1936 *Present:* **Moseley J. and Fernando A.J.**

LETCHIMAN *v.* MURUGAPPA CHETTIAR.

72—D. C. Colombo, 6,741 (Testy.).

Administration—Application on a copy of last will—Proof of copy—Civil Procedure Code, s. 539 (c)—Evidence Ordinance, s. 63.

Where application is made for letters of administration with the copy of a will annexed under section 539 (c) of the Civil Procedure Code, the document produced must be proved in accordance with the terms of section 63 of the Evidence Ordinance.

APPEAL from an order of the District Judge of Colombo.

H. V. Perera (with him *Kumarakulasingham*), for appellant.

C. *Thiagalingam* (with him *Nadesan*), for defendant, respondent.

Cur. adv. vult.

November 24, 1936. FERNANDO A.J.—

The petitioner applied as attorney of the widow of the deceased Narayan Chetty for letters of administration with copy of a will annexed, on the footing that the will had been executed by the deceased, Narayan Chetty. The application was opposed by the fifth respondent, the present appellant, on various grounds.

Along with his petition, the petitioner filed the document marked X 7 which purports to be a copy issued by the Sub-Registrar of Karakudi, and it transpired in the evidence that the original will said to have been executed by Narayan Chetty was at one time in the custody of Arunasalam, the attorney of the fifth respondent, and it was stated that Arunasalam had on one occasion brought it to Colombo and had handed it to Mr. Muttusamy, the proctor for the present petitioner. Mr. Muttusamy, however, did not take the will into his custody, and produce it in Court, because Arunasalam was unwilling to part with the possession of the document unless a sum of Rs. 250 was paid to him, to be paid to Meyappan Asari from whose possession Arunasalam had obtained the document. Meyappan Asari appears to have taken certain proceedings in connection with the will in India, and apparently claims the sum of Rs. 250 as expenses incurred by him in those proceedings.

The original application made to Court by petitioner's proctor is in these terms: "Mr. Muttusamy files proxy, affidavit, and a petition of the petitioner together with last will, and Supreme Court order, praying for letters of administration with will annexed to the estate of the above-named deceased, and for an order directing service of order *nisi* on the respondents and executors.". It would follow from this application that the petitioner originally took up the position that the document produced by him was in fact the last will of the deceased, and it was only after Mr. Muttusamy's evidence on November 8, 1934, that Counsel for the petitioner moved that letters of administration with copy of the will annexed be issued in terms of section 539 of the Civil Procedure Code. The learned District Judge has ordered letters of administration to issue with copy of the will annexed, but has not limited the letters so ordered to issue in any manner whatsoever. An examination of section 539, however, will show that letters issued in terms of that section must be limited in some way, and in all cases in which letters of administration have issued in England in similar cases, they have been limited till the will itself is brought into Court. Counsel for the respondent thought that the relevant sub-section that would apply was section 539 (C) where provision is made that probate of a copy of a will may be granted where the original is in the hands of a person residing out of the Island who cannot be compelled to give up the original to the executor, but even in that case the section requires that the executor or another applicant should produce a copy, and that the letters issued or the grant of probate as the case may be, should be limited until the original is brought into Court. The only other section under which the District Judge was entitled to make an order in the terms of this order is section 518 where letters of administration with copy of the will annexed

may issue after the will itself has been proved. In view, however, of the statement of Counsel, I propose to deal with the order made by the learned District Judge as an order made under section 539.

Assuming that the original will is in the hands of Meyappan Asari, and that the latter cannot be compelled to give it up to the petitioner or to some other person to be produced in Court, it is necessary before letters of administration with copy of that will can issue, that a copy should be produced in Court, and the document so produced must be a copy of the will within the terms of the Evidence Ordinance. Section 61 of that Ordinance provides that the contents of a document may be proved either by primary or by secondary evidence. Section 62 declares that primary evidence means the document itself, and section 63 sets out the secondary evidence which can be produced; and illustration (c) states that a copy transcribed from a copy, but afterwards compared with the original, is secondary evidence, while a copy not so compared is not secondary evidence of the original, although the copy from which it was transcribed was compared with the original. Now the document produced in Court and marked X 7 is a copy issued by the Sub-Registrar, and it was stated by Counsel for the respondent that on the rules applicable in India, a last will may be deposited with the Registrar, and the Registrar is then required to enter in his book a copy of the document that is tendered for registration, while the original, with the endorsement to the effect that it has been registered, is returned to the party who presents it. It may fairly be assumed, therefore, that a copy that is made by the Registrar for the purpose of his record is compared by him with the original that is tendered for registration. The document X 7 now produced is a copy of the copy made by the Sub-Registrar for this purpose, and there is no evidence to the effect that that copy was ever compared with the original, and in the absence of such evidence, the copy X 7 cannot be accepted in Court as a copy of the original will.

I have assumed for this purpose, that the original will is in the hands of some person who cannot be compelled to give it up, but the evidence here indicates that the person in whose custody that original is, was willing to give it up, on payment of certain expenses incurred by him. The will itself is one that can be proved in India, and deals with property situated in India as well as in Ceylon. It would appear that some action had been taken on the will by Meyappan Asari in India, and I am not satisfied that the claim he makes is an unreasonable claim. The property belonging to the deceased which is dealt with by the will is said to be of considerable value, and even if the demand made by Meyappan Asari is unreasonable, I feel sure that the keen contest between the parties in the District Court has caused the parties much more than the amount demanded by Meyappan Asari. An order like the order applied for, involves the finding by the Court that the will has in fact been proved, and I fail to see how the burden which lies on the respondent has been discharged by the mere production of a witness who says, that he saw the deceased sign a document without definite proof that that document is in identical terms with the so-called copy that has been produced in Court.

For these reasons, I hold that the document produced in Court cannot be admitted as a copy of the will said to have been signed by the deceased Narayan Chetty, and that the order made by the learned District Judge must be set aside. In view of this conclusion, it is not necessary to refer to the other points that were discussed in the District Court.

Counsel for the respondent further applied to this Court for issue of letters of administration on the footing that no will has been proved, but with the evidence before us that there is a will executed by the deceased it is not possible to consider this application. I would, therefore, set aside the order of the learned District Judge and dismiss the application of the petitioner. The petitioner will pay to the fifth respondent the costs of this appeal and of the proceedings in the Court below.

MOSELEY J.—I agree.

Appeal allowed.