[HIGH COURT OF AUSTRALIA.]

DWYER . . . . . APPELLANT;

AND

VINDIN . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1906.

SYDNEY, *Aug.* 20.

Griffith C.J., Barton and O'Connor JJ.

Practice—Special leave to appeal—Question of fact—Probate of will—Issues of unsound mind and undue influence—Costs of unsuccessful caveator.

Although as a general rule an unsuccessful defendant in a probate suit will not be ordered to pay the costs, if he had an interest in opposing probate and the will was made under circumstances which naturally tended to raise a suspicion of testamentary incapacity or undue influence, there may, nevertheless, be other circumstances rendering the defendant's opposition unreasonable and justifying an order for costs against him. In a case where the question whether a defendant had by his conduct disentitled himself to take advantage of the general rule or not depended upon the facts special leave to appeal to the High Court was refused.

Special leave to appeal from the decision of *Walker* J. refused.

MOTION for special leave to appeal.

The appellant lodged a caveat against the granting of probate of his wife's will on the ground that it had been obtained by undue influence on the part of the respondent, and that the testatrix, at the time when she made the will, was not of a sound and disposing mind and did not understand the contents of the will. The issues so raised were tried in a probate suit before *Walker* J., in which the respondent was plaintiff and the appellant was defendant. The will was proved in solemn form, and at the conclusion of the suit the Judge granted probate to the respondent and ordered the appellant to pay the costs of the suit so far as they were caused by his opposition to probate.

It is not necessary for this report to set out the facts in detail. It is sufficient to state that the will was prepared by the respondent, and was in his favour. The gross value of the estate was about £200, and the net value about £100. His Honor, while recognizing that the circumstances surrounding the making of the will were somewhat suspicious, came to the conclusion that the evidence established the testamentary capacity of the testatrix, and rebutted the presumption of undue influence that was raised by the suspicious circumstances, and was also of opinion that the appellant was aware of circumstances which rendered his opposition to the will unreasonable.

It was for special leave to appeal from this decision that the present application was made.

Delohery, for the appellant. On the evidence the Judge came to a wrong conclusion. The presumption was against the plaintiff, and the only evidence offered to rebut it was that of the plaintiff himself. That was not sufficient. [He referred to *Parker* v. *Duncan* (1).] Even if the Judge was right as to the facts, he should not have ordered the appellant to pay the costs of the suit. The circumstances fully justified the appellant in opposing probate, and in raising the issues of unsound mind and undue influence: *Wilson* v. *Bassil* (2); *Tristram & Coote Ecclesiastical Practice*, 10th ed., p. 497.

[GRIFFITH C.J. referred to *Barry* v. *Butlin* (3); *Fulton* v. *Andrew* (4).]

The judgment of the Court was delivered by

GRIFFITH C.J. The amount involved in this case is small, the total value of the estate being £200, and after payment of debts about £100. The case therefore is one in which the Court will not grant special leave to appeal unless it can be said that some important question or general principle of law is involved. It is said that the case is brought by the facts within the rule that the burden is cast upon the person propounding a will, who has prepared it himself, and is entitled to benefits under it, to establish affirmatively the testamentary capacity of the testator, and to

(1) 62 L.T., 642.
(2) (1903) P., 239.
(3) 2 Moo. P.C.C., 480.
(4) L.R. 7 H.L., 448.

H. C. OF A. 1906.

DWYER v. VINDIN.

remove the suspicion that the will has been obtained by undue influence, and, further, it is said that under the circumstances a person interested in having the will declared invalid is entitled to presume what the law presumes, that the will is *primâ facie* invalid, and therefore to call upon the person propounding the will to prove, not only that it was properly executed, but that it was not obtained by undue influence. It is said that the learned Judge who granted probate in this case was satisfied too easily that the burden which the law casts upon the plaintiff was discharged, not that he made any mistake as to the rule of law applicable to the case. Another objection is that the learned Judge applied the right rule wrongly to the facts in evidence. That, however, is not a ground for granting special leave to appeal. Even if he did, we should certainly not grant special leave in the circumstances of this case. The only material point, therefore, is that the learned Judge ordered the defendant to pay the costs occasioned by his unsuccessful opposition to the will. There is no doubt as to the general rule that in a case of this sort a person interested is entitled to raise this defence, and does not by doing so incur any risk of being ordered to pay the costs if he is unsuccessful. That is not disputed. But the rule is subject to this exception, that though as a general rule that principle is to be applied, there may be circumstances that would make it unreasonable to raise such a defence; if he knows, for instance, that although the will is *primâ facie* invalid, on the ground of the suspicious circumstances surrounding its execution, there are facts which remove this objection. In this case the learned Judge, while recognizing the general rule, thought that the defendant by his own conduct had deprived himself of the right to take advantage of the rule. That is a question of fact, and on questions of fact it is not our practice to grant special leave to appeal.

We are therefore of opinion that special leave to appeal in this case ought not to be granted.

Special leave refused.

Solicitor for applicant, *W. M. Daley.*

C. A. W.