M.R.O. 1—39,000—16-10-29.

MADRAS RECORD OFFICE.

Government of Madras.

Judicial DEPARTMENT.

G.O. No. 999 Press ~~Mis.~~

26-27

Dated 23 — 7 — 1927

Not to be folded or roughly handled

Proceedings of the Madras Government, Judicial Department, from 23rd to 29th July 1859.

No. 26. Read the following letter from THOMAS SYDNEY SMYTH, Esq., Advocate General; to the Chief Secretary to Government, Fort Saint George, dated 11th July 1859.

I have the honor to acknowledge the receipt this day of the order of Government of the 8th July 1859, No. 935, in the Military branch of the Judicial Department; and with reference to para. 2, I beg to observe, that the course there proposed by Government appears to me decidedly preferable to that proposed by the Military Secretary.

2. As regards para. 3, Government are aware that under Section 43 of Act VIII of 1855, in the case of Civil Estates under Rupees 500, the Administrator General *may* grant a certificate to "any person claiming to be entitled to a principal share" (*i. e.*, as I construe it, to the next of kin, or wife) "of the effects of the deceased." If the Administrator General declines to grant such certificate, the next of kin *may* apply to the Court for Letters of Administration under Section IX. The only cases left unprovided for—are, 1stly, where such next of kin *declines* to apply for a certificate; 2ndly, where having done so and been *refused*, he *declines* to apply to the Court for administration. In either of these cases, it seems to me, that it would be only just to small Creditors either to make it obligatory on the Administrator General to take out Letters of Administration, when requested by any such Creditor, or else to authorize the Creditor to apply for administration to be granted to himself.

3. I take this opportunity of mentioning to Government that a new and (unless removed by further consideration) very serious difficulty has recently been created in the working of this Act by a new reading, which Mr. Justice Bittleston, (contrary to the opinions of his predecessors, and I believe, of the Courts at Calcutta and Bombay) has given to part of Section XI, viz., the words "and no person shall, within one month after his death, have applied for Probate of a Will."

4. These words until lately, have always been held to mean an application *in India* for Probate—and I think properly so held; for, firstly, the words "within one month after his death" are obviously inapplicable to cases of applications *in England* for Probate, as no such application could *possibly* be made *there* "within one month after the death" of a person dying in India; and, 2ndly, Probate obtained in England has never been considered to be, and in my opinion is not, operative upon *bona notabilia* within the Jurisdiction of Her Majesty's Supreme Courts of Judicature in India.

5. Mr. Justice Bittleston, however, has held that the words "applied for Probate of a Will" include cases where Probate has been applied for and obtained in *England*, though *not* "within one month after the death" of the Testator; and on this ground he has, in several cases, to the great inconvenience of the parties interested, refused to grant the Administrator General administration with the Will annexed where the Executors in England have authorized and instructed him to apply for it,—thus leaving wholly unprotected whatever parts of the Estates in question happen to be in India.

6. I trust, however, that in the course of next term, by further argument, and by inducing him to consult his brother Judges at Calcutta and Bombay, he may be induced to revert to the construction adopted by his predecessors. If not, it will be necessary* to apply to the Legislature to insert the words "in India," or some words of the like effect, between the words "have applied" and the words "for Probate of a Will."

* As the Administrator General has no funds wherewith to appeal.

P. S.—In para. 4 of the abovementioned Order of Government, Act VIII of 1855 is, by a clerical error, cited as Act VIII of 1859.

No. 27. To H. FORBES, Esq., Member for Madras of the Legislative Council of India, Calcutta, dated Fort St. George, 23rd July 1859, No. 999.

Your letter of the 17th March last, on the subject of providing for the administration of Military Estates, limited to 500 Rupees in value, was communicated to the Military Department

Proceedings of the Madras Government, Judicial Department, from 23rd to 29th July 1859.

Ext Mis. Cons., 15th April 1859, No. 523.
Proceedings, 17th June 1859, No. 2141, Mily. Dept.
Do. 2nd to 8th July 1859, Nos. 53 to 56, Judl. Dept.
Advocate General's letter, 11th July 1859, annexed to this letter.

of the Secretariat, to the Advocate General, and also to the Government Solicitor, and I am directed now to forward to you copy of the correspondence that has ensued, and the orders of Government thereon.

2. I am instructed to request, that you will be good enough to apply for an Act to the effect proposed by the Military Secretary in para. 2 of his Memorandum, but as extended by Government in para. 2 of their Proceedings, 8th July 1859, No. 935.

3. In regard to the administration of Estates non-Military, under Rupees 500 in value, in cases where the next of kin, or, to use the phrase in the Act, the "person claiming to be entitled to a principal share," *declines* to apply for a certificate from the Administrator General, and where having done so and been refused, he *declines* to apply to the Court for administration, I am directed to state, that as remarked by the Advocate General, seems only just to small Creditors either to make it obligatory on the Administrator General to take out Letters of Administration, when requested by any such Creditor, or else to authorize the Creditor to apply for administration to be granted to himself.

4. I am further directed to draw your attention to the remarks of the Advocate General in paras. 3, 4 and 5 of his letter, and to suggest that the doubts therein referred to, be removed by inserting the words "in India," or some words of the like effect, between the words "have applied" and the words "for Probate of a Will" in Section XI of Act VIII of 1855.

Dated 11th July 1859.

(Signed) T. PYCROFT,
Chief Secretary.

Exd. F. Cartledge.

Judicial Department.

No. 999.

F. Forbes, Esqre.
Member for Madras of the
Legislative Council.

Sir,

Your letter of the 17th March last, on the subject of providing for the administration of Military Estates, limited to 500 Rupees in value, was communicated to the Military Department of the Secretariat, the Advocate General, & also to the Govt. Solicitor, & I am directed now to forward to you copy of the correspondence that has ensued, & the orders of Govt. thereon.

2nd I am instructed to request that you will be good enough to apply for an Act to the effect proposed by the

in P 2 of his Memorandum
Military Secretary as extended
by Government in para 2 of
their Proceedings 8th July
1859 No 3351

3. In regard to the administration of Estates Non-Militarys, under Rs 500 in value, in cases where the next of kin, or, to use the phrase in the Act, the "person claiming to be entitled to a principal share", declines to apply for a certificate from the Administrator General, & where have they declined & been refused the declines to apply to the Court for administration I am directed to suggest that it would only tend to small creditors either to make it obligatory on the Administrator General to take out letters of administration, when requested by any such creditor

creditor, or else to authorise the creditor to apply for administration to be granted to himself.

4. I am further directed to draw your attention to the remarks of the Advocate General in paras 3, 4, & 8 of his letter, & to suggest that the doubts therein referred to may be removed by inserting the words "in India", or some words of the like effect, between the words "have applied" & the words "for probate of a will" in Section XL of Act VIII of 1855.

Dated 11th July 1859.

Fort St George
23d July 1859

J P

actual by H
Advocate Genl

Sub. Ltr to Govt 23rd March No 10 of 1860.

Rept. to No 19 of 1860

Rec'd 29 July.

Sub. 1859 Depart.

No 999

To

H. Forbes. Esqre

Member for Madras

of the Legislature Council

Dated 23rd July 1859.

Sir

Forwards copy of correspondence and the Orders thereon respecting the Military Estates and requests Govt will apply for an Act to the effect proposed by the Military Secretary, but as extended by Govt Order suggests that certain doubts suggested by the Advocate General be removed by inserting "in India" between "have" "applied" and "for Probate of a Will" in Sec 9 Act 8 of 1855.

2 Encls

Recd 28 July

Ansd 25 Aug