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O'Connor J.

tinued unlawful occupation of land which is a trespass only by fiction of law.

For these reasons I am of opinion that the judgment of the Supreme Court was right, and the appeal should be dismissed.

*Appeal dismissed with costs.*

Solicitor, for the appellant, *J. W. Maund* for *J. A. Nathan.*

Solicitors, for the respondents, *Minter, Simpson & Co.*

C. A. W.

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[HIGH COURT OF AUSTRALIA.]

FORSTER . . . . . APPELLANT;

AND

SHACKELL AND ANOTHER . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *March* 29, 31.

Griffith C.J., Barton and O'Connor JJ.

*Married Women's Property Act* 1890 (*Vict.*) (*No.* 1116), *secs.* 4 (5), 22—*Insolvency Act* 1897 (*Vict.*) (*No.* 1513), *sec.* 119—*Insolvency of married woman—Whether her property subject to restraint on anticipation vests in her trustee in insolvency.*

The effect of sec. 119 of the *Insolvency Act* 1897 (Vict.) is that, so far as her property is concerned, a married woman is in the same position as she was before the Act, but, so far as she is personally concerned, she is subject to all the provisions of that Act as if she were a *feme sole.*

Therefore, under sec. 22 of the *Married Women's Property Act* 1890, property of a married woman, which she is restrained from anticipating, does not, on her insolvency, form part of her estate divisible among her creditors, notwithstanding sec. 119 of the *Insolvency Act* 1897.

Decision of the Full Court (*In re Forster*, [1906] V.L.R., 182; 27 A.L.T., 129), reversed.

APPEAL from the Supreme Court of Victoria.

The estate of Annie Forster, a married woman, was compulsorily sequestrated on 24th August, 1905, and Edward Herbert Shackell was appointed trustee thereof. By the last will of Donald McRae, deceased, father of Mrs. Forster, all his property, subject to certain bequests and annuities, was given to trustees in trust for all his children who, being sons, should attain twenty-one, or, being daughters, should attain that age or marry. As to the share of each daughter it was directed that the trustee should pay her the income of such share for her separate use independent of any husband, but so that she should not have power to deprive herself thereof by sale, mortgage, charge, or otherwise, by way of anticipation. An application was made by the trustee of Mrs. Forster's estate for a declaration that she was entitled to receive from Duncan McGregor, the trustee of the will of Donald McRae, all money coming to Mrs. Forster under such will, and for an order for the payment of all such moneys to the trustee on the ground that such money formed part of the estate of Mrs. Forster. Alternatively, the trustee asked for a declaration that, as and when they should become due and payable by the trustee of the said will to Mrs. Forster, such moneys would constitute property of Mrs. Forster to which she would become entitled after the sequestration of her estate and before she would have received her certificate, within the meaning of the Insolvency Acts, and, consequentially upon such declaration, an order directing the trustee of the will, as and when such moneys should become due and payable to Mrs. Forster, to pay them to the trustee.

The Judge of the Court of Insolvency made an order which so far as is material was as follows:—"This Court doth declare that the said Edward Herbert Shackell as such trustee as aforesaid is entitled to receive from the said Duncan McGregor as such trustee as aforesaid all moneys coming to the said insolvent under the said will as and when the same become due and payable. And this Court doth order that the said Duncan McGregor as such trustee as aforesaid do pay such moneys to the said Edward Herbert Shackell as such trustee as aforesaid as and when the same become due and payable."

From this order Mrs. Forster appealed to the Full Court, which dismissed the appeal: *In re Forster* (1).

(1) (1906) V.L.R., 182; 27 A.L.T., 129.

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Mrs. Forster now appealed to the High Court.

