

14
MADRAS RECORD OFFICE.

Government of Madras.

Judicial DEPARTMENT.

G.O. No.

1318

Press
~~Mis.~~

3-7

3-7

Dated

1-9-1918

22/23

Not to be folded or roughly handled

*Proceedings of the Madras Government, Judicial Department,
1st September 1864.*

Read the following papers:—

- No. 3. From the Honorable Sir C. H. SCOTLAND, Knight, Chief Justice of the High Court of Judicature at Madras; to His Excellency Sir W. T. DENISON, K. C. B., Governor in Council, Fort Saint George, dated 2nd July 1864.

I beg to acknowledge the letter of the Chief Secretary of the 22nd of April last, No. 564, referring to the instructions conveyed in paragraph 7 of the Despatch from the Secretary of State, under date the 30th June 1862, and requesting me to furnish your Excellency in Council with any suggestions that my colleagues and myself might desire to make for altering or amending the Letters Patent constituting the High Court.

2. I have now the honor to submit the following suggestions and observations, in which, with the exceptions hereinafter pointed out, my Honorable colleagues concur, for the consideration of the Right Honorable the Secretary of State for India in Council.

3. So much of the provision in this Clause as directs that the declaration shall be made before "such authority or person as the Governor in Council may commission to receive it" was proper enough upon the original establishment of the Court. But in the new Charter the Clause should be altered by substituting the words "before any other Judge of the said Court."

Clause 3.

4. Inconvenience is occasioned by strictly defining, as these Clauses in effect

Clauses 7, 8, 9, 10.

do, the functions of each class of practitioners. Attorneys, when they appear before a Judge in Chambers and apply for the postponement of a case for a commission to examine a witness, for an order to compel the attendance of a party, &c., do in fact plead for their clients, and have occasionally to argue upon the effect of affidavits and points of law and practice. On the other hand an Advocate retained to argue in support of an appeal might in strictness be said to *act*, if only the necessity of filing the Memorandum of appeal or the Vakalutnamah should be thrown upon him. Before the establishment of the High Court, Barristers had for some years practised in the Sudder Court without the intervention of an Attorney, and the Judges see no reason why an Advocate should not be permitted to conduct an appeal to the High Court from the Courts in the Mofussil, unassisted either by Vakeel or Attorney. But this, the Clauses under notice, might, if construed strictly, be held to prohibit as involving something which amounted to *acting* for the suitor. In this country it is not practicable to apply absolutely the strict rules of professional etiquette, generally observed in the conduct of litigation in England, without great hardship and unfairness to Native suitors; nor is it necessary or expedient for the proper or efficient conduct of business in the High Court that they should be so applied.

5. My Honorable colleagues are of opinion with me that it would be better to leave these matters of practice to be regulated, like the qualification and admission of practitioners, by rules of the Court. I therefore suggest the omission of the

Clau

8th and 9th Clauses, and the introduction in Clause 7, after the word "Advocates" in the 3rd line, of the words "Vakeels and Attorneys;" and in the 4th line, the substitution of the words "plead and act" for the words "and plead"; and that Clause 10 should be altered by substituting for the last paragraph, beginning with the words "and no person" in the 6th line, the provision that "no person but such Advocates, Vakeels or Attorneys shall be allowed to appear, plead, or act for any suitor except that any suitor shall be allowed to appear, plead, or act on his own behalf or on behalf of a co-sutor: provided that a written authority be filed as required by the Code of Civil Procedure," (Section 115.)

6. There is a further observation called for as regards Clause 10. Under the Procedure Code "recognized Agents," as therein defined, are authorized to do any thing which a suitor in person may do, and as the Charter is now framed (reading Sections 10 and 37 together) there is room for question whether in the High Court "recognized Agents" are not excluded: and, if suitors are to be allowed to conduct suits in the High Court by such Agents, it would be well to add to Clause 10 the further exception: "and except that the recognized Agents of suitors, as defined by the said Procedure Code, shall be allowed to do all such acts as they are by the said Code authorized to do." My colleagues and I, however, are disposed to think that, considering the facility of obtaining professional assistance in the Presidency town, and the danger of encouraging a class of ignorant and unscrupulous persons about the Court to the detriment of the suitors, the appearance by a "recognized Agent" may properly be excluded in the High Court; but if admitted at all, we think it very desirable that such Agent should not possess the right of Advocacy in Court, in which case it would be well, instead of the above exception, to add, "and except that the recognized Agents of suitors, as defined by the said Procedure Code, shall be allowed to appear and act, but not to plead on behalf of such suitors."

7. I am aware that the Bill for amending the Civil Procedure Code, now under consideration of the Governor General's Council, provides for the extension to the High Court of the Clauses relating to "recognized Agents;" and if either of the suggestions made in the last paragraph should be adopted by the Council in the amended Code, then, of course, there would be no necessity to introduce into Clause 10 any exception as regards "recognized Agents."

8. The amount to which exclusive jurisdiction is by this Clause given to the Court of Small Causes may properly be increased. The facility with which judgments can now be obtained in the High Court, and the comparatively small cost of the procedure in cases decided upon the first appearance of the parties, have led to suits being frequently brought in the High Court which ought to have been brought in the Court of Small Causes. There is no good reason why the limit of exclusive jurisdiction should not be extended to 300 Rupees, and I would therefore suggest that that amount be substituted for 100 Rupees in the latter part of the Clause.

