1918.

Present: Bertram A.C.J. and Shaw J.

FERNANDO *v.* FERNANDO.

92—D. C. Colombo, 48,190.

Resulting trust—Property bought by mother in the name of her son—Election by son under mother's will—Costs of action—Administratrix.

When property is bought in the name of one person with money of another, there is a presumption of a resulting trust in favour of the person who provides the money. This presumption does not arise where property is bought by a father or another person in *loco parentis* in the name of the child. In such a case a strong presumption arises that it was intended to be a gift to the child. Such a presumption (of gift) does not necessarily arise in the case of a mother, but only when she has placed herself in *loco parentis* within a special legal sense, *i.e.*, when she has assumed an obligation to provide for the child. Very little evidence is wanted to establish that a mother stands in *loco parentis*. The presumption of gift in favour of the child can be displaced by evidence of the intention of the parties.

In order that a person who is put to his election (of his rights under a will) should be concluded by it, two things are necessary: (1) a full knowledge of the inconsistent rights and of the necessity of electing between them; (2) an intention to elect manifested either expressly or by acts which imply choice and acquiescence.

Where property was bought by a mother in the name of her son, it was held, in the circumstances of this case, that the son held it in trust for the mother, and that, even if it was in the nature of the gift to the son, he had elected under the mother's will to treat it as the mother's property.

ONE Nonno Fernando invested Rs. 20,000 on mortgage. The bond was drawn up in favour of her son Edwin. By her will, executed on May 8, 1911, she disposed of the said sum in the following terms: "I have invested the sum of Rs. 20,000 in the name of my said son Edwin by bond No. 999 dated July 6, 1907, and attested by D. C. Pedris, Notary Public. It is my will and desire that the said sum should be recovered and distributed as follows (. . . . .)." Nonno Fernando died on June 16, 1911, and her son Edwin died on November 8, 1911.

By Nonno Fernando's will her sons Samuel and Edwin were appointed executors. It was proved that both Samuel and Edwin had applied for probate of the will, and in the schedule to their petition for probate the sum of Rs. 20,000 was included as forming part of their mother's estate. The bond was in Edwin's possession, and on his death the administratrix of his estate included it among

the assets of Edwin. Samuel, the surviving executor under Nonno Fernando's will, instituted this action against the defendant (the administratrix of Edwin's estate), claiming the principal and the interest on the bond on the ground that Edwin was trustee of the amount for Nonno Fernando. It was contended on behalf of the defendant that Nonno Fernando being mother of Edwin the investment should be deemed a gift or advancement in favour of her son. The learned District Judge gave judgment to the plaintiff. The defendant appealed.

E. W. Jayawardene (with him *Nagalingam*), for defendant, appellant.—Ordinarily, when a person purchases property or invests money in the name of another, the property or investment is deemed to be held on trust for the purchaser or the person who invests. But where the purchaser is the father, or is a person standing in *loco parentis* to the person in whose name the property is purchased, then the transaction does not amount to a trust, but is presumed to be a gift to the child. *Gray v. Gray*,[1] *Eliot v. Eliot*,[2], *Sidmouth v. Sidmouth*,[3] *Hepworth v. Hepworth*,[4] *Shock v. Mcavoy*,[5] *Bennet v. Bennet*,[6] *Re Richardson, Weston v. Richarson*,[7] *28 Hals. 55, 17 Hals. 119, 15 Hals. 415, Commissioner of Stamps v. Byrnes*.[8]

The principle is the same under the Roman-Dutch law. See *Kadinammal v. Nathan Kangany*;[9] *Affefudeen v. Periathamby*;[10] *Voet 18, 1, 8; Nathan, vol. II., s. 852.*

This principle has been recognized in South Africa. *Elliot's Trustees v. Elliot*.[11]

This presumption is rebuttable, and only evidence of the intention of the parties at the time of or contemporaneous with the transaction is admissible. But subsequent acts or expressions on the part of the parent will not convert the gift into a trust. See *Murless v. Franklin*,[12] *Sidmouth v. Sidmouth*,[3] *Dyer v. Dyer*,[13] *Crabb v. Crabb*.[14]

[Bertram C.J.—If we hold that this is a gift, have you not elected to take under the will?]

