

CLARA MICHAELS (PLAINTIFF).....APPELLANT;

AND

ABRAHAM L. MICHAELS (DEFEND- } RESPONDENT.
ANT)

1900

*May 1, 2.

*Oct. 8.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Husband and wife—Separate property of wife—Married woman’s Property Acts, (N.S.)—Action by wife against husband.

Under the Married Women’s Property Acts of Nova Scotia, a promissory note indorsed to the maker’s wife can be sued on by the latter against her husband.

APPEAL from a decision of the Supreme Court of Nova Scotia affirming, by an equal division, the judgment at the trial in favour of the defendant.

The only question raised by the appeal was whether or not the appellant could maintain an action against her husband as maker of a promissory note indorsed to the plaintiff by the payee. The provisions of the Married Woman’s Property Acts affecting the question as set out in the judgment.

Mellish for the appellant. The note is not a contract between the parties such as is prohibited by the statute. It is in the hands of the plaintiff a chose in action. Independent of the statutes relating to the property of married women, a married woman was capable of having a chose in action conferred on her. The indorsement of the note was an assignment of a chose in action and it belonged to the wife so long as the husband did not reduce it into possession. See Williams on Executors (9 ed.) pp. 739 and 798; also

*PRESENT:—Sir Henry Strong C.J., and Taschereau, Gwynne, Sedgewick and King JJ.

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Fleet v. Perrins (1), per Blackburn J. at p. 541-2, (1868), decided before the earliest Married Woman's Property Act; *Dalton v. Midland Counties Railway Co.* (2); *Gates v. Madeley* (3), per Parke B. at page 427; *Richards v. Richards* (4); *Sherrington v. Yates* (5); *Anson on Contracts* (7 ed.) p. 120; *Eversley on Domestic Relations*, p. 198.

This is property within the meaning of sec. 3 of ch. 94 R. S. N. S. (5 ser.) acquired when that statute was in force. The effect of the Act of 1898 was to make the plaintiff discover, and enable her to sue her husband notwithstanding the note was indorsed to her long before its passage. *Eversley* 334, 424; *Weldon v. Winslow* (6); *Woodward v. Woodward* (7); *Lowe v. Fox* (8); *Lush, Husband and Wife* at p. 463; *Weldon v. Neal* (9); *Weldon v. DeBathe* (10); *Severance v. Civil Service Supply Association* (11); *James v. Barraud* (12); *Butler v. Butler* (13); *Spooner v. Spooner* (14); *Russ v. George* (15).

Borden Q.C. for the respondent. The plaintiff claims as indorsee against the maker. The action is *ex contractu* upon an implied promise arising from the fact of the plaintiff being the holder of a promissory note made by defendant. *Stephens on Pleading* (7 ed.) p. 11; 1 *Comyns Digest*, p. 284, 290; 1 *Saunders on Pleading & Evidence* (2 ed.) pp. 162, 447; *Bullen & Leak's Precedents on Pleading* (3 ed.) p. 94.

By the statute 3 & 4 Anne ch. 9, the indorsee is given the same right of action against the maker as the indorsee of a bill of exchange had by the custom

(1) L. R. 3 Q. B. 536.

(2) 13 C. B. 474.

(3) 6 M. & W. 425.

(4) 2 B. & Ad. 447.

(5) 12 M. & W. 855.

(6) 13 Q. B. D. 784.

(7) 3 DeG. J. & S. 672.

(8) 15 Q. B. D. 667.

(9) 51 L. T. 289.

(10) 14 Q. B. D. 339.

(11) 48 L. T. 485.

(12) 49 L. T. 300.

(13) 16 Q. B. D. 374.

(14) 155 Mass. 52.

(15) 45 N. H. 467.

of merchants against the acceptor and the same implied promise exists between indorsee and maker of a promissory note as between indorsee and acceptor of a bill of exchange. *Welsh v. Craig* (1); *Bishop v. Young* (2); *Powell v. Ancell* (3).

Between husband and wife at common law there could be no contract express or implied because they are one person. 1 Chit. Black, p. 442; *Crawley on Husband and Wife*, pp. 28, 29; *Phillips v. Burnet* (4); *Cahill v. Cahill* (5). This is the principle upon which conveyances from husband to wife are held to be void. *Co. Litt. 112 a.*; *Re Breton* (6); *Bliss v. Aetna Life Ins. Co.* (7). The result is that at common law the indorsement gave the plaintiff no cause of action against her husband, but the note when indorsed to her became extinguished. *Haley v. Lane* (8); *In re Price* (9); *Jackson v. Parks* (10); *Gay v. Kingsley* (11); *Chapman v. Kellogg* (12); *Abbott v. Winchester* (13); *Roby v. Phelon* (14).

