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MADRAS RECORD OFFICE.

Government of Madras.

Judicial DEPARTMENT.

G.O. No. <u>1498</u>	Press <u></u> Mis. <u></u>
Dated <u>18.4.58</u>	18.4.58

Not to be folded or roughly handled

Government {1904} of Madras. L
PUBLIC

Recd.

Regd.

} 1904.

Enclosures

Spare copies

G.O., No. 1004, 12th December 1904.

N P

DECEMBER.

Vacancies in the Executive Council and in the High Court.

Recording decision of the Government of India regarding the treatment of vacancies caused by the appointment, pending the orders of His Majesty, of officers to fill substantive vacancies in the High Court or in the Executive Council.



GOVERNMENT OF MADRAS.

PUBLIC DEPARTMENT.

READ—again the following papers:—

G.O., No. 1498, Judicial, dated 6th July 1875.

ABSTRACT.—Communicating to the Honourable the Judges of the High Court resolution of the Government of India deciding that an officer who while acting as a Judge of the High Court is appointed by Her Majesty the Queen to be a Judge of that Court actually becomes so from the date of his Letters Patent.

G.O., No. 1028, Public, dated 9th October 1901.

ABSTRACT.—Recording letter from the Government of India forwarding copy of a despatch from the Secretary of State regarding the date from which the five years' tenure of his office by a Member of the Council of the Governor-General or of the Governor of Madras or Bombay should be reckoned.

READ—also the following paper:—

From H. G. STOKES, Esq., I.C.S., Under Secretary to the Government of India, Home department (Judicial), to the Chief Secretary to the Government of Madras, dated Calcutta, 25th November 1904, No. 2011.

In continuation of the Home department endorsement No. 955, dated the 23rd June 1875, I am directed to forward, for the information and guidance of the Government of Madras, a copy of the marginally-noted correspondence with the Government of Bombay regarding the treatment of vacancies caused by the appointment, pending the orders of His Majesty, of officers to fill substantive vacancies in a High Court of Judicature in India or in the Executive Council of the Governor of a Presidency.

ENCLOSURES.

From C. H. A. HILL, Esq., C.I.E., I.C.S., Acting Secretary to the Government of Bombay, Judicial department, to the Secretary to the Government of India, Home department, dated Bombay Castle, 16th June 1904, No. 3107.

I am directed to address the Government of India regarding the difference of procedure in filling up a substantive vacancy of a Judgeship in His Majesty's High Court of Judicature and in filling up the appointment of an ordinary Member of the Executive Council. The question has attracted attention in connection with the arrangements made to fill up the vacancy in the grades of District Judges caused by the appointment of the Hon'ble Mr. Justice H. F. Aston, Barrister-at-Law, I.C.S., as a Judge of the High Court, Bombay, vice the Hon'ble Mr. E. T. Candy, C.S.I., I.C.S., who retired from the service on the 12th July 1903.

2. Under the provisions of section 7 of the Indian High Courts Act, 1861 (24 and 25 Vic., Cap. 104), it is lawful for the Governor in Council, upon a vacancy occurring in the office of Judge of the High Court, to appoint a person with the necessary qualifications required by the Statute to act as a Judge of the High Court until some person has been appointed by His Majesty the King-Emperor to that office. The directions for the treatment of a vacancy caused by the absence on leave of a Judge, and of a permanent vacancy in that office are contained in the Government of India's Financial department Resolutions, No. 6269, dated the 28th October 1874, and No. 1291, dated the 15th June 1875, copies of which were forwarded to the Government of Bombay under the Home department endorsements No. 1387, dated the 11th November 1874, and No. 955, dated the 23rd June 1875, respectively. The order of 1873 directs that an

officer who has been appointed by the local Government to act as Judge of the High Court and is subsequently confirmed in the appointment by the Crown, actually becomes a Judge from the date of his Letters Patent, and that from that date he ceases, as a matter of fact, to have any lien upon his former substantive appointment. Under this rule which has been consistently followed in the Bombay Presidency, the officer appointed as a Judge of the High Court by the local Government has the status of only an acting incumbent till his appointment is confirmed by the Crown. He, however, draws full pay of a High Court Judge from the date of taking charge and no part of his pay as District and Sessions Judge.

