Presiding Officer to determine the objections to voters within the meaning of rule 42. Rule 1(A) provides that all disputes arising under these rules other than objections under rules 15 and 42 shall be decided by the Magistrate and his decision shall be final. So, according to this rule, any objection decided by the Presiding Officer under rule 42 is exempted from the rule which makes all other decisions of the Magistrate final and not liable to be challenged in a Civil Court. Objections which were determined, as it appears clear from paragraph 5 of the plaint, do come under rule 42 and are therefore cognizable by the Civil Courts. We think, in this view, the decision of the Lower Court is correct and that the appeal must, accordingly, be dismissed with costs.

A. C. R. C. *Appeal dismissed.*

TESTAMENTARY JURISDICTION.

Before Costello J.

SANTASILA DASI

v.

NARENDRA NATH PAL.*

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March 27.

Probate—Holograph will—Application by widow executrix—Caveat by testator's brother—Allegations of testamentary incapacity, undue influence and forgery of will in caveator's affidavit—Notice under Chapter XXXV, rule 29 of the Rules of Original Side—Liability for costs.

Rule 29 of Chapter XXXV of the Rules of the High Court, Original Side, is a reproduction of the English rule 18 of Order XXI of the Rules of the Supreme Court in England. A notice such as is contemplated by the rule must be served with the defence.

It is to be observed that the rule contains the word "merely" and therefore the last paragraph of the affidavit of the caveator in the present case is not sufficient to bring the matter within the terms of the rule. A plea of undue influence or fraud is inconsistent with notice.

Ireland v. *Rendall* (1), *Cleare* v. *Cleare* (2) and *Harrington* v. *Bowyer* (3) referred to.

* Testamentary suit No. 15 of 1927.

(1) (1866) 1 P. & D. 194. (2) (1869) 1 P. & D. 655.

(3) (1871) 2 P. & D. 264.

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If a caveator merely requires that the will be proved in solemn form he must not while giving the notice prescribed by the rule set up a defence of undue influence or fraud or any matter of that character.

In this particular case, even if the matter had fallen within the terms of the rule it would not have followed that the caveator would be entitled to escape liability for costs.

APPLICATION for probate.

One Surendra Nath Pal who died on the 30th April, 1927, left a will dated 15th July, 1923, whereby after making certain dispositions of his property he left the whole of the residue to his widow. The widow being the executrix applied for probate of the will, whereon the deceased's brother Narendra Nath Pal entered a caveat. The will which had been written in the handwriting of the testator himself was attested by two independent and responsible persons as witnesses. The brother besides entering a caveat filed an affidavit alleging that the deceased at the time he made the will and up to the time of his death was a man of weak intellect with very imperfect knowledge of English, that the will was procured by the widow by undue influence and that the will was not genuine but was in effect a forgery. In the last paragraph of his affidavit the caveator prayed that the will should be proved in solemn form and for liberty to cross-examine the witnesses produced in support of the will. At the hearing, his counsel stated that he did not intend to rely on any of the allegations made in his affidavit but that he merely required the will to be proved in solemn form. The Honourable Court ordered issue of probate to the executrix and made the caveator liable for all the costs of the proceedings.

Mr. S. C. Bose, for the propounder.

Mr. D. N. Basu (with him *Mr. K. C. Chakravarti*), for the caveator.

COSTELLO J. This is an application for the grant of probate of the will of one Surendra Nath Pal, who died on the 30th April, 1927. The will is dated the 15th July, 1923, and was therefore made more than four years before the death of the testator.

By that will the testator made certain dispositions of his property and he left the whole of the residue of it to his widow whom he appointed to be the executrix of that will. When the widow applied for probate of the will in the ordinary course a caveat was entered by a brother of the deceased (named Narendra Nath Pal) who filed an affidavit alleging that his brother was at the time he made the will and up to the time of his death a man of weak intellect and had a very imperfect knowledge of English. He also alleged in effect in his affidavit, that the will was procured by the undue influence of the widow. But there was a still more serious allegation in the affidavit in that the caveator contended, or at any rate, stated that the will was not genuine, and in effect he said that it was a forgery.

In the last paragraph of his affidavit he says: "I therefore insist upon the said will being proved "in solemn form and that I be given the liberty to "cross-examine the witnesses produced in support of "the will".

When the case was called on, the learned counsel who appeared on behalf of the caveator made it clear that he did not intend to rely on any of the matters set out in the affidavit but that he merely required the plaintiff in this suit to prove the will in solemn form.

If ever there was a case where a will might be said to have been executed under thoroughly satisfactory conditions—in my opinion it was this case. The will itself is a holograph will, *i.e.*, written entirely by the testator in his own handwriting. That fact of itself is a very strong indication that the testator was fully cognizant of what he was doing and that what he did was an act of his own volition.

