

MADRAS RECORD OFFICE.

Government of Madras.

Judicial DEPARTMENT

G.O. No. 578	Press
1-2	~~Misc.~~
Dated 13-4-1909	

Not to be folded or roughly handled

No. 1. Read the following letter from J. R. BOYSON, Esq., Government Solicitor, Madras ; to the Chief Secretary to Government, dated 15th March 1859, No. 348.

Sir,

I have the honor to acknowledge the Extract from Minutes of Consultation under date the 11th February 1859, No. 188, Judicial Department.

I submitted same together with all other papers in my office relating to the matter for the consideration of the Advocate General.

I now forward for the information of Government his *original* opinion.

OPINION.

With reference to the only two points upon which Government has directly desired my opinion in their Extract Minutes Consultation, para. 11, under date 11th February 1859, (No. 188, Judicial Department,) that opinion can be given very easily and in very few words.

2. Government desire my opinion in the first place "on the course to be pursued by Government in respect to any further demands to which Mr. Serle may be liable on account of the various Estates mentioned by the Auditors." In my opinion, this must depend on the nature of each particular case or demand. Generally speaking, if any matters should come to light disclosing any criminal misconduct on Mr. Serle's part, such for instance as would come under the provisions of Act XIII of 1859, then unquestionably the Government can, and I think ought to, institute criminal proceedings against him at once. In merely civil claims however, Government can take no steps whatever. They can make no rules, nor pass orders, that can have any legal effect upon a person who is no longer in their service; and in a Court of Law the Government would have no *locus standi* at all. Any suit that may be instituted must be in the name of, and under a Power of Attorney from, the party making the demand upon Mr. Serle. All therefore that Government can do, in this or any future case, is to transmit to the Secretary of State in Council for India all the information respecting law or facts that is procurable here—leaving it to him to make such communication as he may deem fit to the parties interested, and to them to take thereupon such steps as they may be advised.

3. Government in the next place desire my opinion "on Mr. Serle's application for an Audit of his Accounts with his former Agents." I do not quite concur in the remark that no such "Audit could be made *at all*, seeing that Mr. Serle has himself informed the Government Solicitor that he never kept, nor was it his practice in his office to keep any statement of his transactions with his late Agents Messrs. Brundrett and Co." Undoubtedly, a full account of all such transactions ought to have been kept by Mr. Serle, and to be forthcoming, and such an omission or neglect I consider highly blameable on the part of a Public Officer like the Administrator General. The absence of such accounts moreover would doubtless cause much trouble and research in ascertaining the price of Government Securities, and the rates of exchange on the various days when Government Securities were sold here by Mr. Serle, and Bills on England purchased by him, in order to make remittances to England; but still these particulars might, I think, be ascertained. With these particulars, and a reference to the Schedules in the Fort Saint George Gazette given in by Mr. Serle while Administrator General, and a return from the present Administrator General shewing whether receipts, from the several parties entitled, were forthcoming, or, if not, what had become of the sums set apart for such parties, I think that if not a complete Audit, yet one very nearly so, *might* be made of these transactions. I do not think that the mere ordering by Government of such an Audit, at Mr. Serle's request, would bind Government to any thing, or give Mr. Serle any claim or advantage whatsoever,

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while it might, possibly, be the means of furnishing Government with some information. In as much however as I quite concur with the Right Honorable the Governor in Council that neither under Act VIII of 1855, or any other authority, has he any power, legally, to make such an order, I am of opinion that Government ought not to make any order which they have no power legally to enforce, and which the party to be affected by it, however consenting at first, might resist with impunity, if he should afterwards change his mind.

4. Having said thus much, I believe I have given my opinion so far as called by the Extract Minutes Consultation now before me; but with reference to the numerous papers laid before me along with this Extract Minutes Consultation—especially the letters from the present Administrator General, the Auditors, and the Government Solicitor—many other points arise, on which I think that I ought perhaps to submit my opinion for the consideration of Government; especially on the point as to whether Mr. Serle is legally liable to pay interest on any and which of the sums retained in his hands, and if so at what rate, and for what periods.

