Warren v. Cotterell.

Married Women's Act. 1872—*Ejectment*—"*Separate tort.*"

Under the Married Women's Property Act, 1872, a wife may be the sole defendant in an ejectment brought to recover possession of land owned by her husband, who is permanently resident out of the Province.

[Chambers, April 20, 1872.—*Mr. Dalton.*]

This was an action of ejectment to recover possession of the east half of lot 36, in the first concession of the township of West Zorra.

On the 18th April, and before any appearance was entered,

T. Ferguson obtained a summons calling upon the plaintiff to show cause why the writ of summons herein, and the copy and service thereof, should not be set aside with costs on the ground that the sole defendant named in the said writ is a married woman, and that the land in question does not belong to her, but to her husband. He referred to Cole on Ejectment, page 84.

No cause was shown; but as it appeared that the action had been commenced after the passing of the Married Women's Property Act, 1872 (35 Vict. cap. 16, Ont.), judgment was reserved, for the purpose of considering the effect of that statute. On the 20th April, judgment was delivered by

Mr. Dalton.—The facts of this case seem to be, that the sole defendant is a married woman, whose husband has gone to reside permanently in the State of Michigan. The motion is to set aside the writ of ejectment, copy and service, because the husband is not joined as a defendant. The wife is, in fact, "the person in possession," and the motion is not grounded on a denial of this, but on the alleged necessity that the husband should be joined in an action against the wife. As to the necessity of this, in ordinary cases there can be no question; but whether it applies to ejectment may perhaps be doubtful, from the peculiar nature and object of the action. In ordinary actions it has hitherto been applicable, even to this extent, that where she is sued for her own separate debt, and does not defend, a judgment signed against her alone will be set aside. No cause having been shown to this summons, it does not appear how or when the present defendant acquired possession; and I am not aware of any case under our Ejectment Act in which this question has arisen, except one in Chambers some months ago, where I set aside the process on account of the non joinder of the husband. Under the old Ejectment Act, the point could never have arisen, and in practice the difficulty is lessened by the fact that where the husband is permanently resident abroad, service may be made upon the wife for him (Tidd's Prac. 9th Ed. 1210-1). Here the wife, and not the husband, is the person in possession, and the plea of non joinder would be a plea in abatement.

In the action of ejectment, which is unlike any other, the defendant is in possession of the specific land sought to be recovered, and the plaintiff, by his writ, alleges that possession to be unlawful. Can the defendant in such a case merely set up matter in abatement, and offer no defence on the merits? Can he say, as this defendant practically does, "This may indeed be your land, but you cannot sue me for its recovery"? It seems an extraordinary thing that a person can retain possession in person of the land of another, and yet, even while standing upon it, deny the right of the owner to pursue his legal remedy without joining some one else who is not in possession, and is, in fact, out of the country.

In *Bissill* v. *Williamson*, 7 H & N. 395, Baron Bramwell says, "In ejectment there never can be any proceeding analogous to a plea in abatement: for the plaintiff in his writ says, 'I am entitled to possession,' and therefore matter in abatement can be no reason for defendant holding the land." The form of action which bears the strongest analogy to ejectment is replevin, in which one man claims and another defends possession of a specific chattel. In this action no plea in abatement is allowed, unless it alleges matter which gives the defendant a title to the return of the chattel (Gilbert on Distress, 146). In ejectment the possession is not, indeed, given to the plaintiff, as is the case in replevin, where "the deliverance of the goods is immediate, so that the plaintiff hath possession before the defendant can plead thereto" (Gilbert, *loc cit*); but both forms of action, being for the recovery of a specific thing, are in this respect identical. The Married Women's Property Act, 1872, meets the case exactly, section 9 providing 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." Now the tort here complained of is the unlawful possession of this land, which possession is held by the wife alone. This is therefore her "separate tort;" and the action having been commenced since the passing of the statute, I think the application must fail.

Summons discharged without costs.

CHANCERY CHAMBERS.

(*Reported by* Thomas Langton M.A., *Student-at-Law.*)

Re S. & M., Solicitors.

Next friend. Statutes—35 *Vict., c. 16 (Ont.)*—*Solicitor*—*Taxation*—*Delivery of bills of costs.*

The Act of 35 Vict., c. 16 (Ont.), which gives power to a married woman in certain cases to sue and be sued alone, does not prevent her husband being considered as *dominus litis*, and the suit his suit, if she joins him as a party plaintiff; nor does it obviate the necessity for a next friend in order to bind her.

It is the policy of the Court that a solicitor is bound by his original delivery of bills of costs to his client, and it is not competent for him to make a qualified or conditional delivery of a bill, which would, even by a reservation in express terms, enable him to deliver subsequent and more complete bills in the event of recourse being had to taxation.

[Chambers, August 20, 1872.—*The Chancellor.*]

This was an appeal by *Spencer* from an order of the Referee made upon the petition of clients for the taxation of solicitors' bills. He took the preliminary objection to the petition that it was made by two married women and their husbands, without the intervention of next friend for the married women, and contended that an order made upon such a petition would not bind the married women who might by next friends subsequently take proceedings for a second tax-