

The Property Rights of Married Women Under Modern Laws (Part I)

John B. Winslow
Wisconsin Supreme Court

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

Repository Citation

John B. Winslow, *The Property Rights of Married Women Under Modern Laws (Part I)*, 1 Marq. L. Rev. (1916).
Available at: <http://scholarship.law.marquette.edu/mulr/vol1/iss1/4>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact megan.obrien@marquette.edu.

THE PROPERTY RIGHTS OF MARRIED WOMEN UNDER MODERN LAWS

BY JOHN B. WINSLOW

Chief Justice of the Wisconsin Supreme Court

It is recorded that in the year 1547 a law was promulgated by Henry VIII of England "that women should not meet together to babble and talk, and that all men should keep their wives in their houses." How successfully this drastic statute was enforced I know not, but one finds it difficult to suppose that the "babbling" entirely ceased. Henry defied the Pope with some degree of success, but it is hard to believe that he could by a single stroke of the pen deprive womankind of the blessed privilege of talking.

It is difficult also to imagine what the uxorious monarch would have said had he been alive during the days of rampant suffrage militancy just before the present European war, and had he seen Mrs. Pankhurst advancing on the royal palace at the head of a suffrage procession which the police force of London could barely control. Certainly he would be justified in feeling that the merry England of the Tudors had become a very serious England when even the King in his palace could not feel secure from violence at the hands of women.

Mankind has indeed journeyed far in many fields since the days of bluff King Hal, but it is the purpose of this paper to take note of the advance made in only one field, namely, the field of the rights of married women to receive, hold, deal with and dispose of property real and personal.

As to the general position of woman in society prior to the Christian era, and even for many centuries afterwards, history leaves us in no doubt. Generally speaking she was considered an inferior creature, intended by nature to be a slave or a weakling.

It was true then as now that no man came into the world unless some woman had advanced knowingly and fearlessly to the very gates of death in order that he might live; it was true then as now that no love ever equalled a mother's love, and that no

childish grief was ever so bitter but that it could be sobbed out upon a mother's bosom, but these things seem ever to have been forgotten as the youth reached man's estate.

Under the patriarchal system it was in some sense natural that this should be so. An eminent jurist, speaking of the subject before the students of a law school not many years since, very truly said:†

"Under the patriarchal system the woman was nothing, the man was everything. The ancient patriarch was a despot and a nomadic barbarian, and regarded his wives as his property as truly so as his flocks and herds. The daughters were servants and always to be bought and sold at the will of the father to the highest bidder. Jacob purchased his two wives, Leah and Rachel, by performing certain services for their father, Laban, and then, having absorbed pretty much all of the other personal property of his father-in-law, fled to his own country. Laban pursued with a mind apparently bent on replevin, but the case was at last amicably adjusted between the parties, and a monument erected to bind the bargain. The Tenth Commandment, which was aimed at the sin of covetousness, no doubt embodied the common sentiment of the time in placing in the same category the wife, the man servant, and the maid servant, and the ox and ass. Under the patriarchal system, war and the chase and the pasturing of cattle were the principal occupations of life and for none of these was woman fitted. In the absence of social institutions and habits there seemed to be no place for her, and her position was one of degradation and neglect. When the girl married she became the daughter of the husband rather than the wife and all her property became absolutely his. His power over his wife was absolute and despotic. While under the reformed system of Justinian great strides were made in the direction of individual and personal rights, and, later on, the modern law of western and southern Europe granted to unmarried women and to widows many privileges before unknown, there seems to have been no improvement in the legal status of woman as wife. She was still under tutelage, not to her father, but to her husband. * * *

†Stanley Woodward in *Albany Law Journal*, 61, pp. 213, 214.

THE PROPERTY RIGHTS OF MARRIED WOMEN

“Another reason for the degradation of the female sex was the universal prevalence of polygamy. If the old patriarchs had been satisfied with one wife for one man, the whole family relation would have been higher and better. In Greece, where polygamy never flourished, the ideal woman was the good wife. The Greek poems are full of noble women like Penelope, who, through many years, watched and waited for the return of a storm-tossed husband who in return adored his wife as his crowning glory. The affection of Hector for Andromache, the love of Alcestis for her husband, and her consent to die that he might live; these and many other types of beautiful female character are scattered through the early history of Greece, and serve to illustrate the truth that the Grecian civilization founded on monogamy as the basis of the family was far in advance of the Asiatic civilization founded on a polygamous marriage system.

