[ORIGINAL CIVIL.]

1872
Feb. 12.

Before Mr. Justice Phear.

ARCHER *v.* G. J. WATKINS AND ANOTHER.

Husband and Wife—Plea of Coverture—Separate Property of Wife—Succession Act (X of 1865*)—Plea of Infancy——Act XL of* 1858 *- European British Subject.*

See also 13 B. L. R. 387; 12 B. L. R. 358; 10 B. L. R. 282

The defendant, a married woman living with her husband, both domiciled in British India, and resident in Calcutta where they had been married on 21st May 1866, and having property to which she was absolutely entitled under the provisions of the Succession Act, signed a promissory note in favor of the plaintiff for a debt due by her to the plaintiff, at the same time giving a verbal promise to pay the amount out of her own property. In a suit on the promissory note in which the husband and wife were made parties, the wife pleaded her coverture. *Held*, that she was liable to pay the amount of the promissory note out of her own property; and the Court would, if necessary, make a personal decree against her.

The defendant was, at the time of making the promissory note, of the age of 19 years. The evidence showed that her father was born at sea, and lived the greater part of his life in Calcutta. It was not shown of what country his parents were, or whether the ship on which he was born was a British ship. The defendant pleaded minority at the time of making the note. *Held* the defendant was not a European British subject, and not exempted from the operation of Act XL of 1858: she therefore attained her majority at 18 years.

THIS was a suit brought to recover the sum of Rs. 2,658 alleged to be due from the defendants to the plaintiff, as principal and interest on two joint and several promissory notes made by the defendants on the 6th and 25th of November 1869; and for money stated to be due on divers accounts stated between the plaintiff and the defendants.

The plaintiff in her plaint and written statement stated that the defendants, who were husband and wife, were, at the time of making the promissory notes, domiciled in India, and residing in Calcutta; that the female defendant was, at the time of her making and executing the promissory notes, entitled in her own right to a large sum of money exceeding Rs. 25,000, which came to her from the estate of her father James

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Archer, deceased, and which was, at the time of the institution of the suit, in the hands of the Administrator-General of Bengal; and that the female defendant, at the time of executing the said pormissory notes, agreed and undertook to pay the plaintiff the amount of the same out of the money come to her from the estate of the said James Archer.

The defendant, Emma Watkins, in her written statement stated that the plaintiff was her step-mother; that she was the wife of the defendant G. J. Watkins, to whom she was married on 21st May 1866 in Calcutta; that the promissory notes were signed by her jointly with and at the request of her husband; that at the time when the promissory notes were signed by her, and at the time of the institution of the suit, and up to 20th December 1871, she was an infant under the age of 21 years; that she was at the time of the making of the promissory notes, and at the time of the institution of the suit, and still was, the wife of the defendant G. J. Watkins and that she signed the notes at the request and by the direction of her husband, and that her husband was still living.

Mr. *Lowe* for the plaintiff.

Mr. *Ingram* and Mr. *Evans* for the defendant Emma Watkins.

The defendant G. J. Watkins in person.

Mr. *Lowe*.—The defence of minority is not valid. The age of majority under the law applying to the defendant is 18 years. The case of *Rollo* v. *Smith* (1) does not apply under the circumstances appearing in the evidence as to the *status* of the defendant. In the Succession Act "a minor" is stated to be any one under age of 18. Again, in Act XL of 1858, section 26, 18 years is for the purposes of that Act to be considered the age of majority; that Act has moreover been held to be extensive enough to include persons not expressly included in the Act—*Madhusudan Manji* v. *Debigobinda Newgi* (2) and *Jadunath Mitter* v. *Bolyechand Dutt* (3). The inconvenience spoken of in

(1) 1 B. L. R. O. C. 10.
(2) 1 B. L. R. F. B. 49.
(3) 7. B. L. R., 607.

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both these cases would result in this case if 21 is held to be the age of majority.

Mr. *Ingram* for the defendant E. Watkins.—The question arises here whether a person, suing a married woman with her husband, can obtain a general decree against her. In England two suits would be necessary, one in equity against her, and another on the promissory notes against the husband. [PHEAR, J.—This Court administers both law and equity.] But there are no trustees to represent the interest of the wife. When a married woman does any act, she is presumed to do it by compulsion of her husband. Can the Court give the plaintiff any relief? The sum of money, if existing, is not in the hands of trustees. A Court of Equity only enforces its power against the wife where there are rustees; where there are no trustees (though it is a case which could not arise in England), a Court of Equity cannot interfere. As to this the law is the same in India as in England, and was not intended to be altered by section 4, Act X of 1865. This is, as it were, a Common Law action in which the plaintiff seeks to get a general decree against the defendant under which her person could be taken in execution: that could not be done even in England. The plaintiff cannot get a personal decree against a married woman; where a person has taken security from a married woman living apart from her husband, the decree must be against her separate estate—*Johnson* v. *Gallagher* (1). She must be presumed to have intended the security to be enforced against her separate estate—*Picard* v. *Hine* (2). In the present case the husband and wife were living together, and the presumption is the other way.

