APPEAL FROM ORIGINAL CIVIL.

Before Rankin C.J. and Buckland J.

1930

Jan. 27, 28.

FORRESTER

v.

FORRESTER.*

Divorce—Wife's costs de die in diem—*Wife's costs of unsuccessful suit—Costs of appeal—Independent means of wife—Jurisdiction of appeal Court—Attorney's costs—Affidavits, proper way to do—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75).*

If a wife brings a suit for divorce, which is ultimately dismissed, the question whether she ought to get an order against her husband for her costs, where she has sufficient separate estate, is a question entirely within the jurisdiction of the Court.

As between the husband and the wife, in a matrimonial suit, there is no reason why the wife should not be made to pay to her husband the costs, which her conduct has occasioned to her husband, if she has the money to do so.

Hall v. *Hall* (1) relied on.

An order of the trial court, in anticipation of and antecedent to the result of the suit, about security for costs to be given by the husband in respect of the wife's costs in prosecuting the suit, cannot bind the hands of the appeal Court.

Otway v. *Otway* (2) relied on.

Holt v. *Holt* (3) and *Weber* v. *Weber and Pyne* (4) referred to.

Position of the attorney in such cases considered.

Remarks upon the practice of making affidavits and applications on insufficient materials.

APPLICATION by the husband, principal respondent, for an enquiry as to the private means and separate estate of his wife.

The facts sufficiently appear in the judgment.

Mr. Ormond, for the applicant, appellant and principal respondent.

Mr. Meyer, for the opposite party, respondent and petitioner.

*Application in Appeal from Original Civil, No. 55 of 1929, in Matrimonial Suit No. 1 of 1929.

(1) [1891] P. 302.
(2) (1888) 13 P. D. 141.
(3) (1858) 28 L. J. P. & M. 12.
(4) (1858) 28 L. J. P. & M. 11.

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RANKIN C. J. In this case, the wife brought a petition for dissolution of marriage against her husband on the ground of adultery. The suit was brought under the Indian and Colonial Divorce Jurisdiction Act of 1926. At first instance, the wife obtained a decree and, an appeal being taken by the husband, the appeal Court reversed that decree and dismissed the suit of the wife.

During the proceedings on the Original Side, various orders were from time to time made for security for costs to be given by the husband in respect of the costs which the wife was incurring in prosecuting her suit in the trial Court. When the decree for divorce was set aside, this Court made an order, which was expressed to be conditional upon the result of an application which might be brought within a limited time by the husband asking for an enquiry into the question whether the wife had sufficient separate estate of her own. Subject to that condition, the Court ordered that the amount of security which was in the neighbourhood of Rs. 4,000 and which had been given by the husband in respect of the wife's costs on the Original Side should be paid to the wife for her costs of the trial. As regards the wife's costs of the appeal, the Court, subject to the same condition, directed that the husband should pay those costs. It appears that, in addition to the security which was given for the costs of the trial, a sum of Rs. 650 was given as security for the wife's costs of the appeal and, at the hearing of the appeal, an order for further security was asked for on behalf of the wife.

Now, at the time when this Court made the order as to costs to which I have referred, a certain amount of argument was addressed to us with a view to showing that the wife was at all events entitled to be paid her costs of the appeal, although she was unsuccessful. Notwithstanding that argument, the Court definitely made the order as to costs conditional

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upon the result of an application to enquire as to whether the wife had sufficient separate estate.

The husband having made an application for such an enquiry, the same argument has been renewed before us to the effect that, in the circumstances of this case, the wife has a right to the costs of the appeal, although, as a matter of fact, her suit has been dismissed. The first question is whether that contention is correct. I have thought fit not to proceed upon extracts out of any text book however meritorious but to look to the cases on this subject and I am satisfied that this Court has complete jurisdiction over this question whether the unsuccessful wife should be given her costs of the appeal.

