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co-accused, who has been tried together with the juvenile affected by the order, has been sentenced to imprisonment for a term exceeding four years. In such a case the appeal will lie to this Court under the provisions of proviso (*b*) to section 408 of the Code of Criminal Procedure.

This appeal will therefore be transferred to the Court of Session of the Tharrawaddy District for disposal, and the Sessions Judge is directed to accept the appeal as having been instituted in his Court on the date on which the memorandum of appeal was presented in this Court.

APPELLATE CIVIL.

Before Sir Arthur Page, Kt., Chief Justice, and Mr. Justice Mya Bu.

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Jan. 9.

A. B. NEOGI

v.

B. B. NEOGI AND OTHERS.*

Will—Probate obtained without issue of citations to persons entitled—Revocation of probate—Genuineness of will disputed—Burden of proof on person propounding the will—Averment of will being a forgery—Onus of proof—Succession Act (XXXIX of 1925), s. 236.

Where probate of a will has been granted without citing parties to whom notice ought to have been given, and one of such persons applies to the Court to have the probate revoked on that ground the probate will be revoked. The burden of proving the genuineness of the will lies upon the person who propounds the will. The *onus* is not on a person entitled to be cited to prove that the will was a forgery.

Ramanandi Kuer v. *Kalawati Kuer*, 55 I.A. 18—*followed.*

Bhattacharyya for the appellant. The propounder of a will must prove that the document in respect of which he is applying for probate is genuine. No

* Civil First Appeal No. 100 of 1935 from the order of this Court on the Original Side in Civil Misc. No. 4 of 1935.

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citations were issued when the respondent obtained probate of this will. In the case of *In the matter of the Petition of Hurro Lall Shaha* (1) it was held that when a Hindu is applying for probate special citations should be issued to all persons interested in the will. The proceedings were defective for this reason. Secondly, the trial Court erred in putting the onus of proving that the will was a forgery on the appellant.

[PAGE, C.J. The decision in this case is covered by *Ramanandi Kuer* v. *Kalawati Kuer* (2).]

Surridge for the respondent. The burden of proof was correctly placed upon the appellant, because he is the person now seeking to impugn the genuineness of the will. The will has already been proved in the probate proceedings in common form.

PAGE, C.J.—In this case an application was filed by the appellant for the revocation of probate granted to the 1st respondent of the will of Hari Charan Neogi who died at Calcutta on the 8th June, 1926. Hari Charan Neogi left him surviving a widow, one adult son, six minor sons and two minor daughters. On the 8th February, 1927, the 1st respondent Bibhuti Bhushan Neogi, who is the eldest son of Hari Charan Neogi, applied to the High Court at Rangoon for a grant of probate to be made to him, and probate was granted to the 1st respondent on the 8th March, 1927. It is common ground that neither the widow nor any of the minor children of Hari Charan Neogi were cited in connection with this application for probate. The appellant at all material times was a student, and he alleged that the small monthly

(1) I.L.R. 8 Cal. 570. (2) 55 I.A. 18.

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allowance which he received from the 1st respondent, who was the *kurta* of the family, was not forwarded to him in November, 1934, as the result of which he came to know that the 1st respondent was managing the estate not as *kurta* of the family but as an executor of an alleged will of Hari Charan Neogi executed on the 1st February, 1926. He then applied for an opportunity of inspecting the will, and after perusing it both he and one of the alleged attesting witnesses of the will stated that the signature on the will was not that of Hari Charan Neogi nor was the signature of that attesting witness his signature. Thereupon the present application to revoke the probate granted to the 1st respondent was filed.

Two issues arose, (1) whether there was just cause for the revocation of the probate upon the ground that "the proceedings to obtain the grant were defective in substance" by reason of the fact that neither the widow nor any of the minor children were cited, and (2) whether the will was a forgery. At the trial Leach J. observed :

> "When a will is proved in common form, as this will was, it is not necessary that the Court should order citations to issue, and I consider that the fact that no citations were issued in this case does not in itself constitute a ground for revoking the probate which had been granted. The question at issue is whether the will is a genuine will or not. If the petitioner proves to the satisfaction of the Court that the will was not executed by his father, then he is entitled to the order which he seeks. The burden of proving that the will is a forgery lies heavily on him."

