M.R.O. 1—38,000—16-10-20.

MADRAS RECORD OFFICE.

Government of Madras.

Judicial DEPARTMENT.

G.O. No. 1744-1745 — Press
— Mis —
8-9-10

Dated 18-12-1918

Not to be folded or roughly handled

No. 8. Read the following letter from C. F. CHAMIER, Esq., Acting Register to the Court of Sudder Udalut; to T. PYCROFT, Esq., Chief Secretary to Government, dated 4th December 1858.

SIR,

1. I am directed by the Judges of the Sudder Udalut, to submit the following preliminary observations which they have to offer on the proposed Civil Code of procedure, forwarded for their opinion thereupon. Their more detailed remarks, will follow as soon as practicable.

2. The Judges are led thus to divide their communication on the subject of the Code owing to the short period allowed to them for expressing their views, and their wish that the observations they now put forward may be printed in time to reach the Legislative Council, by the date on which they purpose to deal with the Code finally.

3. The Judges are constrained to notice the inconvenience and disadvantage they are subjected to by being required to meet so important a reference within such a circumscribed period. The resolution was taken by the Legislative Council on the 6th Ultimo, to accord two months from that date for the expression of public opinion upon the Code. On the 22nd Ultimo, the amended copy of the Code reached the Judges. This has to be circulated among them, and their joint observations on it, if to be received at all, have to reach Calcutta by the 6th Proximo. The heavy and constant current duties of the Court reduce the period for their deliberations on the Code to a very narrow measure. It is to be regretted moreover that time has not been afforded to obtain the views of the Judges in the Provinces upon measures in the efficiency of which they are so much interested, and of which they are so competent to judge.

4. The Judges are impressed with a sense of the value of the proposed Code. It is most clear, comprehensive, and reasonable in its provisions, and its intentions are conveyed in the simplest and plainest terms. They think, however, that it does not go far enough in the line of reform projected. and that it would have been preferable, before regulating the procedure of the Courts, to have determined in what way the Courts themselves are to be constituted.

5. The sole object of an examination held on a disputed claim should be to secure to the Judge the materials on which to form his judgment. Every procedure not required for the attainment of that end is, so far as relates to the deciding Judge, an unnecessary labour; and as regards the suitors a needless cause of delay, anxiety, and expense. As regards the ends of justice, such added delay increases the opportunities of perverting them.

6. The procedure of the County Courts in England, and the analagous Small Cause Courts in India, is a model for simplicity and despatch. The system works well in respect of the class of suits to which it is applied, and the Judges know of no objection to its extension to suits of all descriptions. The Courts in question deal ostensibly with claims for personal property limited in value to £50, or Rupees 500. Their range of inquiry often however embraces questions connected with rights in real property, and if fair means are afforded by the system of investigation practised in these Courts, for deciding on claims to the value of Rupees 500, it is difficult to say why claims of a far higher value may not be decided fairly by the like means.

7. In the proper use of such a system everything no doubt depends upon the capacity of the Judge who has to administer it. But this is equally true of any other system. No rules of procedure will convert an inefficient into an efficient Judge. The result of all he may do towards bringing a suit before him to a close will appear in the judgment he gives, and there the stamp of the person filling the tribunal will be impressed. All that can be done towards checking the evil of a bad decision will be to provide in the record the materials upon which remedy may be given in appeal. Whatever procedure is established for this end, will lie outside what the Judges have noticed as that only truly necessary to provide for the settlement of a suit. That is, it will lie outside the necessities of the Judge entrusted with the suit, and it will bring with it the train of evils in superfluous labour, delay, expense, and risk of justice, to which the Judges have above adverted as consequences.

8. It is therefore a subject of the highest importance that the Legislature should raise up the best possible Courts of Original Jurisdiction, which the circumstances of the country will allow of providing, and give them the simplest and most expeditious form of procedure that can be devised.

9. The improvements for facilitating the progress of a suit towards final decision, which the Judges discern in the proposed Code, are simplicity in the pleadings, so that the whole may be taken in one day, the prevention of all avoidable remands by the Appellate Court, the limiting the grounds on which Special Appeals may be admitted, and the reducing the disposal of such applications to the result of one hearing. The Judges would like to see the step in reform advanced to the enabling a Court to dispose, ordinarily, of a suit in one day, as soon as brought before it for hearing, as is accomplished daily in multitudes of suits by the County and Small Cause Courts; and they would wish the remedy in appeal to be restricted to the redressing such error only as all, even the best constituted Courts of Original Jurisdiction, are liable from time to time to fall into.

