Supreme Court of Canada

Lamb *v.* Cleveland (1891) 19 SCR 78

Date: 1891-05-12

Euphemia G. Lamb and Another

Appellants

And

Bartholemew Cleveland, Administrator, &c., of Sarah Jane Cleveland, Deceased

Respondent.

1890: Oct. 30, 31; 1891: May 12.

Present:—Sir W. J. Ritchie C.J. and Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK.

Statute—Repeal of—Restoration of former law—Distribution of intestate estate—Feme coverte—Husband's right to residuum—Next of kin.

The Legislature of New Brunswick, by 26 Geo. 3 c. 11 ss. 14 and 17, re-enacted the Imperial act 22 & 23 Car. 2 c. 10 (Statute of Distributions) as explained by s. 25 of 29 Car. 2 c. 3 (Statute of Frauds), which provided that nothing in the former act should be construed to extend to estates of *femes covertes* dying intestate but that their husbands should enjoy their personal estates as theretofore.

When the Statutes of New Brunswick were revised in 1854 the act 26 Geo. 3 c. 11 was re-enacted, but sec. 17, corresponding to sec. 25 of the Statute of Frauds, was omitted. In the administration of the estate of a *feme coverte* her next of kin claimed the personalty on the ground that the husband's rights were swept away by this omission.

*Held*, that the personal property passed to the husband and not to the next kin of the wife.

Per Strong J.—That the repeal by the Revised Statutes of 26 Geo. 3 c. 11, which was passed in the affirmance of the Imperial acts, operated to restore sec. 25 of the Statute of Frauds as part of the common law of New Brunswick.

Per Gwynne J.—When a colonial legislature re-enacts an Imperial act it enacts it as interpreted by the Imperial courts, and *a fortiori* by other Imperial acts. Hence, when the English Statute of Distributions was re-enacted by 26 Geo. 3 c. 11 (N.B), it was not necessary to enact the interpreting section of the Statute of Frauds, and its omission in the Revised Statutes did not affect the construction to be put upon the whole act.

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*Held*, per Ritchie C.J., Fournier, Gwynne and Patterson JJ., That the Married Woman's Property Act of New Brunswick (C.S. N. B. c. 72), which exempts the separate property of a married woman from liability for her husband's debts and prohibits any dealing with it without her consent, only suspends the husband's rights in the property during coverture, and on the death of the wife he takes the personal property as he would if the act had never been passed.

The Supreme Court of New Brunswick, while deciding against the next of kin on his claim to the residue of the estate of a *feme coverte*, directed that his costs should be paid out of the estate. On appeal the decree was varied by striking out such direction.

Appeal from a decision of the Supreme Court of New Brunswick affirming a decree of the Judge of Probate for Westmoreland County in proceedings for administration of the estate of a married woman.

The sole question to be decided in the case is: When a married woman dies, intestate and leaving property, is her husband, or her next of kin, entitled to such property according to the law in force in New Brunswick? The courts below have decided that the property goes to the husband.

The English Statute of Distributions (22 & 23 Car. 2 ch 10) was formerly part of the common law of New Brunswick, as was also sec. 25 of the Statute of Frauds which declared that nothing in the Statute of Distributions should be construed to extend to the estates of *femes covertes* dying intestate, but that their husbands should enjoy their personal property as they might have done theretofore.

The New Brunswick act, 26 Geo. 3 ch. 11, re-enacted the English Statute of Distributions and the said section of the Statute of Frauds. The Revised Statutes of New Brunswick, passed in 1854, contain 26 Geo. 3 ch. 11, except section 17, corresponding to section 25 of the Satute of Frauds, which was omitted. The present Statute of Distributions is ch. 78 C.S. N.B., which is in the same form as the Revised Statutes.

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In this state of the statute law the appellants, who are the next of kin to the deceased, and who would be entitled to her personal estate if she had left no husband, claim that the latter's rights are swept away by the legislature; that the husband formerly took his wife's estate, not by virtue of his marital right but simply as administrator; that his exemption from the operation of the Statute of Distributions being taken away, and it being well settled that he is not of any kin to his wife, he is bound to distribute the estate as would be any other administrator.

*W. W. Wells* for the appellant. The husband cannot claim the benefit of the general scheme of distribution, as he is not of kin to his wife. *Bailey* v. *Wright[[1]](#footnote-1)*; *Milne* v. *Gilbert[[2]](#footnote-2)*.

Nor is he entitled to the property by virtue of his marital right. Prior to 31 Edw. 3, he had no right whatever in the personalty of his wife, but it was dealt with by the Ordinary in his discretion[[3]](#footnote-3). Under 31 Edw. 3 c. 11 he simply enjoyed the residue of the personal estate as administrator, the law then being that an administrator was not bound to account to any one[[4]](#footnote-4). He took the estate, not by virtue of his marital right but as "the nearest and most lawful friend" of his wife as the statute provides. See *Fortre* v. *Fortre[[5]](#footnote-5)*; *Sir George Sand's Case[[6]](#footnote-6)*; *Fettiplace* V-. *Gorges[[7]](#footnote-7)*; *re Lambert's Estate[[8]](#footnote-8)*.

Then under the Statute of Distributions, 22 & 23 Car. 2 ch. 10, the husband would be bound to distribute his wife's estate as he would that of a stranger. The Statute of Frauds only preserved his former right which was to take his wife's property as her administrator.

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At all events, in New Brunswick the legislature, by repealing the section corresponding to section 25 of the Statute of Frauds, has expressly declared that the husband shall be in the same position as other administrators. See *Wood* v. *DeForrest[[9]](#footnote-9)*.

Even if the husband's rights should be considered as otherwise existing, they have been taken away by the Married Woman's Property Act, which vests her separate property entirely in the wife.

*Skinner* Q.C. and *Pugsley* Sol. Gen. of New Brunswick for the respondent. That the husband took the personal property of his wife at her death *jure mariti* see *Squib* v. *Wyn[[10]](#footnote-10)*; *Watt* v. *Watt[[11]](#footnote-11)*; Tyler on Infancy and Coverture[[12]](#footnote-12).

The Married Woman's Property Act was intended to protect the separate property of a wife from being taken for the husband's debts, but not to interfere with the husband's right to it at her death. The fact that she could not make a will without his consent shows that the husband's rights were not to be completely swept away by this act.

Sir W. J. RITCHIE C. J.—I am content to rest my judgment on the reasons given by the learned Chief Justice in the court below as I entirely concur in the conclusion at which he has arrived, except with reference to the costs; the defendant having gained the suit, and the court having held the property to be his, he should not, in my opinion, have been made to pay the costs, which was the practical result of saying the costs should come out of his estate. As a general rule when costs are awarded out of the estate it is in cases where the testator has so devised his property as to create ambiguities and mistakes as to the

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proper construction of his dispositions. In such a case the testator has himself really rendered an appeal to the court necessary. In this case the unfortunate defendant was in no way to blame, and having gained his suit I can see no good reason why he should be mulcted in costs. If now the costs are to come out of the estate he will have gained but a barren victory; in fact, he might as well have allowed this small estate to be divided among the next of kin as be obliged to divide it amongst the lawyers, more particularly as to the costs in this court, coming here after such a clear exposition of the law in the court below. I can only look upon this appeal as a mere experiment, and I agree with the learned judge in *Elliott* v. *Gurr*[[13]](#footnote-13) that "if parties will try experiments, and call in question rules clearly established by a uniform course of practice, they, and not the parties proceeded against, ought to be liable to the expenses. It is the duty of the court to check such novelties in practice by costs."