9. The right of appeal given by this Clause is too general, extending, as it does, to all questions of fact as well as law, and considerable practical inconvenience may result from it without any

Clause 12.

Clause 14.

corresponding advantage to the suitor. A review of judgment is provided for in the Civil Procedure Code, and under Section 14 of the High Court's Act, 24 and 25, Viet. Cap. 104: and the rules framed under Section 13, a Division Court composed of more than two Judges can at any time be appointed to hear cases of particular importance, or in which difficult questions are likely to arise. I think that where a suit has been determined by a Division Court, consisting of two or more Judges, the only appeal should be to the Privy Council in the cases in which such appeal is now given. I suggest that in line 3, the words "of one Judge" be substituted for the words "one or more Judges," and that the 4th and subsequent lines be omitted. Three of my colleagues, I should state, do not concur in these observations. They entertain doubts as to the advisability of abolishing the appeal provided by the 14th Clause.

10. As to these Clauses one or two observations are suggested by the recent

Clauses 18, 19 and 20.

Judgment of the Privy Council in the appeal of "Abraham v. Abraham," deciding that under the rule of Equity and good

conscience, a Hindu by birth, but not by religion, may in the Mofussil be governed in his rights to property by Hindu or English law at his own election. At present the High Court on its Original Side administers English law and rules of Equity to all who are not Hindus and Mahomedans by religion, and it may be worthy of consideration whether the same rule which now governs in the Mofussil should be made applicable to Native converts in the Presidency Town. It is certainly anomalous that converts from the Hindu and Mahomedan religion may, under precisely the same circumstances, have their rights decided by English law in the High Court and by Hindu or Mahomedan law in the Courts in the Mofussil. These observations are made without any certain knowledge of what may be the provisions of the Code of Civil law for India now under consideration; but if that Code is likely soon to be in operation, these Clauses will no doubt be made to provide for its future application to all cases to which it may be capable of application.

11. Some alteration of this Clause is very necessary. In the late Supreme

Clause 37.

Court the Procedure in testamentary suits was in all respects the same as the antiquated Ecclesiastical Procedure formerly in use in England. It contrasts most unfavorably with the simple rules which

now regulate the procedure of the Probate Court in England, and I need hardly say that its continuance in the High Court is extremely objectionable. It will be a great improvement in the Charter to provide that the proceedings in the High Court, in matters testamentary and intestate, should be regulated, as nearly as may be, by the rules and proceedings of the Probate Court, in the same way as the Charter now provides respecting the exercise of matrimonial jurisdiction.

12. Nothing is said in the Charter respecting the procedure in Civil matters of Admiralty and Vice-Admiralty jurisdiction. Some express provision should in this respect be made, and it is suggested that this will best be done by providing that the procedure in the High Court shall be regulated by the rules and regulations for the time being approved and established by the orders of Her Majesty in Council, and circulated by the Board of Admiralty to the Vice-Admiralty Courts.

13. An additional observation may be made upon Clause 37. It would be better if power were given to the High Court to modify and adapt the procedure of the Probate, Divorce and Admiralty Courts in England, by rules and orders of its own. In this way the High Court would be enabled to make the proceedings in all branches of its jurisdiction as uniform as might be found practicable. With the Charter and Act, as at present framed, it is very doubtful how far the Court has any power of making rules of its own for the regulation of procedure, and this power might now with advantage be distinctly provided for. One of the Judges, while quite agreeing that power to make rules and regulations in matters of practice should be given to the High Court, is clearly of opinion that there is nothing whatever in the nature of Probate and Admiralty questions to prevent their being disposed of by the same simple procedure that governs all other cases.

14. One or two observations on this Clause have been left to the last, as they do not meet with the concurrence of all my colleagues. They convey the suggestions of Sir Adam Bittleston and myself alone. The appointments of the Ministerial Officers necessary for the administration of justice and the due execution of the powers of the Court might safely, and I think ought properly, to be confided to the Chief Justice, subject only to the approval of the local Government as regards salaries. Considering the duties and responsibilities of the office of Chief Justice, it can hardly be thought necessary to require that every appointment should be submitted for approval. I would, therefore, suggest for consideration the omission of the words in lines 8 to 11: "and we do hereby ordain that every such appointment shall be forthwith submitted, &c., and shall be either confirmed or disallowed by the Governor in Council." But should the latter provision be retained, it ought not to apply to every appointment on the occasion of vacancies in existing offices; and I suggest that after the word "appointment" in the 10th line, there should be added either the words, "except upon the happening of a vacancy," or the words "when made for the first time."

15. A separate paper containing the entire Sections, 3, 6, 7, 8, 9, 10, 12, 14, and 37, as they would stand with the amendments now proposed, accompanies this letter.

Clauses 3, 6, 7, 8, 9, 10, 12, 14 and 37 of the Letters Patent of the High Court of Madras, with the proposed amendments.

3. And we do hereby ordain that the Chief Justice and every Judge of the said High Court of Judicature at Madras, previously to entering upon the execution of the duties of his office, shall make and subscribe the following declaration before any other Judge of the said Court.

6. And we do hereby authorize and empower the Chief Justice of the said High Court of Judicature at Madras, from time to time, as occasion may require, and subject to any rules which may be prescribed by the Governor in Council, to appoint so many and such Clerks and other Ministerial Officers as shall be found necessary for the administration of justice, and the due execution of all the powers and authorities granted and committed to the said High Court by these our Letters Patent. And it is our further will and pleasure, and we do hereby, for us, our heirs and successors, give, grant, direct, and appoint that all and every the Officers and Clerks to be appointed as aforesaid, &c., &c.

