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# The Development of the Property Rights of Married Women

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THE DEVELOPMENT OF  
THE PROPERTY RIGHTS OF MARRIED WOMEN.

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Thesis for  
the Degree of L. L. M.

by

ANDREW J. SMITH, L. L. B.

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1893.



Throughout the whole history of remote antiquity, women having the status of wife were regarded as being too inconsiderable to be allowed the right to possess property. Throughout all this comparatively unknown and unknowable period of human existence, the wife was at most, but a secondary being. Whether under laws of ancient empires or laws of wandering tribes, her rights to independent possessions, were denied. If we follow the few inroads that so slightly penetrate this realm of almost pre-historic human existence, we find our own Caucasian race covering a great portion of the continent of Europe, and at times parts of Asia, little else than savages. Their home was the forest and their occupation like the aborigines of America, was, war. To a great extent their law was the law of might, and therefore one's right to a thing, depended solely upon his power to get it. If he was strong enough to wrench it from someone weaker it was his. We often hear of the supremacy of mind over matter, but it is in the realm of intellectuality that this supremacy exists, in civilized society,

where law and order prevail, and the weak have rights. In a wilderness, and among warlike tribes, it takes masculine force and masculine courage to maintain life for self and family, and to these qualities would naturally attach the rights and duties of social government. So a wife was acquired in much the same way and regarded in much the same manner as other chattels. She belonged to her captor and had only such rights as he saw fit to grant to her, she being his property to possess or dispose of at his will. In wars between tribes or nations, no practice was more common than the capture of wives. This practice was followed by a great part if not all the primitive nations, and the early history of the Greeks and Romans show them not to be exceptions. In such case to be sure the captive woman was the wife of the one that took her, but looked at from a present standpoint, her position corresponded more to that of a slave than wife, bound as she was by the custom of the time to serve and obey. During the first centuries after the foundation of Rome, the Roman women possessed no rights at all, and when she finally possessed the right to inherit, she remained a minor, and could dispose of nothing without the consent of her guardian, the

father being guardian as long as he lived unless he appointed another in his place. By the later Roman law, as far as domestic relations were concerned, the husband was legislator, judicator, and executor. He could punish his wife, sell his children, give his daughter to a husband of his own selection, and divorce himself at will. The authority the father exercised was transferred to the husband, who then had absolute control of the life and fortune of his wife.

As the more savage customs gradually softened into the early dawn of civilization, the practice of capturing wives was followed by the practice of purchasing them, the husband paying the price set by the father or owner, she still being allowed no independent rights. So firmly was the idea of the husband's superiority stamped upon these early customs, it is not much wonder that it followed civilization up to so recent a date. Even when Greece had advanced to her highest degree of civilization, the rights granted to women were but little greater than those granted by the tribes of the Orient. Thus for ages the husband was the recognized person, the wife an unimportant but necessary auxiliary.

We now come to deal with the common law, an institution

which was the implantation of the ideas and customs of all previous time. The accumulations of thousands of years. So in tracing the rudimentary formation of the common law, we are drawn necessarily into a consideration of the customs and manners of a rude and barbarous people, who possessing qualities of bravery and nobleness, knew as yet little of the amenities of civilized life and felt still less the claims of refined and spiritual natures. They were a warlike people, strong and enduring, and the rights which they maintained were such rights as military minds conceived. Naturally the institution which they established bore the stamp of their own character and times. As England, at the time of the molding of the Common Law was deluged by Normans, Danes, Saxons and emigrants from nearly, if not all the tribes and nations of the continent besides the Romans that were already there, their law was the combination, the compilation, the selection, from their previous laws.

