

HINTS FOR THE IMPROVEMENT OF THE COURTS OF JUSTICE AT
THE CAPE OF GOOD HOPE.

[The following 'Hints' were drawn up at the request of some inhabitants of Cape Town, by a gentleman who has long held a very high judicial appointment in one of our most important colonial possessions, and who had become, by a residence of nearly two years in South Africa, well acquainted with the defects of the Courts of Justice in that settlement. Though written without any view to publicity—addressed in the form of a letter to a friend, this hasty sketch may probably furnish useful suggestions, at a time when most important reforms of the institutions of the Cape Colony are in progress.]

MY DEAR SIR,

Cape of Good Hope, Sept. 23, 1823.

WHILST interchanging our thoughts and opinions on the state of this colony, the conversation has frequently been directed to the Administration of Justice: and we have deplored the situation of the Judge, and the little confidence which appears to prevail in the decisions of the Courts, as now established. Several improvements have been suggested; and you have requested me to draw up some sketch of a new and improved system of Colonial Jurisprudence.

In consequence of your request, I have frequently and seriously reflected on the matter, and now commit to writing the result of my consideration.

After all the attention which I have given to the subject, I am aware that my knowledge and local experience are not sufficiently extensive and profound to enable me to do complete justice to so vast an undertaking. But such information as I have obtained, shall, with pleasure, be imparted. I will therefore endeavour to suggest a few hints, which appear to me to be useful, and likely to assist those who may be engaged in newly modelling the legal polity of this Colony.

Whatever improvement is attempted, must be introduced by a charter from the Crown. No instrument possesses equal weight and authority; and none will be received with the same respect: none is so well calculated to bear down the opposition, and to repel the attacks of those who may wish to perpetuate the abuses of the present Constitution.

I shall now proceed to consider, 1. The construction of the Court, the number and qualifications of the Judges, and other officers, together with their salaries; 2. The extent of their jurisdiction, and manner of raising the salaries of Judges; 3. The modes of proceeding in civil suits; 4. The mode of proceeding in criminal pro-

secutions; 5. The slave code, and the laws adapted to the native, black, and coloured population.

The Court must be a Supreme Court, similar to that of Ceylon, and the settlement of the East India Company. No appeal must exist, except to the King in council; and the decisions of the Judges must not be liable to control, or reversal, by any Colonial authority.

The reason for this is obvious: for, if the Court be controlled by any set of persons resident within the Colony, dissensions are likely to arise. Persons not so competent to the investigation of legal matters as the Judges, will be employed to interfere in their decisions; and those in authority may indirectly gain an improper influence in the decisions and proceedings of the proper tribunals.

I think that I speak from my own experience, when I say that one of my decisions was reversed in the West Indies, by the Colonial Council, very much through the malignant feelings of an individual member. And so uninformed were the members of the Court of Error of the papers before them, that the principal ground of their decision was stated to arise from a fact, brought to their knowledge by the evidence, which fact, upon inquiry, was not found to exist; but the direct contrary appeared, on the perusal of the documents upon which they professed to form their opinion.

Upon carrying the papers for the advice of counsel in England, the decision of the Court of Error was found to be wholly untenable; and, upon a second trial, the jury were made to see the falsehood of the pretence under which the Court of Error attempted to shelter themselves:—an exposure, highly derogatory to the dignity and respectability of a British tribunal. When an appeal is made to England, no such disgraceful influence can be exercised.

The Judges must be three at least in number. Many inconveniences arise from two Judges only sitting: as in doubtful and difficult cases, where a diversity of opinions exists, the decision must be made by *one* against the opinion of *one*, or no decision can be given. Besides this, the business of this Colony requires, at least, three Judges.

The Salaries of the Judges ought to be as follows: The Chief Justice's salary, three thousand pounds a year, or two thousand five hundred pounds, at least; that of the Puisne Justices, two thousand pounds each;—all to be paid according to some invariable standard, and not left to fluctuate with the depreciation of the circulating medium of the Colonies, often depressed by the fraudulent practices of the Colonial Government, and the unwise and unwarrantable variations which they are pleased to introduce into the money, or other supposed measure of value.