STRONG J.—The question presented by this appeal relates to the disposition of the residue of the personal estate of Sarah Jane Cleveland, a married woman who died intestate and without issue, leaving her husband, the respondent, surviving, and also her brother and two sisters; her father and mother having both died before her. The respondent, as the intestate's husband, obtained letters of administration, and having thereunder administered the estate passed his accounts before the judge of the Probate Court of Westmoreland County, whereupon a question arose as to the proper disposition of the surplus assets of the estate remaining after the payment of the debts. The respondent contended that he was entitled to retain the residue for his own use, whilst the appellants (the

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children and personal representatives of the intestate's brother) insisted that the deceased's next of kin, viz., her brother and sisters or their representatives, were entitled to this surplus. The Judge of Probate having decided in favor of the husband the present appellants appealed to the Supreme Court of New Brunswick, which court having affirmed the judgment of the Probate Judge (Mr. Justice Palmer dissenting) the present appeal has been taken to this court.

The English Statute of Distributions (22 & 23 Car. 2nd cap. 10) was originally in force in New Brunswick as well as the subsequent explanatory enactment contained in the 25th section of the Statute of Frauds. The effect of this legislation is well known; the Statute of Distributions not having made any express provision as regards the husband's rights in the surplus assets of his wife to whom he had been appointed administrator, and doubts having arisen as to its applicability to that case, the 25th section of the Statute of Frauds enacts that the Statute of Distributions should not extend to the estates of *femes covertes* dying intestate, and expressly affirmed the husband's common law right to the whole residue for his own benefit. This provision of the Statute of Frauds, which as part of the law of England was applicable in New Brunswick at and from the date of its organization as a Province in 1784, was, by the Provincial Act, 26 Geo. 3, cap. 11, by which statutory provision was made for the distribution of the estates of persons dying intestate, substantially re-enacted. The 17th section of the last mentioned act was as follows:

Nothing in this Act shall be construed to extend to the estates of *femes covertes* who die intestate, but that their husbands might administer and enjoy them \* \* \* \* \* \* as they might have done before.

In 1854 the statutes of New Brunswick were revised,

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and the enactment contained in the 17th section of 26 Geo. 3 cap. 11 was not re-enacted, nor was any other provision made for the case for which it had provided. The appellants insist that the effect of this repeal is to entitle them, as next of kin of the intestate Mrs. Cleveland, to have the estate distributed amongst them in the same way as if she had left no husband. This pretension is, in my opinion, wholly unfounded. According to an elementary rule universally applicable in the interpretation of written laws the effect of the simple abrogation without more of a statutory enactment, not itself repealing but made in affirmance of the previous law, is to revive the law as it stood prior to the passing of the repealed statute, and the application of this rule in the present case must be to bring back the law to the state in which it was before the passing of the 26 Geo. 3 c. 11, that is to say, to restore what originally formed part of the common law of New Brunswick, namely, the law of England as contained in 29 Car. 2 c. 3 sec. 25.

The circumstance that the repealed enactment was identical in its terms with the 25th section of the Statute of Frauds, so far from constituting a reason for not applying the principle referred to is, if any argument of the kind can be required, a reason for applying it, since it affords a strong presumption; that the revising legislature repealed and dispensed with the 17th section of 26 Geo. 3 as being a superfluous and useless reiteration of the original law.

I do not feel called upon to enter upon any investigation of the history of the law relating to a husband's right to a grant of administration of his deceased wife's goods, nor of his freedom from liability to distribution prior to the Statute of Distributions. It is sufficient to say that under the law of England as administered long prior to the passing of the Statute

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of Distributions, and invariably since the Statute of Frauds, it has always been considered that the husband surviving has a right to the administration of the estate of his wife dying intestate, and that as such administrator he has (as had all administrators before the Statute of Distributions) a right to retain the surplus for his own use. This right it is expressly declared by the Statute of Frauds the Statute of Distributions did not interfere with.

How the exclusive right of the husband came to be originally determined is a matter of no practical importance; it is sufficient to say that it has been settled law for the last two hundred years, and has during that period of time been universally recognized and acted upon and has never been called in question by any judicial authority.

Another question discussed at considerable length on the argument of this appeal, viz., that as to the rights of the next of kin of a husband who survives his wife and dies without having taken out letters of administration to the personal estate of the wife, as against the wife's own next of kin who have obtained administration under 21 Henry 8th cap. 5, is so absolutely irrelevant to the question presented for decision that I decline to enter upon the consideration of it.

I am of opinion that the directions that the costs, as well those in the Probate Court as those in the Supreme Court of New Brunswick, should be paid out of the estate (save so far as they related to the mere passing of the administrator's accounts in the Probate Court) were erroneous. The effect of such directions was to make the respondent bear the costs of a litigation in which he was entirely successful.

Therefore the order under appeal must in this respect be varied by striking out the order for payment of the

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costs out of the estate, and by directing that the appellants do pay to the respondent his costs in both courts below with the exception of those relating to the passing of the accounts. Subject to the foregoing variations this appeal must be dismissed with costs.

FOURNIER J.—Concurred.

TASCHEREAU J.—I see with a sense of relief that whatever conclusion I reach in this case will not affect the result, so I will not take part in the judgment. It would be useless for me to delay it.

GWYNNE J.—The question raised in this case is whether by the law of the Province of New Brunswick a husband, administrator of the estate and effects, etc., of his deceased wife who died intestate, is bound to make distribution of the residue of her personal estate among her next of kin or can retain it to his own use and benefit The contention of the appellants is that he is, by the law of New Brunswick, bound to make distribution among the next of kin of his deceased wife, and Mr. Wells, in his very able argument in support of that contention, opened up the whole question of the origin and nature of the husband's title to the personal property of his wife as it existed before the passing of chapters 111 and 114 of the Revised Statutes of New Brunswick of 1854, as well as the question of the effect of those statutes, and of chs. 72 and 78 of the Consolidated Statutes of New Brunswick of 1876.

