

## MADRAS RECORD OFFICE.

Government of Madras.

*Journal* DEPARTMENT.

|          |      |             |
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237-240

12/13

Not to be folded or roughly handled

*Proceedings of the Madras Government, Judicial Department,  
27th March 1866.*

From the Magistrate of the Godavery District, to the Magistrate of Vizagapatam; dated Cocanada, 30th October 1865, No. 225.

I have the honor to acknowledge the receipt of your letter, No. 340, of 28th instant.

2. The reason why the summonses referred to were served through the Police in your District, was that, on a former occasion, when you were requested by the Joint Magistrate in charge to serve a summons on a party in your District, to require his attendance before the Deputy Magistrate at Cocanada, you declined to do so. I annex copies of correspondence on the occasion, and of an answer given by the High Court to a reference made to them.

3. If a summons issued in one District cannot, any how, be served in an adjoining one, I do not see how business can be carried on; and I should think the Legislature, in framing the Procedure Code, had no such intention, though they may have omitted to provide for its being served beyond the District where it is issued.

4. It seems to me that the terms of Section 70 of the Code of Criminal Procedure sanctions the course I pursued. The summonses at Pittapur were issued through a Police Officer, and the Police force being one throughout the whole Presidency, I do not see why such a document should not be passed through the Police from one District to another. It is no where laid down that a summons is available only in the District where it is issued.

From the Joint Magistrate in charge, Godavery District, to the Registrar, High Court of Judicature, Madras; dated Nursapur, 26th April 1865, No. 96.

I have the honor to submit the following for the consideration and orders of the Judges.

2. According to the prevailing practice, on the 13th instant, I forwarded to the Magistrate of Vizagapatam, a summons to be served on a person at Vizagapatam, in a case pending before the Deputy Magistrate at Cocanada.

3. Mr. Carmichael returned the summons unserved, and stated\* that he did not find any Section of the Code of Criminal Procedure under which he should comply with my request.

\* 15th April, No. 131.

4. I have the honor to request instructions for my future guidance, in order that I may know how to serve a summons on a witness or defendant in a District out of my jurisdiction.

5. For this, no provision seems to have been made in the Criminal Procedure Code. By Section 84, a warrant issued by a Magistrate in one District may be executed by the Magistrate of another District, but no analogous power, regarding the serving of a summons, has been conferred.

*Proceedings of the High Court of Judicature at Madras, 9th May 1865.*

Read letter dated the 26th ultimo from the Joint Magistrate in charge of the Godavery District, requesting instructions as to how a summons is to be served on a person in another District.

The Joint Magistrate must be guided by the provisions of the Code of Criminal Procedure. The High Court are not authorized to expound the law.

(True Extract).

(Signed) P. P. HUTCHINS,

Registrar, Appellate Side.

(True Copies).

(Signed) J. FRASER,

Magistrate.

Referred to the Advocate General for his opinion.

(Signed) A. J. ARBUTHNOT,

Chief Secretary.

29th November 1865.

*Proceedings of the Madras Government, Judicial Department,  
27th March 1866.*

No. 238. From the Government Solicitor, Madras, to the Chief Secretary to Government, Fort Saint George; dated Madras, 8th December 1865, No. 724.

I have the honor to acknowledge the Order of Government, noted in the margin (with enclosures), relative to

Dated 29th November 1865, and made on letter from Magistrate of Vizagapatam to Government, of 4th idem, No. 348.

the issue, service, and execution of Summonses and Warrants, to and against

witnesses and accused persons resident beyond the jurisdiction of the Magistrate before whom the charge is preferred.

2. I submitted the papers for the consideration of the Advocate General, with whom I have also conferred; and

3. I now forward a copy of his Opinion, and return the order and enclosures above noted.

**COPY—OPINION.**

I have carefully considered all the points submitted in the letter of the Magistrate of Vizagapatam, dated 4th November 1865, No. 348.

2. The 1st question divides itself into two parts:—

1st, as to a summons for an accused party.

