1890

# Property Rights of Married Women with Special Reference to the Legislation in New York

Charles P. Ryan
*Cornell Law School*

T h e s i s .

# Property Rights of Married Women

with

Special Reference to the Legislation in New York.

-by-

Charles P. Ryan,

C o r n e l l  U n i v e r s i t y,

School of Law,

1890.

Beginning in 1839, Mississippi leading, the legislatures of the several states of this Union have been gradually but surely removing the legal disabilities which have oppressed married women throughout the common law system of jurisprudence, since the introduction of the Feudal System.

As a result of this legislation married women's statutes, so called, are to-day universal. These statutes of the various states, though having for their design the accomplishment of the same general object, the abrogation of all power of control on the part of the husband over the wife's property, are by no means uniform in their provisions.

The purpose of this essay is to trace briefly the rules governing the property rights of married women as they existed at common law and in equity; and to study as closely as an article of this character will permit, the effects of the more important married women's separate property acts which have emanated from the Legislature of New York.

## The Common Law System.

### Personal Property in Possession.

At common law marriage vests in the husband an absolute title of all the wife's personal property which is in possession. This is true whether the wife has actual or beneficial possession; whether the property is

that of the wife at the time of marriage, or subsequently becomes hers by gift, bequest, purchase or as a result of her labor. The husband may make any disposition of it, with or without consent of the wife. Once married, her title to this property is forfeited and she can regain it only by the will of her husband.

If the wife survives the husband, and no disposition has been made of this property, it passes to the husband's personal representatives.

Choses in Action.

Marriage acts not as an absolute but as a qualified gift, to the husband, of the wife's choses in action. To make his title complete he must reduce the choses to possession during coverture.

In case he dies before taking the steps necessary

to reduce them to possession she, and not his personal representatives, is entitled to the property. If the wife dies before the husband leaving choses in action, unreduced to possession during coverture, the right of the husband, as such to make them his own, ceases. But by the statute of 29 Charles II. he was entitled to administer on her estate, and as her administrator to recover and reduce to possession all her choses in action, if any, still outstanding and after first paying therewith any debts contracted by her before marriage, to retain the residue as his own property.

Whenever it becomes necessary for a husband to seek the assistance of a court of equity to obtain possession of his wife's choses, Equity in pursuance of the maxim that "he who seeks equity must do equity" will compel

him to make a suitable provision, for his wife and her children, known as the wife's equity of settlement.

## Chattels Real.

The husband has a qualified interest, also, in the chattels real of his wife. The law gives him power, without her consent, to sell, mortgage or otherwise dispose or incumber the same at his pleasure.

Chattels real unappropriated during coverture vest in the wife absolutely after the death of the husband. If the wife dies before the husband they go to the husband. In this respect they resemble choses in action. But an important distinction exists between the right by which the husband claims, at the death of the wife, choses in action unreduced and chattels real unappropriated. The former, we have seen, go to the husband in a

representative capacity, while the latter vest in the husband as such. He does not hold them by force of statute as administrator the avails of which are to be applied to the payment of his debts. He holds them as his own; it being one of his marital rights that his wife's chattels real, upon her death shall belong to him absolutely.

The chattels real may also be levied upon under execution for the debts of the husband while the coverture lasts. By this process the title becomes transferred to the creditor; and the wife is permanently dispossessed of her chattels real, even though she should survive her husband.

If the husband makes a lease of the wife's term and before expiration of the lease dies, the personal rep-

resentatives of the husband are entitled to the rent.

Though the husband by will cannot prevent the wife's enjoyment of her chattels real if she survives him, still it has been held that a lease, made by the husband to take effect immediately upon his death, is valid, and the wife's interest is barred until the termination of the lease.

Real Property.

The husband acquires by marriage the usufruct of all the freehold estate of the wife. His estate in such property is a freehold. During their joint lives he takes absolutely the rents, issues and profits that accrue during coverture. If unreduced to possession during coverture, he may maintain suit to recover rents and profits which had accrued while coverture lasted.

if unreduced during his life, they pass to his personal representatives, the wife not being entitled to recover them.

