mentioned that although the published apology was one which emanated from the suggestion of the Chief Justice, yet that his Lordship had not once mentioned it in his judgment nor taken it into consideration in mitigation of punishment.

175. [The Chief Justice said that after the delivery of his judgment he told Mr. Tayler that if he made certain additions to his apology which had been already published, his punishment would be mitigated.]

176. Mr. Paul said that the apology which Mr. Tayler had been required to make was a most abject one, and he was surprised that that gentleman did not Consider his reputation to be worth more than a month''s imprisonment.

177. [The Chief Justice.--I do not consider the apology was an abject one.]

178. Mr. Paul said that it appeared to him the apology was a most abject one, as Mr. Tayler stated that what he said was unwarranted and wholly without fundation, He (Mr. Paul) would have suffered six months'' imprisonment, no matter how much in the wrong he might have been, rather than make such an apology as that. However much sympathy Mr. Tayler might have had at first, he bad since altogether lost it by such conduct. He did not blame his Lordship for demanding the apology, as it seemed to bave been fixed in his mind that such an apology was necessary. Mr. Paul mentioned the fact that Mr. Tayler''s final apology was not to be received till a week after the judgment had been pronounced, so that it was seen that his Lordship had fully made up his mind, no matter what apology was given, to sentence Mr. Tayler to a fine of Rs. 500 and a week''s imprisonment. He only referred to this in order to show a reason for the misunderstanding which had arisen. As regards the law of the case of Wellesley v. Duke of Beaufort 1831 2 Russ. and M. 639 : 39 E.R. 538 : 34 R.B. 159 that was a case in which upon only an apology being made the order was discharged, which shows that an apology is sufficient sometimes. And further, the Chief Justice expressed no opinion that the affidavit, or rather the apology to the affidavit, was an aggravation of the offence, until he delivered his judgment, yet that affidavit was before him.

179. [The Chief Justice.--I was not advising Mr. Tayler.]

180. No, my Lord, but you gave the impression that if the affidavit was rectified and the apology published, Mr. Tayler would be discharged.

181. He then continued.--There was nothing in the character of the Chief Justice to induce the editor to caluminate and attack him. In fact he only said that in case he carried his dictum too far he would raise a storm. There is surely no contempt in that. The only dictum was that the printer and publisher would be proceeded against; naturally the editor took offence at this. This did not refer to anything the Pioneer had said. The Pioneer contained no dictum. It was the Friend of India that contained the dictum which the editor thought was going too far. Since the Court has signified its disapprobation, the newspaper has been silent on the subject and in no way endeavoured to prer judice proceedings.

182. [Macpherson, J.--The article of the 26th April states or at least imputes that the Chief Justice acted wrongfully and attacked and turned everything against Mr. Tayler that he possibly could, and then protests against the cruelty (not the severity) of the sentence. There is a vast difference between cruelty and severity. The poetry must be taken as part of the article.]

183. Mr. Paul said that this was merely an expression of what the public opinion was. Surely an editor is not responsible for an opinion that prevails or for expressing it; The Friend of India had done the same thing. He himself thought that Mr. Tayler would have been discharged. In fact from what the Chief Justice had said on Tuesday, he (Mr. Paul) did not attend on Saturday although he was watching the case for Mr. Tayler--for in fact he thought that nothing further would be done. Many people thought that the public apology was not fairly treated and, therefore, they thought the sentence a cruel one. Exception should not be taken at that one word "cruel" here, which merely meant harsh, and nothing more. The editor had never had a wish to impute malice to the Chief Justice, or he would not have paid the tribute he did to the Chief Jastice"s talents, etc., which he did in the lines directly precading the word cruel." Surely the Chief Justice was a little too sensitive. There was not one misstatement, not one hostile criticism even, and oonld that article be called mala fide? It was difficult to convince a Judge who himself had to put what oonstruotion he pleased on the sentences he found offensive and to judge, of their meaning himself. Did the Chief Justice think that a Judge who thought he had done right should not be told he had delivered a cruel judgment (meaning a harsh judgment) if that judgment had been unnecessarily severe? After all the Chief Justice did go unnecessarily into the past life of Mr. Tayler and the hearers upon that thought the judgment cruel.