No. Before Edwin can be said to have elected it must be proved that he had a clear knowledge of both the funds and properties between which he has to elect and of the necessity of electing. See *Worthington v. Winnington*,[15] *Dillon v. Parker*.[16] *Edwards v. Morgan*,[17] *Spread v. Morgan*,[18] *13 Hals. 125.*

[1] *(1677) 2 Swan 594.*
[2] *(1677) 2 Cas, in Ch. 231.*
[3] *(1840) 2 Beav. 447.*
[4] *(1870) L. R. 11 Eq. 10.*
[5] *(1872) L. R. 15, Eq. 55.*
[6] *(1879) 10 Ch. D. 474.*
[7] *(1882) 47 L. T. 514.*
[8] *(1911) A. C. 386.*
[9] *2 Cur. L. R. 76.*
[10] *12 N. L. R. 313.*
[11] *(1845) 3 Menz. 86.*
[12] *(1818) 1 Swan 13.*
[13] *(1788) 2 Cox Eq. Cas. 92.*
[14] *(1834) 1 My. & K. 511.*
[15] *(1855) 20 Beav. 67.*
[16] *(1818) 1 Swan 359.*
[17] *(1824) 13 Price 782.*
[18] *(1865) 11 H. L. Cas. 588.*

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Samarawickreme, for respondent.—The presumption of gift does not arise in the case of mother and son. See *Re De Uisme*,[1] *Bennet v. Bennet*,[2] *In re Orme Evans v. Maxwell.*[3] In *Devoy v. Devoy*[4] evidence of the father was admitted to show what his intentions were when he made the investment. See also *Forrest v. Forrest.*[5] See also Evidence Ordinance, section 8.

The facts of this case make it clear that the investment was made in Edwin's name for the sake of convenience, and that it was not intended to be a gift to the son. Edwin himself included the mortgage as part of his mother's estate. Edwin was the business manager of his mother, and in such a case a presumption of gift would not arise. See *Garret v. Wilkinson.*[6] Edwin has elected to take under the will. Counsel cited *Kadija Umma v. Meera Lebbe.*[7]

E. W. Jayawardene, in reply.

May 23, 1918. BERTRAM A.C.J.—

This case has been very fully argued, and we are greatly indebted to counsel on both sides for the comprehensive way in which they have brought the authorities before us. It is a case in which one finds some difficulty in coming to a conclusion, but on consideration of the ample material afforded us in this case, I have come definitely to a conclusion in favour of the respondent.

To discuss the principles of the case let us consider, in the first place, whether the persons concerned are such that a presumption in favour of a gift would arise. It seems to me very clearly that they are. It is recognized that, in the case of a father and son, if an investment of this kind by the father in the name of the son is proved to have been made, the presumption is that a gift was intended. Sir George Jessel M.R. in *Bennet v. Bennet*[2] said: "The doctrine of equity as regards presumption of gifts is this, that where one person stands in such a relation to another that there is an obligation on that person to make a provision for the other, and we find either a purchase or investment in the name of the other, or in the joint names of the person and the other, of an amount which would constitute a provision for the other, the presumption arises of an intention on the part of the person to discharge the obligation to the other; and, therefore, in the absence of evidence to the contrary, that purchase or investment is held to be in itself evidence of a gift." The Master of the Rolls then proceeds to say that, in the case where the parties are not father and child, we have to consider whether one of the parties is in *loco parentis* to the child, not in the ordinary sense, but in a special legal sense, that is to say, whether the person who makes the investment or the transfer is

[1] *(1863) 2 De G. J. & Sm. 17.*
[2] *(1879) 10 Ch. D. 474.*
[3] *(1884) L. T. 51.*
[4] *(1857) 3 Sm. & G. 403.*
[5] *(1865) 11 L. T. 763.*
[6] *2 De G. & Sm. 244.*
[7] *(1903) 7 N. L. R. 23; (1908) 11 N. L. R. 75.*

the person who has assumed an obligation to provide for the child. Now, there can be no doubt in this case that the testatrix was in *loco parentis* as regards her son Edwin. The business belonged to her. She had made provision for his brother at the time of his marriage. I have no doubt that she would have made similar provision for Edwin, and I have no doubt in this case that the presumption arises that her original investment was a gift, unless we have clear and definite evidence to the contrary.