Though the husband's interest in his wife's real estate is liable for his debts, still nothing more than the husband's usufruct is thereby affected. Nor can any disposition of the property by the husband or his creditors defeat the wife's ultimate title. In case the real estate of the wife is converted, during her life, into personalty by voluntary acts of the parties such personalty becomes the property of the husband.

If the wife survives, she is again the sole owner of her lands, and the heirs and personal representatives of the husband have no interest in them. At the wife's death, the husband surviving, no child having been born

capable of inheriting, the husband's interest ceased. But if such child has been born, the surviving husband becomes vested with a life interest in all her lands, known as his curtesy estate.

Surviving Wife's Rights.

The question now arises, what interest did the wife gain. by marriage, in the property of her husband? No vested interest was acquired; but marriage did at once confer upon her an inchoate right in his estate which became consumate at his death, she surviving. This was the well known provision termed dower, consisting of a life estate in one-third part of the real property of inheritance of which the husband was seized at any time during coverture, in which the wife had not conveyed her right of dower. It was not necessary, as it was in case

of curtesy, that a child should actually have been born; and while the husband might have a right of curtesy in trust estates, legal seisen was necessary to support dower.

It will be seen that this estate of the wife differs materially from the curtesy estate of the husband.

In addition to dower, by the common law which remained in force till the reign of Charles 1. the widow was entitled to one-third, and if he left no children to one-half,of her husband's personalty. Successive statutes changed this so that at the beginning of the eighteenth century a husband could bequeath his entire personal estate if he desired.

This summary indicates, I think, in outline at least, the changes effected by marriage in the property rights

of women at common law. For almost a century after Blackstone few essential alterations were made by legislative enactment.

## The Equitable Doctrine.

As a result of these harsh, inflexible and, in many cases, unjust principles of the common law, Equity, always anxious to prevent haraship, interposed the doctrine of trusts and enabled a woman or her friends to place, between her and her husband a trustee against whom the husband could assert no rights in property conveyed to the "sole and separate use" of the wife. This estate may be created at any time, before or during coverture; and in any kind of property, real or personal. No particular form of words is necessary; but an intention to

exclude the husband must be unequivocally expressed. If no trustee is designated, a court of equity will declare the husband a trustee, and his marital rights at common law will be displaced by his duties as trustee in equity.

In relation to her spearate estate the wife's position would be entirely changed from that assigned at common law. Her contracts, void in a court of law, would in a court of equity be valid and enforceable against her spearate estate. Although, as is well known, a wife could not sue or be sued at common law, in equity in regard to her separate estate both could be done.

This doctrine originating as early as the fourteenth century, was well settled in England in 1695 (Drake vs. Storr, 2 Freem. 205); and was enforced there

and in this country, under proper circumstances, until legislation rendered its application no longer necessary.

## Under the Statutes of New York.

Although Mississippi was the first state to legislate on this question, her act of 1839 was merely permissive and lacked the liberal features which has characterized subsequent legislation. Several states soon joined the movement notable among them, for completeness of change, being Maine and Michigan which acted in 1844.

In New York the first radical change affecting the property rights of married women was made in 1848. Previous to 1848 there had been a strong public feeling that the wife should be relieved of an oppressive legal system which placed her, as regards property matters, in a posi-

tion extremely inferior to that of her husband. In the Constitutional Convention which sat in 1846 this was a prominent topic of debate, and the substance of the subsequent act of 1848 was at one time incorporated in the project of the new Constitution but was finally defeated.

Public sentiment was by no means smothered by this action of the convention. The advocates of reform in this direction brought their influence to bear on the legislature, the result of that influence being in the first instance the Act of 1848.

