

in as full and ample a manner as if she were sole and unmarried, and to make it more emphatic, has added, *any law, usage, or custom, to the contrary notwithstanding.*"

The mental and moral capacity of the wife were never questioned, for she was allowed to perform many acts requiring ability, discretion, or act as agent and attorney for another in all matters of business requiring skill and judgment, as well where it was in the business of another as where it was in her own business, as in dealing with property settled to her separate use. She could perform a condition without the concurrence of her husband, as to convey an estate to J. S., which was devised to her on condition of so conveying; and she could make a will of her personality with her husband's consent. She could also make a will as executrix against his consent, and she had absolute power to act as a *feme sole* during the exile or transportation of her husband.

Before her marriage she could fill a great variety of offices: see *The King v. Stubbs*, 2 T. R. 395-397, and *Co. Lit.* 326. The legal fiction was that "Her separate existence is not contemplated; it is merged by the coverture in that of her husband; and she is no more recognised than is the *cestui que trust* or the mortgagor, the legal estate, which is the only estate the law recognises, being in others,"—Per Lord Brougham, C., in *Murray v. Barlee*, 3 M. & K. 220.

It was to establish her individual entity, and to attach those rights to it in law which she was in fact capable of exercising, that led to the interference of the legislature. It is our duty to give effect to a statute which was so manifestly intended to have been the Married Women's Bill of Rights.

I am of opinion the personal separate estate is at the complete disposal of the wife in this country, as it is at her disposal in the courts of equity in England.

And I am of opinion that a wife may contract in respect of her real as well as of her personal separate estate, although she cannot, by any direct act of her own, charge or dispose of it without the consent of her husband.

The effect of such a contract will be to bind her present or future separate personal property, and I am not satisfied it will not bind her real property also. It may bind her real property, firstly, because the Imperial Act 5 Geo. II. ch. 7, makes real estate liable as goods and chattels for debts, and by the like process; and, secondly, because the restrictive clauses in ch. 85, sec. 15, and in ch. 73, sec. 4, apply only to conveyances and acts of the wife, and not to judgments recovered adversely to or in good faith against her. Her position in this respect may be likened to that of a tenant for years who is restrained from alienating. The provision applies only to the acts of the tenant, and not to those transfers which take effect by operation of law, as by bankruptcy or sale on execution.

The giving of a warrant of attorney for the *bona fide* purpose of a judgment being entered up against the debtor and his property seized, was held to be no breach of his covenant as lessee not to encumber or charge the property demised or the term granted, even under the 1 & 2 Vic. ch. 110, sec. 13, which was similar in its effect to the Consol. Stat. U. C., ch. 89, secs.

48, 49, while these provisions were in force, so long as it was not given with the object of evading the restriction: *Croft v. Lumley*, 4 Jur. N. S. 903 H. L., 6 H. L. Cas. 672; *Doe dem Mitchinson v. Carter*, 8 T. R. 57, 300.

I am not able to adopt the judgment of the court in *Kraemer v. Glees*. It appears to me, and I need not say that I express and mean to express myself with all respect for the very learned and able judges who concurred in that judgment, that it is a judgment opposed to the object and principle of the statute; and as it is the only decision upon the act, and the act introduces a branch of law to which we have not before been accustomed, I think I am warranted by the course taken in many other cases under similar circumstances, when I entertain a very strong opinion myself, to deliver that opinion, although it differs from a previous decision.

It is only in peculiar instances this should be done, for the general rule is undoubtedly to follow an adjudicated case by a court of equal authority; but I consider this to be a peculiar case, and to justify me in following precedents applicable under the like circumstances.

In my opinion judgment should be given for the defendants, because the husband should not have been joined as a defendant; but on the general question my opinion is in favour of the plaintiff.

Judgment for defendants.

COMMON PLEAS.

(Reported by S. J. VAN KOUGHNET, Esq., Barrister-at-Law, Reporter to the Court.)

CORPORATION OF THE TOWN OF ST. CATHARINES V. GARDNER.

Road Co.—Portion of road running through town—Obligation to repair.

Plaintiffs, a joint stock road company, were in operation, in possession of their road and in receipt of tolls several years before the incorporation of the town of Clifton, within which portion of the road in question lay: *Held*, following *Regina v. Brown and Street*, 13 C. P. 356, that plaintiffs were still entitled to collect the tolls within the limits of the town of Clifton, notwithstanding the incorporation of that town and the erection of some of plaintiffs' toll gates within the limits of such town. [20 U. C. C. P. 107.]

Action for breaking down plaintiffs' toll gates and toll houses.

After the issue of the writ, by consent and order of a judge in Chambers, pursuant to sec. 154 Con. Stat. U. C. ch. 22, a case was stated for the opinion of this court.

The following were the facts agreed upon between the parties:

Plaintiffs were a joint stock company, under 12 Vic. ch. 84, and 14 & 15 Vic. cap. 122, consolidated by 16 Vic. ch. 190, and also by ch. 49 of Con. Stat. U. C. and constructed their road from the Suspension Bridge to Table Rock, Niagara Falls. The town of Clifton was incorporated, in 1856, by 19 Vic. ch. 63, after the construction of said road, and plaintiffs erected toll gates and collected tolls before, and continued to do so after, the incorporation of the said town and until defendant destroyed said toll gates.

The place where the gates were erected and the road from Suspension Bridge to Niagara Falls were within the limits of the town of Clifton.