184. The Chief Justice.--The object of that jndgment was to justify the Court and not to attack Mr. Tayler.]

185. Mr. Paul here mentioned the very strong remarks which had been made on Mr. Justice Shee and the Jury who had tried Toomer when almost every newspaper in England denounced both the verdict and the sentence. He continued: Mr. Tayler had a grievance and in consequence of that he did very unwisely insult Mr. Justice Mitter. The Chief Justice"s high and exalted position prevents him from seeing disappointed suitors, and from witnessing what such men feel. Mr. Tayler knew that he was not in the country when the fraud was committ, edso that at the most he could only be accounted guilty of a constructive fraud, not of any moral fraud. Had Mr. Justice Mitter said that the fraud was perpetrated by Mr. Tayler"s agent all would have been well, but he did not do so.

186. Mr. Paul then proceeded to comment upon the judgment, showing that Mr. Tayler really had been aggrieved. The Chief Justice in his judgment in the case of Zuhooroonissa against Mr. Tayler said that it was unnecessary to consider the question whether there had been any fraud or concealment. To this jndgment the Hon"ble Mr. Justice Mitter said, "I entirely concur," and when the Chief Justice said that it was unnecessary to enter into the question, Mr. Justice Mitter held that it was not necessary to decide, for that was part of the Chief Justice"s judgment, and then he went on and found that Mr. Tayler had been guilty of both fraud and concealment. There was no evidence before the Court in that case to justify Mr. Justice Mitter in saying that Mr. Tayler had committed fraud. All that could by any means have been said upon the evidence was that a fraud had been constructively committed on behalf of Mr. Tayler, but not by him, because all the transactions with Ahmedoollah were conducted by Enaynt Hossein, who

was acting as agent for both parties.

187. The Court then adjourned to the following day.

188. Mr. Paul in resuming his argument the next morning said that when the Court rose the day before he was still on the subject of the article of the 26th April, with reference to that part of it which stated that every possible point had been turned against the accused. He (Mr. Paul) had also endeavoured to show that Mr. Tayler had good grounds for complaint against the decision of Mr. Justice Dwarkanath Mitter, and concluded by showing that although the Chief Justice had declared it to be unnecessary to decide whether there had been any fraud or concealment on the part of Mr. Tayler, Mr. Justice Dwarkanath. Mitter, after declaring his concurrence in the jndgment of the Chief Justice, went further, and expressed what he (Mr. Paul] could not help thinking was a dissent from the judgment of the Chief Justice, that it was unnecessary to decide that fraud had been committed. Mr. Justice Mitter''s judgment was as follows: "I entirely concur. 1 feel no hesitation in holding that the plaintiff is entitled to recover both upon the ground that she has paid a debt due from Mr. Tayler to Ranee Usmedh Koer when she was under no obligation to pay it, as also upon the ground that a fraud has been perpetrated against her by Mr. Tayler in concealing from her the fact that the estate sold by him to her was under attach-ment in execution of a decree of Court. I should have been extremely sorry if the state of the law were otherwise" As to the duty of the Judges, he (Mr. Paul) must refer to the Bench as it must know better what its duties were than any of the outside world, but it struck him that it behoved Judges to be particularly care-f ul in the expressions used in their judgments, that the ordinary meaning was to be given to the words used. If a Junior Judge thought that the jndgment of his senior required to be made stronger by further remarks, it was his duty to make them and to give his reason for doing so. But in this case no reason was given as to why, when the Chief Justice had declared it was unnecessary to go into the question of whether there had been fraud or not, the Junior Judge should have considered it to be his imperative duty to come to a finding directly opposite, without assigning any reason. He (Mr. Paul) would assume, as indeed the judgment showed, that the bargain for the sale of the estate was altogether carried on between Enaynt Hossein and Ahmedoollah and that Bnaynt Hossein acted in the matter as the agent of both parties. Enayut Hossein stated that Ahmedoollah knew of the attachment, and that he had told him of it. Mr. Tayler was at a distance at the time and took no part in the proceedings, and how therefore was he to know that Enaynt Hossein, who was acting as agent for both parties, had kept concealed a fact, which was in his knowledge, from his other principal? Justice Dwarkanath Mitter did not say in his jndgment that the agent of Mr. Tayler had committed fraud, and that Mr. Tayler was constructively responsible for the acts of his agent, but he said that Mr. Tayler had committed a fraud himself, and he (Mr. Paul) contended that that conclusion was arrived at without there being a tittle of evidence to support it. Mr. Tayler never took any part in the contract with Ahmedoollah from beginning to end, but left it all to his agent, and an amount of moral obloquy had been thrown upon him which there was not a tittle of evidence to support. The Chief

