[VASSILIADES, P., TRIANTAFYLLIDES AND JOSEPHIDES, JJ.]

A.E. PANTELIDES, ADVOCATE,

Appellant,

v.

EMINE RUSTEM MOUSTAFA PAFITI,

Respondent-Plaintiff,

and

PANAYIOTA PHILIPPOU *ALIAS* PANAYIOTA ANDREA NICOLA THROUGH THE GUARDIAN AD LITEM ANDREAS NICOLA HJI SYMEOU AND ANOTHER,

Respondents-Defendants.

(*Civil Appeal No.* 4422).

Advocate—Costs—Liability to pay costs personally—Advocate ordered to pay costs—No opportunity given to show cause—Order set aside on appeal—The Civil Procedure Rules, Order 59, *rule* 7—*English Rules of the Supreme Court, Order* 65, *rule* 11.

Costs—Liability of advocate to pay costs personally—See above.

This is an appeal from an Order made in the District Court of Nicosia on the 26th January, 1963, for the payment of costs by the appellant, one of the advocates in the case. The amount involved exceeds £60 as costs thrown away. The circumstances which led to the order appealed from are very shortly as follows :

In May, 1960, the respondent-plaintiff filed an action in the District Court of Nicosia against the respondents-defendants Panayiota Philippou and her husband Andreas Hji Symeou for the specific performance, *inter alia*, of a settlement in a previous action which was given in the form of a judgment by consent. The defendant-husband instructed the appellant advocate to defend the action for both defendants and signed for himself and his wife the usual retainer form. Acting for both defendants, the appellant-advocate entered an appearance for them, filed their joint defence, and, after taking other incidental steps in the proceedings, appeared for them before the District Court in May 1961. The Court made a consent order on May 13, 1961, for a local inquiry by a Land Registry Officer for the purposes of the action. About ten months later, in March

1962, the parties were again before the Court through their respective advocates, when the evidence of the Land Registry Officer was taken, and the case was adjourned for further hearing on a future date. After three adjournments, on the 8th December 1962, the wife was present in Court for the first time and the appellant-advocate who was acting for both defendants on the husband's instructions, stated that after a second direct contact with the first defendant (the wife) he formed the impression that she was not of sound mind; and that he mentioned this informally to his colleague, the advocate acting for the plaintiff. A certain discussion ensued the outcome of which was that the Court took "a bad view" of appellant's way of handling this matter of a litigant of unsound mind; and eventually, the Court asked him whether he wished to have his client, the wife in question, subjected to a medical examination regarding the state of her mind. The appellant-advocate consulted the husband on the point, and informed the Court that he could not agree to the examination suggested. The Court, thereupon, adjourned the case for a ruling at their next sitting in January, 1963.

On this adjourned hearing, in the presence of all the parties and their advocates, the Court read their ruling. After stating the circumstances which led them to their conclusion, and without calling upon the advocate to show cause, and without hearing any evidence in the matter, the Court say that they were satisfied that defendant 1 (the wife) was not a person of sound mind—"Deploring", as they put in it their note, the attitude of the appellant, the Court referred to the English case of *Yonge* v. *Toynbee* [1910] 1 K.B. 215, C.A. and ordered that "all costs thrown away be paid personally by Mr. Pantelides" the appellant herein. The Court then appointed the husband as guardian *ad litem* for his defendant-wife, and directed the filing of an appearance within two weeks and the continuation of the case in its "usual course."

It is against this order for the payment of costs that the advocate took the present appeal

It was argued on his behalf, *inter alia*, that the failure by the trial Court to give an opportunity to the appellant-advocate to be heard in the matter before the making of the order should be sufficient to dispose of the whole appeal. Counsel for the respondent, very rightly in the opinion of the Supreme Court, stated that he was unable to support the order made against the appellant in the circumstances: and left the question of costs to the Court.

In allowing the appeal and setting aside the order appealed from, the Court :

Held, (1) we set aside the order made for the payment of costs against the appellant.

(2) All incidental costs, *i.e.* costs in the action for the hearing of the 8th December, 1962 and thereafter as well as the costs of this appeal (excepting the costs decided on the 20th December 1963) to be costs in cause between the parties to be decided in due course by the trial Court; and in no event to be made costs against the respondent-plaintiff.

(3) As the matter is still *sub judice* we prefer to say no more. The order of the District Court for the appointment of the husband as guardian *ad litem* for his wife, having not been questioned, stands.

Appeal allowed. Order for the payment of costs against the appellant set aside. Order for costs as aforesaid.

Cases referred to :

Yonge v. *Toynbee* [1910] 1 K.B. 215, C.A.;

Myers v. *Elman* [1940] A.C. 282; [1939] 4 All E.R. 484;

Abraham v. *Jutsun* [1963] 2 All E.R. 402.

Appeal.

Appeal against the judgment of the District Court of Nicosia (sitting at Morphou), (Izzet and Loris D. JJ.) dated 26th January, 1963 (Action No. 395/60), whereby it was adjudged that all costs thrown away be paid by appellant, one of the advocates in the case.

G. Ladas, for the appellant

H. Suleyman, for the respondent-plaintiff.

L. Clerides, for the Bar Council, as *amicus curiae*.

Andreas Nicola, in person for himself and on behalf of his wife, Panayiota Philippou, as her guardian *ad litem* in this case.

