1965 *Present :* **Sri Skanda Rajah, J., Sirimane, J., and Manicavasagar, J.**

MRS. N. BIYANWILA, Appellant, *and* MRS. A. AMARASEKERE, Respondent.

S. C. 104 (Inty.)/1961—D. C. Kurunegala, 4774

Testamentary action—Application for probate of will—Respondent not named—Order nisi entered and subsequently made absolute—Incapacity of Court to revoke probate—Failure of applicant for probate to mention heirs of deceased—Effect—Civil Procedure Code, ss. 374 (c), 377 (a), 379, 524–526, 529, 532, 533, 536, 537, 839.

A widow (the respondent to this appeal) filed in the District Court a document which she alleged was the last will of her deceased husband by which he bequeathed all his property to her and appointed her as executrix. In her application for probate no respondent was named and no mention was made of the deceased's intestate heirs. The Court did not grant an order absolute in the first instance, but entered an order *nisi*. The order *nisi*, as published, stated that the probate would be issued to the petitioners " unless any person on whom the Court directs the order to be served " shall show cause to the contrary. The Court did not, however, indicate any particular person or persons on whom the order *nisi* should be served. After publication, the order *nisi* was made absolute, the respondent administered the estate as executrix, and proceedings were terminated on 20th June 1952.

About nine years later, on 11th February 1961, the appellant, who was the youngest child of the deceased and was a minor at the time probate was granted, challenged the will as a forgery and moved, in the same proceedings, that probate be recalled and that the estate be administered afresh on the footing of intestacy.

It was conceded that the power of a District Court to recall or revoke a probate which has already been granted is limited, by virtue of section 536 of the Civil Procedure Code, to cases where an order absolute has been entered in the first instance.

Held, by SIRIMANE, J., and MANICAVASAGAR, J. (SRI SKANDA RAJAH, J., dissenting), that, although section 525 of the Civil Procedure Code permits a petitioner in testamentary proceedings to omit making any person as respondent to his petition, the Court may enter an order *nisi* even in such a case. After the order *nisi* has been duly published in terms of section 532, any person interested in the administration is entitled, under section 533, to show cause against it. An order *nisi* does not lose its character as such, merely because no particular person has been called upon to show cause. Accordingly, the order made in the present case could not be equated to an order absolute in the first instance. The appellant, therefore, was not entitled to ask for a recall of probate in the same proceedings.

Held further (by SIRIMANE, J., and MANICAVASAGAR, J.), that the failure of the petitioner (the widow) to mention the names of the heirs of the deceased did not render the proceedings void. The requirement of section 524 in this respect is only directory and not mandatory.

APPEAL from a judgment of the District Court, Kurunegala.

C. Ranganathan, with *Mark Fernando*, for the intervenient-petitioner-appellant.

H. W. Jayewardene, Q.C., with *W. D. Gunasekera*, and *L. C. Seneviratne*, for the original-petitioner-respondent.

Cur. adv. vult.

April 1, 1965. SRI SKANDA RAJAH, J.—

This is an appeal from the order of the learned District Judge of Kurunegala dismissing an application filed on 11th February, 1961, in a testamentary proceeding which commenced on 19th January, 1949, and terminated on 20th June, 1952. The petitioner prayed that —

(i) the probate issued on 25th May, 1951, be recalled ;

(ii) the proceedings be declared null and void *ab initio* ; and

(iii) proceedings be taken in respect of this estate on the footing of intestacy.

The relevant facts in chronological order are :—

One Solomon Amarasekera died on 11th July, 1948, leaving his widow Alice and four children Oliver, Walter, Gladys and Neeta, the present petitioner, who, according to her affidavit, was 14 years old at the time. Alice, the widow, filed petition dated 19th January, 1949, praying for probate of a document dated 10th March, 1948, alleging that it was Solomon Amarasekera's last will attested by five witnesses, whereby he had bequeathed all his property to Alice and appointed her executrix.

