Revenue Department

No 294

Dated 4—3—1859

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No. 25. Read the following Extract from the Minutes of Consultation in the Judicial Department, under date the 16th February 1859, No. 210.

Read the following Circular from R. B. CHAPMAN, Esq., Under Secretary to the Government of India; to the Secretary to the Government of Fort St. George, dated Fort William, the 21st January 1859, No. 159.

SIR,

I am directed by the President in Council to forward for information and guidance, the accompanying copy of a correspondence containing the opinion of the Advocate General at this Presidency, regarding the liability to the Mofussil Criminal Courts of persons born in this country, lawfully descended from male European natural-born British subjects whose mothers, grand-mothers, or more remote ancestresses may not have been British subjects.

Letter from Advocate General, dated 24th Dec. 1858 with 2 enclosures.

From W. RITCHIE, Esq., Advocate General; to C. BEADON, Esq., Secretary to the Government of India, Home Department, dated Calcutta, 24th December 1858.

SIR,

I have the honor to enclose copies of a letter from Mr. Simson, Joint Magistrate of Mirzapore, to myself, and of my reply regarding the liability to the Mofussil Criminal Courts of persons born in this country lawfully descended from male European natural-born British subjects whose mothers, grand-mothers, or more remote ancestresses may not have been in any sense British subjects. The subject being one of general importance, on which I have been several times referred to, I think it advisable to lay the correspondence before you in case of future reference.

From JAMES SIMSON, Esq., Joint Magistrate of Mirzapore; to W. RITCHIE, Esq., Advocate General, Calcutta, No. 543, dated the 18th December 1858.

SIR,

I have the honor to submit the following case for your consideration and legal opinion:

2. A., the son of a European British subject is born in wedlock at Patna in India and married an Armenian woman in this country, from whom he had issue B., likewise born in lawful wedlock. Is B. a European British subject so as to render him *not* amenable to the Mofussil Criminal Court, or not?

3. I beg also to be informed what is the limit, if any, to country-born persons, descended legitimately from one European male ancestor several generations back, to be themselves considered as European British subjects so as to render them not amenable to the said Courts.

P. S.—I beg also to request that you will be good enough to inform me whether the Circular of the Sudder Nizamut, throwing the *onus probandi*, that a defendant is amenable to the Mofussil Courts, *i. e.* is not a European British subject, on the Magistrate or Committing Officer, is still in force or not.

From W. RITCHIE, Esq., Advocate General; to J. SIMSON, Esq., Joint Magistrate of Mirzapore, dated Calcutta, the 22d December 1858.

SIR,

In reply to your letter No. 543, dated the 18th Instant, I have the honor to state that I am of opinion, that in the case put by you B., as the son born in wedlock of A., who was the son born in wedlock in British India, of a European British subject, is clearly a British subject within the meaning of the Charter of, and Acts relating to the Supreme Court, and is not amenable to the jurisdiction of the Mofussil Criminal Court.

2. The circumstance that A's mother was an Armenian, and that B's mother was not a European British subject, makes no difference in this respect. The son of a father who was a European British subject, and the son of such son, are both British subjects within the meaning of the Charter and Statutes, whatever be the race or country of their mother, provided the sons were born in wedlock.

3. The second question put by you is a more difficult one. It is certain that the legitimate grand-sons in the male line of a European British subject are entitled to all the privileges of British subjects within the meaning of the Charter and Statutes, though both they and their fathers may have been born in this country, of Native, Armenian, East Indian, or foreign mothers. Whether the privilege extends beyond the grand-son, has never been determined, and may be treated as an open and doubtful question.

4. My own opinion is that if the East India Company's possessions in India continued in the same state in respect of sovereignty, as they were in 1774, when the Charter and the first Statute relating to the Supreme Court were passed, no descendant beyond the grand-son of a European British subject would be entitled to the privileges of a British subject, such descendant and his father, and intermediate male ancestor or ancestors being born in this country. For in that case, as India was, when the Charter and Statute passed out of the allegiance of the Crown and its inhabitants were in theory the subjects of the Great Mogul, the decendants born in this country of a European British subject, would be born out of the allegiance, and would be aliens; but for the operation of certain general English Statutes (25 Edward III. Chapter 2, 7 Anne Chapter 5, 4 George II. Chapter 21, 13 George III. Chapter 21) and by these Statutes the privileges of a British subject are limited to grand-children by the father's side of natural-born subjects. The same result would follow whether the mother or female ancestors were British subjects or not.