In *Graysbrook* v. *Fox[[14]](#footnote-14)*, the reason of the passing of the statute 31 Edw. 3, ch. 11, and the mischief to remedy which it was enacted, are stated to have been:

Although the ordinary might (as is there stated by common law)

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seize and take the goods which the intestate had at the time of his death, yet, for the debts due to the intestate, or for things in action, the ordinary had no remedy, for he could not bring an action of debt or other action for a debt due to the intestate, and by the same reason he could not release the debts due to the intestate, but his interest was only to seize the things which the intestate had in possession, and with them he might do as he pleased, but he could not sue the debtors of the intestate, and thereby the persons to whom the intestate was indebted could not have remedy for the debts due to them by the intestate, but only according to the rate of the value of the goods in possession, \* \* \* and thus he to whom the intestate was indebted was defrauded of his debt, and he that was indebted to the intestate retained the debt in his hands which, by good reason, ought to go to satisfy the creditor of the intestate. And this was taken to be a thing against conscience, and a great mischief, and therefore, to redress it the statute 31 Edw. 3 c. 11 was made, which enacts that, "in case where a man dieth intestate, the ordinaries shall depute the next and most lawful friends of the dead person intestate to administer his goods which deputies shall have an action to demand and recover as executors the debts due to the said person intestate in the King's court for to administer and dispend for the soul of the dead, and shall answer also in the King's court to others to whom the said dead person was hold en and bound in the same manner as executors shall answer, and they shall be accountable to the ordinaries as executors are in the case of a testament as well of the time past as the time to come. So that this act provides that where a man dies intestate the ordinary shall commit the administration to others who are the next and most faithful friends of the dead, and it gives them an action of debt and does not give it to the ordinary himself, \* \* \* and so it has remedied the said mischief.

And it is there further said that for the redress of the said mischief,

The act enables the administrators to have an action and to recover the debts as executors may, which point is the only purview of the act.

In *Ognell's case*[[15]](#footnote-15) it was held to be undoubted law that a *feme coverte* could not make an executor without the assent of her husband, and that the administration of her goods of right belongs to the husband, and in *Hensloe's case[[16]](#footnote-16)*, in Trinity term 42 Eliz., which decides that the ordinaries had no title by the common

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law to the personal estate of persons dying intestate, but that their title thereto was derived from the King to whom as *parens patriæ* they belonged it was adjudged:

That no power was given to the ordinary before the statute to sell or give the goods, or to dispose of any of them to his own use or any other, nor had he any authority to release the debt due to the intestate, nor had the ordinaries or their deputies or committees any action to recover any debt, or to take any advantage of any covenant or of any other thing in action. That by the act the ordinary is bound to grant administration to the next and most lawful friends. That is: the next of blood who are not attained of treason, felony, or have other lawful disability, but are lawful friends; and further, that now by the act the administrators of intestates' estates, although appointed by ordinary under the authority of the act, had nevertheless vested in them by the act a more absolute interest in the goods of the intestate than the ordinary ever had, and consequently than he ever could confer; that they had under the act as absolute property in the goods and chattels of the intestate as executors had.

31 Edw. 3 c. 11 is the first and only statute upon which the title of the husband to the debts due to, and choses in action of, his deceased wife depends; the ordinary had never had any interest in or power over such species of property and consequently could never have transferred to another any interest in or power over such property. By the common law the husband had acquired absolute title in right of his marriage in all the personal property in the possession of his wife at the time of the marriage or which came into her possession during the coverture, and also the right to reduce into possession all debts due to her and all her choses in action, or to release and discharge them during the coverture; so that the wife during the life time of her husband could die entitled to no personal property, unless in virtue of some agreement with her husband, other than debts due to her, or choses in action not reduced into possession and not released or discharged during the coverture, and so it was

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adjudged in the third year of Charles the First in the case of *Jones* v. *Rowe[[17]](#footnote-17)*, from Sir W. Jones's report of which, as more full than the other, I make the following extract:—

Before the statute (31 Edw. 3 c. 11) the ordinary had nothing to do with the goods or debts of a *feme coverte*, unless she was executrix to another, for her goods in possession belonged to her husband by the inter-marriage and the wife had no property in them, but the husband if he wished could release them during the coverture; but if the wife should die before their recovery the husband could not sue for them, neither had the ordinary had anything to do with them but the debtor shall have the profit of them. The way to prevent this was to make an executor which the wife could do with her husband's assent and she could make her husband her executor and in this manner as her executor he could recover the debts. The statute of 31 Edw. 3 gives power to the ordinary to commit administration to the next and and most lawful friend of the intestate and no one can be the next and most lawful friend of the wife but her husband and upon her death it is he who takes charge of her funeral and other things belonging unto her and so administration ought to be committed to him and such power given to the ordinary must be strictly pursued and cannot be governed by his discretion and the statute 21 H. 8 does not extend to this case for that is where the husband dies intestate the widow, or his next of kin, or both shall be joined together.

Now, the interpretation put upon the statutes has invariably been, that the husband of a woman dying intestate was exclusively and absolutely entitled to have administration of the goods and effects of his deceased wife granted to him; that in the case of a husband dying intestate it was discretionary with the ordinary to grant administration to the widow of the deceased, or to his next of kin, or to the widow and next of kin conjointly, by 21 H. 8; and that in all other cases administration should be granted to the next of kin of the intestate, or to some or one of them in the discretion of the ordinary where the intestate died leaving several his next of kin in equal degree. It becomes important, therefore, to consider why the

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same words in 31 Edw. 3 ch. 11 were construed by the courts to apply to the next of kin or the nearest of the blood of the intestate in all cases except in the case of a wife dying intestate, leaving her husband her survivor, in which case they apply to the husband alone, who is not next of kin, or of the blood, of his deceased wife at all. We have seen that in such a case the ordinary before the statute had no power whatever over the goods or debts of the *feme coverte* dying intestate; that without the assent of her husband she could die possessed of no personal estate or effects other than debts or goods over which the husband had had during the coverture full and absolute power to dispose of, relinquish, discharge and release. Prior to 31 Edw. 3 ch. 11 the ecclesiastical courts had exercised the jurisdiction of compelling the persons appointed by the ordinary to administer the personal estate of deceased persons, whether the same should die testate or intestate, to account for any surplus of personal estate remaining after payment of debts and legacies in the case of a will, and after payment of debts where the deceased had died intestate, and of distributing such surplus in the discretion of the courts. After the passing of the acts the ecclesiastical courts attempted to assert their right to exercise the jurisdiction they had before exercised of compelling administrators to account, and of distributing whatever personal estate of the intestate should remain in the hands of the administrator after the satisfaction of the debts of the intestate at the discretion of the ecclesiastical courts equally as before, but the common law courts interposed by prohibition and prevented the continuance of the exercise of such jurisdiction.

In *Slawney's case*, in 19 James 1st[[18]](#footnote-18) administration having been granted to the widow of an intestate it

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was adjudged that she could not be compelled by the ecclesiastical courts to distribute any part of a surplus remaining in her hands after satisfaction of debts to or among the next of kin of the intestate not being his children, Hobart C.J. saying:

If a man observe well the statute 21 H. 8 c. 5, he shall perceive by preferring the wife and children to the administration that the statute did imitate the mind of the intestate to prefer them that it is like he would have preferred if he had made a will, which must be by giving the profit of the estate, and not only labor and dolor in suing and being sued, to bring in and defend the estate, and then to give this vast power to the ordinary to give the surplusage where he will.