Justice in his judgment had expressed his disbelief in the evidence of Enayut Hossein and his belief in that of Ahmedoollah, not from the fact that the evidence of one was preferable to the other by reason of character, but from a chain of circumstances. His Lordship had shown in his judgment that if Enayut Hossein was to be believed, there would have been something done which had not been done. He would ask his Lordship to bear in mind these facts. The judgment on the original case was tantamount--perhaps not to a direct charge of perjury against Enayut Hossein, but sufficiently so for Mr. Tayler to hold and express the opinion that the Court had considered he had been guilty of perjury. He would now refer to Mr. Taylor''s petition for a review of judgment. In that petition Mr. Tayler said as follows: "All your petitioner now desires to do is to inform the Court that the statement put in and the evidence given by Enayut Hossein and his creatu es are totally false". This was a statement of fact and was nothing more than what the Court had already decided in its judgment. Mr. Tayler''s petition went on--and was made and given without the approval, concurrence or knowledge of your petitioner, and in direct opposition to the instructions given by your petitioner to Enayut Hossein before his departure from India". Mr. Tayler said that the fabric of the defence set np by Enayut H ossein was directly contrary to the instructions he gave him before leaving for India. Mr. Tayler never disputed nor wished to dispute his liability for the money and when the action was brought against him, the defence set np by his agent was directly contrary to the written instructions which he had left behind him. Mr. Tayler, as far as he was aggrieved, was satisfied by the statement that the Chief Justice had not made any imputation of moral fraud against him, and he accordingly bowed to the judgment. The Court allowed the proceedings for review of judgment to go on and Mr. Tayler fully believed that some justice would be done him in that way. He had put in a petition which he had verified by affidavit, praying that the words used in the judgment of the Hon''ble Mr. Justice Dwarkanath Mitter might be ip some way retracted or modified. This might have been done without detracting from the gravity of the judgment in any way. The course of justice did not require that the words should be repeated and though the Court was right when it said that it could not go on to a review of judgment in a case where the party applying to the Court did not express himself aggrieved at the decree, the Court might have done something for the reputation of Mr. Tayler by retracting or modifying the remarks which had been made against him. That might be done by stating that the fraud imputed to Mr. Tayler was fraud committed by Mr. Tayler''s agent in his absence. In the judgment of Messrs. Norman and Loch, in the Ticaree case, words which were used in the judgment were afterwards modified, and the same might very well have been done in this case. Mr. Tayler could not be considered to be an active party to the perpetration of the fraud as he was absent in England at the time, and when the negotiations were going on with Ahmedoollah, Mr. Tayler was only constructively negotiating with him through his agent Enaynt Hossein and not actively. Mr. Paul then submitted that in order to correct what was found to be an error in a judgment it was not necessary that there should be a reivew of judgment, and the Court, in the case of an error in a judgment which was admitted in itself to be a correct judgment, had power to rectify the error, by retracting or Modifying, the expression to which exception had been taken. If a date in judgment was