3. In the case of the appointment to the office of a Member of the Executive Council, however, a different practice prevails although the appointment is made in the same manner as that of a High Court Judge. Section 27 of the Indian Councils Act, 1861 (24 and 25 Vic., Cap. 67), provides that "if any vacancy shall happen in the office of an ordinary Member . . . of the Council of either of the Presidencies, when no person provisionally appointed to succeed thereto shall be then present on the spot, then, and on every such occasion, such vacancy shall be supplied by the appointment of . . . the Governor in Council . . . ;" and that "until a successor shall arrive the person so nominated shall execute the office to which he shall have been appointed, and shall have all the powers thereof, and shall have and be entitled to the salary and other emoluments and advantages appertaining to the said office during his continuance therein, every such temporary Member of Council foregoing all salaries and allowances by him held and enjoyed at the time of his being appointed to such office." For account purposes it has been held that the officer provisionally appointed by the Governor in Council to be a Member of the Council in a full vacancy and subsequently confirmed in the appointment by the Crown, ceases to have a lien on his former substantive appointment from the date of the actual occurrence of the vacancy, and not from the date of confirmation of the appointment by the Crown.

4. The difference in the treatment of the two cases is, in the opinion of the Governor in Council, apparently due to the use of different expressions in the two Statutes empowering the Governor in Council to make provisional arrangements for filling up vacancies in the offices of a Judge of the High Court and a Member of the Council. In the case of a High Court Judge, section 7 (paragraph 2) of the Indian High Courts Act uses the expression "to act," while in the case of a Member of the Council the expression occurring in section 27 (paragraph 1) of the Indian Councils Act, is "such vacancy shall be supplied by the appointment of . . . the Governor in Council." The expression "to act" has been understood in its usually accepted meaning of "to officiate" and construed to imply that until an officer is actually appointed as a High Court Judge by the Crown under section 2 of the Indian High Courts Act, he must be considered as officiating only within the meaning of the Civil Service Regulations so that he still retains a lien on his former substantive appointment. This seems to have been the view taken by the Government of Bombay and the Government of India when the orders in the Government of India, Financial department Resolution No. 1291, dated the 15th June 1875, quoted above, were passed. On the other hand, the expression "such vacancy shall be supplied by the appointment of . . . the Governor in Council" occurring in the case of a Member of the Council has been taken to justify the vacancy and the appointment being treated as substantive. The Governor in Council is, however, of opinion that the construction placed on the wording of the Statute as to the High Court is too strict and that both sections are intended to convey the same meaning and are used to signify only the "provisional" or "temporary" nature of the appointments and nothing more. That the expression "to act" has not in the English Statute been used in the technical sense of the Civil Service Regulations is clear from the third paragraph of section 27 of the Indian Councils Act which contains the words "and if any ordinary Member of the Council . . . be rendered incapable of 'acting' or of attending 'to act' as such a substantive ordinary Member cannot be said to be 'officiating' in his own appointment. The difference of construction does not affect the official selected for the vacancy in Council or in the High Court. Both alike draw the full pay of the temporary appointment, but it affects the allowances of the officers promoted in the consequential chain of arrangements. Those promoted in the room of a High Court Judge receive full salaries of their appointments only from the date of the High Court Judge's confirmation by the Crown, while those promoted in the place of a Member of the Council draw full salaries with effect from the occurrence of the vacancy. His Excellency in Council thinks that there is no sufficient reason for this difference and he is of opinion that the treatment of Judicial officers in such a matter should be the same as that of Executive officers.