We have, therefore, to consider whether we have any clear or definite evidence to the contrary, and we have further to determine what acts we are entitled to look at as evidence of a contrary intention. In the first place, there are the acts of the testatrix herself. Now, it has been argued, and the authorities have been very fully cited, that the only acts or declarations on the part of the testatrix which we are entitled to look at are contemporaneous acts or declarations. I have very carefully considered the authorities, but I do not think that they can go that length. It is quite true that observations tending in that direction have been made in a great number of cases, in particular the cases of *Crabb v. Crabb*,[1] *Murless v. Franklin*,[2] *Sidmouth v. Sidmouth*,[3] *Dumper v. Dumper*,[4] *Christy v. Courtenay*,[5] *Williams v. Williams*,[6] and the Irish case of *O'Brien v. Sheil*.[7] In the contrary direction there are two cases: *De Voy v. De Voy* [8] and *Forrest v. Forrest*.[9] Now, with every respect for the Irish Master of the Rolls who decided the case of *O'Brien v. Sheil*,[7] I do not think that the cases of *De Voy v. De Voy* [8] and *Forrest v. Forrest* [9] can be left wholly out of account. Not only so, but there are observations in some of the cases tending in the same direction. The conclusion I have come to in regard to the principles governing this matter upon the authorities is this: firstly, that no subsequent act or declaration can possibly change the nature of a trust when once such a trust has been originally constituted; and further, that any acts or declarations which are not contemporaneous, but which are subsequent to the transaction, though they may be looked at by the Court, have comparatively slight probative value. That seems to me to be the effect of the decision, and I do not think that we should be justified in acting on any acts or declarations made by the testator if they stood alone, or if they are capable of any other interpretation.

So much then for the principle. Now, what have we got in the case in regard to the making of the will? It was made with the full knowledge of the testatrix's son. She spoke in the will of this investment as an investment of her own made in her son's name.

[1] *(1834) 1 My. & K. 511.*
[2] *(1818) 1 Swan 13.*
[3] *(1840) 2 Beav. 447.*
[4] *(1862) 3 Giff. 583.*
[5] *(1849) 13 Beav. 96.*
[6] *(1863) 32 Beav. 370.*
[7] *Irish Rep. 7 Eq. 255.*
[8] *(1857) 3 Sm. & G. 403.*
[9] *(1865) 13 W. R. 380.*

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Now, of course, if it was not an investment made in her son's name, but a gift to the son, this reference in the will would not alter the fact. But the fact that she did so refer to it in her will, and referred to it apparently with the knowledge of the family, is a fact that may be taken into account. Further, under the same will she did make reference to a transaction, which was admittedly a gift to a son, namely, a conveyance of certain property in the Pettah, and there is this fact that, when she came to deal with that transaction, she gave her son the opportunity of declining to recognize her disposition of that property; whereas in regard to the investment of the money, though it was perfectly open to her to give a similar corresponding direction, she gave her son no such alternative. That indicates that, in her opinion, her son was not entitled to any such alternative.

Now, if this circumstance stood alone, I do not think that we should be justified in acting upon it. But there are further circumstances, namely, the acts of Edwin himself. Now, what are they? It appears that he was present when the will was read out to his mother. He appears to have made no protest that his mother was, in fact, dealing with his property. Mr. Jayawardene with some force said that this may have been due to his feelings of reverence to his mother, and he cited an observation of a Lord Chancellor, Lord Nottingham: " these acts of reverence and good manners will not contradict the nature of the transaction." That observation would have great force but for this. This was not merely a single occasion. It appears from the evidence of Mr. Vanderstraaten that there were two meetings of the family at which Edwin was present when the will was read and, apparently, discussed. Edwin, therefore, had an opportunity, after the first meeting, if he thought that his property was being unfairly dealt with, of putting the question of this gift before his mother and his brother. But it does not apppear that he did so. The argument as regards reverence and good manners, therefore, hardly applies to the case. In the second place, not only did he acquiesce in the will when it was read in the mother's presence, but when he came to prove the will there appears to be no doubt that this very sum, which is now claimed as his own property, was included by him in the inventory. Well, it is very difficult to explain that. He had his eyes open, and if what is now contended is true, he must have known that he was including his own property in the inventory, and the natural explanation is that he recognized that the property was not his own property, but his mother's. Further, he took over the Pettah property which his mother had left him in the will. He allowed his brother to take over the Hulftsdorp property, and to get in the rents, apparently, in anticipation of the conveyance under the will.

