

Mr. Hyde, in support of the rule. Alimony is payable from the date of service of citation. *Nicholson v. Nicholson & Ratcliffe* (1), even where the wife is in prison for the felony *Kelly v. Kelly* (2). That there are children, by a former marriage, is no ground for paying a less proportion of the husband's income. *Hill v. Hill* (3); *Thompson v. Thompson* (4), as to paying the costs of the respondent into Court. *Evans v. Evans and Robinson* (5).

PHEAR, J.—I shall allow alimony to the respondent at the rate of rupees 110 per month, commencing from the date of service of the citations, and to run according to that rate till final decree. As to the costs let the Registrar make the best estimate he can of the expenses of the suit from commencement to and including the final hearing, and say what sum will be proper for the petitioner to pay into Court for his wife's costs. The petitioner must pay this amount into Court, and the wife's attorney or proctor will have a lien on the sum to the full extent of the costs. This will be the course in all future cases.

Before Mr. Justice Phear.

KELLY v. KELLY AND SAUNDERS.

Payment out of Court—Taxation de die in diem.

1869

June 15.

Mr. Hyde now made an application on notice for an order that the costs in this suit, already incurred by the respondent, should be taxed by the taxing officer, who should also make an estimate of the probable costs of hearing, and that the amount of the estimated costs and the costs of the present application, should be paid to the respondents' proctor by the petitioner. A certificate of the Registrar was given that the money had been paid into Court, in accordance with the order of May 14th.

Mr. Hyde submitted that the respondent was entitled to taxation of her costs, de die in diem (6). For, if she was unsuccessful in the divorce suit, the Court would not order her costs though taxed to be paid out to her. *Heal v. Heal* (7); *Keats v. Keats & Montezuma* (8): The Court has power to order the wife's costs to be taxed, from time to time, against the husband in a suit for dissolution of marriage. *Weber v. Weber & Pyne* (9).

Mr. Marindin, for the petitioner, opposed the application, referring to Brown's Matrimonial Cases, 282-83. If the wife raise a substantial defence, the costs for that are not to be paid her, and her costs may be, in various ways, subject to deduction, so that it would be much to the disadvantage of

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| (1) 31 L. J., Pro. & Mat., 165. | (6) Mac. on Divorce, 226. |
| (2) 32 L. J., Pro. & Mat., 181. | (7) 1 L. R., Pro. & Mat., 300. |
| (3) 33 L. J., Pro. & Mat., 104. | (8) 1 S. & T., 358. |
| (4) 37 L. J., Pro. & Mat., 33. | (9) 1 S. & T., 220 |
| (5) 1 S. & T., 323; Mac. on Div., 227. | |

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the petitioner, if they were to be taxed now. *Clarke v. Clarke Perren & Cummins* (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.

KELLY v. KELLY AND SAUNDERS.

Witness—Cruelty—Evidence.

1869

June 15.

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.

(3) 6 Jur. N. S., 404.

(2) 28 L. J., Pro., & Mat., 136.

(4) 28 L. J., Pro. & Mat., 138.

(5) 2 S. & T., 107.