

[618] the learned Chief Justice comprised the majority of the Full Bench. We will cite further the following passage from the conclusion of the judgment delivered by Ghosh J.—“I am inclined to think that cl. (a) in s. 5 is the only clause which provides for the specific relief contemplated by s. 9 of the Act, viz., by taking possession of certain property and delivering it to a claimant.”

We think that on the face of the plaint it would be impossible to deliver possession of the *hât* in question to the plaintiff in such a way, and that upon the principles laid down in the judgments of the majority of the Full Bench as to the application of s. 9 of the Specific Relief Act, the present case cannot be brought within that clause. It seems to us that it is nothing to the point that the *hât* was stated in the plaint to be within certain specified boundaries. The question is as to the mode of possession. According to the plaint possession was exercised by the collection of tolls and rent and the like. That appears to us to be, in the words of the learned Chief Justice at p. 547, “an incorporeal right which must always remain in the possession of its owner, though he may for any reason be prevented from exercising it.” If the plaintiff is entitled to receive the tolls, rents, and the like from the tenants and persons frequenting the *hât*, he has not been dispossessed of the *hât* merely by the action of the defendants in causing such rents and tolls to be given to them by those persons instead of to the plaintiff. If those tolls, rents, and dues are really payable to the plaintiff, it would be no answer to any claim made by him against the persons liable to pay them that they had paid them to the defendants.

There has certainly been no dispossession which could be remedied in the manner provided by cl. (a) of s. 5 of the Specific Relief Act.

The rule is discharged with costs.

Rule discharged.

29 C. 619.

[619] MATRIMONIAL JURISDICTION.

Before Mr. Justice Stephen.

GEORGUCOPULAS v. GEORGUCOPULAS.* [29th April, 1902.]

Husband and wife—Wife's costs, application for—Divorce Act (IV of 1869), s. 7—Foreign domicile—Property of wife.

On an application by the wife for her costs during the pendency of her suit for judicial separation and her husband's suit for divorce:

Held, that a wife, whose property is retained by her husband, is entitled to her costs. That, inasmuch as the parties are domiciled abroad and the law of that country is not before the Court, s. 7 of the Divorce Act applies, and the Court will act on the general principles of English law.

Mayhew v. Mayhew (1) followed.

THIS was an application made on behalf of the Petitioner, Angelique Georgucopulas, for an order that the Respondent; John George Georgucopulas, should pay into Court such sum of money as in the opinion of the Court would be sufficient to cover the costs already incurred and to be incurred by her in prosecuting and defending two pending suits, or give sufficient security to the satisfaction of the Registrar of the High

* Suits Nos. 12 of 1900 and 13 of 1900.

(1) (1895) I. L. R., 19 Bom. 293.

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Court, and that he should deposit or find security for the costs already incurred by her, and also pay her or her attorney *de die in diem* during the hearing of the two suits such sums of money as the Court should think proper, and pay her costs for the hearing of the two suits.

Mr. *Sinha* for the Petitioner. I apply for an order that the husband do pay or give security for his wife's costs in prosecuting and defending the two suits now pending.

The husband is bound to provide for the wife's costs in the two suits now instituted. See *Rattigan on Divorce*, p. 363.

[620] Here, it is admitted, she has no property at all except her marriage portion, which is in her husband's hands. See *Weber v. Weber* (1), *Natall v. Natall* (2), *Mayhew v. Mayhew* (3), *Kelly v. Kelly* (4), *Broadhead v. Broadhead* (5).

This case does not come under s. 4 of the Succession Act. See *Miller v. The Administrator-General of Bengal* (6) and *Hill v. The Administrator-General of Bengal* (7).

I submit on the authorities shown that the property of the parties is not affected by s. 4 of the Succession Act.

Here the husband says he has no means, but that fact is not sufficient to prevent the order being made.

Mr. *Avetoom* for the Respondent. This is not a *bona fide* application. The wife instituted her suit on the 29th August 1900, and since 11th April last the case has been on the list of pending suits.

