

MADRAS RECORD OFFICE.

Government of Madras.

Judicial DEPARTMENT.

G.O. No.

1649

Press

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53-54

Dated

7. 10. 1862. ~~19~~

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Not to be folded or roughly handled

*Proceedings of the Madras Government, Judicial Department,
7th October 1862.*

No. 53. Read the following letter from T. SYDNEY SMYTH, Esq., Advocate General;
to the Honorable T. PYCROFT, Chief Secretary to Government, Fort Saint George
dated 3rd September 1862.

I beg to bring to the notice of His Excellency in Council some circumstances connected with my Department, of which I believe Government is not fully aware, with a view to Government's considering whether some alteration may not be advantageously introduced in the practice which now exists.

2. I refer, in the first instance, to the great latitude for directly consulting me, without any reference whatever to Government (either to request its previous sanction, or to inform it afterwards, so far as I am aware) allowed to the Public Works Department, and to the Judge Advocate General of the Army.

3. In the case of some Departments, such as the Commissary General's, the Accountant General's, the Military Secretary to Government with reference to Military Estates, the Superintendent of Marine, the Revenue Board, and others, the advantage if not necessity of direct and immediate reference to me for advice is obvious; matters frequently occur which properly require such advice and require it without delay; matters such as these Departments cannot fairly be expected to decide without such assistance; and I do not at present recollect any instance in which my advice has been unnecessarily called for by any of these Departments.

4. I would submit however that the matters which *properly* require my advice in the Public Works and Judge Advocate General's Department—(*i. e.*, such as these Departments cannot fairly be expected to decide for themselves)—are very few, and seldom if ever require such an immediate reply as to preclude forwarding the matter through Government.

5. In the Department of Public Works a great part of the matters referred to the Law Officers of Government are matters much more of *discretion* than involving any matter of law; and such matters, I submit, ought rather to be disposed of by the Officers of that Department. Other matters consist of repeated references (varied only by being accompanied some times by a complete, but generally at first by a *very incomplete* bundle of documents,) on one single point, which has been advised upon over and over again, viz., whether young men in the Public Works Department can be dismissed for not acquiring languages, where their contracts contain no stipulation whatever on that point. Where such a point has been once advised upon, it can hardly I submit, be really necessary to submit each successive case as it arises, just as if no previous advice had ever been given on the point.

6. As regards the Judge Advocate General's Department, I have for years constantly been in the habit of giving my advice, some times in personal interviews, some times by letter, whenever desired by the Officer at the head of the Department; but latterly the calls on my time and attention became so frequent, that on receiving an official demand for my opinion, on a point which I considered I had fully disposed of by private letters, I informed that Officer that I did not consider he was entitled to call for my opinion officially, unless through Government, and begged to refer him to Government. In reply he forwarded to me an Order of Government, dated 30th January 1852, authorizing the Judge Advocate General to consult the Advocate General direct upon all occasions. I would submit for the consideration of Government whether this can really be necessary. In all other Military matters, Government, and His Excellency the Commander-in-Chief, refer them to me through the Secretary to Government in the Military Department; and no delay, I believe, is ever found in practice to occur in consequence.

7. Whenever legal advice is really necessary for any Department, there can be no question that it is my duty to furnish it to the best of my ability, but I submit that Government, and not the head of each Department (with the exceptions already noticed in para. 3), should be the judge of such necessity. I submit too, that Government should know what work it's respective Officers really perform, and that to permit any one Department to devolve any portion of it's work upon another, without Government knowing any thing of the nature or quality of the work so devolved, has a tendency to keep Government in the dark as to the efficiency

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officers; a tendency to multiply references which perhaps would not be made if it was necessary to submit them to Government and to request the permission of Government before making them; and finally, a tendency not only to throw on the Law Officers an undue amount of work, but to keep Government in ignorance of the amount of work actually required from and performed by them—a matter which may obviously become of much importance, if any question arises respecting compensation or remuneration.

