

MADRAS RECORD OFFICE.

Government of Madras.

Judicial DEPARTMENT.

G.O. No. 1086	Press ~~Mis.~~
<i>53-54</i>	
Dated 9-8-1948	

Not to be folded or roughly handled

Fort St. George, Judicial Consultation, 10th August 1858.

No. 53. Read the following letter from J. R. BOYSON, Esq., Honorable Company's Solicitor; to the Chief Secretary to Government, dated July 30th, 1858, No. 417.

SIR.

1. I have the honor to acknowledge the Extract from Minutes of Consultation noted in the margin. I submitted same for the consideration of the Advocate General and have since had frequent communication with him thereon.

2. I now forward for the information of Government a copy of his report and opinion as to the duties which are and ought to be performed by the Law Officers of Government in virtue of their appointment.

3. The Advocate General has gone so fully into the subject that I do not think it necessary to add any further remarks.

COPY OPINION.

1. The duties of the Law Officers may, it appears to me, be comprised under the three heads of Criminal business, Civil business, and Advising.

CRIMINAL.

2. I consider it to be the duty of the Law Officers to conduct all Criminal cases where the interests of Government are concerned, or which the Advocate General, exercising the powers of the Attorney General, considers of sufficient importance, on public grounds, (ex. gr. the peace, health, or morals of the public) to require him to conduct the prosecution.

3. I have more than once, at the instance of the late Chief Magistrate, prosecuted in cases of apparently no special importance, but where he informed me there was a good opportunity of transporting Criminals, whom, though well known as old and dangerous offenders, the Police had hitherto been unable to bring to justice.

4. I have also always hitherto conducted the prosecution in all capital cases, and in all others, in which the presiding Judge requested my assistance. In some of these cases I consider that I acted rather Amicus Curiae than as Advocate General, and in either capacity—the latter more especially—I should always feel myself at liberty to act according to my own discretion, according to the circumstances of the case, even if my opinion should differ from that of the Judge or Court, and to prosecute or to abandon any prosecution after it had been commenced according to my own judgment and discretion. I mention this particularly, because this right was once questioned at Bombay, in 1845, and, on reference to the Home Government the Law Officers of the Crown, one of them the present Lord Chancellor, gave a decided opinion, a copy whereof is annexed in favor of the undoubted right of the Advocate General to act solely according to his own judgment and discretion in such cases.

CIVIL.

5. I consider it the duty of the Law Officers, as such, to conduct or defend all cases in which the Honorable Company are parties: also all cases where servants of Government are sued in their individual capacities for acts done by them under the immediate orders of Government, and respecting which they had no discretionary powers, or freedom of action, such as the action brought in 1848 by Vencataroyaloo Naidoo against Sir Henry Montgomery, Chief Secretary to the Government of Madras and against the Publisher of the Fort St. George Gazette, for Libel for publishing in the Gazette an Order of the Governor in Council respecting the Plaintiff, which order was signed by Sir Henry Montgomery as Chief Secretary. As another instance I cite the case of Captain Collyer of the Madras Engineers sued in 1854, I think, in the Supreme Court, on the Small Cause side, on account of some work upon the Cochrane Canal performed under his direction, under orders from Government. In this case time pressed, and I therefore defended him, and non-suited the plaintiff, without waiting the result of a reference to Government.

6. I consider them equally bound to do so in all cases of a public nature, such as that noted in the Extract Minutes of Consultation, (No. 870, Judicial Department) of 29th June 1858, now under reply, both as regards the liberation of the slaves and the condemnation of the vessels and I think that the attempt to distinguish between the

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liberation of the slaves, as a public concern and the condemnation of the vessels as a private one, was altogether erroneous and untenable. If, however I understand para. 2 of the Extract Minutes of Consultation correctly, it would lead me to suppose, that there must have been some misunderstanding concerning this case. I can hardly think that it could have been meant to contend seriously that the services of the Law Officers in that case, were not to be given at all events, and under all circumstances, and, in the first instance at all events, free of expense. And I almost incline to think that the question of remuneration must have arisen subsequently and only in consequence of the realization of the sum of £1005-2-6 or probably more, by the exertions of the Law Officers. In such cases certainly it has, I believe, *always* been the practice, at all three Presidencies, whenever a Fund has been recovered, whether for the Crown or the Honorable Company, by the exertions of the Law Officers to *allow* them (I do not say as a matter of right) their costs out of such Fund, if not recovered from the adverse party, which, in cases of success, they almost always are, and in which *latter* case, they are always allowed *as a matter of course*. The cases in which the Law Officers' costs have been paid out of funds recovered by their exertions, have been, and are likely to be, so few, that it may deserve consideration, whether it is worth while to introduce a new rule, and to set aside the usage which has hitherto prevailed.