Or
(The Clause as it stands, adding after the word "appointment" in the 10th line the words "except upon the happening of a vacancy," or "when made for the first time".)

7. And we do hereby authorize and empower the said High Court of Judicature at Madras to approve, admit, and enrol such and so many Advocates, Vakeels, and Attorneys as to the said High Court shall seem meet, who shall be and are hereby authorized to appear, plead, and act for the suitors of the said High Court, subject to the rules and directions of such Court.

8. Omitted.

9. Omitted.

10. And we do hereby ordain that the said High Court of Judicature at Madras shall have power to make rules for the qualification and admission of proper persons to be Advocates, Vakeels, and Attorneys-at-Law of the said High Court, and shall be empowered to remove, on reasonable cause, the said Advocates, Vakeels, or Attorneys-at-Law, and no person whatsoever but such Advocates, or Vakeels shall be allowed to plead for, or on behalf of, any suitor in the said High Court; and no person or persons whatever but such Advocates, Vakeels, or Attorneys-at-Law shall be allowed to appear, plead, or act for any suitor in the said High Court except that any suitor shall be allowed to appear, plead, or act on his own behalf or on behalf of a co-suitor; provided that a written authority be filed as required by the Code of Civil Procedure.

12. And we do further ordain that the said High Court of Judicature at Madras, in the exercise of its ordinary Original Civil Jurisdiction, shall be empowered to receive, try, and determine suits of every description, if, in the case of suits for land or other immoveable property, such land or property shall be situated, or in all other cases if the cause of action shall have arisen, or the defendant at the time of the commencement of the suit shall dwell or carry on business, or personally work for gain within the local limits of the ordinary Original Jurisdiction of the said High Court, except that it shall not have such Original Jurisdiction in cases falling within the jurisdiction of the Small Cause Court at Madras, in which the debt or damage, or value of the property sued for does not exceed 300 Rupees.

14. And we do further ordain that an appeal shall lie to the said High Court of Judicature at Madras, from the judgment, in all cases of Original Civil Jurisdiction, of one Judge of the said High Court.

37. And we do further ordain that the proceedings in all matters coming before the said High Court of Judicature at Madras, in the exercise of its Admiralty and Vice-Admiralty jurisdiction, shall be regulated by the rules and regulations for the time being approved and established by the orders of Her Majesty in Council, and circulated by the Board of Admiralty to the Vice-Admiralty Courts; and that the proceedings in all matters coming before the said High Court of Judicature at Madras, in the exercise of its testamentary and intestate jurisdiction, shall be regulated as nearly as may be by the rules and proceedings of our Court of Probate in England; and that the proceedings in all matters coming before the said High Court, in the exercise of its matrimonial jurisdiction, shall be regulated, as nearly as may be, by the rules and proceedings of our Court for Divorce and Matrimonial causes in England; and that, save as hereinbefore in this Clause otherwise provided, the proceedings in Civil suits of every description, between party and party brought in the said High Court, shall be regulated by the Code of Civil Procedure prescribed by an Act passed by the Governor General in Council, and being Act No. VIII of 1859, and by such further or other enactments of the Governor General in Council in relation to Civil Procedure as are now in force: provided always that the regulation of such proceedings respectively shall be subject to such laws and regulations as shall be hereafter made by the Governor General in Council in relation to such proceedings respectively.

(In connection with this Clause, it is suggested that a general power should be given to the High Court of making rules or orders for adopting the English mode of pleading and procedure, and from time to time altering and amending such rules—See paragraph 13 of letter.)

(Signed) C. H. SCOTLAND, Kt.,
Chief Justice.

No. 4. MINUTE by the Honorable T. PYCROFT, dated 14th July 1861.

The suggestions of the Judges of the High Court for the amendment of some of the Clauses of the Letters Patent for that Court, appear to me judicious. I do not perceive much to remark upon.

2. It certainly seems unnecessary that every appointment of a Ministerial Officer of the High Court made by the Chief Justice, even that of a Clerk or Bailiff, should be submitted for the approval of the Governor in Council, as required by this Clause of the present Letters Patent. The amended Clause, however, seems to go too much the other way, in leaving all such appointments absolutely to the Chief Justice. There are, I think, some appointments on which the Government should have a veto. It might be left to the local Government, who are not likely to interfere unnecessarily in such a matter, to determine what appointments, acting or confirmed, should require their approval; or such appointments might be specified in the Letters Patent. Those that occur to me are: (1 and 2) the Registrars on both sides of the Court; (3) the Commissioner and Taxing Officer; (4) the Clerk of the Crown and Government Prosecutor; and (5) the Sheriff, or the officer who, under the arrangement lately ordered by the Secretary of State, may be substituted for him. These two last, indeed, seem properly to be Government appointments.

The words "no person whatsoever but such Advocates or Vakeels shall be allowed to plead" seem superfluous and to be included in those that follow:—"No person or persons whatsoever but such Advocates, Vakeels or Attorneys-at-Law shall be allowed to appear, plead or act," &c. The distinction, too, seems inconsistent with the amended Clause 7, and with the remarks of the Chief Justice in paragraphs 4 and 5 of his letter.

I doubt whether it be advisable to permit "recognized Agents" to appear and act in the High Court. The objections urged by the Chief Justice and his colleagues seem to me of weight.

