

MADRAS RECORD OFFICE.

Government of Madras.

Judicial **DEPARTMENT.**

G.O. No.	401	Press Mis.
1-3		
Dated	2-4-	19.1860

Not to be folded or roughly handled

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*Proceedings of the Madras Government, Judicial Department,
for the month of April 1860.*

No. 1. Read the following letter from the Honorable Sir A. BITTLESTON, Kt., Puisne Justice of Her Majesty's Supreme Court of Judicature, to the Honorable the Governor in Council, &c., &c., &c., Fort Saint George, dated 26th March 1860.

Referring to the letter of your Excellency in Council, bearing date the 27th January 1860, forwarding to the Judges of the Supreme Court a copy of the Report of the Commissioners appointed to consider the defects of the present Judicial system in the Madras Presidency and their remedies and requesting their opinion upon the measures recommended by the Commissioners, I have now the honor to submit my reply.

Having given to the subject of that Report as much consideration as the pressure of other business would permit (though less I fear than its importance deserves), I have arrived at certain conclusions as to some of the chief measures therein recommended, and consider it desirable not to delay further the expression of my own views thereon, although considering the want of unanimity amongst the Commissioners themselves even upon the most important points and the great differences of opinion known to exist amongst others well qualified to judge, it would be presumptuous in me to say that I entertain any great confidence in the correctness of those views.

I do not propose to enter upon any enumeration of the evils existing in the present system. The Commissioners have done so in their Report and I accept their statement as founded upon experience and investigation and as fairly representing the general opinion upon that subject. But I notice in passing that the evil to which they prominently call attention is the want of any sufficient special training in the Judicial branch of the Civil Service.

I proceed to consider some of the chief remedies proposed.

First.—As to the union of the Supreme and Sudder Courts and the constitution thereby of one Appellate Court for the whole Presidency. I think this a desirable measure, provided that the constitution of the new Court be satisfactory. All depends upon that.

If the only object to be gained were the strengthening of the Sudder Court, I should say that that object might be more easily and more simply effected by placing at the head of it a Judge with the requisite qualification of professional training; and on the other hand, if the result of the union would be, or even probably might be, to impair the efficiency of the Supreme Court or to weaken the confidence of the community in its decisions (a confidence derived from the professional training and independence of the Judges,) I should consider any advantage gained by the additional strength given to the Sudder, too dearly purchased.

But I think that the strengthening of the Sudder Court is not the only object to be gained; and that the union of the Sudder and Supreme Courts may be effected without impairing the efficiency of the latter.

The Commissioners observe that "to constitute the High Court of five Judges, of whom two only should necessarily be professionally trained men, would be virtually to give the balance of power to the unprofessional Judges and pro tanto to abandon the advantages derivable from the change proposed;" and I concur with them in the opinion that in the constitution of the High Court "the balance of power" (as they express it) should be given to the professional Judges.

I desire however to point out that the scheme of the Commissioners appears defective in this respect. It provides that the High Court shall be composed of six Judges; of whom three shall be appointed by the Crown and selected from the English, Irish or Scotch bars; and three shall be nominated by the Governor in Council and selected from such members of the Judicial branch of the Civil Service as shall have been on the bench for five years. So that, if the business of the High Court exercising the original jurisdiction now vested in the Supreme Court is to be (as it ought to be) transacted before two Judges, the scheme of the Commissioners leaves only a single professional Judge with three Civilian colleagues to dispose of the appellate business of the High Court, including (it is to be observed) appeals from the decisions of the two professional Judges.

This arrangement would I think be far from satisfactory, and seems to me not in harmony with the principles laid down by the Commissioners themselves.

*Proceedings of the Madras Government, Judicial Department,
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To remedy this defect in the plan proposed by the Commissioners, I would suggest that (assuming the whole number of Judges to be six) not less than four of that number should be Barristers; the remaining two being either members of the Judicial branch of the Civil Service, who had been on the bench five years, or Barristers at Law who had practised in India for five years. I also think it desirable that of the Barrister Judges two should always be selected from the ranks of the profession in England. With two Civilians and two Barristers, who had practised for several years in India, on the bench, the Court would not lack local experience, and the introduction of professional men fresh from the Home Courts, as vacancies in the two remaining seats should occur, would in my opinion contribute greatly to the efficiency of the new tribunal.