5. The Government Solicitor, I observe, in his letter to the Chief Secretary, dated 5th November 1858, forwarding my opinion of the 1st November, gives it as his "opinion, that Mr. Serle should pay interest at 5 per cent. instead of 4 per cent.," and from 1846 and 1851 respectively to the present time, and he thinks that the Court of Equity would decree interest at that rate "if indeed it did not direct its computation at that rate with annual rests, or, in other words, that it should be compounded annually." This opinion the Auditors seem to endorse, though the value of their opinion on a mere point of law may be perhaps somewhat problematical; while the Administrator General, in his letter to the Auditors, dated 22nd December 1858, informs them that he "did not consider that interest was recoverable on account of sums set apart," and the Administrator General, (as Government is aware) is also the Master in Equity of the Supreme Court, and an Equity lawyer of considerable experience.

6. I cannot entirely concur with either of these opinions; but the idea that a Court of Equity would decree annual rests under similar circumstances, seems to me quite opposed to the circumstances under which, and the principles upon which, Courts of Equity at home have acted in decreeing annual rests. In all the decided cases upon the subject which I have been able to examine; and it is by the decided cases, and them alone, that Mr. Serle's legal liability must be determined:—and as to annual rests meaning compound interest, the very reverse has been expressly decided by Lord Longdale, and confirmed on appeal by Lord Cottenham. His words are "annual rests in themselves do not carry compound interest."

7. I was not indeed aware that Government desired any legal opinion on this point. I gave none in my opinion of the 1st November last, 1stly, because Government had not asked for one; 2ndly, because I knew that, whatever my opinion or that of Government might be, Government had no power to direct Mr. Serle to pay interest at any particular rate, or indeed interest at all. Even however if I had offered an opinion on the subject, I should probably have restricted myself to the consideration of the actual legal liability of Mr. Serle in his present position, that of a person who is not, nor has been for the last three years, an Officer or servant of Government. Upon the moral point of view of the question I should not have considered, until so informed, that Government desired any assistance from me in forming their own opinion.

8. It is certainly stated broadly in the leading Text book on the subject, "Williams on Executors," among the "grounds on which an Executor or Administrator may be charged with interest," "that he has been guilty of negligence in omitting to lay out the money for the benefit of the Estate;" for which the author cites several cases as per margin; and, in another place, "but if the Court observes that an Executor keeps money dead in his hands without any apparent reason of necessity, then it becomes negligence, and a breach of trust, and the Court will charge the Executor with interest," (which a reference to the authorities will show to mean interest at 4 per cent. for which are cited the cases in the margin; Text books however are very apt to mislead unless their meaning is ascertained by reference to the cases which they cite. The general words "the money," and "money," would seem to include all

1. *Rourke v. Hart*, 11 Ves. 59.
2. *Tebbs v. Carpenter*, 1 Mad. 304.
3. *Amory v. Thompson*, 15 Ves. 402.

4. *Scree v. Hind*, 1 Ves. Jr. 291.
5. *Luttrell v. Hume*, 1 Ves. 194.
6. *Tanner v. Turner*, 1 J. and W. 34.
7. *Gaskell v. Fenwick*, 3 Y. and J. 451.

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monies whatsoever, including money set apart for creditors, legatees, and distributive shares for next of kin; but the cases shew that what is meant is only "assets," or money belonging to the Estate. The cases moreover are all cases of Executors who acted in violation of express specific directions to invest, and the decisions refer only to instances where loss has been occasioned to the Estate, by the Executor "keeping money dead in his hands," which he was expressly directed to invest, or to apply in reduction of debts bearing interest, so as to benefit the estate. Now in the case of money due as a debt to a creditor of a deceased, or money being a legacy due to a legatee, or money being a distributive share due to a next of kin, none of these monies when once set apart for the parties respectively entitled, are, in my opinion, any longer "assets" of the estate. The primary duty of an Executor or Administrator is towards the estate,—to protect it, and to invest its "assets," so as to benefit and augment the estate; but to creditors, legatees, and next of kin, his primary duty is to pay them, or set apart for them the sums due to them. As a general principle I have no doubt that Executors, Administrators and Trustees are bound to make profitable, while in their hands, all monies coming to their hands in those capacities. Sir A. Hart, Lord Chancellor of Ireland observes* "We are not loosely to