The Judgment of the Court was delivered by :

1967
Nov. 10

A.E. PANTELIDES, ADVOCATE
v.
EMINE RUSTEM MOUSTAFA PAFITI AND ANOTHER

VASSILIADES, P. : This is an appeal from an Order made in the District Court of Nicosia on the 26th of January, 1963, for the payment of costs by the appellant, one of the advocates in the case. The amount involved exceeds £60.–(Vide ruling of the 13th May, 1963, herein) as costs thrown away. The relevant circumstances which led to the order are :

In May, 1960, the respondent-plaintiff, Emine Rustem Moustafa Pafiti of Morphou, filed an action (No. 395/60, D.C. Nicosia) against the respondents-defendants Panayiota Philippou and her husband Andreas Nicola Hji Symeou, of Morphou, for the specific performance, *inter alia*, of a settlement in a previous action–(No. 442/56, D.C. Nicosia), which was given the form of a Judgment by consent. The dispute in that action was over adjacent property.

The defendant-husband instructed the appellant advocate to defend the action, for both defendants, and signed for himself and his wife, the usual retainer form. Acting for both defendants, the appellant-advocate entered an appearance for them, filed their joint defence, and, after taking other incidental steps in the proceedings, appeared for them before the District Court in May 1961. The Court made a consent-Order on May 13, 1961, for a local inquiry by a Land Registry Officer for the purposes of the action.

About ten months later, in March, 1962, the parties were again before the Court through their respective advocates, when the evidence of the Land Registry Officer was taken, and the case was adjourned for further hearing on a future date. After three adjournments (which naturally affect the question of costs) the case was again before the Court on the 8th December, 1962. On this last occasion the wife, a party directly connected with the property in dispute, was personally present for the first time, and the advocate who was acting for both defendants on the husband's instructions, stated that after a recent direct contact with the first defendant (the wife), he formed the impression (the "suspicion" as he described it) that she was not of sound mind; and that he mentioned this informally to his colleague, the advocate acting for the plaintiff.

We do not wish to enter for the purposes of this Judgment, into the details of the discussion which followed in chambers and in open Court, between the judges and advocates of the parties, in this connection, which is recorded at pages 12 and 13

of the notes. The outcome of that discussion was that the Court took "a bad view " of appellant's way of handling this matter concerning a litigant of unsound mind, the Court thought; and of certain remarks made by the appellant in the course of the discussion; and, eventually, asked him whether he wished to have his client, the wife in question, subjected to a medical examination regarding the state of her mind. The appellant consulted the husband on the point, and informed the Court that he could not agree to the examination suggested. The Court, thereupon, adjourned the case for a ruling at their next sitting, January 12, 1963.

On this adjourned hearing, in the presence of all the parties and their advocates, the Court read their ruling as recorded at pages 14 and 15 of the record. After stating the circumstances which led them to their conclusion, but without calling upon the advocate to show cause, and without hearing any evidence in the matter, the Court say that they were satisfied that defendant No. 1 (the wife) was not a person of sound mind and could not follow the proceedings which were "of a complicated nature and involved the determination of property rights" (page 14 G).

"Deploring", as they put it in their note, the attitude of the appellant, the Court referred to the English case of *Yonge* v. *Toynbee*, [1910] 1 K.B. 215, C.A. and ordered that "all costs thrown away be paid personally by Mr. Pantelides, the appellant herein.

The Court then asked the husband whether he consented to be guardian *ad litem* for his wife in this case; and on his reply in the affirmative, the Court appointed him accordingly, and directed the filing of an appearance within two weeks, and the continuation of the case in its "usual course".

Against this order for the payment of costs (which as we have already said, amount to a considerable sum) the advocate took the present appeal.

When the matter was first before the Court of appeal, the view was expressed that the Bar Council might wish to have the opportunity to be heard in this very exceptional case in our courts, as far as one can say from memory. Indeed, today, Mr. L. Clerides of the Bar Council, appeared by leave of the Court, as *amicus curiae*, on behalf of the Council; fully prepared to help the Court in this matter.

Mr. Ladas for the appellant, went into the history of the case; and after criticising several points about the procedure and

the reasoning on record which led the trial Court to the order in question, he took first, ground six on the notice of appeal, that is, the failure to give an opportunity to the appellant to be heard in the matter before the making of the order, as in his submission, this should be sufficient to dispose of the whole appeal

Learned counsel, while conceding that the Court had power to order an advocate to pay costs personally after giving him an opportunity to show cause, pointed out that *Yonge* v *Toynbee* on which the trial Court relied in making their order, was decided on completely different facts to those in the present case, and in quite different circumstances, and he then referred to *Myers* v *Elman* [1940] A C p 282 (also reported in [1939] 4 All E R p 484) and to *Abraham* v *Jutsun* [1963] 2 All E R p 402 Counsel, moreover, referred to Order 59 rule 7, of our Rules, and to the English Order 65, rule 11, from which our rule originates

We find it unnecessary to discuss, for the purposes of this Judgment, either the provisions in our rule (which, apparently, the District Court did not have in mind) or the effect of the cases referred to by counsel for the appellant, as Mr Suleyman for the respondent, very rightly, in our opinion, stated that he finds himself unable to support the order made against the appellant, in the circumstances, and left the question of costs to the Court

This made it unnecessary for us to hear Mr Clerides as *amicus curiae* We only wish to thank him and the Bar Council for their interest in the matter, and for his appearance today And, while on this point, we wish to add the appreciation of the Court for the assistance received from all counsel before us today, in this exceptional proceeding

As the matter is still *sub judice*, we prefer to say no more The order of the District Court for the appointment of the husband as guardian *ad litem* for his wife, has not been questioned, and it, therefore, stands, as far as we can say here We allow the appeal, and set aside the order made for the payment of costs against the appellant on January 26, 1963. All incidental costs, *i e* costs in the action for the hearing of the 8th December, 1962 and thereafter, as well as the costs of this appeal (excepting the costs decided on December 20, 1963) to be costs in the cause between the parties to be decided in due course. by

the trial Court; but in no event to be made costs against the respondent (plaintiff).

Appeal allowed. Order for the payment of costs against appellant set aside. Order for costs as aforesaid.