* * *

“To the careful student of written and unwritten law of the various nations of the earth in reference to the institution of marriage, and the consequent position of woman it will be apparent that everywhere she was an unhonored if not a discredited being until marriage ceased to be a purchase and polygamy became a crime, and divorce was no longer the arbitrary option of the husband. The ancient Irish law of the *Senchus Mor*, the Mosaic code, the law of the Twelve Tables, the Civil Law of Rome, as well as the ordinances of all the Oriental countries, treat woman either as the drudge or the toy of man, and not in any sense as his equal or his companion. And the same tendency of distrust discloses itself in all the customs and edicts which practically made woman incompetent to acquire or enjoy property in her own right.”

Christianity brought with it many wonderful changes in human thought but none perhaps more remarkable than this changed view of marriage; and with this changed view began the improvement in woman's position in society and before the law.

Christian doctrines theoretically raised woman to her feet, crowned her and placed her by man's side. The prohibition of polygamy and the elevation of marriage to be an institution ordained of God were the doctrines which were chiefly instrumental in producing the theoretical change of attitude; I say theo-

retical because the actual change has been very long in coming, and, indeed, can not yet be said to be complete even in the most favored countries. The leaven has been ever working but the results have been ever slow and the obstacles tremendous; in the earlier centuries came the persecutions of the Christian church, and when these ordeals had been triumphantly met and conquered, there came wave after wave of barbarian invasion which threatened to sweep away all the landmarks of Christianity and of civilization itself. Again the church triumphed and certainly none of the triumphs of Christianity are more striking than the conversion from heathenism to Christianity of the young and vigorous pagan peoples which overran Europe in the early centuries of the Christian era.

It is true that among the German tribes married women were endowed with certain independent property rights in very early days; as a general rule this property consisted principally of household and housekeeping property although it seems sometimes to have included real estate. She received it at marriage from her husband or from her relatives as a wedding portion, and retained sole control of it afterwards. She also received one-half of the estate at her husband's decease as was the case under the civil law. Most of these rights were present in England also prior to the Norman Conquest but they disappeared within two centuries after that event under the influence of the feudal system which attained its complete development under the Normans. Under this system real estate was the great and important species of property. The feudal lord owned the land; he granted it out in parcels to his subordinate nobles and they in turn to their inferiors in return for military service. The days of female militancy had not yet come; men were supposed to be the only persons capable of performing military service, consequently the grants were made only to men and as a general thing only as long as military service was rendered. The break up of the feudal system which took place after the so-called days of chivalry passed and the modern period of industrialism had begun had no immediate effect upon the property rights of married women in England. Reforms as important as this always move slowly. This is specially true in England, and perhaps in most English speaking countries. Unmarried women quite soon acquired the right to hold property and make contracts in many respects

THE PROPERTY RIGHTS OF MARRIED WOMEN

equally with men, but the emancipation of married women in respect to property rights came with leaden steps, and for the most part the changes have taken place within the last thirty or forty years.

An English law writer¹ not long ago graphically summarized the position of the married woman under the common law of England at the opening of the 19th century as follows:

“A century ago a married woman was, in legal text books, the associate of idiots and lunatics; she was, generally speaking, as incapable of enjoying rights over property, or creating rights by contract, as her own infant children. Upon the marriage the husband and wife became one person in law; that one person was the husband; the wife, for nearly all legal purposes, became on her marriage a nonentity. She was the shadow, and her husband the substance; he took practically all the property to which she was entitled, and endowed her with just as much or as little of his worldly goods as he pleased. She could not bring or defend an action in her own name or in her own right, and an injury done to her by the wrongful act of another person resulted, if an action were brought at all, in a pecuniary profit to her husband, into whose pocket the damages found their way. He could put her under lock and key if she didn't please him, and could, it used to be said, administer moderate personal correction to her if she did not behave properly. She could not, even after her husband's death, appoint a guardian of her infant children.”²

There was a certain degree of logic in this general principle. The Bible says that husband and wife shall be one flesh and this statement was accepted fully and completely. If the two individuals were henceforth to be really one, the individuality of one must necessarily be merged in that of the other; so Blackstone says that the legal existence of the woman was said to be suspended during the marriage, “or at least incorporated and consolidated into that of the husband, under whose wing, protection and cover she performs everything.”

