FREDERICK DE S. CONGER (PLAINTIFF) ..... } APPELLANT;

AND

GEORGE ALLAN KENNEDY (DEFENDANT) ..... } RESPONDENT.

1896

*May 18.

*June 6.

ON APPEAL FROM THE SUPREME COURT OF THE NORTH-WEST TERRITORIES.

Constitutional law—Marital rights—Married woman—Separate estate—Jurisdiction of North-west Territorial Legislature—Statute—Interpretation of—40 V. c. 7 s. 3 and amendments—R. S. C. c. 50—N.W. Ter. Ord. no. 16 of 1889.

The provisions of ordinance no. 16 of 1889, respecting the personal property of married women, are *intra vires* of the legislature of the North-west Territories of Canada, as being legislation within the definition of property and civil rights, a subject upon which the Lieutenant-Governor in Council was authorized to legislate by the order of the Governor General in Council passed under the provisions of "The North-west Territories Act."

The provisions of said ordinance no. 16 are not inconsistent with sections 36 to 40 inclusively of "The North-west Territories Act," which exempt from liability for her husband's debts the personal earnings and business profits of a married woman.

The words "her personal property" used in the said ordinance no. 16 are unconfined by any context, and must be interpreted not as having reference only to the "personal earnings" mentioned in sec. 36, but to all the personal property belonging to a woman, married subsequently to the ordinance, as well as to all the personal property acquired since then by women married before it was enacted. *Brittlebank* v. *Gray-Jones* (5 Man. L. R. 33) distinguished.

APPEAL from the decision of the Supreme Court of the North-west Territories, affirming the judgment of the trial judge who dismissed the plaintiff's action with costs.

---

*PRESENT:—Sir Henry Strong C.J. and Taschereau, Sedgewick, King and Girouard JJ.

1896

CONGER v. KENNEDY.

A statement of the facts and questions at issue in this case will be found in the judgment of the court pronounced by his Lordship the Chief Justice.

Hogg Q.C. for the appellant. The legislature of the North-west Territories was, by order in council passed under the provisions of the 13th section of "The North-west Territories Act," properly vested with the power to enact their ordinance no. 16 of 1889, and that ordinance was from the date of its assent (22nd November, 1889) the law applicable to the personal property of married women in the territories. The provisions of the ordinance are not repugnant to R. S. C. ch. 50, secs. 36 to 40 but entirely consistent therewith, being merely an enlargement of its application.

These provisions were not in force when *Brittlebank* v. *Gray-Jones* (1) was decided. The *primâ facie* meaning of the ordinance must be adhered to; *Kraemer* v. *Gless* (2); and as the legislation is remedial it must be liberally construed. Wilberforce on Statute Law (3); Hardcastle on Statutes (4). The ordinance is not restricted and has application to all the property of a married woman, married during the time it remained in force.

Armour Q.C. for the respondent. The property in question passed to the husband upon marriage, when he became liable for the debts of the wife and was by the common law vested with the ownership and possession of her property. The Dominion statute alters the common law and must be strictly interpreted; so also should the ordinance in any effect it may have.

"The North-west Territories Act" restricts the classes of property which may be held by married women as separate estate. The ordinance is limited by all the words after the words *feme sole* and deals with procedure only, the former words of the clause being intro-

(1) 5 Man. L. R. 33.
(2) 10 U. C. C. P. 470.
(3) P. 235.
(4) 2 ed. p. 71.

ductory only and having reference to the classes mentioned in the Dominion Act as capable of being held as separate estate. The absence of any intention that this ordinance should enlarge the married woman's rights as defined by the Dominion statute is shown by the repeal of the ordinance and the further provisions made by ordinance no. 20 of 1890 at the next session of the legislature. Any other interpretation would be incompatible with "The North-west Territories Act" and the provisions of 54 & 55 Vic. (D.), ch. 22, s. 6. These facts show that Parliament did not intend to give the North-west Legislature free scope in respect to married women's property for they both legislate directly upon that subject. *Lawson* v. *Laidlaw* (1); *Howard* v. *The Bank of England* (2); *In re March* (3); *In re Jupp* (4); *Brittlebank* v. *Gray-Jones* (5).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—This is an appeal from an order of the Supreme Court of the North-west Territories, affirming the judgment of Mr. Justice Rouleau who dismissed the appellant's action.