found to be wrong or the names of parties were declared wrongly or a genealogical tree was not properly placed in the judgment, it would not be necessary to apply for a review of judgment in order to correct them. His Lordship the Chief Justice in refusing the application for a review of judgment said: "it appears to me that there is no ground for reviewing the judgment. I have read very carefully the judgment which I delivered in this case, and see nothing in it which I can retract. I did retiiiark upon the judgment of the Subordinate Judge, but abstained from expressing any opinion as to whether there was any fraudulent concealment on the part of Mr. Tayler". In the''eourae of Mr. Justice Mitter''s judgment on the same application, he said: I wish to add, however, that I should not be justified in withdrawing the remarks in question upon an ex parte proceeding of this kind. Enaynt Hossein is not before the Court, and so far as the the plaintiff is concerned she is in no way interested in opposing this application, inasmuch as the petitioner is not seeking for any interference with the decree which had been passed in her favour. "If this were to be the case, it would be impossible for a person to obtain redress for injuries of this kind, if the other person were out of the jurisdiction of the Court or transported beyond the seas. Why was Mr. Justice Mitter so careful of the reputation of Enayut Hossein? If these proceedings were ex parte there were no grounds to affect Enayut Hossein''s character; why should he reject the petition? Why should the Court express no opinion on evidence before it? Nobody asked Mr. Justice Mitter to hold Enaynt Hossein guilty of the serious offence. How could a prosecution have benefited Tayler when the Chief Justice had already stigmatised Enayut Hossain as guilty of a falsehood, and when Enayut Hossein was at that very time undergoing a sentence of imprisonment for frauds perpetrated against Mr. Tayler? Why should he be put to these great expenses P Surely it would have been sufficient for Mr. Justice Mitter to have said that during Mr. Tayler''s absence this fraud was commited by his agent. It does not matter whether Mr. Justice Mitter believed Kelly or not; it is sufficient that Kelly took the responsibility himself; he admitted that Mr. Tayler had had no hand in the frand; this was evidence prima facie. Many European gentlemen had to rely on their agents for native contracts. It was very good advice of Mr. Justice Mitter''s that Mr. Kelly should have known what was in the statement, but that advice was impracticable. Mr. Tayler was deeply aggrieved. The reasons of Mr. Justice Mitter were not satisfactory; if it was intended to charge Mr. Tayler with personal fraud, there was not a tittleof evidence to support the accusation. Had he put his grievance in a short, clear, logical way he might have cleared his character; but he went into the hyperboles censured by the Chief Justice. Mr. Tayler was more sensitive on account of the Chief Justice''s observations. The Chief Justice had delivered the judgment from an attacking point of view. He felt that a colleague had been attacked. Here is a proof of the evil of the prosecutor being the Judge. The Chief Justice considered Mr. Tayler''s insolence and the insult offered to Mr. Justice Mitter, but he forgot Mr. Tayler''s grievance. Mr. Tayler, being a man of some historic reputation, perhaps an unfortunate man, but a man of some accomplishments, though from the time he took to being Vakil, he acred very unfortunately, felt deeply the attack on his character, having descended from his high position; there was, therefore, some extenuation for his offence, not perhaps sufficient to stop the Chief Justice''s judgment, but sufficient to

mitigate the blame and lessen his degradation.

189. Mr. Paul then turned to the subject of the opinion which had been formed as to the severity of his Lordship''s sentence, and went on to say that he submitted, with all due respect for Mr. Justice Mitter, and to the Court, that in his view the reasons which had been given for the view which had been expressed of Mr. Tayler''s conduct by Mr Justice Mitter were not correct, and that gentleman had every right and reason to complain of having been adjudged guilty of fraud without any evidence to support that view, and he also had a right to complain that when he presented his petition for a review of judgment, the Judge refused to retract or modify one single word which he had used. All these circumstances might be urged in extenuation of the conduct of Mr. Tayler. Mr. Tayler had committed a very foolish act, doubtless, in appealing to the papers, but the Court must look to the provocation he had received. There was no doubt that Mr. Tayler had a grievance, and if he had proceeded to vindicate his character in a proper way, it was not impossible to say that public sympathy might not have gone with him.

