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*May 12, 13.

*June 9.

DONALD FRASER (DEFENDANT) APPELLANT;

AND

ANNA DOUGLAS (PLAINTIFF) RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

*Married woman—Separate property—Liability for debts of husband
—Execution of judgment—Registry law—"Real Property Act"
—"Married Women's Act," R.S.M. (1891) ch. 95—Conveyance
during coverture.*

Where land was transferred, as a gift, to a married woman by her husband, during the time that the "Married Women's Act" R.S.M. (1891) ch. 95, was in force, the husband being then solvent, and a certificate of title therefor issued in her name under the provisions of the Manitoba "Real Property Act," the beneficial as well as the legal interest in the land vested in her for her separate use, and neither the land nor its proceeds can be taken in execution for debts of the husband subsequently incurred, notwithstanding the provisions of the second section of the "Married Women's Act" respecting property received by a married woman from her husband during coverture.

APPEAL from the judgment of the Court of Appeal for Manitoba(1), reversing the judgment of Mathers J., at the trial, and ordering that judgment should be entered for the plaintiff, with costs.

This was an interpleader issue directed to try whether or not a stock of furs seized in execution of a judgment against one John S. Douglas, as belonging to him, was the property of the respondent, plaintiff in the interpleader issue, Anna Douglas, his wife, as against the appellant, defendant in said issue, the

*PRESENT:—Girouard, Davies, Idington, MacLennan and Duff JJ.

(1) 17 Man. R. 439.

execution creditor of her said husband. The plaintiff's husband bought a property on Jarvis street, in the City of Winnipeg, with his own money and, in February, 1893, conveyed it to her, *bonâ fide*, as a gift. This property had been brought under the "Real Property Act," the transfer was made by the husband to the wife, without the intervention of a trustee, and, under the provisions of that statute, a certificate of title issued to the wife as owner. He was then solvent and did not, at that time, owe the debt for which the judgment was recovered against him. Some time afterwards and a few days previous to the coming into force of the "Married Women's Property Act" of 1900 (1), under a power of attorney from the plaintiff, he sold and conveyed the property, receiving \$1,300 therefor which he handed over to one Dickson who had been acting as trustee for moneys belonging to her. The husband had, in the meantime, become insolvent and, about seven months before the coming into force of the "Married Women's Property Act" of 1900,* the plaintiff had commenced doing business as a manufacturer and dealer in furs in a small way and, as she had funds to spare from time to time, she placed moneys which she received from the business in Dickson's hands. Dickson acted as her trustee, receiving and paying out these moneys at her request, generally for living expenses, up to the time of the sale of the Jarvis street property. The proceeds of this sale were put into the business which, thereafter, continued to increase until the stock in trade became considerable. This business had from the beginning been carried on in the name of "Douglas & Company" and a certificate had been registered, as

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required by the provincial statute, shewing that the plaintiff was the sole owner of the business. The premises in which the business was carried on had been rented for her by her husband, who also attended to buying, selling, banking and other matters in connection with the business and received wages from her for his services.

The appellant, defendant in the interpleader issue, recovered a judgment against the husband, in 1906 (1), in respect of an old liability, execution thereon was issued, and the stock in trade in question (appraised at \$5,945.35) was seized by the sheriff, as property belonging to the husband. On the wife making claim to the goods, the interpleader issue was ordered and tried by Mr. Justice Mathers who entered judgment for the defendant, appellant. His judgment (2) was reversed by the judgment from which the present appeal is asserted.

T. Mayne Daly K.C. and *J. Travers Lewis K.C.* for the appellant.

Pitblado for the respondent.

GIROUARD J.—I agree in the opinion stated by Mr. Justice Idington.

DAVIES J.—At the conclusion of the argument at bar I felt that the crucial point of the case was the effect of the deed from the husband, Douglas, to his wife of the Jarvis street property, and the ownership of the \$1,300 consideration paid for the property when sold.

This \$1,300 went into the business and constituted

(1) 16 Man. R. 484.

(2) 17 Man. R. 141.

practically the capital on which it was founded. Previously to it being paid in, the business was of a very limited character and there is no doubt that the \$1,300 was the basis on which it was subsequently built up.

As the business was registered in the name of the plaintiff (respondent), and the evidence shewed that the credit for all goods supplied was given to her alone, and not to her husband, it seemed tolerably clear that if the capital which formed the basis of the business was hers also no reasonable doubt could exist as to the result of this action.

A careful study of the Manitoba statutes has convinced me that the construction put upon these statutes by the Court of Appeal was the correct one, and that the effect of the husband's deed to the wife given, as held by the trial judge, *bonâ fide* and not in fraud of creditors was, under all the statutes read together, to vest in her an absolute title.

The appellant relied upon the effect of the proviso to section 2 of the "Married Women's Act" R.S.M. (1891) ch. 95, which section authorized married women to have, hold and enjoy real and personal property however acquired free from the debts or control of their husbands. The proviso declared that the section should not extend to any

property received by a married woman from her husband during coverture.

