R. *v.* BUCHANAN.

[Criminal Jurisdiction (Maxwell Anderson, C.J.) June 6, 1934.]

Wounding with intent—European charged with wounding a native—motion for trial by jury—Jurors and Assessors Ordinance, 1932 *s.* 8.[1]

A European was charged with wounding a native with intent to maim. Counsel for the defence applied by motion for trial by jury.

HELD.—Trial by jury in such a case will be granted only for special reasons.

[**EDITORIAL NOTE.**—S. 248 of the Criminal Procedure Code Cap. 4 (Revised Edition Vol. I p. 134) is substantially the same as s. 8 of the Jurors and Assessors Ordinance, 1932 (Rep.) A large portion of the original report of the case is omitted as it has reference only to a point of procedure under the repealed Ordinances No. 6 of 1878 and No. 3 of 1876.]

MOTION for trial by jury.

The Attorney-General, *R. S. Thacker,* for the prosecution.

H. M. Scott, K.C., with *J. N. Leleu* and *J. B. Williams,* for the accused.

H. M. Scott, K.C., (with him *J. N. Leleu*) moved the Court for an order that Buchanan be tried with a jury on the grounds that (*a*) accused was an European, (*b*) the question to be decided was entirely one of fact arising out of incidents between accused and a native Fijian.

After reading an affidavit in support of the motion and referring to the relevant section of the Ordinance counsel said that the practice adopted by His Lordship's predecessors was that if the accused was a British subject and the question one of fact and the credibility of witnesses, judges always considered it advisable to grant such an application. The present case was one entirely of fact whereby a native was alleged to have been wounded by the accused. In the British Empire questions of fact were considered by a jury, while the judge advised and directed the jury on questions of law. The law allowed an accused to make application to a judge to be tried by jury and the question was entirely in the discretion of the Court. The question on which the whole case rested was whether the accused had any intent or not, which was why, he would like to stress, seven of the accused's peers should consider it. It was not so much a question of why should the application be granted as why should it not be granted. He thought that the mere fact that the legislature provided that it was competent for an accused to apply supported the application.

The Court.—I have the gravest doubt whether it is open for him to apply or not. I would have thought that the discretion rested entirely with me, but I know that there are precedents.

H. M. Scott, K.C.—The practice has been to apply to the Chief Justice, and I have set out the reasons for the application and trust your Lordship will grant it.

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[1] *Rep. Vide Editorial Note.*

The Attorney-General, *R. S. Thacker.*—I feel that the matter can be left entirely with the Court. I think when an application is made to the Court for a jury, some special reasons must be adduced, one or more of which must be acceptable to the Court. The matter seems one entirely for your Lordship's judicial discretion.

MAXWELL ANDERSON, C.J.—At first I had the gravest doubts as to whether this motion was in order but I find that it has been the custom to make these applications. This motion gives an opportunity to state clearly what the law is, and I have considerable authority to quote. The relevant section of Ordinance 16 of 1932[1] reads as follows :—

> " Whenever a criminal case shall be brought under the cognizance of the Supreme Court, " in which the accused or one of them or the person against whom the crime or offence shall " have been committed, or one of them shall be a native, or a person of Asiatic origin or " descent the trial shall take place before the Chief Justice with the aid of assessors in lieu of " a jury, unless the Chief Justice shall, for special reasons to be recorded in the minutes of " the Court, think fit otherwise to order and upon every such trial the decision of the Chief " Justice with the aid of such assessors on all matters arising thereupon, which in the case " of a trial by jury would be left to the decision of the jurors, shall have the same force and " effect as the finding or a verdict of a jury."

I have inclined to read that as meaning that the matter was one for me to decide without hearing counsel on either side but I am prepared to read it otherwise and listen to any reasons produced, which are cogent. The section makes it quite clear that normal trial in this Colony where a native is concerned shall be by the Chief Justice and assessors.

There is on record a previous case in which a learned predecessor of mine referred the matter to the Secretary of State with the recommendation that the words " in lieu of a jury," be deleted. The Secretary of State's reply to this was as follows :

> " I request you to invite the attention of the Chief Justice to the fact that whether in capital " or other cases, the Ordinance prescribes that trial by assessors shall be the rule in the case " specified in that section ; and therefore the judge need not feel that he has the responsibility " of dealing with an open question when application is made to have the case tried before a " jury. He is on the contrary, in a position to reply to any such application (without assign- " ing reasons, unless he think fit to do so) that he declines to interfere with the prescribed " course of law ; the responsibility being thrown upon him of satisfying himself that there is " sufficient ground for such interference. I may add although every case must be decided on " its own merits it is difficult to conceive the circumstances which would justify the judge in " directing that a grave criminal offence alleged to have been committed by or against a white " man, and in which a native is also concerned, should be tried before a jury.
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> " When the draft of this Ordinance was being considered by my predecessor with the advice of " high legal authorities, it was felt that the rule prohibiting trial by jury and prescribing trial " with assessors in cases in which a native or coloured immigrant might be concerned, should " not be absolutely without exception. There may be cases in which no serious miscarriage of " justice would be risked by allowing a jury, as for instance where a simple question of fact " in a case of minor importance is at issue, or when a white man is not concerned on either " side. There may also arise a case of grave importance in which a jury could not advan- " tageously be refused. If it is clearly understood by the judge and by the public that the " law cannot be suspended unless for some very strong and exceptional reason established to " the entire satisfaction of the judge, whose discretion in the matter cannot be impugned ; and " that no person is entitled to claim a jury under s. 70 of the Criminal Procedure Ordinance of " 1875, there will be no reason for such doubts and difficulties as have been apprehended.
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> " I may add that the question of ' constitutional right ' seems to me to be fully met by " Chief Justice Corrie's reply to the counsel who raised it in Walker's case.
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> " Having regard to the express enactment now under consideration there is no pretence for " saying that in Fiji any man is entitled to demand a jury ; and the court need not admit " this argument."

I agree entirely with the Secretary of State, even if I am not bound to do so. I have heard no reasons which in my opinion would justify a departure from the normal mode of trial which would be the effect if I granted the application and accordingly the motion fails and is dismissed.

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[1] *Vide Editorial Note.*