MR. 0. 2—32,000—16-10-99.

MADRAS RECORD OFFICE.

Government of Madras.

Judicial **DEPARTMENT.**

G.O. No. 1174 Press ~~Mis.~~

255-256

255-256

Dated 22 - 7 — ~~19~~ 1897.

415

Not to be folded or roughly handled

1x

Proceedings of the Madras Government, Judicial Department,
22nd July 1867.

No. 255. Read the following Proceedings of Government in the Military Department, dated 15th July 1867, No. 2565.

Communicating papers anent the power of the Governor General of India in Council to pardon Natives against whom sentences have been recorded by Courts Martial.

(Vide Proceedings, Military Department, dated 15th July 1867, Nos. 381 & 382).

No. 256. ORDER THEREON, 22nd July 1867, No. 1174.

Resolved that copies of the foregoing Proceedings be forwarded to the Honorable the Judges of the High Court, and to the Advocate General for information.

(Signed) R. S. ELLIS,
Acting Chief Secretary.

To the Honorable the Judges of the High Court.
„ Acting Government Solicitor.

Exd. J. Tulloch.

MILITARY DEPARTMENT.

PROCEEDINGS OF THE MADRAS GOVERNMENT.

Read the following papers:—

From the Right Honorable the Secretary of State for India, India Office, London, 25th April 1867, No. 22, to His Excellency the Right Honorable the Governor General of India in Council.

I have received and considered in Council your Military letter, dated 6th October 1866, No. 261, forwarding memorandum by the Officiating Judge Advocate General, as to the power of the Governor General of India in Council to pardon natives against whom sentences have been recorded by Courts-martial.

2. In reply, I have to forward for your information an opinion by the Standing Council, Mr. Forsyth,* on the question raised in the memorandum of the Judge Advocate General.

* *Dated 28th November* 1866.

3. I have also to inform your Excellency, with reference to the concluding paragraph of Earl de Grey's despatch, No. 26, dated 25th June 1866, in the Judicial Department, that having communicated with the Secretary of State for War and with His Royal Highness the Field Marshal Commanding-in-Chief, on the propriety of maintaining the existing state of the law on this subject, which involves questions affecting the discipline and usage of Her Majesty's British Forces, I am of opinion, after a careful consideration of the whole subject, that it is not desirable to interfere with the law as it now stands.

4. In thus disposing finally of the questions raised in your despatch, No. 204, dated 25th April 1865, it is hardly necessary that I should observe that I entirely concur in the opinion expressed by your Excellency in Council, that the power now shown to be possessed by the Viceroy and Governor General, to pardon or remit a portion of the punishment awarded in the case of a Native Soldier by the sentence of a Court-martial assembled within British Territories, should be exercised very sparingly and only for very sufficient reasons.

Instructions on behalf of the Secretary of State in Council.

You are requested to refer to the accompanying case and opinion, and with reference to the accompanying memorandum by Lieutenant-Colonel Maisey, the Officiating Judge Advocate General of the Bengal Army, to state for the information of Lord Cranborne, your opinion upon the question raised by Colonel Maisey.

Opinion of Mr. FORSYTH.

By the Act 18 of the Governor General in Council, 1855, the Executive Government in each Presidency has the power to grant pardons or remit punishment awarded in respect of crimes or offences "whether the same be awarded by any of Her Majesty's Supreme Courts of Judicature, "or by any other Court or Officer *exercising jurisdiction within the said territories.*" By the Articles of War for the Native Army, Act 29 of 1861, in chapter 6, which provides for the mode of dealing with offences not Military, it is enacted, "When any Officer or Soldier in any place "*within the jurisdiction of any Criminal court established by Her Majesty or the Govern-*"*ment of India, or any Local Government,* is accused of any offence triable by any such Court, "he shall be delivered over to a Magistrate to be proceeded against according to law." And by Article 125, "In any place *out of the British Territories in India,* such offences when com-"mitted by Officers or Soldiers shall be cognisable by Courts-martial." It follows therefore, that in the case of non-military offences committed by Native Officers or Soldiers, they can only be tried by Courts-martial when such offences are committed out of the British Territories in India. Now the power to pardon and remit punishment given to the Executive Governments of the Presi-

