1892 EDWARD MOORE (PLAINTIFF) .....APPELLANT;

*Nov. 2, 3.

AND

1893 JANE JACKSON (DEFENDANT) .....RESPONDENT.

*May 1. ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Married Woman's property—Separate estate—Contract by married woman —Separate property exigible—C. S. U. C. c. 73—35 V. c. 16 (O.)— R. S. O. (1877) cc. 125 and 127—47 V. c. 19 (O.).

A woman married between 1859 and 1872 acquired, in 1879 and 1882, lands in Ontario as her separate property and in 1887, before the Married Woman's Property Act of that year (R.S.O. c. 132) came into force, she became liable on certain promissory notes made by her.

Held, reversing the decision of the Court of Appeal, that the liability of her separate property to satisfy a judgment on said promissory notes depended on the construction of the Married Woman's Real Estate Acts of 1877 (R.S.O. cc. 125, 127) and The Married Woman's Property Act, 1884 (47 V. c. 19) read in the light furnished by certain clauses of C. S. U. C. c. 73; and that her capacity to sue and be sued in respect thereof carried with it a corresponding right on the part of her creditors to obtain the fruits of a judgment against her by execution on such separate property.

APPEAL from a decision of the Court of Appeal for Ontario (1) reversing the judgment of the Divisional Court (2) and restoring that of the trial judge in favour of the defendant.

The question for decision on this appeal is whether or not certain lands in the township of Etobicoke, in the county of York, were the separate estate of the respondent Jane Jackson and liable to satisfy the plaintiff's claim against her.

The facts of the case are not in dispute and the decision depends on the construction to be put on the

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

(1) 19 Ont. App. R. 383. (2) 20 O. R. 652.

statutes of Ontario relating to married women's property, namely: An act relating to Property Rights' of Married Women (1) the Married Woman's Real Estate Acts (2); the Married Woman's Property Act, 1884 (3); the later acts do not affect the case.

The action was tried before Chief Justice Armour who gave judgment for the defendant, holding that under these acts the wife had no power of disposition of her property. The Divisional Court reversed this judgment, but it was restored by the Court of Appeal. The plaintiff appealed from the latter decision to the Supreme Court.

Moss Q.C. for the appellant. Separate use is not essential to possession of separate property. *Chamberlain* v. *McDonald* (4) where Mowat V. C. dissents from the holding in *Royal Canadian Bank* v. *Mitchell* (5); *Cameron* v. *Walker* (6).

In re Konkle (7), and *Taylor* v. *Meads* (8), are leading cases on the question of separate estate.

Armour Q.C. for the respondent cited *McLean* v. *Garland* (9); *Cahill* v. *Cahill* (10); *Hope* v. *Hope* (11).

THE CHIEF JUSTICE.—The respondent Jane Jackson, is a married woman, and the object of this action is to make certain lands situate in Parkdale and Etobicoke, held by her for an estate in fee and acquired since her marriage, liable for the payment of several promissory notes made by her during coverture and which are now held by the appellant.

The cause was originally heard by the Chief Justice of the Queen's Bench who entered judgment for the

(1) 35 Vic. ch. 16.
(2) R. S. O. [1877] chs. 125 and 127.
(3) 47 Vic. ch. 19.
(4) 14 Gr. 447.
(5) 14 Gr. 412.
(6) 19 O. R. 212.
(7) 14 O. R. 183.
(8) 4 DeG. J. & S. 597.
(9) 10 Ont. App. R. 405.
(10) 8 App. Cas. 420.
(11) [1892] 2 Ch. 336.

1893

MOORE v. JACKSON.

The Chief Justice.

respondent. This judgment was subsequently reversed by the Divisional Court of Queen's Bench. The respondent then appealed to the Court of Appeal which court reversed the judgment of the Queen's Bench Division in part. Against the latter judgment the present appeal has been brought.

The solution of the questions which are raised depends upon the application of statutory enactments which have been varied from time to time. It becomes, therefore, important to ascertain the exact provisions of the statutes which are applicable. In order to arrive at this end we must bear in mind the several dates of the respondent's marriage, of the acquisition by her of the property in question and of the promissory notes sued upon. The marriage took place in 1869. The Etobicoke property was conveyed to her in June, 1879, and February, 1882. The Parkdale property was acquired in March, 1887 The promissory notes sued upon were made in May, June and July, 1887. I may say at once that as regards the Parkdale property its liability to be applied to the satisfaction of the plaintiff's debt has not been controverted by the Court of Appeal. In this conclusion I entirely agree. The question for our consideration is therefore confined to the lands in Etobicoke.

It may also be premised that as regards any of the lands in question which were conveyed by the respondent, Jane Jackson, to her co-defendant Mary Jane Graydon, which may be found to be otherwise liable to the appellant's claim, the conveyance of such lands was void as being in fraud of creditors. This has been decided by both the courts below, and I entirely acquiesce in the correctness of their judgments in this respect. I will therefore proceed to consider the case as confined to the Etobicoke lands which, as I have already said, were acquired by Mrs. Jackson in 1879 and 1882.

The first statute which altered the common law property rights of married women was the Consolidated Statute U. C. cap. 73.

By the first section of that act it was enacted that—

> Every woman who has married since the 4th day of May, 1859, or who marries after this Act takes effect, without any marriage contract or settlement shall and may, notwithstanding her coverture, have, hold, and enjoy all her real and personal property, whether belonging to her before marriage or acquired by her by inheritance, devise, bequest, or a gift, or as next of kin to an intestate or in any other way after marriage free from the debts and obligations of her husband and from his control or disposition without her consent in as full and ample a manner as if she continued sole and unmarried, any law, usage or custom to the contrary notwithstanding; but this clause shall not extend to any property received by a married woman from her husband during coverture.