The Common Law then, being the gradual development and outcome of all previous time concerning ideals of conduct, it is not strange that the rights of married women were gauged to a large extent by her former rights. At common law, by the marriage the wife's individual civil identity was lost,

being merged of that of her husband. They became one in person but "the husband was that one". He at once became endowed with all her real property which she acquired either before or after marriage. This he could lease or convey without her consent. It must be observed however that upon his death, she surviving the title again vested in her, and she could affirm or avoid any lease or conveyance of them made by her husband. His right to all her personal property was as complete and absolute, as though he had purchased it from some third person, and to this she acquired no right in case she survived the husband. Even her earnings and presents belonged absolutely to him. The only property right she had were her choses in action which were more in the nature of a right to property than to property itself. And "these" says Blackstone "the husband may have if he pleases; that if he reduces them by receiving them or recovering them at law, and upon such receipt or recovery, they are absolutely his own, and shall go to his executors or administrators or as he shall bequeath them by will, and shall not revert to the wife". The husband's right to the wife's chattels real, sub-



ject them to execution for his debts, and as the title was not in the husband, the title was transferred by operation of law from the wife to the creditor of the husband.

The law thus allowing the husband absolute contrroll of the wife's property was not wholly one sided. One redeeming feature at least was that he took her debts as well as herself and property and in case she possessed no property he must pay her debts out of his own estate. In case the husband was banished or had abjured the realm, or had been transported, the wife was given the same rights to sue, contract, and possess personal property as a fem. sole. The Courts of Chancery during the time of Lord Hardwick and the Court of Kings Bench during the time of Lord Mansfield endeavored to extend these exceptions further. These two great minds saw the necessity and ultimate recognition of her property rights, but their enlightened conclusions were for a time swept away by the "backward tide of English conservatism".

One of the first great steps toward breaking down the barrier that so completely subjected the wife's property to the disposition and contrroll of the husband, was gradually taken in the Courts of equity, in the nature of Equitable

Separate Estates. This great step was prompted by the abuses to which the wife's property was subject by creditors and bad management of the husband, and a total ignorance in many cases, of the wife's happiness and independence. At first the law was avoided by placing the separate estate in the hands of the trustee, who held it solely for her separate use. It was therefore beyond the reach of the husband and his creditors. Gradually this technical method was abandoned and at length the wife was allowed to take by will or grant, without the interposition of the trustee. This instrument conveying, must however state definitely that the conveyance was for her sole and separate use. A wife could take a settlement for her separate use, from her husband as from anybody else, providing it was not conveyed to the prejudice of creditors. The husband could also be trustee. The question then arose, whether a valid trust for a separate use could be created not in immediate contemplation of marriage. This was finally well settled, that although the trust did not bind her while unmarried, and that she could wholly defeat it by conveyance, yet if she did not so defeat it the trust would revive upon a subsequent marriage. In respect to her separate estate her position was very different from that assigned to her as

wife by the common law. Equity in respect to her separate estate regarded her as a fem. sole and allowed her to make contracts, charging, and enforceable against her separate estate. So highly did courts of equity favor and protect married women that even when there was no contract or separate estate, if the husband in asserting his common law right to the possessions of her property, sought the aid of a court of equity, it would be granted only on condition, that he settle on his wife such portion of the property, and upon such conditions for <sup>her</sup> separate benefit as the court might deem reasonable and just. This was known as the Wife's Equity of Settlement. Thus did the common law and equity grow side by side, equity granting relief where the common law could not. While in the theory of the law, the husband and wife were still regarded as one, and the wife therefore having no separate entity, yet by the aid of the equity courts she was entitled to many privileges in direct repugnance to this theory.

At the time of the passing of most of the earlier Married Women's Property Act, their existing property rights were wonderfully in advance of those allowed by the courts of law. In fact for hundreds of years had their rights been so grad-

ually extended, that although the passing of these acts, was, a decisive step toward the qualization of their property rights, yet it was by no means an overwhelming inovation upon common law liberties, as allowed by the courts of equity. These statutes were not the work of legislators, living before their time, and seeing the wants of a people before the people themselves, had seen and felt them but they were the combined voice of the whole community proclaiming. Those statutes were simply a means of doing, with perhaps greater felicity, what had been done to a great extent for years. This only goes to show that it is the custom and habits of the people that in fact makes the law. Thus resting upon the common law as they do, and depending in various ways upon the law for interpretation and limitations the pervailing law must be considered with reference both to the statutes and the common law. As has been truly said: "all provisions of law, statutory and common, at whatever several dates established are to be construed together as contracting, expanding, enlarging and attenuating one another into one harmonious whole." The statutes in the different States, and in England differ to some extent both as to the time of enactment and as to their effect, but in a general way they

are very similar.

