ORIGINAL CIVIL.

Before Mr. Justice Pontifex and Mr. Justice Wilson.

PROBY *v.* PROBY.

1879 *May* 20, & *June* 12.

**Suit for Judicial Separation—Liability of Husband for Costs of Wife—Indian Succession Act (X of* 1865), *s.* 4.

In a suit for judicial separation between persons subject to the Indian Succession Act, the Court will not, unless under exceptional circumstances, order the husband to give security for his wife's costs.

The principle upon which the Divorce Court in England acts, in requiring the husband, in a suit for judicial separation, to provide for his wife's costs, is based upon the absolute right which the law formerly gave the husband upon marriage to the whole of his wife's personal estate, and to the income of her real estate, leaving her destitute of all means to conduct her case; but this state of the law has been completely altered in India by s. 4 of the Indian Succession Act, which prevents any person from acquiring, or losing, rights in respect of property by marriage.

In this case a petition had been presented by a wife, praying for a judicial separation from her husband, on the ground of cruelty. The marriage took place in 1879. The petitioner now asked that her husband might be ordered to pay her such alimony, pending the suit, as the Court might think fit; and also that he might be ordered to pay into Court such sum as might be sufficient to pay the petitioner's costs of, and incidental to, the suit. The respondent admitted his liability to pay alimony, but contended that he should not be ordered to provide for the petitioner's costs.

Mr. *Bonnaud* for the petitioner.—The difficulty in this case arises from the decision in *Broadhead* v. *Broadhead* (1). There the husband, who was the petitioner, was ordered to deposit a sum for his wife's costs. There was no evidence before the Court that the wife had any separate property, and it was argued that, as the marriage had taken place subsequently to the Indian Succession Act, s. 4 of that Act applied, and that, therefore, the husband was not liable to pay his

(1) 5 B. L. R., App., 9.

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wife's costs; and the question now is, whether the effect of s. 4 of the Indian Succession Act is to abrogate the rule, which the English Court follows, in requiring the husband, in a suit by the wife for judicial separation, to provide for the wife's costs. In any case, before s. 4 can apply, it must be shown that the wife has separate property. Admitting that s. 4 does make a difference in the status of a married woman having an Indian domicile, yet, as the Divorce Act here contains no provisions giving the Court a general power over costs, such as that conferred on the English Court, by 20 and 21 Vict., c. 85, s. 51, and as s. 7 of the Indian Divorce Act provides that the Courts here are to "act and give relief on principles and rules as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief," I submit that the practice of the English Court, as to making the husband deposit a sum of money to meet his wife's costs, should be followed by this Court. The practice of the English Court is based upon the principles on which the Ecclesiastical Courts gave relief—*Jones* v. *Jones* (1). In that case, which was decided after the Married Woman's Property Act of 1870 was passed, the husband was ordered to pay a sum into Court to cover the costs and expenses of his wife. It is the universal practice of the Court in England that the wife is entitled to payment of her costs, and if they are not paid, she has a right to a stay of proceedings—*Keane* v. *Keane* (2); and though that Court has power to disallow the wife's costs of the hearing of a suit in which she has been unsuccessful, it will only exercise that power in cases where the wife's attorney has been guilty of some misconduct, or has instituted the suit knowing that it was without reasonable ground—*Flower* v. *Flower* (3). The principle upon which the Court acts in requiring the husband to provide for his wife's costs is, that as a decree for separation is fit and necessary for the protection of the wife, and as she has no means of her own, she is entitled to charge her husband for the necessary costs of the proceeding as much as for necessary food or clothing—*Browne* v. *Achroyd* (4), *Fowle* v.

(1) L. R., 2 P. & D., 333.
(2) L. R., 3 P. & D., 52.
(3) L. R., 3 P. & D., 132.
(4) 5 E. & B., 819.