10. The existing impediments to the expeditious final disposal of a suit, which the Judges see maintained in the proposed Code, are:—

1st. The requiring the Courts to lay down the points on which evidence is to be offered, before the oral evidence can be put in; necessitating thus, at the least, two hearings of every suit by the Court of Primary jurisdiction before it can be brought to a close.

2nd. The requiring the depositions of witnesses to be recorded, thereby prolonging the hearing of the suit in its last stage of hearing.

3rd. The system of Appeal over Appeal, first of right extending over the whole matters in issue and the whole record, and secondly, on special grounds.

11. The reform contemplated in the proposed Code thus falls, in certain important respects, short of reaching all the matters open to reform.

12. As regards the first object above noticed as left in operation by the Code: It sounds well in theory that the Court should lay down precisely the issues to be tried before proceeding to receive evidence or try them. In practice the measure, the Judges are persuaded, has little real value. An incompetent Judge will not execute this or any other duty efficiently, and a competent one will assuredly not overlook the true bearings of a suit in his progress with the enquiry and in his judgment given at the close. Moreover, in Courts heavily laden with business as ours are under the present laborious system of procedure, many will not inform themselves of the details of the suit at this inconclusive stage, but will leave it to underlings to draw up the issues. The consequence is that very ordinarily these issues consist of mere copies or excerpta from the pleadings, made without discrimination or effort of mind. And rarely in suits of any intricacy, especially those coming from the native tribunals, are light and clearness evolved in the procedure.

13. Furthermore, the great mass of the suits in this Presidency are of too petty a nature to call, as a matter of necessity, under any point of view, for the process in question of clearing up the issues. The average for five years from 1852 to 1856, gives the following results as descriptive of the litigation in the Presidency.

Suits for claims not above Rs. 20 in value..... 45,264.
Do. from above that sum to Rs. 500..... 52,634.
Do. of higher value than Rs. 500..... 1,577.

Thus but 1 suit in 63, lies outside the jurisdiction of the Small Cause Courts in point of value. In point of description, that is distinguishing suits for real from those for personal property, but 1 in 11 is without the limits of their jurisdiction.

14. In view of all the above considerations, that is the avoidance of unnecessary labor to the Judge and delay and expense to the suitors, the little practcial results obtained from the process, and the petty nature of the bulk of the litigation in the Presidency, the Judges think that at the utmost it may be left to the discretion of a Judge to record or not the points in issue before receiving the evidence the parties may prove to adduce. The check against the prodution by parties of needless witnesses would be sufficiently supplied by taxing them in the apportionment of the costs with the expenses incurred on account of the witnesses proving to have been unnecessarily brought forward.

15. It appears to the Judges far preferable that the burden of conducting cases to an issue should fall on the parties and their pleaders rather than on the Courts. They would therefore have (as now) a statement put in by the parties containing a list of their witnesses and the points they are called to prove. The Judge would thereon decide whether these points were of import to the case, and would accordingly accept or refuse to hear the evidence offered. If at any stage he might deem further evidence than that produced requisite, he might call for it. At present the burden being cast upon the Judge of setting out the issues, should he have done so defectively the parties at a further stage of the suit, when in appeal, have the opportunity of taking exception to his omission, and can throw back the case. The Judges observe that if the rules of pleading prescribed and illustrated in Chapter III, Section 2 of the proposed Code be strictly enforced, the Judge's setting out the issues will be little more than a labor of supererogation, The Judge should scarcely be required to patch up the work of the suitors and their pleaders, a resource for them which will encourage laxity on their parts, especially where a native bar is in question. The Judges also observe that Section 159 of the above chapter provides that the points for determination shall be specified in the Judgment, which appears to be all that is necessary towards requiring due attention to this particular.

16. According to the plan advocated by the Judges, the witnesses, as the documents might be produced on the day the suit first came to a hearing, and the whole suit, as in the Small Cause Courts, might be brought to a close in one day.

17. As regards the second object which the Judges wish to secure, namely, the shortening the stage of the examination of the witnesses, their recommendation is that the Judge's notes of evidence be made the sole record of the depositions. Such notes may be taken down nearly as fast as the witness speak, and very many may thus be examined and disposed of in one day; certainly many more than are ordinarily comprehended in one suit. These notes might be explained to the deponents, altered or added to at their instance or on the requisition of the parties to the suit, and attested as depositions usually are now, after which, to secure legible handwriting, copies might be made and kept with the original notes on the record.