In England, prior to the Married Women's Property Act of 1882, the position was that the husband, by the mere fact of the marriage, was possessed of all the properties of both—the whole of the common means of subsistence; and, on that principle, in the absence of clear proof of sufficient separate estate of the wife, the Court dealt with this matter upon the footing that it was right that the wife should have her costs provided for by the husband in these matrimonial suits. In such a case, even if the wife's charge of adultery failed in the first instance, she was allowed costs of the suit. The case, which is of some importance, because it was afterwards followed by the decision of the Court of appeal and which bears upon the present question, is the case of *Holt* v. *Holt* (1). That was a case where the husband had obtained a decree for separation *a mensa et thoro* from the Ecclesiastical Court and, after the Divorce Court was set up in 1857, he sued for a complete divorce. In that case, a question arose whether, in the meantime, the wife would have alimony and be paid her costs of the suit. The argument for the wife was very well put forth by the learned lawyer, Dr. Phillimore, and his argument

(1) (1858) 28 L. J. P. &. M. 12.

was this: "In *Weber* v. *Weber and Pyne* (1), it was "decided, that in dissolution suits this Court will "order payment of the wife's costs *de die in diem*. "The principle on which costs are granted is, that the "husband is supposed to possess the whole of the joint "property, and that the wife has no means of her own "wherewith to defend herself: that principle is "applicable notwithstanding the previous sentence of "divorce *a mensa et thoro*." The Judge, accordingly, accepted that argument. He said: "With regard to "the costs, the question whether the wife is entitled to "them must be decided on other principles. She has, "undoubtedly, a right to defend herself against this "proceeding; and if she does so, inasmuch as the suit "was instituted by the husband for his own purposes, "I think that the costs of conducting her defence "should be paid by him."

That was the position in the fifties, long before the Married Women's Property Act of 1882 was thought of. Since then, in modern times, I need hardly say, it is well settled that, if a husband brings a suit for divorce against his wife and succeeds in proving matrimonial misconduct and also succeeds in proving that the wife has money of her own to a sufficient amount, it is the practice to condemn the wife in costs.

The question, with which we are confronted in this appeal, is a question which was almost exactly raised in the case of *Otway* v. *Otway* (2). That was a case where cross petitions were presented both by the husband and the wife. Both were found guilty of adultery. The husband was also found guilty of cruelty. The Judge dismissed the husband's petition, but gave the wife a decree for judicial separation. The husband appealed to the Court of appeal and the Court of appeal held that judicial separation could not be given at the instance of the wife, who had committed misconduct. So the wife, as respondent, failed and the husband succeeded in the appeal. The

(1) (1858) 28 L. J. P. & M. 11. (2) (1888) 13 P. D. 141.

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wife ultimately lost her case for judicial separation. The question of the wife's costs of the appeal was carefully dealt with by the Court of appeal in that case and Cotton L. J. dealt with that question—there being no evidence at all of separate estate or anything of that sort any more than there had been in the previous case of *Holt* v. *Holt* (1)—in the following way: he said "As regards the appeal, I doubted very much "whether we ought to allow any costs of the wife on "the appeal, we having decided against her on the "ground that she had already been found guilty of "adultery before any of the proceedings in the appeal "were taken. But I think the case, we have been "referred to, of *Holt* v. *Holt* (1) settles that question. "If, after she had been found guilty of adultery, she "had herself actively brought the matter before this "Court, then I should have thought no provision ought "to be made for her costs; but here she was only "defending herself against a proceeding taken by the "husband, and that being so, I think that, following "what is laid down in *Holt* v. *Holt* (1), it was reasonable "for her to instruct a solicitor and counsel to appear." He then goes on to say "It does not prevent her from "requiring her husband to provide for the costs "reasonably incurred in bringing her case against his "appeal before the Court." If anything is necessary to show that the principle upon which that case was decided was that there was no question of the wife having separate estate, that is provided by what the Lord Justice goes on to say, because he goes on to notice that these parties had been married in 1879, before the Married Women's Property Act of 1882. He points out that "Although a married woman does "retain a right to property which comes to her after "the passing of the Act, we do not know that she had "any such property and, therefore, in my opinion, we "must decide this case independently of the position "of a married woman under the recent legislation;" and all the Lord Justices agreed in thinking was

(1) (1858) 28 L. J. P. & M. 12.

that that case had to be decided entirely apart from any question whether the woman had separate estate or sufficient money.