¹ Montague Lush in “A Century of Law Reform” (1901), p. 342.

² 1 Blackstone's Com., p. 442.

The wife having thus ceased to exist in the eye of the law during the married state, it was logical that the rights of property which she had while single should at once pass to her husband. There were some compensations resulting from this absorption of the personality of the wife by the husband; for instance the husband upon his marriage became at once bound to pay all of his wife's debts, nor could she be sued without joining her husband with her; if she committed a crime in the presence of her husband she was presumed to have committed it by his command or under his coercion, and hence was not liable to prosecution for it; as a corollary of this latter doctrine, however, the law, holding him responsible for her misbehavior, deemed that he ought to have the power of correction and chastisement, although not in a violent or cruel manner.

It is interesting to note what Blackstone writing in 1765, has to say about the husband's power of correction of the wife.⁸

"The husband also, by the old law, might give his wife moderate correction. For, as he is to answer for her misbehavior, the law thought it reasonable to intrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children; for whom the master or parent is also liable in some cases to answer. But his power of correction was confined within reasonable bounds, and the husband was prohibited from using any violence to his wife *aliter quam ad virum, ex causa regimminis et castigationis uxoris suae, licite et rationabiliter pertinet* (otherwise than lawfully and reasonably belongs to the husband for the due government and correction of his wife). The civil law gave the husband the same, or a larger, authority over his wife; allowing him for some misdemeanors, *flagellis et fustibus acriter verberare uxorem*; (to beat his wife severely with scourges and cudgels); for others, only *modicam castigationem adhibere*, (to use moderate chastisement). But with us in the politer reign of Charles the Second, this power of correction began to be doubted; and a wife may now have security of the peace against her husband; or, in return, a husband against his wife. Yet the lower rank of people, who were always fond of the old common law, still

⁸ Blackstone's Com., p. 444-445.

THE PROPERTY RIGHTS OF MARRIED WOMEN

claim and exert their ancient privilege; and the courts of law will still permit a husband to restrain a wife of her liberty, in case of any gross misbehavior.

“These are the chief legal effects of marriage during the coverture; upon which we may observe, that even the disabilities which the wife lies under are for the most part intended for her protection and benefit; so great a favorite is the female sex of the laws of England.”

Mr. Blackstone’s idea that the female sex was at that time a favorite of the laws of England seems more than strange. The sex might surely pray to be delivered from such favoritism.

A learned English commentator (Mr. Christian), who annotated a new edition of Blackstone in the early part of the nineteenth century, entertained serious doubts as to the correctness of Blackstone’s conclusions of favoritism, and after enumerating the differences in the treatment of men and women in criminal matters, proceeded to state the differences in civil and property rights as follows.⁴

“Intestate personal property is equally divided between males and females; but a son, though younger than all his sisters, is heir to the whole of real property.

“A woman’s personal property by marriage becomes absolutely her husband’s, which at his death he may leave entirely away from her; but if he dies without will, she is entitled to one-third of his personal property, if he has children; if not, to one-half. In the province of York, to four-ninths or three-fourths.

“By the marriage, the husband is absolutely master of the profits of the wife’s lands during the coverture; and if he has had a living child, and survives the wife, he retains the whole of those lands, if they are estates of inheritance, during his life; but the wife is entitled only to dower, or one-third, if she survives, out of the husband’s estates of inheritance; but this she has whether she has had a child or not.

⁴ 1 Blackstone’s Com. Lewis’ Edition, p. 445.

"But a husband can be tenant by the courtesy of the trust estates of his wife, though the wife cannot be endowed of the trust estates of the husband.

"With regard to the property of women, there is taxation without representation; for they pay taxes without having the liberty of voting for representatives; and indeed there seems at present no substantial reason why single women should be denied this privilege. Though the chastity of women is protected from violence, yet a parent can have no reparation by our law from the seducer of his daughter's virtue but by stating that she is his servant, and that by the consequence of the seduction he is deprived of the benefit of her labor; or where the seducer at the same time is a trespasser upon the close or premises of the parent. But when by such forced circumstances the law can take cognizance of the offense, juries disregard the pretended injury, and give damages commensurate to the wounded feelings of a parent.

