Present: The Hon. Sir Joseph T. Hutchinson, Chief Justice, and Mr. Justice Middleton.

Sept. 5, 1910

In re the Last Will of TISSERA APPUHAMY.

TISSERA *et al. v.* GUNATILLEKA HAMINE.

D. C., Kalutara, 258.

Application for recall of probate—Summary procedure—Civil Procedure Code, ss. 536 and 537—Proof in solemn form and in common form.

Where an order *nisi* declaring a will proved has been made absolute and probate granted, an application for the recall of probate cannot be made in the summary manner indicated by section 537, Civil Procedure Code. The person attacking the will must bring an action for the purpose in the ordinary manner and must prove his case.

Our Legislature has not adopted the English practice of proof in common form and in solemn form.

The direction in section 537 that all applications for recall of probate shall be in a particular way applies only to the applications which are authorized by section 536.

THE facts are fully set out by the Chief Justice in his judgment as follows:—This is an appeal by the widow of the late P. S. Tissera against an order dated April 12, 1910, that the will of the said P. S. Tissera and M. Dona Simona Gunatilleke Hamine (the

[1] *(1895) 2 N. L. R. 86.*

[2] *(1865) 3 N. L. R. 79.*

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appellant) be declared a forgery, and that the probate issued in this case be recalled, unless sufficient cause be shown to the contrary on April 27.

Tissera died on October 19, 1900, leaving the appellant his widow. On January 22, 1901, she applied to the District Court for probate of his will, supporting her application by an affidavit sworn by her on January 17, 1901, in which she swore that he duly executed his last will jointly with her, dated January 23, 1900, and that his heirs were herself, one daughter by his first marriage, and six children by her; that all the children were minors; and that she had no reason to suppose that her application would be opposed by any one. She also filed another affidavit, sworn on January 17, 1901, by all the five attesting witnesses, proving the due execution of the will.

On January 22, 1901, an order *nisi* was made; it orders that the will be declared proved, unless any person shall on or before a certain date show sufficient cause to the contrary. The Court directed the order *nisi* to be advertised as required by section 532 of the Civil Procedure Code; this was done; and on April 4, 1901, it was ordered that the order *nisi* be made absolute, and probate of the will was issued to the appellant. She filed her inventory on June 28, 1901, and her final account on March 13, 1902, when the Court declared the estate closed. Then on March 21, 1910, the present respondent, who is the daughter of Tissera by his first wife, applied to the Court for an order *nisi* on the appellant to show cause why the probate should not be recalled and the will declared a forgery. In support of her application she filed an affidavit, sworn by her the same day, in which she stated that she was a minor at the time of commencement of the testamentary proceedings, and was not aware of them, and was under the appellant until she married about five months ago; and that she believes that the will was not the act and deed of her father, but was forged by the appellant. Upon the strength of this affidavit the District Court made the order now under appeal.

Sampayo, K.C., for the appellant.—It is only where probate of a last will has been issued on any order absolute in the first instance that the summary procedure indicated by section 537, Civil Procedure Code, may be availed of for the recall of the probate. In this case the District Judge ordered the order *nisi* to be advertised in the *Gazette*.

Seneviratna, for the respondents.—The application for probate did not name any respondents. The minors were not represented by guardians when application for probate was made. The advertising in the *Gazette* can in no sense be termed a notice to the minors. The probate must, therefore, be deemed to have been issued on an order absolute in the first instance. Under the English Law proof of a will may be in common form or in solemn form.

Where a will has been proved in common form, the executor may at any time within thirty years be compelled to prove it *per testes* in solemn form. Probate granted on an order absolute in the first instance is proof in common form. The present application by way of summary procedure for the recall of probate is therefore regular.

Cur. adv. vult.

September 5, 1910. HUTCHINSON C.J.—

His Lordship, after setting out the facts, continued as follows:—

The learned Judge says that the section of the Code relied on by the petitioner (the present respondent) contemplates a case such as this. The section appears from the journal entries to have been section 537, which, however, says nothing as to the cases in which an application for recall of probate can be made. The respondent's counsel at first contended before us that section 536 applied, and that the order granting probate was " an order absolute in the first instance, " which seems to me to be unarguable. There does not appear to be anything in the Code to expressly allow an application for recall of probate, except in the case mentioned at the end of section 536. And if there were, it would seem to be reasonable that the burden of proving that the probate ought to be recalled should be on the applicant. It could not be right to order that, if no further evidence is given, a will which has been duly proved nine years ago by the oaths of all the attesting witnesses and of the executor, and which has ever since been acted upon, shall be declared to be a forgery upon the mere allegation of one person, who gives no reason for her suspicion. There ought to be some means in a case like the present by which a person interested in the estate of the alleged testator may be allowed to prove that the will was a forgery. But it is a serious matter; the will was duly proved, and was acted upon for many years; debtors paid their debts to the executrix, and people dealt with her on the faith of the will which the Court had sanctioned; and the rights which innocent third parties thought they had acquired should not be taken from them without giving them a chance of being heard. The will cannot be declared a forgery on the mere allegation of suspicion; the applicant must prove that it is a forgery.

Our Legislature has not adopted the English practice of proof in common form and in solemn form. It has given full directions in chapter XXXVIII. as to the manner of proof, and this will was duly proved in the manner so directed. And when the Legislature enacted in section 536 that in certain cases (of which this is not one) a probate so granted can be recalled, I think it is implied that in no other case can it be recalled, and that the direction in section 537, that all applications for recall of probate shall be made in a

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particular way, applies only to the applications which are authorized by section 536. I think that the Legislature did not intend that in cases other than those mentioned in section 536 a grant or probate should be recalled in proceedings in the summary manner mentioned in section 537. The person attacking the will must bring an action for the purpose in the ordinary manner, and must prove his case.

The order of April 12 should be set aside, and the respondent's application to the District Court should be dismissed with costs in both Courts.

MIDDLETON J.—I entirely agree.

Appeal allowed.