I observe that the Madras Commissioners propose to exclude from the list of persons, eligible as Judges of the High Court, the third, fourth, and fifth classes mentioned in the Code of the English Commissioners—i. e., certain members of the Uncovenanted Service and Vakeels—I hesitate to express any opinion on this point, but my impression certainly is, in accordance with the view of the Madras Commissioners, that at present the confidence of the people in the new tribunal would be rather weakened than strengthened by the admission of those classes.

I entirely concur in the recommendation of the Commissioners that the new Court should be created by Royal Charter; that the Judges, holding office under Royal letters patent, during the pleasure of the Crown, should be removable by the Crown only, and that no power of suspending any Judge of the High Court should be vested in the Local Government.

Further I think that any member of the Civil Service, being appointed a Judge of the High Court, should thereby become ineligible as a member of the Council.

The Advocate General seems inclined to think that it would be better to postpone an amalgamation of the Supreme and Sudder Courts, until the Sudder and Mofussil Courts had been remodelled and brought into satisfactory working order; and that opinion is, I know, shared by others for whose judgment I entertain the greatest respect. But I am bound to express my own opinion; and I cannot but believe that a Court constituted as above suggested would be in itself a great boon to the community and afford considerable help towards the attainment of further improvements. Exercising a general superintendence over all inferior tribunals, its function would be to establish, as far as possible, uniformity of decision throughout the country; to lay down general principles and to give authoritative expositions, not upon point of procedure merely but, as the occasion arose, upon many unsettled matters of substantive law.

It is, I confess, with a view to the last object that I am specially impressed with the value of such a tribunal; nor do I hesitate to say that I look to it as a step towards the general introduction throughout the Presidency of virtually the same system of substantive law which has hitherto under the Royal Charter been confined to the Presidency town.

Independently of any action of the Legislature for that purpose, it may reasonably be supposed that, in a Court constituted as above suggested, recourse would be had to general principles of English Law in dealing with cases, (and such cases affect very large classes of the community) to which no specific law is applicable but which are left to be decided "according to justice, equity and good conscience." Thus the system of substantive law administered in the Appellate branch of the High Court would gradually assimilate itself more and more to that administered by the same Court exercising its original jurisdiction; and the way would be prepared for the express introduction by the Legislature of the same system of substantive law in the Mofussil and the town.

I do not enlarge further on this subject, my views mainly coinciding, as will be noticed, with those expressed upon this point by the Advocate General, in paragraph 10 of his separate Minute and with those of the late Chief Justice Jervis and Mr. Lowe there referred to; and also as I think with the opinion of Mr. Chamier, the Registrar of the Sudder Court, who has published some useful suggestions on Judicial Reform in this Presidency. But in connection with this subject it has occurred to me as worthy of consideration whether upon the establishment of the High Court it might not be practicable and desirable to bring the Zillah of Chingleput or at least some part of it within the limits of the original jurisdiction of that Court. The central

*Proceedings of the Madras Government, Judicial Department,
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position of Madras, with reference to the surrounding district of Chingleput suggests some alteration of this kind.

I wish to add, that whatever might be the constitution of the High Court, I should consider it objectionable to give a right of appeal from the Judges exercising the original jurisdiction to the other Judges of the Court. Any unnecessary multiplication of appeals is a serious evil; and I think that the only appeal from the High Court, whether exercising original or appellate jurisdiction, should be to the Privy Council.

I dissent therefore from the proposal contained in Section 163 of the Commissioners' Code of Procedure and from Section 165, so far as it limits the appeal to the Privy Council to cases in which the High Court exercises appellate jurisdiction; but either branch of the Court, that exercising the appellate or that exercising the original jurisdiction, should have the power of referring any particular case brought before it to a full Court.

