

1896.
May 21 and
July 8.
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In the Matter of the Goods and Effects of APPUHAMY
ARACHCHI, Deceased.

Between DINGIRIAPPU, Petitioner, and PUNCHIRALA *et al.*,
Respondents.

D. C., Kégalla, 39.

Civil Procedure Code, s. 534 (proviso)—Renewal of application, once dismissed, for probate or letters of administration—Discretion of District Judge with reference thereto.

D, claiming to be the legitimate son of A, applied for letters of administration to the estate of A, naming in his petition A's parents and two brothers as respondents. Respondents opposed the petition on the ground that D was not the legitimate son of A. The District Judge tried the issue as to legitimacy, and being of opinion that it was not satisfactorily proved that D was legitimate, dismissed his petition. D thereafter renewed his petition, naming in it as respondents the same persons as those named before, and his own mother in addition—

Held, that under the proviso to section 534 of the Civil Procedure Code it was within the power of the District Judge to receive the new application, but he was not obliged to do so.

The proviso to section 534 allowing the renewal of an application, once dismissed, for probate or letters of administration, will receive effect in cases where there is a change of circumstances, or when the application can be supported by additional evidence, or on grounds different from those considered and adjudicated upon by the Court.

THE facts of the case sufficiently appear in the judgment.

De Saram, for appellant.

Bawa, for respondent.

Cur. adv. vult.

8th July, 1896. LAWRIE, J.—

In September, 1895, Dingiriappu applied for letters of administration to the estate of Appuhamy Arachchi, who died in November, 1891. He named as respondents the father and mother and the two brothers of the deceased.

He stated in his petition that he was the only son of the deceased.

The respondents opposed this application on the ground that the petitioner was the illegitimate son of the deceased Arachchi.

The issue as to legitimacy was tried on 15th January, 1896. The District Judge of Kégalla discharged the rule *nisi* and dismissed the petition, holding that it had not been satisfactorily proved that the petitioner was legitimate.

From that decision no appeal was taken. Administration was not granted to any one. On 14th February, 1896, the petitioner

presented the present application for administration of the same estate, again alleging that he was the only son, and naming the same respondents, with the addition of his mother.

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The District Judge refused to entertain the second application, observing that the petitioner's proper course was to have appealed in the former case.

LAWRIE, J.

Against this refusal the applicant now appeals. He rests his appeal on the proviso to the 534th section of the Code: " Provided, " however, that the dismissal of the petition shall not be a bar to " a renewal of the application by the petitioner as long as grant " either of probate of the deceased's will or of administration of " his property shall not have been made, either on the occasion " of this application or subsequently thereto, to some other person " than the petitioner." Under this section it certainly was within the power of the District Judge to have received this renewed application, but I am of opinion that he was not obliged to do so. It would have been different had the petition set forth *res noviter veniens ad notitiam*—if he had stated that he could now adduce evidence which was beyond his power when the former application was heard, but he does not say that he has any other evidence available than he had at the last trial. Although the dismissal of the former petition is not *res judicata* either as to the petitioner's legitimacy or as to his right to administer, it is right to prevent respondents from being harassed, and the time of the Court from being wasted in re-hearing the same witnesses on the same issue.

The proviso in the 534th section allowing a renewal will receive effect in cases where there is a change of circumstances, or when the application can be supported by additional evidence, or on different grounds than the Court considered and adjudicated on.

I recommend that the order of the District Judge be affirmed with costs.

The District Court is directed to take steps to appoint an administrator under section 619. The present applicant's rights to claim as heir when administration is granted are expressly reserved.

BONSER, C.J.—I agree.