In that petition :

(i) no respondent was named ;

(ii) no mention was made as to who Solomon Amarasekera's intestate heirs were ;

(iii) there was an averment that the petitioner did not apprehend any opposition to her application for probate ; and

(iv) a prayer for an order absolute in the first instance.

The minute sheet contained a printed form ordinarily used for minuting an application praying for an order nisi in a testamentary case. The journal entry, therefore, reads that the proctor " *moves that an order nisi be entered declaring the status of the petitioner and* her *right to take out* probate as executrix appointed under the last will ".

The order of the Judge was also part of the printed form and was as follows : " The motion is allowed and it is hereby ordered that an order nisi be entered declaring that the petitioner is entitled to probate to the estate of the deceased and that a copy of the said order be published in the Government Gazette and twice in the Daily News newspaper. " (The words underlined above are in print in the form used for minuting. The rest of the words are in the handwriting of the officer who minuted. The Judge has merely signed underneath.)

Order nisi was accordingly entered and on 11th March, 1949, proof of publication was filed and the order nisi made absolute. Probate was issued to Alice on 25th May, 1951, and proceedings terminated on 20th June, 1952.

The relevant portion of the order nisi which too was in a printed form, was as follows :—

" It is ordered that the Will .....be and the same is hereby declared proved unless any person on whom the court directs the order to be served shall on or before the 11th March, 1949, show sufficient cause to the satisfaction of this Court to the contrary. "

" It is further ordered that .....she is entitled to have probate of the same issued to her accordingly unless any person on whom the court directs the order to be served shall on or before 11th March, 1949, show sufficient cause to the satisfaction of this court to the contrary. "

The court did not, however, indicate any particular person or persons on whom the order nisi should be served.

The words underlined above in the order nisi are in italics and are merely meant to indicate the spaces wherein the name or names of some person or persons were to be entered. They are not meant to be reproduced.

I must confess that in my vast experience I have never before come across an order like the one made in this case or an order nisi like this. This experienced judge does not appear to have even scrutinised the terms of the order nisi before he appended his signature to it.

It is necessary to consider sections 524 (1), 525, 526 and 529 of the Civil Procedure Code which relate to an application to have a will proved. They are reproduced below for convenience.

524 (1) : Every application to the District Court to have the will of a deceased person proved shall be made (i) on petition by way of summary procedure, (ii) which petition shall set out in numbered paragraphs the relevant facts of (*a*) the making of the will, (*b*) the death of the testator, (*c*) the heirs of the deceased to the best of the petitioner's knowledge, (*d*) the details and situation of the deceased's property, and (*e*) the grounds upon which the petitioner is entitled to have the will

proved; (iii) the petition shall also show whether the petitioner claims as creditor, executor, administrator, residuary legatee, legatee, heir, devisee, or in any and what other character.

(The internal numbering is mine.)

525 : If the petitioner has no reason to suppose that his application will be opposed by any person, he may file with his petition an affidavit to that effect, and may omit to name any person in his petition as respondent.

Section 526 provides that the court " shall make an order nisi declaring the will to be proved, which order shall be served upon the respondent, if any, and upon such other person as the Court shall think fit to direct ",

and Section 529 " if no respondent is named in the petition, *the Court may in its discretion* make the order absolute in the first instance ".

As no respondent was mentioned in the petition it was open to the court, *in the exercise of its discretion* as provided for by Section 529, to enter either an order absolute in the first instance as prayed for or an order nisi.

Before a judge can exercise discretion his mind should be actually directed to the application itself. In this instance the application was for an order absolute in the first instance. The journal entry, however, did not represent to the judge that it was such an application ; for, it represented that the application was, contrary to the fact, one for an order nisi. It is only if the journal entry had read " moves for an order absolute in the first instance " and the order of the judge was ' enter order nisi ' it can be said that the judge exercised discretion. In the words of the Judicial Committee in the *Bribery Commissioner v. Ranasinghe* [1], " the Court must not decline to open its eyes to the truth " that the order in question was made without the exercise of discretion. To put it in another form, the judge acted on the Biblical principle of " ask and it shall be given ".

