Present : Sir C. P. Layard, Chief Justice, and Mr. Justice Grenier.

1903.
August 12.

CLARA FERNANDO *v.* ROSA FERNANDO.

D. C., Negombo, 603.

Application for discovery of property by an administrator—Procedure—Citation—Security—Civil Procedure Code, chapter LIV.

The procedure to be adopted in an application by an administrator for discovery of property belonging to the intestate's estate under chapter LIV. of the Civil Procedure Code indicated.

APPEAL from an order of the District Judge directing the appellants to deliver certain property to the respondent as administratrix of the estate of her deceased husband.

H. J. C. Pereira and *H. A. Jayewardene*, for appellant.

Dornhorst, K. C., and *E. W. Jayewardene*, for respondent.

Cur. adv. vult.

12th August, 1903. LAYARD C. J.—

In this case the Court seems to have misunderstood the procedure laid down in chapter LIV. of the Civil Procedure Code. The respondent is the administratrix of the intestate husband's estate. The appellants are persons in whose possession the administratrix alleges was certain property which had belonged to the intestate and which the respondent claims as his legal personal representative. She therefore presented a petition under section 712 of the Civil Procedure Code, and cited the appellants to appear before the court. The first mistake appears to have been made in the citation issued. The object to be authorized by issue of a citation under section 712 is the discovery of property, so that section explicitly provides for a citation to attend the inquiry, and that the person cited should be noticed that he would be examined for the purpose of such discovery. The citation issued in this case is silent as to the personal attendance of the appellants, and thereby calls upon them to appear to show cause why they should not deliver certain articles to the administratrix. Sections 712 and 713 show that the respondents should have been simply cited as witnesses, for section 713 provides that persons so cited need not take notice of the citation unless it is accompanied with payment and tender of the sum required by law to be paid or tendered to a witness subpœnaed to attend a trial in a civil court. To assist the applicant for a citation and the Court that issues it, the Code actually provides a form of citation. (Form No. 111 in schedule A.) That form explicitly calls upon the person cited to appear "personally" and to answer in court to the application of the person applying for the citation. I cannot

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imagine why, when a form is expressly provided which is in accordance with the express terms of an enactment, persons should go out of their way to draft a form inconsistent with the terms of the enactment. The appellants, I gather from the record, did in pursuance of the citation personally attend the court. The court, however, instead of recording their appearance, records that their counsel and proctor appeared and proceeded to deal with the case as if it was an ordinary trial. The appellant's counsel took some frivolous objection to the procedure, which was properly over-ruled. But neither appellant's counsel nor respondent's counsel appears to have in any way assisted the judge by inviting his attention to the proper procedure to be adopted under chapter LIV. of the Code. Now, section 714 clearly lays down that upon the attendance of a person in obedience to citation issued at the request of an administrator under section 712, the first thing to be done is to examine such person fully and at large respecting the property of the intestate, or of which the intestate was in possession at the time of, or within two years preceding, his death. The proceedings, however, in this case began by the evidence of the administratrix being recorded without any demand on the part of appellant's or respondent's counsel. When a procedure is clearly and explicitly laid down as is in section 712, I cannot see that there is any justification for a departure from it. If the person cited puts in an affidavit, in which he swears that he is the owner of the property, the District Judge is bound to dismiss the proceedings as section 714 enacts. In this case no such affidavit was put in by the appellants, the persons cited, so the District Judge should, after having recorded their examination and such further evidence as might have been produced by either party, have acted as provided by section 716. Instead of doing this, after a sort of trial the District Judge proceeds to reserve judgment, and some seven days after hearing the evidence orders certain property referred to in list A to be delivered to the respondents by the appellants. It is obvious that the procedure to be adopted under chapter LIV. is a very summary one, for section 716 thereby provides that if it appears to the Court from the examination of the person cited by the administratrix and other testimony (if any), that there is reason to suspect that property of the intestate is withheld or concealed by the person cited, the Court shall, unless such person gives security by a bond entered into with the administratrix with such sureties and such penalty as the Court approves for the delivery of the property, or in default of such delivery for the payment of the value thereof to the administratrix and of all damages which may

be awarded against the obligor for withholding the same, whenever it shall be determined in an action brought by the administratrix, that it belongs to the estate of her husband's intestate, make a decree reciting the grounds thereof requiring the person cited to deliver possession of the property to the administratrix. In the event of such security being given, and after payment within a time to be fixed therefor of any costs which the Court may award to the administratrix, the proceedings shall be dismissed. I gather from the judgment of the District Judge that it appeared to him from the examination of appellants and the other testimony adduced before him that there was reason to suspect that certain property of the respondent's intestate was withheld by the appellants. The order made by him, however, cannot stand as it is, and it must be set aside, and the case remitted to the District Judge to make such an order as is contemplated by section 716. In such order he must fix a reasonable time for the appellants to give security. As counsel for both parties appear to me to be responsible for the error in procedure in the District Court, the administratrix and the persons cited by her (the appellants in this case) must each bear their own costs of the proceedings in the District Court. The appellants are entitled to their costs of this appeal.

GRENIER, A. J.—

I agree. The procedure laid down in a case of this kind is so plain and simple that it seems inconceivable to me why it was not followed, as it should have been followed. The sections prescribing the procedure are taken from the New York Code of Civil Procedure relating to testamentary proceedings, and are admirably adapted for the speedy and effectual discovery and conservation, for purposes of administration, of property belonging to an intestate estate which happens to be in the hands of a third party.