8. Matters connected with Military Law are, I believe, supposed to be the peculiar Department of the Judge Advocate General and his subordinates, who are, I believe, selected either for their actual or supposed knowledge thereof, or at least with a view to their acquiring such knowledge. If they possess such knowledge, they can dispose of such matters themselves; but if they do not possess such knowledge and if the Advocate General must therefore dispose of such matters for them, it seems only fair, both to him and to Government, that Government should know who it is that really does the work. Government cannot know this if the Advocate General is empowered to demand the Advocate General's opinion (whether officially, demi-officially, or privately, is quite immaterial) whenever he likes, and to refer to him whatever questions he pleases. If His Excellency the Commander-in-Chief requires my opinion upon any point, it can be furnished to him as expeditiously, I submit through the Military Secretary to Government, as through the Judge Advocate General of the Army. In Her Majesty's British Army it is extremely rare—in fact almost unheard of—for the Attorney or Solicitor General to be consulted about Courts Martial or matters of Military Law, though such questions arise in England much more frequently than here; while Sir Charles Napier's work on Military Law shows what is expected, in that Army, from Officers in that Department. Such matters form, I believe, the sole duty of the Judge Advocate General's Department.

9. I therefore respectfully submit for the consideration of His Excellency in Council whether, in future, references for my opinion on matters connected with Public Works Department and that of the Judge Advocate General of the Army should not have in each case the previous sanction of Government.

10. I trust that Government will excuse my troubling them on this subject, when I assure them, that what between the increased number of references, and the extra duties lately imposed upon me, the time at my disposal for private practice has been of late years greatly diminished; and, as Government is well aware, there is no pension attached to my office, however long and well I may serve Government, and my private practice is the only source to which I can look for the means of retiring when failure of health, or any similar contingency, may compel me to do so.

11. It was always distinctly understood that the Advocate General's whole time was not at the disposal of Government. The late East India Company purposely attached no pension to the office, and a comparatively small salary (barely sufficient to support the necessary expenses of living at the Presidency), on the understanding that the Advocate General was to be compensated by allowing him full time for private practice, to which and which alone he was to look for his means of retiring—the East India Company considering this the best and cheapest means of securing to themselves the services of a competent legal adviser, and making it necessary to him to be in full practice.

12. This being the understanding, it is obvious that every extra duty imposed on the Advocate General is in fact depriving him of his stipulated remuneration, just as much as if a deduction were made from his salary. Except that, as my income from private practice is much more valuable than my salary, any diminution of the former is proportionately the more severe of the two.

13. The actual working of the newly instituted High Court is yet so unsettled that I shall only now say that its tendency appears to be considerably to increase my duties, especially on account of the absence of any clause in the new Charter corresponding to that in the old Charter which enacted that the Supreme Court should have no jurisdiction in matters concerning the Revenue.

*Proceedings of the Madras Government, Judicial Department,
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14. Government are aware how large a part of my time was devoted, for several months, to the labors of the late Judicial Commission: my duties as a member of the Madras Council for making Laws involve a further and very serious demand upon my time and attention—a demand which, as far as I can calculate, appears likely to increase very considerably; yet for neither of these has any remuneration been ever mentioned, though the latter duty was, I believe, devolved upon me under instructions from the Secretary of State. I would respectfully solicit Government to bring these matters to the notice of the Home Government, and to suggest such remuneration as they consider me fairly entitled to for these additional duties. Even in the case of the debts of the late Nabob of the Carnatic, when severe extra labors extending over more than two years and a half were imposed upon me, such as almost entirely destroyed my private practice, the Secretary of State cut off nearly one-half from what this Government had expressly stated to be "a very moderate compensation" for my extra labors and the losses they entailed, and thus subjected me to an actual loss of upwards of Rupees 40,000; thus proving that, when such losses are once incurred, this Government is powerless either to do me justice itself, or to procure it for me from the Secretary of State.

15. This it is that now chiefly actuates me in soliciting the support of Government to my present endeavours to guard myself beforehand against similar consequences so likely to result from demands upon my time which I believe Government never contemplated; while, as to others (I refer especially to my duties as Member of the Legislative Council) they certainly formed no part of the duties of my office when I accepted it, but have been quite recently created by the Home Government, and form a very serious tax upon my private practice.

No. 54. ORDER THEREON, 7th October 1862, No. 1,649.

Paras. 1 to 4 and 6 to 9 of this letter will be referred to the Military Department for consideration there, the Order of the 30th January 1852, No. 225, having proceeded from that Department.