This Act of 1848 (Laws of 1848, ch. 200) was far more sweeping in its provisions than had been the legislation in any state prior to this time. It extinguished all the common law rights of the husband in respect of the wife's property. Henceforth the wife was declared

sole owner of all property, real and personal which she should own at marriage, and of all which should becomes hers by any title during coverture. It attempted to divest rights already vested in the husband under the common law, but this provision proved ineffectual being declared unconstitutional and void. Westervelt vs. Gregg, 12 N. Y., 202; Ryder vs. Hulse, 24 N. Y., 372.

This Act was amended by Laws of 1849, Chap. 375 and though now in the main superceded by later statutes, it has influenced subsequent legislation in this and other states and is to-day frequently cited by the courts.

Curtesy.

By the third section of the original Act, a wife was empowered to receive from any person, other than her husband, property of any description; but no power to

dipose of that property was given her, leaving the husband's claim at her death precisely as it was before the statute.

The Amendment of 1849, conferred upon the wife authority to "convey and devise real and personal property, and any interest or estate therein, and the rents, issues and profits thereof in the same manner and with like effect as if she were unmarried." This plainly gave the wife power to defeat the husband's right of curtesy if any such right remained.

It was at first declared by the Supreme Court, (Billings vs. Billings, 28 Barb. 343) Potter, J. writing an exhaustive opinion, that the husband's curtesy right had been entirely abrogated by the statute.

However plausible the reasoning of Justice Potter,

when a few years later the question again came before the Supreme Court a different rule was enunciated. Matter of Winne, 2 Lansing, 21. In this case the court say it cannot be denied that the legislature possessed the power to deprive the husband of all right jure uxoris and as tenant by curtesy initiate, and still preserve the right of the husband to the tenancy to curtesy consumate.

This is in accordance with the weight of authority; and in Hatfield vs. Sneden (54 N. Y., 280) the law is said to be substantially settled, that while the Acts of 1848 and 1849 excluded the husband during life from control of or interference with his wife's separate real and personal estate and gave her alone the power of disposition by deed or will, yet they left him the right of

curtesy in her real property and of administration for his own benefit of her personalty in so much as remained at her death undisposed of and unbequeathed . This may safely be said to be the law of this State, respecting curtesy, to-day.

As regards the wife's personalty the most recent case on this point (Robbins vs. Mc Clure, 100 N. Y. 328) holds, that where a married woman dies intestate and leaving no descendants, the rule of the common law is still in full force and the husband is entitled to the personal estate of his wife, undisposed of at her death, by virtue of his marital right, as well as his right of administration. Where descendants are left, the husband takes the same portion of his deceased wife's personalty, as his widow would be entitled to in like cases.

Ransom vs. Nichols, 22 N. Y. 110.
Barnes vs. Underwood, 47 N. Y., 351.

Manner of Charging Wife's Estate.

It has been stated that previous to legislation a married woman's contracts made in reference to her separate estate were binding in equity. Still, on no branch of the entire subject under consideration, has there been greater conflict of opinion, both in equity and, until a recent date, under the statutes than as to what acts of the wife would bind her property. Mr. Bishop treating generally of this point says: "Since the confusion of tongues at the Tower of Babel, there has been nothing more noteworthy, in the same line, than the discordant and ever shifting utterances of the judicial mind on this subject." This remark is peculiarly applicable to the decisions in New York.

The great authority prior to the statutes was the

case of Jaques vs. Methodist Episcopal Church. As Methodist Episcopal Church vs. Jaques (3 Johns. Ch. 78) it came before the Chancery Court in 1817. Here Chancellor Kent in an elaborate opinion, after an exhaustive review of the English cases, holds that a married woman can charge her separate estate only when power to so charge is given her in the instrument creating her separate estate. This doctrine of Kent was subsequently overruled in the Court of Errors (17 Johns. 548) where the position is taken that a married woman may act as a feme sole in respect to her separate property, except so far as she is restrained by the instrument in which the estate is created. This rule, with considerable rigor, was applied by the courts until 1848.

