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I should judge that they were entitled so to do, the object of a promissory note is to show that the particular transaction represented by the note is a separate transaction, and it is intended that the remedies in respect of that transaction should be separately pursued. Subsequently, however, the plaintiffs instituted this suit for a general account to be taken of all the transactions between the plaintiffs and the defendants. I am not prepared to say upon the pleadings as they stand that the suit instituted by the plaintiffs in this Court in respect of all these transactions is in any sense a **[630]** vexatious suit; nor is it desirable, in my opinion, that at this stage there should be an issue as to whether it is vexatious or not, because, after all, that question must depend upon the result of the account, and justice can be done between the parties by the apportionment of costs after the account has been taken. I propose to direct an account to be taken in this suit. I think that, so far as the promissory notes are concerned, they do not *prima facie* constitute items in a running account. I think, however, the fact that security has been undoubtedly given in respect of the total amount of indebtedness of the plaintiffs to the defendants makes it desirable that there should not be a separate proceeding in respect of one of those promissory notes, having regard to the fact that there exists a suit in the High Court in which all the transactions between the parties can be dealt with.

While, therefore, as a general rule, it would be no answer as regards a suit instituted in the Calcutta Court of Small Causes upon a promissory note for the defendants to say that the claim is a matter of account, the situation is altered when a suit such as the present one is instituted in this Court by the defendants in the Small Cause Court suit. The question of procedure then becomes, as I have already said, a matter of convenience rather than a question of right.

I, therefore, propose to refer it to the Official Referee to enquire and report what sum, if any, is due to the defendants or the plaintiffs in respect of the various transactions mentioned in the plaint and the written statement, and in making his report I desire him to state whether the sums paid to the defendants or the realizations made by them were in respect of any particular items in the account or in respect of the general indebtedness.

The probability is that when that report is made, there will be further materials before the Court enabling the Judge to deal with the costs of this suit and of the present application. The application for the stay of proceedings in the Calcutta Court of Small Causes must stand over until the report is made.

The costs of the suit and of the Rule are reserved.

Attorney for the plaintiffs: *S. K. Sirkar.*

Attorney for the defendants: *N. C. Bose.*

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30 C. 631 (=7 C. W. N. 565.)

[631] MATRIMONIAL JURISDICTION.

BOYLE *v.* BOYLE.* [13th May, 1903.]

Divorce—Wife's costs—Dismissal of wife's petition—Liability of husband—Deposit or security for costs.

* Original Civil Suit No. 5 of 1902.

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30 C. 631=7 C. W. N. 865.

In a divorce suit where it is shown that the wife has no money of her own, the mere fact that no deposit has been made or security given for payment of the wife's costs is no obstacle to the making of an order against the husband to pay her costs, though her petition is dismissed.

Robertson v. *Robertson* (1), *Otway* v. *Otway* (2), and *Proby* v. *Proby* (3) referred to.

[Ref 17 I. C. 399=1912 M. W. N. 1004.]

ORIGINAL SUIT.

After the petition of Mrs. Boyle for a divorce from her husband on the ground of incestuous adultery was dismissed, an application was made for an order directing the husband-respondent to pay the costs of the petitioner notwithstanding such dismissal. The petitioner had not during the hearing applied that a deposit should be made or security given by the respondent for her costs.

From the evidence adduced in the case it appeared that the petitioner had no money of her own, and it was admitted that the parties were not governed by section 4 of the Indian Succession Act, but were subject to the Married Woman's Property Act of 1882 (45 and 46 Vict., c. 75).

Mr. *Avetoom* (Mr. *Garth* with him) for the petitioner. On the authorities my client is entitled to the costs of the suit as between party and party. All the cases are given in Rattigan on Divorce, page 371, where the principle is stated: *Flower* v. *Flower* (4), *Jones* v. *Jones* (5), *Robertson* v. *Robertson* (1).

Mr. *Knight* (Mr. *Dunne* with him) for the respondent. The petitioner did not apply during the hearing of the suit for a **[632]** deposit to be made or security given for her costs. She has presented her case to the Court without any aid from the respondent's pocket: the ground for making any order in her favour for costs no longer exists; *Sopwith* v. *Sopwith* (6), *Glennie* v. *Glennie* (7). The petitioner is governed by the Married Woman's Property Act, 1882, and therefore the dictum of Cotton, J. in *Otway* v. *Otway* (2) would apply. The authorities cited in Rattigan do not support the proposition laid down by him. The cases there deal with the question of the solicitor's position when costs have been deposited. On the merits of this case no order for costs should be made.

HENDERSON J. As to the costs, I am asked to make an order directing the respondent to pay the costs of the petition notwithstanding that the petition has been dismissed.

Under clause 16 of the Indian Divorce Act, the High Court may order the costs of counsel and witnesses and otherwise to be paid by the parties or such one or more of them as it thinks fit, including a wife, if she have separate property, and section 7 of the same Act enables Courts in this country to give relief according to the principles and rules upon which the Divorce Court in England acts and gives relief. The principles and rules upon which the Court in England used to act in exercising its discretion as to a wife's costs are discussed in *Robertson* v. *Robertson* (1) and *Otway* v. *Otway* (2). It has been the rule in England, and it has been followed in this country also, that a wife should not be precluded by want of means from establishing her case either

(1) (1881) L. R. 6 P. D. 119.
(2) (1888) L. R. 13 P. D. 141.
(3) (1879) I. L. R. 5 Cal. 357.
(4) (1873) L. R. 3 P. 132.
(5) (1872) L. R. 2 P. 333.
(6) (1860) 29 L. J. (P. & M.) 132.
(7) (1863) 3 Sw. & Tr. 109.

as petitioner or respondent, and it was usual for the wife to apply pending the hearing that the husband should make a deposit or give security for the estimated costs that might be incurred by his wife. At one time in England it was held that under Rule 159 of the English Divorce Court Rules the discretion of the Judge to allow costs at the hearing to the wife was limited to the amount for which security had been given or deposit made by the husband, but in *Robertson* v. *Robertson* it was decided that where the wife was allowed costs, and where [633] there were no improper proceedings taken on her behalf she should be entitled to the actual costs incurred by her. In the present case the petitioner did not apply that a deposit should be made or security given by the respondent for her costs, and now that the hearing has been concluded, it is said that she has not been precluded from establishing her case by any want of means, and that no order therefore can now be made against the respondent for payment of her costs.