2nd, as to summons for a witness.

3. Chapter IV of the Criminal Procedure Code details the procedure with respect to the summons of a party accused; but Section 75 makes the provisions of this Chapter, relating to a summons and its issue, applicable to every summons issued under the Act.

4. The provisions of Chapter IV apply, therefore, to summonses for witnesses, as well as for accused parties. Whatever is legal with respect to a summons for the latter, is so with respect to a summons for the former.

5. Section 70 states that a summons shall be ordinarily issued through a Police Officer. The latter part of this Section has no application, I think (as contended for in the letter of the Magistrate of the Godavery District, dated 30th October 1865, No. 225), to the present question. That part of the Section only applies to cases of immediate emergency, and when no Police Officer is available. It cannot apply to ordinary cases, or authorize the Magistrate to issue the summons to the Magistrate of another District, or any person not a Policeman.

6. Is then the first Clause of Section 70 sufficiently wide to admit of the construction that a summons may be served by a Policeman anywhere throughout the Presidency, and beyond the limits of the district in which the Policeman who originally has charge of the summons serves?

7. The words themselves are perhaps sufficiently wide to warrant an answer in the affirmative; but when we look to the chapter on warrants, and see what is to be done, in order to execute a warrant out of the District of the Magistrate who issues the warrant, I think that the absence of any similar provision with respect to summons must restrict the service of summons through the Police to persons residing within the District of the Magistrate who issues the summons.

8. Section 77 provides, just as in the case of a summons, that the warrant shall be ordinarily directed to "a Police Officer."

9. Section 80 provides that the warrant may be passed by endorsement from the Policeman to whom it is directed to another Policeman. No such provision exists with reference to a summons.

10. Section 83 provides that a warrant shall ordinarily be executed within the jurisdiction of the Magistrate issuing it.

11. Then comes the important Section 84, which provides for the execution of the warrant in a District other than that in which the warrant issued. Section 86 provides that the Magistrate issuing the warrant may send it by post to the Magistrate of a District in which the person to be arrested is; and such warrant is to be executed as if the execution were in the District of the Magistrate who issued the warrant.

12. These express provisions, with reference to warrants, and their absence in the immediately preceding Chapter which treats of "summons", points, I think, conclusively, to the intention of the Legislature to constitute a marked difference between the extent to which a summons and a warrant are to operate, with reference to territorial jurisdiction.

13. These arguments apply with equal force to the service of a summons to compel the appearance of a witness. For Section 75 renders Chapter IV applicable, as I have already observed, to the service of *all* summonses issued under the Act.

14. As to the 2nd question—

In cases under Chapter XV, a summons *must* issue in the first instance. In all other cases it seems to be within the discretion of the Magistrate to issue either a summons or warrant in the first instance. Section 67 gives him this power—see also Sections 179 and 248. But I do not think that he would exercise a sound discretion, and he must not exercise any other, in substituting a warrant in the first instance for a summons for the apprehension of an accused party, and *a fortiori* of a witness, simply because such person was beyond the limits of his own District. The Legislature may have expressly intended the present position of affairs, though I can hardly think so; for if an accused party or witness cannot be reached, because he is out of the jurisdiction of the Magistrate before whom the charge is preferred, crime must go unexpressed, and the prosecution of offences be brought to a standstill.

15. But if this be an unintentional oversight on the part of the Legislature, it is for the Legislature to rectify it, and not for the Magistrate to seek a remedy by a practice, which might work the gravest possible injury to perfectly innocent parties. A man residing in a distant district may be falsely accused of a crime through spite or other malevolent motive, or unjustly though in good faith. He may be perfectly ready, and even anxious to surrender himself and take his trial, if only informed that a charge is pending against him; and it appears to me that it would be monstrous to issue a warrant in such a case in the first instance. Still more forcible are the objections to such a procedure in the case of a mere witness.

