

In the Matter of the Last Will and Testament of

KATHIRIKAMASEGARA MUDALIYAR.

D.C., Jaffna (Testamentary), 1,084.

1900.

December 7.

Order nisi allowing probate—Showing cause against it—Bequests to adulterine bastards—Impeaching their validity—Civil Procedure Code, ss. 524 and 527.

An executrix named in a will applied for probate under section 524 of the Civil Procedure Code, and an order *nisi* was duly entered. The respondents in showing cause did not object to the will being declared proved, but objected to the validity of certain bequests in the will, in that they were in favour of certain illegitimate children of the testator born to him in adultery.

Held that, at that stage of the proceedings, it was not open to the respondents to raise this contention, but that the applicant was entitled to probate.

IN this case the testator was a married man living in separation from his wife. He had been living with the petitioner for over twelve years, and by his will, whereof he had appointed the petitioner executrix, he had left the bulk of his property to his illegitimate children by her. The petitioner applied under section 524 of the Civil Procedure Code for probate, and an order *nisi* under section 527, declaring her executrix and directing the issue of probate to her, was duly made. The respondents on the petition were the brothers and nephews of the testator. They had no objection to the will being declared proved, but they objected to the bequests in the will to the illegitimate children on the ground that they were adulterine bastards, and were under the Roman-Dutch Law incapacitated from taking under the will of their father.

The District Judge held that the disability, if any, did not attach to the children of a married man by an unmarried woman; inasmuch as it appeared that under the Roman-Dutch Law adultery was the intercourse of a married woman with a person other than her husband; and disallowed the objection.

The respondents on the petition appealed.

1900.
December 7.

W. Pereira, for appellants—Ordinance No. 21 of 1844 gave the power to a testator to devise his property to anybody, provided the latter was not "legally incapacitated from taking the same". It thus became necessary to see whether under our Common Law these children could take under their father's will. [BONSER, C.J.—Can that question be gone into at this stage of the proceedings? This is merely an application for probate.] That was the only question discussed in the Court below, and the present appeal is from the District Judge's ruling on that question. The only issue framed was: "Are the bequests valid at law?" The District Judge overruled the present respondent's objection to this issue and proceeded to try it; and, after elaborate argument by counsel on the two sides, decided the issue against appellants. They appeal against the order because, being an order on a proceeding to which they were parties, it may possibly be pleaded as *res judicata* against them in any subsequent contention. They pray that the order be set aside, but it will suit them equally well if the order is wiped out on the ground that the issue was prematurely framed.

Sampayo, for respondent, was heard on the question as to costs.

The following judgment was delivered on 7th December, 1900, by BONSER, C.J.—

An inhabitant of Jaffna, of the name of Kathirikamasegara Mudaliyar, died a short time ago leaving a will, by which he appointed a woman, with whom he was living and who is said not to be his wife, executrix, and his property to his children by her. The executrix propounded the will and made the brothers and sisters of the testator respondents to her petition. They did not object to probate being granted to the executrix, but they objected that the bequests to the children of the executrix were void, as being in contravention of the Roman-Dutch Law. It does not appear how the Roman-Dutch Law can apply to this testator or to his estate. His name seems to indicate that he is what is termed "a Malabar inhabitant of the Province of Jaffna," in which case another Code of Law would apply. But the District Judge insisted apparently upon discussing the question of the validity of these bequests there and then, and, after hearing argument, decided that the bequests were valid. The legatees were not represented at the argument, nor are they before us to-day. The brothers and sisters appealed against the decision of the District Court, but it seems to me quite impossible to entertain argument on the question as to the validity of the bequests before probate has been granted; and in the absence of the parties most

interested in the question, I think that the order of the District Judge should be amended, and that the order which should be made is that probate should issue to the executrix.

1900.
December 7.
BONSER, C.J.

No order as to costs.

BROWNE, A.J. concurred.