Secondly.—With reference to the proposed constitution of the Civil Courts subordinate to the High Court, I am reluctant to express any opinion, especially in the absence of Mr. Strange's Report. The main feature, however, of the plan recommended by the Commissioners, viz., the introduction of Barristers on the Bench of the Zillah Courts, appears to offer an apt remedy for the evil generally acknowledged to exist in the present system. At the same time, I cannot refrain from expressing a very serious doubt whether the advantages held out by the Commissioners in their report will prove sufficient to induce any considerable influx of practising Barristers from England into the High Court; and I believe that at all events for many years to come the Chief Judicial Offices in the Mofussil must be filled (with perhaps a few rare exceptions) by Members of the Civil Service. I attach therefore great importance to any measures which can be adopted for severing the Judicial and Revenue branches of the Service and giving a special legal training to the Members serving in the Judicial branch. Mr. Chamier's suggestions with that object seem worthy of serious consideration.

Thirdly.—As regards the proposed Code of Procedure for all the Courts of the Presidency, I have not the time nor would it I think answer any useful purpose at present, to follow the Report of the Commissioners through the details of that Code. But I wish to say generally that I am anxious, at all events, to see the Procedure of the Supreme Court simplified and rendered as uniform as possible, the distinction between the different sides of the Court abolished or greatly modified, and the practice in the Master's Office (if it should be found expedient to retain it) greatly improved. I concur with the Commissioners in recommending the use of written pleadings and in their objections to the practice of a preliminary settlement of issues by the Court.

Fourthly.—With respect to the practitioners of the High Court, the Commissioners recommend that before the Judges exercising the original jurisdiction of that Court, the well known distinction between the functions of Barrister and Attorney shall be maintained; but they have been unable to agree upon the question whether in the appellate branch of the Court the same distinction should be enforced or whether the present practice of the Sudder Court should be followed.

The question, which is undoubtedly one of considerable difficulty and importance, presents two points for consideration, which are not, I think, kept sufficiently distinct in the Minutes of the Commissioners. 1st, ought Barristers and Advocates called by the High Court to have exclusive audience in the Court. 2ndly, assuming that privilege to be conferred upon them, ought it to be insisted upon that the Barrister or Advocate should receive his instructions from an Attorney. The 1st of these questions might properly in my opinion be left to the Court itself. I do not however hesitate to say that I am strongly impressed with the belief that the interests of the suitors will be best consulted by giving exclusive audience to Barristers and Advocates called by the High Court itself. The Commissioners are agreed that that should be the case in the Court exercising original jurisdiction, but some of them think that in the Appellate Court, Attornies and Vakeels as well as Barristers should be allowed to plead. I gather from the Advocate General's Minute that the Attornies are not desirous of that privilege; and with regard to the Vakeels at present practising in the Sudder Court the question is whether to admit them as a body amongst the practitioners

*Proceedings of the Madras Government, Judicial Department,
for the month of April 1860.*

of the Court would not tend to impair its efficiency by lowering the status of the bar. Upon the best consideration which I have been able to give to the matter, I have come to the conclusion that exclusive audience should be given to the bar on both sides of the High Court, the bar being composed of English or Irish Barristers, Scotch Advocates, and Advocates called by the High Court itself. Thus all Vakeels properly qualified might obtain admission to plead as Advocates not only on the Appellate side of the High Court but before the same Court exercising original jurisdiction, upon an equality with the other members of the bar of the High Court; and by the rules of the Court relating to the admission of Attornies, facilities might be afforded to any who should prefer that branch of the profession. The 2nd is a question of professional etiquette, and though in my judgment the interests of the Client and the administration of justice are in general advanced by the division of labour between Advocate and Attorney, I should think it unnecessary to make any provision on the subject. The intervention of an Attorney between the Advocate and the Client is enforced at home not by any rule of Court or other positive law, but by the authority of professional opinion only. And cases occur now and then, in which it is deemed permissible for the Barrister to depart from the ordinary rule. The honor of the bar is safe in its own keeping; and the public interests will not suffer by leaving this question to be settled by the practitioners themselves.