Both the Nova Scotia and Ontario Acts are like the English Married Woman's Property Act, 1882, and the Massachusetts Act; they do not do away with the unity of husband and wife but only remove certain specific disabilities of the wife leaving all others untouched. *Butler v. Butler* (15), per Willes J. at page 835; *Lord v. Parker* (16); *Edwards v. Stevens* (17); *Ingham v. White* (18).

The Ontario and Nova Scotia Acts referred to created in married women no contractual capacity whatever.

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(1) Str. 680.

(2) 2 B. & P. 78.

(3) 9 Dowl. 893.

(4) 1 Q. B. D. 436.

(5) 8 App. Cas. 420, 425.

(6) 17 Ch. D. 416.

(7) 19 N. S. Rep. 363.

(8) 2 Atk. 181.

(9) 11 Ch. D. 163.

(10) 10 Cush. 550.

(11) 11 Allen (Mass.) 345.

(12) 102 Mass. 246.

(13) 105 Mass. 115.

(14) 118 Mass. 541.

(15) 14 Q. B. D. 831.

(16) 3 Allen (Mass.) 127.

(17) 3 Allen (Mass.) 315.

(18) 4 Allen (Mass.) 412.

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Moore v. Jackson (1); *Foster v. Hartlen* (2); Neither does the New Brunswick Act. *Wallace v. Lea* (3).

There is a further ground as to the claim for interest, that inasmuch as plaintiff and defendant were living together as man and wife during all the time for which interest is claimed and plaintiff was receiving money from defendant from time to time, their transactions are of a character that it is impossible to go into to find out how much of the interest he has paid, and therefore none should be allowed.

We refer also to *Fitzgerald v. Fitzgerald* (5); *Turnbull v. Foran* (6); *Conolan v. Leyland* (7); *In re Roper, Roper v. Doncaster* (4); *Weldon v. DeBathe* (8).

The judgment of the court was delivered by :

SEDGEWICK J.—The plaintiff, appellant, is the wife of the defendant, respondent, and sues her husband upon a promissory note, dated 6th June, 1892, for \$1,000, made by the husband and payable on demand to the order of one Jenny Levi, who gave valuable consideration therefor. Jenny Levi subsequently indorsed the note to her sister, the plaintiff, as a present. It is admitted that the whole transaction as between all parties was a perfectly *bonâ fide* one, and the only question in controversy in this suit is whether or not the plaintiff, being the defendant's wife, can recover on the note in question.

At the time of the making of the note section three of chapter 94 of the Revised Statutes of Nova Scotia, 5th series, was in force. It is as follows :—

Every married woman who shall have married before the nineteenth day of April, 1884, without any marriage contract or settlement, shall and may, from and after the said date, notwithstanding her coverture,

(1) 22 Can. S. C. R. 210.

(2) 27 N. S. Rep. 357.

(3) 28 Can. S. C. R. 595.

(4) L. R. 2 P. C. 83.

(5) 15 Q. B. D. 234.

(6) 27 Ch. D. 632.

(7) 39 Ch. D. 487.

(8) 14 Q. B. D. 344.

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 possession of her husband, whether such real estate or personal property shall have belonged to her before marriage or 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.

Section 81. Nothing herein contained shall authorise any married woman to make a contract with her husband otherwise than in this chapter expressly mentioned. * * *

This chapter 94 and subsequent Acts on the subject of married women's property were by chapter 22 of the Acts of 1898 consolidated and amended; secs. 12 and 23 being as follows :

12. Every woman, whether married before or after this Act, shall have, in her own name, against all persons whomsoever, including her husband, the same civil remedies, and also (subject as regards her husband to the proviso hereinafter contained,) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. * * *

23. The Married Woman's Property Act, 1884, and the Acts in amendment thereof are hereby repealed; provided that such repeal shall not affect any act done or right acquired while such acts were in force, or any right or liability of any husband or wife, married before the commencement of this Act, to sue, or be sued under the provisions of the said repealed Acts or either of them, for or in respect of any debt, contract, wrong or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this Act.

