1914.

Present: Pereira J. and De Sampayo A.J.

FERNANDO *v.* FERNANDO.

104—D. C. Negombo, 1,448

Application for letters of administration by widow to husband's estate—Allegation that persons named as children of deceased were illegitimate children of the widow—Is inquiry as to legitimacy relevant at that stage ?

A widow applied for letters of administration to her deceased husband's estate, making certain minors respondents to her application, stating that they were the children of the deceased and herself. On the returnable date of the order *nisi* appellants appeared and alleged that the minors were not the children of the deceased, but were the illegitimate children of the widow, and moved for an inquiry as to who were the heirs of the deceased, but did not really oppose the grant of letters of administration.

Held, that such an inquiry was not relevant at that stage of the case.

THE facts are set out in the judgment.

A. St. V. Jayewardene, for opponent, appellant.

Rodrigo, for applicant, respondent.

Cur. adv. vult.

October 13, 1914. DE SAMPAYO A.J.—

In this case the respondent, Ago Fernando, applied for letters of administration to the estate of her late husband Pemanis Fernando, who had died intestate, and she made certain minors respondents to her application, stating that they were children of the deceased and herself, and as such were heirs to a half of this estate. On the returnable date of the order *nisi* certain parties, one of whom is the appellant, appeared and alleged that the minors were not children of the deceased, but were illegitimate children of the applicant by one Sutiya, and moved for an inquiry as to who were the heirs of the deceased. They did not really oppose the grant of letters of administration to the applicant, as indeed they could not, since the applicant, as widow of the deceased, was entitled to such letters. The applicant properly objected to the motion, but the District Judge over-ruled the objection and framed an issue as to whether the minors were the legitimate children of the applicant and the deceased and entered upon an inquiry. In the result the District Judge decided the issue in the affirmative. The decision of the issue appears to me to be right on the evidence, but we cannot ignore the objection to the proceedings. The District Judge relied on

Re the Intestate Estate of Banda [1] but that case is distinguishable, because there the application for letters was opposed, and the opponent claimed letters for herself. Moreover, the Appellate Court gave no reasons for its affirmance of the order of the lower Court. The more authoritative decisions on this point are *Re Kathirikamasegara Mudaliyar* [2] and *Kantaiyar v. Ramoe*, [3] where it is pointed out that where letters of administration or probate is not opposed, such questions as who are entitled to the property of the deceased are not relevant in that early stage of a testamentary case, but should be left to be decided in some subsequent proceedings in the presence of all parties interested. It is true that in the Court below the proctor for the appellant, in answer to the applicant's objection, stated that he opposed the grant of letters on the ground of the heirs having been wrongly disclosed. This opposition was not hinted at in the motion made or in the affidavit filed in support of it, nor was any claim for letters made by the opponents for themselves or any of them, and I regard the statement of the proctor as merely due to the exigencies of the argument. Moreover, while an applicant for letters is no doubt required to name the heirs of the deceased as respondents, I think that the fact of legitimacy, upon which the right of the persons named as heirs may ultimately depend, is not an allegation that need be made and can be traversed, and therefore not a material allegation in the sense of that expression in section 534 of the Civil Procedure Code. In my opinion such a dispute is not a "ground of opposition to the application such as ought to be tried on *viva voce* evidence" within the scope of section 533. The status of the applicant himself may, of course, be material, since on it may depend the very claim for letters, but that is not in question in this case. This brings me to another insuperable objection. The minors, who are the persons most interested in this matter, were not parties to the proceedings in the Court below, nor are they respondents to this appeal. As things stand it is impossible to consider this appeal on its merits.

I would quash the proceedings, but without prejudice to the right of the appellant to raise the question of heirship when the estate comes to be distributed or at some other proper stage of the testamentary suit. As regards cost, although we interfere with the finding of the District Judge, we do so on grounds condemnatory of the appellant's intervention, and, moreover, neither the proceedings nor this appeal can be sustained in the absence of the minors. I think, therefore, that the District Judge's order as to the costs of the abortive proceedings should stand and that the appellant should further pay the costs of this appeal.

PEREIRA J.—I agree.

Proceedings quashed.

[1] (1897) 3 *N. L. R. 173.*

[2] (1900) 5 *N. L. R. 29.*

[3] (1904) 8 *N. L. R. 207.*