# SOME ASPECTS OF MARRIED WOMEN'S PROPERTY

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At common law the husband and wife were originally regarded as one person. With minor exceptions the wife was incapable of acquiring or holding property independantly from her husband. The history of the wife's separate property may be traced through a series of statutes culminating in our present Married Women's Property Act. This process of independence was aided by the court of equity devising the equitable doctrine of a married woman's separate estate.

At common law all freehold acquired by the wife came under the control of the husband who took the rents and profits and could alienate it subject to the right of a wife to recover it by a writ of entry from his alienees after his death. Of the wife's chattels real, the husband had complete control as well as power of disposition except as to disposition by will during her lifetime. Of her tangible personalty he became the absolute owner and also of her choses in action if he succeeded in reducing them into possession. As the wife could not contract she could not convey. The only common law method of conveying the whole of a husband and wife's estate in lands was by "levying a fine" to which husband and wife were parties and to which she gave her assent after a separate examination.

Before the various Married Women's Property Acts equity had devised an equitable estate for married women. It is difficult to say when the device was invented but it certainly was in use sometime before 1788. A married woman had always been able to act in "autre droit" for example to exercise a power of appointment or to act as agent. Developing this common law principle that a married woman acting in autre droit was as competent as a femme sole, the courts of equity brought into existence the equitable separate property for married women. By means of a settlement property was conveyed to trustees to hold for the sole and separate use of the wife, to pay the income for her, and to hold the property in trust for such persons as she might by deed or will appoint. In this way the property escaped the control of the husband and the liability for his debts. As a further safeguard from the persuasion of her husband equity also devised a restraint upon anticipation which might be imposed under the terms of the settlement. Its effect was to prevent the wife from assigning her income or in any way charging it before it actually came into her possession.

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The first legislative attempt in New Brunswick to provide for separate property for married women occurred in 1851[1] when "an act to secure to married women real and personal property held in their own right", was passed. This act was substantially re-enacted as Chapter 114 in the 1854 consolidation.[2] It provided for two classes of cases having no reference either to the date of marriage or to the time when the property was acquired. The property of the married woman living with her husband was by force of that act exempted from all liability by reason of the husband's debt and he could not convey, encumber or dispose of it without his wife's consent. It was liable for her debts contracted before marriage and for judgments recovered against her husband for her wrong. The woman who had been deserted or abandoned by her husband stood in an entirely different position. She could recover in her own name and for her own use for her services and for debts due her and for damages or injuries to herself or to her property. No change was made until 1869[3] when the provisions of Chapter 114 of the consolidated statutes were made to apply to married women living separate and apart from their husbands, not wilfully and of their own accord (though they had not been abandoned or deserted). Additional provisions were made with a view to securing to wives thus separated from their husbands complete control and power of disposal over their own property. The husband was deprived from all interest in the wife's propery quite irrespective of the date at which it had been acquired or of the date of the desertion or separation.

The rights and liabilities of a married woman living with her husband with regard to her separate property as secured to her by the provisions of the 1876 consolidation were judicially determined by the case of **Wallace v. Lea**[4] when the Supreme Court of Canada gave its approval to the dissenting judgment of Mr. Justice Hannigan. Her property could not be conveyed or encumbered by her husband without her consent, evidenced by her joining in the deed and acknowledging it. Her property was not liable for his debts, she was not given any power to contract or so as to bind herself or her property and she had not the power of disposal of her property except with the concurrence of her husband. This was the position until the Married Women's Property Act of 1895[5] was passed.

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1. (1851) 14 Vict., c. 24 N.B.
2. R.S.N.B. 1854, c. 114.
3. (1869) 32 Vict., c. 33 N.B.
4. 28 S.C.R. 595.
5. (1895) 58 Vict., c. 24 N.B.

It might be noted here that at this time England or Ontario had not legislated in this matter. The first Imperial act dealing with married women's separate property was enacted in 1882.[6] This act, while it went further in many regards than our previous acts must be regarded, however, as being junior to our acts. Indeed this subject illustrates a generally held view that regarding property this province at this time took second place to no other jurisdiction in either legislation or the interpretation placed on the law of property, particularly real property, by our courts.

It is to be regretted that legislation of the past generation has not kept pace with that of previous generations. The courts also have been somewhat less than bold in this respect and the recent lack of dissenting judgments does not augur well for the development of a vigorous jurisprudence in this province.