What was asked for was an order absolute in the first instance. Therefore, it would be reasonable to presume that what was granted by the judge was an order absolute in the first instance as asked for. This view derives support from the further fact that no person was named for being served with the order.

In this view of the matter it seems unnecessary to consider the other submissions, e.g., whether the provisions of Section 524 (1) are directory or mandatory ; the validity and effect of an order nisi which did not name the person on whom it should be served.

In *Tissera v. Gunatileke* [2] the Divisional Bench has laid down that the District Court is empowered, under the provisions of sections 536 and 537 of the Civil Procedure Code, to recall the probate granted in pursuance of an order absolute entered in the first instance. This is such a case.

[1] *(1964) 66 N. L. R 73 at 78.*

[2] *17 N. L. R 212.*

Lapse of time, difficulty of proof and interests of third parties are not considerations which should deter the Court from deciding a matter like this.

For the reasons I have endeavoured to set down above, I would allow the appeal with costs both here and below.

SIRIMANE, J.—

Solomon Amerasekera died on 11.12.48. His widow (the respondent to this appeal) filed in the District Court of Kurunegala what she alleged to be his last Will (executed before 5 witnesses) and by her petition dated 19.1.49 prayed that an order absolute be entered in the first instance granting her probate of this Will.

She alleged that she did not apprehend any opposition to her application and named no respondent to the petition. This she was entitled to do under Section 525 of the Civil Procedure Code.

The Court exercising its discretion in the matter as provided for by Section 529 did not grant an order absolute in the first instance, but entered an order Nisi, and directed that it be published in the Government Gazette and a Newspaper. (By the last Will the deceased who had 4 children had left all his property to his widow.) After publication the Order Nisi was made absolute, the respondent administered the estate as executor, and proceedings were terminated on 20.6.52.

About 9 years later, on 11.2.61, the appellant, who is the youngest of the 4 children of the deceased, challenged the Will as a forgery, moved that probate be recalled, that the proceedings be held void *ab initio*, and that the estate be administered afresh on the footing of intestacy.

The learned District Judge refused the application, and the appeal is from that order.

It may be noticed here that the appellant averred in her petition that the respondent had granted the bulk of the valuable property to the other three children and excluded her because she had contracted a marriage against the respondent's wishes. She (the appellant) was a minor at the time probate was granted to the respondent, but she married in 1951 and admittedly became aware of the fact that the respondent had obtained probate as executor of the last Will as far back as 1952, though she did not come into Court till 1961.

It is conceded that the power of a District Court to recall or revoke a probate which has already been granted is limited to cases where an order absolute has been entered in the first instance (see Section 536 of the Civil Prodecure Code).

Counsel for the appellant contends that the order entered in this case though in the form of an Order Nisi is really an order absolute in the first instance. He submits that an order to be considered an " Order Nisi " must be served on a respondent, or upon some person who is called upon to respond. He refers to Sections 377A and 379 of the Civil Procedure

Code (which appear in the chapter relating to Summary Procedure) and points out that an " Order Nisi " as contemplated in those Sections takes effect only if the *respondent* does not show cause against it. But, as pointed out earlier, Section 525 permits a petitioner in testamantary proceedings to omit naming any person as respondent to his petition and Section 529 gives a discretion to the District Court to enter an Order Nisi even in such a case. Section 526 provides that an Order Nisi declaring a Will to be proved should be served on—

(*a*) the respondent, if any, and

(*b*) On such other person as the Court shall think fit to direct.

The question then is whether, where no respondent is named by the petitioner, it is obligatory on the Court to name one.

In my opinion the Court has a discretion in the matter. It may name a person on whom the Order Nisi should be served, or it may order publication of the order Nisi so that any person interested in the administration may show cause against it.

