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an exclusion that must be proved, but an exclusion known to the plaintiff. This is distinctly laid down in *Krishnabai* v. *Khangowda*[1]. See also *Hari* v. *Maruti*[2] and *Dinkar* v. *Bhikaji*[3].

We reverse the decree of the lower appellate Court, and remand the appeal for a fresh trial. Costs to abide the result.

Decree reversed.

(1) I. L. R., 18 Bom., at p. 202. (2) I. L. R., 6 Bom., 741.
(3) I. L. R., 11 Bom., 365.

TESTAMENTARY JURISDICTION.

Before Mr. Justice Strachey.

CHOTALAL CHUNILAL, PLAINTIFF, *v.* BAI KABUBAI, DEFENDANT.*

1897. December 9.

Practice—Procedure—Contentious matter—Duty of Registrar—When a petition for probate or letters of administration becomes contentious—Non-appearance of caveator—Form of order.

So long as a petition for probate or letters of administration is "non-contentious" it is to be dealt with by the Registrar. As soon as it becomes "contentious" it is to be treated as a plaint in a suit, and the suit is governed, so far as practicable, by the procedure prescribed by the Civil Procedure Code.

The petition becomes contentious not upon the entry of a caveat, but upon the filing of the affidavit in support of the caveat.

Where, in consequence of the filing of the affidavit, the matter becomes a suit, the whole suit must be disposed of by the decree of the Court. Where, therefore, at the hearing of the suit the defendant does not appear in support of the caveat, it is not a correct procedure for the Court merely to dismiss the caveat, leaving it to the Registrar to dispose of the petition as a non-contentious matter. The proper form of order is that the caveat be dismissed and that probate or letters of administration issue, provided that the Court is satisfied that the papers are in order.

THE plaintiff presented a petition praying for probate of the will of his father Chunilal Motilal.

The defendant filed a caveat against probate being granted to the plaintiff.

* Suit No. 27 of 1897.

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The matter thereupon, in accordance with the practice, became a suit, was duly numbered as such, and was included in the list of testamentary cases "for hearing".

No affidavit, however, was filed in support of the caveat, and it now appeared on the day's list "for dismissal under Rule 42(1)" of the High Court Rules.

Macleod appeared for the petitioner:—This matter has been improperly set down for dismissal under Rule 42. That rule does not apply. The caveatrix has filed no affidavit, and I, therefore, ask that her caveat be dismissed, and probate be granted by the Court to the petitioner. There is now no opposition to his petition.

[STRACHEY, J.:—I am informed by the Registrar that in such a case as this, *i. e.*, where no affidavit has been filed in support of the caveat, the practice is for the Court merely to dismiss the caveat, and for the Registrar to grant probate.]

If so, that practice is wrong. The matter has become a suit, and the Court must deal with it. It is for the Court, and not the Registrar, either to grant or refuse the relief prayed for. The defendant (*i. e.*, the caveatrix) fails to support her case by making the necessary affidavit. Why should that fact make it necessary for the petitioner to present a fresh application to the Registrar instead of having his case decided now by the Court? The matter was some time ago on the board for hearing. If it had been reached, and had been called on for hearing, the Court would have dealt with it and have granted probate. It was not reached, and not called on, and now improperly appears on the list "for dismissal." I submit that it is the caveat that must be dismissed. The petition of the plaintiff for probate should be granted. His petition has become a suit (Succession Act, X of 1865, section 261; Probate and Administration Act, V of 1881, section 83). A suit is not dismissed because no written state-

(1) 42. All writs of summons to appear and answer shall show in the margin the date of the filing of the plaint, and of any order to amend the summons, and shall be delivered to the Sheriff—for service within the local limits of the jurisdiction of this Court—or to the Prothonotary for transmission elsewhere, within twenty-one days from the filing of the plaint, or the date of such amendment; otherwise the suit will be set down on the Trial Board to be dismissed unless otherwise ordered.

ment is filed. This petition ought not to be dismissed because no caveat is filed.

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There was no appearance for the caveatrix. The Court dismissed the caveat, and reserved judgment on the point whether the Court or the Registrar should grant probate. Subsequently the following judgment was delivered :—

STRACHEY, J. :—I have to decide a question of practice in the Testamentary and Intestate Jurisdiction of this Court which has arisen lately in several cases, and which I have taken time to consider. It relates to the course which should be adopted where a caveator fails to file an affidavit in support of the caveat within eight days after its entry under Rule 183 of the Rules of the Supreme Court (Ecclesiastical) which is still in force.

In one of the cases in which the question has arisen, the suit was according to the usual practice put up for dismissal of the caveat for non-compliance with this rule, and Mr. Macleod, who appeared for the petitioner, asked me not only to dismiss the caveat, but to direct probate to issue to his client. The Registrar, however, informed me that the practice was for the Court to confine itself to dismissing the caveat, and for the case upon such dismissal to be treated as a non-contentious matter in which under Rule 3 of the Testamentary and Intestate Rules made on the 1st December, 1882, the grant of probate is made, not by the Judge, but by the Registrar. On the other hand, Mr. Macleod contended that the Court being seized of the case, the more reasonable and expeditious course would be to avoid taking two steps where one was sufficient, and that where a petition for probate had become contentious by the entry of a caveat, and by the proceedings being converted into a suit, it should be completely disposed of by the decree of the Court.

The Registrar has kindly furnished me with a note, from which I gather that the course adopted in most of the few cases on the subject of which there is any record has been to dismiss the caveat, leaving the grant of probate to be made by the Registrar. Only six cases have been found, and in three the order was simply "caveat dismissed with costs." In one the Judge added to these words "application to be dealt with by the Registrar." In another the Judge on the consent of the defendant decreed

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administration to the guardian of an infant plaintiff; and in the sixth the order was "caveat dismissed with costs. Probate to issue to both plaintiffs."