So in *Levanne's case*, in 6 Car. 1st[[19]](#footnote-19) where administration had been granted to the sister of an intestate, a prohibition was granted at her suit restraining the ecclesiastical court from entertaining a suit instituted there for the purpose of compelling the administration to distribute a surplus in her hands, said to be large, among the next of kin of the intestate; the court saying that prohibition was well grantable

because the absolute interest in the goods is in the administrator, and administration being granted the ordinary hath nothing to do, and he cannot now, as he might at common law, repeal the administration committed at his pleasure.

In *Tooker* v. *Loane*, in the 15th year of James 1st[[20]](#footnote-20) a prohibition was granted to restrain the ecclesiastical court interfering to make distribution of the surplus of the personal estate of an intestate in the hands of administrators, "because the ordinary hath no power to make distribution of the surplusage," and the court held that by the true meaning of the statute, specially 21 Hen. 8, a benefit was intended to the administrator and not an unprofitable burthen, and the statute gives a preferment to the wife and next of kin. In an anonymous case decided in

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the 21st year of Charles 2, in the Kings' Bench reported in Sid. 489, it was adjudged that administration of the goods of his deceased wife must be granted to the husband and to no one else; and in *Cox* v. *Webb[[21]](#footnote-21)*, the same point precisely, and that this was not like the case of two in equal degree, was adjudged in the Kings' Bench, in the 6th year of William and Mary in the time of Holt Chief Justice.

In *Palmer* v. *Allicock[[22]](#footnote-22)*, in the 36th year of Charles 2nd, a man died intestate leaving no wife and only one child, a son, who obtained letters of administration to his father and then died intestate, under age, and his next of kin obtained letters of administration *de bonis non* of the father, whereupon the next of kin of the father instituted a suit in the ecclesiastical court to repeal these letters, and the question was whether a prohibition should go at the suit of the next of kin of the child to prevent the ecclesiastical court repealing these letters of administration. In that case Mr. Pollexfen *arguendo* for the prohibition, which after many arguments was granted, said:

At the common law there was no wife or child that had any right or interest in the intestate's estate, but the ordinary was the master thereof to distribute it *in pios usus*, and perhaps the wife and children might come in under that name but not otherwise. Then the 31 Edw. 3 c. 11 gave only an action to the administrator, and then the statute 21 H. 8 c. 5 left it in the wife and next of kin by virtue of the administration, but notwithstanding all these there were many inconveniences before the act 22 & 23 Car. 2, c. 10 of distribution. The statute of 21 H. 8 c. 5 settled the administration, but left the estate unsettled, only it went with the administration.

Again he argued:

Then supposing there be an infant who has an interest vested, whether the estate shall go to the next of kin to the infant, or to the next of kin to the father?

Which was the question before the court; he continues:

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Wheresoever the whole estate shall go the administration shall go as if a wife die the husband shall have the administration, though this be not mentioned within the statute of 21 H. 8, c. 5, or this law, (22 & 23 Car. 2 c. 10) and the reason is because the marriage gave him a kind of interest in the estate of the wife and the children shall have nothing to do therein.

In support of which he cited *Ognell's case*[[23]](#footnote-23) and *Rowe's case[[24]](#footnote-24)*.

Here we see that the right of the husband under 31 Edw. 3 c. 11 to have administration of his deceased intestate wife's estate granted to him is put upon his having "because of his marriage a kind of interest in the estate of his wife," and, although this be but the argument of counsel, still coming from such an eminent counsel who succeeded in his contention it is entitled to the greatest weight, and in *Fortre* v. *Fortre[[25]](#footnote-25)*, in the 4th year of William and Mary, it was adjudged by the whole court, Sir John Holt C.J., that the ecclesiastical court may grant administration to the widow or to the next of kin of an intestate, which they please.

But where the wife dies the husband is to have the administration being the only true and lawful next of kin by the statute 31 Edw. 3, c. 11.

By this language the court cannot be construed as having meant that in point of fact the husband was, by 31 Edw. 3, c. 11, made or declared to be next of kin of his wife, but that he and he alone was to have administration granted to him in virtue of his right as husband to be regarded as the next and most lawful friend of his wife under the statute 31 Edw. 3, and as such beneficially entitled to her estate equally as the next of kin of other intestates were entitled under 21 Hen. 8 c. 5, and 22 & 23 Car. 2 c. 10.

In *Petit* v. *Smith[[26]](#footnote-26)*, the reason of the passing of 22 & 23 Car. 2 c. 10, is thus stated by Holt C.J.:

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At common law, before the statute ordered administration to be granted, the ordinary appointed committees of the personal estate and in those times it was the practice to compel such committes to distribute, but afterwards when the ordinary by virtue of the act of Parliament, 31 Edw. 3, c. 11, granted administration, this administrator had all the power of an executor, and being in nature of an executor it was adjudged that he was not compellable to make distribution, which being thought hard to those of kin to the intestate of equal degree the statute of distribution was made.

In *Blackborough* v. *Davis*[[27]](#footnote-27) Holt C, J. refers to a case of *Duncomb* v. *Mason* (said in Raymond's reports to have been decided in the Common Pleas in the time of Bridgeman C. J. and therefore not later than the 2nd year of Car. 2nd or two years before the passing of the statute of distributions) wherein it was held that of right the husband could repeal administration granted to the next of the blood of his deceased wife,

because the husband has an original right by 31 Edw. 3 c. 11 as the most lawful friend of the wife and was not within 21 H. 8 c. 5 so that the ordinary had no election in the case of the husband.

And in *Squib* v. *Wyn[[28]](#footnote-28)*, Lord Chancellor Cowper says:—

The husband's title at law to the personal estate of the wife is favored; even a term which is as chattel real shall go to the husband surviving his wife, and as to all the personal goods they are his by the intermarriage: though the husband administering to the wife is liable to pay her debts, yet he is entitled to the surplus which will go to his representatives.

In *Edwards* v. *Freeman[[29]](#footnote-29)* Sir Joseph Jekyle, Master of the Rolls, says that the design of the statute of distributions was:

To do what a good and just parent ought for all his children.

Lord C. J. Raymond[[30]](#footnote-30) says that:

It only makes such a will for the intestate as a father free from the partiality of affections would himself make, and this I may call a Parliamentary will.

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And Lord Chancellor King[[31]](#footnote-31) says:—

The occasion of making this statute was to put an end to the controversy betwixt the temporal and spiritual courts. The ordinary before took bonds from the administrator to make distribution, and those bonds were at law adjudged void, and the administrator entitled to all the personal estate. One died intestate, leaving a considerable personal estate, and a son and daughter; the son administered and the daughter contended for a share in the spiritual court where it was thought a hardship that the son should have all, yet the daughter was prohibited at law; however, this statute of distributions takes away the administrator's pretensions, (which before he had made with success) of retaining the whole.