Fifthly.—Amongst the miscellaneous recommendations of the Commissioners, there are several upon which I desire to express my concurrence with them.

I concur with them in recommending the appointment of a public prosecutor, though not in recommending the abolition of the Grand Jury, which in this country especially serves I think many useful ends.

I agree also that perjury and prevarication in a witness should subject him to punishment, by fine or imprisonment with hard labour or both, to be inflicted by a summary order of the Court before which he is examined. I expressed that opinion some time ago in a charge to the Grand Jury and subsequent experience has confirmed it.

The facts of one case within my own knowledge will illustrate the importance of some such provision. During the hearing of an Equity suit before me (P. Mootoo Chetty *vs.* P. Chuckera Chetty in the first term of 1859) a witness was sworn and examined on the part of the plaintiff and made a statement at variance with that which was expected from him; upon which an affidavit was produced and shown to him in which the witness had (as he admitted) previously made a statement directly contradicting his evidence in the box. I committed him to prison to take his trial for perjury at the next Criminal Sessions. If I had possessed a power of summary punishment I should have exercised it. The result was that at the next Sessions the false witness was indicted, tried before me and acquitted. There was no Officer whose duty it was to conduct the prosecution. The Clerk of the Crown had no means of effectually doing so, but the Solicitor for the plaintiff in the suit voluntarily undertook the prosecution; and at the Sessions preferred a bill of indictment, brought certain witnesses in support of it and instructed Counsel to conduct the case in Court.

The indictment however charged the prisoner with having given false evidence in the witness box; whilst the conclusion at which I had arrived in the Equity suit after a nine days' hearing was that the evidence given in the witness box was true and that given in the affidavit false. Of course my opinion upon the evidence in the Equity suit was not communicated to the Jury upon the trial of the indictment, but a few questions put to the witnesses sufficed to show the Jury that there were many witnesses who had been called upon the first occasion who were not called upon the second, and that they consequently were in no condition to decide, which of the two statements was true.

This case suggests the expediency of an enactment that whenever a witness shall be proved to have wilfully made on oath at different times two directly conflicting statements material to the issue of a judicial proceeding, he shall be liable to the penalties attached to the crime of perjury; such a provision is in force in the Mofussil (Regulation 3 of 1826) and should be extended to the Presidency towns.

*Proceedings of the Madras Government, Judicial Department,
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In conclusion I think that the Commissioners have exercised a very sound discretion in not complicating the question of Judicial reform by any proposal to subject European British subjects to the criminal jurisdiction of the Mofussil Courts.

I am desired by the Chief Justice to express his deep regret that he is unable in his present state of health to furnish the Government with his separate opinion on the measures recommended by the Commissioners.

He has however favored me with written observations upon this letter, and those observations (though not in a form in which he would have ventured to submit them for the consideration of Government,) I have his permission to subjoin. "I concur (he says) generally in your observations with respect to the constitution of the High Court; but I think it very desirable that the new Court should retain and perpetuate the name of 'the Supreme Court' a name which has already obtained credit with the Native community.

"Although one Court instead of the two Courts may in itself be a great good, yet I think it would be a great evil if introduced immediately.

"On this point I fully agree in the views which the Advocate General has ably enforced in his Minute.

"The great desideratum is qualified Judges.

"Amalgamation will not supply this desideratum.

"India asks for men and we give her a system for bread and we give her a stone, a precious stone perhaps, at the right time but not now.

"I am anxious to begin by getting the men wanted, for I am by no means confident that they are to be got. I think that the best way to strengthen the Sudder Court would be to put local Barristers on the bench as fast as possible. They are docti utriusque juris, and practice both in the Supreme and the Sudder Courts. But are these men to be got or what other Barristers are to be got?

"There is a good deal of Indian Law relating to the religious and Civil usages of the Natives. Of this the Judges of the Supreme Court are as profoundly ignorant, as the Commissioners assume the Sudder Judges to be of the English Law. How are the two sets of Judges to work together?

"By this arrangement, called amalgamation, but really a Mezention union, until you have the life blood of law animating all the Members of the United Bench. I fear that you will imperil the success of your proposed reform.

