

MADRAS RECORD OFFICE.

Government of Madras.

Financial DEPARTMENT.

G.O. No. 7

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No. 10. From the ADVOCATE GENERAL; to the CHIEF SECRETARY to Government, Fort Saint George, dated 30th December 1857.

SIR,

As the Appeal Petition in the case of Andrew Robertson *versus* the East India Company and others is now about to be sent home, it may perhaps be convenient that I should state, in some detail, the principal grounds upon which, in my opinion, that Appeal ought to succeed.

2. In the Judgment delivered in that case, Chief Justice Rawlinson stated as follows:—

“ Having so lately delivered Judgment in the Suit of Davis *versus* the Trustees of the Madras Civil Service Annuity Fund, a case in all important points precisely similar to the present, I do not think it necessary to go again at length over all the grounds on which the present Judgment of the Court is founded.”

3. I must therefore refer to his Judgment in Davis' case for most of the grounds upon which he relies in support of the Judgment given in this case, and in fact treat that as if given in the present case.

4. The Chief Justice, it will be found, professes in general terms to assent to the unanimous Judgment delivered by the Supreme Court of Calcutta, (Peel, C. J. ; Buller, J. and Colville, J.) in the very similar case of “ Blunt *versus* Halliday and others, Managers of the Bengal Civil Service Annuity Fund,” especially as regards the construction put by the Calcutta Court upon the Documents, which in that case, as in this, (for they are the identical same Documents) constituted the original contract upon which the Plaintiff relied; yet, in very many and important particulars, he seems to have quite overlooked or lost sight both of that construction and the reasons by which it was supported; and, in others, to have given a totally different construction, without assigning his reasons, and (so far as I can discover from the printed Judgment) without even being conscious that he was giving a flat contradiction to the construction and conclusions of the three Calcutta Judges.

5. The Chief Justice, after a general assent to the Judgment of the Calcutta Court as regards the construction to be put on the Documents in the case, (the very same Documents that were now before himself) say that “ the additional facts established” in both Davis and Robertson's cases “ take” them “ wholly out of the authority of that case,” *i.e.*, Blunt and Halliday.

6. As regards these “ additional facts,” I think it will be found that some of them are assumed by the Chief Justice as facts upon insufficient grounds, and that to others he has attached consequences, or drawn conclusions from them, that cannot be supported, and do not fairly attach to the facts in question.

7. In Davis' case the Chief Justice said:—

“ The terms of the contract in the present case are to be collected from the Despatch of the East India Directors of December 31st 1824, from the Report of the Trustees of the Madras Civil Service Annuity Fund of 1818 on the Annuity plan proposed by the Court of Directors, the Despatch of the Directors of November 1826 containing some further terms and the general confirmation of the Fund, and from the Rules for the management and distribution of the Civil Annuity Fund which was established on the 1st May 1825.” And afterwards—“ Had the present case rested solely on the grounds abovementioned, and on the Rule directing a separate account with each subscriber, and on others of not greater weight, I confess, I should have hesitated before coming to a conclusion different from that which was arrived at by the Court of Calcutta.”

8. Now as regards Messrs. Davis' and Robertson's claim to a refund under the provisions of the Fund of 1825, it must be remembered that, as regards Madras, those provisions were modifications of the *previous Madras Deeds* of 1814 and 1818, the latter whereof (Clause 3, page 89) expressly *negatives* any refund: mere silence therefore seems to me to leave that

previous negative untouched and in full force, and so makes the case against a refund stronger in the Madras case than in the Calcutta one.

9. In the Calcutta case it seems to have been admitted at the Bar, as I believe it was here, that the provisions of the Fund of 1825 no where expressly sanction any refund:—at all events, the Judges all expressly say that such is the case.* I quote from the printed Pamphlet, and refer to the pages by their numbers for brevity sake.

“Peel, Chief Justice, says (page 16) “if it” (*i. e.*, the right to a refund) “exists at all, it must exist by on original, fundamental, *tacit* condition, for *nothing* is stated about it in terms. Buller, J., says (page 28) “it is contended on the part of the Plaintiff that, *although* there is *no express provision* for refunds, still, &c. Colville, J. says (page 37) “it is conceded (indeed it could hardly be denied) that the Rules do *not* expressly give the right to a refund that is claimed.” And again (page 45) “but I also believe * * * * * that according to the *original* scheme, there was *no* provision, *either express or implied*, for a refund of excess subscriptions.”

10. Chief Justice Rawlinson in one part of his Judgment appears to assent to these views, where he says that, but for “the additional facts,” which in his opinion, take Messrs. Davis’ and Robertson’s cases “out of the authority of the Calcutta case,” he might have agreed with Chief

Justice Peel.† In saying this, Sir C. Rawlinson *necessarily* admits that there is no *expression* of such intention, for *had* there been such an

expression of it no question *could* have arisen as to whether or not such an intention was or could be

implied. Yet at the conclusion of his Judgment, Sir C. Rawlinson says.† A more direct contradiction to the previous part of his own

Judgment, and certainly to the construction put by the three Judges at Calcutta on the agreement (a construction to which Sir C. Rawlinson professes to assent) can hardly be conceived.