In my opinion, with all due respect, in so holding the learned trial Judge misdirected himself in law. The exact questions which arose in the present case were raised and determined by the Judicial Committee of the Privy Council in *Ramanandi*

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Kuer v. *Kalawati Kuer* (1) which was not cited to the learned trial Judge. In that case Lord Sinha delivering the judgment of the Board in connection with section 50 of the Probate and Administration Act of 1881, which for the purpose in hand is identical in its terms with section 263 of the Indian Succession Act, observed :

" There has been some divergence of opinion in the Courts in India as regards the law and procedure governing cases for revocation of probate, due in part to the introduction into Indian practice of the difference in English law between the grant of probate in common form and probate in solemn form. It is worse than unprofitable to consider how far, if it all, that distinction has been incorporated into Indian law. It has often been pointed out by this Board that where there is a positive enactment of the Indian Legislature the proper course is to examine the language of that statute and to ascertain its proper meaning, uninfluenced by any consideration derived from the previous state of the law—or of the English law upon which it may be founded.

These observations apply with peculiar force to testamentary cases which are governed by the Indian Succession Act of 1865 or the Probate and Administration Act of 1881 (both now repealed by the Succession Act of 1925). As Sir A. Wilson observed, in delivering the judgment of this Board in the case of *Kurrutulain Bahadur* v. *Peara Saheb* (2), these Acts while to a large extent embodying the rules of English law on the subject yet departed in many particulars from those rules ; and in the progress of the development of the law and practice in testamentary cases, the ecclesiastical origin of this jurisdiction of the Courts in England has been completely discarded ; and the Indian Legislature has gradually evolved an independent system of its own, largely suggested, no doubt, by English law, but also differing much from that law and purporting to be a self-contained system . . . The relevant illustrations to the section are : ' (*b*) The grant was made without citing parties who ought to have been cited. (*c*) The will of which probate was obtained was forged or revoked.'

It is apparent that the plaintiff in this case set up both these grounds for revocation. The first issue as framed comes under illustration (*b*) and the second issue under illustration (*c*).

(1) (1927) 55 I.A. 18. (2) 52 I.A. 244.

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If these issues were tried separately and the plaintiff succeeded on the first issue, that in itself would be sufficient for revoking the probate ; but it would still be open to the defendant to prove the will and, if she succeeded, the probate would stand.

If on the other hand the plaintiff failed on the first issue, that would not preclude her from proceeding to prove her second ground—namely, that the will was forged, and the probate would stand or fall, according to the result."

His Lordship added :

"With regard to the second issue as to whether the will was forged or genuine, the onus of proof depends upon the finding on the first issue. If citations were not served, *i.e.*, properly and effectively served, on Thakurani, the daughter is entitled to ask that probate which was obtained in her absence should be recalled and the executor or his representative called upon to prove the will in the present proceeding. In other words, the onus of proving that the will was genuine is in view of their Lordships' conclusion upon the first issue upon the defendant."

At the trial Leach J. came to the conclusion that the appellant had failed to prove that the will was not a genuine one. The learned Judge disbelieved the evidence adduced on behalf of the appellant, and added that

"no reason has been advanced why I should reject the affidavits of the brother-in-law and of the other attesting witness."

Now, the only evidence which had been tendered upon the second issue—namely, whether the will was genuine or not, on which issue the burden lay upon the respondent, were these two affidavits which had been sworn in the proceedings filed for the purpose of obtaining an issue of probate. It is unnecessary for the purpose of disposing of this appeal to determine whether such affidavits were admissible evidence of the facts to which they relate in the present proceedings. That is a question which may have to be determined hereafter. But,

in our opinion, it is impossible that the finding of the learned trial Judge upon the second issue should be allowed to stand having regard to the fact that upon that issue he misdirected himself as to where the burden of proof lay. It may be, if the onus had been placed upon the respondent, as we think it ought to have been, that the learned trial Judge would have revoked the grant of probate without calling upon the appellant to argue or prove his case. In our opinion the second issue must be retried upon the footing that in the events that have happened the onus upon that issue is on the persons propounding the will, and that it is for them to prove that the will is a genuine one, and not for the appellant to prove that the will is a forgery.

The result is that the appeal will be allowed, the order from which the appeal is brought set aside, the grant of probate revoked, and the proceedings returned to the Original Side in order that it may be determined (by some learned Judge other than Leach J.) whether the will was the genuine will of Hari Charan Neogi, the onus upon that issue of satisfying the Court of its genuineness being upon those propounding the will. If in the event it is decided that the alleged will is the will of Hari Charan Neogi the grant of probate will stand. At the rehearing the parties will be at liberty to adduce such evidence as they may be advised. The appellant is entitled to his costs of the appeal from the contesting respondents, advocate's fee five gold mohurs. The costs in the trial Court both of the previous hearing and of the rehearing will be assessed by the trial Court and will abide the event.

MYA BU, J.—I agree.