In *Rex* v. *Bettesworth*[[32]](#footnote-32) the husband's right to have administration granted to him of his deceased wife's estate is said to be

in respect of the interest he has in the estate and because no one is *in æquali gradu.*

In *Humphrey* v. *Bullen*[[33]](#footnote-33) where a husband survived his wife and took out letters of administration to her estate, and died before receiving a legacy to which his wife had been entitled, and the administrator of the husband received the legacy, it was held that he was entitled to retain it against an administrator *de bonis non* of the wife, as the absolute property of the husband. Lord Hardwicke there says:

During the coverture they (that is the husband and wife) are but one person, but when that coverture is dissolved by the death of the wife the husband is certainly the next friend and nearest relation, and has a right to administer exclusive of all other persons.

Lord Hardwicke, by these words, "next friend and nearest relation, and has a right to administer exclusive of all persons," must be taken as expressing the undoubted opinion of the Lord Chancellor, that the husband is the person who is indicated in 31 Edw. 3 c. 11 as "the next and most lawful friend of the dead intestate," and as such exclusively entitled to the

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administration of his deceased wife's estate. The Lord Chancellor in that case states the object of the passing of the Statute of Distributions thus:

At common law no person at all had a right to administer, but it was in the breast of the ordinary to grant it to whom he pleased till the statute 21 H. 8 c. 5 which gave it to the next of kin, and if there were persons of equal kin, whichever took out administration was entitled to the surplus, and for this reason the statute was made in order to prevent this injustice and to oblige the admininistrator to distribute.

In *Elliott* v. *Taylor*[[34]](#footnote-34) it was adjudged by Lord Hardwicke that the husband's right to administration of his wife's estate is transmissible to his representative and shall not go to hers. Lord Hardwicke there says:

The husband is not mentioned in the Statute of Car. 2 of Distributions; his surviving his wife is not a provision within that statute. No person but the husband can be entitled to the personal estate of the wife unless by some agreement, so he might have had administration and the whole would have been his own and nobody could have shared it with him.

Lord Thurlow, it is true, in *Fettiplace* v. *Gorges[[35]](#footnote-35)*, speaking of a wife dying intestate leaving her husband her surviving, says:

In that case the husband takes as next of kin and not from his marital rights,

but it is to be observed that this was not the point in judgment in the case, and in *Watt* v. *Watt[[36]](#footnote-36)*, it was expressly decided that a husband could not take under the designation "next of kin" to his wife, Lord Ch. Loughborough there saying:

The description of next of kin of the wife can in no respect apply to the husband. He is entitled to the personal property of his wife *jure mariti*; her personal property vests in him by the marriage. At the death of the wife, if it is necessary for him to have an administration to enable him to get in her personal property the administration

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granted to him is granted to him as husband, and when you look at the statutes, there is no law that gives the husband a right by force of the statute to administer to his wife. The husband's right is supposed in all the statutes. The statute 21 Hen. 8 c. 5, which directs who shall have administration, takes no notice of the husband. They are to grant it to the widow, or the next of kin, or both. That statute, therefore, does not take the widow to be the next of kin. It takes no notice of the widower for the law gives it to him, and where it was necessary for him to have the authority of the Ecclesiastical Court to enable him to obtain her personal property he had a right to it. That right was secured to him absolutely and exclusively, as held by the courts, by 31 Edw. 3 c. 11.

The proper conclusion to be deduced from these cases is that the husband, in virtue of 31 Edw. 3 c. 11, was held to be exclusively entitled to have administration of his deceased intestate wife's estate granted to him, and such title was founded upon the principles of the common law which had vested in him all her personal estate in possession and absolute power to reduce into possession for his own benefit all her debts and choses in action and to relinquish, release, acquit and discharge them, of which power being deprived by her death, and in recognition of such his right at common law to all her personal estate, and to enable him to reduce into possession and to recover such of her choses in action as had not been reduced into possession, released or discharged during the coverture, and because there was no one else having any claim in equal degree with him, the exclusive right to have administration granted was held to be vested in him by the statute 31 Edw. 3 c. 11, so that it is more correct to say that it was rather in virtue of his recognised right to beneficial interest as husband in his wife's estate that he became entitled to have administration granted to him in order to enable him to reduce such beneficial interest into possession, than to say that he became entitled to the beneficial interest in virtue of the letters of administration, although such

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letters constituted the mode recognised by law as necessary to enable him to reduce such interest into possession after the death of his wife. So, likewise, the widow and next of kin of an intestate under 21 Hen. 8 c. 5, which act had no application whatever to the case of a wife dying intestate leaving a husband her surviving, in virtue of their recognised beneficial interest in the intestate's estate, and as being the person whom the law deemed that the intestate would himself have preferred if he had made a will, were recognised as being and were held to be the persons to whom the administration of the intestate should be granted, upon the principle that where the estate should go there the administration should go; and further, it was because of the imperfection of 21 Hen. 8 c. 5, in not providing for distribution of the surplus of the intestate's estate after payment of his debts among his widow and next of kin, and because of the injustice and mischief which was occasioned by reason of the courts of common law prohibiting the ecclesiastical courts interfering to compel such distribution even among the next of kin of equal degree, while the common law courts were themselves unable to make any distribution, that the statute of distributions 22 & 23 Car. 2 c. 10 was passed; and finally, in the case of a wife dying intestate leaving a husband her surviving, there being no person who was deemed in law to have any claim upon her personal estate in equal degree with him, that case did not at all come within the range of the injustice and mischief to remedy which the statute of distributions was passed.

We have already seen that the case of a husband surviving his intestate wife was held not to be within, or affected by, 21 Hen. 8 c. 5. Indeed the language of this latter act seems to place this beyond all doubt wherein it enacts that:

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In case any person dies intestate the ordinary shall grant the administration of the goods of the person deceased to the widow of the same person deceased or to the next of his kin or to both.

This provision seems to have been enacted merely for the purpose of enabling a widow to have an interest in the estate of her intestate husband, which otherwise she would not have had, without in any manner interfering with the right of a husband to administer to the estate of his intestate wife, which the courts held to have been absolutely vested in him by 31 Edw. 3 c. 11. Now, a perusal of 22 & 23 Car. 2 c. 10 discloses a similarity of expression naturally to be expected in an act intended to be passed for the purpose of amending the provisions of 21 Hen. 8 c. 5., and of remedying the injustice and mischief occasioned to the next of kin of the intestate in equal degree with the administrator appointed under that act by reason of the action of the common law courts interfering to prohibit the ecclesiastical courts to compel a distribution of surplus while themselves unable to supply a remedy.

In 21 Hen. 8 c. 5, the provision is:—

In case any person dies intestate, or that the executor named in any testament refuse to prove the said testament, then the ordinary, or other person or persons having authority to take probate of testaments as above is said, shall grant the administration of the goods of the testator or person deceased to the widow of the same person deceased or the next of his kin, or to both, as by the discretion of the same ordinary shall be thought good, taking surety of him or them to whom shall be made such commission for the true administration of the goods, chattels and debts which he or they shall be so authorised to administer, and in case where divers persons claim the administration as next of kin, which be in equal degree of kindred to the testator or person deceased, and where any person only desireth the administration as next of kin, where, indeed, divers persons be in equality of kindred, as is aforesaid, that in every such case the ordinary to be at his election and liberty to accept any one or more making the request where divers do require the administration.