*Mitchell* K.C. (with him *Hayes*), for the appellant. Before the *Insolvency Act* 1897, the separate property of a married woman which she was restrained from anticipating was protected from her creditors by sec. 22 of the *Married Women's Property Act* 1890. Sec. 119 of the former Act was not intended to over-ride sec. 22 of the latter Act. Its object was to get rid of doubts which might arise under sec. 4 (5) of the *Married Women's Property Act* 1890 as to what was the separate property of a married woman, as to what powers the trustee had over a married woman, or as to the application of the penal provisions of the insolvency law to a married woman. A limited construction should be put on sec. 119 because sec. 22 of the *Married Women's Property Act* 1890 is not specifically repealed, and because, if the section is not limited, the trustee would get rights over property which the married woman herself had not. A provision in a general Act will not be read as over-riding a provision in a special Act: *In re Smith's Estate* (1); *Maxwell on Statutes*, 4th ed., p. 266. As to the effect of a restraint on anticipation, see *Bateman* v. *Faber* (2); *Brown* v. *Dimbleby* (3); *In re Wheeler's Settlement Trusts* (4); *Oxford* v. *Reid* (5). [They also referred to *O'Keefe* v. *O'Donoghue* (6); *In re Hannah Lynes* (7).]

*Goldsmith* and *Starke*, for the respondent Shackell. The object of a restraint on anticipation is, not to prevent a woman's creditors getting paid, but to prevent her husband getting her property: *Hood Barrs* v. *Heriot* (8). The position of a woman has so changed in late years that there is no reason why the legislature should not alter the law so as to make her property, which she is restrained from anticipating, assets for the payment of her creditors. A married woman's property is none the less hers because it is her separate property. A married woman was first made liable to the insolvency laws by the *Married Women's Property Act* 1870 (No. 384) sec. 21, and under that section it was

(1) 35 Ch. D., 589.
(2) (1898) 1 Ch., 144.
(3) (1904) 1 K.B., 28.
(4) (1899) 2 Ch., 717.
(5) 22 Q.B.D., 548.
(6) 21 V.L.R., 528.
(7) (1893) 2 Q.B., 113.
(8) (1896) A.C., 174.

held in *Noyes* v. *Glassford* (1) that a restraint on anticipation was uneffectual to protect property the subject of the restraint from a married woman's creditors. Then in the *Married Women's Property Act Amendment Act* 1882 (No. 736) was enacted sec. 6, which is substantially the same as sec. 22 of the Act of 1890. The plain effect of sec. 119 of the *Insolvency Act* 1897 is to place the law in the same state as it was when *Noyes* v. *Glassford* (1) was decided. There is no public policy as to married women to which this interpretation is opposed. The effect is to substitute sec. 119 for sec. 4 (5) of the *Married Women's Property Act* 1890, and to proceed on the different basis of treating a married woman in the same way as if she were unmarried. [They also referred to *Married Women's Property Act* 1884 (No. 1828); *Bankruptcy Act* 1883 (England) (46 & 47 Vict., c. 52) sec. 152.]

*Winnecke* for the respondent Duncan McGregor.

*Mitchell* K.C. in reply. Sec. 119 of the *Insolvency Act* 1897 is merely an addition to the words of sec. 4 (5) of the *Married Women's Property Act* 1890, and together take the place of sec. 21 of the *Married Women's Property Act* 1870. That being so, they together must be read with sec. 22 of the *Married Women's Property Act* 1890.

*Cur. adv. vult.*

The judgment of the Court was delivered by

GRIFFITH C.J. This is an appeal from the decision of the Full Court dismissing an appeal from the Court of Insolvency at Melbourne. The appellant is a married woman and an insolvent. She is entitled under the will of Donald McRae to certain property for her separate use with a restraint on anticipation. A motion was made in the Court of Insolvency by the trustee of her insolvent estate for a declaration that as such trustee he was entitled to receive from the trustee of the will of Donald McRae all moneys coming to the insolvent under such will, or for an order for the payment of all such moneys to him as trustee of the insolvent estate, on the ground that such moneys formed part of

(1) 3 V.L.R. (L.), 77.