This statute did not in any way provide that married women should be liable on their contracts nor that their real property should be so liable. Nor did the statute confer upon married women the power to convey their real estate coming within the terms of the first section without the concurrence of their husbands nor otherwise than as the legal estates of married women had been theretofore required to be conveyed, namely, by a deed in which the husband should be a concurring party, duly acknowledged before the proper officers on an examination of the woman apart from her husband.

So far as the mere use of the term "separate estate" has any bearing on the question before us, it may be remarked that this statute of 1859 affixes the denomination of "separate estate" to the statutory property created by the first section. The expression will be found to be so applied in sections 3, 14, 15 and 16 of the act. It is manifest from the context that in all these clauses the words "separate estate" are used to indicate the species of legal estate created by the first section of the statute, and not as in any way referring

1893

MOORE v. JACKSON.

The Chief Justice.

to separate estate arising under the peculiar doctrines of courts of equity with reference to the equitable interests of married women in property settled to their separate use. In the case of the *Royal Canadian Bank* v. *Mitchell* (1) Spragge V. C. expressly decided that the separate estate created by the statute was not analogous to the equitable property of a married woman settled to her separate use either in respect of the power of disposition or in respect of its liability for the debts of the owner. In *Kraemar* v. *Gless* (2) and in *Wright* v. *Garden* (3) similar conclusions were reached.

The next statute to be noticed is that of 1872, 35 Vic. cap. 16, intituled "An Act to extend the property rights of married woman. By the first section of this act it is enacted—

That after the passing of this Act, the real estate of any married woman which is owned by her at the time of her marriage, or acquired in any manner during her coverture, and the rents, issues and profits thereof respectively, shall without prejudice and subject to the trusts of any settlement affecting the same, be held and enjoyed by her for her separate use, free from any estate or claim of her husband during her lifetime, or as tenant by the courtesy, and her receipts alone shall be a discharge for any rents, issues and profits, and any married woman shall be liable on any contract made by her respecting her real estate as if she were a *feme sole*.

And by the 8th section of the same act it was declared that:—

A husband shall not be liable for any debts of his wife in respect of any employment or business in which she is engaged on her own behalf, or in respect of any of her own contracts.

The 9th section provides (*inter alia*) that:—

Any married woman may be sued or proceeded against separately from her husband in respect of any of her separate debts, engagements, contracts or torts as if she were unmarried.

By chapter 125 of the Revised Statutes of Ontario, (1877) section 3, it is enacted as follows:—

(1) 14 Gr. 412. (2) 10 U. C. C. P. 470.
(3) 28 U. C. Q. B. 609.

Every woman who married between the 5th day of May, 1859, and the 2nd day of March, 1872, (both inclusive) without any marriage contract or settlement, shall and may, notwithstanding her coverture, have, hold and enjoy all her real property, whether belonging to her before marriage or acquired by her by inheritance, devise or gift, or as heir-at-law to an intestate, or in any other way after marriage free from the debts and obligations of her husband, and free from his control or disposition without her consent, in as full and ample a manner as if she continued sole and unmarried; but this section shall not extend to any property received by a married woman from her husband during coverture.

By the second section of the same act provision was made for the case of a woman married before May, 1859, and by the 4th section for that of a woman married after March, 1872.

Section 18 is as follows:—

A husband shall not be liable for any debts of his wife in respect of any employment or business in which she is engaged in her own behalf or in respect of any of her own contracts.

The last clause of section 20 provides that:—

Any married woman may be sued or proceeded against separately from her husband in respect of any of her separate debts, engagements, contracts or torts as if she were unmarried.

Chapter 127 of the Revised Statutes of Ontario, 1877, is intituled "An Act to facilitate the conveyance of real estate by married woman," and by the 3rd section it is provided that a married woman may convey her real estate by deed to which the husband must be an executing party.

By "The Married Woman's Property Act, 1884," (47 Vic. cap. 19) which took effect on the 1st July, 1884, it is by section 2, subsection 1, enacted that:—

A married woman shall in accordance with the provisions of this Act be capable of acquiring, holding and disposing by will or otherwise, of any 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.

Subsections 2 and 3 of the same act are as follows:

1893

MOORE v. JACKSON.

The Chief Justice.

Subsec. 2 :—A married woman shall be capable of entering into and rendering herself liable in respect of, and to the extent of, her separate property on any contract, and of suing and being sued either in contract or in tort or otherwise in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her and any damages or costs recovered by her in any such action or proceeding shall be her separate property, and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property and not otherwise.

Subsec. 3 :—Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property unless the contrary be shown.

By the last section of the statute (sec. 22) "The Married Woman's Property Act," R. S. O. 1877, c. 125, is repealed, and so much of section 3 of the "Married Woman's Real Estate Act," R. S. O. 1877, cap. 127, as required the husband to be a party to and to execute the conveyance by a married woman of her real estate is also repealed.

I have now noticed all the material statutory enactments which in my opinion can apply to the present case. The "Married Woman's Property Act," R. S. O. 1887, cap. 132, so far as it alters the act of 1884, can have no application to the present case inasmuch as the Revised Statutes of that year did not take effect until 31st December, 1887, and the promissory notes, for the recovery of which the present action was brought, were made in May, June and July, 1887.

The question we have to answer, therefore, depends on the construction to be put on the two acts of 1877 and the act of 1884, read in the light furnished by certain clauses in the act of 1859.

It does not appear to me that in construing these statutes we have anything to do with the question of tenancy by the courtesy. As Mr. Justice Maclennan has put it in his judgment we may regard the case as

if Mrs. Jackson's interest had been a mere life estate, in which case no question of tenancy by the courtesy could possibly arise. Again the doctrines of courts of equity as regards estates settled to the separate use of married women, either through the intervention of an express trustee or without a trustee, have, in my opinion, no bearing upon the question before us. So far from elucidating the acts of the legislature which we have to construe they would rather tend to embarrass us in performing that task, inasmuch as they present false and misleading analogies. No doubt the legislature might, if it had thought fit to do so, have referred to those doctrines as furnishing a proper standard by which to measure the rights and liabilities of married women as regards their legal separate estate created by the statutes, but I do not find that any such intention is expressed or is to be necessarily implied.