The defendant is a minor until she has attained the age of 21. For certain purposes Act X of 1865 makes the age of majority at 18, *i. e.*, for purposes of the Act., *viz.*, "certain cases of intestate and testamentary succession." It is not a general Act. The Marriage Act V of 1852, made 21 the age of majority. That is also the age of majority by Act V of 1865. The Legislature could hardly have intended Act X of 1865 to be general, when

(1) 3 De Gex., F. & J., 494; see 510, and cases there cited. (2) L. R., 5 Ch., App., 274.

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by an Act of the same year, they had made a different period the period of majority. The case of *Rollo* v. *Smith* (1) applies. The only laws of majority are the Hindu, Mahomedan, and English. The defendant is not governed by the Hindu or Mahomedan law; therefore English law applies.

Mr. *Lowe* in reply.—The plaintiffs do not ask for a personal decree; the mere fact of asking for a decree does not mean it is necessarily to be a personal decree. The Court will make an order against the separate property whether in the hands of trustees or not: *Hulme* v. *Tenant* (2) and *Johnson* v. *Gallagher* (3) is against the defendant's contention—*Murray* v. *Barlee* (4) *per* Lord Brougham, and *Matthewman's case* (5). The plaintiffs' case goes further than these; for here the money was lent on the express representation that it was to be repaid out of a certain fund, and that the defendant does not deny; there is a contract which a Court of Equity will enforce. As to the defence of minority, it has not been shown that the defendant has any law but that of this country; under that law she is entitled to certain money: and for that purpose it is submitted she came of age at 18. Otherwise she would at 18 have arrived at an age when she could take property, but could not contract. By the Succession Act the period is 18: see sections 215 and 216. See also section 4. Under the Act a person over 18 can make a will: see section 46.

On a subsequent day, *Mr. Ingram* referred to two decisions of the Bombay High Court on the question of minority, which are mentioned in the Supplement to Thomson on Limitattion page 8.

PHEAR, J. (after taking time to consider)—Two principal questions have been raised in this case, namely:—

1*st*—Was Mrs. Watkins, at the time of making the notes, which are the subject of suit, in capable of binding herself or her property by reason of coverture?

2*nd*.—Was she at that time under the disqualification of infancy?

(1) 1 B. L. R., O. C., 10.
(2) 1 Wh. & Tu., L. C., 435.
(3) 3 De Gex., F. & J., 494; see 513.
(4) 3 My. & K., 209
(5) 3 L. R., Eq., 781.

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Now I may say shortly that, by the principles of English law, the power of a woman under coverture, *i. e.*, of a married woman to contract is limited to the extent to which she can be treated as a *feme sole*; and that, in a Court of Equity, she is treated as a *feme sole* so far as concerns dealings with her separate estate. In other words, a marrried woman, notwithstanding coverture, has power to contract in respect of her separate estate so as to bind that. Also a promise, whether verbal or written, to pay a debt out of her own property, is held to be a contract made in respect of her separate estate, if she has any; and a contract to pay money simply, if made by her in writing, is construed of itself to imply a promise by her to pay out of her own property. These are the conclusions which I draw from the elaborate judgments of V. C. Kindersley in *Vaughan* v, *Vanderstegen* (1), and of L. J. Turner in *Johnson* v. *Gallagher* (2), and one or two later decisions affirmative of these.

In the present case, the contracts sued on, excepting perhaps those for the repayment of Rs. 15 lent, are not only in writing, but were, I think, without doubt, accompanied by a verbal promise on the part of Mrs. Watkins to pay the money out of her own property. I must therefore for the reasons I have mentioned consider them to be contracts made by her in respect of her own property, and consequently the question before me changes itself to this; had Mrs. Watkins in fact separate estate at the dates of the contracts?

It is often a matter of much nicety in English Courts to determine, whether or not a married woman's property is endued with the character of separate estate. Inasmuch, however, as separate estate is in England entirely the creature of the Court of Equity, it is always an equitable estate in the woman as contra-distinguished from a legal estate; it is generally necessary to its existence that the legal estate should be outstanding in some one, who can be made a trustee for her, and it is therefore reached through the trustee. Thus it happens that, even though a married woman's contracts of a certain class can be enforced when she possesses separate estate, still she herself retains in a Court of Equity, as well as of Law, her immunity from personal liability.

