

**Supreme Court of Canada**  
**Russell v. Russell, (1918) 57 S.C.R. 1**  
**Date: 1918-06-10**

Ada M. Russell (Defendant). Appellant;

and

Len Russell (Plaintiff). Respondent

1918: May 16; 1918: June 10.

Present:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Anglin and Brodeur JJ.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

*Statutory law—Married woman's caveat—Affidavit—" Married Woman's Home Protection Act," ch. 4, Alberta statutes 1915—"Alberta Land Titles Act," sec. 85.*

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*Held*, Davies and Brodeur JJ. dissenting, that a caveat filed by a married woman under the "Married Woman's Home Protection Act," ch. 4, Alberta statutes 1915, must be supported by an affidavit of *bona fides* as required by the provisions of sec. 85 of the "Land Titles Act."

APPEAL from a decision of the Appellate Division of the Supreme Court of Alberta reversing the judgment of Hyndman J. in chambers<sup>1</sup>, in favour of the defendant.

The material facts of the case and the circumstances on which the issues depend will be found in the judgments now reported.

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*R. B. Bennett K.C. for the appellant.*  
*J. D. Matheson for the respondent.*

**THE CHIEF JUSTICE:—**Some time prior to the 12th August, 1916, the appellant commenced an action against her husband for alimony and on this date filed a caveat under the "Married Woman's Home Protection Act," c. 4, statutes of 1915, against his land.

The claim for alimony was refused by the trial judge on the ground that the appellant had sufficient means of her own. On the 27th day of April, 1917, the respondent executed a transfer of his land to one D. Gillen. The "Dower Act," c. 14 of the 1917 statutes, came into force on the 1st of May, 1917, and by that Act the "Married Woman's Home Protection Act" was repealed. On the 1st June, 1917, the respondent gave notice of motion for an order to remove the caveat and in October, 1917, judgment was rendered refusing the application.

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<sup>1</sup> 12 Alta. L.R. 111.

The judge of first instance held that under the "Interpretation Act," section 48, saving acts done and rights existing,

the wife is entitled to maintain her caveat, notwithstanding the repealing statute, until the same is removed in the manner provided by the Act creating the right and in the "Land Titles Act."

The judge does not deal otherwise with the application to remove the caveat.

Four judges of the Appellate Division, without giving any reasons, reversed that judgment and ordered the caveat removed.

It was argued here that because Mr. Justice Walsh held in the alimony action that the wife was provided for to the extent that an award of alimony was unnecessary she was not entitled to her caveat.

The judgment of Mr. Justice Walsh is not in this

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record and there is no evidence that the appellant has a private estate.

It is also urged that the caveat should be removed because it is not supported by affidavit as required by the provisions of section 85 of the "Land Titles Act," and in that contention I concur.

The "Married Woman's Home Protection Act" was passed subsequently to the "Land Titles Act," but section 8 of the former Act provides:

This Act shall be read with and as part of the "Land Titles Act."

If the "Land Titles Act" is read with the provisions of the "Married Woman's Home Protection Act" inserted in the proper place, having regard to those provisions, we have a statute which enables any married woman to file with the registrar an instrument to be known as a married woman's caveat and which is described in all the sections dealing with the matter as a caveat and for which a special form is provided.

Then we have section 85 which reads as follows

*Every caveat* filed with the registrar shall state the name and addition of the person by whom and on whose behalf the same is filed and *except in the case of a caveat filed by the registrar* as hereinafter provided shall be signed by the caveator, his attorney or agent, and shall state some address or place within the province at which notices and proceedings relating to such caveat or the subject matter thereof may be served and the nature of the interest claimed and the grounds upon which such claim is founded, and shall be supported by an affidavit that in the belief of the deponent the person by whom or on whose behalf the

caveat is filed has a good valid claim in respect of the land, mortgage or encumbrance intended to be affected by the same, and that the caveat is not filed for the purpose of delaying or embarrassing the applicant, or owner, or any person claiming through him, which affidavit or affidavits may be in the form X in the schedule to this Act.

This section provides that all caveats with the single exception of a caveat filed by the registrar under section 100 must be supported by an affidavit as to good faith, etc.

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Independently of the very broad terms of section 85, there are very obvious reasons why such an affidavit should be required in the case of a caveat filed by a married woman.

It is quite conceivable that an unscrupulous adventuress alleging herself to be the wife of a homesteader or even a lawfully married woman moved by some unworthy motive should improperly and without justification seek to embarrass a man in dealing with his property. I can see no difficulty in framing an affidavit in accordance with the general provisions of form X to meet the requirements of section 85 with respect to the married woman's caveat.

I would dismiss the appeal with costs.