16. Of course, cases may and will arise, the circumstances of which would justify, and indeed necessitate, the issue of a warrant in the first instance. Thus, in cases triable by the Court of Sessions, the language of Section 179 seems to point to the issue of a warrant in the first instance: the Magistrate's discretion to issue a summons for the warrant is named *first*; the summons secondly, and in the proviso. The same remark applies to cases triable under Chapter XIV, in which more than six months' imprisonment is the punishment—see Section 248. The language of Section 67 seems to leave it to the discretion of the Magistrate to issue a summons or a warrant in ordinary cases; and Section 73, to permit of the issue of a warrant before the return of the summons, where a summons has been issued.

17. With reference to witnesses, it seems to me that a summons is the first process ordinarily contemplated.

18. Sections 186, 187, and 191 point out this. Section 188 enables a Magistrate to issue his warrant for a witness in the first instance, if he believes that the witness will not attend in the first instance without one. But it would be stretching the meaning of this Section far beyond its fair and legitimate construction to apply this to the case of a witness simply because he resides out of the jurisdiction of the Magistrate requiring his attendance. *Non constat* that such a witness might not be perfectly willing to attend and give his evidence, if he was only aware that the ends of justice required it. To haul up such a witness by apprehending him under a warrant, and, it may be, drag him from one end of the Presidency to the other, to speak to alleged facts of which he may know nothing, and it may be in the most trivial case, would be an evil, on the gravity of which it is unnecessary to dilate.

19. In my recent Opinion, dated 2nd October last, I incidentally touched upon this subject. What I then wrote on the subject of summoning witnesses did not in any way form the ground of my opinion, which was based on the argument that His Excellency the Governor General could not, by applying the Code of Criminal Procedure to the kingdom of Mysore, give it any efficacy beyond the territorial limits of such kingdom.

20. That a witness, if necessary for the ends of justice, should be summoned and compelled to attend, appeared then to me, as it does now, a reasonable provision of the law; but the present question, *how* the summons is to be served, or whether a warrant may issue in the first instance, was not present to my mind.

21. I am fully alive to the hardship to which an individual may be subject, by having to leave his business and travel long distances; but this, in my opinion, is a less evil than the entire defeat of justice, by the inability of the Court to reach the accused, or the witnesses. It must be left to the Magistracy, if armed with the power of compelling the attendance of witnesses, without reference to their place of residence, to exercise that power with such tenderness as shall cause the least possible inconvenience to individuals, consistent with the due administration of public justice.

22. The accused may, indeed, in practice be reached now. If a man be charged with any of the more serious classes of offences triable by the Court of Session, and there appear to the Magistrate reasonable grounds for the charge, I apprehend he would issue his warrant in the first instance, without reference to the fact that the accused happened to be in another District.

23. Section 74 meets to some extent the case of a person resident in one District accused of crime in another. It does not, however, get over the difficulty with respect to witnesses. It provides that the Magistrate of a District may take the initiative with respect to any person within his own District, suspected of having committed an offence in another District. He may issue either his summons or warrant. Sections 88 and 89 provide for the transmission of the accused, when apprehended, to the Magistrate within whose jurisdiction the offence was committed.

24. I conceive that under this Section the Magistrate of one District can put in motion the Magistrate of another, and that when the Magistrate in whose jurisdiction an offence may have been committed sends to the Magistrate within whose District the accused resides a Statement of the case, it would be the duty of the latter to deal with the case under Sections 74 and 88.

25. Such a course would meet the cases in which it may be desirable to *summon*, in the first instance, an accused party residing beyond the limits of the District in which the offence is committed. But it is a tedious and round-about procedure at the best, and, as I have before observed, it does not touch the case of a witness.

26. It is manifest that if the witness cannot be reached, the apprehension of the accused may become a mere empty form; and I cannot think that it was the intention of the Legislature to cut up a Presidency, as it were, into Criminal circles. On the confines of two Districts the evils of such a system would be in constant operation. The system would be a positive premium for crime.