18. The Judges would call attention to the proceedings of the Honorable the President of the Council of India in Council of the 12th July 1858, whereby this system of examination having been found attended with complete success in the trial of petty Criminal cases in Assam, it was, under authority from the Honorable the late Court of Directors, prescribed for adoption throughout all the non-regulation provinces under the Government of India.

19. The advantages of this system pointed out in the correspondence attached to the said proceedings are as follow. "It will not only generally tend to improve and expedite decisions, but remove that frequent source of complaint that Omlahs distort the evidence in taking it down. It will make young officers trust to themselves and their own note-book for a memorandum of what has been deposed, instead of a native record, and it will give general satisfaction to all but those who are interested in obstructing or delaying justice." "The system is now in full operation, and has entirely answered expectations. Justice being greatly expedited, the influence of native officers about the Court checked, the swarms of petty Attorneys who made a livelihood by fomenting litigation have nearly lost their occupation, false and frivolous complaints have decreased, whilst to the people who have wrongs to complain of, the change has proved most beneficial and acceptable." "The system was found to work so well that it has been extended to the trial of cases of a more heinous character, the only difference being that the evidence is taken down more in detail." "There is no reason why the system should not be applied with equal advantage to civil and revenue suits, at least up to a certain amount." "There can be no rational doubt as to the superiority of such a system over any in which the decision of the Court is derived from hearing proceedings read over, and Magistrates and their Assistants should be prohibited from deciding cases in any other way than on the *vivâ voce* principle which appears to be applicable to all cases." "It would be a most important step towards purifying our Courts from the unlawfnl influences too often used to impede justice both in and out of doors. It would be but little extra labor to the really pains-taking Magistrate, while it would compel those who may now devolve the preparation of cases on their Omlah, to exert themselves."

20. Such are the sentiments of those who have tried the system herein advocated. At the risk of appearing prolix, the Judges will offer a few more observations on the same head. Where a Judge has his time fully occupied, or if indolent, he will be liable not to devote his attention to an

examination involving such protraction of time in taking it as when a third party has to write down every statement in full grammatical sentences, and the less so when the language used is not his own. Very commonly then the whole process of taking and recording the evidence is left to a ministerial Officer. His opportunities of turning the statements to any side, or of promoting witnesses as they appear in succession to keep them in accord, or of suggesting statements to produce discord and break down the evidence, according as his services may have been purchased by an interested party, are thus very great. The Judges are assured that much in perversion of justice is practised in this way. Again, where the Judge personally conducts the examination and the course thereof is obstructed only by the time occupied in taking down his notes, the mind of the Judge will be in continued action, and the thread of his thoughts in questioning the witness unbroken. He will be in proper posture to cross-question and expose a false witness, and to elicit the truth. He will moreover be called to watch the demeanour of the witness in giving his answers, and the witness will be susceptible of the effect of the eye of the Judge upon him. He may not dare to make statements to him, which he would give with composure to a ministerial servant not interested in exposing him. The examination will be a reality, in lieu of the mere semblance of one as too often at present, and in the celerity with which the whole body of witnesses will be disposed of in the course of the day, that opportunity of tutoring will be taken away which exists when the examination extends over more than a day, and the unexamined witnesses are accessible to the interested parties in the interval.

21. The Judges notice that Chapter III, Section 146, prescribes that Judges shall take notes of the evidence as it proceeds. This call for their personal attention to the reception of the evidence may however be easily evaded by their taking down these notes as the depositions are read to them. The Judges also notice that by Chapter V, Section IX, the Judge's notes are all the record necessary to be kept of the examinations held in questions of pauperism, investigations which may involve very extended inquiry into rights in property of all descriptions.

22. The Judges have only to add that every advantage from the system of examination they are advocating is such as will flow from it to whatsoever classes of cases it may be applied, and that the higher the interests to be protected as the cases may rise in importance, the greater will be the amount of benefit to be obtained by its use. So well is this understood in England that the system in question is there practised in all the tribunals, Civil and Criminal, and in all cases coming before them of whatsoever complexity or importance. It is therefore also the system prevailing in the Courts established by Royal Charter in India, as also in the Colonies. Impressed with the view of the applicability of this system to trials of all descriptions, the Judges have already thus recommended it for adoption in dealing with the above papers connected with the practice in Assam, in their communication to the Government of the 19th October 1858, as also in their previous communication of the 4th August 1858, made on the subject of re-constituting the Courts in this Presidency.

