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THE LEGAL POSITION
OF WOMEN AS WIVES
AND MOTHERS

(IN ENGLAND AND WALES)

BY

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PAMPHLET

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THE LEGAL POSITION OF
WOMEN AS WIVES AND
MOTHERS

(In England and Wales)

Introduction

AN attempt has been made to summarize very briefly, in a popular form, the most important points in regard to the legal position of women as wives and mothers. To cover the ground completely would take a great deal of space and would result in a publication unsuitable for general use. Where the law cannot be given accurately without quotation from a number of legal judgments, it has perforce been necessary to omit much that is interesting as being beyond the scope of this pamphlet. Provided that its limitations are borne in mind, it is hoped that the pamphlet may serve a useful purpose. Married women are only now emerging from coverture and acquiring a legal status independent from that of their husbands. This is a period of transition where, for the majority of women, the shoe has ceased to pinch very severely. Less fortunate women have found out to their cost the inadequacy of the present law.

Personal Rights

On marriage a woman does not now lose the right to dispose of her person. Prior to the passing of

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the Matrimonial Causes Act 1884, a husband could imprison his wife in his own house if she refused to perform her marital duty, and it was only in 1891 that it was decided in the well-known case of the *Queen v. Jackson* that the husband has no right, where his wife refuses to live with him, to take her person by force and restrain her of her liberty.

Rights of Property

At Common Law the legal existence of the wife was merged in that of her husband. It may be presumed that this curious legal fiction was found to create a great many hard cases, or it may be that new and progressive ideas were making themselves felt. No new statute was passed, but the Court of Chancery invented the doctrine of "separate use" and of "trusts" which enabled property to be placed in the hands of trustees for the benefit of the wife, of which the income was at her own disposal. It is interesting to notice that under complete coverture the husband could not transfer property to his wife as, legally, they were one. After the invention of the doctrine of trusts and separate use he was able to make her a gift by declaring himself to be a trustee for property settled for her separate use.

Married Women's Property Acts were passed in 1870, 1874, 1882, 1907-1908, of which the Act of 1882 is the most important at the present time. It makes a married woman "capable of acquiring, holding and disposing by will or otherwise of any real or personal property as her separate property." It also makes a married woman "capable of entering into . . . to the extent of her separate property . . . any contract and of suing or being sued . . .

as if she were a *feme sole*." The crucial sentence in the foregoing quotation is "to the extent of her separate property." A man or a single woman can make contracts without limitation and be held liable for them, but a married woman is only liable to the extent of her separate property. A further limitation reduces still further her powers of contract, for the separate property in respect of which a married woman may enter into a contract must be property not subject to restraint from anticipation. The power of restraining a person from anticipating their income is bound up with the theory of property in trust and was intended as a protection to women, who were and perhaps are still considered incapable of managing their own financial affairs.

The kind of property in respect of which a married woman may contract is known as "free separate property," and it must be of such a nature that she may reasonably be presumed to have contracted in respect of it.

In a certain case* a woman having an income of £117 a year, subject to restraint from anticipation, bought clothing for herself for which she was unable to pay. It was found that her only "free separate property" was her clothing and it was held that she could not "be presumed to have contracted with respect to it."

As a contract under this section of the Act creates no personal liability, a married woman cannot be sent to prison under the Debtors' Act. The creditor in the case mentioned had therefore no redress and the woman no punishment.

Separate property has no existence except when the owner is under coverture. On the death of her

* *Leake v. Driffield*.

husband, for instance, her property ceases to be "separate" in a technical sense, and she does not, as would be just and as might be imagined, become liable to pay debts incurred before the death of her husband out of any property to which she may become entitled by his death; though, if she marries again, any unsettled property she may possess becomes "free separate property" and available for those creditors with whom she has contracted "to the extent of her (free) separate property." The only advantage that the creditor of a defaulting married woman seems to possess is that the onus of proving her lack of free separate property lies on her.