* *Hanagan v. Nolan*, 1 Molloy 45.

permit any man however respectable, to retain the money of others in his hands without making it productive. An Executor's duty in this respect is to deal with the trust estate as a provident person would with his own, and every provident person makes interest of his money when he has got together a sum which he thinks to be worth while to lay out at interest." This case however, like those cited in "Williams on Executors" is one of a breach of trust by an Executor in neglecting to invest a part of the estate, of the "assets," and is not an express decision upon the point to which I have adverted, viz., the case of monies not "assets," not belonging to the estate, but set apart from the estate to be paid to other parties, who neglect or delay to come forward and claim them; and indeed I can find no case that has ever decided, when an Executor or Administrator has set apart the sums due to creditors, legatees, or next of kin, and given public notice by advertisement that the money is ready for them, that when they neglect or delay to claim their own, the Executor or Administrator is bound to invest their money for them, or in default of so doing to pay them interest himself. That money due to a creditor, legatee, or next of kin, when once set apart for them, is no longer "assets," or part of the Estate, will be obvious from the consideration, that if a person entitled to a distributive share die within the year (i. e. before he can claim payment) that share is "ceased" in him, and goes to his personal representative, not to the personal representative of the first intestate; and a Court of Equity would at any time declare the Executor or Administrator to be a Trustee in respect of any such share for such next of kin or his personal representative. So likewise if a legatee die within the year, or before it is ascertained what is the amount of surplus, or whether there is any surplus at all, still his representative and not the representative of the first testator, shall have the legacy. The case of a creditor is stronger still, as he is not bound to wait a year, or even a day, before he can claim payment. With reference therefore to the remark in para. 2 of the Honorable Court's Despatch No. 38 of 1858, (in Extract Minutes Consultation 16th October 1858, No. 1463, Judicial Department) that, in Chester's estate, the sum of £ 205-2-9 when received back by Mr. Serle from Messrs. Brundrett and Co., "properly should have been again placed to the credit of the Estate," it must I think be taken to mean, that the sum in question should have been entered under the head of that Estate, as held by Mr. Serle (not as part of the Estate, but) in trust for the party or parties beneficially entitled—whether so entitled as creditors, legatees, or next of kin, I am not aware. An entry of this kind Mr. Serle unquestionably ought to have made, as I before intimated in para. 16 of my opinion dated 1st November 1858; but when these sums were once set apart from the Estate for parties legally entitled thereto, I do not see how they could be again properly entered as belonging to or forming part of the estate, or "assets."

9. Many cases have decided that where an Executor, expressly directed to invest, violates that direction, and keeps the money dead in his hands, he shall pay interest, at 4 per cent., and it is equally clear that creditors whose debts bear interest, and legatees whose legacies the Estate is unable to pay at the end of the year, are entitled, when paid, to interest from the Estate, so far as the Estate will extend; but I cannot find any case that has decided, when an Executor or Administrator has set apart for creditors, legatees, or next of kin, the full amount to which they

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are entitled, and given notice by public advertisement that their money is laying at such a place, ready to be paid to them on their application, that if they do not come forward for a great length of time, they are entitled to demand interest from the Executor because he did not invest their money for them; and, as a general rule, I concur with the Administrator General in his opinion that "interest is not recoverable on account of sums set apart." The particular period for which, the rate at which, and the particular circumstances under which, I think Mr. Serle is chargeable with interest, I shall notice presently.

† Despatch No. 38 of 1858, para 2 and 3. 10. Mr. Serle it appears† remitted to his London Agents as follows; in Hawes' Estate Rupees 5,876-1-6, in November 1816; and in Chester's Estate £ 205-2-9 in September 1851, half of the former sum was paid to the parties entitled; the other half, and the whole of the latter sum, seem to have been returned to Mr. Serle in June 1853.

