

MADRAS RECORD OFFICE.

Government of Madras.

Judicial DEPARTMENT.

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Mis.

254-257

Dated 21. 9. 1865 19 .

Not to be folded or roughly handled

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21st September 1865.

(CONFIDENTIAL).

No. 254. Read the following letter from E. C. BAYLEY, Esq., Secretary to the Government of India, to the Secretary to the Government of Fort Saint George; dated Simla, 22nd August 1865, No. 1247

Home Department,
Legislative.

Although the Native text-books of Hindu law nowhere recognise a posthumous disposition of property, the validity of a Hindu's Will has long been admitted by our Courts in the Presidencies of Bengal and Bombay. In Madras also, after some fluctuations of opinion, it is now settled that a Hindu's testamentary power is co-extensive with his independent right of alienation *inter vivos*. Liberty of testation is thus thoroughly established throughout peninsular India; and it is understood that the practice of making Wills is beginning to prevail among the Burmese Buddhists, although their law of succession is founded on that of the Hindus. The Muhammadan law recognises the testamentary power, which, however, without the consent of the heirs, does not extend to more than one-third of the testator's estate.

In the case of the Hindus and Burmese, the power in question has probably been derived from the English law, and its exercise doubtless produces in India the beneficial effects which it has produced in England and elsewhere, by stimulating the circulation of property, and quickening the stagnation of society. But the power has been engrafted on the Hindu system, and is used by the Muhammadans, without any of those securities for its due exercise, such as the requirement of writing, signature, and attestation, which have been found desirable in Europe. Nor are Native testators subject to any restraints such as exist in England in the cases of devises to religious or charitable uses, of postponements of the acquisition of the absolute interest in property, and of prospective accumulations of its income.

Thus the High Court at Bombay has decided that a Hindu's Will need not be attested, and the High Court of Madras has lately declared, in a learned and elaborate judgment, that a Hindu's Will need not be in writing, in other words, that a Hindu may make a valid nuncupative Will, and this without any formalities similar to those required in such cases by European systems of jurisprudence. So Hindas' nuncupative Wills were held valid by the late Supreme Court at Fort William, and are recognized by the present High Court of Judicature for Bengal. Considering the facilities with which frauds in setting up nuncupative Wills are attended (for false swearing is more easy to perpetrate, and more difficult to detect, than forgery), it may perhaps be doubted whether the benefits above mentioned, arising from the introduction among the Natives of the testamentary power, are not counterbalanced by the encouragement which its recognition by our Courts at present affords to perjury. Moreover, the same evidence that sets up a false nuncupative Will may practically revoke a true written one. The witness has only to declare that the testator made a nuncupative Will subsequent to the date of the written Will and revoking the latter, and his evidence, if believed, destroys the written Will, however solemnly executed or carefully preserved. Lastly, even in the case of a genuine testamentary disposition by word of mouth, the certainty of writing is re-placed by the frailty of memory.

Then, as to the non-existence of restraints on the testamentary power: a Native may now, on his death-bed, when his mind is enfeebled by disease or fear, deprive his nearest relations of self-acquired property which would otherwise have devolved upon them, and bequeath it in accordance with the dictates of his priests, or the promptings of his own superstition. A Native testator, in the absence of anything like what is technically called the rule against perpetuities, may lock up his estate for an indefinite time, and thus obstruct the circulation of property, check the improvement of land, and withdraw capital from its natural employment in commerce. A Native testator may legally create an accumulating trust, absorbing the entire income of property, not merely (as in the well-known Thellusson case) during the full period for which the vesting of property may, according to English law, be protracted, but (for anything to the contrary enacted by the Legislature, or laid down by the Judges) for the full time expressed by the Native formula of limitation, 'so long as moon and sun endure.' Thus in the case of a bequest to the testator's family idol, with directions that, after its expenses are paid, the surplus shall belong to certain persons and their descendants in the male line as a joint family, and that none of these heirs shall have power to alienate, the Privy Council has held that such a testamentary disposition is effectual, although the family may obviously remain undivided for ever. There is reason to fear, too, that under colour of a bequest to religious uses, a Hindu often not only enjoys property but trades with it, without his beneficial interest being subject to the just demands of his creditors. It may be that the creditors would have a right to come against the surplus income of the property after providing thereout for the expenses of the idol. But the ascertainment of what ought to be allowed for such expenses is generally a matter of such difficulty as practically to reduce that right to a nullity.

Again, a Native's Will, not requiring to be proved, need not be deposited for safe custody. The resulting opportunities for forgery and fraudulent alteration are obvious. Nor can a Native executor be compelled to exhibit an inventory or account of his testator's estate, except by the tedious, expensive, and hazardous process of a law suit. The consequence is, where the estate is too small to bear the costs of the suit, that women, children, and absentees have no adequate check on the executor, and, at any distance of time, it is difficult to fix him with the possession of moveable and sometimes even of immoveable property.

