

stop the running of the statutory period of desertion, which had begun already. There is no necessity in such a case for the insertion of that provision, as the President was careful to point out in *Dodd v. Dodd* (1); and in my view, and I think in his view also, it is appropriate only in cases in which the evidence shews the Court of summary jurisdiction that the wife's safety is in jeopardy. If, on the other hand, the husband has been guilty of cruelty, and therefore this non-cohabitation provision is properly included in the order, the wife, if the husband commits adultery, can rely upon that cruelty coupled with the adultery in proceedings instituted to obtain a divorce.

In my opinion this appeal should be dismissed.

Appeal dismissed.

Solicitor for petitioner: *H. A. Brady.*

Solicitor for the King's Proctor: *Solicitor to the Treasury.*

W. J. B.

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March 10, 12.

Probate—Practice—Lunatic Defendant—Position of Official Solicitor, if appointed Guardian ad litem—Will torn up in Testator's Presence without his Authority—Subsequent Ratification inadmissible—Words missing from Will when pieced together—Oral Evidence—Probate—Form of Order.

The official solicitor, if appointed guardian ad litem to a lunatic defendant in a probate suit, has no greater rights and is in no better position than any other solicitor appearing for a party in a probate suit, except that he will probably be allowed, out of the estate, costs properly incurred in the conduct of the defence.

Where a will has been torn up without the testator's authority, he cannot, by any subsequent ratification of the destruction, render the act a valid revocation of the will.

The dictum of Butt J. in *Mills v. Milward*, (1889) 15 P. D. 20, approved.

The Court will not order to be inserted in the probate words actually missing from a torn will which has been pieced together, but the practice to be followed in such a case, where satisfactory oral evidence is before the Court proving what the missing words were, is to allow a document shewing what those words are proved to have been to be annexed to the probate.

THIS was a probate suit in which a torn will was propounded. The plaintiffs, Ethel Gill and Alfred Ogden, as executors,

(1) [1906] P. 189, at p. 202.

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propounded the will of John Hinchliffe Gill, late of Heath Lodge, Hebden Bridge, in the county of York, dyer and finisher, who died on July 7, 1908, the said will bearing date December 22, 1902.

The defendants were four sisters and a brother, next of kin of the testator. The sisters did not appear; but the brother, who was of unsound mind, was represented by the official solicitor as his guardian ad litem, and he pleaded that the will was not duly executed, and that it was revoked by having been torn up by the deceased or by the plaintiff Ethel Gill in his presence and by his direction, with the intention of revoking the same.

The writ was issued on September 23, 1908; the appointment of the official solicitor as guardian ad litem of the male defendant was made in October, 1908; a copy of the case, submitted to counsel for the plaintiffs before the suit was commenced, was furnished to the official solicitor on November 21, 1908; the defence was delivered on December 5, 1908; and the action was, on December 18, 1908, set down for hearing before the Court itself.

A correspondence, commencing on February 16, 1909, and ending on March 9, 1909, passed between the official solicitor and the London agents for the plaintiffs' solicitors, in which the former insisted upon being afforded facilities to interview the plaintiffs' witnesses.

The names of the witnesses and the main points of the evidence which they would be able to give were contained in the case, a copy of which was furnished to the official solicitor, as aforesaid, in November; and copies of the actual proofs, which the plaintiffs' solicitors took subsequently, were furnished to the official solicitor on March 6, 1909. His demand to be given facilities to see the witnesses being resisted,

Priestley, K.C. (W. O. Willis with him), applied to the Court to postpone the hearing, upon an affidavit of Mr. William Howard Winterbotham, the official solicitor, which, inter alia, exhibited copies of the correspondence which had passed, and stated that "as appears from this correspondence Messrs. Ridsdale & Son refuse to consent to my seeing the witnesses referred

to and taking their proofs, on the ground that, having been supplied with the proofs they have themselves taken, I am not entitled to anything further. As a matter of fact, I was in the first instance only supplied with a proof of the plaintiff Ethel Gill, and it was not until the 6th inst. that other proofs were sent to me. I have not, however, read those further proofs, because I prefer to take statements from the witnesses myself, and not to accept statements obtained by the solicitor acting for the other side. . . . I submit that . . . facilities should be afforded to me by the plaintiffs' solicitors to interview the persons I desire to see, or, in the alternative, that the order appointing me guardian ad litem of the lunatic defendant should be discharged, so as to relieve me from further responsibility in the case."