Fowle (1). [WILSON, J.—Have you any authority for saying that an action would lie against a husband by an attorney, before showing that the wife was right?] If the suit was *primâ facie* bad, the Court would not grant the order. But here a *primâ facie* case is made out, and the suit will be stopped if security for costs is not given. In *Brown* v. *Ackroyd* (2), Lord Campbell, C. J., says—"Where there exist such facts as justify a divorce *a mensâ et toro,* the wife may seek the divorce and must have the means. Neither . . . . is it necessary in such an action as this for the proctor to show that there was full evidence of facts necessarily entitling the wife to a divorce *a mensâ et toro* . . . it is enough if there be reasonable cause for the proceeding." In *Belcher* v. *Belcher* (3) it was held, that the husband is liable to the costs of the wife, unless she has a separate income sufficient both for her own support and for the payment of her costs. [WILSON, J.—That was a question as to who should pay the costs, not a question of security for costs.] The principle upon which the decision went was, that the husband is presumed to possess the whole of the property, and that principle was followed in *Broadhead* v. *Broadhead* (4). The Court will make an order for the taxation and payment of the wife's costs in a matrimonial suit against the husband notwithstanding his apparent inability to pay them—*Ward* v. *Ward* (5). In *Kelly* v. *Kelly* and *Saunders* (6) the husband was ordered by this Court to pay a sum into Court for his wife's expenses.

Mr. *Trevelyan* for the respondent.—Section 4 of the Indian Succession Act does away with the grounds upon which the English rule as to making the husband provide for his wife's cost is based. The Married Woman's Property Act in England is not so extensive in its operation as the Indian Succession Act, which, so far as property is concerned, abolishes the doctrine of unity between husband and wife. The principle upon which all the English cases go, is founded on the rule that the whole of the wife's property becomes the husband's

(1) 3 Calc., 502.
(2) 5 E. & B., 826.
(3) 1 Curteis, 444.
(4) 5 B. L. R., App., 9.
(5) 1 Sw. & Tr., 484.
(6) 3 B. L. R., App., 4.

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upon marriage, and that, therefore, she has no means of her own—*Milne* v. *Milne* (1), *Wells* v. *Wells* (2), Browne on Divorce, 275, *Beevor* v. *Beevor* (3). Even supposing that costs are payable because they are necessaries, that is founded on the same principle of unity between husband and wife. [WILSON, J.—Do you say that a husband's liability for necessaries is gone since the Succession Act was passed?] Yes. [PONTIFEX, J.—He would be liable for maintenance.] Not in a Civil Court; only under s. 536 of the Criminal Procedure Code, or s. 234 of the Presidency Magistrates' Act. There is a specific provision as to necessaries supplied to persons incapable of entering into contracts, contained in s. 68 of the Contract Act, but that does not apply to wives. *Fowle* v. *Fowle* (4) is not an authority; the parties were married before the Succession Act was passed, therefore the case is on the same footing as the English cases, which do not, as I contend, apply to persons subject to the Succession Act. It is not necessary, moreover, that the English rule should be applied here when the wife has no means, for she can sue in *formâ pauperis*. In *Walker* v. *Walker* (5) the Court refused to tax the costs of the wife against the husband, he being possessed of no property whatever, and having been shortly before discharged from prison as an insolvent-debtor. That case, therefore, conflicts with *Belcher* v. *Belcher* (6) cited on the other side.—The case of *Broadhead* v. *Broadhead* (7) apparently follows *Kelly* v. *Kelly* and *Saunders* (8), which was based upon the English authorities. Both these cases were decided after the Succession Act was passed, but I submit that they are not binding upon the Court, having regard to the provision of s. 4 of the Succession Act.

Mr. *Bonnaud* in reply.—The costs and all reasonable expenses incurred preliminary to the institution of proceedings, as well as the expenses of the proceedings themselves, are "necessaries"

(1) 40 L. J., P. & M., 13.
(2) 33 L. J., P. & M., 72.
(3) 3 Phill., 261.
(4) 3 Calc., 502.
(5) 1 Curteis, 560.
(6) *Ibid*, 444.
(7) 5 B. L. R., App., 9.
(8) 3 B. L. R., App., 4.

and for them the husband is liable—*Wilson* v. *Ford* (1). [WILSON, J.—*Ottaway* v. *Hamilton* (2) expressly re-affirms *Browne* v. *Achroyd* (3).]

The judgment of the Court was delivered by

PONTIFEX, J.—The petitioner has instituted proceedings praying for a judicial separation from her husband. She is now scarcely more than 18 years of age; she was married on the 15th of February last, and her husband attained the age of 21 on the 17th of May. They lived together only until the 17th of April, when the petitioner separated herself from her husband; and she alleges cruelty on the part of her husband as the ground on which she claims a judicial separation.

Within four days from the service on her husband of her petition, she served him with notice of her present application for an order directing him to pay her such alimony during the pendency of her suit as this Court might think fit, and also to pay into Court such sum as might be deemed sufficient to pay her costs of, and incidental to, this suit.