dencies by Act 18 of 1855, applies only where the punishment has been awarded by a Court or Officer exercising jurisdiction within the British Territories. It therefore does not apply to the case of punishments awarded by sentences of Courts-martial for non-military offences committed by Native Officers or Soldiers. But in such cases it is provided by Art. 164, that "it shall be competent to any Officer having authority to confirm the sentence of a General or other Court-martial "and to remit any sentence passed by such Court-martial." The words "any Officer having authority" I think clearly refer to the Commander-in-Chief, or other Commanding Officer specified in Article 161, and do not embrace the Governor General of India in Council. Unless jurisdiction has been given by some subsequent Act to Courts-martial to try Native Officers and Soldiers for civil offences committed within the British Territories of India, they have no such jurisdiction. I am not aware of any such Act. The 100th section of chapter 11 of 28 Vict., does give such jurisdiction in the case of "any Officer or Soldier or other person subject to this Act." But by the 1st section of that Act it is provided that "nothing therein contained shall affect any Articles "of War enacted under the authority of the Government of India" respecting Native Officers or Soldiers, and upon the trial of all offences committed by any such Native Officer or Soldier, "reference shall be had to the Articles of War framed by the Government of India for such Native "Officers and Soldiers." I think therefore, that, the 100th section does not embrace Native Officers or Soldiers, and that in determining their case we must be guided by the provisions of Act. 29 of 1861. My opinion therefore is, that in the case of non-military offences committed by Native Officers or Soldiers, and tried by Courts-martial, there is no power in the Governor General of India in Council to grant pardon or remit punishment.

If am right in the view I have taken, I wish to call the attention of the Secretary of State in Council to the anomaly that follows. By force of the 100th section of the Mutiny Act, 28 Vict. C. II., European Officers and Soldiers serving in India "at a distance of upwards of 120 miles from "the Presidencies of Fort William, Fort Saint George and Bombay respectively," are made triable by Courts-martial for "any crime, which if committed in England would be felony," but Native Officers and Soldiers can only be so tried for such offences when they are committed by them out of the British Territory. So that it may be said that the European Forces are in a worse position than the Native Forces, if it be thought a disadvantage to be tried by a Court-martial instead of by a regularly constituted Criminal Court.

28*th November* 1866. (Signed) W. FORSYTH,

MILITARY DEPARTMENT PROCEEDINGS, SEPTEMBER 1866.

Power of the Governor General to pardon those against whom sentences have been awarded by Court Martial.

From the Under Secretary to the Government of India, Home Department, 8th August 1866, No. 3470; to the Officiating Secretary to the Government of India, Military Department.

Transferred to the Military Department.

From the Right Honorable the Secretary of State for India, India Office, London, 25th June 1866, No. 26; to His Excellency the Right Honorable the Governor General of India in Council.

The despatch* of your Excellency in Council, dated 17th April, No. 204 of 1865, relative to the power of the Governor General of India, to pardon those against whom sentences have been recorded by Courts Martial in India, or to remit any portion of such sentences, has been laid before me in Council.

* *Military.*

2. I have been in correspondence with the Secretary of State for the War Department on the subject of your despatch, and I now forward, for the information and guidance of your Excellency in Council, the opinion of the Law Officers of the Crown and of the Standing Counsel on the questions raised in the discussion between your Government and His Excellency the late Commander-in-Chief.

3. The propriety of maintaining the existing state of the Law on this subject is still under my consideration.

OPINION IS REQUESTED.

1. Whether the Governor General of India in Council (being the person authorised to administer the Supreme Executive Government in the Presidency of Bengal) has the right in case of a Native Soldier in the service of the Government of India tried by Court Martial under Articles of War for Native Soldiers for the offence of insubordination to grant a pardon.

