

CHAPTER XLII.

The Provincial High Courts.

344. The constitution of the High Courts is hardly directly affected by the Provisions of the new Constitution. The existing provisions of the Government of India Act relating to the chartered High Courts (Ss. 101—113) are for the most part repeated in substance in the new Act with slight changes. Briefly these changes, nearly all of which except the last relate to the constitution of the Courts, are as follows:—

Changes in the Constitution and powers of High Courts.

(i) That the Judges will continue to be appointed by His Majesty. But their tenure would be during good behaviour instead of during pleasure. They can be removed by His Majesty only on the ground of misbehaviour or of infirmity of mind or of body, on a report of the Judicial Committee of the Privy Council.

(ii) That there shall be a fixed age limit of 60 instead of the present practice whereby an undertaking to retire at the age of 60, is obtained from every Judge, on appointment, no age limit being fixed by the Act.

(iii) That every Puisne judge, or every person qualified to be appointed a Puisne Judge, shall be eligible for the appointment of Chief Justice. The present Act (S. 101 (4)) has been legally interpreted as rendering only barristers eligible for the office of Chief Justice. On the question of Civilian High Court Judges, the Select Committee observe as follows:—“We are clear (and we are informed that this is the general opinion of their colleagues) that the Indian Civil Service Judges are an important and valuable element in the judiciary, and that their presence adds greatly to the strength of the High Courts. It has been suggested that their earlier experience tends to make them favour the Executive against the subject, but the argument does not impress us; we are satisfied that they bring to the Bench a knowledge of Indian country life and conditions which barristers and pleaders from the towns may not always possess, and we do not doubt that the Crown will continue to appoint them. The Indian Civil Service Judges are not at the present time eligible for permanent appointment as Chief Justice of a High Court, though we understand that this rule does not apply in the case of Chief Courts. We see no reason for this invidious distinction, and we think that His Majesty's freedom of choice should not be thus fettered.”

(iv) That the existing statutory requirement that at least one-third of the Judges of every High Court must be members of the Indian Civil Service, and at least one-third must be barristers, shall be abrogated. The Select Committee observed as follows on this point: "We need hardly add that our acceptance of the proposal to abrogate the statutory proportion so far as barristers are concerned implies no doubt as to the necessity of continuing, in the interests of the maintenance of British legal traditions, to recruit a reasonable proportion of barristers or advocates from the United Kingdom as Judges of the High Courts."

(v) That the salaries, pensions, allowances, etc. of Judges shall in future be fixed by Order in Council instead of, as at present, by the Secretary of State in Council.

(vi) That Additional Judges shall henceforth be appointed by the Governor of the Province, in his discretion, instead of by the Governor-General in Council.

345. The existing jurisdiction and powers of High Courts are maintained, except that the powers of the High Courts under S. 107 of the Government of India Act 1919 with respect to subordinate Courts which has been construed by certain High Courts as conferring upon them a wide juridical competence, have been specifically restricted to administrative powers, and not any juridical jurisdiction. As to the meaning of the words 'jurisdiction and powers' which are found in all the three lists of subjects in Schedule 7 to the Act, we may extract the following from a memorandum submitted by the Secretary of State before the Joint Select Committee :—

"The phrase "jurisdiction, powers and authority" has a long history reaching back to the Regulating Act of 1773, and it is employed in sub-section (1) (a) of S. 106 of the present Government of India Act to indicate, along with the power to establish a High Court, the whole scope of the Letters Patent. The Letters Patent themselves indicate the distinction which is to be drawn at least between, on the one hand "jurisdiction" and on the other "powers and authority"; the broad distinction seems to be that "jurisdiction" indicates juridical competence, and "powers and authority" administrative. The Letters Patent indicate, for instance, as regards civil jurisdiction, that that is a competence to try and determine, whether originally or on appeal, matters arising in issue between parties. The criminal jurisdiction is a competence to try all persons brought before the Court in due course of law and, of course, to hear appeals from the orders of Courts exercising a subordinate criminal jurisdiction. The

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Letters Patent, however, do not set out to describe or specify the content of the jurisdiction. The Law to be administered by the High Court is left to the competent legislative authority in India and the scope of the appellate power of the High Court is also left to the operation of existing legislative provision in India or to subsequent provision, which, in this respect, may hereafter be made by competent legislative authority in India.

The distinction made explicitly or implicitly in Letters Patent between "jurisdiction" on the one hand and "powers and authority" on the other is clear from the nature of the "powers" there given. They include, for instance, powers to appoint officers of the Court itself; powers to admit advocates, vakils and attorneys and to make rules for their qualification, removal and suspension; powers to regulate their proceedings; and powers to delegate duties of a judicial, quasi-judicial or non-judicial nature to any Registrar, Prothonotary, or Master, or other official of the Court.

But the powers and authority of the High Courts of this nature are much wider than those described in the Letters Patent, and may conveniently be displayed under the following four heads namely:—

Powers and authority of High Courts.

