1952 *Present :* **Rose C.J. and Pulle J.**

A. PANNANANDA THERO, Appellant, *and* U. PIYARATNA THERO, Respondent

S. C. 24—D. C. Galle, 8,254 (Testy.)

Will—Probate—Delay in making application—Effect on grant of probate.

Where an application for probate of a will was made eight years after the death of the testator—

Held, that mere lapse of time not satisfactorily explained should not bar the admission to probate of a will where such lapse of time has not affected the rights of any person.

[1] *2nd ed. p. 252.*

APPEAL from a judgment of the District Court, Galle.

H. V. Perera, Q.C., with *M. H. A. Azeez* and *A. M. Ameen*, for the petitioner appellant.

E. B. Wikramanayake, Q.C., with *W. D. Gunasekera*, for the 1st respondent.

Cur adv. vult.

March 5, 1952. PULLE J.—

A last will admittedly genuine was executed by one Akmeemana Seelawansabhidana Maha Thero on the 27th January, 1938. The testator had four pupils, namely, the appellant and the three respondents, of whom the 1st respondent Unawitiya Piyaratna Thero was named as the executor of the will. The testator died on the 20th June, 1939, and it was not till the 28th August, 1947, that proceedings were taken to have the will proved. The application for probate was not made by the executor, the 1st respondent, but by the appellant and it was resisted by the 1st respondent on two main grounds, namely, that the lapse of eight years since the death of the testator had made the application stale and that rights of third parties in respect of the temporalities bequeathed by the last will had accrued since the death of the testator. The learned Judge held in favour of the submissions made on behalf of the 1st respondent and refused the application. The present appeal is from that order. The application for probate was not opposed by the 2nd and 3rd respondents.

It would be convenient first to consider whether any rights had accrued to any one since the death of the testator which would be injuriously affected by the grant of probate. The principal provisions of the will related to the incumbency of three temples, Galpotte Vihare which was devised to the 1st respondent and Sri Sudarsanaramaya and Seelawansaramaya devised respectively to the appellant and the 2nd respondent. A clause provided that if the 2nd respondent was unwilling to accept the incumbency it should pass to the 3rd respondent.

In regard to Galpotte Vihare there were two actions instituted by one Indrasumana Therunnanse. The first was against the testator and the appellant and the second against the appellant who asserted rights under a deed granted by the testator on 4th May, 1938. In both actions Indrasumana Therunnanse was successful. His rights are now firmly established and will remain unaffected by proof of the will. Anyone laying claim to Galpotte Vihare as the successor to the testator will be estopped by the decree pronounced against him.

The 1st respondent has exercised the office of incumbent of both Sudarsanaramaya and Seelawansaramaya since the death of the testator. Whether the will be admitted to probate or not, it is conceded that actions to recover the incumbencies by the appellant or the 2nd respondent would be successfully met by the pleas that they are time barred.

Learned Counsel for the 1st respondent frankly admitted that the proof of the will would in no way affect adversely the rights acquired by his client either before or after the death of the testator. On the other hand if probate of this will, the validity of which is not disputed, is refused it may seriously affect the rights of the beneficiaries and frustrate for all time the intentions of the testator as to the line of succession to the incumbencies in question. It was held in *Terunnanse v. Terunnanse* [1] and followed in *Vipulananda Therunnanse v. Sedawatte Pannasara* [2] that title to an incumbency is not acquired by prescription. It, therefore, follows that if the appellant is entitled under the will to the incumbency of Sri Sudarasanaramaya that title still remains but it is only unenforceable by action by lapse of time against the *de facto* holder of the office.

As the title to the incumbency created by the will is not taken away by any possible acquisition of title by prescription it cannot be, as the learned District Judge has found, that the grant of probate would be useless.

For the decision of the next question I would accept the finding that the appellant has failed satisfactorily to account for the delay in applying for probate. The cases of *Caroline v. Eddie et al.* [3] and *de Silva v. Mendishamy* [4] appear to lay down that before probate of a will is granted the applicant must account satisfactorily for the delay in producing it. No reason is assigned as to why the practice which apparently was in force before the enactment of the Civil Procedure Code of 1889 should still govern applications for grant of probate. If in the circumstances of any particular case the grant of probate long after the execution of a will would serve no practical purpose or would amount to an abuse of the process of court, the inherent power of the court might be invoked to refuse a grant, but I cannot understand why mere lapse of time not satisfactorily explained ought to bar the admission to probate of a will properly executed and acknowledged to be genuine and where such lapse of time has not affected the rights of any person. The decisions in *Re Last Will and Testament of A. Hendricks and S. Hendricks* [5] and *Re Estate of Usuph Lebbe and his wife Serja* [6] appear to lay down by implication, if I may say so with respect, the correct principle, namely, that it is not a condition precedent to granting probate that the delay in making the application must be satisfactorily explained. Lawrie J. said in the first case that letters of probate should issue *valeat quantum* and added, " Here, I think, the executor who produces the will of his father and mother who died many years ago should be called on to explain the delay, and if his omission to produce the will earlier be shown to have been wilful, he may properly be punished under section 517 of the Civil Procedure Code. " In the latter case Layard C.J. emphasized that all applications for letters of administration or for the grant of probate since the enactment of the Civil Procedure Code must be considered with reference to the terms of that Code and pointed out that there was no provision that before granting letters of administration

[1] *(1927) 28 N. L. R. 477.*
[2] *(1941) 20 C. L. W. 119.*
[3] *(1930) 32 N. L. R. 331.*
[4] *(1898) 3 Browne's Reports 102.*
[5] *(1901) 4 N. L. R. 24.*
[6] *(1903) 6 N. L. R. 194.*

the Court must have regard to the time that has lapsed since the death of the intestate. Referring to an earlier case in *14 N. L. R. 201* Layard C.J. said,

> " I think, therefore, on the authority of *Moysa Fernando v. Alice Fernando*, the Civil Procedure Code has settled the law with regard to issue of letters of administration, and that it would not be safe for this Court to place too much reliance on the old decisions referred to by the District Judge ; and as there is no suggestion that the lapse of time has caused any change of title or affected the rights of the parties, and as it is obvious that the title of the minor respondents cannot possibly have been in any way affected by the delay, I think the District Judge was wrong and that the petitioner is entitled to be granted the prayer of his petition. "

In my opinion the order of the District Judge appealed from should be set aside on the ground that the appellant was entitled to have the will admitted to probate. The appellant will be entitled to the costs of the appeal against the 1st respondent but each party will bear the costs of the contest in the District Court.

ROSE C.J.—I agree.

Order set aside.