It may be thought advantageous to a married woman that she can elude the payment of her just debts by such trickery (devised by men and not by women, it must be remembered) but, as any one with business experience will readily grasp, the main effect of these tortuous provisions is to make it extremely difficult for a married woman to embark on any commercial enterprise. Credit is the chief asset for a business career and a married woman is liable to be looked at askance when she requires it. The differences in the position of married and single women in regard to contracts are the basis for that indispensable description of all female signatories of legal documents. A woman *must* be a "spinster" or "married woman" or "widow" whatever qualifications or professional distinction may be added to her.

Coverture in Criminal Cases or Civil Actions

In certain cases a husband is liable for his wife's actions while she is under coverture, for instance in the case of a libel action being brought against

her, except as regards the free separate property she may possess. In certain minor offences (misdemeanours) and in theft (felony) the wife, if charged with her husband, is usually considered as having acted under his influence. This does not apply in the case of treason, murder, manslaughter or keeping a disorderly or gaming house. It is difficult to perceive any reason why the fiction that a married woman is not a fully responsible citizen should be retained in our legal system. Any half-way house between complete protection and real freedom creates anomalies and difficulties. A short Act removing the remnants still left of coverture could be passed without controversy if public opinion were organized in its support.

Inheritance

If a wife dies intestate all her personal property goes to her husband, whether she has children or not. Her real estate goes to her husband for life and then to the eldest son. If a husband dies intestate and there are children, one-third of his personal estate goes to the widow and two-thirds to the children in equal shares. If there is any real estate, one-third of it goes to the wife for life and then to the eldest son, and two-thirds to the eldest son. Where the husband has died intestate and there are no children, the result depends on the value of the estate. If it is under £500 it goes to the widow, and if over £500 half of it, after the first £500 has been taken by the widow, goes to the widow and half to the Crown, failing there being any next of kin. Real estate in the case of an estate over £500 in value is divided between the widow and the Crown, unless there are relations, however distant. In either event, the widow only

gets one-third of it for her life. Where a child dies under the age of 21, not having been able to make a will while a minor, all his estate passes to the father. These inequalities are so glaring that they have probably attracted more attention than other serious disabilities of the wife in connection with her property. The greatest blot on the law is perhaps the freedom of the husband to dispose of his property without making any provision for his wife. In many other countries, including Scotland, a man is obliged by law to leave a certain proportion of his property to his wife and children.

Maintenance

A woman is nominally entitled to be maintained by her husband, but the right is not easily enforced. In certain cases, where the husband and wife are not living together, the husband is liable for necessities supplied to his wife suitable to his estate and degree. To make this of any effect, the wife has to obtain credit, which she is not likely to secure unless she is in an independent financial position. Endless difficulty, too, may arise over the question of what is a "necessary" for any particular wife suitable to the estate and degree of her husband.

In the case of a husband and wife living together, the wife may pledge her husband's credit, acting as his agent, unless he withdraws his authority from her to do so. Here again difficulties may arise as to the suitability of the wife's purchases in view of her husband's position.

As a large section of the population is accustomed to pay ready money for articles of daily consumption, it is obviously useless to the majority of married women to be able to secure maintenance from a negligent husband by living on credit and having

the bills sent to him. The only other way, however, that a woman can secure maintenance from her husband is by going into the workhouse and allowing the Guardians to recover her cost of maintenance from the husband. A wife has not even a right of property in the food in the house and the household effects, nor in savings from the housekeeping money (unless living apart from her husband).

For further details on the subject of *Maintenance* the reader is referred to the Programme Series of Pamphlets—No. 5, "Maintenance Orders," price 4d.

Separation and Divorce

The subject of separation orders under the Summary Jurisdiction (Married Women) Act, 1895, is also dealt with in Pamphlet No. 5, but it may be mentioned here that two new Acts on the subject have recently been passed. One of these raises the amount which a woman may receive for herself and family under a separation and maintenance order by allowing a maximum of 10s. to be ordered in respect of each child, in addition to a maximum of 40s. for the woman herself (the former maximum for both wife and family). The other will allow of reciprocal action both in obtaining and enforcing maintenance orders between this country and the Dominions, but is not yet in operation, as reciprocal Acts have not yet been passed by the latter.