190. With regard to the second point of the same subject, the allegation that the Chief Justice had turned every point that could be turned against Mr. Tayler with great severity and bitterness, Mr. Paul proceeded to justify these remarks. With regard to the judgment itself if the Chief Justice thinks that the two cases of the Ranee of Tekaree and of Zuhooroonissa had such connection as to make it proper to introduce the point into his judgment respecting the maid, there is some reason, for Curiosity'' in his letter deeming them to be connected cases.

191. As to the observation made by your Lordship on the statement in the 1st letter and the petition of review and Mr. Tayler''s oral explanation, I cannot help thinking your Lordship has misapprehended Mr. Tayler''s meaning. I believe Mr. Tayler meant to say that if Mr. Justice Mitter had based his judgment on the bypotheti-cal case of fraud he would have had nothing to say, and not that if the Chief Justice had agreed with Mr. Justice Mitter then he would have had no ground of complaint. The plea as to whether there was a fraud is one thing, that Mr. Tayler was the author of it, is quite another. Mr. Tayler did not attack at all the judgment of Judges Norman and Loch. I think the attribution of degraded cowardice conveyed by your Lordship was not founded on the facts of the case. Tayler had no ground of complaint against your Lordship, and that was the reason he did not attack you it was not because your position rendered you unassailable.

192. [Macpherson, J.--Why are you arguing on Mr. Tayler''s case? Is it with the view of showing that the article in the Englishman of the 26th April is correct in facts.]

193. Yes, my Lord.

194. [Macpherson J.--That the judgment of the Chief Justice was a vindictive judgment.]

195. No, not with that view, but that it was an unnecessarily severe judgment.

196. [Macpherson, J.--The imputation in the article is that the sentence was a vindictive one. The wording of the paragraph is not that the sentence was severe, but that it was cruel.]

197. [The Chief Justice said that the word "cruel" imputed a wish to cause pain.]

198. That, I submit, is not the meaning which the word is intended to convey.

199. [The Chief Justice.--If the remark was merely, that the judgment was a severe one, it would be no contempt. That would only be fair criticism.]

200. Mr. Paul said that he was placed in a very peculiar position. There was not the slighest intention to cast an imputation on his Lordship, but the whole case had turned on a misunderstanding which had unfortunately arisen. Where the word cruel was used, it only meant to express harshness and severity and nothing more.

201. [The Chief Justice.--The article says that I knew of Mr. Tayler''s bad state of health. That I did not know; all that I did know was that he was suffering from gout, and as I had shortly before that seen him in society and knew that he was able to make a journey to Pa.tna, I did not know he was suffering from anything else than a simple attack of gout. I knew nothing of what was stated in the medical certificate until after the judgment had been delivered.]

202. Your Lordship comes to the conclusion that this article is intended to charge you with cruelty.

203. [The Chief Justice.--If the word only means severe 1 do not complain.].

204. Mr. Paul said that the word "cruel" in the articles must be taken in connection with the words which followed it. In one part of the article the sentence is called a cruel one, in the next paragraph the words "the harshness of the sentence" occur, and a little lower down there ar.e the words "cruel severity". Captain Fen-wick never intended that the word "cruel" should be used in the bad sense which had been imputed to the words and he said so now publicly through him (Mr. Paul). He hoped the Court would not construe the word ''cruel'' in that bad sense.

205. Macpherson, J.--That is the ordinary meaning of the word.]

206. [The Chief Justice.--The meaning of the word cruel is a pleasure to inflict pain.]

207. How could it be imputed that your Lordship would take pleasure in inflicting punishment.?

208. [Macpherson, J.--The question is whether that was not imputed.]