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Tindal Atkinson, K.C. (*Durley Grazebrook* with him), for the plaintiffs, opposed the application. The plaintiffs' London agents have gone out of their way to furnish information which it was not incumbent upon them to supply to the official solicitor, but they strenuously oppose his present application and submit that it is unwarranted. The official solicitor is in no better position than any other solicitor appearing for an ordinary party in a probate action, unless it be in regard to his costs.

BARGRAVE DEANE J. This application raises a question of considerable importance, because it is alleged by those who make it that the official solicitor is in a different position to an ordinary party in a probate action. There is no precedent for any such position. The official solicitor stands in no better position than any other party in a probate action. His contention is that he is entitled to call upon the solicitors on the other side to afford him facilities to interview and cross-examine their witnesses before the hearing. Whether a solicitor is entitled to go and interview a witness who he knows has given a statement to the other side is a point as to which some differences of opinion exist; but, except in the case of the attesting witnesses to a testamentary document, who are the witnesses, not of any one party, but of the Court, and medical witnesses, who may also, possibly, be looked upon in that light, a solicitor is certainly not

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entitled to call upon the solicitors on the other side to afford him facilities for interviewing witnesses. Mr. Winterbotham is in no better position than any other solicitor who is acting for a party in a probate action, except, perhaps, in regard to costs.

It has, however, been the practice for a long time for the official solicitor to apply for information to the solicitors on the other side who have made him a party to the suit; and I know from experience that very often the solicitors have supplied information and have furnished proofs of witnesses. But I am not aware that the official solicitor has any right to demand facilities or information further than any other solicitor who is acting for a party in a probate action; and if the other side decline to supply him with proofs or to afford him other facilities, I am afraid he must be left to make inquiries and obtain information himself, in which case he might, perhaps, have ground for asking for the costs of prosecuting those inquiries. I cannot see, therefore, that I can help the official solicitor at all in the present case or accede to his application. It is said by counsel on his behalf that he cannot be ready by to-morrow. I am told, on the other hand, that the plaintiffs' witnesses are, or may be, already on their way up from Yorkshire. It will be open to me to adjourn the hearing at any stage if I see any necessity for doing so; but I cannot at present put the plaintiffs to the expense of coming up for nothing, and I must refuse this application. The case will take its place in the paper to-morrow.

March 12. On the hearing of the case, Mrs. Gill, the testator's widow, was called and deposed as to the destruction of the will by herself in a fit of temper and after her husband, when drunk, had made some irritating remark to her. A lady who was staying in the house at the time spoke as to what took place on the following day, when the testator told his wife to fetch the will and shew the witness what she (the wife) had done to it in her temper. Another witness deposed to a conversation within a few months before the testator's death, when the testator told this witness that he had left all he had to his wife, but had by

his will made provision that his sisters were to take the property in case his wife should predecease him.

The surviving witness to the will having proved that it was duly executed and that the other attesting witness, in whose handwriting the will was, was dead, the learned judge intimated that, in the absence of any evidence on the other side, he was fully satisfied and desired no further witnesses to be called by the plaintiffs.

Priestley, K.C., for the official solicitor, representing the lunatic defendant, addressed the Court and referred to *Mills v. Milward*. (1)

BARGRAVE DEANE J. I have no hesitation at all about this case. The Wills Act says that a will may be revoked in certain specified ways, one of which is by tearing, and it says that the tearing must be performed by the testator himself, or by his direction and in his presence—that is to say, the act must distinctly be done by the testator’s authority.

