

Judicial 1872
(193) Department.

MS SERIES.

G.O. No. 417

DATED 23.3.1872

Confidential

[Despatch Abstract.]

Opinion of the Advocate General of
Calcutta on Mr Mayne's claim to
continue, a member of the Council
of His Excellency —

BACK PAPERS.

G.O.	No.	Department.	Date.	G.O.	No.	Department.	Date.

FURTHER PAPERS.

G.O.	No.	Department.	Date.	G.O.	No.	Department.	Date.

Proceedings of the Madras Government, Judicial Department, 23rd March 1872.

No. 144. Read the following letter from the Secretary to the Government of India, Home Department (Judicial), to the Chief Secretary to Government, Madras, dated Fort William, 8th March 1872, No. 446.

I am directed to forward, for the information of His Excellency the Acting Governor, the accompanying copy of an opinion by the Advocate General of Calcutta on Mr. Mayne's claim to continue a Member of the Council of His Excellency for the purpose of making Laws and Regulations after he had resigned his appointment as Acting Advocate General, by virtue of which he had been called on to perform the duties of an additional member of the said Council.

1. On the first question.

I am of opinion that according to the true meaning of Sections 29 and 30 of the Indian Councils Act, an Advocate General or Officer acting in that capacity nominated as an additional Member of the Local Legislative Council, ceases to be a Member when he ceases to hold the office of Advocate General. It is in respect of the holding of that office that he is nominated to the Council, it being obligatory on the Governor to appoint him. Further (as an argument in support of this view) only eight additional Members can be appointed, and one of them must be the Advocate General or the person acting in that capacity. Assuming the full number to have been nominated, if a new Advocate General is appointed, the lawful number will be exceeded, from which it seems to follow that the intention of the Act was that the office of Advocate General should draw to it the office of Member of Council, and that the tenure of the latter should cease with that of the former.

I am not informed whether Mr. Mayne was nominated an additional Member before or after he was appointed Acting Advocate General. If the former, his seat was vacated by acceptance of that office.

2. On the second question, it is necessary to go somewhat fully into the old Acts as to the relations between Government and the Courts.

By the Act 13 of Geo. 3, C. 63 (which established the Supreme Court of Bengal), Section 17, it is provided that nothing in this Act shall extend to subject "the person of the Governor-General or any of the said Council to be arrested or imprisoned upon any action, suit, or proceeding in the said Court."

Twenty-one Geo. 3, C. 70 (relating also to Bengal), recites the above Act and the Letters Patent issued in pursuance, and the dissensions which had arisen on the construction of the Act and Charter, and that it was expedient that the Government of the Province of Bengal, &c., should be supported, enacts that the Governor-General and Council of Bengal should not be subject jointly or severally to the jurisdiction of the Supreme Court of Bengal for or by reason of any act or order or any other matter or thing whatsoever committed, ordered, or done by *them in their public capacity only and acting as Governor-General and Council*. Section 2 enacts; that if any person should be impleaded in the Court for any acts done by the order of the said Governor-General and Council, in writing, he should be justified and acquitted on giving the order in evidence, with proof that the acts had been done according to the purport of the order.

Then comes this remarkable proviso:—Section 3. "Provided always, that with respect to such order or orders of the said Governor-General and Council, as do or shall extend to any British subject or subjects, the said Court shall *have and retain* as full and competent jurisdiction as if this Act had never been made."

Apparently, therefore, an order of the Governor-General in Council in Bengal, excluding Mr. Mayne from the Legislative Council, would be a matter of which the Supreme Court could have taken cognizance against the Governor-General and Council. Let us see how this question of the immunity of the Government from the action of the local Courts was subsequently dealt with in the legislation for the other Presidencies.

*Proceedings of the Madras Government, Judicial Department,
23rd March 1872.*

By Act 37 Geo. 3, C. 142, a Recorder's Court was established at Madras and Bombay. Section 11 gives similar protection to the persons of the Governors and Members of Council, and proceeds thus, "nor shall it be competent to the said Courts within their respective jurisdictions, to hear or determine, or to entertain or exercise jurisdiction in any suit or action against the Governor or any of the Council, for or on account of any act or order, or any other act, matter, or thing whatsoever, counselled, ordered, or done by them in their public capacity, or acting as Governor and Council."