The case was tried before Mr. Justice Ritchie, who gave judgment for the husband, and his judgment was sustained by an equally divided court, the Chief Justice and Weatherbe J. dissenting.

Two questions arise, first, whether section 81 of ch. 94, above quoted applies to the case in question; and secondly, if it does not whether section twelve of

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the Act of 1898, can be taken advantage of in order to sustain the action.

Upon the first point Mr. Justice Ritchie held, as I understand him, that the plaintiff could not succeed, inasmuch as her claim was based entirely upon the contract specified in the promissory note or, in other words, that there was some contractual obligation between the wife and the husband in respect of it, and that in consequence her right to succeed was shut out by her incapacity to make a contract with her husband as provided in section eighty-one, above referred to.

This, I respectfully submit, is a fundamental error in the judgment appealed from. Section three gave her a right to hold and enjoy all her personal property, whether acquired before marriage or after marriage otherwise than from her husband. There can be no doubt but that the note in question is property, and that it had not been reduced into possession by the husband. It was, therefore, as much hers as if it had been a chattel, and she had a right to deal with it as the statute says "in as full and ample a manner as if she were sole and unmarried." Is she prevented from enforcing it because at common law she could not enforce it against her husband? Or because she is prohibited by chapter 94 from making a contract with her husband?

In my judgment, she is not. There is not here, in my view, any contractual relationship between the husband and the wife. The contract is between the maker and the payee only and the wife's right depends, not upon any promise made to her or on her behalf by the husband, or upon any contractual relationship between the two, but upon other principles altogether.

Now, it is elementary that as a general rule no one can recover in an action *ex contractu* except a person

who is a party to the contract or his representative. There must in every case be privity of contract, a promise made by the defendant to the plaintiff. Even if that promise is to pay money to a third person or to do something for the benefit of that third person, it is settled that that third person cannot sue on the contract, he not being the promisee. See *Tweedle v. Atkinson* (1).

And this principle has been laid down over and over again in this court as well as in England. *Cleaver v. Mutual Reserve Fund* (2); *Guerin v. Manchester Fire Assurance Co.* (3) at page 150.

There are, of course, exceptions to the rule, the most important exception being the case of Bills of Exchange, which, by the law merchant, were excluded from the operation of the principle. Promissory notes, as everybody knows, did not come within the operation of the law merchant, and the statute 3 & 4 Anne, ch. 9, was passed for that purpose. Covenants running with the land may be considered as forming another exception, and now, in most of the provinces of Canada as well as in England, all contracts are assignable and the assignee may sue thereon in his own name. But the maker of a promissory note makes his contract with the payee alone. It is by virtue of the statute of Anne, and subsequent legislation, and not by virtue of the contract, that a holder other than the payee is entitled to sue upon it. Although the action is an action *ex contractu*, the plaintiff obtains his title to sue upon the contract, not by virtue of a promise made to him, but of a promise made to the payee, which promise enures to his benefit as a legal consequence of the indorsation of the instrument to him by the payee or by any other indorser. It seems to me then clear that section 81 of chapter 94 does not apply to the present case.

(1) 1 B. & S. 393.

(2) [1892] Q. B. •

(3) 29 Can. S. C. R. 139.

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Upon the other ground Mr. Justice Ritchie stated that :

If the Married Woman's Property Act, 1898, were in force, it would probably remove all the plaintiff's difficulties ; but it has no application to this promissory note, the title to which accrued to the plaintiff, if at all, long before the commencement of that Act.

The Act referred to was passed before the institution of this action and, in my judgment, the plaintiff could avail herself of its provisions, notwithstanding that it was passed after the making of the note. Section 12 gives her, in express terms, in her own name, the right to sue her husband, and section 23 would seem to admit that even previously she had that right under the original Act. I have no doubt but that the statute has a retrospective operation. It is a provision relating to procedure and practice only, where the general principle that there is a presumption against retrospective construction does not apply. *Gardner v. Lucas* (1):

For these reasons I am of opinion that this appeal should be allowed and judgment entered for the plaintiff for the amount of the note sued upon, with interest and costs, the plaintiff to have her costs in all the courts.

His Lordship the Chief Justice took no part in the judgment on account of illness.

Appeal allowed with costs.

Solicitor for the appellant : *John M. Chisholm.*

Solicitor for the defendant : *H. C. Borden.*

(1) 3 App. Cas. 603 ; and see Statutes, pp. 314 *et seq.* Maxwell on the Interpretation of