23. The Judges have now to advert to the third head on which they seek for reform, namely, the system of Appeals. The consideration of the limits to which the right of Appeal may be allowed is intimately bound up with the question of the constitution of the Courts. The Judges must therefore here request attention to their propositions for a re-constitution of the Courts in this Presidency made in their communication to the Government of the 4th August 1858, before adverted to.

24. The Judges then proposed to have no Court of original jurisdiction but such as might be composed of three Judges, one of these being a European. They expressed their belief that such Courts would prove efficient, and command public confidence in a degree to justify their decisions being left to be final, save where such error or defect might have occurred as the present system of Special Appeal is designed to remedy. That is, the Judges proposed that there should be but one Appeal, in any case, and that only on special grounds. They however extended the grounds for Special Appeal in order to give better power than at present of affording substantial redress. The proposed Code perpetuates the right of Appeal in every case, and over the whole matter in the case, and allows of a Special Appeal, limited however to being on two grounds only, namely, to correct error or defect, first of law, secondly of procedure.

25. The recommendation of the Judges depends, as has been explained, upon the character of the Courts to be entrusted with original jurisdiction. If adopted, it will sweep away, as made

superfluous by improving these judicatories, a large and oppressive body of existing Judicial labour, and therewith very materially reduce the delay, expense, and risks of litigation.

26. The reduction of the grounds on which Special Appeals may be preferred, made in the proposed Code, will, the Judges have to observe, be suitable only where the Appellant Courts may be of an efficient order. The Judges have the hope that it is the design of the Legislature to constitute such Courts. The bulk of the Appellate Courts existing in this Presidency are not of a character to be left with such narrow check in Special Appeal as provided in the proposed Code. They require nearly as much supervision over their decisions given in Appeal Suits as do the Courts of primary instance in respect of their decisions. These Appellate Courts, it will be remembered, are composed of Judges of several grades. There are the Principal Sudr Ameens who are chiefly natives drawn from the District Moonsiffs, the selection of whom does not always prove to have been a happy one. Then there are the Subordinate Judges. These are Europeans, but for whom no Judicial training exists prior to their being placed on the bench. They have to learn their duties at the expense, it must be said, of the suitors. There are also a class of officers appointed occasionally to relieve the Appeal files of the Civil Courts, namely, the Assistant Judges, who are of the same stamp as the Subordinate Judges. Lastly, there are the Civil Judges. These have had judicial experience in the lower capacity of Subordinate Judge, but the constitution of the service does not secure the promotion to this grade of none but fit men. All these Courts it will be observed are constituted with but single Judges, and the Judges trust, with the limited means of redress against the decisions given in Appeal provided by Special Appeal appearing in the proposed Code before them, that it is not in the contemplation of the Legislature to retain, as appellate tribunals, any such Courts as are now entrusted with the decision of Appeals in the provinces of this Presidency.

27. If however none but efficient Courts of Appeal are to be set up, that is, Courts composed of a plurality of experienced Judges, it appears to the Judges that the reduction of grounds for Special Appeal made in the proposed Code is not only warrantable, but that this may with propriety be carried still further. It is an evil in the present law of Special Appeal that it affords endless temptations and opportunities to suitors and their legal representatives to open out all, or nearly all the merits of a case, in the hope of inducing the Court to interfere with the Decree adverse to them, where there may be no true grounds, as limited by the law, for admission of the Special Appeal. Thus if it be a question whether the Decree "hath failed to determine all material points in difference in the cause," a hearing thereupon may involve a consideration of all really material to the suit that may have been met in the Decree, so as to understand the weight and effect of the alleged omission. Again, if the question be of the "misconstruction of a document," this may be made to include the effect given to the document, and in order to judge whether the alleged misconstruction is one to influence the decision, the force of all the other documents and oral evidence given in the suit may have to be considered. The whole examination may, and often does, end in the rejection of the Special Appeal as untenable. The law goes far enough to necessitate the inquiry, and not far enough to enable the Court to grant redress where in the process thereof the decision below may be found to be a faulty one, but not so in respect of any of the circumstances giving the Court of Special Appeal jurisdiction to interpose. Thus a vast amount of needless judicial labor, with its attendant delays and expenses to suitors, is under the present system incurred. The Judges look upon the last ground for Special Appeal retained in the proposed Code, to be of a similar character to those the effect of which is above illustrated, but certainly in less degree. If the opportunity be accorded of objecting to a Decree that the treatment of the suit involves "error or defect in the procedure or investigation of the case," the Court may be taken over the whole examination held in the case before it can be determined whether the error or defect is of a "substantial" nature, so as to have affected "the decision of the case upon the merits." Such a question in itself is not one involving a higher amount of discrimination or knowledge than any other matter of appeal such as it is proposed to leave absolutely to the adjudication of the Courts of regular Appeal; on the contrary, in most cases it will embrace only matter lying on the surface of the treatment of the suit, not liable to be overlooked or misunderstood by such Court of Appeal. The question is furthermore not one ordinarily involving the extensive results of an error in law, but will often only affect the particular suit in respect of which it has arisen. It is also a legitimate matter for