On the 11th of December, 1889, at Napanee, in the province of Ontario, William Cox Allan was married to Janet C. Conger, then a widow. At the time of the marriage William Cox Allan was domiciled in the North-west Territories, having his residence at Macleod, in those territories. On or about the 9th of January, 1890, Dr. and Mrs. Allan went to Macleod and continued to reside there as man and wife up to the month of October, 1890, when Mrs. Allan left the territories and never afterwards returned there during her husband's lifetime. Dr. Allan died on the 30th of November, 1893, intestate, and the defendant was duly

(1) 3 Ont. App. R. 77.
(2) L. R. 19 Eq. 295.
(3) 27 Ch. D. 166.
(4) 39 Ch. D. 148.
(5) 5 Man. L. R. 33.

1896

CONGER v. KENNEDY.

The Chief Justice.

appointed to be his administrator and now represents his estate.

At the time of the marriage Mrs. Conger owned a quantity of furniture, household stuff and goods, specifically described in the statement of claim. These goods were then stored in the city of New York, but were soon afterwards removed to Macleod, which place they reached about the 19th of January, 1890, when they were immediately placed in Dr. Allan's house where they remained up to the time of his death. They were then taken possession of by the respondent, in whose possession they have since remained. On the 17th November, 1892, prior to the death of Dr. Allan, Mrs. Allan executed a bill of sale whereby she assigned and conveyed the goods in question to her son, the present appellant. The respondent having refused to deliver up the goods, insisting that they belonged to the estate of Dr. Allan, the present action was brought to compel the specific delivery up of the property, or in default for damages. The respondent in his statement of defence claims the goods as belonging to the estate of his intestate. The action was tried before Mr. Justice Rouleau who dismissed it with costs, and this judgment, on an appeal to the Supreme Court in *banc*, was upheld, Mr. Justice Wetmore dissenting from this decision.

There is no question of fact in dispute between the parties. It is conceded that Dr. Allan was at the date of the marriage domiciled in the territories. The respondent's proposition that the law of the territories as it stood at the time of the marriage must govern as to the marital rights of the husband in the personal property then belonging to the wife is not controverted by the appellant.

The questions we have to decide are then limited to two. First, had the territorial legislature power

to enact the territorial ordinance no. 16, of 1889, passed on the 22nd November, 1889? Secondly, if the ordinance referred to was *intra vires* of the assembly, what is its proper legal construction?

By the North-west Territories Act (Revised Statutes of Canada, ch. 50, sec. 13) it was enacted that:

The Lieutenant-Governor in Council shall have such powers to make ordinances for the government of the North-west Territories as the Governor in Council from time to time confers upon him; but such powers shall not, at any time, be in excess of those conferred by the ninety-second and ninety-third sections of "The British North America Act, 1867," upon the legislatures of the several provinces of Canada:

2. No such ordinance shall be so made which is inconsistent with or alters or repeals any provision of any Act of the Parliament of Canada in force in the territories.

By an order of the Governor General in Council dated the 11th day of May, 1877, it was ordained that the Lieutenant-Governor of the North-west Territories in Council should be, and he was thereby, empowered to make ordinances in relation to certain enumerated subjects, and amongst others upon "Property and civil rights in the territories, subject to any legislation by the Parliament of Canada upon these subjects."

By section 36 of the North-west Territories Act, Parliament enacted that:

All the wages and personal earnings of a married woman, and any acquisitions therefrom, and all proceeds or profits from any occupation or trade which she carries on separately from her husband, or derived from any literary, artistic, or scientific skill, and all investments of such wages, earnings, moneys or property, shall be free from the debts or dispositions of the husband, and shall be held and enjoyed by such married woman, and disposed of without her husband's consent, as fully as if she were a *feme sole*, and no order for protection shall be necessary in respect of any such earnings or acquisitions; and the possession, whether actual or constructive, of the husband, of any personal property of any married woman shall not render the same liable for his debts.

This provision is followed by others which may be read as subsidiary to it contained in the sections from 37 to 40, inclusive.

1896

CONGER v. KENNEDY.

The Chief Justice.

The legislative powers of the Lieutenant-Governor in Council having, pursuant to section 24 of the Act, become vested in the Legislative Assembly of the Territories, that legislature passed the ordinance now in question, being no. 16 of 1889, and thereby enacted that:

> A married woman shall, in respect of her personal property, have all the rights and be subject to all the liabilities of a *feme sole*, and may alienate, and by will or otherwise deal with, personal property as if she were unmarried.

And this was declared to be subject to the proviso that it should have no retroactive effect.

This ordinance was assented to by the Lieutenant-Governor, and came into force on the 22nd November, 1889, and was therefore the law which was applicable to the personal property of Mrs. Conger at the date of her marriage on the 11th of December, 1889.

We are of opinion that this ordinance was entirely within the competence of the territorial legislature. It was legislation on a matter coming within the definition of property and civil rights, a subject which, by the order in council of the 11th of May, 1877, the Lieutenant-Governor in Council was authorized to legislate upon, and which consequently was within the jurisdiction of the assembly.

