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SOME POINTS OF COMPARISON BETWEEN ENGLISH
AND AMERICAN LEGISLATION, AS TO MARRIED
WOMEN'S PROPERTY.

THE English law on the property rights of married women is to us only less important than our own. We do not, indeed, look to it for authority—in this department of law the mother country has followed us, and not we the mother country—but, not to speak of 'the special ties between us, the attitude of England towards this as yet unsolved social—not less than legal—question, must be interesting; for it is England which now more than any other nation unites a cautious radicalism and an enlightened conservatism in the treatment of the questions with which the time is grappling.

According to a contemporary writer on jurisprudence, (Prof. Sheldon Amos, *Science of Jurisprudence*), there are three methods which laws relating to married persons may pursue :

1. Where married persons retain the same property rights and capacities as before, subject to the duty of maintaining the household and family. "This," he says, "seems to be the method to which the best European legislation is constantly tending, and which has nearly been completely developed in some of the United States of America."

2. Where some artificial relationship is created by the marriage. An instance of this is afforded by the English Common Law of Husband and Wife.

3. Where the artificial relationship is created, but the parties are left a discretion to qualify the nature of this relationship. The equity "Separate Estate" and some Continental systems are examples.

The first of these methods is that to which England, by the Act of 1870, and still further by the Married Woman's Property Act of 1882, has, like ourselves, given adherence.

Now though the two nations have reached the same point, the conditions from and through which they came to it differed widely. The common law as to *baron* and *feme* prevailed, indeed, in both countries, but here the parallel ceases. Not to delay upon the origin or present rules of the equity separate estate, suffice it to say, that it has been for a long time possible in England, for property to be held by a married woman with almost full power of control and disposition. The doctrines of a wife's equity to a settlement, and the settlement required at the marriage of a ward of chancery, show the solicitude of that court to protect a wife's rights.

Few marriages among the upper classes, or where much property is involved, take place without a careful settlement of that property. It is upon married women in the poorer classes whose scanty earnings are their all, that the common law bears hardest. In America, the separate use has never been universal. Fully grown in England only at a period subsequent to the settlement of this country, it was administered in certain states, as New York, New Jersey and portions of the South. In New England it was hardly known. (Schouler, Husband and Wife, 248 ff). Some states had no equity system. Nor was the separate estate so necessary in a new, poor, rapidly-growing country, the needs of which required that money should be tied up as little as possible.

Thus in America, for a time, there was not need enough of married women's laws to overcome old doctrines, and in England the class which most required protection had least power to make itself heard.

Our purpose does not admit of any examination of the American married women's acts in general, or of any state in particular. They have been fully commented on by courts and text writers, and, as has been said, "to attempt a useful summary of laws so incongruous, so purely local and so constantly changing, is useless." (Schouler, Husband and Wife 254.)

Although some older states, even in the last century, had "*feme sole trader*" laws, or the germs of them, the movement really began about the year 1850, by several states passing general acts which have since, year by year, been added to, attended meantime by a judicial construction often unfriendly to the actual, if not the legal intention of the framers, until all the states have joined the movement, the last to follow being Virginia, in 1877.

England began later than America, and has proceeded with less legislation and more indication of some definite plan. Her first step was similar to ours. A clause in the Matrimonial and Divorce Causes Act of 1857, gave to a woman deserted by or judicially separated from her husband, power to act as a *feme sole*, obtaining in the former case from a court or magistrate a so-called protection order against her husband's creditors. A curious statute in 1878 allowed the same privilege in cases of aggravated assault upon her by her husband. (41 & 42 Vict. c. 19, s. 4.) But the first real Married Woman's Act was that of 1870, which, though now repealed, calls for some notice. This act gave a married woman her earnings and the right to trade; allowed her to deposit in banks, and to hold and transfer stocks, loans and so forth, as if *sole*; suffered her to hold to her separate use any property descending to her from an intestate, and money coming to her by deed and will, not exceeding in amount 200*l.*; and empowered her to sue or be sued alone in matters relating to her separate property. (Her powers extended to a suit for libel: L. R., 10 Q. B. 147.) She might insure her husband's life; he was not liable for her ante-nuptial debts except (by an amendment in 1874) as far as he had got assets of hers. She was liable to the parish for support of husband and children. An excellent feature of the act was the provision for a summary and private settlement of disputes between husband and wife as to her separate property. (See on this act a Treatise on M. W. Prop. Act 1870, Griffith.) Now this act was evidently intended to supplement, not to supplant the equity separate use. The right to earnings and to embark in trade, was a measure of relief to the poorer classes to whom the doctrine of separate use was of no real benefit. The same is true of the 200*l.* taken under deed or will. Large amounts under deed or will could only be held separately by a regular settlement, as before. In cases of intestacy she was given the benefit of the

possibility that the intestate had contemplated making such settlement.