Well, now, these are very definite acts. Some explanation has to be given to them. We must take them into account in finding

a verdict in the case, and there are only three alternative explanations. The first is that, as claimed by the respondent, this investment was an investment of the mother made in Edwin's name, and that Edwin recognized the fact. Another alternative is that the property was really Edwin's that Edwin realized that his mother was making a fresh arrangement of the family property by the will, and that he had determined to make an election and to accept the arrangement made by the will in place of this made by his mother in her family. The third alternative is that he did not really know what he was doing when he took the property left him by the will. I do not think that we can accept the third alternative. Edwin was his mother's business manager. The will was drawn up with some deliberation. He must have known the value of the family properties. It comes to this then, that it was either the case that Edwin recognized the original investment on the mother's part, or else it was an election by Edwin to abide by the will. In my own view the first alternative is the correct one. The conclusion which the facts point to is what the testatrix said in her will, namely, that this was an investment made in her son's name.

There are two other considerations. The first is this: during her lifetime the testatrix had endowed her son Samuel on his marriage. Edwin did not marry. No occasion had arisen for his mother to make him a similar gift. There is, therefore, not in the case of this investment—assuming it was a gift to Edwin—the same natural explanation as there was in the case of Samuel. The other point is that Edwin was her business manager, and Mr. Samarawickreme cited to us the case of *Garrett v. Wilkinson*,[1] where that was taken into account. There was another case, *Bone v. Pollard*,[2] where similar facts were taken into consideration. This circumstance, I think, helps to explain the fact that the investment was made in the son's name. There is also this additional circumstance, that after Edwin's death, his sister, as administratrix, proceeded to deal with this property on the footing that the mother's will was to take effect. It is a strong circumstance, I think, that all the family recognized that the mother's will correctly stated the facts when she described the transaction as an investment. Had this not been the case, I think some question would have arisen as to the family rights, and some formal measure would have been taken to ascertain the exact position of Edwin's estate.

That being so, it is hardly necessary for me to discuss the principles of the law with regard to election. But as it has been very fully gone into, I should like to say that, if I did not think that this alleged transaction was a trust, I should be disposed to hold that there was evidence that Edwin made an election to accept the arrangement made by the will. I fully admit the force of what Mr. Jayawardene said as to the effect of the authorities on

[1] *2 De G. & Sm. 244.*

[2] *(1857) 24 Beav. 283.*

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this subject. It appears from the authorities that a person who makes an election must be aware of his own rights. I thought at first that it might be argued that it was only necessary for him to know the two alternative rights between which he was to elect. But I think it is clear that the authorities go further than that, and the Court must be satisfied, if it determines that an election was made, not only that the person electing knew his two alternative rights, but also that he knew that he was under a legal obligation to make a choice. That, I think, is clearly made out by the judgments of all the Lords in the case of *Spread v. Morgan*.[1] All the members of the Court made explicit statements to that effect. This is not a peculiar principle of equity, but it is part of the very nature of the case. An intention to elect implies knowledge, not only of the rights between which the election is to be made, but also of the necessity of making an election. But I do not think that the judgments of the House of Lords go to this extent: that it must be shown positively that, in some formal manner, it was definitely brought to the notice of the person in question that he was under a legal obligation to make a choice. It appears to me, after a careful consideration of the judgments of the Lords who decided the case, that what they lay down is this: that it must be reasonably clear from all the circumstances that the person making the choice knew his obligation to make it. It is quite true that Lord Lestbury in his judgment does say, " there is nothing to prove that William was informed of his equitable obligation to elect." But, if the other judgments are examined, they come to this: that it must appear from the facts that it was reasonable to conclude that the person electing was aware of the necessity of making a choice. Nor is this knowledge a mere imputed knowledge, based upon a presumption of law. It must be knowledge inferred from the facts. This is the real explanation of the judgment in *Worthington v. Winnington*,[2] In that case the Master of the Rolls no doubt said at the conclusion of the argument, " every one is assumed to know that if he takes under a will he must give full effect to it, and that he cannot be allowed to adopt that part of it which is for his advantage and reject that which is not." But he made this observation before he had considered the authorities. If his judgment is examined, it will be found that, after he had examined the authorities, he came to the conclusion that certain circumstances " constituted or proved a knowledge on her part that she was bound to elect." He says, " I think that she must be taken to have known that, if she did not withdraw it, she was, by law, bound to make good to the other legatees and devisees their loss." By that he means he found on the facts that she knew it, and not merely that the knowledge ought to be imputed to her.