"Female virtue, by the temporal law, is perfectly exposed to the slanders of malignity and falsehood; for any one may proclaim in conversation that the purest maid or the chastest matron is the most meretricious and incontinent of women with impunity, or free from the animadversions of the temporal courts. Thus female honor, which is dearer to the sex than their lives, is left by the common law to be the sport of an abandoned calumniator.

"From this impartial statement of the account, I fear there is little reason to pay a compliment to our laws for their respect and favor to the female sex."

The right of correction by physical chastisement has long since disappeared and is now merely a matter of historical interest. I fancy that it never actually existed on this side of the Atlantic, though I have given the subject no study. If it did exist in theory it certainly did not in practice to any appreciable extent.

In England, Canada, and all of the British Colonies as well as in all of the states of the Union, statutes have removed or greatly modified the common law disabilities of women, such as their inability to make contracts, to control their own earnings,

THE PROPERTY RIGHTS OF MARRIED WOMEN

and to control and acquire their own property free from the interference of their husbands. In some states the control is absolute and the powers of married women are equal to those of their husbands or their unmarried sisters; in other states great modifications of the common law rules have been made and there is now no state or country which derives its law from English sources in which the rigorous rules of the common law of England are still in force.

It is my intention first to review the law of Wisconsin on the subject.

The constitution of the state, adopted in 1848, contained no provisions substantially increasing the common law rights of married women, and as it provided that the common law should continue in force in the state until changed by the legislature, the property rights of women in Wisconsin were in many respects not essentially greater when the state entered the Union than they were at common law in England. Her personal property became the absolute property of her husband at the instant of marriage; her earnings became the property of her husband, her real estate could be worked or rented by her husband and the proceeds became his personal property; she could not convey it away except by joining with her husband in a deed, nor could she will her property away without the consent of her husband. Practically the only way in which she could have any separate income was by having property put in trust for her sole use, in which event she could receive and enjoy the income; if she died before her husband he could continue to enjoy the use of her real estate during his life. The homestead could not, however, be mortgaged or deeded without the wife's signature, and this latter provision has remained intact ever since. She was entitled, on the death of her husband, to dower out of his estate, i. e., the right to the use or rental during her life of one-third of the real estate which he owned, also to her own and her deceased husband's wearing apparel and ornaments, as well as household furniture not exceeding \$250 in value and other personal property not exceeding \$200 in value; she also could demand a reasonable allowance for support out of the estate during the course of its settlement, and she was entitled in case the husband died without a will to receive the same share of the personal property as a son or daughter.

Wisconsin was, however, a progressive state then as now, and the legislature speedily took up the question.

On the 1st day of February, 1850, an act entitled "An act to provide for the protection of married women in the enjoyment of their own property" received the approval of Governor Farwell, and this act forms the basis of the present enlightened system of law on the subject.

This act provided, first, that the real estate and the income therefrom of any woman already married should be her sole and separate property as if she were single, and should not be subject to the disposal of her husband; second, that both the real and personal property of any woman thereafter married which she should own before marriage and the income thereof, should not be subject to her husband's disposal nor liable for his debts, but continue to be her sole and separate property; third, that any married woman might receive from any person other than her husband real or personal property by inheritance, gift, or grant of any kind, and hold the same to her own separate use and convey or will the same or the income thereof in the same manner as if she were unmarried, and such property should not be subject to her husband's disposal nor liable for his debts. This act seemed radical in those days. When it came before the Supreme Court for construction in 1853, Justice Crawford said of it that it "certainly goes far towards clothing one class of females with strange and manly attributes, yet it is a meritorious statute, designed to remedy a supposed evil of the common law, and therefore it ought to be liberally construed."⁵ The good judge's cautious reference to the "supposed evil" of the common law which the act was designed to remedy is quite delicious.

