

## APPELLATE CIVIL.

Before U Tun Byu and U Aung Tha Gyaw, JJ.

I. J. DUCKWORTH (APPELLANT)

v.

MISS D. I. DUCKWORTH (a) MA KHIN THI  
(RESPONDENT).\*

H.C.  
1948

Mar. 8.

*Succession Act, ss. 229, 230—Grant of letters of administration without issuing special citation to the executor—Whether valid—Effect of grant of letters—Order XXI, Rule 27, of the Code of Civil Procedure.*

*Held*: Renunciation by an executor can be made prior to the institution of proceedings for letters. Under s. 229 of the Succession Act a duty is cast on an applicant for letters of administration to prove satisfactorily that the executor has already renounced. When the fact of renunciation by executor has not been proved the court has no power to grant letters of administration unless special citation calling upon the executor to accept or renounce his executorship has been issued to him. Service of general citation is not sufficient.

Renunciation of executorship may be made orally before a Judge or by a writing signed by the executor.

It is not necessary or expedient in an application for a probate or letters of administration to consider any issue relating to the title of the testator to, or his power to dispose of, any property. Grant of probate or letters of administration does not confer on the grantee any title to the property over which the testatrix had no right to dispose of. It only perfects the representative title of the executor or administrator to the property which belonged to the testator and over which he had the disposing power.

*Behary Lal Sandyar v. Mohan Gossam*, I.L.R. 4 Cal. 1, followed.

*Held further*: The scope of Order 41, Rule 27 (1) (c), of the Code of Civil Procedure is limited and it is for the court to decide whether such evidence as is applied to be admitted is necessary to enable the court to pronounce its judgment and whether there is substantial cause for admitting it at that stage.

*The* Tun for the appellant.

P. K. Basu for the respondent.

---

\* Civil Misc. Appeal No. 40 of 1947 being appeal from the order of the District Court of Yamethin in Civil Suit No. 1 of 1947, dated the 23rd June 1947.

H.C.  
1948

I. J. DUCK-  
WORTH  
v.  
MISS D. I.  
DUCKWORTH  
(a)  
MA KHIN  
THI.

The judgment of the Bench was delivered by

U TUN BYU, J.—Miss D. I. Duckworth, who is the respondent and I. John Duckworth, who is the appellant in this appeal, are the children of Daw Shwe Hle of Pyinmana who died in September, 1941 leaving behind a will, in which she appointed one Saya Chit Pe as executor, which was filed in the proceedings before the District Court of Pyinmana as Ex. "A." Miss D. I. Duckworth applied in 1947 for letters of administration to the estate of Daw Shwe Hle in the Court of the District Judge, Yamèthin, making the appellant I. John Duckworth and three other persons who were the grandchildren of Daw Shwe Hle, as respondents to the application. Miss D. I. Duckworth in paragraph 2 of her application for letters of administration stated that Saya Chit Pe, who had been appointed executor to the last will of the deceased Daw Shwe Hle, had renounced or failed to accept the executorship and that he had not taken any steps to prove the said will. The application was opposed by I. John Duckworth, who is the appellant in this appeal, and the District Judge, after hearing the parties, granted letters of administration to Miss D. I. Duckworth.

The most important contention so far as the appellant is concerned is that, as no special citation required under section 229 of the Succession Act had been issued, the District Judge had no power to issue the letters of administration to Miss Duckworth in view of the explicit provisions of section 229 of the Succession Act. It is not disputed that no special citation was issued in this case. It is, however, urged on behalf of the respondent Miss Duckworth that Saya Chit Pe had renounced the executorship, and that it was, accordingly, not necessary to issue the special citation required under section 229 of the

Succession Act. The first question which has to be determined is, whether Saya Chit Pe had in fact renounced the executorship. Miss Duckworth in her evidence stated as follows :

"Saya U Chit Pe was appointed executor, but Saya Chit Pe shifted to Myingyan and altogether failed to accept the executorship. I did not call him to prove the will or take any steps."

And in her cross-examination she also stated that Saya U Chit Pe was still alive, and was residing at Pynmana and that she had no occasion to ask him to file an application in Court to prove the will. It is clear, therefore, from her own statements made in Court that Miss Duckworth implied that Saya Chit Pe had renounced the executorship from the mere fact that he had not taken any steps to prove the will or, at least, from the fact that he had remained inactive. It is also clear from the record of this case that there is no evidence to prove that Saya Chit Pe had declared, whether orally or in writing, that he had renounced the executorship. There is also no evidence to suggest that Saya Chit Pe had even informed anybody of his intention to renounce the executorship. It is urged that the failure of Saya Chit Pe to appear in Court after the issue of the general citation to him ought also to be considered as indicating that he had renounced the executorship. It will however not be proper to make such a presumption from the mere failure of a person, who had been appointed executor, to take steps to prove the will, or because he had remained inactive.

The provisions of section 230 of the Succession Act might be reproduced here, and it is as follows :

"230. The renunciation may be made orally in the presence of the Judge, or by a writing signed by the person renouncing, and when made shall preclude him from ever thereafter applying for probate of the will appointing him executor."

H.C.  
1948

I. J. DUCK-  
WORTH

v

MISS D. I.  
DUCKWORTH

(a)

MA KHIN  
THI.

U TUN BYU,  
J.

H.C.  
1948

I. J. DUCK-  
WORTH

v.  
MISS D. I.  
DUCKWORTH  
(a)

MA KHIN  
THI.

U TUN BYU,  
J.

