

1892 LEANDER J. CROWE (DEFENDANT).....APPELLANT;

*May 11.

*Oct. 10.

AND

ANNIE ADAMS (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Title to goods—Married woman—Execution against husband—Replevin—Justification by sheriff—Married Woman's Property Act, R. S. N. S. 5th ser. ch. 74.

In an action by A., a married woman, against a sheriff for taking, under an execution against her husband, goods which she claimed as her separate property under the Married Woman's Property Act (R. S. N. S. 5th ser. ch. 74) the sheriff justified under the execution without proving the judgment on which it was issued. The execution was against Donald A. and it was claimed that the husband's name was Daniel. The jury found that he was well known by both names and that A.'s right to the goods seized was acquired from her husband after marriage which would not make it her separate property under the act.

Held, reversing the judgment of the court below, that the action could not be maintained; that a sheriff sued in trespass or trover for taking goods seized under execution can justify under the execution without showing the judgment; *Hannon v. McLean* (3 Can. S.C. R. 706) followed; and that under the findings of the jury, which were amply supported by the evidence, the goods seized must be considered to belong to the husband which was a complete answer to the action.

APPEAL from a decision of the Supreme Court of Nova Scotia affirming the judgment at the trial in favour of the plaintiff.

The plaintiff was a married woman residing in the county of Colchester and the defendant was high sheriff of the county. The action was one of replevin to recover possession of goods seized by defendant on

* PRESENT :—Strong, Taschereau, Gwynne and Patterson JJ.

(Sir W. J. Ritchie C.J. was present at the argument but died before judgment was delivered.)

execution against the plaintiff's husband, it being claimed that the goods were the separate property of the plaintiff. Evidence was given at the trial that plaintiff had filed a license with her husband's consent to carry on a separate business of farming, and that the husband had never interfered in said business and did not live with her. Also, that after marriage the husband had conveyed land to trustees to hold in trust for his wife, and that she had taken an assignment of a bill of sale of stock which her husband had given to one McMillan.

1892
CROWE
v.
ADAMS.

The jury found that the goods seized were not the separate property of the plaintiff, and that she had not carried on a separate business in respect to said goods. The trial judge set aside these findings and ordered judgment to be entered for the plaintiff, holding that the sheriff in order to justify the seizure was obliged to prove a valid judgment, and the judgment on which the execution issued was defective in varying from the pleadings by giving a different name to the defendant in the action. The full court affirmed the judgment of the trial judge and the defendant appealed to this court.

Newcombe for the appellant.

Borden Q.C. for the respondent.

STRONG J.—The appellant is sheriff of the county of Colchester, and he appeals against a judgment of the Supreme Court of Nova Scotia in a statutory action of replevin brought against him by the respondent Annie Adams. The appellant, under a writ of execution against the goods of Donald Adams purporting to be issued upon a judgment recovered by John McDougall, seized the goods which have been replevied in the action. The appellant, amongst other defences which need not be mentioned, pleaded that the goods seized

1892

CROWE

v.

ADAMS.

Strong J.

were not the goods of the plaintiff and also justified under the writ of execution before mentioned. The trial of the action took place before Mr. Justice Ritchie and a jury. The appellant did not put in evidence the judgment upon which the writ purported upon its face to have been issued, namely, a judgment against Donald Adams. It was proved sufficiently to warrant the finding of the jury to that effect that Donald Adams, the execution debtor named in the writ of execution, was the respondent's husband. It is quite clear on authority that the sheriff sued in trespass or trover for taking or converting goods seized by him under an execution, can justify under the writ without showing the judgment (1). It is true that under the old forms of pleading, when the sheriff was made a defendant together with the execution creditor and the defendants joined in pleading, it was essential to show the judgment inasmuch as according to the old rules of common law pleading it was requisite that a plea should be good in its entirety, and the execution creditor could only justify under a judgment as well as an execution, but it was never doubted, so far as I know, that the sheriff sued alone might justify under a writ of *feri facias*, and for obvious reasons it would have been unreasonable that the law should have been otherwise.