The separate estate of a married woman in property settled to her separate use was, as is well known, purely a creature of courts of equity originally introduced whilst that system of jurisprudence was in a formative stage. It was from time to time modelled and further developed, first by the introduction of the restraint upon anticipation, a fetter upon alienation which was altogether repugnant to the principles of the common law. Then it was further adapted to the case of a settlement upon a single woman to her separate use by providing that the separate use should arise as " a postponed fetter " (to use the words of Lord Langdale in *Tullett* v. *Armstrong*) (1), on her marriage. Next arose the question of the liability of this equitable property to make good the contractual liability of married women possessed of it. And lastly came the question as to her power of disposition over estates of freehold and inheritance in land thus settled. The

(1) 1 Beav. 1.

1893

MOORE v. JACKSON.

The Chief Justice.

settlement of these questions gave rise to rules involving much nicety and refinement which I can never think it was the intention of the legislature to have introduced into the statute law of Upper Canada and made applicable to the new species of statutory legal estate in land which was called into existence by the acts referred to.

Further, I do not consider that the extent of a married woman's power of voluntary disposition as regards her statutory separate estate is conclusive upon the question of the liability of that species of property to make good debts which she may have contracted. Incidentally this *jus disponendi* may have some relevancy in the interpretation of the statutes, but I cannot agree that it is in any way decisive.

The English cases decided upon the "Married Woman's Property Act" (Imp.) 1882, so far as the legislation here has been borrowed from the English enactments, are applicable, but we have to be careful in applying them for the reason that the preceding legislation in England and in the province of Ontario was entirely different, and the Ontario statutes are of course all to be construed, especially as regards the meaning of terms, as *in pari materiâ*.

The question then is: What, upon the true construction of the statutes before referred to, is the liability of the respondent Mrs. Jackson, a woman married after 1859 and before 1872, (viz., in 1869) upon these notes made in May, June and July, 1887, as regards these Etobicoke lands, which were acquired by her in 1879 and 1882? In *Kraemar* v. *Gless* (1) Draper C.J. speaking of the statutes of 1859, says:—

> Every provision for these purposes is a departure from the common law and so far as is necessary to give these provisions full effect we must hold the common law is superseded by them. But it is

(1) 10 U. C. C. P. 475.

against principle and authority to infringe any further than is necessary for obtaining the full measure of relief or benefit the act was intended to give.

This principle of construction was adopted and acted upon by Spragge V. C. in *Royal Canadian Bank* v. *Mitchell* (1), by the Court of Queen's Bench in *Wright* v. *Garden* (2), by my brother Gwynne in *Balsam* v. *Robinson* (3), and to the best of my ability I endeavoured to follow it in *Mitchell* v. *Weir* (4), and I propose to take it as a guide in the present case.

The right of Mrs. Jackson in these lands was originally dependent on the statute of 1877. By the third section of that act it was declared that a woman married between 1859 and 1872 should have in lands acquired by her after the statute precisely the same rights as were conferred upon a woman married after the 4th May, 1859, by the 1st section of Consolidated Statutes U. C. cap. 73, that is to say a right to—

> Have, hold and enjoy her lands free from the debts and obligations of her husband and from his control or disposition without her consent in as full and ample a manner as if she continued *sole* and unmarried.

It was decided in the case of the *Royal Canadian Bank* v. *Mitchell* (1), and *Wright* v. *Garden* (2), that the estate which was thus conferred by the statute of 1859 upon women married after the date of that enactment was not liable to make good their debts, at least so far as debts arising under contracts are concerned, for the reason that the statute of 1859 neither imposed such a liability nor took away the common law disability of a married woman to bind herself by contract. Notwithstanding this, however, the right of unfettered enjoyment free from the control of the husband which the statute did confer was undoubtedly

(1) 14 Gr. 412.
(2) 28 U. C. Q. B. 610.
(3) 19 U. C. C. P. 269.
(4) 19 Gr. 570.

1893

MOORE v. JACKSON.

The Chief Justice.

properly described and defined by the expression "separate estate" or "separate property." We find indeed in the statute itself clear evidence of this. In the 16th and 18th sections of the statute of 1859 we find the new statutory property created in favour of *femes covertes* by the 21st section referred to by the legislature as her "separate property" and her "separate estate."

This has a significance which I will refer to hereafter. In the case of *Wright* v. *Garden* (1), it was contended that the statute of 1859 had created separate property which was to be accompanied by the like incidents as property settled to the separate use had acccording to the doctrines of equity. One of the learned judges, Mr. Justice Wilson, was of this opinion; but the majority of the court repelled this construction and held that there was no liability, adopting the reasons which Spragge V. C. had previously stated for the same conclusion in the case of the *Royal Canadian Bank* v. *Mitchell* (2).

It follows, therefore, from these cases that by the reference to separate property in the statute of 1859 separate property in the sense in which the courts of equity used that term was not intended, but what was meant was that particular species of new separate property created by the statute itself. For this proposition, therefore, we have the high authority of the cases cited.

Then the 20th section of the act of 1877 contains this clause:—

> Any married woman may be sued or proceeded against separately from her husband in respect of any of her separate debts, engagements, contracts or torts as if she were unmarried.

The lands in question here were acquired after the statute was passed and before it was repealed. Would

(1) 28 U. C. Q. B. 610. (2) 14 Gr. 412.

they then have been liable for the satisfaction of the promissory notes sued upon if there had been no repeal of this enactment?