[1] *(1865) 11 House of Lords 588.*

[2] *(1855) 20 Beav. 67.*

Applying that principle to this case, what do we find? We find that Edwin had acted as his mother's business manager, that the matter had been discussed in the family, that the will was the result of the family deliberation, that he must have known the comparative values of the family properties, and that consequently he knew precisely what the two alternatives meant. He had the question of election prominently brought before his mind by the provisions of the will about the Pettah property. I think that the facts are such that if we did not hold the transaction to be a trust, I should hold that an election had been proved. I would put it in this way, that the circumstances were such that it would be a reasonable inference that the necessity of making an election was fully present to his mind, when he in fact made the choice.

There is only one further small point, and that is that, apparently by an oversight, the District Judge has made an order that the costs of the administratrix in this case be borne by herself. I think she was clearly open to no criticism for having brought this action. It is clear that she can be sued as administratrix or executrix, and that, though she is personally liable for costs, she can recover from the estate any costs for which she is liable in that capacity. I do not think that the District Judge intended that she should pay the costs personally, and the word " personally " had better be eliminated from his order. In my opinion the appeal should be dismissed, with costs.

SHAW J.—

I agree. The only difficulty I feel in this case is the application of the law to the particular facts of the case. The law is well established that the presumption that arises, when property is bought in the name of one person with money of another, of a resulting trust in favour of the person who provides the money, does not apply in a case where property is bought by a father or another person in *loco parentis* in the name of a child. On the contrary, in such a case a strong presumption arises that it is intended to be a gift to the child. The law will be found so stated in *Halsbury's Laws of England, vol. 17, page 119*, and in *Taylor on Evidence, paragraph 1017a*. It has also been affirmed in numerous cases which have been cited to us, of which I need only mention *Sayre v. Hughes* [1] and *Commissioner of Stamp Duties v. Byrnes*.[2] Whether this presumption necessarily arises in the case of a mother is open to some doubt, and there are divergent decisions upon the subject. The balance of authority goes, however, to show that such a presumption does not necessarily arise in the case of a mother, but only when she has placed herself in *loco parentis*, within the special meaning given to those words in these cases.

[1] *L. R. 5 Equity 376.*

[2] *(1911) A. C. 386.*

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See *Bennet v. Bennet* [1] and *In re Orme Evans v. Maxwell.* [2] This matter, however, is not of very great importance in the present case. It was pointed out by Sir George Jessel M.R. in *Bennet v. Bennet* [1] that in the case of a mother, very little evidence beyond relationship is wanted to establish that she stands in *loco parentis*, there being very little additional motive required to induce a mother to make a gift to her child. I agree with what my Lord said that, in the present case, the facts that Edwin Fernando was living with his mother managing her business without a salary, receiving pocket money from her, and the fact that the mother had given considerable sums to her other son on the occasion of his marriage, shows that she stood in *loco parentis* to Edwin Fernando. The presumption of a gift in favour of the child arising under these circumstances can, however, be displaced by evidence of the intention of the parties. But the cases appear to me to show that the evidence of intention of the person in *loco parentis* must be contemporaneous with the purchase and relate to the intention at the time. I would refer on this point to *Murless v. Franklin* [3] and *O'Brien v. Sheil.* [4] The character of the evidence which is necessary to displace this presumption is well put by Lord Langdale in *Sidmouth v. Sidmouth.* [5] His Lordship says: " That contemporaneous acts or even contemporaneous declarations of the parent may amount to such intention has often been decided. Subsequent acts and declarations of the parent are not evidence to support the trust, although subsequent acts and declarations of the child may be so. But, generally speaking, we have to look to what was said and done at the time." I agree with what fell from my Lord that, when Judges have said that these acts are not evidence, what they really meant to convey is that they are of very little probative value, not that they should be altogether shut out from consideration. Now, applying the law so laid down to the present case, we have no contemporaneous statements of the mother in evidence before us. The only expressions of any view of the mother on her part are the terms of her will, by which she dealt with the property which was in the name of her son as if it was property which she had power to dispose of by will. This certainly cannot be used as showing what her intention was four years before when the bond was executed. At most it can amount to her view as to what her rights were at the date of the will. But even as to that it is somewhat equivocal, because we find that in another part of her will she deals with property admittedly not her own but the property of her son. But the strong evidence in this case in favour of the intention of the mother having been to establish a resulting trust is in the acts of Edwin Fernando himself. The fact that he was