The only question in the cause is, therefore, that which has been dealt with in the very well reasoned judgment of Mr. Justice Townshend, viz., whether the goods seized by the appellant and which have been replevied in the present action were or were not the property of the execution debtor, the respondent's husband. *Primâ facie* goods in the actual possession of the wife of an execution debtor are the goods of the latter. It lies on the wife to show if she can that they

(1) *Hannon v. McLean*, 3 Can. S. C.R. 706. See also Churchill on Sheriffs 2 ed. p. 441.

are her separate property, that is her separate property under the statute law or under the doctrines of courts of equity as to the separate property of married women. It was argued by the learned counsel for the respondent that these chattels were equitable separate property. There is no evidence whatever of this from the deeds and documents in evidence. Then the jury by their findings, on evidence amply sufficient to warrant them, have negatived the facts upon which alone this property could have been separate property under the statutory law of Nova Scotia; they found, first that the property levied on was not nor was any part of it acquired by the plaintiff in any other way than from her husband, and secondly that this property was not obtained by the earnings of the plaintiff since 19th April, 1884, in any employment, occupation or trade carried on by her separately from her husband. The respondent is then a woman married before the 19th of April, 1884, who does not bring herself, as regards a title to the separate ownership of this property, within any of the provisions of the Married Woman's Property Act (N.S.) and therefore, as Mr. Justice Townshend has, I think rightly, held, the goods seized must, under the findings of the jury which were warranted by the evidence, be considered to belong to her husband the execution debtor. The appeal must consequently be allowed with costs and judgment entered for the appellant with costs in the Supreme Court of Nova Scotia.

1892
 CROWE
 v.
 ADAMS.
 Strong J.

TASCHEREAU J.—This appeal must, in my opinion, be allowed. I adopt Mr. Justice Townshend's reasoning in the court below. Proof of a judgment by the sheriff was unnecessary in this case, the plaintiff not having shown a title in herself apart from her husband. It is not necessary for a defendant to prove his

1892.
 CROWE
 v.
 ADAMS.
 Gwynne J. plea of justification if the plaintiff has not proved an act which requires justification.

Gwynne J.—I am also of opinion that this appeal should be allowed.

PATTERSON J.—The plaintiff is a married woman who carries on the business of farming at Wittenburg in Colchester County in Nova Scotia, and lives on the farm. She was married before the year 1884. Her husband does not make his home at the farm, but is occasionally there. The goods in question were in the plaintiff's possession on the farm and were in use for the purposes of the farm when the defendant, who is the sheriff of Colchester county, seized them.

These facts, which have not been formally found by the jury, I take from the evidence of the plaintiff herself. Other facts on which her evidence bears we must, as I apprehend, take from the findings of the jury.

The jury specifically found that the plaintiff's husband did not interfere in the management of the property and affairs at Wittenburg.

We have thus the fact that the plaintiff had an employment, occupation or trade which she carried on separately from her husband, and that therefore the provisions of the Married Woman's Property Act of Nova Scotia relating to a married woman's separate business, which provisions begin with section 52 of chapter 94 of the Revised Statutes, 5th series, apply to her. They do not, however, apply to the property now in question, because the jury find that no part of it was obtained by the plaintiff since the 19th day of April, 1884, in any employment, occupation or trade carried on by her separately from her husband.

The jury further find that no part of the property seized was acquired by the plaintiff in any other way than from her husband.

We have therefore to regard the goods as having been acquired by the plaintiff from her husband after marriage, and to discuss her right of action from that point of view.

The goods being seized in her possession, and a married woman having power when carrying on a separate business, and also in some other circumstances, to hold personal property apart from her husband, she made a *primâ facie* title to the goods by showing her possession of them. Were it not for the statute under which these rights are given the possession of the wife would have been ascribed to the husband and would have been evidence of title in him, but as under the effect of the statute the possession is *primâ facie* evidence of property in the plaintiff the defendant has to meet the charge of wrongfully seizing the goods. For this purpose he relies in the first place on the fact found by the jury that the plaintiff's right to the goods, whatever it was, was acquired from her husband after marriage. That fact has been held by the learned judge who dissented in the court below to be a complete answer to the plaintiff's action. I think he is correct in that opinion. If the plaintiff has any title to these goods as her separate property she must derive it under the third section of the statute which reads thus:—

Sec. 3.—Every married woman who shall have married before the nineteenth day of April, A.D. 1884, without any marriage contract or settlement, shall and may from and after the said date, notwithstanding her coverture, have, hold and enjoy all her real estate not on or before such date taken possession of by her husband, by himself or his tenants, and all her personal property not on or before such date reduced into the possession of her husband, whether such real estate or personal property shall have belonged to her before marriage or

1892
CROWE
v.
ADAMS.

—
Patterson J.
—

1892

CROWE
v.
ADAMS.

shall have been in any way acquired by her after marriage otherwise than from her husband, free from his debts and obligations contracted after such date and from his control or disposition without her consent in as full and ample a manner as if she were sole and unmarried.

Patterson J.

That section gives separate rights in property acquired after marriage but only when acquired otherwise than from the husband. Property acquired from the husband is not touched but is left as at common law.