Lastly, the character and ex-officio powers of a Native executor seem to be by no means clearly defined. The High Court of Bengal has lately held on appeal that he has no greater power over immoveable property than a Manager. Now the powers of a Manager, as declared by the Privy Council in a case to which the High Court refer, are limited and qualified, and in the case of a mortgage, the lender is bound to enquire into the necessity for the loan, and to satisfy himself, as well as he can, with reference to the parties with whom he is dealing, that the Manager is acting in the particular instance for the benefit of the estate. If this be so in the case of a mortgage or conditional sale, *a fortiori*, it must be so in the case of an absolute sale. It is unnecessary to dwell on the difficulties which this doctrine imposes on all persons dealing with Hindu executors.

The Indian Succession Act, 1865, contains provisions on all these subjects, expressed in language of remarkable clearness and simplicity.

As to the execution of Wills, it provides (Section 50) that the testator (who must have completed the age of 18, and be of sound mind) shall sign the Will, or that it shall be signed by some other person in his presence and by his direction, and that the Will shall be attested by at least two witnesses, each of whom must sign it in the presence of the testator. To preclude the danger of allowing the Will to be supported by the testimony of persons beneficially interested in its contents, the Act declares (Section 54) that a bequest to an attesting witness, or his, or her, wife or husband, shall be void.

As to revoking Wills, the Act (Section 57) provides that no Will shall be revoked otherwise than (a) by the marriage of the testator; (b) by another Will or Codicil; (c) by a writing declaring an intention to revoke, and executed as a Will is required to be executed; or (d) by burning, tearing, or otherwise destroying the Will, with the intention of revoking it.

Section 101 restricts the power of creating successive interests in property by declaring that "no bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the life-time of one or more persons living at the testator's decease, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong."

A direction to accumulate the income to arise from any property is declared (Section 104) to be void, except in the case of immoveable property, or where the accumulation is to be made from the death of the testator. In either of these cases the direction is valid in respect only of the income within the year next after the death.

As to bequests to religious or charitable uses, the Act provides (Section 105) that no one having a nephew or niece, or other nearer relative, shall have power to make such bequest, except by Will executed not less than twelve months before his death, and deposited, within six months from its execution, in the place provided by law for the custody of the Wills of living persons.

The Act impliedly requires every Will to be proved by declaring (Section 187) that no right, as executor or legatee, can be established unless probate of the Will shall have been granted. And Section 259 provides that all original Wills, of which probate may be granted, are to be preserved among the records of the Court until some public registry for Wills is established.

Within six months of the grant of probate, the executor must exhibit in Court an inventory containing a full and true estimate of the deceased's property, and must, in like manner, within one year from the grant, exhibit an account of the estate, showing the assets that may have come to his hands, and the manner in which they have been applied or disposed of (Section 277).

Lastly, the character and powers of an executor are clearly defined. He is the legal representative of the deceased for all purposes, and all the deceased's separate property vests in him as such (Section 179). He has the same power to sue in respect of all causes of action that survive the deceased, and to distrain for all rents due to him at the time of his death, as the deceased had when living (Section 267). And he may dispose of the deceased's property, either wholly or in part, and whether moveable or immoveable, in such manner as he shall think fit (Section 269).

Section 331, however, excludes the Hindus, Muhammadans and Buddhists from the benefit of these provisions, as well as from that of having the series of simple rules contained in Part XI of the Act applied to the construction of their Wills.

I have been desired to submit the foregoing remarks for the consideration of His Excellency the Governor in Council, and to request that His Excellency in Council, after consultation with such persons as he may deem best capable of advising on such a matter, will favor the Government of India with his opinion as to the expediency of extending to the Hindus, Muhammadans and Buddhists, or any and which of them, such parts of the Indian Succession Act, 1865, as relate to Testamentary Succession, including in this phrase all that relates to the execution, revocation, interpretation and probate of Wills, and the limitation of the exercise of the testamentary power. You will understand that it is not proposed to increase in any respect the testamentary power possessed by Natives, nor to give it to any Natives (if such there be) who do not at present possess it, but only to provide rules calculated to insure its being exercised beneficially to the community, and satisfactorily to the surviving relatives of individual testators.

Proceedings of the Madras Government, Judicial Department,

21st September 1865.

No. 255. To the Honorable Sir COLLEY HERMAN SCOTLAND, Knight, Chief Justice of Her Majesty's High Court of Judicature, Madras, dated Fort Saint George, 21st September 1865, No. 1365.

I am directed to furnish you with the annexed copy of a letter from the Government of India, dated 22nd August 1865, No. 1247, marked "Confidential," and to request that you will be good enough to favor His Excellency the Governor in Council with your opinion on the points specified, in regard to the extension to Hindus and Muhammadans of such parts of the Indian Succession Act of 1865, as relate to testamentary succession.

(Signed) W. HUDLESTON,
Acting Secretary to Government.

NOTE.—The same to the Honorable Sir ADAM BITTLESTON, Knight, Puisne Judge of Her Majesty's High Court of Judicature, Madras.

No. 256. To the Honorable WILLIAM HOLLOWAY, Puisne Judge of Her Majesty's High Court of Judicature, Madras, dated Fort Saint George, 21st September 1865, No. 1366.