[1] *(1879) 10 Ch. D. 474.*
[2] *(1884) L. T. 51.*
[3] *(1818) 1 Swan 13.*
[4] *Irish Rep. 7 Equity 255.*
[5] *(1840) 2 Beav. 447.*

present and knew the instructions given by his mother to include the property in the will; that he was present when the will was read over, and on neither occasion made any suggestion that the property was his; and the fact that after his mother's death he took the property under her will which he would not have been entitled to take had he repudiated the will, and claimed that this property in dispute was his. But, above all, the fact that he, as one of the executors of the will, swore an affidavit confirming the schedule of the property which was the property of his mother, and included this very sum of money now in dispute. It seems to me to be almost incredible that he would have acted in the way I have mentioned had he been all along aware, or had he thought, that the property in dispute belonged to himself absolutely. I, therefore, agree with the finding of the Judge that there was in this case a resulting trust in favour of the mother, and that there was no intention of a gift to the son. But beyond this, even if this were not the true deduction to be drawn from the evidence I have mentioned, it appears clear to me that Edwin Fernando, prior to his death, elected to take the benefits under the will in place of the property which was the subject of the bond. There appears to be no doubt as to the law with regard to the essentials which are necessary to be present in the mind of a person who is called upon to make an election. There must be clear proof that the person was acquainted with his rights and with the necessity of election, and he must have unequivocally made his election. It is only necessary to cite one case for this proposition, because that is a very clear case decided by the highest tribunal in England, namely, the House of Lords. I refer to *Spread v. Morgan*.[1] The matter is summarised by Lord Chelmsford in his judgment at page 615: "In order that a person who is put to his election should be concluded by it, two things are necessary. First, a full knowledge of the inconsistent rights and of the necessity of electing between them. Second, an intention to elect manifested either expressly or by acts which imply choice and acquiescence." The judgments of Lord Westbury and Lord Cranworth contain expressions to the same effect. In the present case the acts that I have referred to of Edwin Fernando appear to me to show both unequivocally an election, and also the fact that he knew the necessity of making an election, and in fact made it. The fact that he took property that was left him under the will, the fact that he allowed his brother to have an interest under the will which he would or should not have had unless Edwin Fernando had made his election, and the fact that Edwin Fernando included the property in dispute in the inventory, all show that his state of mind was such as is referred to as being necessary in the judgments of the case I have referred to. The fact that he included what he claimed to be his own property in

[1] *(1865) 11 House of Lords 588.*

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the inventory as part of his mother's estate seems to me to show clearly that he knew that he must elect between that property and the property given to him by the will, and that he must, if he wanted the benefits of the will, restore that property to his mother's estate by including it in the inventory of her estate, which he in fact did.

One other point only remains to be referred to in this case, and that is, the order that the appellant should pay the respondent the costs personally. It was contended on behalf of the appellant that under our law a married woman is unable to bring an action without joining her husband, and that, even if she sued or was sued in her representative capacity, her husband must be joined if it is desired to make her liable for costs. The answer to this appears clear, that section 475 of the Civil Procedure Code alters the law with regard to suits by married women in their capacity of administratrix or executrix, and they can now be sued in these capacities in the same way as any other person. This being so, it appears to me to follow, as a necessary consequence, that they are liable to the same result as any other litigant, namely, to the obligation to pay costs if they are unsuccessful. The District Judge has in his decree added that the appellant should pay the costs " personally ". This order might have the effect of preventing her from recouping herself in respect of any costs she is compelled to pay out of her brother's estate. There is no reason, on the facts of this case, why she should personally pay the costs, she having done nothing in any way improper in contesting the present suit. I therefore, agree that, subject to the omission of the word " personally " in the decree, the judgment appealed from should be affirmed, and the appeal dismissed, with costs.

Appeal dismissed.