As it would be unnecessary and in this short space impossible to treat the statutes of the several states separately, special reference will be given to the statutes of New York, from which a comparatively safe idea may be had of the law on the subject in the different states.

The New York statutes of 1848 an act for the more effectual protection of the property of married women, provides, that the real and personal property of any female, who may thereafter marry, shall continue to be her sole and separate property, as if she were a single female. Also the real and personal property of any female already married, shall not be subject to the disposal of the husband, but shall be her sole and separate property, as if she were a single female, etc. The purpose of these statutes could not have been to weaken the marriage relation, to divide the units, and disturb domestic harmony, therefore there were not construed by the courts to mean technically what they say. They were interpreted with reference to settled rights, and especially with reference to the wrongs sought to be obviated. As these statutes were to give married women the same property rights as a female sole.

If she owned the dwelling, furniture, etc., she could forbid him sitting in her chairs, reading her books, or riding in her carriage. Even more, she could refuse him entrance upon the premises. The effect would be as far as she is concerned a divorce *A mensa et thero* without recourse to a court. Again if the husband took and appropriated any of his wife's personality without her knowledge or consent he would be guilty of larceny. But the courts seem to be of the unanimous opinion that he cannot commit larceny of the wife's goods. Bishop in his Criminal Law Sec. 872 says that "Owing to the intimate legal relation created by marriage<sup>8</sup> neither the husband nor wife can commit the trespass necessary in larceny.

Upon this question a judge in Ohio said "I cannot perceive that the separate property of the wife is now essentially different from the estate the husband held before the enactment of these statutes, or now holds in regard to his own property. Nor any good reason if she could not be liable for larceny of his goods before the enactment of these statutes, why he can be held so liable in respect to her property since." It would be seemingly absurd to construe the statutes, to hold the wife's separate property in the same relation to the husband, in all its

bearings as they would to a third person--an alien enemy. The very nature of the conjugal relation forbids.

As has been previously remarked the wife's right to possess property at the common law was not as small as might be supposed and especially the wife of means who could afford the expenses of procuring a separate estate. It was the inequality rendered to those of small means, that, without doubt, prompted the enactment of these statutes. Said a learned judge: "the chief benefit which the law confers is not upon those who possess property by inheritance or otherwise, That for which it seems to me most commendable is the power which it gives to the women of the poorer and laboring classes, to control the fruits of their own labor. Many women of this class are left to struggle against the hardships of life; sometimes with a family of children, abandoned by their husband, or still worse, with a drunken, thriftless, idle vagabond of a man claiming all the rights of husband, and fulfilling none of the duties of that relation. When such men could take the hard earnings of their wives, from service in the mills, or from the attempt to keep boarders, and waste them upon their own indulgence, no woman could have courage to struggle along in such helpless efforts."

But to deal with more specific questions. Coeval with the separate estates arose the question as to whether the wife's title was sufficiently complete to bar the husband's right to courtesy. When land was held simply in trust for the wife in the ordinary way, and the use was not a separate one, the husband was entitled to courtesy. But the difficulty arose in cases where it was held by her separately.

