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MADRAS RECORD OFFICE.

Government of Madras.

Public Works DEPARTMENT.

G.O. No.	612 A	Press Mis.-
558 A - 558 C		
Dated	28-3-	1862.

Not to be folded or roughly handled

*Proceedings of the Madras Government, Public Works Department,
28th March 1862.*

Read the following letters :—

No. 558A. From JOHN MILLER, Esq., Acting Government Solicitor, to J. D. SIM, Esq., Secretary to Government, dated Madras, 29th November 1861, No. 815.

SIR,

1. I have the honor to acknowledge the Proceedings of Government in its Public Works Department, dated 26th November 1861, No. 2,181, and its enclosure.
2. I submitted them for the consideration of the Advocate General and now forward a copy of his Opinion.

COPY OPINION.

1. In my opinion the evidence transmitted by the Chief Engineer is quite insufficient to warrant Government in treating Covenanted Overseer Evans as having been proved guilty of drunkenness. The Engineers at Madura and Wellington evidently speak from mere report, and the latter expressly says that Evans "was *never seen* the worse for liquor when on duty ; but it "was *reported*," &c., and Dr. Renton states that before the 1st August Evans "did *not* appear then "to be a man addicted to intemperance," but that on *one* occasion subsequently "he certainly "appeared to be suffering from indulgence in intoxicating liquors." While Evans seems to plead "fever and sun-stroke" as the cause of his ailments, wholly denies the charge of intemperance, and produces high testimonials from Colonel Rundall extending from the middle of 1855 to the end of 1859, for "general attainments," and "zeal and faithfulness," and as he says he has been actively employed since 1834 (I presume not in India—his Covenant bearing date 13th January 1855) and the Wellington Engineer speaks of him as "superannuated," I think the evidence would fairly warrant the conclusion that age aided to "fever and sun-stroke" and the loss of his son last January, sufficiently account for his present state of uselessness, which does seem established beyond all reasonable doubt.

2. The Covenant, I observe, only binds Government to retain him in their service "if he "shall be able to perform and shall actually perform such service," and as it seems clear that he does not and cannot perform it, I am of opinion that Government are at liberty to discharge him. He has been more than 5 years (nearly 7) in their service, and therefore cannot claim a free passage Home as perhaps he might have been able to do, had his service been less than 5 years.

(Signed) T. SYDNEY SMYTH,
Advocate General.

28th November 1861.

(True Copy.)

(Signed) JOHN MILLER,
Acting Government Solicitor

* No. 558B. From JOHN MILLER, Esq., Acting Government Solicitor, to Colonel F. H. RUNDALL, Deputy Secretary to Government, Public Works Department, dated Madras, 14th March 1862, No. 136.

SIR,

1. With reference to the correspondence which has lately passed between us and particularly to my interview with you yesterday, I have now the honor to forward herewith a form of notice to be served on Mr. Overseer Samuel Evans attached to the District of Coimbatore for putting an end to his engagement with Government.

2. The Covenant between the Government and Mr. Evans is not very clear and has raised considerable doubt in my mind, and I believe also in the mind of the Advocate General as to the power of Government to dismiss the employed under its provisions without any previous notice. Under the general Law and irrespective of any Covenant or Agreement an employer can always summarily and without any previous notice dismiss an employé for misconduct, but under the peculiar terms of the Covenant now before me I think it might be argued and urged that the

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agreement limits the power of dismissal to the cases specified in the clause, viz., "where he shall be guilty of any insubordination, drunkenness or other intemperance or misconduct, or where he shall be guilty of any breach or non-performance of any of the Covenant's provisoes or agreements contained in the Deed" and that in the next clause provision is made as to the notice to be given in cases of such dismissal, and that the two clauses must therefore be read together.

3. I observe this Covenant is for no fixed time, and after giving the Deed much consideration, I am of opinion that this clause about twelve months' notice, was inserted not for the purpose of being read in connection with the previous clause providing for dismissal, but for the purpose of enabling either party to put an end to the agreement after twelve months' notice.

4. It appears evident to me that Mr. Evans can only be dismissed in cases "where he shall be guilty of any insubordination, drunkenness or other intemperance or misconduct or when he shall be guilty of any breach or non-performance of any of the Covenant's provisoes or agreements contained in the Deed," I am of opinion that if Mr. Evans can be brought within any of these cases he can be dismissed or discharged at once and without notice and in such cases there is a covenant by the employed that if he shall subject himself to the penalty of dismissal he shall pay to the Government a sum equal to one year's salary as liquidated damages, which the Government are authorized to deduct from any monies that may be due from them to the employed.