11. I proceed to another material point, wherein Chief Justice Rawlinson differs entirely from the construction put by the three Calcutta Judges on the Honorable Court’s Despatch of December 31st 1824. I mean with reference to the words, in para. 57, “half value and no more.” Here, as at Calcutta, it was argued at the Bar by the Plaintiff’s Counsel that those words, as observed by Colville, J. page 45, “supplied the place of a positive provision for the refund of excess subscriptions.”

12. Peel, Chief Justice, goes at much length into this question, and (page 18) shews the effect, bearing, and subject matter of paras: 52 to 57 of that Despatch; and (in page 20) uses these words:—

“They” (*i. e.* the Court of Directors) “are carrying on a process of reasoning *upon a calculation*; and it seems to me a somewhat strained construction to treat the language there used, and “particular expressions, as for instance the words “no more” as used in reference to a subject “not there in that part of the argument under contemplation, *viz.*, the case of persons who, no “matter from what motive or cause, might not retire at the entitling age.” Buller, J., says (page 29 and 30) “as regards the other expressions of the Rules and Despatch to which such “weight is sought to be attached, it is to be observed that they are made applicable by the “Plaintiff’s argument to a *very different state of facts from that to which they were in reality “applied*, and to this error I trace the doubts which I myself once entertained. The scheme of “the Despatch was entirely based upon the supposition, that each of the nine persons entitled “every year to an Annuity would gladly avail himself of it, and that his subscriptions would “not by that time have accumulated to the amount of its half value. In that case the party re- “tiring would in strictness have to pay up the difference between the amount of his accumulat- “ed subscriptions and the half value of his Annuity, and no more.” And in a subsequent place, (page 33) “I admit freely that payments in excess do not appear to have been contemplated “any more than refunds and that having occurred to a very great extent, there is no slight dif-

“ficulty in applying to such an *unforeseen state of facts*, Rules and calculations framed in im- “perfect foresight.

Colville, J., says (page 41) “the 74th and 75th paras: * * contemplate the possibility of *variations* “in the *actual results* of the working of the Fund as compared with the *calculations* of the “Court,” and further on, almost adopting the words of Peel, Chief Justice, he says (page 45) “upon the whole then, whatever be the difficulties arising from expressions in this Despatch, “I cannot, recollecting that *up to the 60th para:* of that Document it is matter *rather of deser- “tation than regulation*, see my way to the construction for which the Plaintiff contends, or “think that those expressions supply the place of a positive provision for the refund of excess “subscriptions; or materially qualify,” &c., &c. And in another place, he says (page 44) “I “do not deny that some of the expressions, particularly in the 56th and 57th paras: do create “some difficulty. But I think that even such expressions as, ‘all Servants will pay half the “value of their respective Annuities and no more,’ are explicable, when we consider that the “Court was reasoning with reference to the *then* state of things, that at *that* date, and for many “years afterwards, no Servant, whatever might be his contributions, *could* entitle himself to an “Annuity except upon payment of a large fine, and that their *calculation* seems throughout to “proceed upon the *hypothesis*, that almost every member would take an Annuity as soon as he “was entitled to it, and in most cases would have to *pay a fine* of some amount.”

13. Chief Justice Rawlinson however decides on this part of the case, and on the meaning of these words, in a way directly opposite to the opinions of the three Calcutta Judges. He says*—

Chief Justice Rawlinson then proceeds to say that such is *not* the case, and to treat the words “half value and no more” as a *positive and express stipulation* (which Colville, J., page 45, says they are *not*) to refund all excess subscription, used with reference to the *same* state of things as *now* exists. Yet nothing can be more certain than

* “On the part of the Defendant it is contended that, in para: 57, the words ‘half value and no more,’ are to receive a “limited meaning, or rather that they have no application to the “Plaintiff’s case, because used in application to a *state of facts* “not now existing.” [N. B.—These are almost the very words of Peel, C. J., and Colville, J.] “I confess I cannot concur in “this argument. To state that they were applied to another state “of facts is *begging the whole question* between the parties: and “further, is such the case?”

that, in 1825 and for many years after, *no* subscriber *could possibly* have paid *any* excess sub- “scriptions, and all had to pay up fines to complete the “half value;” while, of late years, many have paid considerably more than the half value.

14. I now come to a third point of almost equal importance, where Chief Justice Rawlinson, upon the same Documents that were before the Calcutta Judges, adopts a construction exactly opposed to theirs. In his Judgment in Mr. Robertson’s case, he adverts to the Court of Directors’ Despatch to Bengal, 1st September 1841, where they say—“with respect to a re- “fund of subscriptions we are disposed to meet the views of the majority of the subscribers to “the extent of confining refunds to the excess which may have been paid beyond the half value “of the Annuity, such an arrangement being in accordance with the Regulations of the Fund,”— “thus” (says Rawlinson, Chief Justice,) “shewing the *interpretation* they themselves put on the “much disputed words ‘paying the half value of the Annuity and no more.’”