(1) 2 Drew., 165. (2) 3 De Gex., F. & J., 494.

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It is beyond dispute that, previously to and up to the date of her marriage, Mrs. Watkins was entitled absolutely under the will of her father, and under the will of a Mr. Hare, to a considerable sum of money then in the hands of the Administrator-General. Before her marriage she was of course in fact a *feme sole* with regard to this property, and even after her marriage she would be treated by a Court of Equity as a *feme sole* with regard to it, provided that, either by the terms of the wills, or by a settlement, it had been put into the condition of separate estate during coverture. This admittedly was not the case: there was no settlement, and there are no terms in the wills (so far as they are known) which qualify the gifts. But that which constitutes the essence of a wife's eparate estate is, that by some effective disposition, the property has been reserved to her sole use, and her husband has been excluded from his common law marital rights over it. It is not always necessary that the machinery of trustees should be created by the act of disposition; for even if the legal right be allowed to pass by the operation of the common law to the husband, if the wife's equity is well limited, the Court will make the husband himself a trustee. And is not this reservation and exclusion precisely what has happened in this case, not by the force of the testator's words, nor by settlement *inter partes*, but by the operation of Act X of 1865? The 4th section of that Act runs thus:—"No person shall by "marriage acquire any interest in the property of the person "whom he or she marries, nor become incapable of doing "any act in respect of his or her own property which he or "she could have done if unmarried." Notwithstanding some vagueness as to the outside limits of the subjects of this section, I think it clear that Mr. and Mrs. Watkins and their property fall within its scope. They are both, as it seems to me, without doubt, domiciled in the British India of the Act; such property as they each have is locally situated here; and their marriage took place after the 1st January 1866. It follows then that Mr. Watkins did not by the marriage acquire any interest in his wife's property; the Act excluded him from such marital rights over it as he would otherwise have had; and Mrs. Watkins did not by the marriage become incapable of doing any act in

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respect of her own property, which she could have done if unmarried, that is, she remained, and consequently still is, in the position of a *feme sole* with regard to it.

It appears to me then, that although Mrs. Watkins' right to her property is such as in England would be classed as a legal right, and is not strictly speaking the equitable interest known as a married woman's separate estate, still she has, as the effect of Act X of 1865, at least as great a power over it solely and separately from her husband, as a married woman has in equity over her separate estate, and therefore her contracts with regard to it ought to be enforced upon the same principle as that which leads Courts of Equity to give effect to the contracts of married women in respect of their separate property.

Then comes the question, how is this result to be attained? *Marshall* v. *Rutton* (1) put it beyond all doubt, that by the Common Law of England, a married woman cannot contract, and therefore cannot be made personally liable in an action upon any alleged contract, express or implied. In equity, too, she can only make contracts in respect of her separate estate, and there is no instance in which the Court has passed a personal decree against her even for the enforcement of these. She, it is true, makes the contract, but (to use the language of Sir Thomas Plumer in *Francis* v. *Wigzell* (2),) "the decree has always been against the trustees or holders of the fund which constitutes her separate estate, making that liable to her debts and engagements;" and in *Aylett* v. *Ashton* (3), the Master of the Rolls held, on the authority of *Francis* v. *Wigzell* (2), that the Court had no jurisdiction to make a decree against a married woman for specific performance of a contract made by her in respect of her separate estate. He said that the rule was that "in all cases the Court must proceed *in rem* against the property." If, in the alteration of circumstances introduced by section 4 of Act X of 1865, this rule is still to prevail so far as to deprive this Court of the power to make any decree at all against a married woman, then it is clear that the Court

(1) 8 T. R., 545.
(2) 1 Madd., 258 at 262.
(3) 1 M. & Cr., 105.

cannot even proceed *in rem* against the property, for the married woman is herself the holder and owner of it. Thus, it would happen that a married woman's contracts would practically be without effect upon property, with regard to which the Legislature had made her a *feme sole*, and given her the fullest power of disposition, though they be such as would have been valid and effectual against any separate estate which the Court of Equity by its own authority alone had maintained for her. This seems to be rather a startling consequence of adherence to antiquated rules of English Common Law, after the necessity for them has passed away. The truth is that the doctrine of *Francis* v. *Wigzell* (1), and *Aylett* v. *Ashton* (2), is nothing other than the maxim "Equity follows the Law" in a particular shape. But this maxim is never allowed to bar a remedy which a principle of equity dictates. I am prepared therefore to hold that, if it is necessary, in order to reach the property which ought to be proceeded against, to make a decree against a married woman personally, such a decree must be made.