209. I submit it was not, All that it was meant to express was that tha sentence was a severe one--a very severe one.

210. [Macpheeson, J.--There could be no objection to having it said that the sentence passed was a very severe one.

211. [The Chief Justice.--If it is tsaid that the word was not intended to be used in any bad sense, I am willing to accept that statement.]

212. I now state on behalf of Captain Fenweik that the word was not intended to be so construed.

213. [The Chief Justice.--I am ready to hear the rest of your argument, and will accept Captain Fenwiek"s statement. If the charge had been only that my sentence was a severe one, none of these proceedings would have been taken.]

214. Your Lordship"s mind was so imbued with indignation that the other matters did not strike you. If it were not the intention of Captain Fenwick to say that you were guilty of deliberate cruelty, you will be satisfied then? I think I can prove that the use of the word all through the articles would be inconsistent with such an intention. He does not call you cruel, which might have the sense imputed, but calls the sentence cruel when the word could only mean, at the most, extremely harsh and severe.

215. To go on with Mr. Tayler"s case. No charge was made, merely an inference. I don"t think the charge is fair that he attempted to put aside former judgments, because it does not arise out of the case, and that after Messrs. Norman and Loch had acquitted him; but to add a sting you urge that the affidavit was irregularly taken. Surely that did not fairly arise. That was very severe and should not have been adverted to. I hope I do not give offence, but I must express my opinion.

216. [The Chief Justice.--I do not look upon anything you say as an offence. I give you full liberty and I hope you will not restrict yourself from the fear of offending.]

217. Mr. Paul then resumed and again ran over the arguments as to the Chief Justice"s judgment having been very severe. In that judgment Mr. Tayler was identified with all the acts of Enayut Hossein: he was actively guilty of fraud and taunted with having tried a new way to pay old debts, though he was absent from the country at the time and denied all knowledge of the matter. He said that no one had ever yet come into Court without one scrap of any thing, without one scintilla of extenuation in his favour. Yet none appeared in the judgment, and on those grounds it was very severe. The Chief Justice had no right to go back into Mr. Tayler"s previous history which was not in this case. That was another reason why it was severe. The Chief Justice knew Mr. Tayler was suffering from gout, which at his advanced age was very virulent, and that again made the judgment most severe or cruel in its least offensive sense. That word must be taken with the subsequent context, which shows what the animus was, "We do not defend what Mr. Tayler wrote, but

we do protest," etc. If the editor did not defend Mr. Tayler he could not mean that the judgment was cruel in its worst sense.

218. [The Chief Justice.--If he meant that the object of the Judge was to give pain and not to administer justice, then I understand the word cruel.]

219. No, my Lord, Captain Fenwick imputed no facts to show there were private feelings.

220. [The Chief Justice.--What does "Now you rave or must intend revenge" mean?]

221. [Macpherson, J.--This would appear to be vindictive.]

222. In as much as the article professes to be bona fide the word "cruel" cannot bear that character.

223. [The Chief Justice.--Then why was the quotation altered in one instance to suit Mr. Tayler''s case and not in the word "revenge."]

224. You see, my Lords, were this case before a Jury then we could see how ordinary minds would construe the word. As to me I do not know what it meant? I would ask how many men would have known what it meant. I will, however, submit that no facts are mentioned from which malice could be imputed. When flattering enlogiums precede, why should such imputations of malice be made?. They are wholly inconsistent with such an imputation.