The Judges must be Barristers of England, or Ireland, of five years' standing at the Bar at least. This condition, namely, that

the Judges must be selected from Barristers who have been called to the Bar so long before their appointment, is a matter of great importance; otherwise, the situation of a Judge may be made a job, and any nobleman, or other man of influence, may consider the office as well worth the acceptance of one of his children, or other dependant, and procure his call to the Bar, when he is not qualified to sit in a Court of Justice; and when he is not competent, from his experience and knowledge of his profession, to do credit to the office, and to afford satisfaction to the suitors.

The salaries of the Judges will scarcely exceed the sum of money arising from situations which must be abolished, as will be shown in the sequel.

Judges must be Justices and Conservators of the Peace.

All sentences, rules, orders, decrees, &c., of the Court, to be made with the concurrence of the three Judges; or, in the absence of one or more, the opinion of Judge, or Judges, sitting. In case of a disagreement of opinion, the case must be decided by a majority. If only two are sitting, no judgment must be given, in the event of the Judges not being able to come to an unanimous determination; but the cause must be postponed, until three can be brought together, or a determination agreed upon. Or, perhaps, in the event of only two Judges sitting, and the third Judge not being within the Colony, the opinion of the Chief Justice, or chief Justice, to prevail, and be conclusive. The Court to have a seal.

All processes to issue in the name of the King, and under the seal of the Court.

The rank and precedence of the Judges must be stated in the charter.

Present office of Fiscal must be abolished, and an Advocate-Fiscal, or Attorney-General, with a salary of five hundred pounds per annum, must be appointed. That sum, with permission to practise in all cases, will be a sufficient inducement to a man of talent.

A Marshall, or Sheriff, must be appointed, with a salary, and fees upon warrants and executions, &c. A Secretary, or Registrar, must be appointed also.

In the event of the Fiscal, or the Secretary, being interested in any suit, Court must appoint some other person to act *pro hac vice*.

Judges, and Advocate-Fiscal, to be appointed by the King; the Judges to hold under the Great Seal.

Court must admit advocates and proctors from persons properly qualified.

The abolition of the present office of Fiscal will afford several advantages: 1. He is prosecutor, and receives part of the penalties. What a temptation does this afford to prosecute! He pays no costs;—what a temptation to oppress! And when we consider that

he may prosecute any person, with even the remotest prospect of obtaining a judgment; and that, in case of success, he is amply remunerated; and that no injury arises to him from failure, and no redress is afforded to the innocent person accused, how great may be the oppression and injustice produced!

His salary, likewise, and the emolument of his office, will assist materially in defraying the expenses of the Court.

The jurisdiction of the Court must be over *all* the inhabitants of the Colony, except the Governor. The Court must have first a civil jurisdiction, in trial and decision of all suits arising from contracts, injuries, duties, interests, invested rights, titles in lands, houses, or other property, wherein Individuals or the King are or is entitled to a claim to be so. But no action for any debt or duty, wherein less than one hundred six dollars is sued for, must be tried in the Supreme Court.

The jurisdiction must extend over *testamentary and matrimonial* causes, over *Admiralty* causes, also over *criminal* matters, and prosecutions arising therein, and over the proceedings of all *inferior Magistrates and Judges*.

By uniting all the separate jurisdictions in one Supreme Court, we shall have the following sums to go towards defraying the expenses of the establishment:—

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| Salary of Chief Justice | six ds. 9,000 |
| Salaries of eight Puisne Judges, at 4250 rds. each | 34,000 |
| Salary of Fiscal | 10,000 |
| Salary of Judge of Admiralty | £600 |
| Salary of Registrar of Admiralty | 500 |
| Salary of Secretary of Court of Appeals | 480 |
| Salaries of two Assessors, at 300l. each | 600 |

Making, altogether, a sum of nearly five thousand pounds sterling per annum, besides the emolument arising from forfeitures, &c. and fees of Court, all of which must be reserved to the Crown, and the prosecuting officer.

These sums collected together will nearly suffice to pay the expenses of the Court.

In civil cases, the suits of the natives, and the coloured and native population, may be tried in the same manner as those of other persons; but the oaths of slaves and natives must be admitted, except where their masters, or those interested in the property of the slave, shall be questioned.