* Peel, Chief Justice, says (page 20) “The Directors say, in a subse- 15. The Calcut-
quent Despatch, that they consider a refund within the principle of the ta Judges however---
“original foundation, but they do *not* say that it was a condition of their in the passages quot-
“Grant: on the *contrary*, what they say *seems to me to import that it* ed in the margin*—all
“*was not*. I should expect one in the position of them as donors to agree that the Court’s
“whom the proposal was made to give them what he had given before, words were *not* an “in-
“to say, it is superfluous, it is one of the original conditions of the terpretation,” in 1841,
“Grant in favor of such contributor that he should have, over and above of those words in the
“his Annuity, a refund of his savings with accumulated interest; if Despatch of Decem-
“any doubt of it exist, you must pass a declaratory Rule’. They seem, ber 31st 1824: that
“on the *contrary*, to treat it as a boon *then to be conferred*.” they conveyed *no* ac-

Buller, J., says (Page 32) "great reliance has been placed by the Plaintiff upon the answer of the Directors to the last mentioned proposition of the subscribers, namely, that it is in 'accordance with the Regulations,' and that 'they are prepared to sanction any Rule to that effect adopted by the subscribers'."

"This answer, however, to my mind shows very clearly that the Directors, whether they were right or wrong in their opinion that refunds were in conformity with the principle of the Fund, at all events were satisfied that they were *not then* authorized by existing Rules. Otherwise, instead of saying—'we are prepared to sanction any such Rule which you may adopt,' they would have said rather—'what is the use of your going and squabbling about these refunds, and asking us for our sanction for them?' The right already exists, and is enforceable under subsisting Rule's."

Colville, J., says (Page 46) "something has been said of the effect of the passage in a Despatch of 1841, in which the Court of Directors treat the principle of refund as *in accordance with* the Regulations of the Fund. But, apart from the consideration that the views of the Court of Directors of 1841 do not go far to prove what were in fact the views and intentions of the Court of Directors of 1824, and waiving the objection to construing a contract by the subsequently expressed views of one of the contracting parties, I do not think that this passage can be treated as more than the expression of an opinion that the *concession* of the right to a refund was *not inconsistent with* the principles of the institution." * * * "But they do *not* put the right to refund as a *subsisting* right, but as one which it would be proper to *create* by a Rule which they express their readiness to sanction."

16. It seems to me moreover that when Chief Justice Rawlinson, in his Judgment in Mr. Robertson's case, relied (as an argument that subscribers to the Madras Civil Fund were entitled to refund) on the words used in the Court's Despatch of 1st September 1841, when addressing themselves to the case of the Bengal Fund, he overlooked the very important fact that the Madras Fund is and has long been insolvent, while the Bengal Fund was not only always solvent, but in 1841 had a large surplus, from which refunds could be made without any expense to the East India Company. To the Bengal subscribers the Court therefore, in effect, said, "we are willing for the future to sanction a new Rule authorizing refunds out of your surplus funds, we being thereby put to no expense"—yet this was held by Chief Justice Rawlinson as binding the Court of Directors, in the case of the Madras subscribers, to say (or as if the Court had in effect said) "we offered to sanction refunds to the Bengalees out of their own fund, as it would cost us nothing, and therefore and thereby we have bound ourselves to grant you similar refunds, though, as your fund is insolvent, we must pay them *entirely out of our own pockets; over and above* the contribution we promised you." On this point too the words of Mr. Justice Colville above quoted (as to the views of the Court of Directors of 1841 going but a little way to prove what were in *fact* the views and intentions of the Court of 1824) seem to be very important.

16. These are not the only points, but they are the most important ones, in which Chief Justice Rawlinson has adopted a construction of the documents on which the case mainly rests, utterly at variance with that given to them by the three Calcutta Judges. Their reasons for their opinions are given at length, and appear to me to outweigh those given (where any are given) by Chief Justice Rawlinson, who indeed no where, as it appears to me, seems conscious that on the points I have noticed he is directly at issue with the Calcutta Judges. He no where gives any reason for differing from them, or says that the means to differ, while he more than once intimates that, so far as the Documents only are concerned, he agrees with them. The late Chief Justice of Calcutta being now in the Privy Council, his reasons will doubtless be fully explained and enforced by himself to that tribunal.

18. Sir C. Rawlinson however professes to ground his Judgment chiefly on the "additional facts proved in this case, the *absence* of which was *strongly relied* on by all the Judges at Calcutta," and which, he says "take the present out of the authority of that case." They are four in number, namely, 1stly "the unvarying practice of making such refunds from 1834 to

knowledge of any right already existing by virtue of the Despatch of December 1824—but quite the *reverse*, in fact that they intimated that a right to a refund did *not then* exist, but that the Court were willing as a boon, to *add* such a right, to *create* it, and to *sanction* a new rule for the purpose.

"1851, amounting to ten in number, made even when the Fund was insolvent," 2ndly, the introduction, in 1838, by the Madras subscribers or the Trustees into Rule 16, of the words "but should the contribution be in excess, such excess shall be refunded," and the fact that these words were, in 1838, published by the Trustees in "what is termed a *reprint* of the Deeds of the Madras Civil Service Fund," [though "it is admitted these words expressly authorizing a re-fund never appeared in any of the Rules till they were printed in 1838"] and that copies of this (so called) reprint were sent to the Court of Directors, the Government, and the subscribers: 3rdly, the Trustees' letter of the 14th April 1841, giving the Court notice of these funds made to Messrs. Harris and Webb: 4thly, that the Court of Directors "had not only the *fullest know-ledge* both of the Rules and the practice of refunding, but further that they *approved* of them."

