

ORIGINAL CIVIL.

Before Mr. Justice Scott.

JAMES REVIS AND OTHERS v. C. A. TURNER AND OTHERS.*

*Practice—Costs—Official Assignee defendant—Payment of costs personally—
Civil Procedure Code XIV of 1882, Sec. 219.*1883
September 4.

If the Official Assignee defends a suit he is liable, in the event of failure, to be ordered to pay the plaintiff's costs in the same way as any other defendant, and if the estate be insufficient to pay the costs, he will have to bear them personally. It is for him to protect himself by getting a guarantee of indemnity from the parties who set him in motion.

ARGUMENT on further directions as to costs pursuant to leave reserved.

The suit was brought by the plaintiff against the second defendant, an insolvent, and the first defendant, the Official Assignee and assignee of the estate of the second defendant, to recover a large sum of money, and for a declaration of the validity of certain equitable mortgages. The judgment was in the plaintiff's favour. The first defendant, the Official Assignee, had contested the suit in the belief that certain creditors of the second defendant had guaranteed him against all costs in the suit, and he so stated in his evidence given during the hearing. Accordingly the order as to costs, originally made and drawn up, ran as follows:—"And this Court doth further order that the Official Assignee do, on or before the 25th day of September, 1883, realize the guarantee for the costs of this suit (mentioned by him in his evidence), and apply the sum so realized in payment of the costs of the plaintiffs; and this Court doth further order that, in default of such payment by the said Official Assignee on the date aforesaid, the question of payment of costs by the said Official Assignee shall be brought before the Court, and this Court doth further order that the second defendant do pay to the plaintiffs the costs of this suit when taxed

Subsequently it transpired that the supposed guarantors denied that they had guaranteed the Official Assignee more than the payment of his own costs. The case was, accordingly, set down for further directions as to costs, the Official Assignee having

filed an affidavit in which he alleged that he had been misled by his attorneys and the supposed guarantors, one or both of whom he asked should be ordered to pay the plaintiffs' costs, contending that no order should be made which would make him personally liable to the plaintiff for his costs.

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Jardine for C. A. Turner, the Official Assignee.—The facts stated in the affidavits show that the Official Assignee has been misled as to the guarantee he possessed. The Official Assignee, therefore, not having the guarantee it was supposed he had, the Court has now to make some further order as to costs. Under the circumstances Mr. Turner himself should not be ordered to pay the costs. The order should be made against him only as Official Assignee, and not personally. The order for costs should also go against his solicitors, or the defending creditors, whichever is responsible for having misled the Official Assignee, or both. All persons who set the Official Assignee in motion impliedly undertake to pay his costs.

Inverarity for plaintiffs.—We have nothing to do with arrangements made between Mr. Turner and his solicitors, or the creditors who set him in motion, or any of the matters set out in the affidavit. But we shall not object to any addition to the persons to be held liable for the plaintiffs' costs. The Official Assignee, however, cannot be exempted; he is primarily and necessarily liable for the costs. He can recoup himself either from the estate, or from his attorneys, or guarantors. It is the business of an Official Assignee to get a guarantee; if he fails to do so he will himself have to pay the costs—*Ex p. Angerstein*(1). That case is conclusive. The Court can also order the pseudo-guarantors to pay the costs. The order may be made against them in the first place, and next against Mr. Turner. An order against them cannot, however, discharge Mr. Turner, against whom, in any case, the order must be made. As to the solicitors, we have nothing to do with them; but we do not object to the order going against them, too, if the Court thinks fit to make such an order.

Cur. adv. vult.

September 13. SCOTT, J.—I am asked in this case to make a final

(1) L. R., 9 Ch. Ap., 479.

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order as to costs. When I gave judgment, I allowed the Official Assignee time to recover the costs from the creditors of the insolvent's estate, who, he supposed, had guaranteed the costs of the suit. It appears now that he was mistaken as to the existence of that guarantee. I am not surprised at his mistake after reading the correspondence that passed between him and his attorneys. But the question I have now to decide is whether the Official Assignee must still be held liable. I do not think the current of decisions leaves me any discretion in the matter. *Pitts v. La Fontaine*⁽¹⁾ is the last reported case on the subject. *Ex. p. Angerstein*⁽²⁾ is there adopted by the Privy Council as the law on this point. The rule there laid down is that a trustee in bankruptcy (who is equivalent to the Official Assignee) is liable in the same way as any other party to costs. If success is doubtful, he must obtain an indemnity from the creditors. If he fails to do that, and the estate is insufficient to pay the costs, he must make up the deficiency. I am next asked to call upon the guarantors to show cause why they should not pay the costs. This involves the question of principle whether persons, not parties to the record, can be made subject to such an order. Under the old Procedure Code of 1859, that perhaps was possible. But in section 219 of the new Code the addition of the words "to the suit" to the word "party" seems to show that the Court no longer possesses this power. In England the general rule is that Courts have no power except over parties to the record. The only cases of exception are where the party before the Court was a mere puppet in the hands of a stranger to the suit. The present case does not constitute such an exception—*Hyward v. Giffard*⁽³⁾ and *S. M. Prankumari Dasi v. Abinash Chunder Mookerjee*⁽⁴⁾. The Official Assignee is not, however, without a remedy. An action on the alleged guarantee against the three creditors, or on the alleged negligence against the attorneys, is his proper course. Meanwhile the order must be that the Official Assignee pay the costs of the suit, with leave to recover them from the estate.

Attorneys for the plaintiff.—Messrs. *Craigie, Lynch and Owen*.
Attorneys for the defendant, C. A. Turner.—Mr. *Sayani*.

(1) L. R., 6 Ap. Ca. (P. C.), 482.

(3) 4 M. & W., 194.

(2) L. R., 9 Ch. Ap., 479.

(4) 9 Beng. L. R. 210.