A separation can be secured

- (a) By the wife only in a Court of Summary Jurisdiction ;
- (b) By either party in the Divorce Court (a judicial separation) ;
- (c) By private deed.

In the latter case, the deed is enforceable by an action in the County Court. The number of separated persons in England and Wales is stated by some authorities to amount to a million.

A wife cannot get any redress for the adultery of her husband in a Court of Summary Jurisdiction, but can secure a judicial separation or a divorce in the higher Court. The Poor Persons rules secure her legal assistance in bringing the case, but the expenses of taking witnesses to London and other out-of-pocket expenses may be sufficient to prohibit her from bringing the case. In spite of this, the number of these cases is rising steadily.

To get a divorce, a wife has to prove adultery and cruelty, or adultery and desertion (unless the husband commits bigamy or commits adultery with a near relation of the husband or wife), while a husband can get a divorce on the ground of adultery only. Desertion by a husband as a ground for divorce must be of at least two years' duration, but if the wife applies for restitution of conjugal rights and the husband declines to comply with the decree, the period of waiting may be shortened. This, however, has the drawback of placing the wife in the position of asking an unfaithful husband to return to her, with whom, probably, she would be unwilling to resume conjugal relations. No person in the community is in worse case than the married woman, with children and without independent means, whose husband is persistently unfaithful to her. Provided that he puts in an appearance from time to time in the house of his lawful wife, she has no redress, and must endure the indignity or leave home and children. As stated above, however, she can, if she has the means, bring an action in the High Court and obtain a judicial separation with the custody of the children.

Motherhood (Married Women)

A married woman is not legally the parent of her own child, and under the Common Law the father is sole guardian, and is entitled to the custody of the child. He is unable legally to contract himself out of his rights over his child, so that any deed of adoption, for instance, is liable to be cancelled if the father desires to resume the custody of the child. If such a case be contested, however, and taken into Court, the magistrate has the power to put the interests of the child first. The father's rights continue even after his death, and the child must be brought up according to any wishes which may have been expressed by him, or which it is inferred that he intended to express. The father's rights over his child constitute a terrible power for evil in the hands of a malicious or cruel man. Large numbers of women are quite unaware of the humiliating position they hold, and refuse to believe that a law which is so absurdly at variance with nature can have been devised.

For further details readers are referred to the Programme Series of Pamphlets—No. 4, "The Guardianship of Infants," price 4d.

Motherhood (Unmarried)

The unmarried mother, though not the legal parent of her own child (which is at law *filius nullius*—the child of nobody), has a right to the custody of the child. (Where the legal system of any country is based on the civil law of Rome, it is more favourable to the illegitimate child than the English Common Law.) The principal effects of this somewhat barbarous principle are (1) That it is impossible for the child to inherit from the mother (or vice-versa)

in the case of intestacy, and that where property passes by will, the mother and child pay death duties as if they were of no kin to each other ; and

(2) That the child is not made legitimate by the subsequent marriage of the parents.

As the mother has the custody of the illegitimate child, the father cannot interfere (as for instance in Spain) with its upbringing. The mother is responsible for maintaining the child up to the age of 16, if it becomes chargeable to the Poor Law. Up to the year 1918 a maximum sum of 5s., since increased to 10s., could be secured from the father of the child under an affiliation order. The mother, however, is often lacking in the initiative necessary to bring the case into Court, or is unable to stand the expense. Intimidation and bribery are also resorted to, so that the case may be hushed up, and it is not surprising that the death-rate of these "unwanted" babies is double that of legitimate children. Any attempts to remedy this very unsatisfactory state of affairs have to run the gauntlet of opposition not only from those who, in order to preserve the freedom of men, resist all attempts to enforce a single moral standard, but from people holding the highest moral principles, who fear to increase a loose standard of morals.