The 1895 Act can be considered to be the direct forerunner of our present act and the provisions of our present act can be largely found in this earlier act with the exception that restraint on anticipation was abolished by amendment after the 1895 Act. Without going into the individual secions of our present act it is sufficient to say that by virtue of this act subject to the exceptions noted below that there has grown up in this province a regime of separate property as between husband and wife.

The Act defined the property rights of a married woman, her right to sue and liability to be sued and discharged the husband from certain liabilities for the acts of the wife with which he was burdened at common law.

Accordingly a regime of strict separation of property was established by the Married Women's Property Act and marriage no longer had any effect on the property rights of the spouse inter se. This principle, however, is subject in New Brunswick to four important exceptions, each of which deserves some comment.

Firstly, a husband or wife cannot sue the other in tort unless for a tort committed while living apart under a decree or order for separation. The married woman is provided in section 6(1) with a right of action in her own name for the protection of her own separate property as if she were unmarried. Subject to the qualifications contained in section 6, no husband or wife shall be entitled to sue the other in tort.

In **Curtis v. Wilcox**,[7] the English Court of Appeal had to decide whether or not a marrried woman could maintain an

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6. The Married Women's Property Act, (1882) 45 & 46 Vict., c. 75.

7. [1948] 2 All E.R. 573.

action in tort against a person who now was her husband. The cause of action, a motor vehicle accident, arose before the parties were married. The court below regarded itself bound by the decision in **Gottliffe v. Edelston,**[8] and dismissed the action. The Court of Appeal, in allowing the appeal, decided that the action could be brought. Wynn-Parry, J. at p. 576 said:

> "Section 24 (the definition clause) says: "The word 'property' in this Act includes a thing in action."
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> The effect of s. 2, the language of which is unambiguous, is that in her separate property there is or can be included without exception all the real and personal property which belongs to her at the time of the marriage, while the definition of property in s. 24 makes it clear beyond doubt that, as the language of s. 2 itself indicates, her personal property includes her things in action. Under s. 12 the right of suing which is given to a married woman extends, so far as concerns what may be the subject-matter of the action, to all her property. The limitation which is imposed by the section is not on the kind of property which may be the subject of an action by her, but only on the purpose for which the action may be brought; it must be for the protection or security of her property. It follows, in our judgment, that there is no ground to be discovered in the language of the relevant sections of the Married Women's Property Act, 1882, for holding that "thing in action" is used in that Act in any limited sense. In our judgment, therefore, **Gottliffe v. Edelston** (1) was wrongly decided and is not good law."

Section (1) (h) of the New Brunswick Married Woman's Property Act defines "property" as including a thing in action. This definition, together with sections 3 and 6, would make the decision in **Curtis v. Wilcox** applicable in New Brunswick. It is suggested, however, that the curious remarks of Wynn-Parry, J. at p. 576 where he distinguished a purely personal claim against her husband, e.g., for libel or slander or assault which would be barred, from a claim for personal injuries arising from negligence are merely obiter and would not apply in New Brunswick.

In **Baylis v. Blackwell et al,**[9] the court was urged that the unity of husband and wife had been broken down by the passage of time. The court faced with Lord Sumner's observations in **Edwards v. Porter**[10] that the Act was a Married Women's Property Act and not a married man's relief act and the statutory provision, contained in s. 12 of the Married Women's Property Act, and reaffirmed by the Law Reform (Married Women and Tortfeasors) Act, 1935 could not agree and held that a husband could not maintain an action against his wife for an ante-nuptial tort. At p. 77 McNair, J. said:

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8. [1930] 2 K.B. 378.
9. [1952] 1 All E.R. 74.
10. [1925] A.C. 1 at 38.

> "It may be anomalous that in these days of equity the wife should be able to sue the husband for ante-nuptial torts and possibly for torts during coverture while the husband should not enjoy corresponding rights. This anomaly, if anomaly it be, is, in my judgment, so firmly engrafted in our law that it can only rightly be removed by legislation."

It is suggested that s. 6(3) of the New Brunswick Married Women's Property Act could prevent the above mentioned decision from being followed in New Brunswick.