In the first place this section 20 is not in terms confined to women married after the passing of the act of 1877; the words are "any married woman" which are extensive enough to include women married before the act. Then confining the operation of the provision to estates acquired after the act, and to contracts entered into also subsequently to the act, it surely could not be obnoxious to the rule against retroactive construction to hold that it did embrace married women included in the category provided for by the third section. This being so, what is the effect of saying that a married woman may be sued or proceeded against in respect of her separate debts, engagements and contracts as if she were unmarried?

Can any rational meaning be attributed to such a statute other than this, that a creditor was to be at liberty not only to sue and proceed against a married woman upon her separate contract, but also that having so sued and proceeded against her and having obtained a judgment, he was to have execution of that judgment out of her separate property? Surely it was not meant to mock at creditors by telling them they might sue and recover a judgment, but that such a judgment was to be barren and fruitless because it had not been said specifically that it was to be satisfied out of the statutory separate estate. If there is such a thing as necessary implication we must have recourse to it here and hold that this right thus conferred to sue and proceed against a married woman upon her separate contract as if she was sole and unmarried implies that the judgment thus recovered was to be satisfied. Then, if it was to be satisfied satisfied out of what? What could be available to satisfy it except the judgment

1893

MOORE v. JACKSON.

The Chief Justice.

debtor's separate property. It must follow that the intention was to confer upon creditors the right to sue and to proceed against and enforce payment out of the statutory separate property of the debtor, or otherwise the clause would be wholly illusory.

In addition to the literal construction which I have referred to there is another reason why this 20th section should be held to include the class of women mentioned in the third section of the statute, those married between 1859 and 1872; it is this: Up to the date at which the Revised Statutes of 1877 came into force a married woman had no power of disposition over her real estate except by a deed to which her husband must have been a party, and which was ineffectual to pass her estate until she had been examined apart from her husband touching her consent to "depart" with her estate. By chapter 127 R.S.O., 1877, before set forth, enlarged power was given her of conveying her land by a deed to which her husband was to be a party merely, an examination apart from her husband being now dispensed with. This was to some extent a relaxation, as was supposed, in the married woman's favour. This clearly applied to women married between 1859 and 1872. Then there being this dispensation with formalities previously required, and the power of alienation being thus enlarged, it was not unreasonable that as regards lands acquired after the statute married women should be made liable for their debts also contracted subsequently to that date.

The statute of 1877 was, however, repealed by the act of 1884, and although the 22nd section of the last act contains a saving of liability incurred under the act of 1877 yet that would not aid the appellant, inasmuch as his right and the corresponding liability did not accrue until the notes were made in 1887.

1893

MOORE v. JACKSON.

The Chief Justice.

We find, however, that assuming the correctness of my proposition that the liability created by the 20th section of the act of 1877 applied to women married between 1859 and 1872, the act of 1884 may, without any infringement of the rule against retroactive construction, be applied to the present case.

If Mrs. Jackson's lands in Etobicoke acquired by her in 1879 and 1882 were, under the act of 1877, liable for her contracts entered into subsequent to that act, it was not retrospective legislation offending against sound principles of construction that the statute which repealed the statute of 1877 should, as regards future contracts, also be held to provide a substitute for that liability neither greater nor less than that which the repealed act imposed. This is, in my opinion, just what the act of 1884 did by the 2nd and 3rd subsections of the 2nd section (which I have before set out.)

This act of 1884 greatly enlarged the power of disposition of married women for the 22nd section, repealing the previous law which required the concurrence of the husband of a married woman in any conveyance made by her, dispenses altogether with the necessity of such concurrence, and enables the married woman to convey alone provided she does so by deed.

Thenceforward married women were completely emancipated from their husbands' control both as regards the enjoyment and the disposition of their real estate. Can it be supposed that this would be the time and occasion chosen by the legislature to restrict the liability of their separate property? Surely not. So far then from there being any presumption against a continuance of the liability which existed under the statute of 1877, there ought, I think, to be a presumption that the legislature did not intend to withdraw from liability to the future separate creditors of married women any of their property which had previously

1893

MOORE v. JACKSON.

The Chief Justice.

been liable to creditors under the statute of 1877. All we have to see is, whether the language of the act is sufficiently comprehensive to include persons such as the respondent as regards the date of her marriage and as regards property acquired previously to the act and under the *regime* of the act of 1877 Subsection 2 says that a married woman shall be capable of entering into and rendering herself liable in respect of, and to the extent of her separate property on, any contracts, and of being sued as if she were a *feme sole*. And subsection 3 says, every contract entered into by a married woman shall be deemed to be a contract entered into and to bind her separate property, unless the contrary be shown.

This language is comprehensive enough to include the respondent and her liability as regards all these lands. It applies to all married women unless it is restricted to some particular class of them by the rule against retrospectivity. That rule, however, cannot apply here for, as I hope I have demonstrated, the 20th section of the statute of 1877 imposed, in other words it is true, just such a liability, and this merely carries on or continues the same liability.

It is not then to innovate in any way upon the respondent's rights to say that, as regards contracts entered into subsequent to the act of 1884, these clauses apply in the appellant's favour.

As to the words "separate property" used in these subsections I have already, I think, sufficiently demonstrated that these words, first found in the statutes of 1859, are entirely applicable to the real property of a married woman the title of which was acquired under the statutes of 1877, section 3.

I would lastly remark that I have been unable to see the force of the *ratio decidendi* of the Court of Appeal. Holding, as I do, that the statutes of 1884 subsections 2 and 3 apply, I think it quite immaterial

1893

MOORE v. JACKSON.

The Chief Justice.

what the married woman's power of disposition may be. No doubt courts of equity act upon the theory or presumption that a married woman who has separate property when she contracts a debt intends to make such separate estate as she then has liable to answer it, and it is so liable or at least so much of it as she retains when sued.