One of the early cases on this subject is *Bennett v Davis II*, Peer William 316. J. S. having married his daughter to one Bennett, a tradesman in London, who was extravagant and in debt, the father makes his will and devises the premises in question (being land in fee) to his daughter, the wife of Bennett, for her separate and peculiar use, exclusive of her husband, to hold the same to her and her heirs, and that her husband should not be tenant by the courtesy, nor have these lands for his life, in case he survived, but that in case of his wife's death, go to her heirs. It was urged by the defendant that inasmuch as the separate estate was not lawfully made, the husband was entitled to the lawful use and possession of the land, and that his creditors in bankruptcy could therefore attach the same. But the court denied the right on the ground that



equity would regard as done what should have been done, and said: "If I should devise that my land should be charge with debts or legacies, my heirs taking such lands by descent would be but a trustee and no remedy for these debts or legacies but in equity. So in this case, there being an apparent intention and express declarations that the wife should enjoy these lands to her separate use by that means the husband who would otherwise be entitled to take the profits in his own right during the coverture, is now debarred and made a trustee for his wife.

As early as 1784 in the case of *Heath v Greenbank*, 3 Alk. 716 Lord Chancellor Hardwick gave evidence of his more than ordinary human conception of the complete right a married woman had to her separate estate. In this case by will the wife through trustees was entitled to her separate use to the rents and profits of certain real estate with power to convey. Lord Hardwick said, "The father has made the daughter a fem sole and has given the profits to her separate use, therefore what seisin could the husband have during the coverture; he could neither come at the possession nor the profits. Was there then an equitable seisin of the husband? Not at all, and to admit that there

was would be directly contrary to the intentions of the father and therefore neither in equity nor in law was the husband tenant by the courtesy.

In *Moore v Webster* L. R. Eq. 367, the wording of the will was, "to hold, etc., independent of the husband or husbands she or they may have and free from his or their control and liabilities and to be assigned and disposed of as she or they may think fit by any deed or will in writing." It was held that this operated as a total exclusion of the whole marital interest of the husband and his claim of courtesy was denied. This judgment was subsequently criticised in *Appleton v Pawky* L.R. 8 Eq. 139.

*Baxter v Smith*, 6 Binney 487 holds that the husband is not entitled to the courtesy in the wife's separate estate.

The question was finally settled in New York and most of the other states that if the grantor specified in the grant that the husband was not to be entitled to courtesy his right would be defeated, otherwise upon her death he would be entitled to it. Also if she conveyed or devised the property before death it would defeat his right to courtesy. So after the passing of the act of 1848 and 1849 before mentioned, one of the earliest cases *Clark v Clark* 24 Barbour 531 held that if a married woman seized of real

estate which accrued to her during coverture, does not avail herself of the right given by the statutes to convey or devise the same, her husband will upon her death become tenant by the courtesy, whenever he would have been such tenant prior to the acts of 1848 and 49. Two years later a question arose in another division of the same court in 28 Barbour 343 in which the contrary was held with great firmness, the court construing the statutes in a more literal manner, thus holding that the wife had the sole and only present interest therein. If then she possessed the whole interest how could he be entitled to courtesy when one of the requisites to such holding was a vested interest during the life of the wife. The court saying: "By the statutes she could convey every interest therein." "Could she do this if her husband had courtesy therein?" "Could she convey his vested estate? To entitle her to convey with the same effect as an unmarried female, must she not hold the same interest therein as if she was an unmarried female? Can she convey the whole estate, with the same effect, if she does not hold the whole of it?" "If she holds the whole estate, where is the courtesy?" "Why, if it was not the clear intent of the legislature to abrogate the tenant of the courtesy,

did they by section II of the article of 1849 authorize trustees holding estates for married women to convey them to such married women? It was doubtless only upon the theory that she was to be sole owner." This elaborate opinion which was followed but little, perhaps never expressed the law, notwithstanding the fact that the strict legal reasoning was good. The contrary doctrine was followed and became well settled, that the wife may defeat the husband's courtesy by disposing of the property at any time before her death, but if she does not so dispose of it the estate remains in the husband unaffected by the acts of '48 and '49. *Halfield v Selden*, 54 N. Y. 230, 126 N. Y. 377, holds that when the land is sold after the death of the wife the husband is entitled to the interest during his life, as the money represents the land.