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the estate of the insolvent. Alternatively, the trustee asked for a declaration that, as and when they should become due and payable by the trustee of the will to the insolvent, such moneys would constitute the property of the insolvent to which she would become entitled after the sequestration of her estate and before she would have received her certificate, within the meaning of the Insolvency Acts, and, consequentially upon such declaration, an order directing the trustee of the will, as and when such moneys should become due and payable to the insolvent, to pay them to the trustee in insolvency. The Judge of the Court of Insolvency made an order in the first alternative. An appeal to the Supreme Court from that order was dismissed. The Court thought that the question depended entirely upon sec. 119 of the *Insolvency Act* 1897, which provides that:—"Every married woman shall be subject to all the provisions of and entitled to the benefits given by the Insolvency Acts in the same way as if she were a *feme sole*." Counsel for the appellant contended that her rights were not to be determined by sec. 119 alone, but that the Court must have regard also to the provisions of the *Married Women's Property Act* 1890, by virtue of which alone a married woman could have property. Sec. 4 (1) of the latter Act provides that:—"A married woman shall in accordance with the provisions of this Act be capable of acquiring holding and disposing by will or otherwise of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee." Sec. 22 provides that:—"Nothing in this Act contained shall . . . . interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement agreement for a settlement will or other instrument." So that whatever rights a married woman has under sec. 4 (1) are controlled by sec. 22, and she has none except subject to the provisions of that section. The learned Judges of the Supreme Court, however, thought that the general effect of sec. 119 of the *Insolvency Act* 1897 could not be cut down by any reference to the *Married Women's Property Act* 1890. As reported to us, *Madden* C.J. said that to read the words "every

married woman" in sec. 119 in a limited sense so as to make sec. 22 of the latter Act operative to restrict the generality of sec. 119 would be against every rule of construction. The rules which the learned Chief Justice had in mind are not mentioned, but the only relevant rule which occurs to me is *generalia specialibus non derogant.* Certainly the construction we are asked by the appellant to adopt is not against that rule.

It is necessary to refer briefly to the history of the law. At common law a married woman could not hold property by herself without the intervention of a trustee, and if, when the common law governed the rights of a married woman, sec. 119 of the *Insolvency Act* 1897 had been passed, it would have been quite idle. We cannot, therefore, construe sec. 119 by itself. We must refer to some other Act to see what property a married woman can have, and in order to ascertain that, we must go to the *Married Women's Property Act* 1890. Doing so, we find that a married woman can hold property as if she were a *feme sole.* But that is subject to several conditions, one of them being that contained in sec. 22, viz., that the restraint on anticipation is maintained. Without calling in aid sec. 4 of the *Married Women's Property Act* 1890 the trustee in insolvency could get nothing, and he cannot call in aid that section and at the same time reject sec. 22 of the same Act. It seems to me that, applying the ordinary rules of construction, as soon as you follow out the claim of the trustee under sec. 119 of the *Insolvency Act* 1897, you show that that section has no application to the present case. The restraint on anticipation is in no way affected by sec. 4 of the *Married Women's Property Act* 1890, and it is upon that sec. that the trustee relies to show that the appellant has property which can become subject to the insolvency law. It is said that that is not the meaning of sec. 119 of the *Insolvency Act* 1897. It seems to me the necessary construction, whatever the legislature intended to do.

But, in truth, full effect can be given to sec. 119 without adopting the construction contended for by the respondent Shackell. Under sec. 4 (5) of the *Married Women's Property Act* 1890 a married woman was subject to the insolvency law only in respect of her separate property. How far she was liable to the provisions

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of the Insolvency Acts as to discovery, and to various penal provisions, might very well be open to doubt, and the legislature might have thought it desirable that she should be liable to all the other provisions of the Insolvency Acts. So far as regards property, that must, of course, be only as to her separate property, because she cannot have any other property. The effect of sec. 119, then, is that, so far as her separate property is concerned, a married woman is in the same position as before sec. 119 was passed, but, so far as she is personally concerned, a married woman is subject to all the provisions of the Insolvency Acts as if she were a *feme sole*. That construction avoids any repugnancy between the two Acts. We are of opinion that that is the proper construction of sec. 119, and that the legislature have not abolished restraint on anticipation in case of insolvency. That is sufficient to dispose of the motion in the Court of Insolvency in either branch of it. The property in question is not property of which the trustee is entitled to obtain possession. When she receives the income it will, of course, be in the same position as any other property she gets into her possession. The motion had no foundation in law, and should have been dismissed.

*Appeal allowed. Judgments appealed from discharged. Motion dismissed.*

Solicitor, for appellant, *Gair*.

Solicitors, for respondents, *Brahe*; *Pavey Wilson & Cohen*.

B. L.