I speak with diffidence in respect to this Clause; but am inclined to think that when judgment has been given by a Court of two or more Judges, there should be no appeal, except to the Privy Council under the usual limitations.

3. I am not aware of any provision of the Letters Patent which requires amendment beyond those which the Judges have noticed. Now, however, that the revision of these Letters is about to come under the consideration of Her Majesty's Government, it seems to me a fitting occasion for adverting to what is at present in an undefined state and requires to be settled. I mean the position which the High Court should occupy in relation to the local Government.

4. It was, as I conceive, the intention of the Home Government in the amalgamation of the Supreme Court and the Court of Sudder and Foujdaree Adawlut, that the united Court in its Original and Appellate capacity, and its general duties and functions, should represent the Courts which it had superseded; that the High Court on its Original Side should do whatever would have been done by the old Supreme Court; and that on its Appellate Side it should in like manner perform all

such acts as had previously been performed by the Court of Sudder and Foujdaree Adawlut.

5. The *ex-avant* Supreme Court was merely a judicial tribunal, Civil and Criminal, and had scarcely any administrative or executive duties. The Sudder Court, on the other hand, besides the decision of suits Original and Appeal and despatch of miscellaneous judicial business, was charged with the general supervision and control of all the inferior Mofussil judicatories, received and made up returns, checked judicial expenditure, and was the established medium of correspondence between Government and the judicial Officers in the Provinces.

6. The High Court now appear disposed to repudiate these latter functions; to assert their entire independence of the Government, not merely as respects their judicial acts, in which of course they are independent, but in all other relations; to take up the position of a purely judicial body with none but simply judicial duties to perform. I do not mean that they have stated this in so many words, but the general tenor of their correspondence with, and bearing towards the Government, has been in accordance with that view.

7. In illustration of the above remark, I will now notice briefly some of the communications which have been received by Government from the High Court.

8. On the occasion of large portions of the Ganjam and Vizagapatam Agency tracts being brought under the jurisdiction of the ordinary Courts, the Government requested the Judges of the High Court to submit for publication a Notification of the change, and of the arrangements necessary to carry it out. Such a request would have been complied with by the Court of Sudder and Foujdaree Adawlut as

* From Acting Registrar, 23rd May 1863.

a matter of course. The Judges* directed the preparation of the Notification in their Registry to avoid public inconvenience or delay on the occasion, but stated that "it was not within the province and proper function of the Judges to prepare and issue executive orders on behalf of the Government, for the force and operation of which their judicial act or authority is in no way required."

The Government have thereon directed that such Notifications should henceforward be prepared in the Government Office in communication with the Government Law Officers.

G. O., 9th June 1863, Nos. 84 and 85.

9. In December last, the Registrar of the High Court on the Original Side sent to the *Gazette* for publication a Notice of the Christmas vacation, referring only to those offices which are attached to the High Court in its ordinary Original Jurisdiction.

The Government suggested to the Chief Justice that one Notice should be published, applicable to both sides of the High Court; and they at the same time put it to him whether, as the Notice for the holidays which had been issued by Government included all public offices, it was necessary to issue any separate notice regarding the offices attached to the High Court.

In his reply, Sir C. Scotland "answered distinctly" that "the Ministerial Officers of the High Court were in no

* From Chief Justice, 15th December 1863.

"respect public officers of the Executive Government, and it cannot be permitted that they should be supposed in any way to be so."

The views of the Government on this point are given in paragraph 3 of their

"The Governor in Council cannot assent to the correctness of the foregoing remarks. The Ministerial Officers of the High Court are Public Officers in the employment of the Government, paid by the State, and as much servants of the Government as the Ministerial Officers in any other public office. That this is considered by the Home Government to be their position, is shown by the proviso at the end of Clause 6 of the Letters Patent, which alludes to the right of an Officer or Clerk of the High Court to avail himself of leaves of absence under any rules prescribed by the Governor in Council. Nor can the Governor in Council admit that the adjournment of the Court's sittings, and the suspension of business for the purpose of holidays, is a matter with which the Government have no concern. If it be not open to the Government to direct that the High Court shall be closed on certain days, it may be argued that the Government are not competent in any way to interfere with the duration of, or the period selected for, the periodical adjournments. There are matters seriously affecting the convenience of the public, and in regard to which, if the arrangements made by the Chief Justice and the Judges were deemed to be unsatisfactory, it would clearly be the duty and right of the Executive Government to interfere."

*N. B.—The regular yearly vacations are determined by law, at least as respects the Appellate Side of the Court—Regulation III of 1816.

ment—as the Board of Revenue, the Accountant General's Office, &c.—shall be closed and not available to the public.

10. Certain Returns were called for from the Mofussil Judges in connection with the Whipping Bill, which subsequently was passed as Act VI of 1864 of the Council of India, and the opinion of the Judges of the High Court was requested on the proposed enactment. As the High Court in forwarding their report on the Bill did so in a few words, and did not record their views on any of the important considerations connected with the subject, they were "requested to supply the omission." There was nothing discourteous meant, nor, I must contend, anything discourteous said in regard to the omission on the part of the Court, or in the request for its being supplied. As the question, moreover, was one which had excited much public interest, the papers relating to the Bill were laid upon the Editors' Table.

In their reply, the Judges stated that they did not recognize the right of

From Registrar, 15th January 1864.