If the caveator had taken the elementary precaution of inspecting the will before he recklessly began making charges with regard to his brother's state of mind he must have known perfectly that the will was actually in the handwriting of the brother. More than that, not only did the testator write out the will in his own handwriting but he took the sensible and

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reasonable course of getting entirely independent and responsible persons to be the witnesses to his will. Apparently the caveator thinks it is a matter for regret and a fact which ought to cast some doubt on the authenticity of the will that the caveator selected such independent and responsible persons to be witnesses to the will . . . . . .

I should have thought every reasonably minded person would have seen how much more satisfactory it is to have independent persons to be witnesses to a will. Had the testator adopted the course which the caveator suggests he should have taken, namely, to call in his own relations such as the caveator himself or his sons to witness the will, then it was obvious that some other branch of the family would have immediately alleged that those witnesses had exercised an improper influence on the testator.

The attesting witnesses, who were called, testified that this will is in the handwriting of the testator and that it was duly executed by the testator in the presence of the various gentlemen whose names appear as witnesses.

It is quite clear that all of those witnesses to the will are responsible persons. There is not a shadow of reason, not a scintilla of evidence for suggesting or for ever having suggested that this testator was not fully cognizant of what he was doing or that this will was not properly executed. A more baseless intervention by a caveator, a more unwarrantable intervention by the caveator than the intervention in this case is to my mind impossible to imagine. There was absolutely no shadow of justification at all for the entering of this caveat.

Now it is argued that the effect of this affidavit is to bring the matter within the terms of rule 29 of Chapter 35 of the Rules of this Court. I have had occasion to construe that rule quite recently (*in Re the goods of Cohen ; Cursinder* v. *Cohen*, Suit No. 4 of 1928) and I pointed out that that rule is a reproduction of the English Rule 18 of Order XXI of the Rules of the Supreme Court in England.

It has been held that under the English rule that a notice such as is contemplated by the rule must be served with the defence and rule 29 of the rules of this Court provides "that a party opposing a will may "by *his affidavit* give notice that he merely insists "upon the will being proved in solemn form". It is to be observed that the rule contains the word "merely" and therefore I do not think that the last paragraph of the affidavit in the present case is sufficient to bring the matter within the terms of Rule 29, particularly having regard to the fact that it has been laid down by a very high authority in England that a plea of undue influence or fraud is inconsistent with notice. I refer to the case of *Ireland* v. *Rendall* (1), also to *Cleare* v. *Cleare* (2), reported in the same volume at p. 655, but especially to the case of *Harrington* v. *Bowyer* (3), where at page 265 Lord Penzance said, referring to the case of *Cleare* v. *Cleare* (2), "That "case establishes the proposition that where a party "setting up a will has to prove affirmatively a fact "not merely to negative a charge made by his oppo- "nent, where a proof of such fact forms part of the "burden, which the party propounding the will takes "upon himself, the other party may cross-examine the "witnesses upon such matter without liability for "costs if the proper notice has been given. The "question is, whether under the circumstances of this "case, it is proper that I should exercise my discre- "tion as to costs in favour of the defendant. I think "the court should be consistent in exercising its "discretion; and as it has been already decided in "*Ireland* v. *Rendall* (1), that under similar circum- "stances a party pleading undue influence is liable for "costs, I shall follow that decision."

These cases show quite clearly that if a caveator merely intends to require the executrix to prove the will in solemn form he must not at the same time set up a defence of undue influence or fraud or any matter of that character. Therefore I hold that in this

(1) (1866) 1 P. & D. 194. (2) (1869) 1 P. & D. 655.
(3) (1871) 2 P. & D. 264.

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present case notice was not given in such a way as to bring the matter within the terms of rule 29. But I desire to add that in this particular case the circumstances are such that in any event it would be impossible for the Court to do otherwise than come to the opinion that there was no reasonable ground at all for opposing the will and, therefore, even if the matter had fallen within the terms of rule 29, it would not have followed that the caveator would be entitled to escape liability for costs.

I think it is eminently desirable that persons should be discouraged from recklessly launching probate suits or causing probate suits to be brought especially when there is no other foundation whatsoever for the charges which they recklessly make other than the fact that they feel sore or disappointed because they do not happen to be named as beneficiaries in the will in question. This in my opinion is essentially a case where a caveator should pay the whole of the costs of the executrix and I make an order accordingly.

I pronounce in favour of the will and direct that grant of probate do issue.

Attorneys for the applicant : *B. N. Basu & Co.*

Attorney for the caveator : *S. N. Chunder.*

R. K. C.