It will be observed that section 230 of the Succession Act lays down the manner in which the renunciation of the executorship might be made. It provides that the renunciation might be made either by writing, and in which case it is to be signed by the person making the renunciation, or the renunciation might be made orally, and in which case it is to be made in the presence of the Judge, apparently meaning the Judge before whom the proceeding is pending. Section 230 does not however say when the renunciation should be made, and thus it might be said that renunciation could be made even before the citation is issued, and the wording at the commencement of section 229 does suggest that renunciation could be made even before any proceeding is instituted. Section 230 has however provided the mode in which the renunciation of the executorship might be made, and the provisions of section 230 ought accordingly to be regarded as the provisions which must be looked into for the purpose of considering whether the renunciation which is alleged to have been made is effective in law. The Court could also when issuing the special citation under section 229 of the Succession Act specify in the citation that, after the citation has been served upon the person who has been appointed executor, the Court will on his failure to appear within the prescribed time, assume that he has renounced the executorship and grant letters of administration with the will annexed to another person. Order 8, Rule 5, of the Code of Civil Procedure had been referred to, but Rule 5 of Order 8 does not preclude the Court from scrutinizing the evidence in the case in order to ascertain whether the provisions of section 229 of the Succession Act have been complied with. A duty is cast upon the applicant to prove clearly that she had conformed to all the requirements of law before

the Court can issue the letters of administration to her. There is moreover no definite evidence, in the present case, on which it is possible to arrive at a conclusion that Saya Chit Pe did or had renounced the executorship.

The next question to consider is, what is the effect of the failure to issue the special citation under section 229 of the Succession Act, which is as follows :

" 229. When a person appointed an executor has not renounced the executorship, letters of administration shall not be granted to any other person until a citation has been issued, calling upon the executor to accept or renounce his executorship :

*Provided* that, when one or more of several executors have proved a will, the Court may, on the death of the survivor of those who have proved, grant letters of administration without citing those who have not proved."

It is thus clear that in this case the Court has no power to grant letters of administration unless the special citation has been issued, except in the cases where the executor had renounced the executorship. The failure to issue the special citation to Saya Chit Pe under section 229 of the Succession Act will, in effect, mean that the order granting the letters of administration with the will annexed will have to be set aside in view of the finding that there was no renunciation by Saya Chit Pe in this case. It might, however, be said that Saya Chit Pe, the executor, could be considered to be a party to the proceedings to prove the will as a general citation had been issued to him ; and, from the evidence appearing in this case, it appears that the will Ex. " A " has been proved, and its validity properly established. The course which ought to be pursued will be to set aside the order of the Court below which directs the issue of letters of administration to Miss D. I. Duckworth in respect of the estate of

H.C.  
1948

I. J. DUCK-  
WORTH

v.

MISS D. I.  
DUCKWORTH

(a)

MA KHIN  
THI.

U TUN BYU,  
J.

H.C.  
1948  
—  
I. J. DUCK-  
WORTH  
v.  
MISS D. I.  
DUCKWORTH  
(a)  
MA KHIN  
THI.  
—  
U TUN BYU,  
J.

Daw Shwe Hle and to direct that the Court below should, when the proceedings are received back, issue the special citation to the executor named in the will as required by section 229 of the Succession Act, and, in the event of the executor renouncing or declining to accept the executorship within the time mentioned for the acceptance or refusal of the executorship in the special citation to be issued to him, to grant letters of administration with a copy of the will annexed to Miss D. I. Duckworth.

It might also be mentioned that it has been contended on behalf of the appellant that there was a will left by J. I. Duckworth, the husband of the deceased Daw Shwe Hle, who died in or about 1930 and that the appellant ought to be allowed to produce this will as it would show that the deceased Daw Shwe Hle did not own the immovable properties which she devised under her last will to Miss Duckworth, and it is urged that the Court of Appeal could under Order XLI, Rule 27 (1) (c), Code of Civil Procedure, allow such evidence to be put in. The scope of Order XLI, Rule 27 (1) (c), is certainly limited, and it is for the Court to decide whether such evidence is necessary to enable it to pronounce judgment or whether there is a substantial cause for admitting the document which the appellant now desires to produce. It does not appear that it is necessary or even expedient in an application for the grant of a probate or letters of administration to consider any issue relating to the title of the testator to any of the property included in the will, or relating to the disposing power of the testator in respect of such property. The grant of letters of administration does not really confer any title to the property over which the testatrix had no right to dispose of, and in this connection the observation made by Garth C.J. in the case

of *Behary Lal Sandyar v. Juggo Mohan Gossam* (1) appears to be apposite, which is as follows :

"On the other hand, it is clear that the grant of probate to the executor does not confer upon him any title to property which the testatrix had no right to dispose of. It only perfects the representative title of the executor to the property which did belong to the testator and over which he had the disposing power."

Moreover Mr. J. I. Duckworth was said to have died in 1930, and what is purported to be his last will had also so far not been proved, and apparently what is intended to be produced before the Court now is merely a copy of the alleged will. What would be the probative value of such a document, if it is admissible at all, will have to be decided elsewhere, if necessary. It is obvious that the attempt to introduce such a will under Order XLI, Rule 27 (1), even if it can be proved to exist, cannot be entertained as its production is not necessary or expedient to enable this Court to decide the matters which are now before it.

The order of the District Judge of Pyinmana granting letters of administration to Miss D. I. Duckworth with the will annexed in respect of the estate of Daw Shwe Hle is accordingly set aside, and the case will be sent back to the lower Court for the purpose indicated earlier in this judgment. The appellant will be entitled to the costs of this appeal, but the costs of the Court below will be left to be decided by the District Judge at the conclusion of the hearing before him after the proceedings are returned to him.

H.C.  
1948

I. J. DUCK-  
WORTH

v.

MISS D. I.  
DUCKWORTH

(a)

MA KHIN  
THI.

U TUN BYU,  
J.