5. For the reasons set forth above I am to request that the Government of India may be moved to rule, in modification of the orders contained in their Financial department Resolution No. 1291, dated the 15th June 1875, that an officer provisionally appointed by the local Government to the office of a Judge of the High Court, and subsequently confirmed in the appointment by the Crown, should cease to have a lien on his former substantive appointment with effect from the date of the actual occurrence of the vacancy. If this proposal be sanctioned, I am further to request that retrospective effect may be given to it to enable the officers promoted in the consequential chain of appointments in the room of the Hon'ble Mr. Justice Aston to draw the substantive salaries of their respective appointments with effect from the date of retirement of Mr. Candy, i.e., from the 12th July 1903 instead of from the 10th September 1903.

No. 1004, PUBLIC, 12TH DECEMBER 1904.

From H. H. RISLEY, Esq., C.S.I., C.I.E., Secretary to the Government of India, Home department (Judicial), to the Secretary to the Government of Bombay, Judicial department, dated Calcutta, 25th November 1904, No. 2009.

I am directed to refer to your letter No. 3107, dated the 16th June 1904, regarding the treatment of vacancies caused by the appointment, pending the orders of His Majesty, of a District and Sessions Judge, to fill a substantive vacancy in a High Court of Judicature in India.

2. It is stated that in consequence of the orders contained in the resolution of the Government of India in the Finance department No. 1291, dated the 15th June 1875, officers promoted in such vacancies are treated as having only the status of officiating officers until the date of the confirmation of the Judge's appointment by the Crown. On the other hand, it is explained that officers promoted in place of an officer who is appointed under similar circumstances to fill a substantive vacancy in the Executive Council are granted the full pay of their new appointments from the date of the actual occurrence of the vacancy. The Governor in Council sees no adequate reason for this differential treatment of high Judicial and Executive officers, and accordingly recommends that the Resolution of the 15th June 1875 should be modified and that a District and Sessions Judge appointed provisionally to be a Judge of the High Court and subsequently confirmed should cease to have a lien on his former substantive appointment with effect from the date on which he takes over charge of his duties, in order to enable the officers promoted in his place to draw immediately the full salaries of their new appointments. It is further proposed that, in the event of this suggestion being accepted, retrospective effect should be given to the orders so as to enable the officers promoted in the room of the Hon'ble Mr. Justice Aston to draw the substantive salaries of their respective appointments with effect from the 12th July 1903.

3. In reply I am to say that the Government of India agree with the Government of Bombay in holding that the word "act", as used in section 7 of the Statute 24 and 25 Vic., Cap. CIV (the High Courts Act, 1861), has not the technical significance which is attached to the word "officiate" as used in the Civil Service Regulations. In view, however, of the possibility that an officer so appointed might have to revert to his substantive post, they regret that they are unable to accept the recommendation of the Governor in Council that a Judge appointed provisionally to be a Judge of the High Court pending the intimation of His Majesty's pleasure should be regarded as having relinquished his substantive appointment from the date of his taking over charge of his new duties and that substantive promotions should be given in his place with effect from that date. They have no objection, however, to the Judge so promoted being regarded as an absentee under article 6 of the Civil Service Regulations. In that case substantive *pro tempore* promotions will be admissible in his place under article 90 (1) of the Civil Service Regulations.

The Governor-General in Council is also pleased to allow the officers promoted in the room of the Hon'ble Mr. Justice Aston to receive the benefit of the above ruling with effect from the 12th July 1903.

4. In conclusion I am to observe that, for the reasons indicated in paragraph 3 above, the practice which obtains in Bombay of treating an officer appointed provisionally and afterwards confirmed as a member of the Executive Council as having ceased to retain a lien on his substantive appointment with effect from the date of the occurrence of the vacancy is not in accordance with the rules. Such an officer should, as in the case of an officer appointed provisionally to a Judgeship of a High Court, retain a lien on his former substantive appointment up to the date of his confirmation as a Member of Council by the Crown, and until that date the promotions made in his place should be regarded as substantive *pro tempore* only.

ORDER—No. 1004, Public, dated 12th December 1904.

