called upon to consider. I direct that B, with A as an annexure to it, be registered if duly presented for registration within thirty days after this date. The defendant Tullockchand will pay the plaintiff's cost.

1896.

GOKULBHOY v. TULLOCK-CHAND.

Attorneys for plaintiff:—Messrs. *Hirálál and Mádhavji.*

Attorneys for defendants:—Messrs. *Bicknell, Mervánji and Motilál.*

TESTAMENTARY JURISDICTION.

Before Sir Charles Farran, Knight, Chief Justice, and Mr. Justice Strachey.

DAYA'BHA'I TA'PIDA'S (ORIGINAL APPLICANT), APPELLANT, *v.* DA'MODARDA'S TA'PIDA'S (ORIGINAL OPPONENT), RESPONDENT.*

1896. *July* 10.

Probate—Costs of obtaining probate—Fund liable.

The appellant cited the respondent, who was the executor of one Tulsidás Varajdás, to bring in and prove his testator's will. The Division Court (Starling, J.) ordered the respondent to lodge the will in Court and to take out probate, but directed that the appellant should pay half the costs of obtaining probate. On appeal,

Held (varying the order of Starling, J., as to costs) that the fund primarily liable to the costs of probate was the residuary estate; and part of the residuary estate being as yet undistributed, it should in the first instance be applied to this purpose, and after that the appellant and respondent should contribute in equal shares.

APPEAL from the order of Starling, J. [1]

In this case the appellant (applicant) had cited the respondent who was the executor of one Tulsidás Varajdás, deceased, to bring in and prove his testator's will.

The case was heard before Starling, J.[1], who directed the respondent Dámodar to lodge the said will in Court and to take out probate. In giving judgment his Lordship said:

"Dayábhái having quarrelled with Dámodar wants to make Dámodar pay out of his own pocket all the costs of obtaining probate, and then to have the gratification of bringing the estate into Court. I do not think he should have this double gratification, as I am doubtful whether there is any necessity for probate except for the purpose of enabling one brother to compel the other to render an account of the estate and his application thereof to the Court. If he wants probate taken out, he must pay one-half the costs, including probate duty.

* Appeal, No. 901.

(1) I. L. R., 20 Bom., 227.

1896.

DAYÁBHÁI v. DÁMODARDÁS TÁPIDÁS.

"The order I shall, therefore, make is that on Dayábhái paying to Dámodar or his attorneys half the estimated costs of applying for and obtaining probate (including probate duty), such estimate to be settled, if necessary, by the Taxing Master, but without prejudice to Dayábhái's right to have the same debited against the estate, Dámodar do, as soon as practicable thereafter, apply for and take out probate of the will of Tulsidás Varajdás, deceased. Each party to bear his own costs of this citation and order."

The applicant Dayábhái appealed on the following grounds (*inter alia*):—

(1) That the learned Judge was wrong in not ordering the respondent to take out probate without making any condition that the appellant should pay to the respondent one-half of the estimated costs of applying for and obtaining probate, including probate duty.

(2) That the learned Judge ought, in any event, not to have made the appellant pay anything more than half the costs that remained to be provided for after taking into account the moneys forming portion of the residue of the said estate of Tulsidás Varajdás in the hands of the respondent, of which estate it was admitted that one lákh of rupees and the accumulations and accretions of the income and profits of the said one lákh of rupees for several years remained in the respondent's hands.

(3) That the costs of taking out probate should be ordered to be borne by the respondent as executor out of the moneys in his hands of the said estate, and if the said estate should prove insufficient, that then only should the appellant be required to contribute to the costs in a proper proceeding for the purpose.

Macpherson appeared for the appellant.

Scott for the respondent.

FARRAN, C.J.:—Neither of the parties has appealed from the first part of the order made by the Division Court. So we have not to consider that matter. The only point, before us, is as to the source from which the costs of obtaining probate are to be provided.

The fund primarily liable is ordinarily the residuary estate. Part of the residuary estate in this case, *viz.*, the interest on a lákh of rupees, appears to be as yet undivided between the brothers. This sum, we think, should in the first instance be applied to the costs and expenses of obtaining probate. After that each brother must contribute in equal shares. The order of the Division Court will be varied accordingly.

The following order was made:—

This Appellate Court doth vary the said order dated the fourteenth day of September, 1895, and in lieu thereof doth order that the said respondent do forthwith get

1896.

DAYÁBHÁI v. DÁMODARDÁS TÁPIDÁS.

the said will transmitted from the office of the Testamentary Registrar of this Honourable Court, where it has been lodged pursuant to the said order, to the office of the Chief Translator for translation, and that he do apply for probate thereof within two days after obtaining the translation of the said will from the Translator's office. And this Appellate Court doth further order that the residue undistributed in the hands of the said respondent as executor of the said will (the accumulations of interest on the sum of rupees one lákh set apart to meet the bequest mentioned in clause sixteen of the said will appearing for the purposes of this order to be the only undistributed residue) be, without prejudice to the rights of any son who may be hereafter adopted under the said clause 16 of the said will, applied in the first instance in and towards payment of the costs and expenses of applying for and obtaining the probate of the said will including the probate duty, and that in the event of such undistributed residue being insufficient the appellant and respondent do pay such deficiency in equal shares after the probate duty is ascertained and at the time it is payable by the respondent.

Attorneys for the appellant:—Messrs. *Chitnis, Motilál and Málvi.*

Attorneys for the respondent:—Messrs. *Thákurdás, Dharamsi* and *Cáma.*

MATRIMONIAL COURT.

Before Mr. Justice Strachey and Mr. Justice Tyabji.

A. (THE WIFE), PLAINTIFF, *v.* B. (THE HUSBAND), DEFENDANT.*

1896. *July* 24.

Husband and wife—Divorce—Suit for nullity of marriage—Suit by wife against husband—Costs of wife—Alimony—Maintenance—Suit between Mahomedans—Mahomedan law.

The English law which makes the husband in divorce proceedings liable *primâ facie* to the wife's costs, except when she is possessed of sufficient separate property, does not apply to divorce proceedings between Mahomedans.

A wife sued her husband for dissolution of marriage (both parties being Mahomedans) on the ground of his impotency and malformation. An interlocutory order was made by the Court adjourning the further hearing of the suit for one year, in order that the parties might resume cohabitation for that period. The husband desired to carry out the order of the Court and was anxious that his wife should live with him; she, however, refused to do so and only paid occasional visits to his house. The suit was subsequently dismissed with costs. The wife appealed and subsequently applied for alimony until the disposal of the appeal.

Held, that having regard to the conduct of the wife she was not entitled to alimony. By Mahomedan law a husband's duty to maintain his wife is conditional upon her

* Suit No. 88 of 1893, Appeal No. 895.