27. I think that the existing state of the Law, as I hold it, should be brought under the notice of the Supreme Legislature. If I am well founded, a remedy will be applied. Or it might be desirable to obtain a judicial decision upon it. On a former occasion, I advised such a course. The Government then wrote to the Honorable the Judges of the High Court, requesting them to take an early opportunity of calling a case up, and passing a decision which should settle the construction. No action, I believe, has followed on that communication; and I conceive that it is not one of the functions of the High Court to take the initiative, with the view of simply giving a judicial construction upon a disputed or doubtful point of Law. If it be thought desirable to obtain such a construction, I conceive that the proper course would be to direct the Magistracy to take the earliest opportunity of trying the question, with the view of obtaining a decision upon appeal.

28. Such an opportunity may not immediately arise. The evils of the existing law, assuming that my opinion is well founded, are such, that I would respectfully advise His Excellency the Governor in Council to communicate at once with His Excellency the Governor General in Council upon the subject.

Proceedings of the Madras Government, Judicial Department,  
27th March 1866.

29. My observations upon the second question submitted by the Magistrate of Vizagapatam sufficiently answer his third question in both its branches.

4th December 1865.

(Signed) J. B. NORTON,  
Advocate General.

(True Copy).

(Signed) J. R. BOYSON,  
Government Solicitor.

No. 239. ORDER THEREON, 27th March 1866, No. 465.

The Opinion of the Advocate General will be communicated to all Magistrates for guidance.

2. The following letter will be sent to the Secretary to the Government of India, Home Department.

(Signed) A. J. ARBUTHNOT,  
Chief Secretary

No. 240. To the Secretary to the Government of India, Home Department, dated Fort Saint George, 27th March 1866, No. 466.

I am directed by His Excellency the Governor in Council to forward, herewith, for submission to the Government of India, the papers noted in the margin, relative to a question raised by the Magistrate of Vizagapatam, who doubts the efficacy of a summons beyond the District wherein it issues.

2. The point having been referred to the Advocate General, Mr. Norton is of opinion that, in the existing state of the law, there is no provision by which a Magistrate can procure by summons the attendance before him of a witness who may happen to be resident out of his jurisdiction, and that, where it is necessary to procure by summons the attendance of an accused person residing beyond the limits of the District in which the offence has been committed, the Magistrate can do so only by sending a statement of the case to the Magistrate of the District in which the party happens to reside, and by requesting him to proceed under Section 74 of the Code of Criminal Procedure.

3. Mr. Norton considers that, although the wording of the first part of Section 70 is *per se* sufficiently wide to admit of the construction that a summons may be served by a Policeman anywhere throughout the Presidency, still the absence of any provisions in the Chapter on summons, corresponding with the express provisions contained in Sections 80, 84, and 86 in the Chapter on warrants, must be held to point conclusively to the intention of the Legislature to constitute a marked difference between the extent to which a summons and a warrant are to operate with reference to territorial jurisdiction, *i. e.*, in other words, as restricting the service of summons through the Police to persons residing within the District of the Magistrate issuing the same.

4. This construction of the law, if it be the correct one, must cause most serious inconvenience, and add greatly to the difficulty of dealing with crime in those cases in which witnesses may reside beyond the jurisdiction of the Magistrate issuing the summons. I am, accordingly, directed to submit the papers for the consideration of the Government of India, in order that Legislative action may be taken, if such should be deemed by the Governor General in Council to be necessary under the circumstances of the case.

(Signed) A. J. ARBUTHNOT,  
Chief Secretary.

No 348 of 1865 vizagapatam  
No 2434 " " Secretariat. for info.

The confusion of this matter is that in the Journal Table, seems to be, in person of the paper, like the correct one. I think the Magistrate of Vizag is right, and I am of opinion that his three questions should be answered in the negative.