There is thus nothing that can be called a long, continuous and uniform practice on the subject. It is, however, desirable that a uniform practice should be adopted. The question is what practice would be most in keeping with the Indian Succession Act, 1865, the Probate and Administration Act, 1881, the Code of Civil Procedure (Act XIV of 1882) and, so far as applicable, the rules of practice and procedure of the Probate Division of the High Court in England. The effect of Rule 8 of the Rules of the 1st December, 1882, of sections 238 and 261 of the Indian Succession Act, and sections 55 and 83 of the Probate and Administration Act is that, so long as a petition for probate or letters of administration is "non-contentious," it is to be dealt with by the Registrar: as soon as it becomes "contentious" it is to be treated as the plaint in a suit, and the suit is governed as far as practicable by the procedure prescribed by the Civil Procedure Code. It appears to me that the existing practice does not conform to this distinction as accurately as it might. What it does is to treat the filing of a caveat as the point at which a petition for probate or letters of administration becomes contentious. Immediately upon the caveat being filed, a notice is issued by the Registrar to the "attorney for the plaintiff" in which the proceedings are described and numbered as a suit between the petitioner as plaintiff and the caveator as defendant: this notice states the filing of the caveat, and that "the petition became a suit" upon a date specified, and that "you are required to apply for, and deposit for service a summons within twenty-one days from such last mentioned date under Rule 64 of the High Court Rules"—that is, Rule 42 of the Rules as now revised. The next step where an affidavit is filed in support of the caveat, is that the Registrar gives notice of the fact to the attorney for the plaintiff. If the affidavit is filed within eight days after the entry of the caveat, it becomes the written statement in the suit. If no affidavit is filed within eight days, the suit is put on the board for dismissal of the caveat, and the petition is dealt with by the Registrar in the manner already described. It appears to me that the more

correct procedure would be to treat, not the entry of a caveat, but the filing, within eight days of such entry, of an affidavit in support of the caveat, as the point at which the petition becomes contentious. The form of caveat prescribed by section 252 of the Succession Act, and section 71 of the Probate and Administration Act, and the judgments of the Court of Appeal in *Moran* v. *Place*[1] and *Salter* v. *Salter*[2] show that the entry of a caveat is not necessarily a contentious proceeding, and does not necessarily imply any intention to oppose the grant: it is merely a request that nothing be done in the matter of the estate of A. B., deceased, without notice to the caveator. The caveator may only want time to make enquiries and obtain information. In the cases just mentioned, it was held that in England the contention or litigation commences not with the caveat, nor with the warning of the caveat, nor with the caveator's appearance to the warning, but with the writ of summons which the person warning the caveat and intending to propound the will must then issue, and by which under section 100 of the Judicature Act an action is commenced. In India, though there is a caveat there is no warning, no appearance to the warning, and no writ of summons commencing an action; but a suit is there commenced by the filing of a plaint, and the question is at what point the petition for probate or letters of administration should be treated as having become the plaint in a suit. I think that the point at which this should be done is the filing of the affidavit in support of the caveat, because under the Rules the affidavit must state "the right and interest of the caveator, and the grounds of objection to the application" and that does imply opposition to the grant. Up to the filing of the affidavit, nothing need be done by the Registrar. If within eight days from the entry of the caveat no affidavit is filed, the caveat simply drops, the matter never becomes contentious, and the Registrar can proceed to grant probate or administration as if no caveat had been entered. That is, in my opinion, implied by the Rule which provides that, unless the affidavit is filed within eight days, "such caveat shall not prevent the granting of probate or letters of administration." If within the eight days an affidavit is filed,

(1) (1896) P., 214. (2) (1896) P., 291.

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then, but not before, notice should be given to the petitioner that the petition has become the plaint in a suit, and that he must proceed under Rule 42. This course will prevent any such question as that raised by Mr. Macleod from arising in the future; for until the affidavit is filed, there will be no suit, and if it is not filed in time, the case will not be put on the board for dismissal of the caveat, but the Registrar will ignore the caveat and dispose of the petition.

Where, in consequence of the filing of the affidavit, the matter becomes a suit, the whole suit must, in my opinion, be disposed of by the decree of the Court. In England there is a machinery by which, even after a writ of summons has issued, an order may be obtained for discontinuance of contentious proceedings, and for the grant of probate in common form. In India there is no such machinery, and a probate matter which has once become a suit can only be disposed of like other suits. A relief prayed for in the plaint can only be granted by the Court, and in a petition for probate or letters of administration the relief prayed for is that probate or administration may be granted. It follows that where at the hearing of the suit the defendant does not appear in support of the caveat, it is not, in my [illegible] a correct procedure for the Court merely to dismiss the [illegible]at, leaving it to the Registrar to dispose of the petition as [illegible]n-contentious matter. In such a case I think that the proper form of order is that the caveat be dismissed, and that probate or letters of administration issue, provided that the Court is satisfied that the papers are in order, and, in the case of probate, of the due execution of the will. In a case decided in 1860, Sausse, C. J., directed probate to issue out of the office, "if there is no objection on the part of the officer," and I think that will be the most convenient form of order, except where the Registrar has already minuted.

In the case in which Mr. Macleod appears, and which in accordance with the existing practice has been treated as a suit, I have already dismissed the caveat, and I now direct that probate issue to the plaintiff subject to any objection on the part of the Registrar.

Order that probate issue.