Again, when by the statute she is empowered to convey as though she were an unmarried female it seemed to many as though there could be but little ground for construction, and that she could convey not only without her husband's joining, but that no privy examination or acknowledgement, would be required. But even on this point courts differed. *Selden J.* being of opinion that her right to convey as a fem sole did not repeal the act requiring privy examina-

tions and acknowledgement.

The question then arose, if she could hold and convey as an unmarried female, could she make a deed direct to her husband? On this question the law in the different states is at variance. In 1860 it was decided in *Winans v Peebles*, 31 Barbour 371 that she could convey by deed to her husband, as well as to anybody else. The court saying; "if courts may say that certain conveyances made by her of her separate <sup>estate</sup> are ineffectual and void by reason of her coverture alone, they simply repealed the statute. To say that legislatures do not intend what they have expressed in the clearest and most unequivocal terms, is to set aside or evade their authority. The language is so clear and explicit that there is no room for interpretation or construction. This statute separate the wife entirely from the husband, and completely dissolves the theoretical unity to all intents and purposes as respects the possession, enjoyment and disposition of her separate estate." The same year in 32 Barb. 250, *White v Wagar*, the contrary was held. Mason, J. giving the opinion said: "No doubt there was an intention to confer upon the wife the legal capacities of a feme sole in respect to conveyances of her property, but this does not prove that she can

convey to her husband; for no such question could possibly have arisen in respect to a fem sole, there being no person to whom, in respect to conveyances as made by her, the rule of common law could apply." Some of the further arguments were to the effect that the disability at common law of the husband and wife to convey lands to each other by deed was not the mischief which the founders of the statutes have intended to provide against. "The statutes have in express terms preserved it on the part of the husband by declaring that the wife may take and hold from any person other than the husband, and it would be extraordinary to preserve the disability in one party and remove it from the other, and especially so in a statute like this which was enacted for the protection of the property of married women." "I fear if this is the construction to be put upon the act it will fail to accomplish the purpose intended by the framers. The husband will be pretty likely to get the wife's property, but the wife will get none of his." Thus a construction was put upon the statute which the other courts thought impossible, and followed with little conflict until it was settled by direct statutes in 1783 as follows: "A married

woman may contract with her husband or any other person with the same extent and with like effect and in the same form as if unmarried, and she and her separate property shall be liable therefor, whether such contracts relate to her separate business or estate or otherwise, and in no case shall a charge upon her separate estate be necessary." "But nothing herein contained shall be construed to authorize the husband and wife to enter into any contract by which the marriage relation shall be altered or dissolved or to relieve the husband from his liability to support his wife."

At first glance it might be thought out of place to speak of dower in connection with married women's property right. But inasmuch as the wife's inchoate dower interest is a valuable thing held in her own right, which she may hold or release at her option, it must of necessity fall under the head of her property rights. And one of the first and most effective provisions recognizing her property right was her right of dower. If we realize the early period when this right was instituted we cannot help but regard it as a pronounced step up the incline that so slowly yet effectually led to the plain of property equality between husband and wife. As was said in a preceeding part of

this article, at an early time, immediately after the period of wife-purchase it was the custom for parents, marrying their daughters, to give something of value with them. This of course went to the husband but it protected the wife against ill-treatment from the husband; for he was bound to return it to the parents in case of a separation between them based upon his misconduct. This practice prevailed in the Roman Empire, in Greece and in Egypt. The origin of dower known to the common law, defined as being that portion, usually one third, of a man's lands and tenements to which his widow is entitled after his death, to have and hold for a term of her natural life is not definitely known. Blackstone thinks it was introduced by the Danes, while others think it was brought by the Saxons at the time of the Conquest. But whatever its origin it was known to the early common law, and one of the principal provisions of the new Magna Charta was the dower right.