5. But my impression is that from the time when our possession in India became the dominion of the Crown, a different result followed; and that all children, grand-children, or more remote legitimate descendants, born after that time within those dominions of a European British subject, became themselves entitled to all the privileges of a British subject without the aid of the general Statutes above referred to, as being born within, and not out of the allegiance of the Crown. I therefore am inclined to think, that in respect of all persons descended legitimately from a male European British subject, and born in British India subsequently to the vesting of the Sovereignty in the Crown,* there is no limit in point of degree of descent; to the rights of such persons to claim the privileges of British subjects.

* *The date of such vesting, it was certainly after* 1774 *and previous to* 1813. *Practically for the present purposes, I think the beginning of the century may be taken as the period.*

6. The construction No. 759 of the Sudder Nizamut Adawlut appears to be still in force in that Court. But it is I apprehend inaccurately framed, and has been remarked on as incorrect by the late Chief Justice Sir Lawrence Peel in the Supreme Court. It is also, if taken without qualification, opposed to the spirit of the Privy Council's decision in Calder *vs.* Halnett. I think however that the rule itself is not incorrect if it be taken with the following qualification. If the Magistrate know that the prisoner is a European British subject, it is his duty, whether the prisoner claims exemption or not to abstain from further proceedings against him as a Magistrate. If without any actual knowledge on the subject, the Magistrate have reason to suppose that the prisoner is such a British subject it is the Magistrate's duty to ascertain from him, whether he alleges or denies that he is one. And if he alleges that he is, to give him every facility by allowing time and otherwise for proving that he is, the burden of such proof being on him. A Magistrate will not be justified, if he has reason to suppose that a prisoner is a European British subject, in proceeding against him as if he were not one, without first giving him a distinct opportunity of pleading that he is one. If he do not so plead, or be not able, upon time being allowed him for that purpose, to adduce any satisfactory proof of his being a European British subject, the Magistrate will be quite warranted in proceeding against him. If he do so plead, and give proof or produce documents which, although not amounting to full legal proof of his status, satisfy the Court that he is really a European British subject, the Magistrate should, without putting the prisoner fully to complete his proof by strict legal evidence, take up the case as a Justice of the Peace, and send it up to the Supreme Court, taking care to record distinctly the statement made by the prisoner that he is a British subject of lawful European descent.

R. vs. Foy, Taylor and Bells' Report, p. 219.

7. The regular course of taking the opinion of the Advocate General upon such questions as these is by application through the Secretary to the Government (in the Home Department). To save time however I write to you direct in the present instance, but send copies of your letter and of my reply to the Secretary.

(True Copy.)

(Signed) R. B. CHAPMAN,
Under Secy. to the Govt. of India.

Order.—Ordered to be communicated to the Judges of the Foujdaree Udalut for circulation to all Judicial and Magisterial Officers and to the Military, Revenue and Public Works Departments.

(True Extract and Copies.)

(Signed) T. PYCROFT, *Chief Secretary.*

No. 26. ORDER THEREON, No. 274; dated 4th March 1859.

Ordered to be communicated to the Board of Revenue for circulation among the Collectors.

(Signed) M. NORMAN,
Deputy Secretary to Government.

Revenue 1859 Dept.
D.to Cons.s 8.th March.

No. 313

Extract from the Mins. of Cons.t in the Judicial Depart.t

Dated 16.th February,
Rec.d 25.th 1859.

Communicating Copy of Correspondence containing the opinion of the Advocate Genl. at Calcutta, regarding the liability to the Mofussil Criminal Courts, of persons born in this Country, lawfully descended from male European natural-born British Subjects whose ancestors may not have been British Subjects-

No. 274. 4.th March 1859. L
With an order

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No. 274.

Ordered to be communicated to the Board of Revenue for circulation among the Collectors.

Fort St. Geo: 3
4.th March 1859. 3

101 Copies to the Bd. of Rev.e Dated 6.th