**DAVIES J.** (dissenting):—The single question to be determined on this appeal is whether a caveat filed and registered by the appellant, the wife of the respondent, against the sale of their homestead, was a valid caveat without the affidavit required for an ordinary caveat by the "Land Titles Act."

The trial judge held it was a good caveat. His judgment was reversed by the Appeal Court which ordered that the caveat should be removed from the register and vacated. No reasons were given for their judgment.

I am of the opinion that the appeal should be allowed and the judgment of the trial judge restored.

The reasons for the appeal court judgment must, of course, have been that as the "Land Titles Act" required all caveats to be supported by an affidavit of the caveator in the form given in the schedule to that Act, and as the "Married Woman's Home Protection Act," which was passed subsequently to the "Land Titles Act," provided that "it should be read with and form part of the 'Land Titles Act,' "it was not a valid

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caveat unless supported by the affidavit. That affidavit required the caveator to swear amongst other things "that this caveat is not being fyled for the purpose of delaying or embarrassing any person interested in or proposing to deal therewith," that is in or with the lands to protect the estate or interest in which the caveator fyled his caveat.

The answer which seems to me to be a good one to this argument is the one advanced by Mr. Bennett at bar, viz., that the "Married Woman's Home Protection Act," which came into force 17th of April, 1915, was a special Act passed with a special purpose, viz., to protect a married woman thereafter from being deprived of all her interest in the homestead property which she in many cases did as much to make valuable as her husband did. The caveat required covered the homestead property only and did not affect other lands of the husband. A special form was set out in a schedule to the Act which was strictly followed in this case. It was called a married woman's caveat and had no form of affidavit attached to it nor did the Act itself in any way refer to or suggest that any affidavit was required.

There are many differences in the object and purpose of the ordinary caveats, and those of the married woman's caveat. The object of the former is to protect some right or interest of the caveator in certain lands and the caveator is properly obliged to swear that he does not fyle the caveat for the purpose of delaying or embarrassing any person interested in the land or proposing to deal therewith. The main object of the married woman's caveat was to protect her rights in the homestead and in order to do so to delay her husband so that he could not sell the homestead over her head and deprive her of her rights. That being her

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object and purpose, how could she conscientiously make affidavit that it was not? Reading the two Acts together, it does seem to me an unfair construction to put the married woman in such a position or dilemma that she must swear falsely or lose her rights in her homestead? A reasonable construction should be placed upon both of the statutes in question when read together so that effect may be given to the intention of the legislature.

Such construction is not consistent with requiring an affidavit to be made which could not have been intended to apply to the "Married Woman's Home Protection Act," because an honest, truthful woman could not swear that her caveat was not intended to hinder or delay her husband in dealing with the homestead by sale or otherwise. It was so intended. It was the manifest intention of the "Married Woman's Home Protection Act" to delay and

embarrass the husband so that he should not convey away or mortgage the homestead and deprive her of her rights. To say you must either swear to that which is false or your caveat will be vacated is to put an unreasonable and improper construction upon the two Acts which are to be read together.

I am therefore of the opinion that in following strictly the form given in the "Married Woman's Home Protection Act" and in omitting the affidavit required in the cases of ordinary caveats by the "Land Titles Act," which she could not honestly or conscientiously take, the appellant was within her rights and her caveat was good.

I would allow the appeal and restore the judgment of the trial judge.

**IDINGTON J.**—The Alberta Legislature passed an Act called the "Married Woman's Home Protection Act" which by section one enacted as follows:—

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Any married woman may cause to be filed on her behalf with the registrar an instrument to be known as a married woman's caveat in form WW in the schedule to this Act against the registration of any transfer, mortgage, encumbrance, lease or other instrument made by or on behalf of her husband affecting a homestead as defined in sec. 2 of this Act.

The last section of the Act reads as follows:—

This Act shall be read with and as part of the "Land Titles Act."

This seems clearly to have intended the Act to constitute part of the "Land Titles Act" just as much as if under a distinct caption it had been placed therein originally, otherwise there was no sense in such a provision.

The "Land Titles Act" by section 85 enacts as follows:—

Every caveat filed with the registrar shall state the name and addition of the person by whom or on whose behalf the same is filed and except in the case of a caveat filed by the registrar as hereinafter provided shall be signed by the caveator, his attorney or agent, and shall state some address or place within the province at which notices and proceedings relating to such caveat or the subject matter thereof may be served and the nature of the interest claimed and the grounds upon which such claim is founded, and shall be supported by an affidavit that in the belief of the deponent the person by whom or on whose behalf the caveat is filed has a good valid claim in respect of the land, mortgage or encumbrance intended to be affected by the same, and that the caveat is not filed for the purpose of delaying or embarrassing the applicant, or owner, or any person claiming through him, which affidavit or declaration may be in the form X in the schedule to this Act.