Arto Question No. 1. In Chapter 4 C.C. Proc we find Section 70 as to how a Summons shall ordinarily be served. The ordinary medium is a Police Officer; but, if matters prep, this is a Police Officer; but, if matters prep, this is a Police Officer; but, if matters prep, this is a Police Officer. The term cannot be used by any other person. This term cannot be used to have reference to persons out of the Magistrate's jurisdiction. The plain sense of it is, I think, that he may call on any one at hand and deputize him to serve this prep, a simple and safe and important one than a warrant.

If it meant that a person out of the Magistrate's jurisdiction might be so employed, the Code must have made provision for its being made over to such

3 # in cases such as the first part refers to, are similar to those affecting Wps, examined in cases included in the second part. vide Section 264.

Now, under these rules which appear in Sections 187 - 192, no provision is made for the issue of a warrant for a witness who is simply beyond jurisdiction.

The cases in which a warrant may issue are given in Section 188, which shows that the Magistrate should have reasons to believe that a Wp will not attend without such compulsion. He may then issue a warrant and it seems to me that after this has been done, the warrant can run only within the Magistrate's own jurisdiction, nothing being stated in the Section about parties or otherwise, that I can trace, which provides for a warrant issued for the attendance of a Wp being carried into execution by a Magistrate in a neighboring or other district. The penalty which the absentee incurs

2 person by the <sup>Police Officer</sup> first directed to serve it, as is done in Section 80 where a Police Officer is empowered to deliver one to another Pol. Off. the warrant originally directed to himself.

It would be preposterous to suppose that the words at the close of Section 70 are intended to mean, as the Magistrate of Bodanery seems to have considered "any other officer" a "any other Magistrate".

As to Question No. 2. This takes us to Chapter XV of the C. C. Proc. and to its Section 257 x 260 which satisfy me that a summons must be the first step against a person accused of an offence indicated by this Chapter, and that a Magistrate will be justified in issuing a warrant against such person, only after he has learnt that the summons has been acted on in the manner & to the extent required by Section 260.

As regards Question No. 3. This question divides itself into two parts but the rules in respect of Wps examine it #.

4/ is described in Section 189 where the warrant cannot be served and in Section 191 where a witness has failed to comply with the exigency of a summons actually served on him.

In the latter case the warrant is simply for bringing up the witness to the court - in the other attachment of property & fine are the consequences.

The framers of the Code may have intended to give to a person making a complaint at Cape Comorin, the benefit and the right of securing the benefit of the testimony of a witness residing at Ruppellumbah in Pannam, or Baroor in S. Canara, but I doubt find that they have provided the means of getting at such a witness. In an opinion given by the Advocate General the other day he admitted to him as a clerk last night. I doubt however whether it has been convenient for the advantage of the subjects in the country by the Code Commission, beyond the publication provisions of which, we cannot go.

24 Nov 65.

W.D.

N. 2645. Judicial Dept.

From The Government Solicitor,  
Dated 8<sup>th</sup> December 1865.  
For Orders.

The A's opinion should be communicated to all Magistrates & sent to the Govt of India for their consideration & such action as they may see fit to take upon it. I don't see what more can be done.

W.D. J.P.  
I think it is sufficient for the present to communicate the A's opinion to the Govt. of India. I think, however, something may turn up to elicit an authoritative determination of the point by the High Court. I don't see the necessity of any action in the matter by the Sup. Govt. If the A's views be made generally known, Magistrates will

PROCEEDINGS of the MADRAS GOVERNMENT.

Read the following  
letter from the Magistrate  
of Vizagapatam.

(Here enter 4<sup>th</sup> Nov. 1865 No. 348)

Order thereon

It appears to the  
Governor in Council that  
the answer to the 1<sup>st</sup> of the  
<sup>three</sup> questions put by the Magis-  
trate of Vizagapatam should  
clearly be in the affirmative.  
A Police officer can serve  
a summons in any part  
of the General Police District  
as constituted by Act XXIV  
of 1859.

I have looked over the  
Code and am disposed to think  
that it was right in saying  
at the Council table that  
the law was right. I have  
written my views on the subject.