But this section did not stand alone. Sections 21 and 23 of the same Act provided as follows:—

21. A man may make a valid conveyance or transfer of his land to his wife, and a woman may make a valid conveyance or transfer of her land to her husband without, in either case, the intervention of a trustee.

22. It is hereby declared that the last preceding section was intended to extend, and the provisions of said section shall be held to

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have extended, from and after the first day of July in the year one thousand eight hundred and eighty-five, and shall hereafter extend to all land in the Province of Manitoba and to every estate and interest therein.

The effect of section 21 was to do away with the necessity of a trustee, and a transfer under section 21 would seem to confer upon the transferee all the title, both legal and equitable of the husband, and free from any right or claim on his part.

But apart from that the evidence shews that on the 9th day of May, 1900, when the Jarvis street property was sold by Anna Douglas, the title then stood in her name a certificate of title having issued to her under the provisions of "The Real Property Act" pursuant to the transfer of February, 1893, from her husband to her.

The provisions of "The Real Property Act" in regard to the effect of a transfer and of a certificate of title in force at the date of the transfer from Douglas to his wife, in 1893, and on 9th May, 1900, when the Jarvis street property was sold by her, were statutes of Manitoba, R.S.M. 1891, ch. 133, sec. 70, and statutes of Manitoba, 1892, ch. 38, sec. 4, amending section 57 of R.S.M. (1891) ch. 133.

The Jarvis street land was brought under the "Real Property Act," popularly called the "Torrens Act," before Mrs. Douglas sold it and a certificate of title was taken out in her name. The sections I have above referred to seem to me to determine the point in controversy as to the effect of the certificate of title. The 57th section declares that such certificate of title shall be

conclusive evidence at law and in equity as against Her Majesty * * * and all persons whomsoever that the person named in such certificate is entitled to the land included in such certificate for the

estate or interest therein specified, subject however to any of the exceptions or reservations mentioned

in sections 56 or 58 of this Act.

These exceptions or reservations do not arise in this case. The husband, therefore, having a right to convey to his wife without the intervention of a trustee; the transfer having been made *bonâ fide*, without fraud, and a certificate of title having issued under the "Real Property Act" in the name of the wife, the title was hers absolutely and the husband had no further interest therein.

The money, therefore, that was derived from this land and went into the business was the wife's, and was the basis upon which the business was subsequently built up.

As I have already stated, in my opinion these conclusions dispose of the whole case and the appeal should be dismissed with costs.

IDINGTON J.—This is an appeal by an execution creditor between whom and the wife of his debtor an interpleader issue was tried by Mr. Justice Mathers who decided the issue in favour of the creditor, and upon appeal the Court of Appeal for Manitoba reversed such judgment.

The respondent shewed that her husband having failed, in 1895, or thereabout, she took up, in his absence, the business of an insurance agent. Later, using some small surplus of her earnings as agent, she entered upon a small fur business at which she worked and which she employed her husband to manage.

After being thus engaged some seven years she had acquired the goods now seized under the execution against her husband.

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The people who had supplied these goods sold them to her and intended the title thereto to vest in her.

Primâ facie she is thus entitled to succeed.

It is said, however, that the money with which this business was founded and carried on was in law that of the husband.

The learned trial judge in arriving at this conclusion does not find and report that the whole course of dealing was a sham. He holds that the property from which the chief part of the money was derived that went into the business was that of the husband and that, therefore, the business and goods found therein must be those of the husband.

I agree that the Jarvis street property was the property of the husband in 1892, notwithstanding an improbable story as to the purchase money having come from the wife.

She, in the month of February, 1893, in consideration of natural love and affection, received from her husband a conveyance of this property by virtue of the provisions of the "Real Property Act." The learned trial judge finds expressly this was not made in anticipation of failure but in good faith, and when the husband, after giving the property, was in solvent circumstances. It necessarily follows that he could have given it to her by any proper form of conveyance that would have made it enure to her separate estate free from the attack of his subsequent creditors.

The proceeds of rents and sale of that property found their way into the fur business in question by virtue of a power of attorney from her to the husband. Hence, the learned trial judge holds the business that of the husband because he was entitled by virtue of his marital rights to the rents and to an

interest in the estate for life and that would render the substantial part of the proceeds of the sale the property of the husband and not that of the wife.

There was no marriage settlement, but these moneys were, so far as possibly could be done by the simple device of an oral trusteeship, kept separate from those of the husband.

One Dickson, who undertook the duties of such trustee, received, kept and paid out all these moneys solely to the wife or for her purposes, including those of this business.

It happened that the proceeds of the sale of the Jarvis street property, with which we are here concerned, passed directly from the vendee to this trustee.

Now the ground taken as to these moneys is that in law they were, for most part, the property of the husband.