11. The first question therefore is, is Mr. Serle liable for interest on these sums prior to June 1853. In my opinion a Court of Equity would not so consider him. He remitted the money at the proper time to the proper place, the place where the parties entitled actually were, and where, I think, the Court would hold that he had bona fide every reason to believe that it would speedily reach their hands. The proper advertisements were published in the Fort Saint George Gazette, and, I presume, in the London Gazette also. Such notices usually reach the parties interested; people whose relatives are known to have died in India in the Company's service generally know that enquiry at the India House seldom fails to elicit some information about them; and it is not often that people interested in the property of such deceased persons allow seven years, as Mr. Chester seems to have done, or twelve years as Mr. Wicks, in Major Hawes' Estate, to elapse without any inquiry on the subject. Other monies remitted about the same time, through the same Agents, seem all—as did also one half in the case of Major Hawes' Estate—to have reached their proper owners; and I think the question with the Court would be, had Mr. Serle reasonable ground to believe that these two sums would do the same. His liability to pay interest, on the ground that he ought to have invested, might be tested in this way—suppose Mr. Chester or Mr. Wicks to have applied for and actually received their money from Mr. Serle's London Agents at a period of six or twelve months after the money arrived in London, could Mr. Chester or Mr. Wicks have claimed interest for these 6 or 12 months? Clearly not, I apprehend. If not; then where is the line to be drawn? What was the precise period at which the London Agents were bound to invest? I can see no ground for supposing that under these circumstances a Court of Equity would make Mr. Serle pay interest for any part of the time that this money lay in the hands of his London Agents for the express and bona fide purpose of being paid to these very claimants. In law, it is true, his Agents' possession was Mr. Serle's own possession, but Sir Thomas Plumer, M. R. in *Tebbs v. Carpenter*† nevertheless relies on the circumstance of money being in an Agent's hands, as shewing that in fact the Executors derived no benefit, and did not act with that view.

† 11 M. & W. 307. 12. It may be said, I am aware, that Mr. Serle need not have remitted the money to London at all, until he had ascertained from his Agents that they had actually discovered Messrs. Chester and Wicks; and that, till then, he should have left the money where it was, in the Indian Funds, where it bore interest:—and this in my opinion would unquestionably have been the better and the proper course. In one of these cases I understand it was necessary to sell the Government Securities in order to pay creditors, but in such case the balance might and I think ought to have been re-invested, and left so till Mr. Chester or Wicks turned up. The question however for the Court would still be, I think, did Mr. Serle act bona fide? and had he reasonable grounds for believing that the money would soon reach the parties? The parties, as they themselves shew, were actually living at or near the place where Mr. Serle sent the money; and then, considering that all claimants but these two seem to have got their money, and that these two did not get it only because they never took any step to get it, the question would be whether, under these circumstances, Mr. Serle had reasonable ground to believe that in so remitting the money he took the best step to convey it to its owners, or whether he was morally to blame for not weighing the possibility of their being so deaf to all ordinary notices, and so neglectful of all ordinary inquiries, for so great a length of time. I think a Court would hold under these circumstances that Mr. Serle acted bona fide, and had reasonable grounds for believing that by remitting, as he did, the sums would speedily reach the parties, and it was their own fault, not Mr. Serle's, that they did not receive them.

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13. I now come to the period when these sums again reached Mr. Serle's hands, June 1853, and from that date until he paid the Administrator General and Mr. Cook respectively, I think he is clearly liable to pay interest, but whether at 4 or 5 per cent is not, I think, very clear.

14. I think he is liable to pay interest, because I think a Court of Equity would hold that the fact of his Agents returning the money to him after the lapse of two and seven years respectively, was notice to him that the parties were not likely to be speedily found, and that thereupon, as a public officer, he ought either to have invested the money forthwith, or, at least, to have advertised again for the parties, giving notice that the money would be invested if not claimed within a reasonable time. He had clearly no right whatever to keep the money in his own hands, even while Administrator General; his doing so was a violation of the spirit of Act VII of 1849, Section 9, which directs all assets belonging to the Estates administered by the Administrator General to be kept by him in the Treasury of the East India Company unless otherwise ordered by the Governor General in Council, and though I think these sums were not, technically speaking, "assets," yet the spirit, intent, and clear meaning of the Act obviously is, that the Administrator General, should keep in the Treasury and not in his own hands, all monies received by him as Administrator General, in January 1856. I think the Court would hold that, considering his public capacity, and the obvious intent of Act VII of 1849, Section 9, it was his duty to have invested the money in the Treasury or in Government Securities, and that he must therefore make good whatever interest the money would have produced if so invested in June 1853. I believe the 4 per cent Loan was the only one then open; and the Gazette shew that four per cents then stood but a fraction below par.