In this particular case the will was torn up in the presence of the testator by his wife. Was it done by his authority? There is not a particle of evidence to suggest that he authorized it. The wife says that he did not, and on that I accept her evidence that she did it in a fit of temper. It was about as silly a thing to do as could possibly be imagined; but she was at the time beside herself with anger, just as he was beside himself with drink. I doubt whether he had capacity at the time to give any authority, and I do not think that she was sufficiently self-possessed to appreciate what she was doing. Under these circumstances it is impossible to hold that the act of destruction was performed with the authority of the testator. If it was not done with his authority at that time, the dictum of Butt J. in *Mills v. Milward* (1) indicates what in my opinion is good law, namely, that no amount of authority afterwards can be brought into play so as to ratify an act done without authority at the time. If a testator under such circumstances desired that the act of destruction, performed without his authority at the time,

(1) 15 P. D. 20.

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should prevail, he had it in his power effectually to revoke his will in accordance with the provisions of the Wills Act. He could either execute a document expressly revoking his will, or he could make a fresh will dealing with his property in any way he chose. In the present instance, so far from doing anything of the sort, the testator always treated the act of destruction by his wife rather as a joke and as of no effect in law—and he was right. He told people what she had done in her temper, and he laughed at it; he spoke, within a few months of his death, of having left everything to his wife if she survived him. I am satisfied that this will was never revoked, and accordingly I admit it to probate.

I am asked to allow three or four words which are missing from the left-hand top corner of the document to be included in the probate. Oral evidence was given as to them. It is quite obvious, from the context, what words the missing piece of paper must have contained; and Mr. Grazebrook has referred to the case of *Sugden v. Lord St. Leonards* (1) in support of the proposition that oral evidence may be received and accepted of the contents of a missing document. But I remember a case in which words were, or a certain word was, read into a will by one of the judges of this Court, and when the late Lord Hannen, who was at the time President of this Division, heard of it, he expressed strong disapproval. I will, however, allow a paper to be annexed to this will shewing what were the missing words, as proved before me by the oral evidence of Mrs. Gill, one of the plaintiffs. There is authority for adopting such a course. It will meet the wishes of the plaintiffs and their advisers. It differs only in form from the application they made to me. The rules of practice I have referred to seem to contain a distinction without a difference.

Priestley, K.C., asked for an order for the official solicitor's costs similar to that granted by Neville J. in *Goatly v. Jones* (2), and he also referred to the Rules of the Supreme Court, Order LXV., r. 13, and to *Eady v. Elsdon*. (3)

Tindal Atkinson, K.C. The order should not include the costs

(1) (1876) 1 P. D. 154.

(2) [1907] W. N. 161.

(3) [1901] 2 K. B. 460.

of the misconceived and abortive application to postpone the hearing.

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BARGRAVE DEANE J. I cannot say that the official solicitor, although entirely wrong in his view, was not acting bona fide in making that application. My view is that the official solicitor is entitled to have, out of the estate, such costs as have been reasonably incurred in these proceedings.

Solicitors for plaintiffs: *Ridsdale & Son, agents for Sutcliffes, Hebden Bridge.*

Solicitor for lunatic defendant: *The Official Solicitor.*

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THE BOUCAU.

1909

Jan. 27, 28.

Admiralty—Ship—Damage to Jetty—Negligence—Onus of Proof—Force majeure.

The plaintiffs, the harbour authority of Workington, sued the defendants, the owners of a steamship, for damage to their jetty situate at the junction of, and between, the river Derwent and the harbour. The defence in substance was that the plaintiffs invited the defendants' vessel, which was in charge of a compulsory pilot, to enter the harbour at a time when there was one foot less water than shewn by the tide table, so that, when approaching the entrance, with only two feet of water under her, the head of the vessel was canted to port towards the jetty by a freshet, on her port quarter, of two knots running down the river, whilst a strong breeze was acting on her starboard side, with the result that, though the pilot ordered the engines to be put full speed astern and the order was obeyed, with hand reversing gear, in twenty-two seconds, the way was not taken off in time to prevent the stem of the vessel striking the jetty:—

Held, that the defendants were not liable, as they had discharged the onus of proof by rebutting the prima facie case of negligence against them, for the damage complained of arose from a combination of circumstances consisting of less water than usual, a strong breeze, and a freshet, which together amounted to force majeure.

ACTION FOR DAMAGE to jetty.

The plaintiffs were the Workington Harbour and Dock Board.

The defendants were the owners of the *Boucau*.