1903.
March 6
and 25.

Re Estate of USUPH LEBBE and his wife SERJA.

D.C., Colombo, 1,800 (Testamentary).

NASURDIN LYE, Petitioner.

JASMINI AND OTHERS, Respondents.

Letters of administration—Application for—Staleness of application—Civil Procedure Code, ss. 523, 544, 547—Discretion of Court.

Since the enactment of the Civil Procedure Code all applications for letters of administration or for grants of probate must be considered with reference to the terms of that Code.

As section 547 of that Code enacts that no action shall be maintainable to recover any property in Ceylon where the estate exceeds Rs. 1,000 unless letters of administration shall have issued, and section 544 does not provide that before granting such letters the Court shall consider the length of time that has elapsed since the death of the intestate, but only, where there is a conflict of claims, the provisions of section 523, there is no longer any discretion left to the District Judge as to whether letters shall issue or not.

THE petitioner, who was the son-in-law of Usuph Lebbe and his wife Serja, appeared in Court on 15th October, 1902, and alleged that Usuph Lebbe died intestate on 27th March, 1890, and Serja died intestate on 2nd August, 1892, leaving property within the Districts of Colombo, Chilaw and Kurunegala, and that the respondents were the heirs and next of kin of both the deceased, and that the petitioner was the husband of the fifth respondent. He moved for an order *nisi* declaring the petitioner entitled to administer the joint estate of Usuph Lebbe and Serja.

The District Judge, Mr. D. F. Browne, disallowed the motion in these terms:—

"I have had occasion already in the testamentary proceedings Nos. 1,686 and 1,608 to express my doubts whether the opinion expressed of late in the Appeal Court, that it is the duty of a Court in all cases where it finds that administration has not been taken out to see that it shall be, was intended to override the old rule of our Courts practically forbidding administration after the lapse of five years. In neither case was appeal taken, much as I desired that the question should be ruled upon by the Appellate Court. For my own part I would be willing to grant administration when the delay that has occurred had been satisfactorily explained by an appellant, and the need for it had been made to appear".

The petitioner appealed.

Morgan de Saram, for appellant.

Cur. adv. vult.

25th March, 1903. LAYARD, C.J.—

The petitioner in this case applies for administration of the estate of Conjee Wappu Usuph Lebbe and his wife Dain Serja. The deceased were respectively father-in-law and mother-in-law of the petitioner, who is husband of the fifth respondent, whose sisters, the first and third respondents, are married to the second and fourth respondents. The father-in-law died on 27th March, 1890, and his wife on the 2nd August, 1892, both intestate, and their children are the first, third, fifth, sixth and seventh respondents, the seventh respondent being a minor of the age of fifteen years on the 5th September, 1902, the date of the presentation of the petition to the District Judge.

Under the above circumstances the District Judge, following, as he said, the practice of the English Ecclesiastical Courts, as it was understood and acted upon in certain local cases referred to by him, declined to grant letters of administration, as he said the application came too late, being made after the lapse of more than five years.

The case *in re Caderkamer Varitamby* reported in *1 Lorenz, 95*, was one in which there had been twenty-four years' delay; some of the property of the estate had been sold by the opponent and some given in dowry by him. It was therefore impossible to put the estate back *in statu quo ante*, and therefore the application for letters of administration was dismissed. The case *in re L. Simon Silva*, reported in *3 Lorenz, 160*, was an application for administration *de bonis non*, nearly twenty years after the death of the intestate; and though the report is meagre, it is obvious that there had been some distribution of the estate by the original administrator, who had acted in that capacity for two years before his death. The District Court of Colombo rejected the application for administration *de bonis non*. This Court held that in view of the circumstances of that case the applicant should have the opportunity given to him to show special reasons why his application should be allowed, and remanded the case for that purpose to the District Court. These cases were approved in that reported in *Ramanathan's Reports, 1863-1868, p. 106*. All the above cases were before the enactment of the Civil Procedure Code.

In the case *re Last Will and Testament of A. Hendricks and S. Hendricks* (*4 N. L. R. 24*), this Court, following a judgment of Chief Justice Bonser's in an unreported case from the District Court of Negombo, considered that the District Judge of Galle was wrong in disallowing an application for probate of a will as it was too stale, and directed that letters of probate should issue *valeat quantum* if the will was proved to be genuine. The

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application, being one for probate, it was suggested by Mr. Justice Lawrie, ought to be treated on a different footing from one for a grant of letters of administration.

It appears to me that all applications for letters of administration or for grant of probate since the enactment of the Civil Procedure Code must be considered with reference to the terms of that Code. Now, section 547 of that Code enacts that no action shall be maintainable to recover any property in Ceylon where the estate exceeds Rs. 1,000, unless letters of administration shall have issued, and section 544 does not provide that, before granting letters of administration, the Court shall have regard to the length of time that has elapsed since the death of the intestate, but only, where there is a conflict of claims, to the provisions of section 523.

I think, therefore, on the authority of *Moysa Fernando v. Alice Fernando* (*4 N. L. R. 201*), 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.

I agree with the decision in *4 N. L. R. 201* that the former discretion, whether or not to issue letters, which was exercised where the estate was small or not, has been put an end to by section 547 of the Civil Procedure Code, and I think the terms of section 544 as read with section 547 do not leave the Court any discretion where the application is made late.

As it does not appear that we should be doing material injustice by allowing this appeal, I am disposed to allow it.

MONCREIFF, J.—I agree.