225. Mr. Paul then read the following paragraph from the Chief Justice''s judgment: "I am an unflinching advocate of the liberty of the press. I believe that its freedom is one of the main bulwarks of the rights of the people. I claim no exemption as regards my public acts from the most rigid scrutiny and the most unsparing criticism. All I claim is that there shall be no misrepresentation and no wilful or unfair concealment of facts; and that those who deny infallibility, to the Judges shall not claim infallibility for themselves. I have had no cause to complain of the public press since I have been in this country. Speaking generally, I believe it to be fair, independent and impartial. There has not, I believe, been a single criminal prosecution against a news-papr since I have had the honour to hold the office of Chief Justice, and there have been only one or two private actions for libel. The press in this country ddresses itself for the most part to readers of education and intelligence, men who judge and form opinions for themselves. The press is fair, it is not scurrilous; the public are not captions; and public men do not object to have their public acts freely discussed and fairly criticised. Oar Courts, therefore, are generally free from complaints against the press, either civil or criminal, on the ground of defamation".

226. He continued: Captain Fenwiok had not sinned in any way against that statement. No false facts had been stated in the article in the newspaper, and the only thing to be regretted was the use of an unfortunate word in it, to which a meaning had been given which it was never intended that word should convey and which it did not and could not

properly convey. It was a very gratifying circumstance that, throughout all these proceedings, his Lordship''s general opinion of the press was favourable and also, as would be seen from this very article, the general opinion of the press with regard to his Lordship was also favourable. When the press, as his Lordship, said, addressed itself for the most part to readers of education and intelligence, men who judge and form opinions for themselves,'' it could not be said that his Lordship''s reputation would suffer one iota from anything it might contain. He would mention that, since Captain Fenwick had assumed charge of the Englishman, a manifest change for the better had been observed in the conduct of the paper. And the scurrility with which some people had charged it had altogether disappeared. It was unfortunate that Mr. Taylor''s wrongs should have been ventilated through the newspaper. Mr. Paul read other portions of the article of the 26th, and contended that there was nothing which could be objected to. He submitted that if Captain Fenwick was punished for contempt, that would not alter the opinion of the public as to the sentence on Mr. Tayler, but would only serve to cause Captain Fenwiok to be considered a martyr in a cause of public benefit.

227. The Chief Justice.--My object is not punishment but to vindicate the action taken by the Court. In showing these articles to be a contempt of Court, I do not mean that there is any moral delinquency on the part of Captain Fenwiok, as I thought there was in Mr. Tayler''s case.]

228. Mr. Kennedy.--Under these circumstances, I don''t think we should be justified in further taking up the time of the Court.

229. The Chief Justice.--This is not an attack upon the liberty of the press. All I want to show is that, if anonymous letters are sent to the press containing false statements, the press is responsible for them if the name of the author is not given up.]

230. Mr. Kennedy--Tour Lordship has said that it is not your intention to punish Captain Fenwick.

231. [The Chief Justice.--No, not after what Mr. Paul has said. All I want is to explain my reasons for the course whch has been adopted.]

232. Mr Paul.--With regard to the word "ruse" in the letter of ''Bystander''--

233. [The Chief Justice.--I don''t think Captain Fenwick was the author of that anonymous letter.]

234. Mr. Paul.--No, my Lord, he was not.

235. [The Chief Justice.--He has, however, taken the responsibility upon himself, but the letter is written in a style which I do not think would come from Captain Fenwick.

236. Captain Fenwick very properly submitted to the Court, when the Court first expressed its opinion that receiving subscriptions was a contempt, by declining, to receive atiy more, and he has now very properly explained that the language which was supposed to cast imputations on the motives of the Chief Justice was not so intended. All I mean to contend ia that false statements published in newspapers are not fair criticisms. I have no intention of interfering with the right of appeal to the press, but no one has a right of appeal to the press by bringing false accusations founded on wilful mis-statements.

237. Mr. Kennedy.--As your Lordship had expressed your intention not to punish, I have no right to take up the time of the Court any longer.

238. [The Chief Justice.--I will hear you on the point as to whether the articles are contempts. If I had waited tc proceed by indictment before proceedings were taken, all the mischief, which I wished to prevent, would have been done; and in Mr. Tayler"s case, he would have gone to England if instant and summary measures had not been taken, and would have left the printer and publisher of the paper to be alone responsible.]