5. Immediately succeeding the clause giving the Government a power of immediate dismissal in any of the cases therein mentioned there is the clause to the effect that the agreement between the Government and Mr. Evans shall continue *unless* Mr. Evans shall receive a notice in writing from some properly authorized Officer of the Government twelve Calendar months' previously to his dismissal, that the Government no longer require a continuance of his services in the East Indies or unless he shall give to the Government a like notice in writing when he himself is desirous of putting an end to his services.

6. The word *dismissal* in this clause must evidently be read as referring only to cases where the Government no longer require the services of Mr. Evans, and is in my opinion as I have before mentioned totally independant of the cases where an immediate dismissal may be given.

7. The clause at the end of the agreement under which Government have a right to one year's salary as liquidated damages refers, I think, only to cases where immediate dismissal is warranted and not to the clause where the dismissal is to be by notice.

8. There is no doubt a covenant in the Deed by the employed that he will perform the duties required of him and for a breach of which covenant he may be discharged at once and without notice, but this is qualified by the subsequent words used in that Covenant, viz., "*unless he shall be disabled by sickness or other infirmity* from attending to the business" which he undertakes to perform.

9. As I consider Mr. Evans' case is one where a dismissal by notice only can safely be given, and as I think that the Government by discharging Mr. Evans without notice might incur the risk of an action being brought against them by Mr. Evans for damages for a wrongful dismissal. I have prepared the form of Notice to be sent to Mr. Evans to dispense with his services at a period of twelve Calendar months after receipt of notice.

10. I may here mention that I have conferred with the Advocate General as to the notice, and I have the honor to forward for the information of Government a copy of his Opinion, from which it will be seen that he is of opinion with me that as Mr. Evans is to be dismissed for uselessness and not for misconduct the twelve months' notice should be given him.

11. I would suggest your having the notice prepared in Duplicate, having it signed by Colonel Horsley and sending it to the Engineer of Coimbatore with instructions that he get one of his subordinates to serve one part of it on Mr. Evans and that the other part be returned to you with a Memorandum of the service endorsed on it.

12. The Notice should be served on Mr. Evans by a person who can read, write and understand English, and the server immediately after effecting the service should make a Memorandum of the service on the Duplicate in the following words:—

"Personally served the original of which this is a duplicate on the within named Samuel Evans at Coimbatore, this day of 1862" and should affix his signature to such Memorandum.

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13. The blank in the Notice should be filled up with the date on which twelve months expire from the day of the date on which service is effected.

COPY OPINION.

This having been again laid before me, to advise how Overseer Evans should be discharged and with what Notice, it appears to me that as he is to be dismissed for uselessness, not misconduct, 12 Calendar months' notice of his dismissal ought to be given him, under the terms of his Covenant.

(Signed) T. SYDNEY SMYTH,
Advocate General.

13th March 1862.

(True Copy.)
(Signed) JOHN MILLER,
Acting Government Solicitor.

No. 558c.

ORDER THEREON, 28th March 1862, No. 612A.

1. In his letter of the 8th November 1861, No. 6,972, the Chief Engineer recommended that Mr. Covenanted Overseer Samuel Evans, attached to the Coimbatore District, should be dismissed from the service, as he had been shown by the District Engineer to be unfit for further service from age, natural incompetency, and habits of intemperance; but before acting on this recommendation, the Government thought fit to consult the Advocate General, with reference to the terms of Mr. Evans' Covenant.

2. From the Advocate General's reply, furnished with the former of the two papers recorded above, the Government learn that Mr. Smyth is of opinion that Mr. Evans cannot, under the circumstances stated by the Chief Engineer, be dismissed for "intemperance;" but that under his Covenant, he may be discharged as unfit for the duties he covenanted to perform.

3. In his further letter of the 14th March recorded above, the Acting Government Solicitor submits remarks on the conditions of Mr. Evans' Covenant, and states his opinion, in which he is fortified by that of the Advocate General, that under the peculiar terms of the Covenant in question, Mr. Evans cannot be dismissed from the service of Government for incompetency, unless the stipulated notice of twelve months is first given him, a form of which is now furnished by Mr. Miller.

