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Limitations of Actions - Claim by Wife Against Husband

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27, 1937 wrote, "The agreement made contemporaneous with and as a part of the tire sale contract and without additional charge, is an agreement whereby the seller represents and warrants to the purchaser that the tires being sold to him are *so constructed and free from defects as to be able to withstand during the designated period* wear and tear or injuries caused by blowouts, cuts bruises or underinflation, same being the usual causes of tire trouble and that hence said agreement is merely a warranty that the tires being sold are constructed and free from defects, as aforesaid and not a contract of insurance." *The Weekly Underwriters Insurance Dept. Service* (1937) Oklahoma, p. 3.

After the decision in the instant case was handed down the Attorney General of Nebraska was also asked to rule on the road hazard guarantee and in an opinion dated August 30, 1938 he wrote in reviewing the decision, "While this decision is informative it in no manner would control the Nebraska department or court for the reason that its basis is a section of the Ohio Code. Under the Nebraska statutes and decisions the business of insurance is impressed with the public use and its regulation and supervision are authorized under the broad police power of the state for the purpose of protecting the buying public. The contracts considered in the opinion are warranties of merchandise either as to quality or as to the length of time which they will serve the purpose for which they were intended. Nothing is contained in the Insurance Code or in the General Statutes which will warrant this Department in taking supervision over purely commercial transactions in which certain warranties are made for the purpose of inducing sales." *The Weekly Underwriters Insurance Department Service* (1938) Nebraska, p. 11.

CHARLES D. O'BRIEN.

Limitation of Actions—Claim by Wife Against Husband.—The defendants, husband and wife, were married in 1916. The wife's father gave her $1,200 in cash as a wedding gift which she loaned to her husband who agreed to pay it back with interest. During the same year, the defendants began farming using the $1,200 borrowed by the husband from the wife as part of the capital. The defendants continued farming, and in 1930 the husband transferred all his property to his father.

In March, 1936, the father conveyed to the husband certain livestock and machinery and a one-half interest in other livestock and machinery. In May, 1936, the defendant-husband conveyed the property to the defendant-wife in consideration of the $1,200 debt, which at that time with interest amounted to $2,150, and the assumption by the wife of certain other debts owing by the husband.

An action was begun in 1937 by three judgment-creditors of the defendant-husband to set aside the conveyance given by him to the defendant-wife. The trial court set aside the conveyance, and the defendants appealed.

On appeal, *held,* judgment reversed and a new trial granted. The trial court may have been of the view that the loan having been made by the defendant-wife in 1916, and no precise time having been agreed upon for repayment, it was payable on demand, and therefore action upon the loan was barred by the statute of limitations, and for that reason the debt was extinguished. In Wisconsin, however, the statute of limitations does not run against a claim by a wife against her husband. *Campbell* v. *Mickelson,* 227 Wis. 429, 279 N.W. 73 (1938).

The rule that the statute of limitations does not run against a claim of a wife against her husband was judicially declared in 1891 by the Supreme Court

of Wisconsin in *Second National Bank* v. *Merrill,* 81 Wis. 151, 50 N.W. 505, 29 Am. St. Rep. 877 (1891). In this case, prior to their marriage, the husband had given to the wife his promissory note for a debt he owed her. After their marriage, the wife destroyed the note, and sufficient time had elapsed to outlaw the debt under the statute of limitations. The court held that statutes of limitation do not run against a married woman as between her and her husband, and, therefore, a present transfer to her of other promissory notes in part payment of the antenuptial debt was valid.

The court based its holding upon considerations of public policy stating that a wife ought not to treat her husband as a stranger relative to a debt, and that any other policy would foster domestic disagreement and discord. The rule in question was subsequently followed in the case of *Fawcett* v. *Fawcett,* 85 Wis. 332, 55 N.W. 405, 39 Am. St. Rep. 844 (1893).

In the case of *Brader* v. *Brader,* 110 Wis. 423, 85 N.W. 681 (1901), the plaintiff-widow in 1899, shortly after the death of her husband, sued his executor for money received by the husband in 1872 from the plaintiff's separate estate. The court followed the *Merrill* and *Fawcett* cases, *supra,* and held that action was not barred by the statute of limitations.

In the *Brader* case, *supra,* the Supreme Court of Wisconsin recognized that the statute itself created no exception for a wife, and declared that if such exception was to be made the policy choice could properly be made only by the legislature and not by the courts. The court stated that if the question were an original proposition before it that the contrary rule would be adopted. However, since the rule had been laid down in the *Merrill* case, *supra,* despite the fact that the court expressly disagreed with the reason advanced for the rule, the court felt constrained to follow the established rule indicating that the legislature could change the rule in the light of its own wisdom.

The *Brader* case, *supra,* was followed in turn by *Gudden* v. *Gudden's Estate,* 113 Wis. 297, 89 N.W. 111 (1902) which held that the statutes of limitation do not run against a wife as between herself and her husband so as to bar her claim against his estate for money loaned to him.