The cost of getting an affiliation order depends largely on the expense of bringing witnesses to Court. The evidence of the mother must be corroborated in some material particular, and it is fatal to the case if the mother has been seen much with another man or men, or has taken money or presents before the birth of the child. If the order is granted, it may be paid through the collecting officer, who can also be asked to take action for the recovery of sums due and unpaid, but only at the orders and expense of the mother. As no steps can be

taken until the payments are one month in arrears there is ample time given to the man to escape entirely from his obligations. In any case, legal proceedings for recovery are of doubtful benefit to the mother, as arrears are wiped out by imprisonment, and power to distrain on property is useless where there is nothing of value. In 1913, which is the last normal year which can be quoted, there were just under 38,000 births of illegitimate children. Just under 7,000 affiliation orders were taken out, of which just under 1,500 were enforced by imprisonment.

Nationality

A woman has no right to retain her own nationality on marriage with an alien, though she had this as a Common Law right until 1870, when it was taken away from her by statute. The same law put her into a category with infants, lunatics and idiots in making her unable to renounce her nationality or to apply for naturalization. By the British Nationality and Status of Aliens Act, 1914, she got back part of her rights, as it was enacted that a British woman married to a man who was British at the time of the marriage could not be compelled to change her nationality if her husband changed his. This right, however, was again lost in 1918, when an amending Act gave power to the Home Secretary to denaturalize a wife if he has occasion to denaturalize her (originally alien) husband. In this way, a woman may be compelled to change her nationality against her will, whereas there is no way by which a man born of British nationality can be forced to lose it. A widow of an alien may resume her British nationality on widowhood, but only if she intends to live within the British Empire,

and with the consent of the Home Secretary. A married woman cannot acquire a domicile different from that of her husband, and power to acquire or change domicile is sometimes of great importance. In Australia a woman may retain her nationality on marriage with an alien, and may naturalize herself as an Australian citizen independently of her husband. The fact that such women on arrival in the Mother-country would be considered to be aliens shows the importance of inter-Empire and international agreement on this question. The nationality question is specially interesting as an example within recent times of the way in which women, as unenfranchised citizens, have been liable to lose status and to be deprived of former rights.

Employment

There is at present no legal barrier to the employment of married women, though it has been threatened for many years. Under the Sex Disqualification (Removal) Act, 1919, a woman may not be disqualified by marriage for holding any public office. It is an interesting legal point that notwithstanding these words it is quite frequent for local authorities to dismiss their women employees on marriage. A new disqualification for married women has recently been announced—that women legally separated from their husbands are ineligible to sit for the Civil Service examinations.

The Poor Law

The decision (*Queen v. Jackson*) quoted above, should prevent a wife being compulsorily detained in the workhouse because her husband is an inmate. The legal position of the wife is however not always

acknowledged, nor perhaps realized, and the woman herself is naturally unaware in most cases of her rights. A married woman has the right to obtain relief independently of her husband, from whom the Guardians may recover the cost. A married woman living apart from her husband is eligible for out-door relief. Under the Married Women's Property Acts, the wife having separate property is given the responsibility of maintaining her husband and parents and, concurrently with her husband, of their children, but only if they become chargeable to the Poor Law. This and other liabilities for maintenance are based on the idea of relieving the ratepayers wherever the responsibility for a necessitous person can be placed on a relative.

Conclusion

It will be seen that in spite of the epoch-making changes which occurred during the last century, that the disabilities of married women are still fairly comprehensive. Behind legal disabilities lies custom, and custom will be a harder chain to break than any legal barrier to freedom, because it is part of the habit of thought and almost of instinct of the whole nation. Women even help to impose it on each other and themselves. New worlds cannot be made in a day, but it is useful to make a start in clearing the site. A little goodwill and organization and the legal disabilities of married women will become a tale that is told, and a dream which a new generation will forget.

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