239. Mr. Paul asked whether their Lordships held that in any case it would not be right to open a subscription for the purpose of obtaining a demonstration of public opinion.

240. [Macpherson, J.--That depends very much on the way in which it is done. It is just as easy to write pointedly without being defamatory. If, however, you wish to hear the decision of the Court you had better resume your argument.]

241. [The Chief Justice.--And let everything which has been said be withdrawn.]

242. Mr. Paul.--As I understand, any further argument on the matter would be of no use. If the Court is satisfied that no imputations were intended, I do not see the good of any further argument.

243. Mr. Kennedy.--I don"t understand the Court to say that in every case a demonstration, got up in order to obtain an expression of public opinion, would be a contempt.

244. [The Chief Justice.--No.]

245. Mr. Kennedy.--Suppose in a case of an encroachment on the liberty of a subject by a Judge, it could not be said that it would be unjustifiable, for those who thought their liberties had been encroached upon, to come forward and give a public expression of their opinion or to support it by subscription.

246. [The Chief Justice.--No; but I hold this to be a contempt as it contained a threat.]

247. Mr. Paul said there was nothing to be gained by going on any further. He begged to thank the Court, on behalf of Mr. Kennedy and himself for the patient hearing that had been given.

248. [This Chief Justice.--The Court would have been prepared to decide that these articles are a contempt, but under all the circumstances, and as all imputations of motives have been disclaimed, and Captain Fenwick having submitted to the Court when the Rule was issued, the Rule will not be carried any further, but will be discharged.]

249. Macpherson, J.--I also, as far as the case has gong, was prepared to decide that the Court has power to proceed in this matter by way of contempt, and also that there have been two contempts of Court. As regards the power of the Court to proceed by way of contempt, even when the contempt is not committed in Court or during the pendency of a suit, that point was fully settled in the case of Mr. Piffard and Captain Francis (1863) 1 Hyde 792 Celebrated Trials 1 which was tried before a Bench of eleven Judges. In that case Captain Francis, who was a stranger to the Court, was brought up for contempt which consisted in delivering or attempting to deliver at a Judge"s house a message relating to what had occurred in Court between a Judge and Mr. Piffard. In that case Mr. Bell argued that the Court had no power to deal with the matter which took place out of Court, but out of the eleven Judges sitting, nine held that to proceed by way of contempt was a proper way of dealing with the case. A decision of such a number of Judges quite settles, the question as far as a Division Bench of two Judges is concerned. Mr. Piffard"s case was quite "different, as he was an Advocate of the Court.

250. [The Chief Justice.--I may say that, in my opinion, Captain Fenwiok has adopted a very honourable and proper course in this matter by avowing himself to be responsible for the articles which have appeared, and thus taking the responsibility off the shoulders of the printer and publisher who had nothing to do with it. It would have given me much pain if I had been obliged to proceed against the printer and publisher. I also think that Captain Fenwick has adopted a very proper course in having, through Mr. Paul, withdrawn all imputations of improper motives on the part of the Chief Justice, and in having explained that the word "cruelly" was not intended in any bad sense, but merely as meaning severity. Captain Fenwick not having any such intention, although the word was susceptible of bearing such a meaning, has done himself honour by expressing that he had no such intention. I repeat that the only object I had in taking summary measures against Mr. Tayler, was that he was about to leave for England, and if he had been allowed to go awsy, the printer and publisher of the paper would have been left responsible for his letters. I have already stated that I am an unflinching Advocate for the liberty of the Presp, and I repeat what I said before, that I do not claim for myself any immunity from unspairing criticism for any of my public acts, but all I claim is that there shall be no wilful misrepresentation or coneealment of facts which the person criticising knows to be altogether unfounded. It appears to me that the public Press as well as the Judges of the Court are all instruments for the public good, and, in my opinion, the more public men are submitted to public criticism the better for the public, provided that the

criticism contains no misrepresentations of facts or undue concealment. With this explanation, I order the Rule to be discharged.