15. As to the rate of interest, when I said that I thought it not very clear whether a Court would direct Mr. Serle to pay interest at 4 or at 5 per cent, I said so because while 4 per cent is the lowest rate given by the Courts at home where the ordinary rate of interest is certainly lower than in India, I cannot say that the circumstances in Mr. Serle's case quite come up to those in the cases where the Court of Chancery in England has directed 5 per cent to be paid; much less to those where annual rests have been decreed. I think that had this case occurred in England the Courts there would not have decreed Mr. Serle to pay 5 per cent, still less would they have considered it a case for annual rests. In support of this opinion I will refer to two decisions of Lord Thurlow and Lord Eldon. In *Forbes v. Ross*† the executors were directed by the will to invest in land, or on heritable or personal securities: 5 per cent was obtainable on heritable or Government securities, but the executors lent the money to one of themselves, on bond, at only 4 per cent, a case of gross breach of trust, and of clear employment of the money. Lord Thurlow only decreed them to pay 5 per cent. In *Crackell v. Bethune*,† the executor though directed by the will to invest, not only did not do so, but sold out all the stock, unnecessarily, falsely pretending debts to be paid, though the only one was the Plaintiff's, against whom he pleaded the statute of limitation, Lord Eldon, calling this a very strong case, not of mere negligence in not investing, but of gross misconduct and breach of trust in selling out, gave 5 per cent, but said it was "not a case for rests." For this purpose the Court has always expected the case to go much further. These two cases appear to me to go very far beyond any thing in Mr. Serle's case.

16. Lord Thurlow in two cases † where the retention of money was not only held unjustifiable, but where the executor was supposed to have derived advantage from it, gave only 4 per cent. Lord Loughborough in another † said there must be something special (i. e., beyond mere retention and non-investment) to charge an executor with above 4 per cent. Lord Eldon in a case † where an executor had retained money in his hands for 15 years, while the estate was liable on bonds bearing interest, decreed only 4 per cent. Sir W. Grant, Master of Rolls says † "If it was the executor's duty to lay out and secure profit to the Estate, and he has neglected to do so, complete indemnity is not obtained unless he pays all that might have been obtained; but that is not the principle on which the Court proceeds." "If there is nothing of employment, but mere neglect to pay, it is impossible to charge him with more than 4 per cent."

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17. The cases vary considerably. The later cases differ from the older ones in pointing to annual rests instead of simple interest in cases where the executor has employed the money for his own benefit—and here I should observe that I think a Court might perhaps hold that it lay on Mr. Serle to shew that he did not employ the money for his own benefit, during the time he so improperly retained it in his own hands, viz. from June 1853, till he paid it away. If the Court were so to hold, then, in case of his failing to prove this, the Court would probably charge him with 5 per cent, perhaps even with annual rests, but if the Court found that he had merely retained the money, and been guilty only of gross negligence in omitting to invest it, then I think that, upon the ruling of Lord Cranworth in a very recent case, which was one of omission to invest under circumstances of gross negligence, the Court would merely charge him with 4 per cent simple interest.

