

specific case of a failure occasioned by the provisions of sec. 13 of the *Wills Act* 1915. In our view, however, it is unnecessary here to determine this further contention.

F.C.

1923

In re BOURKE.*Weigall, A.-J.*

Upon the whole, we think that the application on behalf of Mary O'Neil for revocation of the probate of 11th October 1921 was not, as matter of law, justifiable, and that this appeal should be allowed, and that the order *nisi* should be discharged.

On the information before us it appears that the appellants individually have each of them but little to gain from the mischance which has deprived Mary O'Neil of the legacy which the testator bequeathed to her. That they should nevertheless have thought fit to insist upon their strict rights, and to vigorously oppose and to appeal from a judgment which sought to remedy such mischance, is somewhat surprising. We do not, however, see our way to allow to Mary O'Neil any of the costs incurred by her either on the order *nisi* or on this appeal in asserting a position which, as matter of law, we hold to be unsustainable. But we order that the costs as between solicitor and client of all parties other than Mary O'Neil of the order *nisi* now discharged and of this appeal be paid out of the testator's estate.

Appeal allowed ; order nisi discharged.

Solicitors for the appellant : *Braham & Pirani.*

Solicitors for the respondents : *Dillon, Nichols & Stark ; Pearson & Mann.*

W. S. S.

ADDISON v. ADDISON and HOWARD.

MACFARLAN
J.

1923

August 20, 27.

Divorce—Costs—Wife's costs—Adultery—Costs of respondent wife refused as against husband—Conduct conducing to adultery—Attack by co-respondent on respondent's general character—Respondent not calling evidence—Liability of co-respondent for respondent's costs—Marriage Act 1915 (No. 2691), s. 149.

In a suit by the husband for divorce on the ground of the wife's adultery, the wife in her evidence merely denied the charge, and at the trial appeared by counsel, who, subject to objection, cross-examined the co-respondent and addressed the jury, but she did not give or call evidence, and the jury found

MACFARLAN, the charge proved. The Court refused to order the husband to pay the wife's costs, on the ground that there was no reasonable defence, and that her proctor knew, or ought to have known, this.

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The co-respondent by his answer denied the adultery, pleaded conduct conducing to adultery, and gave particulars under his answer which indicated an intention of adducing evidence involving an attack on the wife's general character. At the trial the co-respondent adduced such evidence, but it was not accepted by the jury.

On an application by the wife for an order, in effect, that the co-respondent pay her costs of suit,

Held, that, assuming that the Court has power to grant such costs, yet in the circumstances of the present case an order should not be made.

MOTION.

On the hearing of a petition for divorce, brought by Alexander Gollan Addison against Sybil Marie Addison, on the ground of her adultery with the co-respondent, Walter Howard, the respondent was found guilty of the adultery alleged, and the petitioner was awarded 500*l.* damages against the co-respondent.

The respondent applied for her costs against the petitioner. This application was refused, but liberty was reserved to the respondent to apply for her costs against the co-respondent.

By her answer the respondent did not admit adultery, but at the trial she did not by her counsel or otherwise suggest that she was not a guilty party, and she did not give or call evidence. Her counsel, subject to objection, cross-examined the co-respondent and addressed the jury, but otherwise took no part in the trial.

The co-respondent, by his answer, denied the adultery alleged, but he subsequently admitted it in his evidence. He raised a plea of conduct on the part of the petitioner conducing to the adultery, which plea he supported by particulars indicating that he intended to adduce evidence involving an attack on the respondent's general character. The plea of conduct conducing to adultery was not raised by the respondent.

At the trial the co-respondent adduced evidence in support of the plea of conduct conducing to adultery, which did touch the general character of the respondent, but which was not accepted by the jury.

The respondent now applied, on notice of motion, for an order that her costs be taxed, and when taxed, be paid by the co-respondent to the petitioner's solicitor, and if recovered by him be paid to the respondent's solicitor.

Keating and *Basil Murphy*, for the respondent, in support of the motion. MACFARLAN,
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Lewis for the co-respondent. 1923

Dixon, K.C., L. S. Woolf, and Wiseman for the petitioner. ADDISON
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Cur. adv. vult.

MACFARLAN, J. This is an application on behalf of the respondent wife for an order that her costs be taxed as against the co-respondent, and, if paid to the petitioning husband, be paid by him to the wife's solicitors. The application was based on the authority of *Townson v. Townson and Bucknall* (a) and two cases in New South Wales following this decision. These are the cases of *Cobley v. Cobley and Mullampy* (1911) and *Bowman v. Bowman and Therkall* (1911), unreported in the Law Reports, but referred to in *Mackenzie on Divorce*, at p. 118.

I have already refused to make an order that the petitioning husband should pay the wife's costs, as I considered that there was no reasonable ground of defence, and that that must have been known to her advisers early in the suit. I have felt some difficulty in understanding the grounds of the orders in *Townson's* and *Cobley's Cases*; but in *Cobley's Case*, at any rate, it does not appear from the scanty report available that there was not a reasonable ground of defence. The wife at some stage of the proceedings withdrew from the suit, but it does not appear at what stage that was done, or that her solicitor should have known that she had no defence. If that did appear, I am unable to understand upon what rational principle I could order the co-respondent to pay to the respondent her costs, which I have found she should not recover from the husband, because they were unnecessarily incurred. There may be cases in which that may be so; but I am unable to bring to mind any such case. There may be cases where the respondent and co-respondent in effect join in opposing the decree. That is not this case. Here the wife took no part in the proceedings, and from the beginning it was made clear that she intended to take no part.

With every desire to visit upon the co-respondent punishment for the way in which he conducted his defence, I do not think I should

(a) [1898] 78 L.T. 54.

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be acting in accordance with any logical principle in ordering him to pay costs unnecessarily incurred. The ordinary rule is that, where a respondent wife has defended a suit without any ground of defence, and her solicitor knew, or should have known, this to be so, she should not be awarded costs. In order to take this case out of that general rule, it is relied upon that early in the proceedings it appeared, from the particulars of the answer of the co-respondent, that the wife's reputation would be further attacked. That may have made it desirable, from her point of view, that she should be represented, but I do not think I should be right if I held that the fact that a woman's character is to be attacked in any proceedings is a ground for her appearing and recovering costs against one of the parties. I treat her rather as a third party, or, better, as an outsider, who, if she chooses to appear by leave and succeeds in being heard, does so at her own cost. In this case the wife took no part in the hearing, except that her counsel, subject to objection, cross-examined the co-respondent and also addressed the jury, but she did not take the step which was open to her of giving evidence or of calling other evidence. I think, therefore, that I should not give costs here, but I do not say that there can be no case in which such an order should be made. In all the circumstances of this case I refuse to make the order asked for.

Motion dismissed.

Solicitors for the petitioner : *Williams & Matthews.*

Solicitor for the respondent : *Eustace Murphy.*

Solicitors for the co-respondent : *Derham, Robertson & Derham.*

H. D. W.