It seems to me, however, that if an order can be made allowing costs in addition to the amount for which security has been given or to the amount deposited, there is no reason why in cases where no security has been given or deposit made an order should not be passed directing the husband to pay all costs reasonably incurred by his wife. *Robertson* v. *Robertson* (1) and *Otway* v. *Otway* (2), however, were both cases with respect to marriages which took place prior to the Married Woman's Property Act, 1882. In *Otway* v. *Otway* (2) at page 155 of the report Cotton, L. J. said :—"If this marriage had been after the Act of 1882, we should have had to consider how far that old rule would apply where a woman was put, after that Act, in the position of a *femme sole* retaining all her property, and being in a position to sue and be sued. But these parties were married in 1879, before that Act ; and although a married woman married before that Act does retain a right to property which comes to her after the passing of the Act ; and though under the Act of 1870 she has a right to certain property which came to her after 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. If a case comes before us where a married woman has been married after the Act of 1882, it will be a very serious question for consideration how far we ought to follow the old rule, or what decision we ought to give. I only mention that to show that it does not in the present case, I think, affect the decision, and we do not in any way fetter ourselves by the present decision as regards any case which may arise as regards a woman married after the Act of 1882."

[634] Now it seems to be admitted that the parties here are not governed by section 4 of the Indian Succession Act, but are subject to the Married Woman's Property Act, 1882.

My attention has not been drawn to any case since that of *Otway* v. *Otway* (2), in which the effect of that Act has been considered in England as regards a woman married since the passing of it, but in this country in *Proby* v. *Proby* (3), which turned upon the effect of section 4 of the Indian Succession Act—a provision which places married women to whom it applies somewhat in the same position as women subject to the Married Woman's Property Act, Pontifex and Wilson, JJ., without

(1) (1881) L. R. 6 P. D. 119.
(2) (1888) L. R. 13 P. D. 141.
(3) (1879) I. L. R. 5 Cal. 357.

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30 C. 631=7 C. W. N. 565.

saying that under no circumstances will the Court order a husband to give security for his wife's costs, expressed an opinion that it should be done under special circumstances only, and there being no special circumstances shown, these learned Judges refused the application that the husband should be ordered to deposit the estimated costs of his wife, the petitioner. From the evidence in the case before me, it appears that the petitioner has no money of her own, and it was admitted that if an application had been made before the hearing for the respondent to give security or to deposit the amount of the estimated costs of the petitioner there would have been no answer. Had an order for the respondent to make a deposit or give security for costs been made, I should have allowed the petitioner her costs; and if these costs had exceeded the estimated costs, I should not have limited the order to the amount estimated. In a case where it is shown that the wife has no money of her own, I do not think the mere fact that no deposit has been made or security given should be an obstacle to the making of an order against her husband to pay her costs. I therefore direct the respondent to pay his wife's costs as between party and party on scale No. 2. The order does not, however, cover the costs of the Commissioner sent down to Midnapore, as those costs have been separately dealt with.

Attorneys for the petitioner: *Leslie* and *Hinds*.

Attorneys for the respondent: *Orr*, *Robertson* and *Burton*.

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30 C. 635 (=30 I. A. 83=7 C. W. N. 498=66 P. R. 1903=90 P. L. R. 1903.)

[635] PRIVY COUNCIL.

RAHIMUDDIN *v.* REWAL.* [17th February and 25th March, 1903.]

[*On appeal from the Chief Court of the Punjab.*]

Pre-emption—Punjab Laws Act (XII of 1878) *ss.* 10, 12—" *Village Community* "—*Act IV of* 1872, *s.* 14—*Occupancy tenants in zemindari village.*

The expression "village community" in the Punjab Laws Act (XII of 1878) is not used to denote a village community of the typical sort consisting of members of one family or one clan holding the village lands in common, and dividing between them the agricultural lands according to the custom of the village; but is used to denote a body of persons bound together by the tie of residence in one and the same village, amenable to the village customs, and subject to the administrative control of the village officers.

A "village community" is not confined to the land-owners in the village. Occupancy tenants are members within the meaning of the Punjab Laws Act, and so are all persons in an inferior position who belong to the village, though they may be unconnected with the land and not entitled to any right of pre-emption under the Act.

[Ref. 7 O. C. 275; 21 P. R. 1906=110 P. L. R. 1906; 12 O. C. 1.]

APPEAL from a decision (12th April 1897) of the Chief Court of the Punjab, which reversed a decision (31st March 1894) of the Subordinate Judge of Hissar who had dismissed the suit of the respondents with costs.

The representatives of the second defendant, Sheik Allah Dia, appealed to His Majesty in Council.

The suit was brought for possession of a village called Manda Khera, of which the plaintiffs claimed the right of pre-emption as occupancy

* *Present*: Lords Macnaghten, Davey, Robertson and Lindley, Sir Andrew Scoble and Sir Arthur Wilson.