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In the Matter of the Last Will and Testament of the late VENASI ELLUPALAYAR, deceased.

D. C., Jaffna, 746.

Order nisi *for probate—Showing cause against it—How will must be impeached—Burden of proof.*

Where an order *nisi* for probate of a will is made, it is open to the respondent on the petition for probate to show that the order should not have been made on the material placed before the Court; and if he succeeds in doing so, the Court might discharge such order.

Except in cases in which a paper propounded as a will discloses on the face of it indications exciting serious suspision as to its authenticity, an objection to the genuineness of a will should be supported by affidavit or oral evidence on oath.

Where in a proceeding to obtain probate of a will the Judge, on objection raised by the respondent on the petition for probate, frames the issue, "Did the deceased execute the will or not?"—the burden of proving the affirmative of such issue lies on the petitioner, and he should begin.

THE executor of the last will and testament of the above-named deceased obtained, on petition, an order *nisi* under sections 526 and 527 of the Civil Procedure Code, declaring the will to be proved and directing the issue of probate to him as executor. The respondents on the petition contested the authenticity of the will, but did not support their objection by affidavit or oral evidence. The District Judge thereupon framed the issue, "Did the deceased execute the will?" The respondents assumed the *onus* of proving the negative, but failed to satisfy the District Judge that the will was not the will of the deceased. He accordingly made absolute the order *nisi*. The respondents appealed.

Wendt, for third and fourth appellants.

Dornhorst, for petitioner, respondent.

3rd July, 1896. WITHERS, J.—

The order which makes the order *nisi* absolute for probate should, I think, be affirmed.

I repeat the observations which I made in a similar case which came up from the District Court of Colombo, for I think they are correct.

The Judge before making an order *nisi* for probate naturally satisfies himself that a *primâ facie* case has been made out of the due execution of the will propounded. A material fact may inadvertently escape him, and then it is of course open to a respondent to a petition for probate to show that the order should never have been made. If this is shown, the Judge will discharge

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the order. But in this case the respondent objected to the order *nisi* being made absolute on the ground that the will was not made by the person who is alleged to have made it. Now, in rare exceptions—for instance, where the paper which it is proposed to propound discloses on the face of it indications which excite serious suspicion as to its authenticity—an objection like the present one, before it is entertained, should be supported by affidavit or oral evidence on oath. The only mistake which I think the Judge made was to frame an issue at all on the material before him. However, he did frame this issue, "Did the deceased execute the will herewith filed or not?" Now, the onus of proving the affirmative lay on the petitioner, and properly speaking he should have begun. Respondent, however, voluntarily assumed that onus, and in the opinion of the Judge they failed to prove that the deceased Edu Padian did not make the will.

I think the District Judge arrived at a right conclusion. I think this case may be treated as if the respondents has failed to support their objection against the grant of probate.

The appeal fails, with costs.

LAWRIE, J., agreed.