Then, the only other ground upon which an objection to the constitutional validity of the legislation can be rested is, that it is inconsistent with the provisions of the North-west Territories Act relating to the personal property of married women, contained in sections 36 to 40 (inclusive).

The answer to this contention is well put by Mr. Justice Maguire at the end of his judgment. It is plain that the ordinance, if it is to be interpreted as the appellant contends, is in no way repugnant to the legislation of Parliament contained in the Territories Act. At the most it merely enlarges the scope of a

married woman's rights over her personal property, by making all such property separate property, and giving her in respect of it the rights of a *feme sole*, thus applying to all her personal property the same rights of enjoyment and disposition which Parliament had, by section 36 of the Territories Act, conferred in respect of the particular species of property—her own earnings—specified in that section. It is enough to say that this was perfectly consistent with the Act of Parliament, and cannot by any ingenuity of argument be shown to be *ultra vires* of the legislature.

The real question to be here determined is the interpretation of ordinance no. 16.

In the case of *Brittlebank* v. *Gray-Jones* (1), the Court of Queen's Bench of Manitoba (then the court of appeal from the courts of the North-west Territories) held that section 36 of the Territories Act was restricted in its application to the earnings of a married woman, and did not extend to her general personal property. I entirely concur in this decision, which, however, appears to me to leave the question raised by this appeal untouched, if indeed it does not rather assist us in arriving at the conclusion which the appellant seeks to establish.

The argument of the respondent is that we must subordinate the ordinance to the Act of Parliament, by construing the words "her personal property," the primary meaning of which is "all her personal property," as meaning the particular species of personal property mentioned in section 36 of the Act; namely, the "earnings of a married woman." One objection to such a construction, and by itself a fatal objection, would be that by doing this we should be treating the Act of the legislature dealing with a subject within its competence as entirely ineffectual. If we say that

(1) 5 Man. L. R. 33.

1896

CONGER v. KENNEDY.

The Chief Justice.

there was no enlargement as regards the kind of personal property to which the ordinance refers, but that we are to treat the words "personal property" as used in the same restrictive sense as in the Act of Parliament, then it must have been entirely inoperative, for the powers of disposition of such property conferred by the ordinance would not be more comprehensive than those given by the Act. The ordinance would therefore be useless and the law would remain just as it was before its enactment. In the construction of statutes it is a well established rule, especially as regards beneficial statutes, that the legislature must, so far as is consistent with the language of the Act, be presumed to have intended some alteration in the law, and not a mere repetition of the previous law as to which no doubt or question had been raised.

Then, the words "her personal property" unconfined by any context, must be interpreted as having reference to all the personal property belonging to a married woman, married subsequently to the Act, as well as to all the personal property acquired since the Act by women married before the Act. This is the plain *primâ facie* meaning of the words in question taken in their ordinary sense, from which we have no authority to depart.

If a testator, under the law as it existed prior to any legislation respecting the property of married women, had bequeathed personal property to a married woman with a declaration in the terms of the ordinance that in respect of it she should have all the rights and be subject to all the liabilities of a *feme sole*, and might alienate it and deal with it by will or otherwise as if she were unmarried, there could be no possible doubt but that a court of equity construing such a bequest would hold that the legatee would have, in respect of the subject of the legacy, all the powers of enjoyment

and disposition which a single woman would have to the total exclusion of the husband's common law rights. Authorities innumerable establish this. Then I fail to see any reason why a different construction should be placed upon the language of the legislature. What are included in the words "all the rights" of a *feme sole* as applied to personal property? Clearly they include the rights not only of separate disposition but also of separate enjoyment, and these were the rights which the legislature must be deemed to have intended to confer, not as relating to a particular kind of personal property but in respect of all personal property, unless on some speculative reasoning we are to assume they did not mean what they have said.

Had there been any ambiguity in the language in which the ordinance is expressed so as to leave it open to two alternative constructions, then the rule that innovations on the common law relating to property are to be construed strictly would have applied, but where the language is clear and unambiguous, as here, that principle of construction cannot be applied.

On the whole I am of opinion that the construction adopted by the court below cannot be sustained.

The appeal must be allowed and the judgment of Mr. Justice Rouleau must be reversed and vacated, and for it there must be substituted a judgment declaring the appellant's right to have a specific delivery of the goods and chattels in the statement of claim specified, and directing such delivery with a reference as to damages in respect of any such goods not delivered. The respondent must pay the appellant's costs here and in both the courts below.

Appeal allowed with costs.

Solicitors for the appellant: *Harris & Burne.*

Solicitors for the respondent: *Haultain & McKenzie.*