"You press the immediate establishment of the High Court, because you say its function would be 'to establish as far as possible uniformity of decision throughout the country, to lay down general principles and to give authoritative expositions, not upon points of procedure merely, but, as the occasion arose, upon many unsettled matters of substantive law.'

"This is rather a transcendental function. Could it be safely entrusted to such a High Court as could be now put together?"

No. 2. To the Honorable Sir ADAM BITTLESTON, Knight, Puisne Justice of Her Majesty's Supreme Court of Judicature, dated Fort Saint George, 2nd April 1860, No. 400.

We have the honor to acknowledge receipt of your letter, of the 26th ultimo, communicating your opinion on the Report of the Commissioners appointed to consider the defects of the present Judicial system in the Madras Presidency and their remedies, and to state that a copy of your letter will be transmitted to the Right Honorable the Secretary of State for India and to the Supreme Government.

(Signed) C. E. TREVELYAN,
(") PAT. GRANT,
(") W. A. MOREHEAD,
(") E. MALTBY.

*Proceedings of the Madras Government, Judicial Department,
for the month of April 1860.*

No. 3. To the Secretary to the Government of India, dated Fort Saint George, 2nd April 1860, No. 401.

In continuation of my letter of the 2nd February last, No. 124, I am directed to forward, for submission to the Government of India, copy of a letter, 26th ultimo, in which Sir Adam Bittleston has communicated to Government his opinion, with some observations by His Honor the Chief Justice, on the Report of the Commission appointed to consider the defects of the present judicial system in the Madras Presidency and their remedies.

(Signed) T. PYCROFT,
Chief Secretary.

and independence of the Judges) I should consider any advantage gained by the additional strength given to the Sudder, too dearly purchased.

But I think that the strengthening of the Sudder Court is not the only object to be gained; and that the Union of the Sudder and Supreme Courts may be effected, without impairing the efficiency of the latter.

The Commissioners observe that to constitute the High Court of Five Judges, of whom two only should necessarily be professionally trained men, would be virtually to give the balance of power to the unprofessional judges and pro tanto to abandon the advantages derivable from the change proposed; and I concur with them in the opinion that in the constitution of the High Court "the balance of power" (as they express it) should be given to the professional judges.

I desire however to point out that the scheme of the Commissioners appears defective in this respect. It provides that the High Court shall be composed of six Judges; of whom three shall be appointed by the Crown and selected from the English, Irish or Scotch bars; and three shall be nominated by the Governor in Council and selected from such members of the Judicial Branch of the Civil Service as shall have been on the Bench for five years. So that, if the business of the High Court exercising the Original Jurisdiction now vested in the Supreme Court, is to be (as it ought to be) transacted before two Judges, the scheme of the Commissioners

Commissioners leaves only a single professional Judge with three Civilian Colleagues to dispose of the appellate business of the High Court, including (it is to be observed) appeals from the decisions of the two professional Judges.

This arrangement would I think be far from satisfactory, and seems to me not in harmony with the principles laid down by the Commissioners themselves.

To remedy this defect in the plan proposed by the Commissioners - I would suggest that - (assuming the whole number of Judges to be six) not less than four of that number should be barristers; the remaining two being either members of the Judicial Branch of the Civil Service, who had been on the Bench five years, or barristers at law who had practised in India for five years. I also think it desirable that of the Barrister Judges two should always be selected from the ranks of the Profession in England. With two Civilians and two barristers, who had practised for several years in India, on the bench, the Court would not lack local experience, and the introduction of professional men fresh from the Home Courts, as vacancies in the two remaining seats should occur, would in my opinion contribute greatly to the efficiency of the new tribunal.