The great anomoly in the law, although somewhat less in New Brunswick than in other jurisdictions, is the prohibition of actions in tort between husband and wife living together. While probably it was not the intention of the legislation, if the decision in **Curtis v. Wilcox,**[11] is good law, and it is submitted it is, then s. 6(1) and (3) of the Married Women's Property Act gives almost unrestricted remedies to husband and wife against each other if they live apart under an order of judicial separation for a tort committed during the separation. However, this right is of limited practical application in New Brunswick because of the limited number of judicial separations granted in New Brunswick.

It is suggested that the rule prohibiting actions between husband and wife for torts committed while living together no longer serves its original purpose, namely, of preserving domestic amity. If a wife can go to the magistrate and lay a charge of assault, why should she not be able to maintain an action in tort arising from the same incident. Similarly, if actions in contract are allowed between husband and wife, why not in tort?

The present rule now benefits insurance companies and works to disadvantage of a concurrent tortfeasor. If a father can be sued by his child, for example, for negligence arising out of his operation of a motor vehicle, why should he not be sued by his spouse? Obviously in present day situations the insurers are able to obtain the benefit and spouses suffer the disadvantage of a rule devised for use generations ago.[12] A concurrent tortfeasor also is put to disadvantage by the rule which prevents him, when sued by a wife, from a right of contribution from a husband who is partially at fault.

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11. [1948] 2 All E.R. 573.

12. See Wright, The Adequacy of the Law of Torts, 1961 C.L.J. 44 at p. 60 where he says "Accepting the validity of the doctrine that a wife cannot sue her husband in tort (a doctrine impossible to justify if the defendant is no longer really her husband but an insurance company) . . ."

While there are many more obvious areas for law reform in New Brunswick, this matter could well receive attention, with, of course, the knowledge that certain interests would oppose such a change.

Secondly, special rules have been developed by the courts with regard to the matrimonial home.[13]

> The matrimonial home is frequently the main and only substantial asset of a husband and wife and if the marriage should break down a bitter dispute over the beneficial ownership and the right of occupation of the home often follows in its train . . . It may be necessary to trace the financial history of the patries from the time they were married, to try to find where the money used to buy the home came from and why the conveyance was taken in the particular form it was . . . Where the funds of both parties have gone into the house it may make a great difference whether a particular spouse is entitled to a share in the home or merely to a charge on it for the money put up. Even when these difficulties are resolved, the right to occupation presents a separate problem.[14]

(i) **Title.** As the legal title only provides prima facie evidence as to the beneficial ownership various situations must be considered.

Until very recently the most common situation was where the conveyance is in the husband's name, that is, where the legal title is vested in him. If the husband provided the purchase money he will be the beneficial owner unless the wife can prove that he holds it on trust for her and for this written evidence will be required. If the wife provided the purchase money a presumption of a resulting trust in her favour arises for equity presumes that where the property is paid for by one person and the conveyance is taken in the name of another, the other is intended to hold the property so acquired on trust for the person providing the purchase money.[15] The presumption may be rebutted by showing that a gift was intended but if it is to be rebutted it must be done by evidence of statements or conduct at the time of purchase. Statements made or actions done by a person after the purchase are only evidence against the party making or doing them.[16] If the presumption of a resulting trust is rebutted then a gift by the wife to the husband

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13. The treatment of the topic of the matrimonial home follows somewhat the treatment of the same subject by E. J. Johnson in his work Family Law at pp. 92 and following, as modified by Canadian statute and decisions.

14. Edward F. George, "Disputes over the Matrimonial Home", 1952, 16 Conveyance and Property Laws 27.

15. **Dyer v. Dyer** (1788) 2 Cox Eq. 92.

16. See **Phipson on Evidence,** 19th ed., pp. 690-1.

took place. The relationship of husband and wife is not such that in a case of a gift by a wife to the husband undue influence should be presumed[17] although the gift may be set aside for undue influence if it is proved in fact. But a gift made by a woman to a man she intends to marry is presumed to have been made under undue influence.[18]

Less common is the situation where the conveyance is in the wife's name. If the wife provided the purchase money she is beneficially entitled. If the husband provided the whole of the purchase money the presumption in favour of a resulting trust gives way to the presumption in favour of advancement, that is, the husband is presumed to have intended it as a gift to her and so in this case too she will be beneficially entitled.[19] The presumption can be rebutted by oral testimony of acts or declarations made before or at the time of purchase or by statements or acts afterwards against the interest of the party now claiming. It cannot, however, be rebutted by showing a fraudulent intent for he who comes to equity must come with clean hands. The presumption in favour of advancement is not rebutted by the fact that the husband paid mortgage interest for the presumption in favour of advancement will apply to these payments also.[20]

There is no presumption of advancement where the husband merely joins as a surety in a mortgage effected by his wife. If the husband is called on to pay, it is as a result of a legal obligation arising from the guarantee; there is no question of making a gift and so no presumption of advancement, and on payment the husband becomes entitled, as against his wife, to the ordinary remedies of a surety who has paid his principal's debt.