It is quite clear to my mind that the effect of a conveyance made as this was under the "Real Property Act" is to vest in the grantee the absolute property of him or her conveying free from all the rights of any one else than the grantee unless otherwise expressed.

Such is the policy of the legislation under the "Torrens Title System."

It would seem to be a monstrous absurdity in carrying out such a method of conveyancing to assume that there was by implication engrafted on to its express and positive enactments, declaring the result of the certificate of the registrar to be that of vesting the property in the party obtaining the registrar's certificate, some reservation of the husband's rights when the Act specifies the only exceptions and the supposed rights of the husband are not amongst the number.

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It seems to me there is not the slightest foundation for any such contention.

The legal consequences are that the wife had this property free from the husband's control and thus was absolutely entitled to it.

A post-nuptial marriage settlement on such findings of solvency and *bonâ fide* intention would have been valid, and what has been done was the legal equivalent.

There seems nothing else in the case; for the profits would follow these principal moneys put in, once we find a separate business was in fact carried on.

There could be no doubt of the intention to carry on a separate business and reap the fruits thereof as she was entitled to do under the "Married Women's Property Act." She had herself registered as carrying on the business under the name "Douglas & Co." from her first starting it.

Moreover, it is not the property conveyed that was attacked. It would require a case not made out here and legislation I do not find invoked by virtue of this issue to reach the proceeds.

But I think it would have puzzled a creditor very much to have reached, by any known mode of execution, the supposed marital rights Douglas had in the Jarvis street property after he had, under and by virtue of the "Real Property Act," so managed, in 1893, that the lands were certified under that Act to be the property of the claimant.

If there remained, thereafter, anything exigible at suit of the creditors of Douglas, who has taken it away?

It is only what she got she has conveyed away. When he used her power of attorney to convey away

her rights he surely was not asserting his power as her lord to convey his and her rights.

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He was not the ancient lord and master of his spouse asserting rights for which he had done homage to have had recognized but her poor clerk or servant obeying her vulgar common power of attorney mandates. Such seems the evidence. We have no documents in evidence and assume from the oral evidence that he was not a party conveying.

The tempting inquiries, of how far, if ever, husband and wife were, except when specially given an estate that required such holding, only one person as regards her real estate; of the nature of his rights in regard to her rents, until he became tenant consummate of the courtesy; of whether, till then, they were his or hers or only his because no court had ever dared make him account for them or woman dared pray the court so to do; of the foundation on which rested his right of conveyance of a freehold that overshadowed her power over her own, in order that a true interpretation might be had of the effect of the words in the 20th section of the "Devolution of Estates Act" (1) abolishing the right of tenancy by the courtesy; and what, if anything, remained to the modern lord and master when this was taken away; must be laid aside for the present.

I will not, in view of the desolating effects of the radical "Torrens System," as I understand it in this case, even try to determine the limits of duty to creditors a husband of a woman owning property at common law may owe to such creditors to despoil her of her rights for their sake. In some cases the facts shew he owes much, but in this case it seems morally only a question of who should

(1) R.S.M., 1891, ch. 45.

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reap the unearned increment but for which there had been almost nothing here to contend about.

Since the argument I have found that the question of invasion, by the adoption of the "Torrens Title System" of a husband's rights at common law in his wife's estate has been discussed in the Australian courts, where this system prevails. Two cases, *In re Wildash and Hutchison*; *Ex parte Miskin* (1) in 1877, and *Grimish v. Scott* (2), indicate conclusions different from what I here reach and are worth noticing by the curious student, but the Australian Act of that time and the Manitoba Act, in the nineties, are in many respects widely different, and not least in the effect to be given the certificate, saving certain expressed objections. Besides the development of the law in each country of the powers of married women to convey or hold real estate did not, I gather, keep step so to speak so as to make comparison of view of much value for our present purpose. The case of *Le Syndicat Lyonnais du Klondyke v. McGrade* (3), is also, as well as the above two cases, worth looking at when occasion arises for considering what, if any, effect is to be given to the common law notwithstanding the effect of change in mode of conveyance.

The appeal should be dismissed with costs.

MACLENNAN J.—I have had no doubt at any time that there is no ground for this appeal. It is clear that the business carried on by the respondent was *bonâ fide* carried on by her as her own, separate and apart from her husband, and under a registered name, and it is equally clear that the land, from the sale

(1) 5 Queens. S.C. Rep. 46.

(2) 4 Queens. L.J. Rep. 57.

(3) 36 Can. S.C.R. 251.

of which the principal part of the capital of the business was derived, was conveyed to the respondent by her husband at a time when it was competent to him to do so, and that it became and was in law, having regard to the provincial statutes, her separate property.

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The appeal should be dismissed with costs.

DUFF J.—I agree that this appeal should be dismissed with costs for the reasons given by my brother Idington.

Appeal dismissed with costs.

Solicitors for the appellant: *Daly, Crichton & McClure.*

Solicitors for the respondent: *McKerchar & Forrester.*