The application for alimony the husband does not resist, but he opposes the application so far as it asks that he should provide for the petitioner's estimated costs of suit.

This part of the petitioner's application is grounded on the long established practice of the Ecclesiastical Courts in England, which is still followed by the English Divorce Court, and which was followed by this Court in the case of *Broadhead* v. *Broadhead* (4), in which case the husband was the petitioner.

That practice was, that in suits for judicial separation the husband was ordered to deposit in Court a sum of money to meet the estimated costs of the wife in the suit, and which should be a security to her proctor whatever might be the result of the suit.

It has been urged on behalf of the petitioner, that as s. 7 of the Indian Divorce Act (No. IV of 1869) enacts that this Court should act and give relief on principles and rules as nearly

(1) L. R., 3 Ex., 63.
(2) L. R., 3 C. P. Div., 393.
(3) 5 E. & B., 819.
(4) 5 B. L. R., App., 9.

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as may be conformable to the principles and rules on which the English Divorce Court acts and gives relief; and as that Court in suits for judicial separation is to proceed and act on principles and rules as nearly as possible conformable to those on which the Ecclesiastical Courts had theretofore acted and given relief, therefore we are bound to follow the ancient practice, and to direct the husband in this case to deposit the estimated costs of the petitioner in this suit.

The foundation of the practice which prevailed in the Ecclesiastical Conrt was the absolute right which the law formerly gave the husband upon marriage to the whole of the wife's personal estate and to the income of her real estate, leaving her destitute of all means to conduct her case.

But that state of the law has been completely altered in India by the 4th section of the Indian Succession Act, to which these parties are subject, and which enacts that "no person shall by marriage acquire any interest in the property of the person whom he or she marries, nor become incapable of doing any act in respect of his or her own property which he or she could have done if unmarried."

The foundation of the practice of the Ecclesiastical Courts having been displaced with respect to persons subject to the Indian Succession Act, we think that the practice itself ought no longer, as a general rule, to be followed.

Indeed, in the Ecclesiastical Courts the rule was not an absolute one, but was subject to exceptions, as in the cases where the wife had separate property of her own, or where it was proved that the husband had no means of his own.

And in the English Divorce Court, at least since the publication of the rules and orders of 1865, there has been a discretion to refuse the wife her costs, even in a case where a deposit of estimated costs had been made by the husband under the order of the Court—*Jones* v. *Jones* (1).

Therefore, without saying that this Court will, under no circumstances, order a husband to give security for his wife's costs, for cases of settlement, or particular circumstances might justify

(1) L. R., 3 Prob. and Div., 333.

it, we are of opinion that it should be done under special circumstances only, and as upon the affidavits no special circumstances appear to us to exist in this case, we must refuse that part of this application which asks that the husband may be ordered to deposit the estimated costs of the petitioner.

With respect to the question of alimony pending the suit, there must be a reference to the Registrar to inquire and report upon the amount of income which the husband is entitled to. As the husband admits his liability to provide alimony, there will be no costs of this application.

Attorneys for the petitioner: Messrs. *Smith* and *Chatterjee*.

Attorney for the respondent: Mr. *H. R. Fink*.

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Prinsep.

SIKHER CHUND (ONE OF THE DEFENDANTS) *v.* DULPUTTY SINGH (PLAINTIFF).*

1879 *Aug.* 30.

Suit to recover Property sold by a Guardian—Act XL of 1858, *s.* 18—*Limitation (Act IX of* 1871), *sched. ii, arts.* 15, 92, 145—*Onus of Proof for Necessity of Sale—Evidence—Recitals in Deeds.*

A Hindu family being heavily oppressed with debts, ancestral and otherwise, the two elder brothers of the family, for themselves and as guardians of their minor brother, under Act XL of 1858, applied to and obtained from the District Judge an order, under s. 18 of the Act, for the sale of several portions of the ancestral estate, and sold the same under registered deeds signed by the Judge. Within twelve years after the registration, the adopted son of the minor brother brought several suits against the purchasers to set aside the sales and recover back his share of the property, alleging that the two elder brothers had made the sale fraudulently and illegally to satisfy personal debts of their own.

Held, that a suit of this nature is not a suit "to set aside an order of a Civil Court" under art. 15, sched. ii of Act IX of 1871; nor is it a suit "to

* Regular Appeals, Nos. 167, 132, 133, 134, 135, and 137 of 1877, against the decree of Baboo Matadin Roy Bahadoor, Subordinate Judge of Shahabad, dated the 10th March 1877.