The question raised by the other side as regards succession does not apply here.

In *Proby v. Proby* (8) *Pontifex J.*, p. 362, says this: "The foundation of the practice which prevailed in the Ecclesiastical Court 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."

Here the parties are Greeks, and are not governed by English law, but by the law of their country. S. 45 of the Divorce Act regulates the proceedings in so far as divorce is concerned, and says you must fall back on the Civil Procedure Code. Under the Code security is only given where a person is about to leave the jurisdiction. The parties are not governed by the Succession Act, and this matter must be decided by the Civil Procedure Code. *C. LeMesurier v. LeMesurier* (9), *Allen v. Allen* (10), *Ward v. Ward* (11).

[621] In s. 7 of the Divorce Act, the Court in granting relief will follow the English law, but here it is different, inasmuch as the parties are not governed by English law.

STEPHEN J. In this case on the proceedings of divorce and petition for judicial separation the wife seeks to make her husband liable for her costs. The husband and wife in this case are Greeks, domiciled in Greece and married at Alexandria.

It is contended that this Court has no jurisdiction to act in the matter, since the English law applicable in such cases does not apply here.

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| (1) (1860) 1 S. & T. 219. | (7) (1896) I. L. R. 23 Cal. 506. |
| (2) (1886) I. L. R. 9 Mad. 12. | (8) (1880) I. L. R. 5 Cal. 357. |
| (3) (1895) I. L. R. 19 Bom. 298. | (9) (1895) 64 L. J. P. C. 97. |
| (4) (1870) 5 B. L. R. 71. | (10) (1894) L. R. P. D. 134. |
| (5) (1870) 5 B. L. R. App. 9. | (11) (1860) 1 S. and T. 484. |
| (6) (1876) I. L. R. 1 Cal. 412. | |

I think, however, it is plain under s. 7 of the Divorce Act that this is a mistaken view. Under that section I am to act and give relief on principles and rules existing in England. The breadth of these terms seems to me to indicate that I have power to make such an order as is now sought for.

In considering the substantial question before me it has to be borne in mind that the question of whether the wife is or is not to have her costs depends upon the property which the wife may be supposed to have. If either under the Married Woman's Property Act in England, or under the Succession Act here, it appears that the woman retains her property in spite of her marriage, she will, following the ruling in *Proby v. Proby* (1), not be entitled to her costs.

In this case, however, her position in relation to her husband as regards her property is governed by the law of Greece, and I have before me no evidence as to what that law may be. Under these circumstances I do not think that *Proby v. Proby* (2) and all the cases decided in this Court on the same lines apply I must consequently fall back on the general principle as stated in *Browne and Powles on Divorce* quoted in *Mayhew v. Mayhew* (3). "It is not considered just either that a wife should be left without the means of putting her case fairly before the Court, or that a practitioner should run the risk of losing the proper remuneration for his labours, if he takes up a case which he [622] honestly believes to be genuine, but which may after all turn out to be unfounded." This is part of the law of England, and I am therefore bound by it.

I think therefore that the wife is entitled to the relief which she claims.

Order made in the usual form for the Registrar to decide what costs the husband can pay and how they should be paid, and I direct the reference to be treated as an urgent reference. Costs of this application costs in the cause.

Mr. *Avetoom*. Does the order include costs already incurred?

STEPHEN J. Yes.

Mr. *Avetoom*. I ask that the order be not made to include former costs.

STEPHEN J. I cannot accede to that.

Mr. *Sinha*. I ask for an order, as in *Kelly v. Kelly* (4), either to pay or to give security.

STEPHEN J. The proper order is to make the order in the ordinary form. Costs of this application costs in the cause.

Attorney for Petitioner. *Leslie and Hinds*.

Attorney for Respondent. *S. P. Simmons*.

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(1) (1880) I. L. R. 5. Cal. 357.
(2) (1895) I. L. R. 5. Cal. 357.

(3) (1880) I. L. R. 19 Bom. 295.
(4) (1869) 3 B. L. R. 71.