2. Whether under the foregoing circumstances he has the right to remit any portion of the punishment.

3. Whether in the cases of sentences of Courts Martial on European Officers and Soldiers of Her Majesty's Army and of the Indian European Forces of Her Majesty, formerly in the service of the East India Company for Military offences, the Governor General in Council has the like power to pardon and remit.

4. Whether the suggested general power in the Governor General to pardon and remit extends also to sentences of Courts Martial for Civil offences under the peculiar provision of Section 100 of the Mutiny Act.

OPINION.

1 & 2. We think that under the Indian Act 18 of 1855, the Governor General of India in Council has the right in the case of a Native Soldier tried by Court Martial under Articles of War for Native Soldiers to grant a pardon or remit a portion of the punishment awarded by the sentence of a Court Martial.

3. As respects sentences of Courts Martial on European Officers and Soldiers of Her Majesty's Army and of the Indian European Forces of Her Majesty formerly in the service of the East India Company for Military offences, we think that the case is different. Those Courts Martial are held and those sentences are pronounced under the authority of Acts of the Imperial Legislature. It is in our opinion to say the least very doubtful whether a power of pardon and remission of punishment granted by a Local Act can be held applicable to sentences which derive their authority from Imperial Acts. We do not agree with Mr. Vernon Lushington in attributing to the word "suspend" in the 104th Section of the Mutiny Act 26 and 27. Vic. C. 8. (1863) the force which he assigns to it. We think that when the sentence of the Court Martial has been pronounced, its proceedings are at an end, and it is then no longer possible to "suspend" them. Upon the whole we are of opinion that in the case suggested by this question it is safest to hold that the Governor General in Council has not the power to pardon or remit punishment.

4. We think that the power of the Governor General to pardon and remit does not extend to sentences of Courts Martial for Civil offences under the 100th Section of the Mutiny Act (28 Vic. C. 11, 1865) in the case of Officers or Soldiers whether Native or European. The authority to pass sentences in such cases is derived from an Act of the Imperial Legislature and therefore the reasons given in our answer to question No. 3 equally apply. And in addition to this the 100th Section of the Mutiny Act expressly enacts that the *general or other Officer Commanding-in-Chief* "may, if he shall think fit, suspend, mitigate or remit the sentence," and in the case of sentence of death or penal servitude "such sentence shall not be carried into "execution until it shall have been duly approved by the Governor General in Council or Governor "in Council of the Presidency" which clearly shews in our opinion that no general power to pardon or remit punishment in the case of sentences passed under that Section exists in the Governor General.

(Signed) ROUNDELL PALMER.
(,,) R. P. COLLIER.
(,,) WILLIAM FORSYTH.

3*rd May* 1866.

MILITARY DEPARTMENT, FORT WILLIAM, THE 20TH JUNE 1867.
No. 518.

Copy of the above forwarded to the Secretary to Government, Fort Saint George, Military Department, for the information of the Right Honorable the Governor in Council, accompanied by a transcript of the Proceedings of the Government of India for the month of September 1866, No. 397.

(By Order,)
(Signed) H. K. BURNE, Lieut.-Colonel,
Offg. Dy. Secy. to the Govt. of India.

Judicial 1867 Sept

Pros 22d July

Pres Govt Brig Genl
No 2565-

C/15-
R/17 July

No 1574.

Copies papers annexed
the proceedings of the General
Council of Judicature
Council to pardon Lieutenant
against whom sentences
have been recorded by
Courts-Martial

With an order

July 30 Sent

No 1174 dated 22nd July 1867.

Resolved that copies of
the foregoing proceedings
be forwarded to the Hon'ble
the Judges of the High
Court, and to the Advo-
cate General for infor-
mation.

H.C.C

By Rt Hon'ble to Judges of the High Court
— & — By Government Solicitor. — 23/

Ord. J. E. Cashart.

ORDER, No. 2565, 15th July 1867.
Communicated to the Commander-in-Chief.
(True Extract.)

H. Marshall — Major General,
Secretary to Government.

To the Adjutant General.
" Judge Advocate General.
" Judicial Department, for information.

255-256.