2. The question whether  
a warrant should be

Substituted

Substituted for a Summons  
in any particular case  
is one to be determined by  
the Magistrate at his  
discretion, as also is the  
question whether a warrant  
may be issued to procure  
the attendance of a witness  
who may be out of the  
jurisdiction of the Magis-  
trate issuing such warrant,  
in a case where a Sum-  
mons to the accused shall  
ordinarily issue in the first  
instance, or in a case where  
a warrant for the ap-  
prehension of the accused  
shall ordinarily issue  
in the first instance.  
In all these cases it is for  
the Magistrate to determine  
whether or not <sup>it</sup> is necessary to issue a warrant  
in order to procure the  
attendance

attendance of the witness.  
It should not be issued  
otherwise.  
3. The above appears  
to the Governor in Council  
to be the correct construc-  
tion of the Law as bearing  
upon the cases suggested  
by the Magistrate, but  
before passing orders on  
Mr. Carmichael's reference,  
the Excellency in Council  
resolves to refer it to the  
Advocate General for his  
opinion.

To the Governor and Solicitor.  
Magistrate of Vizagapatam.

PROCEEDINGS of the MADRAS GOVERNMENT.

Read the following papers.

From the Magistrate of Vizagapatnam Here enter 4. No. 15 h. 360  
— Sub. Solicitor - Madras — 8 Dec — 700.

Order thereon 27<sup>th</sup> March 1866. A. J. S.

The opinion of the Advocate General will be communicated to all Magistrates for guidance.

To the Magistrate of all Districts despd 7/4  
" Chief of Police - despd 6/4 The following letter will be sent.

despd 6/4  
To the Secretary to the Government of India Home Department.

Similar  
Sir, I am directed by His Excellency the Governor in Council to forward herewith for

W. D. K.  
J. R.

Dated

PROCEEDINGS OF GOVERNMENT.

No.

136. Department.

for Submision to the Court of  
Suiria the papers noted in  
the margin, relative to a  
question raised by the  
Magistrate of Vizagapatam  
who doubts the efficacy of  
a Summons beyond the  
District wherein it issues.

2. The point having  
been referred to the Corbate  
General, Mr. Norton is of  
opinion that in the existing  
state of the law there is  
no provision by which a  
Magistrate can procure <sup>by a summons</sup> the  
attendance before him of a  
witness who may happen  
to be resident out of his  
jurisdiction, and that where  
it is necessary to procure  
by Summons the attendance  
of an accused person residing  
beyond the limits of the  
District in which the offence  
has been committed, the  
Magistrate can do so only  
by sending a statement of  
the case to the Magistrate  
of the District in which  
the

From the Magistrate of  
Vizagapatam - 4 Nov 1865 - 348.  
For Submision - 8 Dec 65 - 724.

by summons  
conclude is to be  
understood - by  
warrant to  
bring

10/11/4  
the party happens to  
reside and by requesting  
him to proceed under  
Section 74 of the Code of  
Criminal Procedure  
3. Mr. Norton <sup>concludes</sup>  
at that although the  
wording of the first part  
of Section 70 is per se suf-  
ficiently wide to admit  
of the construction that a  
Summons may be served  
by a Police Officer any where  
throughout the Presidency  
still the absence of any  
provisions in the Chapter  
on Summons, corresponding  
with the express provisions  
contained in Secs 80, 84, & 86  
in the Chapter on Warrants  
must be <sup>held to</sup> ~~construed as pointing~~  
conclusively to the intention  
of the Legislature to constitute  
a marked difference between  
the extent to which a Sum-  
mons and a warrant are  
to operate with reference  
to

Fort St. George  
27<sup>th</sup> March 1866

19.10.14

Ludlow 1860. Department.

No. 465-66

PROCEEDINGS OF GOVERNMENT.

27th. 1982.

Dated 27th March/85.

Press No. 2765, G. M. - 14.11.65-600.

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