Twelve years later was passed the Married Woman's Property Act 1882, introduced by Lord SELBORNE, and taking effect January 1st of this year. And here special reference to the equity separate estate is not to be found. By this act a married woman is "capable of acquiring, holding and disposing by will or otherwise, of any real or personal property as her separate property as if she were a *feme sole*, without the intervention of any trustee." She may contract, including the acceptance of any trusteeship or the office of executor or administrator, and sue and be sued without the joinder of her husband. If she trades she is subject to the bankrupt laws. She may deposit in banks, hold and transfer stocks, &c., insure her own or her husband's life, has every remedy civil and criminal for protection of her separate property, even against her husband, with certain exceptions to be noticed hereafter. Property questions between husband and wife may be decided summarily, and, if desired, privately, before a judge. The provisions of the previous act as to his liability for her ante-nuptial debts, and her liability for support of husband and children are continued. It is also provided that her "legal, personal representative" shall succeed to her property rights, and expressly allows existing or future settlements.

Only one or two decisions on this act have appeared, but these give it a liberal interpretation :

In *In re March*, 52 L. J., Chancery 650, a testatrix gave property, real and personal, to "A. and B., and E., the wife of B." Mr. Justice CHITTY held, that the Act of 1882 had wrought such alteration in the relations of husband and wife as to sever that unity of person which the law attributed to them, and therefore B. and E. took each a third of the property, and not a half between them.

In *the Goods of Harriet Ayres*, L. R., 8 Prob. Div. 168, it was held, that under this act a husband need not join in his wife's administration bond; he had no responsibility.

In *James v. Barraud*, 31 W. R. 786, it was held, that a married woman might sue in her own name under this act for torts committed before the act.

Taking up now some points of comparison between this act and our American legislation; in the first place the act provides that

it shall operate upon parties already married, but not affect property the title to which has already accrued. Some of our American statutes have neglected to include such a provision, at the cost of some litigation, though the courts interpret these acts as respecting vested rights. (Bishop on the Law of Married Women, § 37.)

It is worth while to remark, in passing, that the very first section of the first English Act (1870) deals with earnings and trading, while only the later American statutes confer these rights independent of the desertion, absence, and the like, of the husband. (1 Bishop 417.)

A novel feature of the English act is its treatment of the question of presumptions which has given so much trouble here, especially in Pennsylvania. A married woman's contract is presumed to be with reference to her separate estate, and in proceedings for the protection of her property her allegation of ownership is sufficient. The burden of proof lies on the other side. The rule here is almost universally the other way (New York and New Jersey, at least, are exceptions), though no state, it is believed, has decided the question by statute, except those in which a schedule of the wife's separate property is required to be put on record, either as a requisite to title or merely as notice to creditors. (Among these are Maine, Florida, Minnesota, California, formerly Iowa.) The plan of the English statute seems preferable as more in accord with the design of married women's laws. (See argument, *contra*, *Keeney v. Good*, 21 Penn. St. 354.) As to the registry system, praised though it has been, is it well that every married woman with property should have to submit a catalogue of it to the general scrutiny, especially in a country where publicity to private and personal affairs is becoming an "institution?"

That part of the act is worthy of notice which provides that money lent by wife to husband gives her a standing as creditor of his estate only after claims of other creditors have been satisfied. As gathered from the decisions—for the statutes are silent on the subject—it is otherwise here, the wife coming in *pari passu*, or, as in Ohio, as a preferred creditor. (See cases in Wells Sep. Prop. Married Women, p. 372, ff.) Perhaps, by the English rule, temptation as to fraud is made less.

The section on insurance of the husband's life by the wife

obtains here in various forms, some codes limiting the amount of premiums, and a few, as Arkansas and North Carolina, allowing a limited premium out of the husband's funds

The section on remedies gives the fullest power of suing and being sued in matters of property; but actions between husband and wife for a tort are still interdicted; as are any criminal proceedings between husband and wife concerning property while the parties are living together, or where the cause of action arose while they were living together, unless property is wrongfully taken by one party about to desert the other. (The act expressly provides that he shall have all remedies against her, in matters of property, which she has against him.) No one of our states, it is believed, goes so far as to admit criminal proceedings concerning property between married persons, though by some codes a wife may be convicted of arson for firing her husband's building. In all proceedings under this section of the Act of 1882 husband and wife have full power to testify. Before the Act (16 & 17 Vict. c. 83, s.), married persons could give evidence for and against each other, save in cases of adultery, in criminal prosecutions, and as to communications during coverture. Our own laws vary as to the power of husband and wife to testify, though, as hardly need be said, most of them have departed from the common-law doctrines on this point. In one state, Maine, exists a curious law that the power of one party to testify depends upon the consent of the other.