- (i) Powers conferred by the Government of India Act.
- (ii) Powers conferred by Letters Patent.
- (iii) Powers conferred by enactments of the Central Legislature.
- (iv) Powers conferred by enactments of Provincial Legislatures.

(i) The powers conferred by the Government of India Act include those described in the 107th Section—"Powers of the High Court with respect to Subordinate Courts." The power has really been understood to be of a purely administrative nature, but certain High Courts have recently held that it confers upon them a wide juridical competence, and have further pointed out that it is not a power amendable by the Indian Legislature, as it is not included in Schedule V of the Government of India Act. It is the intention on the present occasion to enact the substance of this section, but in such a form as to leave no doubt that it does not confer juridical jurisdiction, but administrative powers.

(ii) Powers and authority conferred by Letters Patent.—The details of these powers have been indicated above. The White Paper itself contains no Provision for amendment of Letters Patent by any authority in India and to this extent withdraws the powers at present enjoyed, in virtue of Schedule V to the Act and the Letters Patent

themselves, by the Central Legislature (and in Burma, the Provincial Legislature). Nevertheless, the individual powers and authority enjoyed in virtue of their Letters Patent by the High Courts would be subject to the jurisdiction of legislatures in India according as they are covered by one entry or another in Lists I, II and III of Appendix VI. For instance, the powers of the High Court under Letters Patent in regard to the admission of advocates, vakils and attorneys would be subject to any competence which might be placed in India to legislate for the constitution and control of the Bar or Bars. Another instance is the High Court's power to delegate functions to Registrars and other officers of its own.

(iii) Powers conferred by Central Legislation :—Instances of powers of this nature are to be found in the Criminal Procedure Code and particularly, in a very wide form, in the second part of the Civil Procedure Code, and it is presumed for the moment that these powers, as at present, will be subject to the competence of the Federal Legislature or, to the extent to which they fall in List III of Appendix VI, to the concurrent competence of the Federal and Provincial Legislatures.

(iv) Powers conferred by Provincial Legislatures :—The most prominent of these powers are those conferred in relation to the subordinate civil judiciary by Provincial Civil Courts Acts in certain Provinces ; thus in Madras the civil subordinate judiciary of the Munsif class are appointed and controlled entirely by the High Court ; in the Punjab the High Court is given the power to nominate persons for recruitment as Subordinate Judges, which nomination must be accepted by the Local Government. In other Provinces the position with regard to Munsifs is the same as that just indicated with reference to Subordinate Judges in the Punjab. But although, except to the extent just stated, the actual appointment of the Civil Judiciary rests with the Provincial Government, in nearly every case the opinion of the High Court as to appointment, transfer, promotion etc. is taken and acted upon by the Local Government. ”

346. (a) The administrative machinery of the High Court is subject to the control of the Provincial Governments ; but any expenditure certified by the Governor after consultation with his Ministers, that is, in the exercise of his individual judgment, to be required for the expenses of the High Court is not subject to the vote of the Legislative Assembly though it will be open to discussion by them. The administrative control of the High Court remains with the Provincial Governments.

(b) Both the Federal and Provincial Legislatures will have power to make laws touching the jurisdiction, powers and authority of the

High Courts. That is to say, the power to regulate juridical jurisdiction follows the power to regulate the substantive law to be interpreted.

347. No discussion is permitted in the Federal Legislature, or in any Provincial Legislature with respect to the conduct of a Judge of a High Court in the performance of his judicial functions.

348. The term High Court includes the Chief Court of Oudh and the Judicial Commissioners' Courts in the Central Provinces, the North West Frontier Province and Sind.

349. It will be observed that, at present, there is no separate High Court for Assam, and there will be none for Orissa, after its separation from Bihar, unless new High Courts are established. Provision has therefore been made, enabling His Majesty to constitute or reconstitute High Courts, and to extend the jurisdiction of the High Court of one Province to another Province.

350. The High Courts have no original jurisdiction in revenue matters, unless otherwise provided by an Act of the appropriate legislature concerned. A Bill or amendment making such a provision shall not be introduced except with the previous sanction of the Governor-General in his discretion, or the Governor in his discretion, as the case may be.

CHAPTER XLIII.

The Federal Railway Authority.

351. We have already seen that the Acworth Committee recommended the separation of Railway finance from general finance. It also recommended that the Railway Board should be constituted into an independent administration, preparing its own programme of work and expenditure, and carrying it into effect within the limits of its budget as approved by the Government of India and the Secretary of State, and accepted by the Legislative Assembly, although remaining an integral part of the Government machine. Since then, the establishment of a Central Controlling Agency has been engaging the attention of the Government of India.

The Government of India appointed Brigadier-General Hammond to study the question and make recommendations. His report was received early in 1932. It was considered by the Government of India and by the Consultative Committee of the Round Table Conference then sitting at