4. Both the District Engineer and Chief Engineer are of opinion that Mr. Evans is useless to the Department, and have, as already noticed, recommended* his immediate removal from it. His further retention in the public service would be a misuse of public money; but the only proper course is to deal with him according to the terms of his Covenant, as explained by the Law advisers of Government. The Governor in Council accordingly resolves that the necessary legal notice (in the form herewith sent) shall be served on Mr. Evans, to the effect that the Government will dispense with his services at a period of twelve calendar months after the receipt thereof.

5. The Chief Engineer will be instructed to give immediate effect to the above order; and in causing the necessary notice to be served on Mr. Evans, he will be particular in seeing that the course prescribed by the Acting Government Solicitor in paragraphs 11, 12, and 13 are duly observed.

(Signed) W. H. HORSLEY, Lieut.-Colonel,
Secretary to Government.

* *Vide* Chief Engineer's letter 8th November 1862, No. 6,972, in Proceedings of Government 26th idem, No. 2,181.

Public Works Dept

No 612A

Proceedings of the Madras Government

Under date the 28th March 1862.

Read the follow

ing letters.

From the City Solicitor

Forwards with reference
to the Proceedings of Gov^t in
its Public Works Dept dated (Here enter 29th Nov 1861 No 815)
25th Nov 1861 No 2181, copy
of Advocate General's opinion
in the case of Contracted Overseas
Evans.

From —————

Gives further opinion
in the case of Mr. Overseas
Pamuel Evans in consulta-
tion with the Advocate (Here enter 14th March 1862 No 136)
General, viz that he cannot
be dismissed without twelve
months notice.

1973

W. M.

W. M.

In his letter
of the 8th November 1861,
No 6972, the Chief Engineer
recommended that Mr
Contracted

Covenanted Overseer
Samuel Evans, attached
to the Cambridge district,
should be dismissed from
the service, as he had
been shown by the Dis-
trict Engineer to be unfit
for further service from
age, natural inconse-
quency, and habits of in-
temperance; but before
acting on his recommen-
dations, the Govt thought
fit to consult the Advo-
cate General, with refer-
ence to the terms of
Mr. Evans' covenant.

2 From the Advo-
cate General's reply,
furnished with the
former of the two papers
recorded above, the
Government learn
that

that Mr. Smyth is of
opinion that Mr.
Evans cannot, under
the circumstances stated
by the Chief Engineer,
be dismissed for "intem-
perance"; but that,
under his covenant,
he may be discharged
as unfit for the duties
he covenanted to per-
form.

3 In his further
letter of the 14th March
recorded above, the
Acting Government
Solicitor submits re-
marks on the con-
ditions of Mr.
Evans' covenant, and
states his opinion,
in which he is fortified
by

by that of the Advocate
General, that under
the peculiar terms of
the Covenant in question,
Mr. Evans cannot be
dismissed from the
service of Government
for incompetency, unless
the stipulated notice
of twelve months is
first given him, a form
of which is now furnish-
ed by Mr. Miller.

4. Both the District
Engineer and Chief En-
gineer are of opinion
that Mr. Evans is use-
less to the Department,
and have ^{already notified,} recommended
his immediate removal
from it. His further
retention in the public
service would be a misuse
of

* See Chief Eng. letter
8th Nov. 61 no 6972.
in Procs. of Govt 26th
idem no 2181.

of public money; but
the only proper course
is to deal with him
according to the terms
of his Covenant, as
explained by the
Law-advisers of Govt.
The Governor in
Council accordingly
resolves that the ne-
cessary legal notice
(in the form herewith
sent) shall be served
on Mr. Evans, to the
effect - that the Govt
will dispense with
his services at a period
of twelve calendar
months after the receipt
thereof.

5. The Chief
Engineer will be in-
structed to give ^{immediate}

W. H. R.

7 Copies
 To The Chief Engineer (With form of Legal Notice.
 13 " By Chief Engineer S.C. Dispt. 2 April.
 3 " Civil Paymaster.
 2 " Accountant Genl.

Sp. No. 1000.

Copy in a Letter to England
27/12th May 1862 N:34

Notice of dismissal to
Mr. Covenanted Overseen
Evans (Cumbria).

Public Works 1862 Depa
Pres. of Govt. for March

N:612 A.
Pres. of the Madras Govt.
D/ 28th March /62

Requiring Chief
Engineer to cause notice to
be served on Mr. Evans
to the effect that Government
will dispense with his services
twelve months after the re-
ceipt of the above notice.

CMS:ASB:V:SC.