That provision of the act which makes the husband liable for his wife's ante-nuptial debts to the extent of any property of hers of which he has gained possession, and which first appeared, as will be remembered, in 1874, as an amendment to the Act of 1870, though of obvious justice, finds a place as far as we know in the codes of only seven states. (New York, West Virginia, Georgia, Florida, Kentucky, Indiana, Colorado.)

So also the liability of the wife for her husband's support, which the English act enforces, is law in very few of the United States. (Nevada, Ty. of Dacotah; Iowa, liable for expenses of family; Illinois, must support poor relatives.) It is in this connection that Mr. Bishop (1 Married Women, § 897), complains that our statutes have given wives an independent estate without any corresponding burden.

The English act provides that for the purposes of the act the legal personal representative of any married woman shall, in

respect to her estate, have the same rights and liabilities, and be subject to the same jurisdiction that she would. This would seem to take away all claim of the husband to take or to administer upon her personal property. As to curtesy the act is silent, but its existence may be doubted. (Curtesy has been held not always to exist under the equity separate use: L. R., 3 Eq. 267, and cases cited; *contra*, L. R., 8 Eq. 139.) It will be remembered that as far back as 1834 the Dower Act put it in the power of a husband to bar his wife's dower by a declaratory deed. Many of the United States have abolished curtesy and dower *eo nomine*—hardly one of them but gives the surviving husband or wife some share in the estate of the other, unless it be the Territory of Dacotah, which confines property interests between married persons to mutual rights of support and habitation each in the dwelling of the other.

Random and incomplete as have been the foregoing observations they afford ground for one or two general remarks. In the first place the English Act is clear, connected, and watchful to guard against abuses of the privileges it extends. Making allowance for the fact that in this department of legislation the United States were pioneers and had to break ground for themselves, it is only repeating the common verdict of law writers to say that the statutes of most of our states are too numerous, are sometimes inconsistent, and are often without definite aim, unless a vague desire to increase the rights of married women can be so called. Mr. Bishop, in a work to which we have already referred, speaks of his own state as one the legislation of which "almost ever since the popular agitation of this subject of married women's laws commenced, has been travelling forward seeking rest and finding none." In the state with which the present writer is best acquainted, which has not departed as far from the old law as have some others, no less than twenty-two statutes have been passed since the year 1848. One or two perhaps rather trivial instances of these may be given. In 1874 appeared a law empowering married women to contract for the purchase of sewing-machines. Now what was wanted was some comprehensive enactment, under which a woman burdened with a worthless husband might contract for any instrument or article whereby she could gain a livelihood. As it is, the act would seem to indicate either that its author could take in the idea of but one material object at a time, or that it was passed in the interest of a sewing-machine company.

Again, in 1871, a married woman was empowered to transfer railroad stocks. In 1874 the power was extended to state and city loans and shares of stock of any corporation, and the next year came a statute word for word the same as the other, except as inserting the word "loans;" making the act extend to loans as well as stock of private corporations. This important point had apparently been quite overlooked the year before, and this in an enactment of one short section. Thus three separate acts were required to give a married woman power over kinds of property substantially identical.

Radical as the English Act of 1882 is in its effect upon the *property*, we think there is traceable in it some effort to preserve the *personal* relation of husband and wife. Note the interdiction in an otherwise sweeping section on remedies, of suits between husband and wife for torts, and of criminal actions as to property where the cause of action arises while the parties are living together, and the admirable method for a speedy and private, and therefore scandal-avoiding, settling of property disputes between husband and wife in the civil courts. Many of our American codes have the same tendency, we do not know whether to call it aim. But our married women's laws are confessedly in a transition state. Some go too far; others not far enough. Some unsettle the old law without forming a new one. Some most advanced codes retain unimportant, vexatious restrictions out of harmony with the general scope of the law.

The problem in married women's laws lies here—how to attain the utmost property rights consistently with the preservation of the family relation upon which—as the discussion of our divorce system which is now taking place will show—the healthy life of organized society depends. The two, we think, are not necessarily inconsistent. How to establish the one without unsettling the other is the by no means easy task which awaits our law makers.

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