Present : Lascelles C.J. and Wood Renton J.

1912.

TISSERA *et al. v.* GOONETILLEKE *et al.*

95—D. C. Kalutara, 722.

Last will—Forgery—Recall of probate—Is a grant of letters of administration necessary to enable heir to sue for his share?—Procedure for having will declared a forgery after the estate had been administered under the probate.

The first respondent took out probate of a last will and duly administered and closed the estate.

The appellant got the will declared to be a forgery in an independent action and then applied for letters of administration.

The District Judge dismissed the application on the grounds that if the administration under the probate were set aside the practical result would be that the estate would have to bear the expenses of administration twice over, and that the appellant could, if necessary, recover his share of the estate by regularly constituted actions.

Held—(1) That the grant of letters would not involve the estate in double stamp duty.

(2) That the appellant was entitled to sue for his share of the estate without obtaining letters.

WOOD RENTON J.—If the point has been *res integra* I should have been disposed to think that section 537 is not limited to the grounds of recall specified in section 536, but that it was intended to permit applications for the recall of probate or the revocation of letters of administration on any legal ground, whether arising under the Code of Civil Procedure or not, to be made in the testamentary case in the manner which it prescribes.

THE facts appear from the judgment.

Seneviratne, (with him *Hector Jayewardene*), for the petitioners appellants.

Bawa, K.C., for the respondents.

Cur. adv. vult.

August 1, 1912. WOOD RENTON J.—

The appellants are the daughter and the son-in-law of one Simon Tissera. The first, second, and third respondents are his wife and children. Simon Tissera died on October 19, 1900, The first respondent produced what purported to be his will, and took out probate in testamentary case No. 258 of the District Court of Kalutara. Under that probate she duly administered and closed the estate. The first appellant, who had been disinherited by the

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will, came forward in the testamentary case in 1910 and claimed to have the grant of probate recalled on the ground that the will was a forgery. The Supreme Court held in appeal (*13 N. L. R. 361*) that an application of this kind could not be made in the testamentary case; that section 537 of the Civil Procedure Code, which provides that applications for the recall of probate shall be made by petition in accordance with the rules for summary procedure, applies only to the grounds of recall indicated in section 536; and that the appellant's only remedy was to bring an independent action to have the will set aside. The appellant took this course. The will was declared a forgery, and she and her husband, the second appellant, apply now for letters of administration. Although the record of the proceedings in the action to set aside the will is not before us, the learned District Judge states that the decree declaring the will to be a forgery cancelled the probate. He has, however, dismissed the appellant's application on the grounds that the administration under the probate still holds good; that if it were set aside, the practical result would be that the estate would have to bear the expenses of administration twice over; and that the first appellant could, if necessary, recover her share of her father's estate by regularly constituted actions.

If the point had been *res integra* I should have been disposed to think that section 537 of the Civil Procedure Code is not limited to the grounds of recall specified in section 536, but that it was intended to permit applications for the recall of probate or the revocation of letters of administration on any legal ground, whether arising under the Code of Civil Procedure or not, to be made in the testamentary case in the manner which it prescribes. The provisions of the Code as to applications of summary procedure are sufficiently wide to secure as thorough an investigation of applications for the recall of probate or the revocation of letters of administration on the ground of forgery as could be obtained by an independent action, and the former remedy is obviously much more convenient than the latter. If it should ever become necessary to raise the question, I reserve to myself the right to consider whether the interpretation of section 537 of the Civil Procedure Code which I have just suggested is not the correct one. The decision of the Supreme Court in the earlier stages of the present case, is however, not in issue now. On the whole, I think that the learned District Judge has come to a right conclusion as regards the appellants' application. He is not, I think, correct in holding that the grant of letters of administration to the appellants would involve the estate in double stamp duty. That objection is obviated by the provisions of section 71 of Ordinance No. 22 of 1909. The appellants have in no way traversed the allegation of the respondents and the statement of the District Judge that the first respondent has administered the estate under the probate and closed her accounts. They have not shown that

any useful purpose would be served by our setting aside all the proceedings under the probate, and, indeed, their counsel stated that the main object of their application was to obtain letters of administration to prevent themselves from being met with the objection that they could not sue to recover any property belonging to the intestate in view of the provisions of section 547 of the Civil Procedure Code. In my opinion no such objection could be taken. In the present case " probate " has been " issued " within the meaning of that section, the appellant's status as being entitled to share in her father's estate has been declared, and there is nothing to prevent her from suing to recover whatever share is due to her in the ordinary way. I would dismiss the appeal with costs.

LASCELLES C.J.—I entirely agree.

Appeal dismissed.