Then came the Act establishing the Madras Supreme Court, Act 39 and 40 Geo. 3, Chap. 79.

It recites a previous general Charter for all the Presidencies, and the changes in it as regard Madras and Bombay by the Act establishing the Recorder's Courts. It also recites the changes effected in regard to Bengal by the 13 Geo., C. 63, and subsequent statutes, and that it might be expedient for the better administration of justice in Madras, that a Supreme Court should be established there in the same form and *with the same powers and authorities* as that then existing in Bengal, and enacts that it shall and may be lawful for the King by Charter to erect a Supreme Court at Madras, with full power to exercise such civil and other jurisdictions, both as to Natives and British subjects, and to be invested with such powers, privileges, and immunities, for the better administration of the same, and subject to the same limitations, restrictions, and control, as the Supreme Court in Bengal, by virtue of any law then in force doth consist of, or is invested with in Bengal, &c.

Section 3.—Provides that the Governor and Council at Madras and the Governor General of Fort William shall enjoy the same exemption, *and no other*, from the authority of the Supreme Court to be erected there, as is enjoyed by the Governor General and Council at Fort William aforesaid, from the jurisdiction of the Supreme Court there already established.

Therefore, if the Charter had followed the Act, the Madras Supreme Court would have had cognizance of the matter in question similarly as the Bengal Court had.

But the Charter of the Madras Supreme Court, dated 26th December 1800, issued under the last act, notwithstanding the terms of the act, repeats the old restrictions of the act constituting the Recorder's Court. I repeat them for convenient reference. Provided that nothing in this charter shall extend (to subject the person of the Governor General, Governor, or any of the Council to arrest) "nor shall it be competent for the said court to hear or determine, or to entertain, or exercise jurisdiction in any suit, or action, against the Governor General, or Governor and Council, for, or on account of any act or order, or any other act, matter, or thing whatsoever, committed, ordered, or done by them, in their public capacity, or acting as Governor General and Council."

It remains only to notice Act 24 and 25 Vic., C. 104, establishing the High Courts. Section 9 provides that each of the High Courts shall have all such powers and authority for and in relation to the administration of justice in the Presidency for which it is established as may be granted and directed by Letters Patent, and subject thereto shall have and exercise all jurisdictions and every power and authority whatsoever in any manner vested in any of the Courts in the same Presidency abolished under this Act at the time of the abolition of such last mentioned Courts.

Since then Letters Patent have issued, and new Letters Patent, and an Act has been passed, and the various jurisdictions and modes of procedure defined; and in Bengal (and probably also in Madras, though of this I am not informed) by rules of the court the procedure has been assimilated to that under the Civil Procedure Code.

In reference generally to these acts it is clear that the persons of the Governor and Council are protected from arrest, and in this view, inasmuch as the ultimate remedy for disobedience of a writ of mandamus would be by an attachment which could not be executed against them, I think the Court might well decide that, as the result would be nugatory, the right, if any, which it possesses of issuing a Writ of Mandamus, ought not to be exercised.

R. v. Heathcote, 10 Mod. 55.
R. v. Cowle, 2 Burr. 564.
R. v. Commrs. of Sewers. Strange 753.

*Proceedings of the Madras Government, Judicial Department,
23rd March 1872.*

I am not informed of the mandatory terms of the rule, or on what grounds it is granted, or whether it is addressed to the Governor (as the person mentioned in Section 29 of the Councils Act), or to the Governor and Council. If the former, and if it is so addressed in reference to acts done by him individually and not jointly with his Council, I do not find that he has been exempted from the jurisdiction of the Court, though he is protected from arrest as above pointed out. If the latter, I am of opinion that the question of the jurisdiction of the Court in the case which has arisen, of an order extending to a British subject, will depend on the view taken of the operation of the Act 39 and 40, Geo. 3, and the Madras Charter. I think they are to be construed together. Whereas the act intends to make all persons subject to, and all complaints cognizable by the new court, with certain exceptions, within which the present case does not fall, the Charter does not go so far, but gives jurisdiction only in some cases and against some persons, and excludes it in the case which has arisen.