7. A somewhat analogous case was that of Audeenarrain Braminy convicted in 1835 for embezzling money from the Sudr Treasury, which money Mr. John Carnac Morris was ordered by Government to make good. Subsequently in 1844-45, Mr. George Norton, then Advocate General, exercising the powers of the Attorney General under the 53 George 3 c. 155 Section CXL, sued Audeenarrain's debtors and recovered considerable sums, the Law Officers as usual receiving their costs, as in the case of a private client, out of the monies so recovered. In this case the question was fully considered, for Mr. Morris strenuously denied the right of the Law Officers to receive any costs asserting that the Government had *given him* the services of their Law Officers. * Letter 18th July 1845 para. 6. which the Advocate General* denied (I think correctly) that the Government, *could legally do*, a view in which Government would seem to have acquiesced.

8. While on this subject, it may be as well to mention a somewhat similar case showing what, in my opinion, is *not* the duty of the Law Officers of Government. In 1847 or thereabouts a gentleman bought a house and ground from Government, not far from Madras and, according to the universal rule between vendors and purchasers, ought to have prepared his own conveyance, but happening to have some influence with the Members of the Government of the day, Government ordered their Law Officers to prepare the conveyance for this gentleman. Government might, with equal propriety, have directed them to prepare his Will, or his Marriage settlement. In this case, not only was the preparing of this conveyance for a private individual wholly *foreign* to duties of the Law Officers, but it was more, it was *directly opposed* to those duties, which are, in such cases, to consider the interests of the East India Company *only*; whereas here the Law Officers had to lay those interests aside and consider only those of the purchaser. It is true that, in this particular case, there may have been little or no such conflict of interests; but, in many cases, it is far otherwise, and it is the principle to which I would call attention. Moreover, had a flaw been subsequently found in the conveyance, the purchaser or his assigns would in consequence have had a right to come on the East India Company, which could not have been the case had the purchaser been left, as he should have been, to select his own Solicitor and Counsel.

9. Again, it has long been the practice at Madras, contrary to that which obtains, I believe, at Calcutta, and at Bombay, and certainly in England, to require the Honorable Company's Solicitor to prepare gratis, the contracts for contractors taking contracts from Government at the trifling, and such as would be of no moment to any one contractor, whilst the present practice at Madras deprives the Solicitor of fees which if I am right in my impression as to the rule prevailing at Calcutta and Bombay, he is there, as he certainly is in England, considered to be fairly entitled to.

10. It used, at one time, to be the opinion, at least apparently, of every Government servant, who was charged with Magisterial duties, that Government and the Law Officers of Government were bound to defend him whenever any action was brought against him in his Magisterial capacity, whatever the nature or quality of the charge against him, and wholly irrespective of

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whether he was right or wrong in his proceeding; one consequence of this would be (if indeed it has not actually been the case, as I rather think it was in one or two instances) that, in assessing damages, if the Magistrate were decided to have been in the wrong, the Court—I do not say rightly—might be tempted to consider the ability of the mulcted party to pay, and to award much heavier damages, if it appeared that Government would pay them, than would have been awarded against the Magistrate, if he had been left to defend himself, now, however, the sound rule may, I think be considered as established here, as it has long been at Calcutta, that Government will indeed always, if requested, advance the Magistrate funds for his defence, but will never commit themselves by undertaking (while ignorant of the real merits, which *never can* be fully and satisfactorily ascertained before trial, or in *some* manner hearing *both sides*) the defence of and so identifying themselves with conduct, which may ultimately prove to have been highly illegal and unwarrantable.

ADVISING.

11. The Law Officers are bound to advise Government whenever required: also to advise the Accountant General without the previous sanction of Government, the nature of the business of his Department requiring often immediate attention. In some instances this may also, for the same reason, be the case with the Collector of Sea Customs. In no other case, however, do I consider that it can be necessary for any Officer or Department of Government to seek the advice of the Law Officers without first obtaining the sanction of Government. In such cases, of course, it will be always competent to the Law Officers to advise Government when they consider the matter one, in which Government ought not, by its Law Officers or otherwise, to advise, or act for or in any way identify themselves with the parties so applying, such as individuals or bodies having discretionary or fixed legal powers and whom Government has no legal right to direct, or to control (except by removal) ex. gr. Magistrates, or the Board of Municipal Commissioners, or any other individuals or bodies paid from rates and taxes, and not in the direct service of Government.