19. I have gone carefully over the Judgments of the Calcutta Judges, and I can find but two of these matters noticed at all, and noticed, I think, by no means in the way that Chief Justice Rawlinson seems to imply, *viz.*, 1stly, the fact that no such refund as claimed by Mr. Blunt had ever before been paid, or even claimed, though thirty members who had retired had all paid in excess, and above the half value of their Annuities. Peel, Chief Justice, refers to this in pages 16 and 23, Buller, J., in page 31, and Colville, J., in page 46, and certainly the fact that no such refund had been even paid or claimed, coupled with the absence of any words expressly authorizing such refund, was a very strong argument against the legality of Mr. Blunt's claim—but it by no means follows that the converse of this proposition holds equally good, and that, if such a claim had been unanimously asserted, it would have shewn a right to the refund. Buller, J., shews this

very clearly, he says,* (page 31) "Then, again, as to the opinion of the subscribers themselves on the question of the right to refunds. If they had all, uniformly and unanimously, from first to last, entertained and acted on the belief that they had such right, although their belief would not have established the right, it might nevertheless have furnished weighty arguments as to the probable intention of the original scheme when not clearly expressed." the Madras subscribers however did *not* do this: their expressed opinions and acts fall far short of what Sir A. Buller here requires: they were first expressed in 1838, thirteen years after the Fund was established, and were then expressed

in a Rule sent home to the Court of Directors with the intention (for this *must* be conceded, as, otherwise, the only inference would be that the Trustees or Subscribers meant to *evade* the provisions which the Directors insisted upon as "necessary alterations" of the 30th para: of the "Regulations as proposed"—see page 67 of the Pamphlet containing the Court's Despatch of 31st December 1824—and to *deceive* the Court of Directors) of submitting it to the Court as a new Rule which the Court might allow or reject at pleasure. Thus viewed, the words introduced by the Madras Trustees in 1838 respecting Refunds cannot be regarded as asserting a *right*, or even as expressing an opinion that they had such a right. The next notice of the matter was in the Trustees' letter to the Court, dated 14th April 1841; but the language here used seems to me quite inconsistent with the assertion of a clear right. It rather seems to treat refunds as matters so rare in occurrence; and insignificant in amount, as to be hardly worth the Court's while to notice, while the concluding words, so far from claiming them as a *right* beyond the power of the Court to question, seem to me expressly to recognize the Court's right to deal with them as they shall think fit. Indeed even Chief Justice Rawlinson, it seems to me, indirectly admits this, where he treats the Court's silence, after receiving the Trustees' letter of 14th April 1841, as amounting to *assent* after full notice. Notice of what? not of an original right, created in 1825 by the original provisions of the Fund, no notice of that, or assent to that could be necessary: notice then of what? Why of a *new* practice, and a *new* construction, recently adopted by the Trustees, of which they give notice to the Court according to the Rules, *in order* to obtain from the Court a *decision*, an assent to or a dissent from such practice or construction. Such a notice, in 1841, is surely not an assertion of a clear right, least of all an original right, established in 1825.

The 2nd point noticed by the Calcutta Judges, particularly by Buller, J., at page: 31, is the absence of any Bengal Rule authorizing Refunds, and the decision of the Bengal Civil Service against such a Rule when proposed, although the Court of Directors had (in 1841) offered beforehand to sanction it. The Judges might well rely on the absence of such a Rule, for, if passed, it would have been conclusive, the Court's assent having been expressly given beforehand, but it is difficult to see what argument can be drawn from such a state of facts that can be fairly applied to

so very different a state of facts as that before the Madras Court, where there never was any express assent of the Court of Directors, where the Rule was never (there is no evidence that it was, and in fact it was not) regularly passed, or ever regularly brought before the Service or a Meeting, and where no express notice of it was ever given to the Court of Directors.

20. These are the only instances, so far as I can see, where the Calcutta Judges do what Chief Justice Rawlinson calls "strongly rely" on the absence of "the additional facts proved" in the Madras cases, and I think that the first instance was *not* strongly relied on by the Calcutta Court, and that, in the 2nd Instance, the fact on whose absence they relied was materially and essentially different from that on whose presence Chief Justice Rawlinson relied.

21. I now proceed to examine the four "additional facts," chiefly relied on by Chief Justice Rawlinson. The first three points, alone, I think amount to nothing as regards their binding the Court of Directors. It is only when taken along with the 4th point that it can be contended they have any such binding effect. 1stly; The "unvarying practice of making refunds" was simply a practice by the Trustees and subscribers of exceeding, in their own favor, the terms of the original contract: but persistence in wrong, however long and uniform, can never make wrong into right. 2ndly; The Rule of 1838, respecting Refunds, and the notice of it to the Court of Directors by sending them, and the Madras Government, a copy of the Rules containing it: and, 3dly; the Trustees' letter, dated 14th April 1841, giving the Court notice of the Refunds paid to Messrs. Harris and Webb. These 2nd and 3rd grounds seem to me to raise substantially the same question, *viz.*, whether *mere notice* by the Trustees to the Court of Directors *can* bind the Court to *anything* beyond their original contract. The Chief Justice says, "the question is, 'were these Rules *bonâ fide* drawn out, and did they express what were the agreement and understanding between *all* the parties at the time or not.'" The question in my opinion is not at all as to the *bonâ fides* with which this Rule was framed. The real question is admitting the *bonâ fides*—1stly, were the Court of Directors parties to that rule before or at the time of its being passed? It is certain they were *not*. 2ndly, was the Rule passed in the way provided by the Rules, *viz.*, at a general meeting, by a majority of three-fourths of the members present or voting by proxy? and 3rdly, was this new Rule subsequently sanctioned and approved by the Court of Directors? I think the onus clearly lay on the plaintiff to show that the Rule was duly passed; * he gave no evidence of the kind for the best of