Recorded.

(True Extract.)

G. S. FORBES,
Chief Secretary.

Copy to Judicial and Financial departments.

NOTES CONNECTED WITH G.O., No. 1004, PUBLIC, DATED
12TH DECEMBER 1904.

[SUBJECT.—Filling up of vacancies in the Executive Council and in the High Court.]
From the Government of India, Home Department, No. 2011, dated 25th November 1904.

[Advance copy circulated to His Excellency the Governor and Honourable Members.]

Chief Secretary—

The practice in the Madras Presidency as regards vacancies in the High Court has been the same as that followed in Bombay, i.e., permanent promotions in the Indian Civil Service list consequent on the promotion of an officer to the High Court are given effect to from the date of the Letters Patent confirming the officer as High Court Judge.

Paragraph 121 of the Manual of Appointments and Allowances.

2. As regards vacancies caused by the promotion of an officer to a seat in the Executive Council, the practice in Madras till lately was the same as that followed in regard to High Court Judge vacancies. In 1901, however, the Secretary of State decided that the term of a Member of Council should be reckoned from the date when he first entered upon the duties of his office, drawing the full pay of a Member of Council appointed in India or after the issue of His Majesty's warrant of appointment. When the Honourable Mr. Stokes was made temporary Member of Council in a full vacancy from the 9th November 1903, the Accountant-General was, on the strength of the Secretary of State's decision, asked (u.o.) whether permanent promotions in the Indian Civil Service list could not be made with retrospective effect from the 9th November in the event of Mr. Stokes being confirmed under letters patent. The Accountant-General replied in the affirmative and permanent promotions were given effect to accordingly.

But promotions can be made *sub. pro tem.*
A. Y. G. CAMPBELL—8-12-04.

4. Submitted that the current may be recorded, a copy being communicated to the Accountant-General. Draft is submitted.

3. Under the present ruling of the Government of India this will not be permissible in future.

A. L. PINTO—7-12-04.

C. S. SIMPSON—7-12-04.

Honourable Member—

No action seems necessary.

A. Y. G. CAMPBELL—8-12-04.

No: nor communication to Accountant-General by us. India will see to that if necessary, as all High Court Judges are affected.

G. S. F[ORBES].

Issue.

A.Y.G.C.—12-12-04.

[G.O., No. 1004, Public, dated 12th December 1904.]

*Proceedings of the Madras Government, Judicial Department,
6th July 1875.*

High Court—Judges.

No. 35. Read the following Proceedings of the Government of India, in the Financial Department, dated Simla, 15th June 1875, No. 1291:—

Read letter from the Government of Bombay, to the Government of India, in the Home Department, No. 2360, dated the 23rd April 1875, and enclosure, regarding an inquiry from the Accountant-General, Bombay, whether an officer, who, while acting as a Judge of the High Court, is appointed by Her Majesty the Queen to be a Judge of the High Court, becomes a Judge from the date of his appointment by the Crown.

RESOLUTION.—The Governor-General in Council agrees in the decision of the Government of Bombay, that in the case referred to the person appointed by Her Majesty the Queen to be a Judge of the High Court actually does become a Judge from the date of his letters Patent, and that from that date he ceases as a matter of fact to have any lien upon his former substantive appointment.

ORDER.—Ordered that the foregoing resolution be communicated to the Home Department, and to the Accountant-Generals Bombay, Madras, Bengal, and the North-Western Provinces.

(Signed) J. A. BOURDILLON,
Offg. Under Secy. to the Govt. of India.

No. 955.

Copy forwarded to the Government of Madras, for information.

HOME DEPARTMENT, JUDICIAL,
SIMLA, 23rd June 1875.

(Signed) T. J. C. PLOWDEN,
Offg. Under Secy. to the Govt. of India.

No. 36. **ORDER THEREON,** 6th July 1875, No. 1498.

Communicated to the Honorable the Judges of the High Court for information.

(True Extract.)

Officiating Chief Secretary.