12. Perhaps the drafting of Acts may be conveniently considered under this head. It would seem, of late years, to have become a not uncommon practice with the Indian Members of the Legislative Council, whenever applied to for an Act by their respective Governments, to reply by desiring that the Law Officers of those Governments might be instructed to prepare a draft, though, I believe, the preparing of such Acts is the *only* duty (and a tolerably well paid one) the Indian Members of the Legislative Council have to perform. I would particularly desire not to be understood as here meaning to complain of my own individual share of such drafting, for it has been very small and never has devolved upon me but in cases where the duty was clear and unquestionable. I only regret it has been of so little use, for the general answer from Calcutta, has been either that the Legislative Council think such an Act is not required, or that it had better be postponed so as to be inserted in that very questionable experiment the ever forthcoming Penal Code, and this, after the Government of Madras, and its locally interested Officers and public bodies, had declared that the Act was urgently wanted, and that the Draft Act would meet the urgency of the case. In other instances, carefully drawn Acts have been emasculated by a gentleman utterly unacquainted with Law (I might instance especially the Draft of the Madras Marine Police Act) in a manner safer to insure their complete failure. In these cases, the preparing such Drafts was a mere and absolute waste of labor and time, what I would suggest on this subject is that, in my opinion, in almost all cases the desired end would be far better obtained if the Officers or Departments, who consider that such Acts are required, and who are familiar with the subject (which often the Law Officers are not,) would prepare full instructions showing clearly and in detail, the various provisions they considered necessary; that then, the Legislative Councillor should prepare the Bill in such manner as he may deem desirable (for every body has his own style of Drafting;) and that then the Draft Bill and the instructions should be laid before the Law Officers of the Presidency to which the Bill relates, for their revision and suggestions.

(Signed) THOS. SYDNEY SMYTH,
Advocate General.

July 27th, 1858.

(True Copy.)
(Signed) J. R. BOYSON,
Honorable Company's Solicitor.

Fort St. George, Judicial Consultation, 10th August 1858.

OPINION.

Her Majesty's Attorney and Solicitor General are requested to peruse the accompanying letter of Viscount Mahon to the Solicitor of the India Board and the correspondence therein referred to, and to give their joint opinion on the question stated by His Lordship "whether in criminal cases it is a power legally left to the discretion of the Advocate General at Bombay to abandon a prosecution, copies of the depositions respecting which have been applied for on the part of Government, in order that such cases might be prosecuted by him (the Advocate General.)"

We are of opinion, that it is competent to the Advocate General at Bombay to abandon any prosecution in which the depositions have been applied for on the part of Government in order that he might prosecute the case. It admits of no doubt that under whatever circumstances the Advocate General is charged on the part of Government with any prosecution, it is exclusively a matter for his judgment and discretion whether he will abandon, or prosecute the case.

Temple, November }
28th, 1845. }

(Signed) FRED. THESIGER,
(") FITZROY KELLY.

(True Copy.)

(Signed) W. ESCOMBE,
Secretary to Government.

(True Copy.)

(Signed) A. S. LEMESSURIER,
Advocate General.

(True Copy.)

(Signed) T. S. SMYTH,
Advocate General.

(True Copy.)

(Signed) J. R. BOYSON,
Honorable Company's Solicitor.

No. 54. To the Secretary to the Government of Bombay, dated Fort St. George, 9th August 1858, No. 1086.

SIR,

I am directed by the Governor in Council to acknowledge the receipt of your letter of 7th June 1858, No. 1323, and in reply to forward a communication from the Company's Solicitor dated 30th July last, submitting a statement of the duties performed by the Law Officers of Government in virtue of their appointment.

(Signed) T. PYCROFT,
Chief Secretary.

Exd F. Cartledge.

Judicial Department

No 1086.

To The Secretary to the Government of Bombay

Sir,

I am directed by the Governor in Council to acknowledge the receipt of your letter of 7th June 1858 No. 1323, and in reply to forward a communication from the Company's Solicitor dated 30th July last, submitting a statement of the duties performed by the Law Officers of Government in virtue of their appointment.

Fort St. George,
9th August 1858.

JP

At Bombay on 10th August 1858

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In Dy. to Comd. 10 August
Provincial MSS 80th

20/1005

The day to the foot of
Humbay

At 1/4 day 1/58

Feb 20/59

acknowledging the receipt of
this letter and in reply forward-
ing a communication from the
General's Camp and division
detracting a statement of
duties performed by the same
Officers of Government in
view of their appointment.

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