If a married woman was restricted in dealing with her separate equitable estate to an alienation by deed she could not make it liable for her promissory notes without a charge by deed. But there is no analogy between that and the present case. Surely it was competent for the legislature, if they thought fit to do so, to say that a married woman should not be competent to dispose of her property in any way, and yet to say that she should be liable on her contracts as if she were a *feme sole* and that to the extent of her estate.

It is all a matter of statutory construction and though the legislature have not done what I have above supposed yet they have by section 20 of the act of 1877 and subsections 2 and 3 of section 2 declared, not merely that the separate property shall be liable (which is all a court of equity does in the case of equitable separate estate), but they have declared that " a married woman shall be capable of entering into any contract as if she were a *feme sole*," thus doing what a court of equity could not do—repealing the rule of the common law and creating a new legal liability. To this they have superadded the declaration that this liability shall be to the extent of her separate property. The liability here does not, therefore, depend upon the power of disposition, but upon the direct and positive enactment declaring the liability of the woman personally as well as that of her estate.

I am of opinion the appeal should be allowed and the judgment of the Court of Queen's Bench restored.

1892

MOORE v. JACKSON.

Gwynne J.

FOURNIER and TASCHEREAU JJ. concurred with the Chief Justice.

GWYNNE J.—The sole question raised by this appeal is whether or not real property in the province of Ontario acquired in 1879 and 1882, in fee simple by a married woman who had been married in 1869, was liable to the satisfaction of a judgment recovered against her in an action brought against her for the breach of contracts entered into by her in 1887, and in my opinion that question is concluded in favour of the appellant, the judgment creditor, by the provincial statute of 1884, 47 Vic. ch. 19. Whatever difficulty there has been in the case seems to me to have arisen from what I cannot but think was the too hasty and inconsiderate introduction into the provincial act of certain sections of the Imperial act of 1882 *in ipsissimis verbis* and from the decisions of the courts in England upon one of the sections of that act; but the difficulty is wholly removed, I think, when we consider carefully the different state of the law which existed in England respecting the property of married women prior to, and at the time of, the passing of the Imperial act of 1882, from that which existed in the province of Ontario when the provincial act of 1884 was passed, and the great difference between the circumstances of the present case, and the question raised in relation thereto, and the circumstances of the cases in England to which we have been referred, and the question in those cases decided upon one of the sections of the Imperial act which has been imported *verbatim* into the provincial act.

The Imperial Act of 1882, 45 & 46 Vic. ch. 75, was passed, as its title and preamble show, for the purpose of consolidating and amending two acts, viz., the Married Woman's Property Act of 1870, and an act of 1874

37 & 38 Vic. ch. 50, which had been passed to amend some provisions of the act of 1870. By this act of 1870 a married woman was enabled to hold as her separate property all the wages and earnings acquired by her after the passing of the act in any occupation, trade or employment in which she might be engaged, and to make deposits in savings banks and to invest monies belonging to her in the funds and in shares in joint stock companies in her own name, and to effect insurances upon her own life and the life of her husband, and to hold all such moneys, stock, shares and policies of insurance as her separate property. And as to women who should be married after the passing of the act it was by the 7th section enacted that where any woman married after the passing of the act should during her marriage become entitled to any personal property as next of kin, or one of the next of kin, of an intestate, or to any sum of money not exceeding two hundred pounds under any deed or will, such property should, subject and without prejudice to the trusts of any settlement affecting the same, belong to the woman for her separate use and her receipts alone should be a good discharge for the same; and the 8th section enacted that where any freehold, copyhold or customary hold property should descend upon any woman married after the passing of the act as heiress or co-heiress of an intestate, the rents and profits of such property should, subject and without prejudice to the trusts of any settlement affecting the same, belong to such woman for her separate use, and that her receipts alone should be a good discharge for the same. Save as above provided a married woman was incapable of acquiring and holding any real or personal property as her separate property and free from the control and disposition and from the debts and obligations of her husband, unless it should be vested in trustees for the

1893
MOORE
v.
JACKSON.
Gwynne J.

use and benefit of the married woman separate and apart from her husband. By the act of 1870 it was further enacted that a husband should not, in the case of any marriage which should take place after the passing of the act, be liable for the debts of his wife contracted before marriage, but that the wife should be liable to be sued for, and that any property belonging to her for her separate use should be liable to satisfy, such debts as if she had continued unmarried. This clause made the interest of every woman married after the passing of the act in all property vested in trustees for her separate use and benefit, as well as all property declared by the act to be her separate property, liable to the satisfaction of debts incurred by her *dum sola*, thus wholly relieving the husband of every woman married after the passing of the act from all liability in respect of all such debts, and leaving him, as all husbands married before the passing of the act were, entitled to all the property which the wife had *dum sola* at the time of her marriage, to the same extent precisely as before the passing of the act. This was deemed an injustice, and to remedy it the Married Woman's Property Amendment Act of 1874, 37 & 38 Vic. ch. 50, was passed, which recites that it was not just that the property which a woman has at the time of her marriage should pass to her husband, and that he should not be liable for her debts contracted before marriage, and that the law as to the recovery of such debts required amendment; it then repealed the provisions of the act of 1870 which exempted the husband from liability for the debts of his wife contracted before marriage, in so far as respects marriages which should take place after the passing of the act, and enacted that husband and wife married after the passing of the act might be sued jointly for any such debt, and proceeded to declare that in such action or in any action brought

for damages sustained by reason of any tort committed by the wife before marriage, or by reason of the breach of any contract made by her before marriage, the husband should be liable to the extent only of the assets of the wife thereinafter mentioned, namely, the value of the property, real and personal, of the wife which by the marriage vested in the husband.