It probably was the intention of Parliament in the Act 39 and 40, Geo. 3, not to relieve the Government from liability to the action of the Supreme Court in cases where British subjects were complainants against them. But on the other hand, it appears to me, on general principles, that the Madras Court only has such powers and jurisdiction as have been delegated to it by the Charter of the King, which is the immediate source of its authority, and that, notwithstanding the terms of the act regarding immunity from the jurisdiction of the Court to be created, the court cannot enquire into the legality or propriety of the provisions of the charter by which it is constituted. In another view, if the charter is a wrong exercise of the powers given by the act, there are proper remedies, but the court established by it cannot rectify its own constitution so as to make it accord with what was intended by the act.

I think, therefore, the more reasonable construction is, that the Act 39 and 40, Geo. 3, gave to the King larger powers in regard to the charter which he was authorized to grant to the new court, than he chose to exercise. And that the Madras Court is effectually prevented by the charter from exercising jurisdiction against the Governor and Council in the present case.

But the point is one of difficulty, and it is just one of those which it is quite possible for a court (if it becomes necessary) to decide either way with a considerable show of reason.

It cannot, I think, be contended that because Mr. Mayne is prevented from bringing an action against the Governor General and Council by the terms of the charter, he can gain his object indirectly by the issue of the prerogative writ of mandamus. For it appears to me plain that the object of the law was to exclude the action of the municipal courts of this country altogether, and in any form, against the Executive Government for acts done by them in that capacity.

(Signed) J. GRAHAM.
4th March 1872.

No. 145. To the Secretary to the Government of India, Home Department,
dated Fort Saint George, 23rd March 1872, No. 417.

In continuation of my letter of the 9th instant, No. 334-A, I am directed by the Governor in Council to forward for the information of the Government of India, copy of a despatch sent this day to the Right Honourable the Secretary of State, reporting the result of Mr. J. D. Mayne's renewed application to the Madras High Court for a Writ of Mandamus against the Government.

2. I am to take this opportunity of conveying the thanks of the Madras Government for the opinion of Mr. Advocate General Graham, which was kindly sent with your confidential letter of the 8th instant, No. 446.

(Signed) W. HUDDLESTON,
Officiating Chief Secretary.

Confidential

N^o. 446.

From

C. B. Bayley Esquire C. S. I.
Secretary to the Govt of India

To

The Chief Secy to the Govt of Madras.

Fort William the 8th March 1872.

Home Department. Sir
Judicial.

I am directed to forward for the
information of His Excellency the Acting
Governor the accompanying copy of
an opinion by the Advocate General
of Calcutta on Mr. Mayne's claim to
continue a member of the Council
of His Excellency for the purpose
of making Laws and Regulations,
after he had resigned his appoint-
ment as Acting Advocate General
by virtue of which he had been
called on to perform the duties

of

of an Additional Members of the
said Council.

I have the honor to be

Sir

Yours most obedt Servant

C. Bayley

Secy to the Govt of India.

13. 3. 72

Sd. 417

1. On the first question.

I am of opinion that according to the true
meaning of Secs. 29 and 30 of the Indian Coun-
cils Act an Advocate General or Officer acting
in that capacity nominated as an addi-
tional member of the local legislative
Council ceases to be a member when he
ceases to hold the office of Advocate Gen-
eral. It is in respect of the holding of
that office that he is nominated to the
Council, it being obligatory on the Governor
to appoint him. Further (as an argument
in support of this view) only 8 additional
members can be appointed, and one of
them must be the Advocate General or the
person acting in that capacity. Assuming
the full number to have been nominated if a
new Advocate General is appointed the
lawful number will be exceeded, from
which it seems to follow that the intention
of the Act was that the office of Advocate
General should draw to it the office of
member of Council and that the tenure of
the latter should cease with that of the
former.

The member, as
I understand him
to be, is a
member of
the Advocate
Council; but
the argument
is in favor of
the Council.

A. P.
but perhaps
the 8 would
include the
Advocate General.
I think the 8
includes the
Adv. Gen. If so
there will be
no room for
the Advocate Gen.

I am not informed whether Mr. Mayne
was nominated an additional member
before or after he was appointed acting
Advocate General. If the former, his
seat was vacated by acceptance of
that office.

2. On the second question, it is necessary
to go somewhat fully into the old Acts
as to the relations between Government
and the courts.

By the Act 13 of Geo. 3 C. 63 (which
established the Supreme Court of Bengal) Sec
7, it is provided that nothing in this Act shall
extend to subject "the person of the Gov. Genl or any
of the said Council to be arrested or imprisoned
upon any action, suit or proceeding in the
said Court."