2. Paras. 1, 2, 5 and 9 are communicated to the Public Works Department with orders that the Chief Engineer and the Officers subordinate to him are not to communicate direct with the Advocate General—unless in cases of extreme urgency, which can very rarely occur—but that all questions arising in that Department, on which the opinion of the Law Officers of Government is really required, are to be submitted to Government, in view to their being referred to the Law Officers, through the Judicial Department.

3. The Government will forward Mr. Smyth's letter to the Secretary of State for his favorable consideration, and with the expression of their opinion that the labor which devolved upon him as a Member of the Judicial Commission appointed by Government in June 1859, and that which will henceforth be imposed upon him as a Member of the Madras Council for making Laws and Regulations under the Indian Councils Act, 1861, appear to constitute fair grounds for some addition to his present salary.

(Signed) T. PYCROFT,
Chief Secretary.

Exd. T. O'Connor.

Mr. Cons. 3^d Feb 1862 at 102 to 104

Judicial 1862 Sept

sent by Mr. Cons.

Judicial Letter to Cons dated
28th Dec 1861
Ref. Feb 69 6/03

Mr. Cons.

Mr. J. Sydney Smith reg.
Advocate Genl.

of 3rd 2
of 6th 3 Sept 1862

No 1801

Refers to notice certain
circumstances connected
with Dept regarding the in-
creased nature of his duties
the inadequacy of his
remuneration with a view to
considering whether some
alteration may not be ad-
vantageously introduced in the
practice which now exists

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Mr.

Adm. - June 3 -

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be. Inquiries in the

Or I'm sorry to appear
for additional remuneration
it will be for the morning of
express this day.

10 Sept -

I think the advertisement is a great deal more
 a question of remuneration for the services
 imposed upon him by the Legislature
 than it is of a fair & reasonable
 one. There can be no doubt but that
 the duties thus imposed upon him are
 burdensome & he is entitled to his
 compensation - I think on this point he
 ought to support his present salary
 for an increase of salary.

1254

Judicial Department.

PROCEEDINGS of the MADRAS GOVERNMENT.

Read letter from the
Advocate Genl. — Enter 3rd Sep. '62.

Order — 7th October 1862 No 1649.

Paras 1 @ 4 & 5 @ 9 of
this letter will be
referred to the Illly.
Dept. for considera-
tion there, the Order
of the 30th Jan'y. '52
No 225 having
proceeded from
that Dept.

2. Paras 1. 2 - 5 - 8 - 9
are communicated
to

to the Pub. Wks.
Dept. with orders
that the Chiefs
Engineer & the Of-
ficers subordinate
to him are not
to communicate
direct with the
Advocate General
— unless in cases
of extreme urgency,
which can very
rarely occur —
but that all ques-
tions arising in
that Dept., on which
the opinion of the
Law

Law Officers of
Govt. is really re-
quired, are to be
submitted to Govt.,
in view to their
being referred
to the Law Of-
ficers, through
the Sudd. Dept.

The Govt. will for-
ward Mr. Smyth's
letter to the Secre-
tary of State for
his favorable con-
sideration, and
with the expression
of their opinion
that

that the labor
which devolved
upon him as a
member of the
Judicial Com-
mission appointed
by Govt. in June
1859, & that
which will hence-
forth be imposed
upon him as a
member of the
Madras Coun-
cil for making
Laws & Regu-
lations under
the Indian
Councils

Councils Act, 1861,
~~do~~ appear to con-
stitute fair grounds
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to his present
salary.

AP

The Mill. Dept.
With No. 225 of '52. M. & S.
" Pub. Works Dept.
" Advocate Genl.

dupd. 8th

dict of Webster

No. 1649.

Dated 7th Dec 1862

10

22 Nov 21/146.
~~157/83~~
 Referring to the Bill & Copy
 deposited in the Books 1164 and 18709
 I let the Advocate General
 dated 3 September 1862, wherein
 you requested to
 send the Judge Advocate General
 not to consult him directly.
 Directing the Chief Engineer
 to communicate with me
 through your own men.
 I am, Sir, Sir,
 1863. Madras - Partial of the Government.
 Informing me in small that
 which will be sent to Sir C.
 Wood for his kind consideration.