an application for review of judgment from the Court that may have fallen into the error to be rectified, and this, especially should it have been committed inadvertently, would be the most proper mode of seeking redress to appoint. The Judges would therefore have this ground of objection omitted as one warranting recourse to the Court of third instance. The Special Appeal would be then only where law, or the principles of equity, might have been infringed by the Court below, and such a ground of objection would rarely lead to unfruitful investigation in the superior Court.

28. The Judges gather that it is designed by the proposed Code that when a Special Appeal is presented and brought to hearing, the question raised therein is to be settled absolutely at this hearing, and that the procedure of the Court is not to be divided into two stages, as at present, one at which the admission of the Special Appeal is allowed, and the other when the matter in Appeal is adjudicated on. This amendment they highly approve, especially in view of the limited grounds on which a Special Appeal is now to be sustainable.

No. 9. ORDER THEREON, No. 1744 ; dated 15th December 1858.

Ordered to be communicated to the Member for Madras of the Legislative Council of India, in reference to his letter of the 8th Ultimo, and that the following letter be despatched.

No. 10. To H. FORBES, Esq., Member for Madras of the Legislative Council of India, Calcutta, dated Fort St. George, 15th December 1858, No. 1745.

SIR,

I have the honor in reference to your letter, under date the 8th Ultimo, to forward to you
* Three Copies. the accompanying remarks* of the Sudr Adawlut, on the Amended Bill for simplifying the procedure of the Civil Court.

(Signed) T. PYCROFT,
Chief Secretary.

Exd. F. Cartledge.

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Judicial Department.

No. 1744

Extract from the Minutes of Consultation

Dated 15 December 1858.

Read the following letter from the Acting Registrar, Sudr Adawlut

+ 3 Copies forwarded to Mr Forbes on the 15th

Fort St George 15th Dec 1858

Ordered to be communicated to the Member for Madras of the Legislative Council of India in reference to his letter of the 8th Ultimo and that the following letter be despatched.

To the Member for Madras of the Legislative Council of India

Fort St George 15th Dec 1858.

Dispt. with 3 Books
& a Note from the Clerg - 15/12

Judicial Depart.t

No. 1745.

To. W.t Forbes Esq.re
Member for Madras of the
Legislative Council
of India.
Calcutta.

Sir,

I have the honor in
reference to your letter
under date the 8.th Ultimo
to forward to you the
accompanying remarks†
of the Sudr Adawlut
on the Amended Bill
for simplyfying the
Procedure of the Civil
Courts.—

† three copies.

Fort St. George,
15.th Dec.r 1858.

Judicial Consultation, 21st Dec.r 1858.

No. 1745.

Extract Mins. Cons.

Dated 15 December 1858.

Forwarding the Remarks of the Sudr Adawlut on the Amended Bill for simplifying the Procedure of the Civil Courts.

Madras—Printed at the Government Press.

243.

Entered in Index 21/12/58

In Dy. to Cons: 21 Dec.r

Judicial 1858 Departt.

No. 1745.

To, The Member for Madras,
of the Legislative Council
for India -
Calcutta.

Dated 15 Dec.r 1858.

Rec.d 4/65/59

Forwarding the remarks
of the Sudr Dewanee
on the Amended Bill
for Sympliffying the
Procedure of the
Civil Court. -

2-12-0.

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