reasons, *viz.*, that it was *not* passed in the way prescribed by the Rules, nor was it ever expressly sanctioned or approved by the Court. As to the question "did these Rules express what were the 'agreement and understanding between *all* the parties at the time or not.'" I cannot understand how the Chief Justice came to introduce such a question, or on what grounds. There is not one iota of evidence to shew that, at the time of the making of this new rule, there was any previous agreement between any persons but the then subscribers to the Civil Fund, an agreement which may certainly bind them, as between themselves, but can hardly bind others, not present and having had no previous notice of their intentions. The Court had not even subsequent notice of this act of the subscribers—certainly not, such notice as I think good faith required, and as the Court had a right to expect. What was the notice? A forwarding to the Court a Pamphlet introduced to their notice under the name of a "Reprint" though now acknowledged to be nothing of the kind. If a mere reprint it could contain no new matter, and therefore would require no examination, and probably received none. But it was *not* a Reprint and *did* contain very important *new* matter, involving an "essential addition" to and "alteration of" the provisions of 1825; and the Court of Directors having by a distinct rule expressly required that all such new matter should be submitted for their express sanction and approval, they had a clear right to expect express notice whenever any such was introduced. How was this new matter introduced? as an addendum to the (miscalled) Reprint? Even as a separate Rule? or in any way likely to attract attention? No, but the very reverse in the way most likely of all others to *escape* notice, a single line introduced in the very midst of a paragraph of 18 lines! admitting that this new rule was adopted by the Trustees in perfect good faith, and that the Trustees *intended* in all good faith to give the Court notice of it, the question is *did* they give the Court such notice as the Court had a right to expect, such as the Court's Rule required, and such as was demanded by that "*uberrima fides*" which the law requires in such circumstances? I think they did not.

22. Here arises a very important question, suppose the Trustees *did* give the Court express notice as according to the "necessary alteration" required by the Honorable Court they ought to have done, of this "essential addition to and alteration of" the original provisions of the Fund, what is to be the consequence, admitting such notice, admitting full knowledge by the Court, and that the Court subsequently maintained entire silence? Does *this* bind the Court to that "essential addition and alteration" of their original contract? This, in my opinion, is the material question. I can find no authority for answering it in the affirmative, nor do I find any cited by Chief Justice Rawlinson: indeed I cannot but think that, were the question put thus to him, he would feel, as Sir J. Colville expressed it, "the objection to *construing a contract* by the *subsequently expressed* views of *one* of the contracting parties." This is however admitting, for argument sake, what I by no means really admit. It is said or argued by the Chief Justice that the Trustees' new Rule of 1838 "expressed the agreement and understanding between all the parties," *i. e.*, as I understand him, *construed* the original provisions of 1825; but it seems to me, on the authority of the Judgment of the Calcutta Court, that this is *not* so, not a mere *construction* of, but an "essential addition to and alteration of" those provisions. The Calcutta Judges decided, as was indeed admitted, that the provisions of 1825, *expressed nothing* about a Refund; they also decided that those provisions *implied nothing*, (*i. e.*, did not necessarily imply any thing,) that authorized a Refund. If then "the subsequently expressed views of one of the contracting parties" cannot be admitted to *construe* a contract, *a fortiori* they cannot be permitted to *alter* it or *add* to it.

23. The fourth and last point obviously involves, indeed it assumes, the whole question. If the Honorable Court with a full knowledge of the facts, did approve of this alteration and addition to the original contract, such approval amounts to making a new contract: and the Court cannot afterwards recede from it, and deprive their Madras Civil Servants of its benefits. And here it must be confessed that the acts of the Honorable Court have created considerable difficulty in the present case. I mean their paying up in 1845, and 1847, (and directing the same to be done "when necessary in future years") the deficiencies of the Fund, created as they were, largely, by these very Refunds; the Court having, not I believe, the knowledge, but, I think, *the means of knowing*, from the accounts and reports forwarded to them, that such was the case. Still greater however is the difficulty occasioned by the Court's correspondence, where, under date the 6th February 1850, they say "we admit we have not hitherto objected to the Rules passed at those 'Presidencies allowing the system of a refund:' and desire Government to adopt such measures as may appear best calculated 'to induce the Civil Service * * * to abrogate' the rule, and in 1851, where, on the Madras Civil Service declining to abrogate their rule respecting refunds, the Court merely reduce the interest on excess subscriptions to 4 per Cent.

* "But how do they" (the Court of Directors) "treat the subject, in 1850, in a Despatch of that year they drew the attention of the Government of India and that of Madras to a discrepancy between a Rule of the M. C. S. Annuity Fund, 'which allows of contributions to the Fund in excess of half the value of the Annuities to be refunded to parties on becoming annuitants' and the Bengal Rules which precluded a refund.

"Doubtless by this time the system of refunding had been found to be inconvenient; but what is the suggestion? *not that it is a rule or practice that they had no notice of or that it is not in accordance with their arrangements with the Service; nothing of the kind*; but the Government is desired to adopt such measures in co-operation with the Government of India "as may appear best calculated to induce the Civil Service at your Presidency to abrogate it."