Government to demand their opinion on legislative matters, as, in giving it, they were not "performing judicial functions or any duty imposed on them by Her Majesty's Letters Patent" * * *. "In this instance the Judges are willing to make a few additional observations."

On the Government in their reply demurring to the correctness of the above

Letter 14th April 1864.

view, the Honorable the Chief Justice replied for himself and his colleagues in a letter, of which I will only say that it was not such as ought to have been addressed to Government.

11. From the above extracts from their letters which I have quoted, it will be seen that the High Court decline to prepare and issue the orders to be sent from Government to the Subordinate Judicial officers; that they assert their Ministerial Officers to be in no respect Public Officers of the Executive Government; deny the right of Government to settle the holidays to be allowed to those Officers; maintain that they are not bound to advise Government on any project of law on which they may be consulted, nor generally to perform any but judicial functions or "duties imposed on them by the Letters Patent."

order of the 27th January last, (see margin) which, as it was not thought necessary to continue the discussion of the subject, was simply placed on record for the satisfaction of Government and information of the Secretary of State. I quite concur in the view held in it, that the Ministerial Officers of the High Court are as much public servants of the Government, as the Ministerial Officers of any other public office—and that it is competent to the Government, not of course to lay down the days on which the Court* shall or not sit, but to prescribe the days on which the offices attached to the Court as those attached to any other Department—

12. If this view be correct it seems to me to follow, either that the Letters Patent must be enlarged, or other provision must be made for the discharge of the other duties which devolved on the late Sudder, and to which I have above alluded.

Supra paragraph 5.

These duties must in this latter case be undertaken by the Government; and as their Judicial Secretary is already amply occupied with his business in the other Departments of the Government Office, the Public, Political, Financial, &c., it will probably be necessary to entertain another officer, of standing and judicial experience who would as it were occupy the position of Minister of Justice. A considerable portion of the present establishment of the Registrar to the High Court on the Appellate Side, which is the same as it was during the days of the old Sudder, will have to be transferred to him.

13. It may, however, still be a question whether the control and supervision of the Mofussil Courts and the Judicial administration generally will be as efficiently provided for under the new system as under the old; nor whether the dignity and usefulness of the High Court will be enhanced by their becoming a mere Judicial tribunal and not the head of the Judicial Department, the adviser and organ of Government in all judicial matters, performing the functions of a minister of Justice. The Members of Government will often have but a slight practical acquaintance with the course of business in the Courts and the details of judicial administration. The Judges of the High Court will have among their Members two at least of great judicial experience, acquired during a long course of service in the Courts in the Provinces. But whatever may be the decision ultimately arrived at on this point, the question should not longer be left in uncertainty. Both the Government and the High Court should know exactly what the latter authority may be required to do, and what it may not; what are and what are not its duties and functions; and in what relation it should stand to the Government; nor should Government be exposed to receive a second time such a letter as that from the Chief Justice of the 14th April last.

(Signed) T. PYCROFT.

No. 5. MINUTE by the Honorable E. MALTBY, dated 21st July 1864.

The only point in the proposed amendments of the Letters Patent, to which it seems necessary for me to allude, is the appointment of the Ministerial servants of the High Court. In the case of the two Registrars, the Commissioner and Taxing Officer, the Clerk of the Crown and the Sheriff, the Government ought to have a veto, unless indeed the appointments in the last two instances should be assigned to the Government as properly belonging to it. I concur in the opinion that the filling up of the other offices should be left in the hands of the Chief Justice.

2. The Supreme Court and the Sudder and Foujdaree Adawlut stood in such different positions towards the Government that their amalgamation to form the present High Court has been attended with some embarrassment as pointed out in Mr. Pycroft's Minute, and it seems very advisable to make use of the present opportunity for the removal of any future difficulty or misapprehension.

3. One of the most responsible and important duties of the Executive Government is to provide for the due administration of Criminal and Civil Justice and to see that the various Courts are in a state of efficiency, and that the Judicial Officers earn public confidence by ability and regularity in the discharge of their functions. Under the old system Government had the advice and aid of the Sudder and Foujdaree Adawlut to assist them in this duty throughout the Presidency except in the town of Madras, and it seems to me to have been evidently intended* that the High Court should render similar service.

4. The Government could obtain from no other source such reliable information regarding the official character and qualifications of the Mofussil Judges, the state of their Courts, and the adequacy of existing judicial institutions and laws to the requirements of the country, as from the High Court before whom the proceedings of the subordinate tribunals pass in review, and it seems to me that any attempt to obtain this end by the appointment of a Judicial Secretary to Government would be unsuccessful.

5. I fully concur in Mr. Pycroft's remarks on this subject, and consider that the High Court would lose neither dignity nor independence by being the advisers of Government on matters connected with the Judicial administration of the country. I have no reason to suppose that the Judges would be disinclined to render information and aid, should this duty be formally assigned to them, but as the question has been raised whether any functions should be expected of them beyond the "duties imposed on them by the Letters Patent," it becomes of consequence that the Letters Patent should be clear and explicit on this important point.

(Signed) E. MALTBY.

No. 6. MINUTE by the Honorable the PRESIDENT, dated 27th August 1864.

I concur generally in the remarks embodied by Mr. Pycroft in his Minute upon the subject of the amendment of the Letters Patent constituting the High Court.

2. It is most certainly desirable that the said Letters should define clearly the relation between the Government and the High Court, and that no opening should be left for the assumption of authority by the former which might be repudiated by the latter.