21 Geo. 3 C. 70 (relating also to Bengal) recites
the above act and the Letters Patent issued in pur-
suance and the Dispensations which had arisen on the
construction of the Act & Charter & that it was
expedient that the Gov. of the Province of Bengal
&c. should be supported - enacts that the Gov
General

General and Council of Bengal should not
subject jointly or severally to the jurisdiction of
the Supreme Court of Bengal for or by reason of
any act or order or any other matter or thing what-
soever committed, ordered or done by them in their
public capacity only & acting as Gov. Genl
and Council. Sec: 2 enacts: That if any person
should be impleaded in the Court for any acts
done by the order of the said Gov. Genl & Council
in writing he should be justified and acquitted
or giving the order in evidence with proof that
the acts had been done according to the
purport of the order.

Then comes this remarkable proviso:
Sec: 3. "Provided always that with respect to such
"order or orders of the said Governor General
"and Council as do or shall extend to any
"British subject or subjects the said Court shall
"have & retain as full and competent ju-
"isdiction as if this Act had never been made."

Apparently therefore an order of the Governor
General in Council in Bengal excluding Mr.
Mayne from the Legislative Council would be
a matter of which the Supreme Court could
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taken cognizance against the Governor General and Council. Let us see how this question of the immunity of the Government from the action of the local courts was subsequently dealt with in the legislation for the other Presidencies.

By Act 37 Geo. 3 C 142 a Recorder's Court was established at Madras & Bombay. Sec. 11 gives similar protection to the persons of the Governors and Members of Council and proceeds thus: "nor shall it be competent to the said Courts within their respective jurisdictions to hear or determine or to entertain or exercise jurisdiction in any suit or action against the Governor or any of the Council for or on account of any act or order or any other act matter or thing whatsoever counselled ordered or done by them in their public capacity or acting as Governor General and Council."

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It recites a previous general charter for all the Presidencies and the changes in it as regards Madras and Bombay by the Act establishing

Establishing the Recorder's Courts. It also recites the changes effected in regard to Bengal by the 13 Geo. 3 and subsequent Statute and that it might be expedient for the better administration of Justice in Madras that a Supreme Court should be established there in the same form and with the same powers and authorities as that then existing in Bengal, and enacts that it shall and may be lawful for the King by Charter to erect a Supreme Court at Madras with full power to exercise such civil and other jurisdictions both as to natives and British subjects and ^{to} be invested with such powers privileges and immunities for the better administration of the same and subject to the same limitations restrictions and Control as the Supreme Court in Bengal by virtue of any law then in force doth consist of or is invested with in Bengal &c.

Section 3. Provides that the Gov^r and Council at Madras and the Gov^r Genl.

General of Fort William shall enjoy
of the same exemption and no other from
of the authority of the Supreme Court to be
in respect there as is enjoyed by the Gov-
ernor General and Council at Fort William
as aforesaid from the jurisdiction of the
said Supreme Court there already established
and Therefore, if the Charter had followed
the Act the Madras Supreme Court would
not have had cognizance of the matter in
the question similarly as the Bengal Court
had.

But the Charter of the Madras
Supreme Court dated 26th Dec^r 1800 issued
under the last Act, notwithstanding the
terms of the Act repeats the old restrictions
of the Act constituting the Recorders Court
I repeat them for convenient reference
and provide that nothing in this Charter shall
extend to subject the person of the Gov^r
General, Governor or any of the Council
all to arrest; nor shall it be competent
for the said Court to hear or determine
or

"or to entertain or exercise jurisdiction
in any suit or action against the
Governor General, or Governor and Coun-
cil for or on account of any act or order,
or any other act maker or thing whatso-
ever committed ordered or done by them
in their public capacity or acting as Governor
General and Council"

It remains only to notice Act
24 & 25 Vic C 104 establishing the High
Courts. Sec: 9 provides that each of the
High Courts shall have all such powers
and authority for and in relation to the
administration of justice in the Presidency
for which it is established as may be
granted and decreed by Letters Patent,
and subject thereto shall have and exer-
cise all jurisdictions and every power
and authority whatsoever in any manner
vested in any of the Courts in the same
Presidency abolished under this Act at
the time of the abolition of such last
mentioned

mentioned Courts.