Mode of proceeding in Civil Suits.

1. The Dutch law may remain in force in civil matters, in all parts of the Colony, except Albany; with some alteration, how-

ever, in the matrimonial code, and in testamentary cases, and the distribution of the estates of intestates; in which latter cases, the law ought to be assimilated to the laws of England, whenever it operates upon British-born subjects and their successors.

2. The forms of proceeding by libel, or summary petition, as the commencement of the suit, may be adopted; and the power to arrest, under a Judge's warrant, or upon an affidavit of debt, to a certain amount, should be introduced, instead of the very exceptionable mode of proceeding by arrest, which now prevails. An affidavit must be made in all cases. And in the case of violent injury to the person, and the prospect of the defendant departing from the jurisdiction, and debts so proved, when the circumstances are verified upon oath, an arrest should be permitted, and in no other civil suits, until after judgment, or upon disobedience of a rule of Court, or contempt of Court.

3. Witnesses must be examined, *viva voce*, in open Court. And the law of evidence which prevails in the English Courts should be adopted without any exception or modification whatever.

4. In some cases, commissions for examination of witnesses, may be allowed, but those cases must be strictly guarded; and commissions only granted upon affidavit, and strong reasons for admitting them.

5. The expenses of witnesses must be allowed, and the *subpoena* and *subpoena duces tecum* must be adopted.

6. An equitable jurisdiction, similar to that granted to the Court in Ceylon, must be included.

7. New trials must be allowed, as they are in Calcutta, and under the same restrictions.

Mode of proceeding in Criminal Suits.

1. Trial by jury must be adopted in all criminal prosecutions within certain districts, and provision for this mode of trial should be extended as far as possible, except in the cases of slaves, and the natives, or coloured or black population; in which instances juries must not be introduced, because they are not impartial, and experience proves their inefficacy.

I have been present myself at several trials in the West Indies, wherein masters of slaves, and others, have been sued or prosecuted; and I never knew one instance in which the person injuring the slave was found guilty, however flagrant and clear his guilt.

2. The law of England, with respect to evidence, must be adopted in all criminal prosecutions.

3. Grand juries must be summoned, and bills presented to them, exactly as in England.

Slave Code.

1. The late proclamation, in regard to slaves, should be fully adopted and enforced.*

2. And in each district, two or more persons should be appointed as guardians to the slaves, and the Hottentots, and other natives. These guardians should be bound by oath to hear the complaints of the slaves, and of the Hottentots, and other black and coloured population. The guardians should have power to summon witnesses, and prepare every necessary document, for bringing to justice those who oppress the natives, &c., and when cases occur, which demand prosecution, the Judges, or the Judge, upon circuit, should have authority to inquire and determine the cases, without the intervention of a jury, in all instances in which a slave, Hottentot, black, or coloured inhabitant, or person, is either plaintiff or defendant; except in those cases in which both parties agree to have the cause tried by a jury. But both parties must consent, and such consent, signed and written, and filed in Court, must be produced before the cause can be removed from the cognizance of the Court to that of the jury. (This is necessary, to protect the slave from the influence of his master.) Guardians must be appointed by the Court.—This is indispensable.

General Rules.

1. Certain periods, or terms, must be fixed for the sitting of the Court, in criminal and in civil matters.

2. A clause must be introduced, strictly prohibiting the Colonial Government from interfering with the provisions of the charter, and rendering null and void all Colonial enactments and regulations repugnant to the charter.

3. The persons of the Governor, Lieutenant-Governor, and each of the Judges, must be protected from arrest, and from criminal prosecutions, during the time they are in office, and for twelve months succeeding.

4. Judges must be protected from all suits, for any thing done in virtue of their office.

5. One Judge sufficient to proceed on circuit, and never more than two on the same circuit. And power must be reserved to the suitors, &c. to move for new trials, and for revision of all proceedings on the circuit, to the full Court.

6. In all civil cases, judgment must be suspended for some definite period after trial, to allow motions for new trial, or other revision or correction.

* A much more complete Slave Code has been since introduced, being upon the same general principles as the Trinidad order in Council.