18. The general rule on this subject may be best given in the words of the present Master of the Rolls, in one of the late cases to which I have already referred. "The rules which apply to the cases in which executors are charged with interest on the balances retained by them are subject to a good deal of difficulty, arising, not so much from any doubt as to the principles themselves, as from the practical application of them to particular cases. Generally, it may be stated, that if an executor has retained balances in his hands which he ought to have invested, the Court will charge him with simple interest at four per cent, on those balances; if, in addition to such retention, he has committed a direct breach of trust, or if the fund had been taken by him from a proper state of investment in which it was producing five per cent, he will be charged with interest after the rate of five per cent per annum; if, in addition to this, he has employed the money so obtained by him in trade or speculation, for his own benefit and advantage, he will be charged either with the profits actually so obtained by him from the use of the money, or with interest at five per cent, per annum, and also with yearly rests, that is, with compound interest.

"The principle on which the Court charges the executor with the profits, which have actually arisen from the property of his cestuis que trust employed by him, is obvious, and of general application where such profits are proved to have been made. It was the money of the cestuis que trust, and they are entitled to receive the profits it has earned. The principle upon which executors charged with interest on balances are made to account with yearly or half yearly rests, is not so clearly defined, nor are the decided cases by any means free from obscurity or contradiction." But it may be safely said, in the words of an eminent text writer on this subject, "It is not easy to define the circumstances under which the Court will charge executors and trustees with more than 4 per cent interest, or with compound interest, and the principles by which the Court is regulated in doing so are involved in much uncertainty."

19. I can find no case in the books exactly parallel to Mr. Serle's. I think that a claim for interest if preferred by Mr. Chester or Mr. Wicks under the peculiar circumstances of the notices published in the Gazette, and their great laches, would be almost one of first impression, and, for the reasons already given, I think the Court would not decree Mr. Serle to pay any interest prior to June 1853; that it would decree him to pay interest from that date; that, in a similar case in England, Mr. Serle would not be decreed to pay more than 4 per cent; that here he would probably be decreed to pay 5 per cent on account of the higher rate of interest here, but not because (unless the Court should find that he had employed the money) the circumstances in his case are such as would in my opinion induce a Court in England to give 5 per cent. Still less such as would induce it to decree annual rests, and least of all such as a Court would hold to warrant the further step of compound interest.

March 14th, 1859.

(Signed) THOS. SYDNEY SMYTH.

Advocate General.

ORDER THEREON, No. 305, dated 15th April 1859.

No. 2.
The Advocate General replies to the reference made to him in Extract Minutes Consultation, 11th February 1859.

Fort St. George, Judicial Consultation, 19th April 1859.

2. As to the course to be pursued by Government in respect to the further demands to which Mr. Serle may be liable on account of the various estates mentioned by the Auditors, Mr. Smyth gives it as his opinion that unless any matter should come to light disclosing any criminal misconduct on Mr. Serle's part—such for instance as would come under the provisions of Act XIII, 1850—Government can take no steps whatever. In respect to any civil claims Government would have no locus standi at all. Any suit that may be instituted must be in the name of, and under a Power of Attorney from, the party making the demand upon Mr. Serle. All therefore that Government can do, in this or any future case, is to transmit to the Secretary of State in Council for India, all the information respecting law or facts that is procurable here, leaving it to him to make such communication as he may deem fit to the parties interested, and to them to take thereupon such steps as they may be advised.

3. The Advocate General considers that the Government should not comply with Mr. Serle's application for an Audit of his Accounts with his former Agent.

4. Having thus disposed of the two questions on which he deems his opinion to have been directly asked, Mr. Smyth discusses at much length the further point as to the extent to which Mr. Serle is legally liable to be charged interest, on account of the estates of Hawes and Chester.

5. The conclusion at which he has arrived is (para. 13) that Mr. Serle is clearly liable to pay interest from the period when he received back the estates from his London Agents, or June 1853, to that on which he paid them over to the Administrator General, and to Mr. Cook respectively.

6. As to the rate and mode at, and by, which the interest should be calculated, Mr. Smyth gives it as his opinion that in a similar case in England Mr. Serle would not be decreed to pay more than 4 per cent, that in India he would probably be decreed to pay 5 per cent on account of the higher rate of interest here; but not because (unless the Court should find that he had employed the money) the circumstances in his case are such as would in his opinion induce a Court in England to give 5 per cent—still less such as would induce it to decree annual rests—and least of all such as a Court would hold to warrant the further step of compound interest.