Since then Letters Patent have
issued and new Letters Patent, and an act
has been passed and the various jurisdictions
and modes of procedure defined; and in
Bengal (and probably also in Madras. Through
of this I am not informed) by rules of the
Court the procedure has been assimilated
to that under the Civil Procedure Code

In reference generally to these
acts it is clear that the persons of the Governor
and Council are protected from arrest, and
in this view, in as much as the ultimate
remedy for disobedience of a writ of mandamus
would be by an attachment which could
not be executed against them. I think the
Court might well decide that, as the result
would be negative, the right, if any, which
it possesses of issuing a writ of mandamus
ought not to be exercised.

I am not informed of the mandatory
terms of the rule, or on ^{what} grounds it is granted, or whether it
is addressed to the Gov^r (as the person mentioned in Sec. 29
of the Council's act) or to the Gov^r and Council. If
the

W. A.

X X X

R. v. Keate
10 Mod 55
R. v. Cowle
2 Burr 864
R. v. Comm^r of
Sewers Strange
763

See note
if mine in
see 7 mem^o
J.B.

the former, and if it is so addressed
in reference to acts done by him in-
dividually and not jointly with his
Council, I do not find that he
has been exempted from the jurisdic-
tion of the Court, though he is pro-
tected from arrest as above pointed
out. If the latter, I am of opinion
that the question of the jurisdiction
of the Court in the case which has
arisen of an order extending to a
British subject will depend on the
view taken of the operation of the
act 39 and 40 Geo: 3 and the Madras
Charter. I think they are to be con-
strued together. Whereas the act intends
to make all persons subject to, and
all complaints cognizable by the
new Court with certain exceptions within
which the present case does not fall,
the Charter does not go so far, but
gives jurisdiction only in some cases
and against some persons, and excludes
it in the case which has arisen.

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It probably was the intention of Parliament in the Act 39 & 40 Geo: 3 not to relieve the Government from liability to the action of the Supreme Court in cases where British subjects were complainants against them. But on the other hand it appears to me on general principles that the Madras Court only has such powers and jurisdiction as have been delegated to it by the Charter of the King, which is the immediate source of its authority - and that, notwithstanding the terms of the act regarding immunity from the jurisdiction of the Court to be created, the Court cannot enquire into the legality or propriety of the provisions of the Charter by which it is constituted. In another view, if the Charter is a wrong exercise of the powers given by the act these are proper remedies, but the Court established by it cannot rectify its own constitution so as to make it accord with what was intended by the act.

I

I think therefore the more reasonable construction is that the act 39 and 40 Geo: 3 gave to the King larger powers in regard to the Charter which he was authorized to grant to the new Court than he chose to exercise. And that the Madras Court is effectually prevented by the Charter from exercising jurisdiction against the Governor and Council in the present case.

But the point is one of difficulty, and it is just one of these which it is quite possible for a Court (if it becomes necessary) to decide either way with a considerable show of reason.

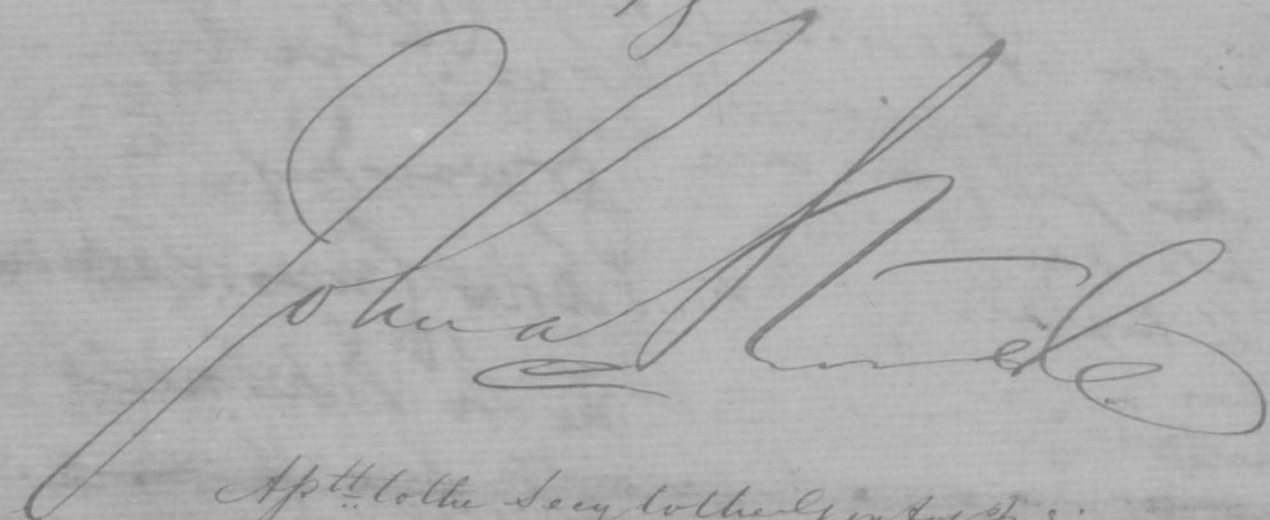
It cannot I think be contended that because Mr. Mayne is prevented from bringing an action against the Governor General and Council by the terms of the Charter he can gain his object indirectly by the issue of the Prerogative writ of Mandamus. For it appears to me plain that the object of the law was to exclude