The application of the rule is further illustrated in the case of *Flanagan's Estate* v. *Flanagan's Estate,* 169 Wis. 537, 173 N.W. 297 (1919). A mortgagee-father gave a note and mortgage before maturity to his daughter, the wife of the mortgagor. The note and mortgage, in the sum of $3,000 exclusive of interest, were executed in 1878. The widow brought an action on the instruments against the husband's estate and also on a $1,000 loan made to the husband some nineteen years previously. The widow died while the actions were pending, and they were continued by her executrix.

The trial court refused to hold the action barred by the statute of limitations on the theory that the widow had become merely subrogated to the rights of her father and since he would be unable to recover, the debt was likewise barred as against the wife. On appeal, the court held that the wife became her husband's creditor as though she had purchased the mortgage and note, and in Wisconsin the statute of limitations never runs against a claim by the wife against the husband.

An exception to the rule followed in the above cases is noted in the case of *Charmley* v. *Charmley,* 125 Wis. 297, 103 N.W. 1106 (1905) which holds that where a wife becomes subrogated to a claim held by a third party against her husband after the statute of limitations has commenced to run against the claim, the statute continues to run on the claim against the wife and recovery

will be barred thereon between the husband and wife at the end of the period of limitation.

The *Charmley* case, *supra,* is distinguished upon the essential fact that the wife became the owner of the husband's debt *after* it became due, and, therefore, the statute of limitations which had begun to run as against a third party continued to run as against the wife, and the rule in the *Merrill* case did not apply. In the *Flanagan* and the *Brader* cases, *supra,* the wife became the owner of the husband's debt *before* it became due, and thus under the rule announced in the *Merrill* case, *supra,* the statute of limitations never became operative.

In considering the cases in jurisdictions outside of Wisconsin, care must be exercised to determine if a similar statute was involved, or whether the case was decided in a jurisdiction where the common law rules relative to coverture apply, namely, the legal inability of a wife to sue her husband. While the latter cases reach a similar result as in the *Merrill* case, *supra,* for the period of coverture, they are to be distinguished from the Wisconsin decisions which are based upon a judicial exception to a statute.

Generally speaking, the following cases may be said to be in accord with the Wisconsin rule: *Schofield* v. *Schofield,* 124 Pa. Super. 469, 189 Atl. 572 (1937); *Morrish* v. *Morrish,* 262 Pa. 192, 105 Atl. 83 (1918); *Ekker* v. *Ekker* (La. App. 1936) 169 So. 815; *Bartholomew* v. *Bartholomew* (Tex. Civ. App. 1924) 264 S.W. 721; *Stockwell* v. *Stockwell Estate,* 92 Vt. 489, 105 Atl. 30 (1918); *Holt* v. *Holt,* 96 W.Va. 337, 123 S.E. 53 (1924); *Hamby* v. *Brooks,* 86 Ark. 448, 111 S.W. 277 (1908); *Barnett* v. *Harsbarger,* 105 Ind. 410, 5 N.E. 718 (1886). A case directly in point with the principal case and decided in the same year is *Cary* v. *Cary* (Ore. 1938) 80 P. (2d) 886.

Cases which generally speaking hold to the contrary are: *Wagner* v. *Mutual Life Insurance Co. of New York,* 88 Conn. 536, 91 Atl. 1012 (1914) which holds that where a wife loaned money to her husband from her sole and separate estate, the statute of limitations ran against the loan as in the case of a transaction between strangers; *Graves* v. *Howard,* 159 N.C. 594, 75 S.E. 998, Ann. Cas. 1914 C, 565 (1912); *Wyatt* v. *Wyatt,* 81 Miss. 219, 32 So. 317 (1902); *Gray* v. *Gray,* 13 Neb. 453, 14 N.W. 390 (1882); *Bromwell* v. *Schubert,* 139 Ill. 424, 28 N.E. 1057 (1891); *Muus* v. *Muus,* 29 Minn. 115, 12 N.W. 343 (1882). A case directly contrary to the principal case is *In re Deaner's Estate,* 126 Iowa 701, 102 N.W. 825, 106 Am. St. Rep. 374 (1905). In *Bennett* v. *Finnegan,* 72 N.J.Eq. 155, 65 Atl. 239 (1916), the rule was applied in favor of the husband in a suit brought by him against his wife.

The rule of law in question, vitally affecting real estate and financial transactions between husbands and wives, is an example of judicial legislation. If it should be deemed advisable to modify the law, the change will have to be made by the legislature, for the Supreme Court of Wisconsin regards the principle as a rule of property from which it should not depart.

WILLIAM EDWARD TAAY.

Pledges—Mortgage Assigned As Security Makes Assignee a Pledgee.—The defendants Hodgson, a mortgage broker, invested money for the plaintiff Burroughs over a period of years. In 1930 he bought a $5,000.00 mortgage on certain property near Salisbury, Maryland. In a letter which he wrote to the plaintiff describing the mortgage, he stated that he thought it was a good investment and would guarantee the principal and interest "under any and all circumstances." The mortgage became due. The plaintiff foreclosed and sold the mort-