7. Mr. Smyth's opinion refers only to the estates of Hawes and Chester, but it is clear that the eleven estates mentioned in the Auditor's letter of 24th December 1858, are in the same predicament, and that interest on them will be similarly chargeable against Mr. Serle, for the period that intervened between his receiving them back from Messrs. Brundrett and Co., and making them over to the Administrator General.

8. Chester's estate and the eleven estates brought to notice by the Auditors have been made over by Mr. Serle to the Administrator General. The Government resolve to furnish a copy of the Advocate General's opinion to that Officer, in view to his taking such means as may be open to him, for recovering from Mr. Serle the interest that may be due by him on account of those estates. It is remarked that Mr. Serle has already paid interest at 4 per cent, on Chester's estate from 15th September 1851 to 11th October 1858, and that he appears chargeable with commission, Rupees 29-12-6, which was deducted by Mr. Teed on his remitting the amount of the estate to Mr. F. Clarke at the East India House, such commission having been already charged by Mr. Serle.

9. In Hawes' estate Mr. Serle, it is observed, has been applied to by Mr. Cook for interest, to the amount of £134-10, for 9½ years, which he was to remit by the first Mail Steamer of January. The Auditors will ascertain and report whether this has been done.

10. The Government regret that they cannot regard the explanation given by Mr. Serle in his letter, 10th January last, to the Auditors in respect to the portion of the sum £1,516-10-6 yet unaccounted for, to be by any means satisfactory. Until the letter from Messrs. Brundrett and Co., remitting that amount to Mr. Serle be produced, it cannot be known what were the further estates included in the remittance, nor whether Hunter's estate on account of which Rupees 1,300 is said to have been paid, was one of them. The alleged remittance to Messrs. Brundrett and Co., of Rupees 3,000 also cannot be admitted in the absence of receipt or voucher

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of any kind. Moreover the balance yet unaccounted for, even if both these items were allowed, is greater than is referrible to any difference in exchange, which indeed would be more likely to have been in favor of the remitter, than the contrary.

£ 1,516 as per	15,160
Given in Mr. Serle's letter 10th January	14,408
	<u>682</u>

11. The Auditors will again call upon Mr. Serle for the letter of his Agents forwarding the remittance of £ 1,516, and for the necessary vouchers required to prove the disposal of the amount—£ 1,516-10-6, less Rupees 10,198, Annas 4, Pice 8—still unaccounted for.

12. The papers now recorded will also be forwarded to the Right Honorable the Secretary of State for India in continuation of the correspondence already transmitted.

(Signed) T. PYCROFT,
Chief Secretary.

Judicial Department.

No. 505

Extract from the Minutes of Consultation.

Dated 13th April 1859.

Read the following letter from the Government Solicitor.

Here enter 15th March, 1859. 1859.

The Advocate General replies to the reference made to him in Ex. Min. Cons.

11th February 1859.

2. As to the course to be pursued by Government in respect to the further demands to which Mr. Serle may be liable on account of the various estates mentioned by the Auditors. Mr. Smyth gives it as his opinion that unless any matter should come to light disclosing any criminal misconduct on

on Mr. Serle's part. such for instance as would come under the provisions of Act XIII-1850. Government can take no steps whatever. The respect to any civil claims Government would have no locus standi at all. Any suit that may be instituted must be in the name of, and under a Power of Attorney from, the party making the demand upon Mr. Serle. All that Government can do, in this or any future case, is to transmit to the Secretary of State in Council for India, all the information respecting law or facts that is procurable here, leaving it to him to make or such communication as he may deem fit to the parties interested.

interested, and to them to take thereupon such steps as they may be advised.

3. The Advocate General considers ^{ers} that the Government should not comply with Mr. Serle's application for an audit of his accounts with his former Agent.

4. Having thus disposed of the two questions on which he deems his opinion to have been properly asked, Mr. Smyth discusses at much length the further point as to the extent to which Mr. Serle is legally liable to the charge in interest, on account of the estates of Hawes and Chester.