I observe that the Madras Commissioners propose to exclude from the list of persons eligible as Judges of the High Court, the third, fourth, and fifth classes mentioned in the Code of the English Commissioners - i.e. certain members of the Unreserved Service and Vakils - I hesitate

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Commissioners are agreed that that should be the case in the Court exercising Original jurisdiction but some of them think that in the Appellate Court attorneys and Vakils as well as barristers should be allowed to plead. I gather from the Advocate General's minute that the attorneys are not desirous of that privilege; and with regard to the Vakils at present practising in the Sudder Court the question is whether to admit them as a body amongst the practitioners of the Court would not tend to impair its efficiency by lowering the status of the bar. Upon the best consideration which I have been able to give to the matter I have come to the conclusion that exclusive audience should be given to the Bar on both sides of the High Court, the Bar being composed of English or Irish barristers, Scotch advocates, and advocates called by the High Court itself. Thus all Vakils properly qualified might obtain admission to plead as advocates not only on the appellate side of the High Court but before the same Court exercising Original jurisdiction, upon an equality with the other members of the bar of the High Court; and by the rules of the Court relating to the admission of attorneys, facilities might be afforded to any who should prefer that branch of the profession. The 2^d is a question of professional etiquette - and though in my judgment the interests of the Client

and the administration of justice are in general
advanced by the division of labour between Advocate
and attorney, I should think it unnecessary to make
any provision on the subject. The intervention of
an attorney between the Advocate and the Client
is enforced at home not by any rule of Court or
other positive law - but by the authority of profes-
sional opinion only. And Cases occur now and
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in this Country especially, serves I think many
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I agree also that perjury and prevarication
in a witness should subject him to punishment by
fine or imprisonment with hard labour or both - to
be inflicted by a summary order of the Court before
which he is examined - I expressed that opinion
some time ago in a Charge to the Grand Jury and
subsequent experience has confirmed it.

March 26th 1830

My dear Mr. Percival

I regret that the
accompanying answer to
the request of the Court for
the opinion of the judges
on Judicial Reform should
have been so long in coming,
but we have been very fully
occupied on that point
and the Committee's Report.

I shall be much obliged
if you will now be

it before the Council be
now - that if considered
desirable it might be
home without delay.

Yours sincerely

A. Pitt-Rivers

Received.

This has just been received. I
do not see what is to be
done with it beyond sending
it home and to the folk of
India in continuation of
previous correspondence.

27/3/60

J.P.

It should be sent home in continuation
of previous papers. This is not the time for
entering into details. Sir A. Pitt-Rivers should
receive an acknowledgment and should be informed
that this letter has been sent to the Secretary. *W. H. D.*

Pro. 31st January 1860 to 19.
To Supp. No 54/1860.

Per. wafly
10/1

Just. L. to Engr.
6th April 7th 12 of 1860

10 April
Judicial Bha. Depart.

From
The Hon. Sec. A. Pittelston N.

2/26th 4
2/37 March 1860

No. 480

Furnishing his opinion
on the Report of the Com.
on prisoners appointed to
consider the defects of the
present judicial system
in the Madras Presidency,
as requested in letter of the
27 January last.

With a Letter.

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Sept 14th

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The Honble Sir Adam Bittlestone.
Rt.

Prison Justice of H.B. M's. Supreme
Court of Judicature.

3^d Honble Sir..

We have the honor to acknowledge receipt of your letter of the 26. Ult^o, communicating your opinion on the Report of the Commissioners appointed to consider the defects of the present judicial system in the Madras Presidency & their remedies — & to state that a copy of your letter will be transmitted to the Rt. Hon^{ble} the Secretary of State for India & to Mr.

Supreme Court
2^d April 1860.

Handwritten signature

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No 18 8 and 1 h.

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N^o 401

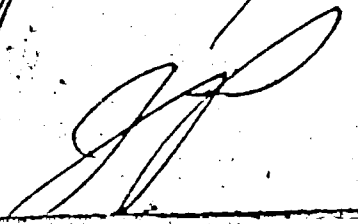
The Secretary to the Govt. of India.

Sir.

Proceedings-

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Wm. P. George
2nd April 1860.



10th Ave
Judicial 18th Sept

No. 101.

The day to the Court of
Justice

of 22nd April 1860.

1st 20th April
Judicial 18th Sept
of 12 of 1860

22nd April

103.