3. It appears to me that, under the present constitution of the Court, the duties of supervising and controlling the interior Mofussil judicatories would be better performed by the High Court than by the Government, and I cannot see that the performance of such administrative duties could in any way lower the position of the Judges.

4. With regard to the claim made by the Chief Justice, that all the Ministerial Officers of the High Court should be appointed by himself without any reference to the Government, I am inclined to agree with Mr. Pycroft that an exception to this should only be made in a few cases. I, however, should be inclined to make such exceptions only with reference to officers who having certain work to do for the Government, correspond directly with the Chief Secretary.

5. I think the Registrar on the Appellate Side, who is now one of the Covenanted Civil Servants of the Government, should be appointed subject to the approval of the Government, and I think that the Government Prosecutor should not act in that capacity without such approval. The other officers instanced by Mr. Pycroft, viz., the Registrar on the Original Side of the Court, the Commissioner and Taxing Officer, and the Sheriff might be left to the appointment of the Chief Justice.

(Signed) W. T. DENISON.

No. 7. ORDER THEREON, 1st September 1864, No. 1318.

Resolved that the papers recorded above be brought to the notice of the Right Honorable the Secretary of State.

(True Extract.)

Secretary to Government.

Exd. T. Cartledge.

Minute by the Honorable
J. Pycroft, on the letter from the Honorable
The Chief Justice dated 2^d July 1864

1. The suggestions of the
Judges of the High Court for
the amendment of some of
the clauses of the Letters Patent
for that Court, appear to me
judicious. I do not perceive
much to remark upon.

Clause 2, (Chief Jus-
-tice's letter, p. 14).

2. It certainly seems un-
necessary that every ap-
pointment of a Ministerial
Officer of the High Court made
by the Chief Justice, even
that of a Clerk or Bailiff,
should be submitted for the
approval of the Governor
in Council, as required by
this clause of the present
Letters Patent. The amended
Clause

clause, however, seems to go
too much the other way, in
leaving all such appoint-
ments absolutely to the Chief
Justice. There are, I think,
some appointments on which
the Government should have
a veto. It might be left
to the Local Government,
who are not likely to inter-
fere unnecessarily in such
a matter, to determine what
appointments, acting or
confirmed, should require
their approval; or such
appointments might be
specified in the Letters
Patent. Those that occur
to me are, (1-2) the Regis-
trars on both sides of the
Court, (3) the Commissioner
and Taxing Officer, (4) the
Clerk of the Crown and
Government Prosecutor, and
the Sheriff, or the Officer
who

Clause 10.

Clause 10.

15
who, under the arrangement
lately ordered by the Secretary
of State, may be substituted
for him. These two last,
indeed, seem properly to be
Government appointments.

The words "No person
whatsoever but such Advocates
or Vakils shall be allowed
to plead" seem superfluous
and to be included in those
that follow. "No person or
persons whatsoever but
such Advocates, Vakils or
Attorneys-at-law shall be
allowed to appear, plead or
act" &c. The distinction,
too, seems inconsistent with
the amended Clause 7, and
with the remarks of the
Chief Justice in paragraphs
4 & 5 of his letter.

I doubt whether it be
advisable to permit "recogn-
ized Agents" to appear

And

and act in the High Court.
The objections urged by the
Chief Justice and his Col-
leagues seem to me of
weight.

I speak with diffi-
dence in respect to this
Clause; but am inclined
to think that when judg-
ment has been given by
a Court of two or more
Judges, there should be no
appeal, except to the Privy
Council under the usual
limitations.

3. I am not aware of
any provision of the Letters
Patent which requires
amendment beyond those
which the Judges have
noticed. Now, however,
that the revision of these
Letters is about to come
under the consideration
of

Clause 14

16
of Her Majesty's Government,
it seems to me a fitting
occasion for adverting to what
is at present in an undefined
state and requires to be settled.
I mean the position which
the High Court should occupy
in relation to the Local Govern-
ment.

4. It was, as I conceive,
the intention of the Home
Government in the amalga-
-mation of the Supreme Court
and the Court of Sudder
and Foujdaree Adawlut,
that the united Court in its
Original and Appellate
Capacity, and in its general
duties and functions, should
represent the Courts which
it had superseded. That the
High Court on its Original
side should do whatever would
have been done by the old
Supreme Court; and that
on

on its Appellate side
it should in like manner
perform all such acts as
had previously been performed
by the Court of Sadar and
Faujdar Adawlat.

5. The ci-devant Supreme
Court was merely a judicial
Tribunal, Civil and Criminal,
and had scarcely any adminis-
trative or Executive duties.
The Sadar Court, on the
other hand, besides the decision
of Suits Original and Appeal
and despatch of Miscellaneous
judicial business, was
charged with the general
supervision and control of
all the inferior Mofussil
Judicatories - received and
made up returns, checked
judicial expenditure, and
was the established medium
of correspondence between
Government

Government and the Judicial
Officers in the Provinces.

6. The High Court now
appear disposed to repu-
diate these latter functions
to assert their entire inde-
pendence of the Government,
not merely as respects their
judicial acts in which
of course they are independent,
but in all other relations -
to take up the position
of a purely judicial body
with none but simply
judicial duties to perform.
I do not mean that they
have stated this in so
many words, but the
general tenor of their corre-
spondence with, and bearing
towards the Government,
has been in accordance
with that view.

In

7. In illustration of the above remark, I will now notice briefly some of the Communications which have been received by Government from the High Court.