the

the action of the Municipal Courts
of this country altogether and in
any form against the Executive Govt.
for acts done by them in that capacity.

4th March 1872. } Sd/ J. Graham.

True Copy



Apptd to the Secy to the Govt of India
Home Department.

Sept 23^d

No. 417. Judicial Department.

To

The Secretary to Government
of India.

Home Department.

Sir,

In continuation of my
letter of the 9th instant N^o 334. A
I am directed by the Governor
in Council to forward for
the information of the Govern^t
of India copy of a despatch
sent this day to the Pr^{ince} of
the Secy of State reporting
the result of Mr. J. D. Magnie's
renewed application to the
Madras High Court for a
writ of Mandamus against
the Government.

I am to take this
opportunity of conveying the
thanks of the Madras Gov^t
for the opinion of Mr.
Advocate General Graham
which was kindly sent with

Yours

Your Confidential letter of
the 8 instant No. 446.

LS

Fort St. George
23 March 1872

23-12-12

This opinion should
be furnished at once
to Mr. Richard for
communication to Mr
O'Sullivan. I fear
that as the point of
jurisdiction it does
not help us much.
On this point our case
is less strong than I
have supposed. The
main point of the
constitution of Section
29 & 30 of the Indian
Councils Act is treated
very correctly.
Perhaps the most
difficult of the Court
of 2 main points may
be of some use, but
how else I am a
little at a loss.

Memo

I circulate for
advice to the
Jury at the
first inst.

Forwarding the
Adm. Gen. Opinion
on W. Haynes's
application for a
handbook. &
light to be sent
to Council. L.B.
13.3.72

which we have
may raise. As
to the interpretation
of letters 29 & 30
of the American Council
Sept. the more I think
of it the more am I
convinced that the
construction on which
we have acted is not
what any intelligent
body would adopt.
If this point has been
agreed upon, still
it appears, might
be laid as the
possible effect of the
franchise of the writ
in the present case,
as the result of the
Commission being placed
in a similar position

A Court is much
bound to look at
the future as well
as at the immediate
effect of its
proceedings.

A. D. S.

Amendment 2 to the
constitution of the
future Advocate
Journal at a time
when the eight anti-
-slavery members having
been already appointed
it would be impossible
for the former to
act in the spirit of
the injunction laid
down in the writ
as that including
the new Advocate
Journal from the
Council & thereby
breaking the law.
This, it seems to me, is
a very important point
and not sufficiently
noticed by Mr. Sullivan.

In the room which
I have mentioned & & of
the opinion the Ad. J. has
urges the plea that
the Court cannot enforce
a writ of Mandamus.
The right to
for then I argue that
it cannot affect the
relief but because
it cannot compel the
J. to convene a
meeting. The writ, even
if issued, will be
altogether in vain.
Question.

L. J.

* act - & the able mind and some others - "not less
are "advisorial members" than a or more than 8"
"so nominated". If I am and not less than half the
right number is fully persons "so nominated" & the
if there is no act for the Ad. J. nomination is all one &

The opinion should go
to Mr. Richard as suggested
I do not think we shall find
that the point of jurisdiction
we shall be beaten & I am sanguine
as to the interpretation of the
actions of the Congress act.

I think the total
number of the
Council - 8 - in-
cludes the Ad. J.
The J. is to
"nominate" the Ad. J.

