Re Last Will of the late W. F. MORRISS.

FRANK WIGLEY, Applicant for Administration.

1903.
January 20.

D. C., Colombo, No. 1,774.

Claimant under a will—Application for probate—Absence of opposition—Discretion of District Judge not to admit will to probate—His duty to make an order nisi *and name the respondents on whom such order should be served—Civil Procedure Code, s. 526.*

A claimant under a will, upon producing it in Court, is not bound to prove that it has not been cancelled by some subsequent will, or that it is otherwise valid.

In the absence of any opposition to the application for probate, it is competent to the District Judge not to allow probate to issue, but then he should make an order *nisi* and name the person upon whom such order should be served.

ON the 11th June, 1902, the applicant filed his petition and affidavit alleging that W. F. Morriss made his last will on the 11th July, 1881, and a codicil thereto on the 24th January, 1885; that by the last will he appointed A. M. Ferguson, F. C. Loos, and D. W. Ferguson his executors; that the testator died on 15th January, 1895; that by the said last will and codicil his daughter Amelia, the wife of the applicant, was made the sole heir to all his property; that the said last will and codicil were found among the papers of the deceased and produced by the applicant before the District Court of Colombo on the 11th February, 1885, and deposited there in conformity with the requirement of section 516 of the Civil Procedure Code; that at the time he produced the said documents he informed the Court that the testator was believed to have signed a paper writing before Mr. Notary A. O. Joseph in 1884, but that the said testator tore up and destroyed the same about the 30th December, 1894; that from a subsequent inquiry he had learnt that the paper writing referred to was never in fact signed by the testator; that the executors named in the last will had not applied for probate hitherto; that A. M. Ferguson was dead, F. C. Loos declined to apply for probate, and D. W. Ferguson was now in England; and that the applicant did not apprehend any opposition to letters being granted to him.

The District Judge, Mr. D. F. Browne, declined to admit the will of 1881 and the codicil of 1885 to probate, because he thought that in 1894 another will had been signed and, from inquiries made, the testator appeared to be born of a Eurasian lady to one Mr. Morriss, who had come from Ireland at the end of the 18th

1903. *January 20.*

century, and that the testator, whether legitimately or illegitimately born, had two children by a Sinhalese woman, one of whom was presently a patient in the Lunatic Asylum, and the other was now Mrs. Wigley. The District Judge considered the difficulties of finding an heir to Mr. Morriss would be very great, and that though there was some evidence that the will of 1894 was destroyed by him subsequently, the legatee appointed by that will should have notice of these proceedings. He therefore declined to admit the earlier will and codicil to probate, but he reserved to the petitioner the right to renew his application when any formal application for the administration of the estate as an intestate one shall be made, or else for probate of the later will.

The applicant appealed.

The case was argued on the 20th January, 1903, before Layard, C.J., and Moncreiff, J.

Walter Pereira, for appellant,—

The District Judge *mero motu* and in the absence of any opponent has rejected the application, refusing even a decree *nisi*. No issues were framed. The applicant does not know how the District Judge came to inquire into the matters connected with the grandfather and father of Mrs. Wigley. No one moved him to institute these inquiries. He, however, believes that this will of 1881 and the codicil thereto are genuine. It was his duty then to have made an order *nisi* and caused it to be served on the possible opponents he had in view. No one came forward, when a special case was stated and submitted to the District Court in regard to the sum of Rs. 10,000, part of Morriss's estate, which came into the hands of one of the executors. The District Judge refused to decide the question submitted until there should be raised up a legal representative of the estate, whether testate or intestate. This sum is now lying idle, and the District Judge's refusal to make an order *nisi* is most inconvenient and has led to a deadlock. It is not the duty of the applicant to prove that the will he propounds was not cancelled. *Voet, 5, 3, 5.* The onus of such proof is upon any opponent who may come forward. The applicant knows of no opponent.

LAYARD, C.J.—

In this case the petitioner has applied for letters of administration with the will annexed. He has supported his application by the necessary affidavits, and he has stated in his application that he had no reason to suppose that the application would be opposed by any person, and has omitted to name in his petition any person as respondent. In view of the facts stated in the

petitioner's application, we think that the District Judge was right in not allowing probate to issue, but in our opinion he should have made an order *nisi* and named the persons upon whom he thought such order *nisi* should be served.

The District Judge has in this case reserved to the applicant the right to propound the will and codicil in the event of application for letters of administration being applied for by any other person. His object in so doing, he states, was that the matter should be litigated between the petitioner and some tangible opponent. It appears to us that, to bring this tangible opponent before the Court, the Judge, acting in this matter under the provisions of section 526 of the Code, should direct that the order *nisi* be served on such persons as he thought fit. We do not wish to interfere with the discretion of the Judge as to who should be named respondents, but it seems clear to us that Mr. Loos, the only surviving executor resident in Ceylon, should be one.

We desire to point out to the District Judge that under our law, when a person claims under a will, he is not bound, upon the production of it, to prove that it has not been cancelled by some subsequent will or that it is otherwise valid, but that it is for the person who intends opposing the will to set up that defence. *Voet, 5, 3, 5.*

MONCREIFF, J.—I agree.