Under the statutes already noticed it was clear

that the liability could be enforced when created in carrying on a trade or business of the wife, (Frecking vs. Rolland, 53 N. Y., 422); or where the contract related to, or was made for the benefit of her separate estate. (Owen vs. Cawley, 36 N. Y., 600; Ballin vs. Dillaye, 37 N. Y., 35.)

When the debt was one not contracted on her own account, for her own benefit or for the benefit of her separate estate, the rule in this State though adopted deliberately by the courts was far from satisfactory. On this question, the case of Yale vs. Dereder has been under the statutes what Jaques vs. Methodist Episcopal Church was under the equitable theory. Beginning in 1858, in 18 N. Y., 265 this celebrated and much criticised case has three times reached the highest court of

the State.

At its first consideration it was decided that in order for a married woman to charge her separate estate with a debt not contracted for the benefit of such estate, it was necessary that there should be evidence of an intention thus to charge it, and that a note or other obligation was not sufficient evidence. In 22 N. Y., 450, its second appearance, Selden, J. held that the intention to chage the separate estate must be declared in the very contract which is the foundation of the charge. The last appearance of this case is in 38 N. Y., 329. Church, C. J., writing the opinion of the court follows the previous decisions, though doubting their propriety, and says: "There is every reason for referring this question to the legislative power, to determine definite-

ly what rule shall finally prevail."

This suggestion was not acted upon until 1884, when by Chap. 381 of the Laws of that year the following is provided:

Section 1. A married woman may contract to the same extent, and with like effect, and in the same form as if unmarried and she and her separate estate shall be liable thereon, whether such contract relates to her separate business or estate or otherwise, and in no case shall a charge upon her separate estate be necessary.

Wife's Right of Compensation for Services.

Laws of 1860, Chap. 90, as amended by the Laws of 1862, Chap. 172, supercedes the Acts of 1848 and 1849 and was evidently drawn so as to avoid the unconstitutional feature noticed in the Act of 1848.

Section 2 of the Act provides: A married woman may carry on any trade or business and perform any labor or services on her sole and separate account, and the earnings of any married woman, from her trade, business, labor or service shall be her sole and separate property, and may be used or invested by her in her own name.

To quote from Judge Earl (93 N. Y., 24), "It was the purpose of those provisions to secure to a married woman, free from the control of her husband, the earnings and profits of her own business and of her own labor and services, carried on and performed on her sole and separate account, which at common law would have belonged to her husband."

What constitutes "earnings of any married woman from her trade, business, labor or services" within the mean-

ing of this statute is often a question of importance, not to the husband and wife alone, but to their respective creditors. Certain it is that a married woman may independent of her husband engage in any business or labor the profits of which are her property, free from all claims of her husband as such and from her husband's creditors. No doubt attempts are frequently made to use this statute as a protection against claims of the husband's creditors, and property is conveyed to the wife as compensation for services which, if creditors were not interested, would be considered unworthy of compen-- sation. These colorable transactions find no favor with the courts and transfers of property from husband to wife as recompense for services rendered in their home, though made in perfect good faith, have at the

suit of the husband's creditors been declared void.

A case in point is Coleman vs. Burr. (93 N. Y., 17). Here, an action was brought by defendant's creditors to set aside a deed made by defendant Burr to his wife, through a third person, on the ground that the deed was made to hinder, delay and defraud creditors. The consideration for the conveyance was the wife's services in caring for the invalid mother of the husband. The referee found that the services were irksome and laborious and the transaction was fair and honest. The court declared the conveyance void, saying: "Whatever services a wife renders in her home for her husband cannot be on her sole and separate account." While it may be asserted that were a different construction put upon this and similar contracts, the temptation to perpetrate fraud

would be too apparent and too available to be resisted, yet the injustice of the decision in this case must be admitted.

Whitaker vs. Whitaker, 52 N. Y., 368.

Reynonlds vs. Robinson, 64 N. Y., 589.