The form of affidavit by the second clause is as follows:—

I believe that I have (or the said caveator has) a good and valid claim upon the said land (mortgage or encumbrance), and I say that this caveat is not being filed for the purpose of delaying or embarrassing any person interested in or proposing to deal therewith.

Sworn before me, etc.

The "Land Titles Act," by section 100 thereof, specifically exempts certain caveators from making an affidavit, thereby emphasizing the necessity for an affidavit in all other cases where the Act provides for the use of a caveat.

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The appellant filed a document (in the form of the caveat which she was enabled to use *under the Act*), with the registrar, relative to certain lands of respondent her husband, without any affidavit or proof of who she was, or in any manner pretending to verify the facts as required by the above section 85 of the "Land Titles Act."

This was done pending an alimony suit which she had instituted against respondent and which ended in the learned trial judge finding she was so circumstanced as not to need any alimony.

Then respondent moved to set the registration aside. Mr. Justice Hyndman refused the application, on the ground that no affidavit was necessary. The Court of Appeal reversed that judgment and directed the removal of the caveat.

We have no notes of why the court so directed, but the counsel arguing here seem to admit it was because of non-compliance with the "Land Titles Act" in failing to file the affidavit I have referred to and that is the point most elaborately dealt with in respondent's factum.

I agree with that view and hence think the appeal should be dismissed with costs.

I see no difficulty in any honest married woman complying with the Act if in truth she needs to resort to that means for her protection.

If she does not then she is quite clearly not one of those the legislature desired to protect and hence should not attempt its use. I can conceive of no reason why she should if entitled to file the caveat refrain from making the affidavit. Moreover, I can conceive of many reasons why she should be required to make the affidavit, and cannot understand the argument addressed to us for distinguishing in that regard this

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caveat from others when the Act has not made any exception in its favour and if so minded could so easily have applied the excepting part of the Act thereto.

To pretend that the legislature when enacting this statute and declaring it part of an Act which in most imperative terms required by said section 85 every caveat filed with the registrar saving the specified exception to have an affidavit of verification and negation of improper motive did not mean it to apply to a married woman's caveat seems like a mockery of the legislature so enacting.

The kind of argument that is presented for supporting the appeal I respectfully submit seems to be that which the rules in *Heydon's Case*<sup>2</sup> suggested it should be the office of the judges to repel, by requiring them to suppress the mischief and advance the remedy, and to

suppress subtle inventions and evasions for the continuance of the mischief and *pro privato commodo*, and to add force and life to the cure and remedy according to the true intent of the makers of the Act *pro bono publico*.<sup>2</sup>

It seems to me obvious that this class of caveat, such as enabled, more than any other needs the restraint of an affidavit such as the statute requires in all but the specifically excepted cases and hence it must have been intended that it should be made. The reason for making the claim, in short, the foundation for it, which the statute required set forth in any affidavit, is needed so that the court on whom the burden is cast may have had defined that which is to be tried.

I think the appeal should be dismissed with costs.

**ANGLIN J.**—Notwithstanding the able and forceful argument presented by Mr. Bennett on behalf of the appellant, further consideration of the "Married

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Woman's Home Protection Act" with the "Land Titles Act"—with and as part of which the former Act is by its 8th section required to be read—has convinced me that the legislature intended that the requirement of section 85 of the "Land Titles Act" as to an affidavit of *bona fides* should apply to a married woman's caveat.

No good reason has been advanced for depriving the owner of property upon which it is sought to register such a caveat of the protection against fraudulent and purely vexatious claims which an affidavit of *bona fides* by the caveator may afford. She should at

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<sup>2</sup> 3 Co. Rep. 7b.

least be required to pledge her oath that she is the wife of such owner and that the property was occupied by her as a homestead. These facts are implied in the first clause of paragraph 2 of the prescribed affidavit:—

I believe that I have a good and valid claim upon the said land.

Nor does the further clause—

that this caveat is not being filed for the purpose of delaying or embarrassing any person interested in or proposing to deal therewith,

*i.e.*, with such land,—present the difficulty which at first blush seemed most serious. Embarrassment and delay to the owner and to any other person proposing to deal with the land are no doubt consequences likely to ensue as a result of the lodging of a married woman's caveat, just as they are likely to ensue as a result of the filing of any other caveat. But the primary "purpose" of the married woman must be the same as that of any other caveator—to protect the "good and valid claim" which she believes she has upon the land. To the existence of that purpose she may well be obliged to pledge her oath. I am satisfied that a judge required to construe an affidavit made in the prescribed form upon a charge of perjury should direct a jury, or himself, that the affiant could not be con-

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victed unless it was established beyond reasonable doubt either that she did not honestly believe that the claim in respect of which she lodged her caveat was good and valid, or that her purpose in filing it was not to protect such a claim but solely to delay or embarrass some person interested in or proposing to deal with the land. The requirement of an affidavit imposed by section 85 is, in my opinion, mandatory and not merely directory and a caveat lodged without such affidavit, although accepted by the registrar, is fatally defective. Solely upon this ground I would dismiss the appeal.