And in 22 & 23 Car. 2 c. 10 the provision is:

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And be it enacted that all ordinaries, and every other person who by this Act is enabled to make distribution of the surplusage of the estate of any person dying intestate, shall distribute the whole surplusage of such estates in manner and form following, that is to say, one third of the said surplus to the wife of the intestate, and all the residue by equal portions to and amongst the children of such person dying intestate and such persons as legally represent such children in case any of the said children be then dead other than such child or children, not being heir at law, who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his life time by portion or portions equal to the share which by such distribution shall be allotted to the other children to whom such distribution is to be made, \* \* \* and in case there be no children nor any legal representatives of them then one moiety of the said estate to be allotted to the wife of the intestate, the residue of the said estate to be distributed equally to every of the next of kindred of the intestate who are in equal degree and those who legally represent them.

Now, bearing in mind that the husband, by administration granted to him of the personal estate of his intestate wife, in effect obtained merely the power to recover and to reduce into possession after the death of his wife the debts and choses in action belonging to his wife over which during the coverture he had had by the common law the absolute right, to recover them for his own benefit, and power to relinquish, release and discharge them, and that the law regarded him absolutely entitled to such administration because of his relationship of husband of the deceased intestate upon, and in recognition of, the principles of the common law, and bearing in mind, also, that in his case the law held that there was not, nor could be, any person who could be said to have any claim in equal degree with him, it must, I think, be admitted that the 22 & 23 Car. 2 c. 10 could not with propriety be held to have any application to the case of a wife dying intestate, leaving a husband her surviving, any more than 21 Hen. 8 c. 5, which, as we have seen, was always held to have had no application to such a case. However, it does appear that about five

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years after the passing of 22 & 23 Car. 2 c. 10 a claim similar to that made in the present case was made in *Wilson* v. *Drake[[37]](#footnote-37)*, by the brother of a woman who had died intestate leaving her husband her surviving who had obtained letters of administration to her estate. What judgment was given in that case does not appear. If the judgment had been in accordance with the judgment of the courts in relation to 21 Hen. 8 c. 5, namely, that 22 & 23 Car. 2 c. 10 did not apply to the case of *femes covertes* dying intestate any more than did 21 Hen. 8 c. 5, such judgment would have been, in my opinion, as I have already pointed out, justified by the judgments of the courts as to the right in which the husband was held to be exclusively entitled, under 31 Edw. 3 c. 11, to administration of his deceased intestate wife's estate. That the Parliament which passed the statute of distributions never intended that it should apply to such a case is apparent from the 25th sec. of the statute of Frauds, 29 Car. 2 c. 3, which clause would seem to have been introduced for the purpose of preventing the courts falling into, what Parliament plainly considered would be, the error of holding that the statute of distribution did operate upon a husband administrator of his deceased wife's estate, and did compel him to distribute such estate or any surplus thereof after payment of debts to and among the next of kin of the wife. The clause enacts that:—

For the explaining an act of this present Parliament entituled "an act for the better settling of intestates' estates" be it declared that neither the said act nor anything therein contained shall be construed to extend to the estates of *Femmes Covertes* that shall die intestate but their husbands may demand and have administration of their rights and credits and other personal estates, and recover and enjoy the same as they might have done before the passing of the said act.

That is to say, entitled to administration under 31

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Edw. 3 c. 11 as husband, and to appropriate the property to his own exclusive use independently of any statute in virtue of his common law right, as it is put by Lord Justice Turner in *Milne* v. *Gilbert[[38]](#footnote-38)*, and by a right paramount to the statute as put by Lord Cranworth in the same case. It is true that there are expressions in the judgment of Lord Justice Knight Bruce in that case to the effect that the 25th sec. of the Statute of Frauds operated

to *give* to the husband or *to restore* to him by way of declaratory enactment the right which he would have had if the statute 22 & 23 Car. 2 c. 10 had not been passed

seemingly, thereby, implying that this latter statute did take from the husband the right to his deceased wife's estate which he previously had; but this was not necessary to the determination of the case before him which was not whether the statute had taken anything from the husband but whether it had given anything to him which he could claim under it. Lord Justice Turner in his judgment says:

The statute of distributions particularly excludes the idea of the husband taking under it.

And referring to the 25th sec. of the Statute of Frauds he expresses his opinion that it was passed to remove any difficulty which might arise upon the question whether that statute had or had not "taken away the common law right of the husband" Lord Cranworth makes use of expressions to the like effect. It is observable, however, that the way in which the Parliament which had passed the act disposed of the suggested difficulty and prevented the possibility of its arising was, not by enacting that something which the statute 22 & 23 Car. 2 c. 10 had taken from the husband should be restored to him, but by enacting and declaring that nothing contained in the act should be construed

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to extend to the estates of *femes covertes* dying intestate.

The act 22 & 23 Car. 2 c. 10, as explained by the 25 sec. of the Statute of Frauds, 29 Car. 2, c. 3, was made perpetual by 1 James 2 c. 17, and that act constituted the law of England upon the subject when the country now constituting the Province of New Brunswick became a British possession, and was consequently the law in force in the Province of New Brunswick when that province was first constituted. The first General Assembly of the Province in 1786, passed the Provincial Statute 26 Geo. 3 c. 11, entituled:

An act relating to wills, legacies, executors and administrators, and for the settlement and distribution of the estates of intestates.

The 14 and 15 sections of this act, which constitute the portion of the act which relates to the distribution of the estates of intestates, are an almost verbatim transcript of sections 5, 6, 7 and 8 of 22 & 23 Car. 2 c. 10. Now it may, I think, be laid down as an invariable course of construction of a Provincial statute, so taken verbatim from an act of the Imperial Parliament, that the Provincial courts should construe the Provincial act in accordance with the construction put upon the Imperial statute, either by the Imperial courts of justice or *a fortiori* by another Imperial statute passed for the purpose of construing and explaining the act under consideration; hence it will follow as a necessary consequence that if the 14 and 15 sections of the statute 26 Geo. 3 c. 11 of the General Assembly of the Province of New Brunswick had stood alone they must have received the construction which by the 25 sec. of the Statute of Frauds was by the Imperial Parliament declared to be the true intent and meaning of 22 & 23 Car. 2 c. 10. The General Assembly of the province, however, in the 17 sec. of the said act 26 Geo. 3 c. 11, enacted that:

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Nothing in this act contained shall be construed to extend to the estate of *femes covertes* who shall die intestate, but that their husbands may demand and have administration of their rights, credits and other personal estates, and recover and enjoy the same as they might have done heretofore

thus using the language of the 25th sec. of the Statute of Frauds *ex majore cauielâ*, but quite unnecessarily, in my opinion, for the reason just given; when, therefore, the General Assembly of the Province, in 1854, passed the Act entituled:—"An Act to revise and consolidate the Public Statutes of New Brunswick," and in the 111th ch. of that act re-enacted the provisions of the 14th and 15th secs. of 26 Geo. 3 c. 11, with some trifling immaterial alterations, but omitted wholly the 17 th section of that act, no alteration was thereby made in the construction to be put upon the said chapter 111, but that chapter must have received the same construction as had been the true construction of 26 Geo. 3 c. 11, which, as I have said, even without the 17th section thereof, must have been the construction put upon the Imperial statute 22 and 23 Oar. 2 c. 10, by the 25th sec. of the Statute of Frauds. Now, the chap. 111 of the statutes of 1854 is consolidated in the Consolidated Statutes of New Brunswick as ch. 78, and the provisions of these chapters, in so far as the present question is concerned, are identical. So, likewise, ch. 114 of the statute of 1854 is now consolidated in the Consolidated Statutes of 1876 as ch. 72, which relates to the property of married women in the Province of New Brunswick, and the sole remaining question is whether the provisions of these chapters, 114 or 72, had or have the effect of divesting the husband of all beneficial interest in the personal property and choses in action whereof his wife died possessed or entitled to and intestate, such personal property in the present case consisting of bonds, mortgages, promissory

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notes, certificates of shares in joint stock companies, and money in bank, standing in the name of the wife. There is so little difference in the language of ch. 114 of the statute of 1854, and ch. 72 of the Consolidated Statutes of 1876, and in fact none so far as affects the question under consideration, that it will be necessary to refer only to the latter chapter, and to the 1st section thereof, for the subsequent sections relate only to the cases of "desertion or abandonment of any married woman by her husband, or of her living separate and apart from her husband," in which case the married woman's interest in and the power over her real and personal property is different from her interest in and power over such property while she lives with her husband.

Now, the 1st sec. of ch. 72 enacts that:

The real and personal property belonging to a woman before or accruing after marriage, except such as may be received from her husband while married, shall vest in her and be owned by her as her separate property and shall be exempt from seizure or responsibility in any way for the debts or liabilities of her husband, and shall not be conveyed, encumbered or disposed of during the time she lives with her husband, without her consent, testified, if real property, by her being a party to the instrument conveying, encumbering or disposing of the same duly acknowledged as provided by the laws for regulating the acknowledgments of married women; and after her abandonment or desertion by her husband, or upon her being compelled to support herself or upon her being separate and apart from her husband, unlawfully and of her own accord, although neither deserted nor abandoned by him, then her real and personal property may be disposed of as provided for in this chapter as if she were a *femme sole*, but her separate property shall be liable for her own debts contracted before marriage, and for judgments recovered against her husband for her wrongs.

This section, it will be observed, does not say that a married woman living with her husband shall hold her real and personal property in the same manner and with the same power of disposition over it as if she were a *femme sole*; while dealing solely with her

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right to and interest in her property while living with her husband it declares that she shall hold it as her separate property exempt from all liability for her husband's debts and not capable of being conveyed, encumbered or disposed of without her consent, such consent in the case of realty to be testified by a deed executed by her jointly with her husband, and duly acknowledged by her as provided by law for regulating the acknowledgments of married women, that is to say, apart from her husband, and to have been executed by her freely and without compulsion from her husband, but how her consent is to be testified in the case of personalty the section does not say. By this section she holds her property, while living with her husband, as settled to her sole and separate use, but the section says nothing as to its devolution in case she should die without making a will, which no doubt she might have done of property so settled. Upon her death therefore, intestate, the right of the husband to her personal property, which was suspended only during the coverture, revived; this was decided by Sir John Leach, Master of the Rolls, in 1833 in *Proudley* v. *Fielder[[39]](#footnote-39)*. There monies were settled to the sole and separate use of a married woman as if she were sole and unmarried.

This expression "said the Master of the Rolls," has no reference to the devolution of the property after her death; she is to retain the same absolute enjoyment of the monies, and is to have the same power of disposition over them as if she were sole and unmarried; but there is not one word here to vest the property after her death in the next of kin, or to defeat the right which her surviving husband is entitled to acquire as her administrator.

In *Cooper* v. *Macdonald*[[40]](#footnote-40) Sir George Jessel, Master of the Rolls, says in relation to the separate estate of a married woman and the interest of the husband therein upon her dying intestate:

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The separate use is exhausted when the wife has died without making a disposition. She enjoyed the income during her life, and she has not thought fit to exercise that which was an incident of her separate estate, the right of disposing of her property. Why should equity interfere further with the devolution of the estate, &c.

And again:

Where she (the wife) dies without making any disposition (of her separate estate) the rights of the husband and the rights of the heir are equally unaffected and equity ought to follow the law.

And in *Stanton* v. *Lambert*[[41]](#footnote-41) it was held that the Married Woman's Property Act, 1882, had not altered the devolution of the undisposed of separate property of a married woman; that upon her death without disposing of the separate personalty the quality of separate property ceases and the right of the husband to such undisposed of personalty accrues as if the separate use had never existed. Now this Imperial statute of 1882, 45 & 46 Vic. ch. 75, vested her property in a married woman much more absolutely than does the New Brunswick statute. By the Imperial statute it is enacted that she shall be capable of acquiring, holding and disposing by will or otherwise of any real or personal property as her separate property as if she were a *femme sole* without the intervention of a justice; that she shall be capable of entering into any contract and of making herself liable in respect of, and to the extent of, her separate property, and of suing and being sued in contract or tort or otherwise, as if she were a *femme sole*, and her husband need not be joined with her either as plaintiff or defendant. She is enabled to carry on trade in her own behalf separate from her husband, and in respect of her separate property is made subject to the bankrupt laws in the same way as if she were a *femme sole*; she is declared to be entitled to have and to hold as her separate property, and to dispose of by will or

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otherwise, all real and personal property which shall belong to her at the time of marriage or shall be acquired by, or devolve upon her, after marriage, including any wages, earnings, money and property gained or acquired by her in any employment, trade or occupation in which she is engaged or which she carries on separately from her husband or by the exercise of any literary, artistic or scientific skill; in fact she is almost in every respect invested during the coverture with all the rights and privileges of a *femme sole* and subject to all the liabilities of one to the extent of her separate property, yet if she dies without having made any disposition of her separate personalty the right of her husband upon her death revives and becomes as to such undisposed of personalty as if the separate use had never existed.

If the New Brunswick legislature had intended to divest the husband of the right devolving upon him by his surviving his wife who died intestate we should naturally expect to find language used expressing the intention of the legislature similar to that used in the 25th section of the Imperial statute 20 & 21 Vic. ch. 85 or in the 23rd section of ch. 132 of the Revised Statute of Ontario of 1887. In the absence of the expression by the legislature of any such intention we must hold the respondent in the present case to be entitled beneficially to the personal estate of his intestate wife and the appeal in this case must, therefore, be dismissed.