"Then what is the direction contained in the Despatch of the following year, 1851, when the Madras Civil Service had declined to abrogate the rule authorising the refund?

"It is as follows: The proposition for abrogating the rule of the Madras Civil Service Annuity Fund which provides for refunding to its Members on becoming Annuitants, the amount

24. On this the Chief Justice observes with great force, as quoted in the margin,* and this is the only part of the case where I feel pressed by his remarks, and which has made me feel any doubt as to the final result.

which they may have contributed in excess of half of the value of their Annuities, having been circulated for the votes of the service, and rejected, we consider it necessary to lay down a principle for regulating the interest to be allowed on such excess when it occurs; we therefore direct that 4 per cent annual interest only be allowed on the subscriptions of Members in excess of half the value of their annuities, and their accounts with the Fund be adjusted accordingly. "I will only ask is this the language or conduct of parties, who have had a new term introduced into their agreement without their consent."

25. It appears to me however, after allowing their full weight to the circumstances here so forcibly and justly relied on by Chief Justice Rawlinson, as shewing knowledge and approval on the part of the Honorable Court; that he has attributed to them an effect beyond the utmost that they can legitimately have.

26. Let it be conceded, for the sake of argument merely, that they do in point of law imply a full assent, on the part of the Honorable Court, made with full knowledge of the facts, to the principle of refunds as laid down by the words introduced in 1838 into the 16th Rule; the question yet remains, what sort of refund did the Court thus assent to, or, in other words, whence was such refund to come, and by whom was it to be paid? The 16th Rule, and the Plaintiff's Bill, both agree that the refund they speak of was a refund to be paid by the Trustees, out of the Annuity Funds in their hands, and it was to this proposition, to a refund of this kind that the Honorable Court assented, if indeed their acts and correspondence above mentioned do really constitute an assent.

27. If therefore the Chief Justice had decreed the Plaintiff entitled to only that which he prayed, viz., to a Refund to be paid him by the Trustees out of the Annuity Fund, the East India Company being decreed to pay nothing whatever in the first instance, but only to make good such deficiency, if any, as might exist after exhausting the Annuity Fund, in making such a decree, I say, the Chief Justice's conclusion would have followed logically from his premises, which it may perhaps not be easy to overthrow.

28. The Decree, however, which he has made is a widely different one; by it the Trustees are to pay nothing; nothing is to come out of the Fund, but the East India Company are to pay everything; not a possible deficiency but the entire sum, in the first instance, out of their General Treasury, i. e., the Public Revenues of India. So that, because the East India Company assented, as the Chief Justice says, that the Plaintiff was entitled to a refund out of the Annuity Fund, therefore the Chief Justice decides that the refund must come not, even partly, out of the Annuity Fund, but wholly from the East India Company. This, even looking at it as a question merely of form, is in my opinion so serious an error, that the Decree, in its present form, cannot possibly stand.

29. The Chief Justice, however, may probably say that the error, if it be one, is one of form only, not of substance, that the result would be, eventually, exactly the same had he made his Decree according to the case made by the Plaintiff, and decreed payment of the refund to be made by the Trustees out of the Annuity Fund, and that the East India Company should only pay the deficiency if any. He may say, "the East India Company are bound beyond all question to contribute to the Annuity Fund whatever is requisite to provide four Annuities yearly; therefore, once granting that the Plaintiff is entitled to have his refund from the Annuity Fund, the East India Company would eventually be bound to repay to the Annuity Fund the deficiency caused by the payment of this refund; so it ultimately comes to the same thing."

30. To this I would reply, that this argument rests entirely on assuming a substantial fact, that of which there is no evidence, and which really is no fact (and may never be a fact) but only an eventual possibility.

31. There is no evidence whatever in the case of the state of the Annuity Fund at the time when the Decree was made, or rather when the cause was heard, so that, for any thing that appears to the contrary, the Annuity Fund, at the date of the hearing and Decree, was quite able to have paid the Plaintiff his Rs. 44,069 in full, without any assistance from the East India Company. As to what might be the ultimate consequence to the Fund of such Payment by it to the Plaintiff, and whether the Fund would, in such case, have been entitled to have had a part, or

the whole, of such Refund returned to it in the shape of an additional contribution from the East India Company towards the providing of Four Annuities, that question was not before the Court, the question before the Court was, the Plaintiff's claim, 1stly, and directly, on the Trustees and the Annuity Fund; 2ndly, but only possibly, on the East India Company. There was no question of any claim by the Trustees or the Annuity Fund on the East India Company, and the Court had no Jurisdiction to decide on a question not then before it, and which might never arise at all: still less to decide that, because, possibly, the East India Company might ultimately be bound to pay something, non-constat how much, to the Annuity Fund, therefore they were bound, forthwith, to pay Rs. 44,069 to Mr. Robertson. The deaths of a few subscribers, having paid up the half value of their Annuities, but dying before they took them, would have materially altered the state of the question. This therefore, I conceive, is no matter of mere form, but one of substance as to which the Decree in its present form cannot stand.

32. There is yet another ground which, in my opinion, is fatal to the present Decree, and which though I am informed it was fully gone into on both sides at the argument at the Bar, besides evidence given respecting it, (as otherwise indeed it could not have formed one of the grounds of appeal, it stands now as the 8th Clause,) I can find no notice whatever of in the Chief Justice's Judgment.