**BRODEUR J.** (dissenting):—We have to decide in this case if a woman who has executed a caveat under the "Married Woman's Home Protection Act" of Alberta is obliged to file the affidavit required by section 85 of the "Land Titles Act" of the same province.

There was also a question of jurisdiction which was raised before us as to the right of the Appellate Division of the Supreme Court of Alberta; but it was not strongly pressed. Besides, it appears that the appellant, who was respondent in the Appellate Division, had not thought fit when they were before that court to discuss that question of jurisdiction; and



it seems to me now too late, when the parties are before this court, to say that the court below was without, authority to deal with the case. The jurisdiction of the Appellate Division was then accepted by both parties and the appellant should not be permitted now to set it aside.

Coming to the question of registration of the *caveat*, it is advisable to state that the Torrens System established in Alberta by the "Land Titles Act" provided that a person claiming an interest under a will, a transfer or a mortgage in any land may file a

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*caveat* forbidding the registration of any instrument affecting that land, unless that instrument be subject to the claim of the caveator (section 84).

It was also provided that the caveator was bound to file an affidavit shewing, 1st, that he has a valid claim and, 2nd, that the *caveat* is not filed for the purpose of delaying or embarrassing any person interested in the land in question.

In 1915 the Legislature of Alberta passed the "Married Woman's Home Protection Act" which gave to a married woman the right to file with the registrar a *caveat* forbidding the registration of any sale by her husband of her homestead.

That Act gave also the power to the husband to apply to a judge for the removal of that *caveat*; and section 8 provides that "This Act shall be read with and as part of the 'Land Titles Act.' "

The appellant, Mrs. Russell, filed such a *caveat* under the "Married Woman's Home Protection Act" and the respondent, her husband, has applied to a judge for the removal of the *caveat*. His application was dismissed but in appeal he obtained judgment in his favour.

Mrs. Russell is now appealing from that judgment and contends that the Appellate Division has erroneously held that her *caveat* should be removed because she has not filed the affidavit-required by section 85 of the "Land Titles Act."

I am, with due deference, unable to agree with the view expressed by the Appellate Division. The "Married Woman's Protection Act" is an enactment which is to be considered by itself. It is true that it is to be read, as section 8 declares, with and as part of the "Land Titles Act;" but in all cases where the provisions of the "Land Titles Act" are inconsistent

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with the "Married Woman's Home Protection Act," or where there is a formal provision in the latter Act, then the provisions of the "Married Woman's Home Protection Act", should prevail.

The instrument which the married woman is entitled to register should not be, if it had not been so determined by the Act, called a *caveat*. The ordinary *caveat* is a claim made by a person that he has some interest in certain lands; it is essentially of a temporary nature according to section 89 and is deemed to have lapsed after the expiration of sixty days, unless some proceedings have been instituted in the meantime.

The ordinary *caveat* also would not prevent the property encumbered to be sold; it could be sold subject to that incumbrance. The ordinary *caveat* also being based upon a statement of a person that he has a claim upon the property by way of an agreement of sale or mortgage, it is only reasonable that it should be accompanied by a sworn statement.

None of those requirements of the ordinary *caveat* present themselves in the right which the wife may exercise under the "Married Woman's Home Protection Act."

First, the statute declares that the wife may register an instrument which will be called a married woman's *caveat*. It is not then, as we see, the ordinary *caveat*; but it is a particular instrument which the law calls a *caveat*.

The law also declares (section 3) that "upon the receipt of such married woman's *caveat* the registrar shall take the same proceedings as in the case of the filing of any other *caveat* under this Act."

The law does not say that upon the receipt of that instrument and of an affidavit the registrar will do this and will do that; but it simply says that upon the

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receipt of the instrument in question the registrar will give notice. The law does not require there any affidavit and section 4 says that so long as such *caveat* remains in force the registrar shall not register any transfer or other document affecting the homestead in question.

That is very different from the ordinary *caveat*, which requires such affidavit. A sale could take place but subject to the right of the person claiming a right upon the property.

This right of the woman is not an uncertain right like the one of the person who would claim under an agreement of sale or a mortgage. It is an absolute right which is given to the woman and I could understand that, in such a case, an affidavit would not be required. The affidavit required by section 85 is for the object of swearing that the caveator has a good and valid claim. Here, in the case of the wife, it is not a claim that she asserts; it is her right which the legislature has granted. It seems to me that the affidavit is not required in the case of the married woman's caveat.

For these reasons, the appeal should be allowed with costs.

*Appeal dismissed with costs.*