

1896.
November 11.

In the Matter of the Last Will and Testament of DON
CORNELIS DIAS.

D. C., Colombo, No. 777.

Civil Procedure Code, s. 712—Discovery of property withheld from an executor—Costs.

In the case of a petition under section 712 of the Civil Procedure Code to discover property withheld from an executor, if the respondent puts in an affidavit claiming to be owner of such property, the only thing for the Court to do is to dismiss the petition. No examination or cross-examination of the respondent can be permitted.

The Court can order no costs in proceedings for discovery under section 712.

THE facts of the case sufficiently appear in the judgment

Sampayo, for appellants.

Dornhorst, for respondent.

11th November, 1896. BONSER, C.J.—

In this case the parties and the Court seem to have misunderstood the procedure laid down in chapter LIV. of the Civil Procedure Code.

The appellants are the executors of a will. The respondent is a lady in whose possession was certain property which had belonged to the testator, and which the appellants claimed as his legal personal representatives. They thereupon presented a

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petition under section 712 of the Code and cited the respondent to attend to be examined. The respondent attended in person, and for some reason which does not appear was represented by an advocate. She put in an affidavit, in which she swore that she was the owner of this property. Thereupon the District Judge, instead of dismissing the proceedings as section 714 requires, ordered the respondent to go into the box to be examined. She was cross-examined at great length and re-examined, and then the Judge delivered judgment finding that this property was hers, and dismissing the petition, and he ordered the executors to pay the costs personally.

Now it is quite clear that as soon as the affidavit was presented the only thing for the Court to do was to dismiss the petition. The Court had no power to dismiss the petition with costs, for there are no costs in these cases. The present respondent was not there as a party to contested proceedings. She was simply cited as a witness under section 712, and section 713 provides that persons so cited need take no notice of the citation unless it is accompanied with payment or tender of the sum required by law to be paid or tendered to a witness subpoenaed to attend a trial in a civil court.

The order was therefore wrong in finding facts which the Judge had no power to find, and in ordering costs to be paid which had not been incurred, and the order must be amended accordingly.

If the person summoned as a witness under sections 712 and 713 claims the property, then the parties are to be remitted to the machinery of an ordinary action for the determination of their rights.

The appellants will have the costs of this appeal.

LAWRIE, J.; agreed.