It will be noticed that this act authorized a married woman to receive property from any person other than her husband, and the claim was at once made that she was still incapacitated from dealing with her husband or receiving the title to property from him, even in payment of a debt which he might owe her; this idea was, however, rejected by the Supreme Court in an early case in which Chief Justice Dixon said, "With respect to her *separate*

⁵ *Norval v. Rice*, 2 Wis. 22.

property the statute has placed her on the same footing as to all the world, her husband included * * * as if she were,—in the words of the statute,—a single female.”⁶ This liberal construction of the statute placed married women so far as their separate property and its management was concerned on entire equality with men even at this early day in the history of the state. In line with this holding, subsequent decisions of the Court held that if a woman had real estate of her own, such as a farm, she might cultivate it, employing the labor of her husband and children for that purpose, and the proceeds of the enterprise still belonged to her and were under her absolute control, and could not be seized to pay her husband’s debts. It was also held that the wife could place her own money in her husband’s hands to be invested for her benefit, and the money did not thereby become his property, but remained her own.⁷

Later it was held by the Court, following the same general policy of a liberal construction of the statutes to effectuate their evident purpose, that she might take title to land paid for by her husband and deeded to her by his request and that her husband could not recover it back notwithstanding he had paid the entire consideration;⁸ also that she might purchase personal property from her husband by using her separate estate and obtain an absolute title thereto;⁹ that she might purchase personal or real estate entirely on her own credit, although she previously had no separate estate and, if the property were a farm, might employ her husband to operate the farm for her and still be the owner of all the profits, free from her husband’s creditors, provided it be done in good faith and not for the purpose of defrauding the husband’s creditors.¹⁰

By Chapter 91 of the Laws of 1859 the legislature struck out the provision of the law of wills which required the husband’s written consent to the wife’s will, and thus placed her on exact equality with her husband so far as testamentary capacity was concerned.

⁶ *Beard v. Dedolph*, 29 Wis. 136.

⁷ *Feller v. Alden*, 23 Wis. 301.

⁸ *Price v. Osborn*, 34 Wis. 34.

⁹ *Carpenter v. Tatro*, 36 Wis. 297.

¹⁰ *Dayton v. Walsh*, 47 Wis. 113.

By Chapter 270 of the Laws of 1864 the legislature further enlarged the homestead right by providing that in case the husband owning a homestead die without will, leaving a widow and no children, the homestead descends to the widow absolutely; if there are children she takes the use of it during her widowhood.

It may be noted here that if the wife owns the homestead she may deed it away and turn her husband out into the cold world at her own will and without his consent. In this respect at least the rights of a married woman are superior to those of her husband in Wisconsin. A somewhat similar condition prevails as to the real estate other than the homestead. While the husband can make a valid deed of the real estate of which he has the title, few will accept such a deed because if the husband dies before the wife she will be entitled to dower out of that real estate, i. e., the use of one-third of it during her life, which right the husband can not defeat by any act of his own, whereas the wife's deed of her own separate real estate is subject to no such contingency. Here, too, the advantage remains with the wife.

In line with the wife's veto power on the sale of the homestead, there has also been given her a somewhat similar power as to the ordinary household furniture and other personal property which is necessary for the family uses and is exempt from sale or execution. The husband can not mortgage it without the wife's signature, nor can he assign his salary or wages unless his wife joins, and in both cases there must be two witnesses to the signature.

The old principles of the common law which gave to the husband absolutely all the earnings of the wife remained in force in this state until 1872, with the single exception that when a husband deserted his wife or by reason of drunkenness or other cause neglected to support her, she might receive and collect her own earnings for her support.

In a case which came before the Supreme Court in 1863¹¹ Chief Justice Dixon said of this apparent solecism in our law,

¹¹ *Elliot, Receiver, v. Bently and others*, 17 Wis. *592.

THE PROPERTY RIGHTS OF MARRIED WOMEN

“It is somewhat remarkable, among the many beneficent changes recently effected by legislation for the welfare and protection of married women, that the legislature should have omitted to secure to the wife the rewards of her individual skill and labor. The real and personal property owned by her at the time of marriage, or which she may receive after marriage, by gift, grant, devise, or bequest, from any person other than her husband, and the rents, issues and profits thereof, are zealously guarded and secured to her sole and separate use. But her earnings, the proceeds of her personal labor beyond that which is required in the discharge of the ordinary duties of the household and family, and which are most frequently the married woman’s only means of acquiring property for the future support and comfort of herself and children, are left to the severe and rigorous rules of the common law, except when the husband, from drunkenness, profligacy, or other cause, shall neglect or refuse to provide for her present support, or the present support and education of her children. R. S. Ch. Sec. 4. This seems contrary to the spirit of modern legislation upon the subject. If the property and its profits deserve protection from the acts or rapacity of the husband or his creditors, the earnings of the indigent but frugal and industrious wife and mother would seem to deserve it still more.”

(To be concluded in the next issue).