5. The conclusion at which he has arrived is

(Para. 13) that Mr. Seale is clearly liable to pay interest from the period when he received back the estates from his London Agents, or June 1853, to that on which he paid them over to the Administrator General, and to Mr. Cook respectively.

As to the rate and mode at and by which the interest should be calculated. Mr. Smyth gives it as his opinion that in a similar case in England Mr. Seale would not be decreed to pay more than 4 per cent, that in India he would probably be decreed to pay 5%, on account of the higher rate of interest here; but not because (unless the Court

note.

From para. 17 it would seem that the mode of disbursement would be on either side. A Court might perhaps hold that it lay on Mr. Seale to show that he did not employ the money for his own benefit during the time he so improperly retained it in his own hands viz from June 1853 until he paid it away.

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Court should find that he had employed the money the circumstances in his case, are such as would in his opinion induce a Court in England to give 5 per cent - still left such as would induce it to decree annual rests - and least of all such as a Court would hold to warrant the further step of Compound interest.

Y. - Mr. Smyth's opinion refers only to the estates of James and Chester - but it is clear that the eleven estates mentioned in the Auditor's letter of 24th December 1858 are in the same predicament, and that interest on them will be similarly chargeable against Mr. Seale for the periods

periods that intervened
between his receiving them
back from Messrs. Brown
& Co., and making
them over to the Adminis-
trator General.

8. - Chester's estate and
the other estates brought
to notice by the auditors
have been made over by
Mr. Serle, to the Adminis-
trator General. The Gov-
ernment resolve to fur-
nish a copy of the Ad-
vocate General's opinion
to that officer, in view
to his taking such means
as may be open to him,
for recovering from Mr.
Serle the interest that
may be due by him on
account of these estates.
It is remarked that Mr.
Serle has already paid
interest

interest at 4% on Chester's
estate from 15 September
1851 to 11th October 1858, and
that he appears charge-
able with Commission
Paper 29-12-6, which
was deducted by Mr. Serle
on his remitting the amount
of the estate to Mr. F. Clarke
at the East India House,
such commission having
been already charged by
Mr. Serle.

9. - In James's estate
Mr. Serle, it is observed,
has been applied to by
Mr. Cook for interest to
the amount of £124-10 for
9½ years, which he was
to remit by the first Mail
Steamer of January. The
Auditors will ascertain
and report whether this
has been done.

He

10. The Government regret that they cannot regard the explanation given by Mr. Cole in his letter, 10th January last, to the Auditors in respect to the portion of the sum of £1516-10-6 yet unaccounted for, to be, by any means satisfactory. That the letter from Messrs. Brunner, Drott and Co. remitting that amount to Mr. Cole, be produced, it cannot be known what were the further estates included in the remittance, nor whether Hunter's estate on account of which Rupees 1800 is said to have been paid, was one of them. The alleged remittance to Messrs. Brunner, Drott and Co. of Rupees 2000 also cannot be admitted.

£1516-10-6 pt for - 15160.
 Given in Mr. Cole's
 letter 10 January } 14,998.
 - 862.

admitted in the absence of receipt or voucher of any kind. Moreover the balance yet unaccounted for, even if both these items were allowed, is greater than is referable to any difference in exchange, which indeed would be more likely to have been in favor of the remitter, than the contrary.

11. The Auditors will again call upon Mr. Cole for the letter of his agents forwarding the remittance of £1516 and for the necessary vouchers required to prove the disposal of the amount.

- £1516-10-6 left Rupees 10,998-4-8, still unaccounted for.

12. The papers now recorded

...recorded will also be
forwarded to the Right
Honorable the Secretary
of State for India in
continuation of the corres-
pondence already trans-
mitted. —

[Faint, mostly illegible handwritten text]

The Government of India
Auditors of the Accounts
of the Administrators
General-
Administration (General)

Desp. B.

[Signature]

Replied to Mr. J. L. Smith

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Favoring Union on the
 above said point of opinion
 regarding the Claim of England
 by the U. S. Coast of California
 by a note of the date, with
 a report to the Administration,
 of the Status of the Franchise

Acting as
Platonic Corp. as

11.55

Order of Disposition

admiral