8. On the occasion of large portions of the Ganjam and Vizagapatam Agency tracts being brought under the jurisdiction of the Ordinary Courts, the Government requested the Judges of the High Court to submit for publication a Notification of the change, and of the arrangements necessary to carry it out. Such a request would have been complied with by the Court of Sudder and Foujdaree Adawlut as a matter of course. The Judges

* From Acty Registrar
23 May 1863.

Judges directed the preparation of the Notification in their Registry to avoid public inconvenience or delay on the occasion, but stated that "it was not within the province and proper function of the Judges to prepare and issue executive orders on behalf of the Government, for the force and operation of which their judicial act or authority is in no way required."

G.O. 9th June 1863.

The Government have thereon directed that such Notifications should henceforward be prepared in the Government Office in Communication with the Government Law Officers.

9. In December last the Registrar of the High Court on the Original side sent to the Gazette for publication

a Notice of the Christmas vacation, referring only to those Offices which are attached to the High Court in its Ordinary Original Jurisdiction.

The Government suggested to the Chief Justice that the Notice should be published, applicable to both sides of the High Court; and they at the same time put it to him whether, as the Notice for the Holidays which had been issued by Government included all Public Offices, it was necessary to issue any separate Notice regarding the Offices attached to the High Court.

In his reply, Sir C. Scotland "answered distinctly" that the Ministerial Officers of the High

From Chief Justice 18th Dec^r 1863.

"The Governor in Council cannot assent to the correctness of the foregoing remarks. The Ministerial Officers of the High Court are Public Officers in the employment of the Government, paid by the State, and as much servants of the Government as the Ministerial Officers in any other public office. That this is considered by the Home Govt. to be their position, is shown by the proviso at the end of clause 6 of the Letters Patent, which alludes to the right of an Officer or Clerk of the High Court to avail himself of leaves of absence under any rules prescribed by the Governor in Council. Nor can the Governor in Council admit that the adjournment of the Court's sittings, and the suspension of business for the purpose of holidays, is a matter with which the Government have no concern. It is not open to the Govt. to insist that the High Court shall be closed on certain days it may be argued that the Govt. are not competent in any way to interfere with the duration of, or the period selected for, the periodical adjournments. These are matters seriously affecting the convenience of the public, and in regard to which, if the arrangements made by the Chief Justice and the Judges were deemed to be unsatisfactory, it would clearly be the duty and right of the Executive Government to interfere."

*A.B. The regular yearly vacations are determined by law, at least as respects the appellate side of the Court, Reg. III. 1816.

High Court were in no respect public officers of the Executive Government, and it cannot be permitted that they should be supposed in any way to be so."

The views of the Government on this point are given in para 3 of their order of the 27th January last (see margin) which, as it was not thought necessary to continue the discussion of the subject, was simply placed on record, for the satisfaction of Government and information of the Secretary of State. I quite concur in the view held in it, that the Ministerial Officers of the High Court are as much public servants of the Government, as the Ministerial Officers of any other public office. and that it is competent to the Government, not of course to lay down the days on which the Court shall or not sit, but to prescribe the days on which the offices attached to the Court

as those attached to any other department - as the Board of Revenue the Accountant General's Office - shall be closed and not available to the public.

10. Certain returns were called for from the Mofussil Judges in connection with the whipping bill, which subsequently was passed as Act VI of 1864 of the Council of India, and the opinion of the Judges of the High Court was requested on the proposed enactment. As the High Court in forwarding their report on the bill did so in a few words, and did not record their views on any of the important considerations connected with the subject, they were "requested to supply the omission". There was nothing discourteous meant, nor, I must contend, anything discourteous said in regard to the omission on the part of the Court, or in the request for its being supplied. As the question moreover was one which had excited much public interest

From Registrar 15 Jan. 1864.

Letter 14 April 1864.

interest, the papers relating to the bill were laid upon the Editor's Table.

In their reply, the Judges stated that they did not recognize the right of Government to demand their opinion on legislative matters, as, in giving it, they were not performing judicial functions or any duty imposed on them by Her Majesty's Letters Patent "x x x". In this instance the Judges are willing to make a few additional observations.

On the Government in their reply, demurring to the correctness of the above view, the Honble the Chief Justice replied for himself and his colleagues in a letter, of which I will only say that it was not such as ought to have been addressed to Government.

11. From the above extracts from their letters which I have quoted

the adviser and organ of Government
in all judicial matters; per-
forming the functions of a
minister of justice. The members
of Government ~~and their Secretaries~~
will often have but a slight
practical acquaintance with
the course of business in the
Courts and the details of judicial
administration. The judges
of the High Court will have
among their members, two at
least of great judicial
experience acquired during
a long course of service in the
Courts in the Provinces. But
whatever may be the decision
ultimately arrived at on this
point, the question should
not longer be left in un-
certainty. Both the Government
and the High Court should
^{exactly} know what the latter authority
may be required to do, and
what

what it may not - what are
and what are not its duties
and functions - and in what
relation it should stand to
the Government - nor should
Government be exposed to
receive a second time such
a letter as that from the
Chief Justice of the 14th April last.

J. P. G. M.

14 July 1864

Judicial Sec. to High Court
22-16 of 1862

Judicial Sec. to High Court

Form

Minute by the Honble
J. Pycroft.

11 Nov 1862

Dated 14 July
Recd 18 July 1862.