Section 532 of the Civil Procedure Code which deals with publication reads as follows " In all cases of application for the grant of the administration of the deceased's property, whether with or without a Will, the Court shall, whether a respondent is named in the petition or not, direct the Order to be advertised in the Gazette, and twice in a Local paper, before the day of final hearing ;..... "

Section 533 sets out three classes of persons who may show cause against an Order Nisi in a Testamentary proceeding being made absolute. They are—

(*a*) a respondent

(*b*) a person on whom the Order Nisi has been directed to be served

(*c*) any person appearing to be interested in the administration of the deceased's property.

So that when a Court directs an Order Nisi to be published where there are no persons mentioned in classes (*a*) and (*b*) above, it says in effect that the petitioner's application will be granted *unless* some person interested in the administration shows cause to the contrary.

I am of the view that in testamentary proceedings, an Order Nisi does not lose its character as such, merely because no particular person has been called upon to show cause.

Form 84 in the schedule to the Civil Procedure Code sets out the form which should be followed in drawing up Orders Nisi in testamentary cases. In the appropriate place where such person (if any) has to be named it sets out in italics the following words " The respondent or any person on whom the Court directs the order to be served."

In this case these words are inapplicable; but the officer who had drawn up the Decree Nisi had copied into it those very words. I do not think however, that the inclusion by error of these superflous words would affect the substance of the order made by the learned District Judge, which was that a decree Nisi and not a decree absolute should be entered.

I am of the view that the order made in this case cannot be equated to an order absolute in the first instance and that the appellant is not entitled to ask for a recall of probate in these proceedings.

Her remedy if any is by way of separate action.

The authorities cited at the argument which have laid down the principle that non-service of summons on a defendant is a fatal irregularity is of little assistance. A judgment entered against a named defendant without service of summons on him obviously violates the rules of natural justice. That principle has no application here.

It was also argued for the appellant that the proceedings in this case are void, as the respondent had failed to comply with all the provisions of Section 524. This section requires that the application to have the Will of a deceased person proved, should be by petition which should set out the relevant facts of the making of the Will, the death of the testator, the heirs of the deceased to the best of the petitioner's knowledge, the details and situation of the deceased's property, and the grounds upon which the petitioner is entitled to have the Will proved.

In the petition presented in this case the respondent had failed to set out the heirs of the deceased. It was argued that if she had done so the Court would have directed service of the Order Nisi on the heirs. But that is a matter of speculation. As pointed out earlier on such an application the Court has to exercise its discretion and it need not direct the service of the Order Nisi on the heirs mentioned.

It was contended for the appellant that the provisions of this section are mandatory. There is no reason to suppose that some of them are, and that some are not. If then, a petitioner fails, for example to mention one single property of the deceased which was known to him, are all proceedings rendered void ? I do not think so. I am of the view that the provisions of this section are only directory, and that a failure to strictly comply with those provisions, does not render the proceedings void *ab initio*.

They are, however, voidable, and in an appropriate case a party may ask the Court for relief under Section 839 of the Civil Procedure Code. In this case however one cannot disregard the long delay on the part of the appellant which places the respondent at an obvious disadvantage. An order revoking probate after the lapse of such a length of time, may even place the rights of third parties in jeopardy. Williams on Executors and Administrators says at page 81 of the 14th edition " Where a party who is..... entitled to call in the probate and put the Executor to proof of the Will chooses to let a long time elapse before he takes this step he is not entitled to any indulgence at the hands of the Court."

I do not consider the present case to be an appropriate one where the Court should exercise its inherent powers under Section 839 of the Civil Procedure Code.

The appeal must be dismissed with costs.

MANICAVASAGAR, J.—

I have read the opinions of the two members who were associated with me, and I agree with Sirimane, J. that this appeal should be dismissed with costs. I propose, however, to state my views on two questions on which submissions were made by Counsel.

An Order Nisi is an order which the Court may make on a petition by way of summary procedure ; as the words indicate, it is an order which will take effect *unless* cause is shown against it. The party against whom relief is sought must be made a respondent to the petition, and a copy of the Order Nisi should be served on him (Section 374 (*c*) Civil Procedure Code) so that he may have the opportunity of showing cause against it.