Such was the state of the law in England when the act of 1882 was passed for the purpose of consolidating the acts of 1870 and 1874 and of amending their provisions by extending the rights of married women in their real and personal property by enacting in substance, as it appears to me the act does, that every married woman, whenever married, whether before or after the passing of the act, should be capable of acquiring, holding and disposing by will or otherwise of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, that is to say, the woman who should marry after the passing of the act, as provided in the 2nd section, and the woman who had been married before the passing of the act, as provided in the 5th section, thus conforming to the provisions of the 1st section which applies to every married woman whenever married. The only sections to which it is necessary to refer for the purposes of the present case are these 1st, 2nd and 5th sections, which enact as follows :—

1. A married woman shall in accordance with the provisions of this Act be capable of acquiring, holding and disposing, by will or otherwise, of any 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.

(2.) A married woman shall be capable of entering into and rendering herself liable in respect of, and to the extent of, her separate property on any contract, and of suing and being sued, either in contract or in tort or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant or be made a party to any action or other legal proceeding brought by or

1893

MOORE
v.
JACKSON.

Gwynne J.

against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property and not otherwise.

(3.) Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property unless the contrary be shown.

(4.) Every contract entered into by a married woman with respect to and to bind her separate property, shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire.

(5.) Every married woman carrying on a trade separately from her husband shall in respect of her separate property be subject to the bankruptcy laws as if she were a *feme sole*.

2nd section. Every woman who marries after the commencement of this act shall be entitled to have and to hold as her separate property and to dispose of, in any manner as aforesaid, 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.

5th section. Every woman married before the commencement of this act shall be entitled to have and to hold and to dispose of in manner as aforesaid, as her separate property, all real and personal property, her title to which, whether vested or contingent and whether in possession, reversion or remainder shall accrue after the commencement of this act, including any wages, earnings, money so gained and acquired by her as aforesaid.

Now these 2nd and 5th sections were quite appropriate having regard to the law as it previously stood and was being amended, which did not enable any married woman to acquire and hold as her separate property any real or personal property otherwise than to the limited extent specified in the 7th and 8th sections of the act of 1870, or through the intervention of a trustee who should hold the property for her use and benefit separate and apart from her husband. The first section then which enabled every married woman to

1893

MOORE v. JACKSON.

Gwynne J.

acquire hold and dispose by will or otherwise of any real or personal property, in the same manner as if she were a *feme sole* without the intervention of any trustee, was an extremely appropriate provision to be inserted in the English act. Having regard also to the fact that in the property real and personal of women married before the passing of the act of 1882 husbands at the time of the passing of that act had vested in them the right of holding and enjoying to their own use and benefit such property as belonged to the wife at the time of the marriage, or was acquired by her subsequently other than such as might be acquired to the limited extent named in the act of 1870, or was vested in a trustee for her to her use and benefit separate from her husband, it was natural, reasonable, and appropriate that the distinction should be made between women married after the passing of the act and those then already married which is made in the 2nd and 5th sections. Under this 5th section arose the case of *Reid* v. *Reid* (1) to which we have been referred as a judgment of the Court of Appeal wherein the court reviewing several cases, namely, *Baynton* v. *Collins* (2); In *re Thompson* and *Curzon* (3); In *re Hughes' Trusts* (4); In *re Tucker* (5); In *re Adames' Trusts* (6); In *re Hobson* (7) and In *re Dixon* (8), hold that where a woman married before the passing of the act of 1882 had, before the passing of the act, acquired a title in reversion subject to a life estate to certain property in excess of what she could have acquired as her separate property under the act of 1870, such property falling into possession after the passing of the act was not made her separate property by section 5. The object of the suit was to have it declared that the property in question was

(1) 31 Ch. D. 402.
(2) 27 Ch. D. 604.
(3) 29 Ch. D. 177.
(4) W.N. 1885 p. 62.
(5) 52 L.T.N.S. 923.
(6) 53 L.T.N.S. 198.
(7) 34 W.R. 195.
(8) 54 L.J. (Ch.) 964.

1893

MOORE v. JACKSON.

Gwynne J.

her separate property under that section, or in the alternative that it might be settled on her and her children. If the property had already been settled to her separate use the action would have been unnecessary, but not having been so settled it became the property of her husband who could have disposed of it and who in point of fact had (although after the passing of the act). It became necessary, therefore, for the wife in order to obtain the benefit of the property separate from her husband to establish that it had become her separate property under the section 5, but Lord Justice Cotton pronouncing judgment said :—

There is a title accruing in reversion before the passing of the act. The husband acquires a title to it subject to his wife's equity to a settlement if it falls into possession during coverture, and subject to her right by survivorship if he dies before it has been reduced into possession leaving her surviving. He might before the passing of this act have disposed of it by mortgage or sale subject to the wife's equity to a settlement and to her chance of survivorship. If the construction contended for by the respondent (the wife) is correct the title of the person claiming under the husband would be ousted, and the wife, notwithstanding the dealing with the property by the husband, would take it as her separate estate when it fell into possession.* * * In my opinion considering the section truly and fairly there must be an accruer of title after and not before the passing of the act, and the title must be considered as accruing when the married woman first acquires her interest in the property whether such interest is at that time in possession, reversion, or remainder.

Now we have only to consider what the nature of the title of the defendant in the present case to the property in question, with which alone we are at present concerned, was at the time of the passing of the Ontario Act of 1884 to see the utter inappropriateness and incongruity of this section 5 as regards the property of a married woman in the province of Ontario married before the passing of the act of 1884, and the inapplicability of the judgment in *Reid* v. *Reid* (1) to such a case as the present. Immediately upon the

(1) 31 Ch. D. 403.

defendant acquiring the respective pieces of land in 1879 and 1882 she became seized of an estate of fee simple therein under ch. 125 R. S. O. 1877, which was but a repetition in that particular of ch. 73 C. S. U. C. in 1859, and under that act she had held and enjoyed the property:—

> Free from the debts and obligations of her husband and free from his control and disposition without her consent, in as full and ample a manner as if she were sole and unmarried.