The same legislation is applied in sections 4 and 5 to women marrying after the 19th of April, 1884, both sections excluding property received from the husband during coverture, with the exception only of wearing apparel and other articles necessary for the personal use of the wife.

The act does not contain any provision like the first section of the English Married Women's Property Act, 1882, (1) which in general terms confers upon a married woman the capacity to hold real or personal property as her separate property in the same manner as if she were a *feme sole* without the intervention of any trustee, though the effect of sections 3, 4 and 5 may be fully as wide as regards any property except that which is acquired by the wife from her husband.

On this ground I think the plaintiff has no right of action even if the defendant were, as against her husband, a trespasser.

But if section 3 could properly be read, as it seems to have been by the other members of the court below, as giving to the married woman power to acquire property from her husband with the two limitations upon her ownership, viz., that the property should not be free from his debts or obligations contracted after the specified date or from his control or disposition without her consent, I should be clearly of opinion that the sheriff established his plea

of justification. He seized under a *fi fa* issued, as the writ recited, upon a judgment against Donald Adams. The plaintiff says her husband is "Daniel" Adams, and the jury find as a fact that Donald Adams and Daniel Adams are one and the same person. This is found on ample evidence including some documents. Daniel or Donald would seem to be a rather illiterate man. His signature, by his mark against the name Donald Adams, appears to three papers, viz., two promissory notes made jointly with John McDougall, who joined in them as surety and paid them, and a conveyance of land in which the plaintiff joins. All three were drawn and witnessed by Mr. Urquhart, a justice of the peace, who gave his evidence at the trial and who wrote the name "Donald Adams" to each paper, knowing the man very well and thinking Donald his right name. Mr. Fraser, to whom the joint notes were given for money lent, and who had known Adams from the time he was a little boy, says he went by the name of Daniel and Donald and understood one as well as the other. Robert Adams, his brother, gave evidence to the same effect, and said that at home he was mostly called Dan, and was, as Robert understood, named after their uncle Donald Tulloch. The plaintiff herself, while she says that her husband's name is Daniel, shows also that when the sheriff's officer came asking for Donald she knew who was meant and answered accordingly that he was not there, her explanation being that he was "at home that day," meaning evidently at the place where he lived which was not on the farm where she lived. When she was recalled, apparently to prove that when the sheriff came to serve the writ of summons in McDougall's action she told him that her husband's name was Daniel, she made it clear that she was under no mistake as to the person who was sued. She knew it as well as her husband did when

1892
 CROWE
 v.
 ADAMS.
 ———
 Patterson J.
 ———

1892
 CROWE
 v.
 ADAMS.
 ———
 Patterson J.
 ———

he filed his appearance as "Daniel Adams sued as Donald Adams."

There is no pretense of disputing, as a matter of fact, the identity of the man who borrowed the money from Fraser which McDougall had to pay, the man who was sued by McDougall and who, after appearing in the action suffered judgment by default, and the plaintiff's husband from whom she acquired the property that was taken in execution.

The learned judge who tried the action, while he felt himself bound to hold that the proof of the plea of justification was technically insufficient, was sensible of the hardship of which, under the circumstances, the defendant was entitled to complain. It is, in my judgment, a hardship that would be a reproach to our jurisprudence, and I think it may be avoided without straining any principle of evidence, though, if astuteness were called for, it should be exercised in favour of what is manifestly the justice of the case and against the formal objections by which that is opposed.

I am not disposed to admit without proof that Daniel and Donald are different names, but assuming them to be different I do not find it formally established that the man's name is not Donald. The evidence for its being Donald seems as strong as that on which it has been taken to be Daniel.

Suppose, however, that "Donald" is a misnomer, what then? In old times in England, and I suppose also in Nova Scotia, a defendant sued by a wrong name might have pleaded the misnomer in abatement; at a later period (under 3 & 4 Wm. IV., c. 42) he might have had the declaration amended at the expense of the plaintiff, and his remedy under the more elastic system of the present day is not less ample. Adams did nothing but file an appearance which acknowledged that he was the person sued by the name

of Donald, and judgment proceeded against him by that name. The duty of the sheriff to execute the process issued upon that judgment is clear. It would be sufficient to refer for authority for this proposition to the one case of *Reeves v. Slater* (1), but I shall first notice two other cases which illustrate the difference between the consequence of misnomer in mesne process and in final process.

1892
CROWE
v.
ADAMS.
Patterson J.

Cole v. Hindson (2) was a case of mesne process. Aquila Cole was summoned to appear in Chancery by a writ erroneously addressed to Richard Cole, and he did not appear. Thereupon a distringas was issued against Richard under which the goods of Aquila were distrained. Aquila brought this action of trespass for the seizure of his goods and recovered. Lord Kenyon C.J. said :

The defendants were not justified in seizing the goods of Aquila Cole under a distringas against Richard Cole, and the averment in the plea that Aquila and Richard are the same person will not assist them, as they have not also averred that the plaintiff was known as well by one name as the other.