To the Honorable the Judges of the
High Court of Judicature at Madras.

Erd. J. Wright.

N^o 1391.

Government of India

Financial Department.

Simla.

The 15th June 1875.

Recd. letter from the Government of Bombay to the Government of India in the Home Department, N^o 2360, dated 23rd April 1875 and enclosure regarding an enquiry from the Accountant General Bombay whether an officer, who while acting as a judge of the High Court, is appointed by Her Majesty the Queen to be a judge of the High Court becomes a judge from the date of his appointment by the Crown.

Resolution.

The Governor General in Council agrees in the decision of the Government of Bombay that in the case referred to the person appointed by Her Majesty the Queen to be a judge of the High Court actually

GOVT. OF INDIA

JUDICIAL.

THE HON. THE JUDGES OF THE
HIGH COURT OF JUDICATURE
AT MADRAS

Dated July, 6th

1875

G.O. 6th July 1875, No. 1438.

JULY.

Nos. 35-36.

High Court—Judges.—Resolution of Government of India, deciding that an officer who, while acting as a judge of the High Court, is appointed by Her Majesty the Queen to be a judge of that Court, actually becomes so from the date of his letters patent, communicated to the Honorable the Judges.

No 1391.

Government of India

Financial Department.

Simla.

The 15th June 1875.

Recd. letter from the Government of Bombay to the Government of India in the Home Department, No. 2360, dated 23rd April 1875 and enclosure regarding an enquiry from the Accountant General Bombay whether an officer, who while acting as a judge of the High Court, is appointed by Her Majesty the Queen to be a judge of the High Court becomes a judge from the date of his appointment by the Crown.

Resolution.

The Governor General in Council agrees in the decision of the Government of Bombay that in the case referred to the person appointed by Her Majesty the Queen to be a judge of the High Court actually

GOVT. OF INDIA

JUDICIAL.

THE HON. THE JUDGES OF THE
HIGH COURT OF JUDICATURE
AT MADRAS

Dated July, 6th

1875

G.O. 6th July 1875, No. 1438.

JULY.

Nos. 35-36.

High Court—Judges.—Resolution of Government of India, deciding that an officer who, while acting as a Judge of the High Court, is appointed by Her Majesty the Queen to be a Judge of that Court, actually becomes so from the date of his letters Patent, communicated to the Honorable the Judges.

actually does become a judge from the date of his letters Patent, and that from that date he ceases to be a matter of fact to have any lien upon his former — Substantive appointment.

Ordered that the foregoing Resolution be communicated to the Home Department, and to the Accountants General, Bombay, Madras, Bengal and the North Western Provinces.

Order.

For the Secretary to the Government of India
Under Secy to the Government of India

No 953

Copy forwarded to the Government of Madras for information.

Home Department
Judicial
Simla 25 June 1875
W. M. Under Secy
to the Govt of India

Communicated. 6 July 1875. No 1498.

Communicated to the Honorable the
Judges of the High Court - for information.

To the Honorable

the Judges of the High Court of Judicature (Sep 19)

Judicial (1875) Report
(High Court - India)
Hon. the Government
of India
Home Department
Dated 23rd June/75
Recd. 30th June/75
No. 55.

1/1829

Communicating
Recd. deciding that an
officer who while acting
as a judge of the High
Court, is appointed by Her
Majesty the Queen to
be a judge of the High
Court, actually becomes
a judge from the date of
his Letters Patent.

W. H. D. S.

Court, actually
becomes so from
the date of his
Letter Patent,
communicated
to the Honorable
the Judges.

Govt. of 1875; Madras.

Judicial ✓

F.P. Cms 3295R
1904

O. 6 July, 1875, No. 1498

Nos. 35-6

High Court - Judges
Resolution of Govt.
of India ^{deposing} ~~deposing~~
that an Officer
who while acting
as a Judge of the
High Court is appoin-
ted by Her Majesty
the Queen to be
a Judge of that
Court.