And by chapter 127, sec. 3, of the same revised statutes she was enabled to convey such her estate in the said lands by deed as fully and effectually as if "she were a *feme sole*," except that it was provided that to make her conveyance of the land valid and effectual her husband must be a party to and execute the deed. Now the Ontario Act of 1884 having repealed this exception or proviso in sec. 3, of ch. 127, *eo instanti* upon the passing of that act the defendant became absolutely entitled to convey the said lands in fee simple as her separate property as fully and effectually as if she were a *feme sole*, by a deed executed by herself alone without her husband being a party to and executing the deed; this estate in the lands in question she still held when the promissory notes sued upon were made by her in June and July, 1887.

The act of 1884 also, while repealing ch. 125 R.S. O. 1877, enacted that such repeal should not affect any right acquired while the act was in force and thereby preserved the rights of all women then married to the property theretofore acquired by them under ch. 125, and *eo instanti* of enacting such repealing clause the act enacted in its 2nd section the 1st section of the English Act of 1882, in *ipsissimis verbis* save only the omission of subsection 5 omitted because of there being no bankruptcy law then in the Dominion of Canada, and thereby enacted, in language as I have shown

1893

MOORE v. JACKSON.

Gwynne J.

sufficient to include every married woman, that a married woman should be capable not only of acquiring but of holding and disposing by will or otherwise of any real or personal property as her separate property, in the same manner as if she were *feme sole*. This power of disposition is in precise conformity with the clause of the act which repealed the exception or proviso contained in sec. 3 of ch. 127 R S. O. 1877. The effect of this 2nd section, subsection 1, coupled with the said repealing clause, as regards the property in question in my opinion was, that *eo instanti* upon the passing of the act the defendant remained seized of the property in question as she had been before the act as her separate property, but discharged from the effect of the exception or proviso which previously had been contained in sec. 3 of ch. 127, and invested with the incident attached to absolute ownership of being able to dispose of the property by will or otherwise by the express enactment contained in the said 2nd section, so as to remove all doubt that after the passing of the act of 1884 she was seized of an absolute estate of inheritance in fee simple in the lands in question as her separate property which, under the 2nd subsection of section 2, was expressly made liable to satisfy all damages and costs recovered against her in any action instituted against her upon any contract entered into or tort committed by her.

In the argument before us this construction of the act and this application of the 1st subsection of the 2nd section to the property in question was not alluded to; the argument was confined on the part of the appellant to dispute, and upon the part of the respondent to support, the judgment of the Court of Appeal for Ontario, which mainly appears to have rested upon this argument, that the repeal of the exception contained in the 3rd section of ch. 127 only enabled the

1893

MOORE v. JACKSON.

Gwynne J.

married woman to convey her real property by deed, and that therefore she could not dispose of it by will, and as a resulting consequence it was argued that the property in question could not be levied upon and made available for satisfaction of an execution issued upon a judgment recovered against the defendant in an action instituted by authority of law against her; that is to say, that while she can cut off any estate by the courtesy which the husband might have, and can convey away absolutely for her own benefit all her real property by deed *inter vivos*, she can, by not conveying it but holding on to it, obtain credit upon the strength of her having it, and prevent her judgment creditors from obtaining satisfaction thereout of their judgment debts. I have already expressed my opinion that section 1 of 47 Vic. ch. 19 enabled every married woman to dispose of her real property by will or otherwise; but apart altogether from this clause, and resting solely upon the repeal of the exception in section 3 of ch. 127 R.S.O., 1877, it is clear that every married woman can dispose of absolutely (by deed executed by herself alone) the whole estate which is vested in her. So long as she lives, therefore, it cannot be doubted that she has an absolute *jus disponendi* of all real property which the law enables her to hold and enjoy free from the control and disposition and from the debts and obligations of her husband. Now the real property of every judgment debtor, to the extent of his estate therein, is bound by a judgment recovered against the debtor and execution issued to enforce satisfaction of such judgment. There is no law which makes the case of a married woman judgment debtor any exception from that rule; on the contrary, the 2nd subsection of section 2, which enables her to enter into any contract and of being sued thereon, or in tort, in all respects as if she were a *feme sole*, and that, all

1893

MOORE v. JACKSON.

Gwynne J.

damages and costs recovered against her on any action instituted against her shall be payable out of her separate property, in express terms subjects her to the provisions of the general law respecting writs of execution, ch. 66 R.S.O., 1877, the 14th section of which declares that:—

> Any person who becomes entitled to issue a writ of execution against goods and chattels may, at or after the time of issuing the same, issue a writ of execution against the lands and tenements of the person liable.

The estate vested in her in the lands in question was an estate in fee simple even though her husband, if he should survive her, might have an estate by the courtesy therein. Whether he would or not have such estate it is not necessary to decide in the present case, and I express no opinion. Whether she could or could not dispose of the lands by will is immaterial, for it is clear and is admitted that she could dispose of them absolutely by a deed *inter vivos*, and that estate which she could have disposed of by a deed executed by herself alone is what the law has expressly made liable to satisfy the judgment obtained against her, and she has no more right than any other judgment debtor to defeat the rights of her judgment creditors by a voluntary or fraudulent conveyance. I have not overlooked the case of *Douglas* v. *Hutchison* (1). Mr. Justice Street considered it to be distinguishable from the present case. I have not thought it necessary to consider whether it be so or not, for if it be not it will be seen from what I have already said that I cannot concur in it, and unless and until our judgment in the present case shall be reversed it cannot hereafter be considered of binding authority. The appeal must be allowed, with costs, and the judgment of the Divisional Court of Queen's Bench restored.

(1) 12 Ont. App. R. 110.

1893

MOORE v. JACKSON.

Patterson J.