Where creditors are not interested the tendency is to allow the husband to relinquish to his wife his right to her earnings, in his own household, so that she can hold them to her separate use. Matter of Kimmer and Gay, 14 N. Y., St. Rep., 618.

Conveyances between Husband and Wife.

Although the Act of 1849 declares that a wife may convey and devise real and personal property in the same manner and with like efect as if she were unmarried, the Court of Appeals in two cases held that this did not give her power to make a deed direct to her husband. White vs.

Wagner 25 N. Y., 328; Winains vs. Peebles, 32 N. Y., 423. It was admitted that there was undoubtedly an intention to confer upon the wife, in respect to conveyances of her property, the legal capacity of a feme sole; but as this precise question could not arise in respect to a feme sole it was thought that such a conveyance could not be permitted.

This doctrine was narrow and ttechnical and was frequently evaded. Still it was never repudiated by the courts of this State and remained the law until 1887 when by Chap. 537 of the Laws of that year it was provided:

Section 1. Any transfer or conveyance of real estate hereafter made by a married man directly to his wife, and every transfer or conveyance of real estate hereafter

made directly by a married woman to her husband, shall not be invalid because such transfer or conveyance was made directly from one to the other without the intervention of a third person.

## Estates by the Entirety.

It is a familiar principle of the common law, that in a conveyance of lands to husband and wife jointly, they do not take as tenants in common nor as joint tenants; but each becomes seized by the entirety, *per tout et non per my*, and upon the death of either the whole remained to the survivor.

Soon after the passage of the Acts of 1848 and 1849 the courts were called upon to decide whether these Acts had changed the common law in this respect. With renewed force it was insisted that the Act of 1860 had com-

pletely abrogated the common law entirety estate. This latter Act provides that all property which comes to a married woman "by descent, devise, bequest, gift or grant--- shall notwithstanding her marriage, be and remain her sole and separate property, and may be used, collected and invested by her in her own name, and shall not be subject to the interference or control of her husband, or liable for his debts."

For many years it was uniformly held by the Supreme Court that, notwithstanding those Acts, the husband and wife took as tenants by the entirety as at common law. National Bank vs. Gregory, 49 Barb., 165; Beach vs. Hollister, 3 Hun, 519; Miller vs. Miller, 9 Abb. Pr., 444.

In 1879 the question, for the first time, was considered by the Court of Appeals in Meeker vs. Wright

(76 N. Y., 262) where it is discussed in an opinion by Judge Danforth. He held that inasmuch as the Act of 1860 gave the wife sole and separate management and ownership of her property, free from the husband's control or interference, and free from his debts, tenancy by the entirety was abolished. It remained for the case of Bertles vs. Nunan (92 N. Y., 152) to settle permanently this question under the existing statutes. Here the question was directly presented. After a thorough consideration of the statutes and their effect on the common law, a majority of the court repudiate the doctrine of Meeker vs. Wright and determine that in respect to estates by the entirety the common law remains unchanged. "The common law incidents of marriage" say the Court, "are swept away only by express enactments.--

We fail to find any reason for holding that the common law rule as to the effect of a conveyance to husband and wife has been abrogated."

Zorntlein vs. Eran, 100, N. Y., 12.

Actions by and against a Married Woman for Torts.

An universal rule at common law was that in actions for "tort committed by or against a married woman the husband must be joined with the wife" and in all cases the husband compensated or received compensation.

The Act of 1860 Chap. 90, Sec. 7, amended by Laws of 1862, Chap. 172, was the first to change this principle. This Act authorized and permitted a married woman to sue and be sued in all matters relating to her separate property, and to bring and maintain an action in her own name for damages against any person or body corporate for any