In the present case the man was known as well by the name of Donald as Daniel, so that, even if the seizure had been under a distringas and not a *fi fa*, the writ would have protected the sheriff, as far as the law in *Cole v. Hindson* (2) is concerned.

We have an early case of final process in *Crawford v. Satchwell* (3). The defendant there had omitted to plead the misnomer, and it was held that he might be taken in execution under a *ca. sa.* by the wrong name.

In *Reeves v. Slater* (1) the sheriff had a *fi fa* against John Stone Lundie, under which he seized the goods of John Stowe Lundie who was the person sued by the wrong name of John Stone Lundie, but he gave up

(1) 7 B. & C. 486.

(2) 6 T. R. 234.

(3) 2 Str. 1218.

1892
 CROWE
 v.
 ADAMS.
 Patterson J.

the goods without selling them and returned the writ *nulla bona*. The action was for a false return. Lord Tenterden C.J. said:—

The party himself having suffered judgment to be entered up against him by the name of John Stone Lundie, it was not for the sheriff to render that nugatory by refusing to execute the *fi fa* and he must be liable for the consequences of having done so.

These cases, which are among the earliest of a mass of cases on the subject of misnomer, show that the sheriff did what under long established principles it was his duty to do, notwithstanding that the real name of the debtor may have been Daniel while the *fi fa* recited a judgment against Donald and commanded him to take the goods of Donald.

But if section 3 can properly be read, as it seems to have been read by the learned judge who tried the action and by the majority of the court *in banc*, as giving the wife some property in the goods the justification was, in my opinion, sufficiently proved as against her.

The production of the *fi fa* would be sufficient proof as against the judgment debtor who could have set aside the writ if it were not warranted by a judgment. Now, if the wife takes any property under section 3 in goods acquired from her husband it is not "free from his debts and obligations contracted after such date and from his control and disposition without her consent." I am inclined to think that, by reason of these limitations, any seizure which would be good against the husband is good also against the wife. It was established by *White v. Morris* (1), which is a case of recognized authority and one in which previous decisions are fully discussed, that when a sheriff takes goods from the possession of an assignee under a deed alleged to be fraudulent as against creditors, the title

(1) 11 C. B. 1015.

being good against every one but a creditor, he must prove a judgment in order to show that he represents a creditor against whom the deed is void, and that that is not sufficiently shown by the writ of *fi fa*; but that reasoning does not strike me as applicable to a title which, if it exists at all, is of such a shadowy character as to leave the goods subject to every debt and obligation of the husband contracted after a named date and to his control and disposition.

1892
 CROWE
 v.
 ADAMS.
 Patterson J.

But I see no reason to doubt that the judgment was proved. The recital in the *fi fa* issued by the court is some evidence of a judgment though not of all the particulars concerning it; but there was also, as I understand, evidence of all the proceedings. The specially endorsed writ which was filed when judgment was entered was produced. Under Order XX., rule 1, the special endorsement constituted the statement of claim. The appearance was proved and the entry of judgment for default of defence under Order XXVII., rule 2, and in the form and manner provided by the statute. I think the objections supposed to exist had reference chiefly to the matter of misnomer which I have already disposed of.

I think the judgment of the court ought to have been to dismiss the action.

I have not overlooked the cross appeal of the plaintiff in the court below.

The appeal there was by the present appellant, and there was a cross appeal with respect to the findings of fact and the direction to the jury at the trial.

The appeal below was dismissed and the order made at the trial was varied in a matter of costs. The cross appeal was not otherwise dealt with, nor was it necessary formally to notice it inasmuch as the principal appeal was dismissed. In the opinions expressed in pronouncing judgment Mr. Justice Townshend was

1892

CROWE

v.

ADAMS.

Patterson J.

against the respondent on the matter of the cross appeal, and the Chief Justice, with whom Mr. Justice Graham concurred, confined his observations in effect to the other branch of the case. The respondent now renews his objections to the charge and to the findings of fact.

In my opinion we cannot interfere as he invites us to do. I find evidence, which I need not discuss in detail, that justifies the findings, and I see no sufficient reason for ordering a new trial.

I think the appeal should be allowed with costs, and the action dismissed with costs.

Appeal allowed with costs and action dismissed.

Solicitor for appellant : *Hector McInnes.*

Solicitor for respondent : *W. A. Lyons.*