PATTERSON J.—I cannot say that the argument for the appellant, though learned and ingenious, created any doubt in my mind of the correctness of the decision of the court below. I so fully agree with the views of the general law and the construction of the provincial statutes expressed in the judgment of the Chief Justice

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of New Brunswick, as well as in those of Mr. Justice Tuck and Mr. Justice Fraser, and those judgments deal so exhaustively with the subject of the controversy, that I do not think I can usefully add anything to what those learned judges have said. I should not have considered that the right of a husband to the personal property of his wife who dies intestate, whether property in possession or in action, was open to serious question, even though declared in the terms of the New Brunswick statute C. S. N. B. ch. 72 to be the wife's separate property, were it not that a different view has been taken by the learned judge who dissented in the court below. I do not propose to enter upon a discussion of the opinions which he ably supports in his judgment. To do so would be, in effect, to repeat the arguments on which the majority of the judges founded their opinions and would serve no useful purpose. I could not further elucidate the question on which the argument has turned, and on both sides of which the language of great judges has been appealed to, viz., whether the right of the husband, which is constantly called *the jus mariti*, is a common law consequence of the marriage, or a right flowing from the statute 31 Edw. III under which the courts held the husband entitled to administration of the estate of his wife who died intestate. The latter position is taken and is much relied on by Mr. Justice Palmer in his dissenting judgment. He more than once speaks of the title of the husband to his wife's choses in action as acquired only as her administrator. Doubtless that was so at law. Choses in action, not being assignable at law, vested in the personal representative. But if administration were granted to one who was not the husband of the intestate he held in equity as trustee for the husband or for the personal representative of the husband. This was established

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by such cases as *Humphrey* v. *Bullen[[42]](#footnote-42)*, and *Elliot* v. *Collier[[43]](#footnote-43)*, and Mr. Justice Stirling in his instructive judgment in *re Lambert's Estate*[[44]](#footnote-44) expressed the opinion that when a married woman made a will dealing with her separate estate, and probate was granted in a general and not limited form, the executor would be trustee for the husband of any separate property not effectually disposed of.

In *Plait* v. *McDougall*[[45]](#footnote-45) a married woman entitled to a fund expectant on the death of her mother died in her mother's lifetime. Her husband survived her and died without having taken administration to her. It was held that his executors, and not the representatives of his wife, were entitled to the fund. The same point was decided in *Proudley* v. *Fielder[[46]](#footnote-46)*.

In *Ripley* v. *Woods*[[47]](#footnote-47) the incipient right of the husband was held to pass to his assignees in bankruptcy. So held also in *Harper* v. *Ravenhill[[48]](#footnote-48)*.

The principle of these decisions does not seem easily reconcilable with the opinion that the husband's right arises merely or mainly from his appointment as administrator under the statute of Edward III., and reasoning based upon that opinion would therefore be apt to lead to a fallacious conclusion. Another point in which I cannot follow the learned judge is in the distinction he makes between *separate property* of a married woman, which is the expression used in the New Brunswick statute, and property held to her *separate use.* I understand both expressions to mean the same thing. We have instances of the three forms of expression, "separate use," "separate estate" and "separate property," being used interchangeably in

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the language of Mr. Justice Stirling in the case so often referred to in this discussion, *re Lambert's Estate*[[49]](#footnote-49) and in language there quoted from a judgment of Sir Gr. Jessell in *Cooper* v. *McDonald[[50]](#footnote-50)*.

I am of opinion that we should dismiss the appeal.

Appeal dismissed with costs.

Solicitor for appellants: W. W. Wells.

Solicitor for respondent: Wm. Pugsley.

1. 18 Ves. 54. [↑](#footnote-ref-1)
2. 23 L. J. Eq. 828. [↑](#footnote-ref-2)
3. 2 Black Comm. 494. [↑](#footnote-ref-3)
4. 2 Black Comm. 515. [↑](#footnote-ref-4)
5. 1 Shower 351. [↑](#footnote-ref-5)
6. 3 Salk. 22. [↑](#footnote-ref-6)
7. 1 Ves. 48. [↑](#footnote-ref-7)
8. 39 Ch. D. 632. [↑](#footnote-ref-8)
9. 23 N. B. Rep. 209. [↑](#footnote-ref-9)
10. 1 P. Wms. 378. [↑](#footnote-ref-10)
11. 3 Ves. 246. [↑](#footnote-ref-11)
12. 2 ed. p. 384. [↑](#footnote-ref-12)
13. 2 Phillimore 22. [↑](#footnote-ref-13)
14. 7th Eliz. Plowd. 277. [↑](#footnote-ref-14)
15. 4 Co. 52 a. [↑](#footnote-ref-15)
16. 9 Co. 39 a. [↑](#footnote-ref-16)
17. Hobart 83. [↑](#footnote-ref-17)
18. Cro. Car. 106; Sir Wm. Jones 175 [↑](#footnote-ref-18)
19. Cro. Car. 202. [↑](#footnote-ref-19)
20. Hobart 191. [↑](#footnote-ref-20)
21. Comerbach 289. [↑](#footnote-ref-21)
22. 2 Shower 408; 3 Mod. 58. [↑](#footnote-ref-22)
23. 4. Co. 51. [↑](#footnote-ref-23)
24. Cro. Car. 106. [↑](#footnote-ref-24)
25. 1 Shower 351. [↑](#footnote-ref-25)
26. 1 P. Wms. 8. [↑](#footnote-ref-26)
27. 1 P. Wms. 44; Ld. Raymond 684. [↑](#footnote-ref-27)
28. 1 P. Wms. 381. [↑](#footnote-ref-28)
29. 2 P. Wms. 439. [↑](#footnote-ref-29)
30. P. 443. [↑](#footnote-ref-30)
31. P. 448. [↑](#footnote-ref-31)
32. 2 Str. 1112. [↑](#footnote-ref-32)
33. 1 Atk. 458. [↑](#footnote-ref-33)
34. 1 Wils. 168, reported as *Elliott* v. *Collier* in 3 Atk. 526. [↑](#footnote-ref-34)
35. 3 Bro. C. C. 8; 1 Ves. 46. [↑](#footnote-ref-35)
36. 3 Ves. 247. [↑](#footnote-ref-36)
37. 2 Mod. 20. [↑](#footnote-ref-37)
38. 18 Jur. 611. [↑](#footnote-ref-38)
39. 2 My. & K. 57. [↑](#footnote-ref-39)
40. 7 Ch. D. 296. [↑](#footnote-ref-40)
41. 39 Ch. D. 626. [↑](#footnote-ref-41)
42. 1 Atk. 458. [↑](#footnote-ref-42)
43. 3 Atk. 526; 1 Ves. Sen. 15. [↑](#footnote-ref-43)
44. 39 Ch. D. 626, 634. [↑](#footnote-ref-44)
45. Taml. 390; 9 L. J. Ch. 150. [↑](#footnote-ref-45)
46. 2 My. and K. 57. [↑](#footnote-ref-46)
47. 2 Sim. 165. [↑](#footnote-ref-47)
48. Taml. 144. [↑](#footnote-ref-48)
49. 39 Ch. D. 626, 633. [↑](#footnote-ref-49)
50. 7 Ch. D. 288, 296. [↑](#footnote-ref-50)