1862

Observations in review
of the Letters Patent for
the High Court of Judicature

11 July

1862

1862

1 - The only point in the proposed amendments of the Letters Patent to which it seems necessary for me to allude is the appointment of the Ministerial Servants of the High Court. In the case of the 2 Registrars, the Clerks, the Surveyor & Telling Officer, the Clerk of the Crown & the Sheriff the Govt ought to have a veto unless indeed the appointments which in the last two instances are be applied to the Govt as properly belonging to it. I am in the opinion that the jelling up of the other offices should be left in the hands of the Chief Justice.

2 - The Supreme Court and the Lord & Housday & Housday stood in such different positions towards the Govt that their amalgamation to form the present High Court has been attended with some embarrassment as pointed out in Mr. Pycroft's Minute & it seems

very advisable to make
use of the present oppor-
tunity for the removal of
any future difficulty or
misapprehension.

3. One of the most responsible
& important duties of the
central Govt is to provide
for the due administration
of Criminal & Civil Justice
and see that the various
Courts are in a state of
efficiency & that the ju-
dicial officers earn public
confidence by ability &
regularity in the discharge
of their functions - Under
the old system Govt have
the advice & aid of the
& J. Adwait to assist
them in this duty through
the Presidency except in
the town of Madras, and
it seems to me to have
been evidently intended
that the High Court should

* 24 & 25 Dec. Cap 104 Sect 9
and
Judicial Letter of Secty of State
No 242 16 May 62. P. 4

- 221 1782X
Under similar service
4 - The Govt could obtain
from no other source
such reliable information
regarding the official character
& qualifications of the Pros-
-posed Judges, the state of
their Courts & the adequacy
of existing Judicial insti-
-tutions & Laws to the re-
-quirements of the Country,
as from the High Court
before whom the Proceeding
of the subordinate Jstia-
-rials pass in review, and
it seems to me that any
attempt to obtain this
aid by the appointment
of a Judicial Secty. to
Govt would be unsuccessful

- 5 - I fully concur in
Mr. Pycroft's remarks
on this subject, and
concede that the High
Court would lose rather
dignity or independence

by being the advisers
of Govt on matters con-
nected with the judicial
administration of the
Country - I have no
reason to suppose
that the Judges would
be disinclined to render
information & aid ~~but~~
should this duty be
formally assigned to
them, but as the question
has been raised whether
any functions should
be expected of them beyond
the "duties imposed on
them by the Letters Patent"
it becomes of consequence
that the Letters Patent
should be clear & explicit
on this important point

I Wrotley

21 July/64

Memorandum

I am, generally, with the
 majority remarks con-
 sidered by the President in
 his minute upon the
 subject of the amendment
 of the letter Patent create-
 -tating the High Court.
 It is, most certainly, desir-
 -able that the said
 letter should define
 clearly the relation between
 the Govt and the High Court
 and that no opening should
 be left for the assumption
 of authority by the former
 which might be repudiated
 by the latter.
 It appears to me that
 under the present consti-
 -tution of the court, the
 duties of supervising the
 administration of the inferior
 judicial judicatures
 would be better performed
 by the High Court than by
 the Govt, and I cannot
 see that the performance of
 such administrative duties
 could in any way lower the
 position of the judges -
 with regard to the clause
 made by the Chesapeake
 that all the Ministerial
 officers of the High Court
 should be appointed by

W

GP

357

Publ. by the Govt 3rd of the
Dec. 16 of 1864

Printed by the Govt

Printed by the Govt

E. B. Smith

1864/13/18

Printed by the Govt
Dec 22 - 1864

Dec 1864

Observations on the
of the letter Patent
for the High Court
of the Govt.

Printed 3-7
1-9-64

himself without any
reference to the Gov^t. I am
inclined to agree with
Mr Dyers that an ex-
=ception to this should
only be made in a few
cases. However should
be inclined to make such
exception only with reference
to officers who having
certain wish to do for the
Gov^t considered deeply
with the Chief.
I think the Registrar in
the appellate side, who
is now an officer of the Gov^t
civil servants of the Gov^t
should be appointed sub-
=ject to the approval of
the Gov^t - and I think
that the Gov^t Prosecution
should not act in that
capacity without such
approval. - That the
officer instanced by
Mr Dyers, & the
Registrar in the original
side of the Court -
the Comm^r & taxing
officer - & the Sheriff
might be left to the app^r of
the Chief Justice

MD

27th August 1864

Judicial Department.

Me

PROCEEDINGS of the MADRAS GOVERNMENT.

Read the following papers

From the Honorable the Chief Justice of the High Court - Here enter 2^d July 1864.

Minute by the Honorable J. Pycroft ——— 11 — do —

do Honble E. Matting ——— 21 — do —

do Honble the President ——— 27 — Aug 1864 —

Order thereon 1st September 1864
 No. 1318.

Resolved that the papers recorded above be brought to the notice of the Right Honble the Secretary of State.

LD

15 copies recd. 7/9

June 12. 1864. 3. 3. 1864

Received 1864. 1864.

From the Honorable the President

Letter 127 Aug 1864.

1864

Observations in series of the letter Patent for the High Court of Madras.

1864 3. 7. 1. 9. 64.

Printed by J. S. G. & Co.
No. 16 of 1864.

21-2-20
20-1-23 1/2

Judicial 1864. Department.

No. 1318

PROCEEDINGS of GOVERNMENT.

Date 1st September 1864