33. The provisions of the Fund of 1825, which do not make, it is conceded, any specific mention of a refund, such as Plaintiff claims, do make specific mention of the way in which all Rules making any "essential addition" to or "alteration" of those provisions were to be passed

by the subscribers and afterwards dealt with by the Directors.* Now the 16th Rule, and the words therein introduced in 1838, on which the Plaintiff

mainly rested his case as establishing Refunds, (and the Chief Justice his Decree) were not shown to have been so passed, (for the best of reasons, because they were not so passed,) but the Rules of 17th June 1853 which declare, in substance, that there shall be no Refunds, and which were passed before the Plaintiff accepted an annuity, and while he was a subscriber to the Fund, and was therefore bound by any Rules regularly made by the requisite Majority of the subscribers, these Rules against Refunds were shown to have been regularly made. Yet the Decree, though passing over the point in total silence, does in effect declare that the Plaintiff is entitled to Refunds in consequence of a Rule not shewn to have been regularly made, and notoriously not so made, but, that he is not bound by the later Rule, though proved to be regularly made, which declares in substance that there shall be no Refunds!

34. It was said, I am told, that the Plaintiff's interest in the Refund was a vested one, and therefore could not be divested. I regret the Court was not pressed to give some specific intimation of its opinion on this point. To me it seems clear that the Plaintiff never had a vested interest in the Refund, even supposing the words added in 1838 to Rule 16 to have been regularly added and to have established Refunds. It might indeed, on this supposition, have become a vested right, and would have done had he, the Plaintiff taken his Annuity before the Rules of June 1853 had been passed; but, till then, his right was merely a contingent one, liable to be defeated if a Rule, such as that of June 1853, should be regularly passed at any time before he took his Annuity: and which, therefore, as such a Rule was so passed before that event, was defeated before he took his Annuity, and therefore never became a vested right. This may be further shewn by another consideration: the Plaintiff's right to an Annuity was always, until it was offered to and actually accepted by him, liable to be defeated by four occurrences; 1stly, his death before he had served the required time, or 2ndly, before his seniors were provided with Annuities, or, at least, had had the refusal of them, or 3rdly, his dismissal from the service, or 4thly, his inability to pay up the half value. His right to the Annuity therefore was contingent on none of these occurrences taking place, and therefore could not properly be called a vested right, but his right to the Refund was clearly dependent on his obtaining an annuity, so that to call it a vested right would be to say that a right can be at the same time vested, but liable to be defeated by several contingencies.

35. This point alone, in my opinion, would be fatal to the decree. I regret having been unable to forward this letter as early as I intended. I began it a month ago, but a succession of references and other matters requiring immediate despatch prevented me from finishing it till the Christmas holidays gave me some leisure.

(Signed) THO. SYDNEY SMYTH,
Advocate General.

No. 11.

ORDER, THEREON, No. 7; dated 8th January 1857.

Ordered that the above letter be forwarded to the Honorable the Court of Directors in continuation of the previous correspondence on the subject of the Suit Robertson *versus* the East India Company and Trustees of the Madras Civil Fund.

Exd. J. A. Wilson.

Robertson's case, relied (as an argument that subscribers to the Madras Civil Fund were entitled to refund) on the words used in the Court's despatch of 1st September 1841, when addressing themselves to the case of the Bengal Fund, he overlooked the very important fact that the Madras Fund is and has long been insolvent, while the Bengal Fund was not only always solvent, but in 1841 had a large surplus, from which refunds could be made without any expense to the East India Company. To the Bengal subscribers the Court therefore, in effect, said, "we are willing for the future to sanction a new Rule authorizing refunds out of your surplus funds, we being thereby put to no expense:"—yet this was held by Chief Justice Rawlinson as binding the Court of Directors, in the case of the Madras subscribers, to say (or as if the Court had in effect said) "we offered to sanction refunds to the Bengalees out of their own fund, as it would cost us nothing, and therefore and thereby we have bound ourselves to grant you similar refunds, though—as your Fund is insolvent—we must pay them entirely out of our own pockets, over and above the contribution we promised you."

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On this point too the words of Mr. Justice Colvile above quoted (as to the views of the Court of Directors of 1841 going but a little way to prove what were in fact the views and intentions of the Court of 1824) seem to me very important.

17. These are not the only points, but they are the most important ones, in which Chief Justice Rowlinson has adopted a construction of the documents on which the case mainly rests, utterly at variance with that given to them by the three Calcutta Judges. Their reasons for their opinions are given at length, and appear to me to outweigh those given (where any are given) by Chief Justice Rowlinson, who indeed no where, as it appears to me, seems conscious that on the points I have noticed he is directly at issue with the Calcutta Judges. He no where gives any reason for differing from them, or says that he means to differ, while he more than once intimates that, so far as the Documents only are concerned, he agrees with them. The late Chief Justice of Calcutta being now in the Privy Council, his reasons will doubtless be fully explained and enforced by himself to that tribunal.

18. Sir C. Rowlinson however professes to ground his judgment chiefly on the additional facts

24. On this the Chief Justice observes with great great force—as quoted in the Margin⁺—and this is the only part of the case where I feel pressed by his remarks, and which has made me feel any doubt as to the final result.

⁺ But how do they (the Court of Directors) treat the subject, in 1850, in a Despatch of that year they drew the attention of the Government of India and that of Madras to a discrepancy between a Rule of the M. C. S. Annuity Fund, "which allows of contributions to the Fund in excess of half the value of the Annuities to be refunded to parties on becoming annuitants" and the Bengal Rules which precluded a refund.