OUTRAGE RECENTLY COMMITTED ON AN ENGLISHMAN IN JAVA.

An outrage, alleged to have been committed on a Mr. Whittle, an Englishman, has excited a considerable sensation among our countrymen in Java. Mr. Whittle, it appears, is owner and commander of a schooner called the *Helen*, but whether sailing under Dutch or English colours, does not clearly appear. Some five or six weeks ago, he cleared out at Batavia, bound for Anjir, and, as is usual, went on board the guard-ship, to show his papers, and get them countersigned. The officer, however, on board the guard-ship, thought proper to detain him, alleging that the passport given to a Mr. S., an English gentleman, a passenger on board the *Helen*, was irregular, as it did not state the *object* of his visit to Anjir. The schooner was, in consequence, stopped; but, on application to the Police Magistrate next day, the passport was declared to be in perfect form. The Commodore, on being informed of what had passed, sent the officer in command of the guard-ship a reprimand, and an order to allow the schooner to sail. When, however, the *Helen* again got under weigh, several shots were fired at her, which Mr. Whittle supposed was on account of his colours not being hoisted, and, as his peak was down, he sent a man aloft to tie them to the mast. The firing, however, was continued, and the schooner brought to, and the guard-ship's boat came along side; the Lieutenant in command of her immediately sprung on board, seized Mr. Whittle by the collar, dragged him to the waste, and ordered him into the boat, at the same time directing four native soldiers, he had in the boat, to load their muskets and shoot him, if he made the least resistance. On reaching the guard-ship, Mr. Whittle was dragged below and confined in a small cabin, and at night a truss of dried grass was thrown in for him to sleep upon. After being several days confined in this manner, his vessel, in the mean time, being in the charge of a boatswain and some men from the guard-ship, he was brought on shore to be examined by the Fiscal, on the charge of not hoisting his colours on leaving the port. It was found, however, that the port regulations did not require that colours should be hoisted by vessels leaving the harbour. Upon this, Mr. Whittle's accusers are stated to have shifted their ground, and brought in various charges, all of which were utterly groundless; but Mr. Whittle and his vessel, at the date of our correspondent's letter, still remained in custody, and it was uncertain when they might be released. The writer remarks, that this is a pretty specimen of the protection which the trade of Java receives from the Dutch Navy, and adds something touching the backslidings of 'Dutchified Englishmen'; but, concludes our pious

correspondent, 'God forgive them, for they know not what they do!' What the epithet of 'Dutchified' is meant to express, we cannot precisely determine; but, judging from the context, it cannot be intended to convey any thing in the way of compliment, as our correspondent proceeds to say, that, in his own private opinion, with some honourable exceptions, the Dutch are, no doubt, 'the Mihtur* caste of Europe!' There is much severity in this, and we only publish it to show the odour in which the Dutch Colonial Government stands with the British residents in Java.

We have given the circumstances of Mr. Whittle's case as they have been communicated to us; and, if they are correctly stated, an outrage has been committed, the infamy of which will not be confined to the mere perpetrators of it, but will attach to the Government itself, unless it grants the inquiry which is so loudly called for, and visits the offenders with such a punishment as shall deter its officers in future from indulging in acts more worthy of the maritime savages of Tunis and Algiers, than of a people boasting to hold a distinguished place among the civilized nations of Europe. We mean no national reflection, for there are ruffianly spirits of all nations; but, when they show themselves by overt acts of violence and brutality, it becomes the office of rulers to inquire and punish; and, when they neglect this sacred duty, they place themselves in the same hateful relation to the community as if they had been accomplices in the crime. Our information states Mr. Whittle to be an Englishman; but at present we say nothing on that score, for, supposing him to have been a Dutch citizen, sailing under the Dutch flag, we will not wrong the paternal feelings of the Government of Java by believing, for a moment, that that circumstance will render it less willing to do him the justice which should be impartially rendered unto all. *Judex damnatur cum nocens absol- ritur*, his Excellency the Commissioner knows to be an old remark, and we hope his conduct on the present occasion may prove that he feels it to be a just one.—*Singapore Chronicle*.

* *Mihtur*—a prince, or a sweeper, but always applied by Europeans in a degrading sense.