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the petitioner, if they were to be taxed now. *Clarke* v. *Clarke Perren & Cumins* (1). See also *Evans* v. *Evans & Robinson* (2). There is no authority for asking for costs in advance.

Mr. *Hyde* in reply.

PHEAR, J.—I made the order in this case for the assessment of the probable amount of the wife's costs and payment of the amount into Court, and directed that the wife's proctor should have a lien for his costs on the amount so paid into Court, on the authority of Sir Cresswell Cresswell's decision in *Sopwith* v. *Sopwith* (3), where oddly enough that learned Judge had to make an explanation for a second time, just as I am obliged to make it now for the second time. And in *Evans* v. *Evans* and *Robinson* (4) the Full Court held that, notwithstanding the dissolution of the marriage had been decreed with costs against the co-respondent, the wife's proctor could have recourse to the sum paid into Court. Finally in the case of *Allen* v. *Allen & D'Arcy* (5). The rule is laid down by the Court, by which the Registrar is to estimate the costs, and by that rule the wife will get the costs of issues actually framed, even though she fails as to them. There is, therefore, no need for Mr. *Hyde's* application. If the wife's proctor, at any stage of the proceeding, wants his costs paid out of Court he can make a simple application for them. He knows the costs are safe in Court. I think this application, which is much more extensive than the Court can grant, should be dismissed. The costs of this application will be disallowed.

Mr. *Hyde* afterwards applied for an order that the costs of the respondent should be taxed on scale No. 2, as between attorney and client; and that the amount, when so taxed, be paid out to her proctor. PHEAR, J., granted the application.

Before Mr. Justice Phear.

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1869
June 15.

Witness—Cruelty—Evidence.

THIS was a suit by a husband for dissolution of marriage under the Indian Divorce Act IV. of 1869, on the ground of his wife's adultery.

On the respondent being called as a witness, Mr. *Marindin* raised the question, whether the respondent, in a divorce suit under the Indian Act can be examined as a witness.

PHEAR, J.—Under the Act, I think, a respondent can be a witness. By the 52nd section she may be compelled to give evidence in the cases there sup-

(1) 34 L. J., Pro. & Mat. 71.
(2) 28 L. J., Pro., & Mat., 136.
(3) 6 Jur. N. S., 404.
(4) 28 L. J, Pro. & Mat., 138,
(5) 2 S. & T., 107.

posed. In other cases her evidence is admissible if she offers herself as a witness.

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The respondent had not pleaded the cruelty of her husband in her defence

Mr. *Hyde*, in the examination in chief proposed to ask the respondsnt questions tending to show cruelty on the part of the husband.

Mr. *Marindin* objected that cruelty must be pleaded specifically. *Allen* v. *Allen & D'Arcy* (15.) It cannot now be made out by examination.

Mr. *Hyde* submitted that he might put the questions with respect to cruelty The Court has power to raise the defence now. *Plumer* v. *Plumer & Bygrave* (16). By the English practice, and by section 14 of the Indian Act, the court has power to raise the issue.

PHEAR, J.—It is one of the rules of English evidence that evidence cannot be given to contradict irrelevant matter, and I think I ought not to treat cruelty or no cruelty as an issue between the petitioner and respondent unless it is pleaded by the latter. It is obvious that if this were not so specific charges need never be brought forward, and the petitioner would not know what case he had to meet. It appears to me that these charges of cruelty cannot be set up by the respondent now. Whether the co-respondent might go into them in reduction of damages is another question.

Before Mr. Justice Phear.

EWING & Co. *v.* GOSAIDAS GHOSE AND TWO OTHERS.

1869
June 17.

Irregular Service of Summons—Effect on Decree—Act VIII. of 1859. *s.* 119.

IN this case the plaintiff had sued the defendants, under Act V. of 1866, upon a joint promissory note of which they were the makers. The summons was served upon the first defendant, and a summons for each of two other defendants was left with him. The first defendant did not apply for leave to defend the suit, and the plaintiff then obtained a decree against all the defendants under Act V. of 1866 and arrested the first defendant in execution thereof, and he was imprisoned accordingly.

A rule was obtained by the prisoner to show cause why he should not be released.

Mr. *Jackson* now moved to make the rule absolute, and, in support of his motion, contended that the summonses had been improperly served. As the note was joint, not joint and several, service on one of the parties only was not sufficient. Even if it were sufficient, the prisoner ought to have had notice under the 37th Rule of the High Court, Original Criminal Jurisdiction.

(1) 28 L. J., Pro. & Mat., 81. (2) 29 L. J , Pro. & Mat., 63.