A common situation is where the conveyance is in joint names. If the wife provides the purchase money the resulting trust is presumed in her favour, that is, she is beneficially entitled. If the husband provides the purchase money the presumption of advancement applies to a beneficial interest in the joint tenancy, that is, the husband and wife are jointly entitled in equity as well in law.

An infrequent, but complicated situation arises when both parties provide money for the purchase price. The Supreme

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17. **Howes v. Bishop** [1909] 2 K.B. 390.
18. **Re Lloyd's Bank Ltd.** [1931] 1 Ch. 289.
19. **Mercier v. Mercier** [1903] 2 Ch. 98.
20. **Dunbar v. Dunbar** [1909] 2 Ch. 639.
21. **Anson v. Anson** [1953] 1 Q.B. 636.

Court of Canada in **Thompson v. Thompson**[22] recently considered the problems which arise in this situation. A series of recent English decisions[23] which adopt Lord Justice Denning's dissent in **Hoddintot v. Hoddintot**[24] enable the English wife to become the owner of a one-half interest in the matrimonial home if it is found that she makes any contributions to its purchase. In **Thompson v. Thompson** the trial judge found that no contribution had been made by the wife to the purchaser of the home. The Court of Appeal made an independent finding of a contribution by the wife, applied the above English decisions, and found for the wife. A majority of the Supreme Court of Canada felt that the trial judge's findings of fact should not have been disturbed and allowed the appeal. But the court did not expressly disapprove of the above-cited English decisions and, in fact, tacitly approved an extension to the English view when Judson, J.[25] said:

> But no case has yet held that, in the absence of some financial contribution, the wife is entitled to a proprietary interest from the mere fact of marriage and cohabitation and the fact the property in question is the matrimonial home. Yet, if the principle is sound when it is based on a financial contribution, no matter how modest, there seems to be no logical objection to its application and the exercise of the same discretion when there is no financial contribution when the other attributes of the matrimonial partnership are present. However, if one accepts the finding of the learned trial judge, the basis for the application of the rules at its present stage of development in England is not to be found in the present case

However, this bold statement, which, it is submitted, constitutes the ratio decidendi of the decision it is somewhat diluted by the following obiter dicta:[26]

> The judicial use of the discretionary power under s. 12 of **The Married Women's Property Act,** R.S.O. 1950, c. 233, in property disputes between husband and wife has not developed in the same way in the comman law provinces of Canada as it has in England. There is no hint of it in this Court in **Minaker v. Minaker,**[27] and there is

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22. [1961] S.C.R. 1.

23. **Rimmer v. Rimmer** [1952] 2 All E.R. 863.
**Cobb v. Cobb** [1955] 2 All E.R. 696.
**Silver v. Silver** [1958] 1 All E.R. 523.
**Richards v. Richards** [1958] 3 All E.R. 513.
**Fribance v. Fribance** [1957] 1 All E.R. 357.

24. [1949] 2 K.B. 406

25. pp. 13-4.

26. p. 14.

27. [1949] 1 D.L.R. 801.

> an implicit rejection of the existence of any such power in **Carnochan v. Carnochan,**[28] where Cartwright, J. stated that the problem was not one of the exercise of a discretionary power but one of application of the law to ascertained facts. Further, in **Jackman v. Jackman,**[29] where the Alberta Court of Appeal in reversing the judgment at trial, had applied the line of decisions above referred to, this Court declined to support the exercise of the discretionary power in the rebuttal of the presumption of advancement in circumstances where the husband's contribution was very large and where it should not have been difficult to draw an inference of a joint interest in the matrimonial home.
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> If a presumption of joint assets is to be built up in these matrimonial cases, it seems to me that the better course would be to attain this object by legislation rather than by the exercise of an immeasurable judicial discretion under s. 12 of **The Married Women's Property Act.**

The right to reside in the matrimonial home presents no problems as long as consortium exists between husband and wife. The wife's right to reside there seems to have been based in part on the husband's liability to support her and partly on his inability to sue her in tort. However, it now appears that her right is an established maritial law and is reciprocal in that when the wife owns the matrimonial home the husband has an equal right to reside there.