I am directed to furnish you with the annexed copy of a letter from the Government of India, dated 22nd ultimo, No. 1247, marked "Confidential," and to request that you will favor His Excellency the Governor in Council with your opinion on the points therein specified, in regard to the extension to Hindus and Muhammadans of such parts of the Indian Succession Act, 1865, as relate to testamentary succession.

(Signed) W. HUDLESTON,
Acting Secretary to Government.

NOTE.—The same to the Honorable L. C. INNES, Puisne Judge of Her Majesty's High Court of Judicature, Madras, the Honorable J. B. NORTON, Advocate General, and the Honorable G. LUTCHMENARASU Chetty.

No. 257. To CHARLES COLLETT, Esq., Civil and Session Judge of Vizagapatam, dated Fort Saint George, 21st September 1865, No. 1367.

In sending you the annexed copy of a letter from the Government of India, dated 22nd ultimo, No. 1247, marked "Confidential," I am directed to request that you will communicate to the Governor in Council your views on the points therein specified, in regard to the extension to Hindus and Muhammadans of such parts of the Indian Succession Act of 1865, as relate to testamentary succession.

(Signed) W. HUDLESTON,
Acting Secretary to Government.

NOTE.—The same to KISTNASAWMY AIYAN, Principal Sudeer Ameen of Coimbatore, M. A. P. STREENAVAS, Principal Sudder Ameen of Tinnevely, and V. RAMAANGAR, Assistant in the Currency Department, Trichinopoly

Recd 23/9

Judicial.

N^o 1365-

The Honble Sir Colley Harman Scotland Kt.
Chief Justice of H. M's High Court of
Judicature.
Madras.

Honble Sir-

I am directed to fur-
nish you with the annex-
ed copy of a letter from
the Govt. of India, da-
ted 22nd Augt '65 N^o 1247,
marked "Confidential",
& to request that you
will be good enough
to favor H. E. the Gover-
nor in Council with
your ~~confidential~~ opi-
nion on the points speci-
fied, in regard to the exten-
sion to Hindus & Muham-
madans of such parts
of the Indian Succession
Act of 1865 as relate to
Testamentary Succession.

C 15th Sept.
1865 - u -

For M. Govt
21st September 1865 }

Same to

The Honble Sir Adam Bittleston Kt.
Joint Judge of H. M's High
Court of Judicature }

[Signature]

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The title is in Colley's handwriting.

[illegible]

The P. S. of at-
Mr. A. P. Stearns
has much trouble
with his hands &
has a bad sprain
in his right hand
he asked if he
is believed to be
dangerous to his
sister - The
large paper
speaks hands
of the family
W. H. L.

I have to be satisfied to
show this letter should
be repeated & submit
a list of Officers

In a note dated
I cannot suggest
any body else -
these seem well
selected

MW

by G.

Mr Chief Justice
Mr Attorney
Mr James
Mr Ambrose Jervis
Mr Holt
Kistnasamy Aiyar
Srinivasiah Iyer
J Govindan
Mr Muthu S. Lakshminarasimhan
V. Ramalingam
Assistant in Charge Dyk

desp 23/9

Judicial.

N^o: 1366.

The Honble William Holloway
Puisne Judge of H. M's. High Court of
Sudicature.
Madras.

Honorable Sir.

I am directed to furnish
you with the annexed
copy of a letter from the
Govt. of India, dated 22nd
Mto. N^o: 1247, marked "Con-
fidential", & to ^{request that} ~~write~~ you
to favor H. E. the Governor
in Council with your opi-
nion on the points therein
specified, in regard to the ex-
tension to Hindus & Mu-
hammadans of such
parts of the Indian suc-
cession Act, 1865, as relate
to Testamentary succession.

For M. George.
21st September/65

Same to

The Honble Lewis Charles James
Puisne Judge of H. M's. High
Court of Sudicature.

The Honble John Bruce Norton
Advocate General.

The Honble S. Sutchmenarasu
Chetty.

desp 23/9

1447 4/11/65
8/11/65

Sudicial

N^o 1367

les Collett Esqre.
Civil & Session Judge of
Tiragapatam.

Sir

In sending you the annexed copy of a letter from the Govt. of India, dated 22nd Veto. N^o 1247, marked "Confidential", I am directed to ~~write~~ ^{inform} you ~~to~~ communicate to the Governor in Council your views on the points therein specified, in regard to the extension to Hindus and Muhammadans of such parts of the Indian Succession Act of 1865, as relate to Testamentary succession.

Same to
T. Kistnasawmy Aiyar
Principal Sudder
Amee of Coimbatore.
Mr. A. P. Sreenivas
Principal Sudder
Amee of Tinnevely.
V. Ramaiahgar.
Assistant in the
Crown Dept.
Trichinopoly

desd 23/9

Indicial

N^o 1367

For the Court of the District Judge of the District of Tiragapatam.

Copy of the letter

dated 1865-1866

1366

Mr. Kistnasawmy Aiyar

Principal Sudder

Amee of Coimbatore

Trichinopoly

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Pro: of Dept. 11

Judicial 1065 Depantt

11-1367

Charles Collett Esq

Civil & Police Judge

Wagapahatani

& others

Notes 21st September 1865

11-1367

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11-1362

Letter 1365-66-67
Just in 21-9-65