Then comes the question of infancy. Is the limit of minority for Mrs. Watkins 18 years or 21 years? It is admitted by both sides that Mrs. Watkins had just attained the age of 19 years when she made the contracts which are the subject of the suit, and therefore if the latter limit is to be taken, she was at that time a minor. If, on the contrary, the limit of minority is for her 18 years, then she was a major.

Now Act XL of 1858 by section 26 prescribes "that every person shall be held to be a minor, who has not attained the age of 18 years," and in a late case,—*Jadunath Mitter* v. *Bolyechand Dutt* (3), I felt obliged to hold that this Act extends to persons within the limit of the original civil jurisdiction of the High Court, as well as to those within the jurisdiction of the Civil Courts in the mofussil. In the same case I held, on the authority of the late Full Bench decision (4), and also upon my own view of the law, that this Act XL of 1858 made 18 years the limit of minority for all purposes of contract. Then the only question is

(1) 1 Madd., 262.
(2) 1 M. & Cr., 105.
(3) 7 B. L. R., 209.
(4) *Madhusudan Manji* v. *Debigobinda Neugi* 1 B. L. R., F. B., 49.

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whether this lady is personally exempted from the operation of this Act, and, for causes to be found outside the Act, had a *status* of minority lasting longer than 18 years. Now the only personal exemption to the operation of this Act, as far as I know, is that, such as it is, which is afforded by section 2 of the Act, and the words of this section are :—"Except in the case of proprietors of "estates paying revenue to Government who have been or shall "be taken under the protection of the Court of Wards, the care "of the persons of all minors (not being European British sub-"jects) and the charge of their property, shall be subject to the "jurisdiction of the Civil Courts." This section does apparently limit the area of persons to whom the Act is to apply so far as to exclude those who are European British subjects, but I am not aware that any other portion of the Act does so. Then, is this lady a European British subject ? In *Rollo* v. *Smith* (1), Mr. Justice Markby was of opinion, on the evidence before him, that the alleged minor was a European British subject, and on that ground he held that his age of majority would be 21, and not 18. By the finding of Mr, Justice Markby, the plaintiff was a person who did not fall under the operation of Act XL of 1858; and Mr. Justice Markby was further of opinion that the words of Act X of 1865 were not sufficient to alter the age of minority generally in respect of the power of making contracts, and that they only did so to the extent to which the Act itself expressly operated in regard to the administration of, and succession to, property. So that in the view taken by Mr. Justice Markby, neither Act XL of 1858, nor the Indian Succession Act applied to the case before him. It is not necessary for me now to consider how far Act X of 1865 does of it itself affect the period of minority. A very cursory inspection of its sections will show that it does affect it for all persons in a considerable number of cases, but I repeat it is not necessary that I should consider the point now, because it appears to me impossible to say on the evidence before me that Mrs. Watkins' father was a European British subject. I do not know where he came from, or anything about his family. The first fact that I know with regard to him is that he was born at sea; then, that he lived

(1) 1 B.L.R., O.C., 10.

the greater, at least the latter, portion of his life in Calcutta. Who his parents were, or whence they came, no one can say, I don't know even that the ship on board which he was born was a British ship. He was manifestly domiciled here. In short I find no ingredient whatever sufficient to give him the character of a European British subject. If he was not so, certainly Mrs. Watkins was not. Consequently in my judgment she is not exempted from the operation of Act XL of 1858, and the words of section 26 "every person shall be a minor who has not attained the age of 18 years" imply that on attaining that age, such person will cease to be a minor. Thus, whatever be the full effect of the Succession Act on minority, I must hold, after the decision of this Court in *Jadunath Mitter* v. *Bolyechand Dutt* (1), that Mrs. Watkins attained majority at the age of 18 years. I am not asked for a personal decree against Mrs. Watkins, and therefore I do not say whether a personal decree would go against a married woman. The decree which I give is based on the line of authorities laid down by the Courts of Equity in England, which justify me in directing that the amount of the debt be realized out of Mrs. Watkins' own property. The decree may be framed after the form of a decree against executors prescribed by Act VIII of 1859.

Judgment for the plaintiff

Attorneys for the plaintiff: Messrs. *Trotman* and *Co.*

Attorneys for the defendant, Mrs. Watkins: Messrs. *Carruthers* and *Dignam.*

(1) 7 B. L. R., 607.