A series of modern English cases establish the principal that if the husband has deserted the wife she is entitled to continue to reside in the matrimonial home even though title is in the husband. Her right to do so is as against him analogous to an irrevocable contractual license and can onlyl be lost either by her misconduct or by order of the court. The wife's right can be protected by an order restraining the husband from entering into any contract for sale of the house until suitable alternative accomodation has been provided for the wife.

But what is the situation where the husband sells without making this arrangement and the wife fails to act quickly in protecting her rights? What is the position of a subsequent purchaser?

The deserted wife's right will prevail as against the purchaser from the husband where the same is merely collusive, that is, where a purchaser buys with full knowledge of the facts. But in **Jess B. Woodcock v. Hobbs,**[30] Parker, L. J. felt it would not prevail against a bona fide purchaser with or without notice, other cases being distinguishable on the grounds that the purchaser did not act in good faith.

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28. [1955] 4 D.L.R. 81.
29. 19 D.L.R. (2d) 317.
30. [1955] 1 All E.R. 445.

A mortgagee seems to be in the same position as a purchaser but in **Westminster Bank v. Lee**[31] the desertion occurred before an equitable mortgage was placed on the land. Here, as there was no notice either actual or constructive of the wife's equity, the mortgagee was held entitled and not the wife. The learned Judge suggested that a purchasr will be affected by constructive notice of the wife's right if he has notice of any fact which may or should have put him on further inquiry whether the husband has deserted the wife or if he has some suspicion he obtains from further inquiry but the mere fact of the wife's possession will not effect the purchaser with constructive notice. It follows that these remarks apply while applying to a mortgagee, apply equally to a purchaser.

The important practical consideration in New Brunswick is of course that the wife must release her dower interest and therefore could in most instances prevent a sale. But does the wife in joining in a deed or releasing her dower right defeat her right to reside in the matrimonial home? If, of course, dower is abolished in New Brunswick, the problem will become much more urgent.

The third exception to the doctrine of separate property is that special procedure under section 7 of the Married Women's Property Act has been devised for settling disputes between husband and wife concerning the ownership and possession of property. Any question of title to or possession of property as between husband and wife is determined by summary application to a Judge of the Supreme Court sitting in the Chancery Division. The application can be made by the husband or wife or any corporation, company, public body or society in whose books and stocks, funds or shares of either party are standing.

The judge before whom such an application comes has a wide discretion[32] although that discretion must be exercised judicially. Indeed the obiter dicta of Judson, J. cited above[33] would appear to fly in the face of the statute. Lord Justice Romer's remarks in **Rimmer v. Rimmer**[34] where he said:

> " . . . cases between husband and wife are not to be governed by the same strict considerations both at law or in equity as are commonly applied to the ascertainment of the respective rights of strangers when each of them contributes to the purchase price of property."

would appear to be the better view of the matter.

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31. [1955] 2 All E.R. 883.

32. Married Women's Property Act R.S.N.B., c. 140, s. 7(1) " . . . the judge may make such orders with respect to the property in dispute . . . as he thinks fit . . ."

33. [1961] S.C.R. 1 at p. 14.

34. [1953] 1 Q.B. 63.

It should be pointed out that the Supreme Court of Canada in **Minaker v. Minaker**[35] made it clear that where the issue between husband and wife comes under this section an ordinary action in the court is barred.

The fourth exception is that in certain cases a presumption of advancement will rebut the presumption in favour of a resulting trust which normally arises when a person buys property which is put in another's name. It is not necessary to develop this exception further except to say that it has been illustrated in the above discussion on the matrimonial home and may be further extended to other property such as stocks and shares, bank accounts, and other personal property.

It goes without saying that New Brunswick lawyers have not utilized the above principles to their fullest extent, particularly the problems relating to the matrimonial home and the special procedure under section 7 of the Married Women's Property Act. It is to be hoped that the New Brunswick courts will be successfully urged to follow the more flexible English approach to a situation which will, in future, become much more common.

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35. [1949] 1 D.L.R. 801.