Whether the dower extended to all the lands and tenements owned by the husband at any time during the coverture or whether it was limited to those only which he possessed at the time of his death was a question which occasioned considerable controversy. It was settled at an early



date, however, that the dower was an interest in all the real estate whereof the husband was seized at any time during the coverture. In more modern times when conveyancing became so common, the difficulty of conforming to the established law was very great, yet it still remains the law.

At the common law if a woman was divorced absolutely she could have no dower. In most of the states a woman is entitled to dower if she obtains a divorce on account of her husband's adultery, but not so entitled when she is the guilty person, and the husband has been divorced from her. The New York law was very much unsettled until 1890 and especially 1892 when the legislature passed an act which gives the wife the right to sell or convey her right to dower for a consideration satisfactory to herself, whether the divorce was granted for her offense or not. Her inchoate right to dower extending to all the real estate of which the husband was seized at the time of the granting of the divorce and also to any and all real estate that he has since that time acquired and in which she would or might have a right of dower or inchoate right of dower. In former times a woman could be deprived of her right by her husband's building a castle upon his land for public de-

fense. It was argued that the right of dower was determined and regulated as a matter of public policy, and as the defense of the realm was superior as a matter of public policy, the right of dower must yield,

The wife's paraphernalia so called is without doubt a relic of the civil law, although differing somewhat in nature, the paraphernalia of the civil law corresponding more closely to the wife's separate estate. What may be regarded as constituting one's paraphernalia depends largely upon one's rank and position in life. One's income, past and present habits determine largely what constitute it. The ornaments and wearing apparel must be suitable to her station. The law at present remains practically as it did at common law, that is the husband owns the articles and can sell them or dispose of them as he sees fit during his life. After the death of the wife whatever remains belongs absolutely to the husband.

*Tipping v Tipping*, 1 Peer Williams 730.

42 N. Y. 212.

The paraphernalia was also liable for the husband's debts, and is at the present time. However since married women have been placed upon such property equality, if the articles of paraphernalia were procured with their own means

it would without doubt be free from the husband's creditors, and go to her representatives upon her death.

The constitutionality of these acts has often been questioned and as often decided that where the husband's interest is one in expectancy depending upon some contingency, it cannot be considered a vested right and therefore acts depriving him of such interest are not unconstitutional.

Cooley Const. lin. 440.

These acts cannot be regarded as unconstitutional because they apply to property to be acquired after their passage, in which case the husband has no vested interest. His former right to the use of the wife's reality during his natural life depended upon positive law existing at the time of marriage, so if the law is changed before the marriage the rights incident to the marriage is limited by the law thus changed, and the husband's expectant rights would not become vested. If on the other hand the husband became vested in the property of the wife previous to these acts, he can in no way be deprived of the same.

In tracing the developments of the rights of married women to possess property, the author has tried to avoid as much as possible, the tendency to regard man and woman

as distinct beings, with interests adverse and conflicting, or to convey the idea that they were ever so regarded, - that they were intended for another sphere but by some mischance were left upon this. Neither does he wish to condemn the laws that governed them in early times; for without doubt they were well adapted to the times and bore a close relation to the other laws.

In savage life where strength and endurance are the chief requisites of distinction she could not possibly, by her very nature, hold a very exalted position as far as physical contests were concerned. The introduction of the feudal system into England was the introduction of great female suffering and injustice; yet the hardships of the Villains could have been no less. The gradual changes in the law that governed her were not made independently, but were incident to the onslaughts of civilization and the development of all law. If the model family prevailed without exception, where husband says: "What's mine is yours" and wife says: "What's mine is yours" -- ours to enjoy, our children's to inherit, there would be little need for a protecting law. But experience teaches us that all families are not in harmony. That the interests of husband and wife are not always in unity; that

selfishness and distrust creeps in and destroys their oneness; that the good qualities of one is often imposed upon by the other; that accident and misfortune play havoc with domestic tranquility; that husband is sometimes a brute, wife devil. So the law has been changed from time to time to meet the exigencies of the times, with a view of broadening and strengthening the family tie, which is the basis of all government, and the impetus to all civilization.