Doubtless by this time the system of refunding had been found to be inconvenient; but what is the suggestion?—not that it is a rule or practice that they had no notice of—or that it is not in accordance with their arrangements with the service—nothing of the kind, but the Government is desired to adopt such measures in co-operation with the Government of India "as may appear best calculated to induce the Civil Service at your Presidency to abrogate it."

Then what is the direction contained in the Despatch of the following year, 1851, when the Madras Civil Service had declined to abrogate the rule authorising the refund?

It is as follows: The proposition for abrogating the rule of the Madras Civil Service Annuity Fund which provides for refunding to its Members on becoming Annuitants, the amount which they may have contributed in excess of half of the value of their Annuities, having been circulated for the votes of the service, and rejected, we consider it necessary to lay down a principle for regulating the interest to be allowed on such excess when it occurs; we therefore direct that 4 per cent. annual interest only be allowed on the subscriptions of Members in excess of half the value of their annuities, and their accounts with the Fund be adjusted accordingly. "I will only ask is this the language or conduct of parties, who have had a new term introduced into their agreement without their consent?"

25. It appears to me however, after allowing their

their full weight to the circumstances here so forcibly and justly relied on by Chief Justice Rowlinson, as showing knowledge and approval on the part of the Honorable Court, that he has attributed to them an effect beyond the utmost that they can legitimately have.

26. Let it be conceded, for the sake of argument merely, that they do in point of law imply a full assent, on the part of the Honorable Court, made with full knowledge of the facts, to the principle of Refunds as laid down by the words introduced in 1838 into the 16th Rule; the question yet remains, what sort of Refund did the Court thus assent to, or, in other words, whence was such Refund to come, and by whom was it to be paid? The 16th Rule, and the Plaintiffs' Bill, both agree that the refund they speak of was a Refund to be paid by the Trustees, out of the Annuity Funds in their hands - and it was to this proposition - to a Refund of this kind - that the Honorable Court assented, if indeed their acts and correspondence above mentioned do really constitute an assent.

27. If therefore the Chief Justice had decreed the Plaintiff entitled to only that which he prayed, viz to a Refund to be paid him by the Trustees out of the Annuity Fund, the East India Company being

mainly rested his case as establishing Refunds, (and the Chief Justice his Decree) were not shown to have been so passed (for the best of reasons, because they were not so passed) but the Rules of 17th June 1853 which declare, in substance, that there shall be no Refunds, and which were passed before the Plaintiff accepted an annuity, and while he was a subscriber to the Fund, and was therefore bound by any Rules regularly made by the requisite Majority of the subscribers - these Rules against Refunds were shown to have been regularly made - Yet the Decree, though passing over the point in total silence, does in effect declare that the Plaintiff is entitled to Refunds in consequence of a Rule not shewn to have been regularly made - and notoriously not so made - but that he is not bound by the later Rule, tho' proved to be regularly made, which declares in substance that there shall be no Refunds!

34. It was said, I am told, that the Plaintiff's interest in the Refund was a vested one, and therefore could not be divested. I regret the Court was not pressed to give some specific intimation of its opinion on this point. To me it seems clear that

that the Plaintiff never had a vested interest in the Refund - even supposing the words added in 1838 to Rule 16 to have been regularly added and to have established Refunds. - It might indeed, on this supposition, have become a vested right, and would have done had he, the Plaintiff, taken his Annuity before the Rules of June 1853 had been passed; but, till then, his right was merely a contingent one, liable to be defeated if a Rule such as that of June 1853 should be regularly passed at any time before he took his Annuity: and which, therefore, as such a Rule was so passed before that event, was defeated before he took his Annuity, and therefore never became a vested right. - This may be further shewn by another consideration: the Plaintiff's right to an Annuity was always, until it was offered to and actually accepted by him, liable to be defeated by four occurrences, 1st his death before he had served the required time - or 2nd before his seniors were provided with Annuities, or, at least, had had the refusal of them - or 3rd his dismissal from the service, or 4th his inability to pay up the half value. His right to the Annuity therefore was contingent on none of these occurrences

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35. This point alone, in my opinion, would be fatal to the Decree. - I regret having been unable to forward this letter as early as intended. I began it a month ago, but a succession of references and other matters requiring immediate despatch prevented me from finishing it till the Christmas holy days gave me some leisure.

I have the honor to be

Sir

Your Most Obedt. Servt.

Fort St. George }
30th December 1854 }

Wm. Henry Smyth
Advocate General

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Ordered that the above letter be forwarded.
At - ed to the Honorable the Council of

Directors in continuation of the previous

correspondence on the subject of the

Trust Roberton versus R. E. & Company &

Trustees of the Indian Civil Fund

J. W. M. Fort George, 2
8 January, 1858. J. W. M.

4.1.57

To the Advocate General - Disputes

Sept. 1858 - 1000

With an order

Final Act to Engd 18th Jan'y No 1
of 1838. —

Financial. 1837. Sept. 10

From the Advocate General.
Madras.

D/30 Dec 1837.

D/5 Jan 1838.

No 11.

States in detail the principal grounds upon which the Appeal Petition in the Case of Andrew Robertson vs the East India Company ought to succeed.

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With an Order
With an order