In the Matter of the Last Will and Testament of JOHN ARON FERDINANDUS.

1895. *September 26.*

D. C., Colombo, C 570.

Formal order of court—Probate—Caveat—Ex parte order—Notice of appeal—Civil Procedure Code, ss. 535 and 526—Useless motions.

An order to be treated as such must be formally drawn up and recorded as required by the Civil Procedure Code.

After an order absolute in the first instance under section 529 of the Civil Procedure Code granting probate of a will to an applicant has been made, it is too late to enter a caveat under section 535.

If the probate has been granted wrongly, it may be recalled under section 536.

Such an order upon a motion, notice whereof was not given to any person, is an *ex parte* order, although it was made after such person had appeared and opposed the motion, and no notice is necessary to be given to such person of an appeal preferred by the applicant.

When an application for probate is once allowed, there is no necessity for a further motion that probate do issue to the applicant.

ON the 1st March, 1895, Louisa Karunaratna, who was named in a document which purported to be the last will of J. A. Ferdinandus, deceased, as his executrix, presented to the District Court a petition and affidavit, together with the said last will, and, in terms of section 525 of the Civil Procedure Code, moved for probate thereof, alleging that she had no reason to suppose that her application would be opposed by any person. The District Judge made an order absolute, under section 529, declaring the will proved, and that probate do issue on her taking the oath of office. Six days afterwards certain persons filed in Court a document in the nature of a caveat. The petitioner, ignoring this opposition, took her oath of office and moved *ex parte* that "probate be granted" to her. The caveators appeared and opposed the motion. The Court ordered that the petition and affidavit

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filed by Louisa Karunaratna be taken off the file, and that she do file a fresh petition and affidavit naming the caveators as respondents.

The petitioner appealed as from an *ex parte* order.

Rámanáthan, S.-G. (with him *Pereira*), appeared for her.

Layard, A.-G., appeared for the caveators and took the preliminary objection that they had not received notice of appeal.

Rámanáthan, S.-G.—No notice is necessary, as the order of the Court below should be looked upon as *ex parte* notwithstanding the appearance of the so-called caveators. Probate had been duly allowed, and therefore the remedy by caveat was not admissible, and the so-called caveators are not respondents truly. [BONSER, C.J.—We think the preliminary objection must be overruled.] If probate had been allowed improperly, the right course is to recall it, under section 536. As the case now stands, probate being now granted and the oath of office taken, it is the duty of the secretary to issue probate as a matter of course.

26th September, 1895. BONSER, C.J.—

This is an appeal against an order of Mr. Grenier, Acting District Judge of Colombo, in which he ordered that the petition and affidavit filed, together with the schedule referred to therein, be taken off the file, and that the appellant, as executrix, do file a fresh petition and affidavit, naming the caveator and the persons mentioned in Mr. Alwis' appointment of date the 6th March, 1895, as respondents, and that proceedings be thereafter taken by the executrix as in the case where respondents are named in a petition of this character. This, although it is called an order, is not an order. No formal order has been drawn up and recorded; but we will treat it as if a formal order has been made as required by the Code.

The executrix appealed against that order.

The Attorney-General, at the opening of the appeal, appeared and took a preliminary objection. He said that he had received no notice of the appeal, and that, therefore, the appeal should not be heard without notice to his clients. The Attorney-General appeared on behalf of Elizabeth Ferdinandus and five others, who appear to have entered a caveat after the order for probate had been made.

The appellant was executrix of the will of the deceased, and she petitioned that probate should be granted to her, and bringing the will into Court she filed an affidavit under section 525, naming no person as respondent to the petition. Thereupon the Court

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under the powers given by section 529, made the order absolute in the first instance. After that order had been made these five persons filed their caveat under section 535 ; but in my opinion they were too late, because the order had already been made, and they are therefore not parties to the proceedings, and they were rightly not served with notice of the appeal, which is an *ex parte* one.

In consequence of this filing of a caveat the secretary of the District Court declined to issue probate as ordered by the Court. Thereupon the executrix took the curious step of moving the Court that probate be granted to the executrix named in the will, although an order to that effect had already been made. I cannot understand why the Court should make an order over again ; but there seems to be a rage in the District Court for making motions, for, even after the petition had been presented, a motion is made by the petitioner that the prayer of the petition may be granted. Why it was thought necessary to supplement the petition by a motion I cannot understand. We were told that it was the practice in the District Court to supplement a petition by a motion in this way. If this be so, the sooner this practice is discontinued the better. When a petition has been presented it ought to come on for hearing in regular course without any motion for that purpose. However, on the second motion, the caveators were heard, and the Acting District Judge made the order, which is now appealed against. I must say that I do not understand the grounds on which that order was made.

The procedure laid down by the Code seems to be quite clear. If the probate has been wrongly granted it may be recalled under section 536. Section 537 points out how an application to recall probate is to be made. It is to be made by petition. The caveators instead of entering a useless caveat, should have applied under section 537 to recall the probate. That they can do now, but, in my opinion, the order was wrong. The procedure invented by the learned Acting District Judge is not in accordance with the Code. There is no justification for it. The appeal must therefore be allowed.

WITHERS, J.—

I quite concur. If the District Judge had satisfied himself that the petitioner had abused the process of his Court by the suppression of some material fact in the affidavit supporting her petition for grant of probate, I think it would have been quite competent to him to have discharged the *order nisi*.

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But that is not the reason given by the learned District Judge for his decision that the petition and affidavit should be taken off the file. He seems to have thought that the course he decided to take was the only way to deal with a state of circumstances for which the Code, in his opinion, had failed to provide. In this I think he was mistaken, for the Code plainly indicates by what time a caveat for the purposes of section 535 must be filed.

A caveator must come in before the final hearing of the petition and the order thereon.

The caveators intervened too late to be in any sense parties to the matter of the petition. If they have a right to ask for the revocation of the grant, they must do so in the way provided by the Code.