1895.
September 24.

In the Matter of the Last Will and Testament of
L. CAROLIS DIAS, deceased.

Between PERERA, Petitioner, and DIAS, Respondent.

D. C., Colombo, 180/425.

"*Rebutted,*" *as used in s. 534 of the Civil Procedure Code—Procedure in the trial of issues framed under s. 533—Order* nisi *on application for proof of will—What evidence may be availed of in showing cause against it—Discharge of order* nisi *— Procedure where cause is shown against it—Civil Procedure Code, ss. 386, 524, and 526.*

Section 534 of the Civil Procedure Code enacts that in the case of a petition for proof of a will, where an order *nisi* declaring the will proved is made, and issues which appear to arise between the petitioner and the respondent have been framed under section 533, "if at the final hearing, or on the determination of the issues thus "framed, it shall appear to the Court that the *primâ facie* proof of "the material allegations of the petition has not been rebutted, "then the order *nisi* shall be made absolute—"

Held, per BONSER, C.J.—(1) The word "rebutted" in the above section does not refer to the trial of the issues, but to the final result of the proceedings.

(2) The procedure in the trial of issues framed under section 533 is the ordinary procedure in a regular action: that is to say, the person who wishes to prove anything should begin, and at such trial it is competent to the respondent to make use of the evidence adduced by the petitioner to obtain the order *nisi* to rebut the petitioner's case.

WITHERS, J.—(1) When a party respondent to an order *nisi* satisfies the Court which granted that order that, on the material before it, it was not competent to make that order, a Judge can and should discharge it.

(2) If an order *nisi* is properly supported, and the respondent has cause to show against its being made absolute, he must satisfy the Court by evidence, either by affidavit or oral testimony, that he has good cause.

(3) When the respondent has put forward his evidence, the Court may do one of two things: either adjourn the matter to enable the petitioner, if he asks to be allowed to do so, to adduce additional evidence; or, if the Court thinks it necessary, it may frame issues to be tried between the petitioner and the respondent. It will depend on the issues framed whether the petitioner or the respondent is to begin.

1895.
September 24.

THE facts of the case sufficiently appear in the judgment of BONSER, C.J.

Dornhorst and *Pereira*, for petitioner, appellant.

Layard, A.-G., for respondent.

24th September, 1895. BONSER, C.J.—

In this case the appellant sought to prove a will and codicil. He proceeded under section 524 of the Civil Procedure Code, and the Court being satisfied that the evidence adduced was sufficient proof of the due making of the codicil, made an order *nisi* under section 826 declaring the will to have been duly proved. That order was served upon the respondent, who appeared under section 533, and satisfied the Court that there were grounds of objection to the application for probate such as ought to be tried by *vivâ voce* evidence. Thereupon the Court framed two issues: first, whether the codicil was duly executed; and second, whether one Dabera was duly appointed executor or not. These issues were directed to be tried. The language of section 533 is somewhat ambiguous; it refers to section 386 as to the procedure to be adopted. Grammatically, the words, "for the purpose under section 386," refer to the word "appointed"; but that cannot be the meaning. They must refer to the word "tried." What it means is that you are to go to section 386 to see how the issues should be tried. On the day for the trial of the issues the appellants adduced no evidence, asserting that the onus of proof was on the other side. The Acting District Judge ruled against them. On that they still declined to call any evidence, and moved that the order *nisi* be made absolute. The Acting District Judge refused that application. It is against that refusal that this appeal is brought. Now, section 386 provides that "issues, when they are framed, are to be tried in conformity "with, as nearly as may be, the rules hereinbefore prescribed for "the taking of evidence at the trial of a regular action," and it appears to me that that means that the procedure is to be the ordinary procedure in a regular action; that is to say, that the person who wishes to prove anything should begin. I see no reason why that rule should not be followed, and why the person who asserts the affirmative should not begin. Reference was made to section 534, where it was provided, "if at the final hearing, or on "the determination of the issues thus framed, it shall appear to "the Court that the *primâ facie* proof of the material allegations "of the petition has not been rebutted, then the order *nisi* shall be

1895.
September 24.
BONSER, C.J.

"made absolute," and it was said that the word "rebutted" shows that the onus of proof lay upon the respondent. But that word "rebutted" does not refer to the trial of the issues, but refers to the final result of the proceedings. The Attorney-General says that the evidence which was adduced by the petitioner himself in support of the order *nisi* was read by the respondent as part of his case, and he satisfied the Court on that evidence that the material allegations of the petition were not proved. Surely it is competent for the respondent to make use of the petitioner's evidence to rebut his own case, and that is what has been done in this case. The Acting District Judge set aside the order *nisi* on the ground that it ought never to have been granted, the material allegations required to be proved under section 534 being not proved. It appears that the evidence was quite insufficient to prove the material allegation (as pointed out by the Attorney-General) that the witnesses were present together when the will was executed. That being so, I think the Acting District Judge was right in setting aside the order *nisi*. The case should go back for new issues to be framed and tried. The issues already framed appear to me to be too vague. To save expense to the parties, we will rescind so much of the order as discharges the order *nisi*, and will put things in the position they were in before the issues were stated. The respondent will have her costs.

WITHERS, J.—

I agree in the order proposed by my lord the Chief Justice, and I have very little to add. But I wish for my part to say that I think when a party respondent to an order *nisi* satisfies the Court which granted that order that on the material before it it was not competent to make that order, a Judge can and should discharge that order.

If an order *nisi* is properly supported, and the respondent has cause to show against its being made absolute, he must satisfy the Court by evidence that he has good cause.

That evidence may be either by affidavit or oral testimony (see section 384 of the Civil Procedure Code).

When the respondent has put forward his evidence to show cause against the order *nisi* being made absolute, then the Court may do one of two things: either adjourn the matter to enable the petitioner, if he asks to be allowed to do so, to adduce additional evidence; or, if the Court thinks it necessary, it may frame issues to be tried between the petitioner and the respondent (see section 386 of the Code). It will depend on the issues framed whether the petitioner or the respondent is to begin. Each case as it arises will be governed by the Law of Evidence applying to it.