

[613] *OLDFIELD v. COBBETT*. July 31, Dec. 13, 1845.

[See S. C. 1 Ph. 557.]

An application by a party sued as executor, for leave to defend the suit, *in formâ pauperis*, refused, though, in addition to the usual affidavit, he swore that he had been prevented by an injunction from receiving any assets, and *semble*, the result would have been the same if he had sworn that there were no assets. *Semble*, a party who is in contempt for non-payment of costs in the suit, is not thereby prevented from moving for leave to defend it *in formâ pauperis*. Whether the discharge under the 48 G. 3, c. 123, of a party detained under process of contempt for non-payment of costs under £20 has the effect of clearing his contempt so as to entitle him to move. *Qu.*

This was a motion on behalf of the Defendant, who was sued as executor of his father, for leave to defend the suit *in formâ pauperis*. The motion was founded on an affidavit of the Defendant, stating, in addition to the usual declaration of poverty, that he had been prevented by an injunction from possessing himself of any assets. The application had been refused, but, as it was said, with some hesitation, by Vice-Chancellor Knight Bruce.

Mr. Temple, Mr. Teed, and Mr. Addis, appeared in support of the motion.

Mr. Wakefield, *contra*, raised a preliminary objection, that the Defendant had some time before been committed under an attachment for non-payment of the costs of certain proceedings in the suit, and that, although he had been since discharged under the statute of 48 G. 3, c. 123 (extended by 1 & 2 Vict. c. 110, s. 18, *vid. Tolson v. Dykes*, 1 Ph. 439), (the sum for which he was detained being under £20), a discharge under such circumstances did not clear his contempt, or consequently entitle him to move, it being expressly provided by the statute that, notwithstanding the discharge of any debtor under it, the judgment whereupon he was taken or charged in execution should nevertheless continue and remain in full force to all intents and purposes except as to the taking of him in execution.

[614] On the other hand, it was insisted that the discharge under the statute put an end to the contempt and to all disabilities consequent on it.

THE LORD CHANCELLOR (after conferring with the registrar) said: I am told, Mr. Wakefield, that the circumstance of a party being in contempt is no objection to his making the common application to sue *in formâ pauperis*. What difference is there between that and a special application?

The argument then proceeded upon the merits.

In support of the motion, *Thompson v. Thompson* (1 Dan. Pr. 42), and *Perrot v. Britton* (M. R. 18th March 1835, cited in Beames's Costs, 2d ed. p. 79), were cited; and *Paralice v. Shepherd* (1 Dick. 136), in which a similar application was refused, was attempted to be distinguished on the ground that there was in that case nothing but the common affidavit, and therefore, for anything that appeared, the Defendant might have had assets.

THE LORD CHANCELLOR observed, that it appeared from the last edition of Mr. Beames's book on Costs, that both *Perrot v. Britton*, and *Thompson v. Thompson*, were decided on the ground that the Defendant was beneficially interested, and on that ground only.

Dec. 13. THE LORD CHANCELLOR [Lyndhurst]. The Defendant, who was sued as executor of his father, moved for leave to defend *in formâ pauperis*. He relied upon an affidavit, in which it was stated that he was prevented from receiving, and did not receive [615] any part of the testator's estate in consequence of an injunction issued before probate was granted.

The right to sue *in formâ pauperis* originated in the statute of Hen. 7. This and the subsequent statute of Hen. 8 are confined to actions in the Courts of Common Law, and do not extend to Defendants. The Courts of Equity have adopted the principle of these statutes, and, proceeding further, have extended the relief to the case of Defendants. But in no instance has the privilege ever been exercised either by a Plaintiff or Defendant suing in a representative character, as executor or administrator.

Lord Hardwicke, in the case of *Paralice v. Shepherd*, said that "on search no precedent could be found either in Chancery or in the Courts of Common Law, of the making an executor or administrator to sue or defend *in formâ pauperis*." This judgment was given in the year 1745; a century has since elapsed, and no instance of any such permission has occurred during the whole of that period. This seems conclusive as to the rule and practice of the Courts upon the question. But the case does not rest

here: the point has been raised and decided in more than one instance. A motion similar to the present was made in a cause between the same parties before the present Master of the Rolls. Mr. Cobbett argued his own case. The motion was refused. It came before the Court a second time, when it was elaborately argued by Mr. Cooper for Mr. Cobbett. The Master of the Rolls adhered to his former decision, and stated in the course of his judgment, that the practice had been clearly ascertained by his immediate predecessor, Lord Cottenham, who had occasion to investigate the point when sitting at the Rolls. Upon the general question, therefore, no reasonable doubt can, I think, be entertained.

[616] But then, it is said on the part of the Defendant, that the affidavit in *Paradice v. Shepherd* was merely in the common form, and that this was the ground of the decision; that here there is a special affidavit denying assets; and that the reasoning of Lord Hardwicke leads to the conclusion that upon such an affidavit he would have granted the application in *Paradice v. Shepherd*. But I think these observations are founded upon a misapprehension of the effect of what was stated by Lord Hardwicke. He came to the conclusion of what is the practice of the Court on three grounds. First, the resemblance of the language of the stat. of Hen. 7 to that of the statutes concerning costs which do not extend to executors or administrators. Secondly, the absence of any instance in which either Plaintiff or Defendant was allowed to sue or defend *in forma pauperis* as executor or administrator. And, thirdly, the form of the affidavit in common use, which, he says, applies only to the ordinary case of a Plaintiff or Defendant, and is not so framed as to comprehend the case of an executor or administrator. This is the whole effect of Lord Hardwicke's observations in the case of *Paradice v. Shepherd*, and there is nothing, I think, leading to the conclusion that he would have considered an affidavit stating that the executor had no assets, a sufficient ground for departing from the rule.

The affidavit, indeed, in this case does not state that there are no assets, but that none have come to the Defendant's hands, by reason of the injunction. I think such an affidavit will not take the case out of the general rule. No authority has been cited for that position, nor is such an exception anywhere hinted at, although cases of a similar nature must have frequently occurred. If the Defendant has conducted himself with propriety, he will be allowed his costs out of the testator's estate.

[617] Something was said as to the hardship of the case, but it must be recollected that in the Courts of Common Law which are governed by the statute, a Defendant is not allowed, even when defending in his own right, to defend *in forma pauperis*. I am of opinion, therefore, that the motion must be refused; but as it seems to have been in some degree countenanced by the Vice-Chancellor Knight Bruce, it must not be with costs.