Just as a wife, whose misconduct puts her husband to expense in a matrimonial suit, may be condemned in her husband's costs, if she has separate property; so, in a proper case, if a wife brings a suit which is ultimately dismissed, the question whether she ought to get an order against the husband for her costs, where she has separate estate, is a question entirely within the discretion of the court. In my judgment, it is idle to contend that there is any rule binding upon this Court upon that subject. This Court is exactly in the same position as the English Divorce Court would be, which technically is this, that the Statute says that the Court has complete discretion.

In these circumstances, it is not very much use for Mr. Meyer, in the course of his very able argument, to refer to cases such as *Flower* v. *Flower* (1), decided in 1873, or to the case of *Hall* v. *Hall* (2), decided in 1891, because these were cases in which no question of independent means arose. On the question of principle, the case of *Hall* v. *Hall* (2)—the case of appeal by the wife who had failed in the trial court—would seem to show that as between the husband and the wife there is no real reason why the wife should not be made to pay to her husband the costs, which her conduct has occasioned to her husband, if she has the money to do so.

In this connection, Mr. Meyer says that, because the learned Judge in the Court of first instance thought fit to make an enquiry sufficient for that purpose and to order the husband to make provision for the wife's costs of the suit, this Court is bound to make an order—whether the wife has separate estate or not—that her costs of the appeal should be paid by the husband. I dissent altogether from the proposition that the order made by the learned Judge, in anticipation of and antecedently to the result of

(1) (1873) L. R. 3 P. & D. 132. (2) [1891] P. 302.

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the suit, binds the hands of this Court when it comes to make an order as to whether the wife should be given her costs of the appeal. What Mr. Justice Costello had to determine was whether the wife, for the purpose of prosecuting her suit, then undetermined, should be given the money to obtain legal assistance. I demur altogether to the doctrine, that has been laid down by Mr. Meyer in his argument, that, from the moment the learned Judge made the order for security for costs in the trial court, this Court is bound as between the parties to make an order for costs of the appeal on the basis that the matter is concluded.

The next question is as to the position of the attorney.

As regards the trial, the attorney has, under the orders of the learned Judge, received certain sums which the husband was made to pay to him. Accordingly, as regards the costs of the trial, Mr. Ormond in his argument very properly said that there might be some difficulty in varying the order which we have already made. The wife's costs of the appeal are not at all in the same position and it by no means appears that if she has independent means there will be any injustice to the attorney if the wife is not given the whole of her costs of the appeal, as our present conditional order contemplates. All we have to consider now is whether we ought to make some enquiry as to what separate estate this woman has, before finally holding that the husband must pay the costs of the appeal to the unsuccessful wife.

As to that, it appears to me that the affidavit upon which the husband came to Court was so negligently drafted and so scrappy that it would be little hardship at all upon him if the Court had refused to read any further and had thrown out his application. This is an example of a very bad practice which is too common in this Court—to make an application on almost no materials, waiting until the opposite party has adduced lengthy reasons against the application,

and then at the time when it is not possible for the opposite party to deny anything, to reply with a lengthy series of charges based upon new materials. Speaking for myself, if I thought that it could be done without extreme hardship, I should be very much tempted to dismiss the application at sight without reading the respondent's affidavit or the affidavit in reply.

I have, however, considered the wife's affidavit in answer and it appears to me that the fact stated in paragraph 7 of the petition, should not alone be looked at. It does seem to me that this woman has had a certain property—"Tamarack," it appears to be called,—and it does also seem that she has life-interest at all events in a sum of money approximately amounting to Rs. 500 a month. It is quite evident that, if this enquiry is to be ordered, it may very well result in no advantage in the end to the husband. It is also evident that, if we are going to embark upon this enquiry, the husband will be required to give some security for the costs of the enquiry. Whether all this is going to be worth his while is a question for him. In my judgment, the correct order to make in this case would be to direct an enquiry, on the husband paying into Court, as security to abide by the order of this Court as regards the wife's costs of the enquiry, a sum of Rs. 300. This sum is not to be taken out and I need not say that no attorney will be well advised, because this Rs. 300 is there, to assume that his client will ultimately get an order to have the money.

The costs of this application are reserved.

BUCKLAND J. I agree.

Application granted.

Attorneys for the petitioner: *Leslie & Hinds.*

Attorneys for the opposite party: *Sanderson & Co.*

G. S.