PATTERSON J.—Mrs. Jackson, a married woman, made several promissory notes, all of them in the months of May, June and July, 1887, payable to the plaintiff.

She was married in 1869 without a settlement.

She had acquired real estate in the township of Etobicoke in 1879 and 1882 by conveyances to herself in fee without the intervention of a trustee.

The question is whether, under the law of Ontario as it existed in 1887, the Etobicoke lands were charged so as to be exigible for the payment of the notes.

The Revised Statutes of 1887 did not come into force until the 31st of December of that year. The law has therefore to be looked for in the Revised Statutes of 1877 and some later acts

The Married Woman's Property Act, which was chapter 127 of R.S.O. 1877, was repealed and replaced by The Married Women's Property Act 1884 (1).

By the Married Women's Real Estate Act (2) as amended by the Married Women's Property Act 1884, every married woman of the full age of 21 years was empowered to convey by deed her real estate and to do other specified things as fully and effectually as she could do if she were a *feme sole*.

The Married Woman's Property Act 1884, while it repealed chapter 125 of the R.S.O. 1877, provided that the repeal should not affect any act done or right acquired while chapter 125 was in force.

Looking at the third section of that act which was in force in 1879 and 1882 when the Etobicoke properties were acquired by Mrs. Jackson we find it enacted that :—

> Every woman who married between the 5th day of May, 1859, and the 2nd day of March, 1872, without any marriage contract or settlement shall and may, notwithstanding her coverture, have hold and

(1) 47 V. c. 19. [See p. 215.] (2) R.S.O. (1877) ch. 127.

1893

MOORE v. JACKSON.

Patterson J.

enjoy all her real property, whether belonging to her before marriage, or acquired by her by inheritance, demise or gift, or as heir-at-law to an intestate, or any other way after marriage free from the debts and obligations of her husband, and from his control or disposition without her consent, in as full and ample a manner as if she continued sole and unmarried, but this section shall not extend to any property received by a married woman from her husband during coverture.

The 4th section enables a woman who married after the 2nd day of March, 1872, to hold her real estate for her separate use free from any estate therein of her husband during her lifetime and from his debts and obligations, and from any claim or estate by him as tenant by the courtesy, but provides that nothing therein contained shall prejudice the right of the husband as tenant by the courtesy in any real estate of the wife which she has not disposed of *inter vivos* or by will; but in the case of woman married, as Mrs. Jackson was, before 1872, the husband's estate by the courtesy remains as at common law.

The state of the law respecting the property of married women and their power to charge it by their general engagements under the Married Woman's Act of 1859 (1), was ably explained by Moss C. J. in the case of *Furness* v. *Mitchell* (2). I do not propose to enter at present upon an historical examination of the subject. For that I refer to the judgment just mentioned, and to what was said in that case by the Chief Justice and other judges of whom I was one, and to my judgment in *Lawson* v. *Laidlaw* (3).

The act of 1859 called the property enjoyed under its provisions "separate property." I referred in *Furness* v. *Mitchell* (2), to five sections of the statute in which it was so designated. But it was held that some qualities of separate property, as recognized by courts of equity and as capable under the doctrines of those

(1) C. S. U. C. c. 73. (2) 3 Ont. App. R. 511.
(3) 3 Ont. App. R. 77.

courts of being charged by a married woman by her general engagement, were wanting paticularly the *jus disponendi*, the woman being incapable of disposing of her property except by a deed in which her husband joined and the husband having still his estate by the courtesy, and that therefore the property, though designated separate property by the statute, was not separate in the sense essential to the married woman's power to create the equitable charge upon it.

Has that state of things been changed by the act of 1884? That is the main question before us.

It has, in my opinion, been changed.

The effect may be the same when property is charged by the general engagements of a married woman whether the charge is one depending in doctrines of courts of equity, or is effected by a process authorized or sanctioned by statute law, but it is to be noted that what was formally recognized only in equity is now a statutory principle. Take subsections 3 and 4 of section 2 which I have already quoted, and apply those provisions to the contracts now sought to be enforced, viz., the promissory notes made by Mrs. Jackson; each note is deemed to be a contract entered into by her with respect to and to bind her separate property, and binds not only the property she was possessed of or entitled to at the dates of the notes respectively, but also all separate property thereafter acquired by her.

Then were these Etobicoke properties her separate property?

They certainly were so, and were so as to the full and absolute estate in fee, subject only to the husband's right by the courtesy.

That right may exist without destroying the character of separate estate even when the separate estate of the wife is equitable only, and of course may when by the operation of a statute it becomes a legal estate.

1893

MOORE v. JACKSON.

Patterson J.

Morgan v. *Morgan* (1); *Appleton* v. *Rowley* (2).

No question of *jus disponendi* is now open. The necessity for the husband joining in a deed by which the wife conveys her property or any interest therein was done away with by the act of 1884 (3); but that restriction in her power to convey by deed would not, as it would seem to me, have prevented the effect given to her contracts by section 2.

Mrs. Jackson's property in the Etobicoke lands was in my opinion separate property and was bound by her contracts under section 2, subsections 3 and 4, that is to say the fee simple of the lands was bound subject to her husband's right if all things existed necessary to create in him an estate by the courtesy. His right as possible tenant by the courtesy should no more stand in the way of making his wife's estate exigible for her debts than would her right of dower stand in the way of a creditor of the husband who sought to enforce a judgment against the husband's lands.

In my opinion we should allow the appeal and restore the judgment of the divisional court.

Appeal allowed with costs.

Solicitors for appellants: *Roaf & Roaf.*

Solicitors for respondent: *Armour, Mickle & Williams.*

---

(1) 5 Madd. 408.
(2) L. R. 8 Eq. 139.
(3) R. S. O. 1877 c. 127 s. 3 amended by 47 V. c. 19 s. 22.