injury to her person or character the same as if she were a feme sole. Under this statute she could sue and be sued alone for all torts relating to her property. (Rowe vs. Smith, 45 N. Y., 230; Baum vs. Mullen, 47 N. Y., 577). Though she could not sue her husband for an injury to her person (Schultz vs. Schultz, 89 N. Y., 644, reversing 27 Hun, 26), yet in Ball vs. Bullard, 52 Barb., 141 it was held that the wife was entitled to damages for a tort committed on her person by one other than her husband and that the husband was not a proper party plaintiff. Laws of 1880, Chap. 245, repealed Section 7, and Ball vs. Bullard ceased to be authority. If a wife could now sue or be sued for a tort it must be by virtue of Section 450 of the Code of Civil Procedure which in 1879 was amended to read as follows: "In an action

or special proceeding a married woman appears, prosecutes, or defends alone or joined with other parties as if she was single. It is not necessary or proper to join her husband with her as a party in any action or special proceeding affecting her separate property."

In Fitzgerald vs. Quann (109 N. Y., 441) which was an action to recover for an injury caused by the slanderous words spoken by the wife, the Court of Appeals held that the common law liability of the husband for the torts of his wife had not been abrogated either by express legislation or by the provisions of the Code of Civil Procedure. This position was reiterated in Mangam vs. Peck, 111 N. Y., 401.

On the other hand, after hopeless conflict in the Supreme Court (Ball vs. Burleson, 40 Alb. L. J., 305;

Campbell vs. Perry, id., 350), the Commission of Appeals in an ingenious opinion insist that Section 450 of the Code gives a married woman power to maintain an action for an injury to her person. Bennett vs. Bennett, 116 N. Y., 584. This placed the husband in the incongruous position that while he had been stripped of the former rights acquired by marriage, he was still liable as previously for the wife's torts.

Further doubt or contention is abated by Laws of 1890, Chaps. 51 and 248. Chapter 51 provides that a married woman shall have a right of action for injuries to her person, her property or character and arising out of her marital relation in all cases where an unmarried woman or a husband now has a right of action by law; that the husband shall not be liable in damages

for his wife's wrongful or tortious acts, nor for injuries to persons or property caused by the acts of the wife, unless the acts were done by actual coercion or instigation of the husband and in all cases embraced in the second section the wife shall be personally liable for her wrongful or tortious acts. Chapter 248 which takes effect September 1st, 1890, amends section 450 of the Code of Civil Procedure so as to make it improper to join the husband with the wife in an action brought by or against the wife for a tort, and makes all sums recovered in an action as damages to the person, estate or character of the wife, her separate property.

Few changes are now necessary to place a married woman, in respect to property rights, on an equality with a feme sole. As the courts are reluctant to construe

the existing statutes beyond their clearly expressed import, it devolves upon the Legislature to remove the remaining oppressive principles of the common law; and in so far as consonant with justice, and the unity of marital relations their removal is inevitable.

Table of Cases.


Ball vs. Bullard, 33

Ball vs. Burleson, 34

Battin vs. Dillaye, 21

Barnes vs. Underwood, 18

Baum vs. Mullen, 33

Beach vs. Hollister, 30

Bennett vs. Bennett, 35

Bertles vs. Nunan, 31

Billings vs. Billings, 16

Campbell vs. Perry, 35

Coleman vs. Burr, 26

Drake vs. Storr, 12

Fitzgerald vs. Quann, 34

Frecking vs. Rolland, 21

Hatfield vs. Sneden, 17

Jaques vs. Methodist Episcopal Church, 20, 21

Mangam vs. Peck, 34

Matter of Kimmer and Gay, 27

Matter of Winne, 17

Meeker vs. Wright, 30

Miller vs. Miller, 30

National Bank vs. Gregory, 30

Owen vs. Cawley, 21

Ransom vs. Nichols, 18

Reynolds vs. Robinson, 27

Robbins vs. Mc Clure, 18

Rowe vs. Smith, 33

Ryder vs. Hulse, 15

Schultz vs. Schultz, 33

Westervelt vs. Gregg, 15

Whitaker vs. Whitaker, 27

White vs. Wagner, 27

Winains vs. Peebles, 28

Yale vs. Dereder, 21, 22

Zorntlein vs. Bram, 32