An application to have a Will proved is also on a petition by way of summary procedure ; but, unlike in the case of such an application, the petitioner may not name a respondent (Section 525) ; if no respondent is named by the petitioner it follows that there is no person on whom he wants the Order Nisi served ; but the Court, whether a respondent be made or not, may direct service of the order on any person it thinks fit. In this case the petitioner did not disclose a respondent ; nor did the Court in the exercise of its discretion direct service on any particular person. Mr. Ranganathan contends that in this situation, though an Order Nisi was made by the District Judge, it cannot be deemed to be an Order Nisi, but an Order Absolute, for the reason that it is not conditioned to take effect on a respondent, if any, or a specified person on whom the Court has directed notice, showing cause. I do not think it relevant to consider whether the District Judge, though he made an Order Nisi, meant it to be an Order Absolute ; true, the application by the petitioner was for an Order Absolute in the first instance, and an officer of the Court had erroneously minuted it in the journal as an application for an Order Nisi ; it may well be that the Judge was guided solely by this minute ; but nevertheless the order he made was in fact an Order Nisi. The submission of Counsel for the Appellant should be considered on the basis of this incontrovertible fact. The answer to his submission is that in such an application as this, any person who is interested in the administration of the property of the deceased though not notified specially has the right, and is entitled to be heard in opposition to the order (Section 533) ; for the Court is bound by the provision of Section 532 to cause the Order Nisi to be advertised in the Gazette, and twice in a local paper before the final hearing, whether a respondent be named in the petition or not ; the choice of the paper lies with the Court, which should in making the selection bear in mind that *the*

purpose of the advertisement is to see that its Order Nisi reaches all persons interested in the administration of the deceased's estate. It is hardly necessary to add that even though a named respondent, and/or a person on whom the Court has directed service of Order Nisi does not show cause, any person interested in the deceased's estate is entitled to be heard and have the Order Nisi discharged by rebutting the material allegations in the petition: there is therefore a class of persons, who though not served with the Order Nisi, are entitled to show cause and be heard in opposition to the Order being made absolute: and if their objection succeeds the Order Nisi, no doubt, will be discharged, but if it fails it must be made absolute. I am of the view that Mr. Ranganathan's submission on this question should be rejected.

The second submission is based on the fact that the petitioner had omitted to state in her petition the heirs of the deceased, which is a requirement of section 524; Mr. Ranganathan submits that this is an absolute requirement, and the omission has resulted in a failure of jurisdiction which renders all orders made by the Court after the petition was filed of no legal consequence. The question therefore is whether this requirement is directory or absolute: Is it a requirement so fundamental that it must be complied with? The answer is to be found on a consideration of the relevant provisions of the Code in order to ascertain the real intention of the legislature. To my mind the words "to the best of petitioner's knowledge" which follow the words "the heirs of the deceased" in the section are alone sufficient to show that the petitioner is not obliged to state the heirs of the deceased; it is not difficult to conceive of instances where the petitioner is a stranger to the family and has no personal knowledge as to who the heirs are: such a person need not state the heirs. There is no provision that the heirs should be made respondents to the petition to have a Will proved, and that the Order Nisi should be served on them. The Court has the discretionary power to direct the Order Nisi to be served on particular persons, but the choice need not be amongst the heirs alone: indeed, the Court may despite the disclosure of heirs in the petition, direct that the order be served on persons other than heirs who the Court considers should be given an opportunity of objecting. The matter is entirely one for the exercise of the Court's discretion; where the power is discretionary the requirement cannot be absolute but is directory.

No doubt the object of the requirement is to assist the Court to decide whether it should notify the heirs of its Order Nisi: but the omission to disclose does not render the Court powerless because it can make inquiry and direct service on any person who it thinks should have notice, and/or reach any person interested in the administration of the deceased's property by advertisement of the Order Nisi which is a necessary step. My view is that the requirement is directory.

Appeal dismissed.