

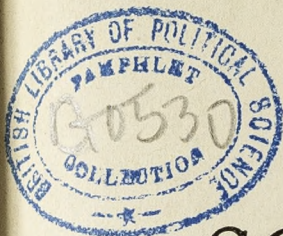
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SCOTTISH LAW

AS IT AFFECTS WOMEN

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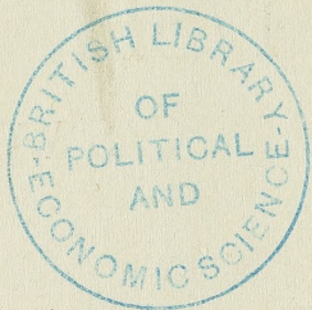
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SCOTTISH LAW

As it Affects Women

THERE are still many differences in Scottish and English law. This pamphlet is designed to show the position of women as wives and mothers in Scotland.

By the laws of all nations the wife was to a greater or lesser extent subjected to her husband. The husband and wife we are told are one, and the unity of persons is so complete, that the legal existence of the wife was largely suspended during marriage, or at least incorporated in that of her husband, until very recently. The wife was without a complete legal personality. This was the ground of the legal decisions which declared the general inability of a married woman to enter into contracts, or be made liable for debts. Thus, it has been said, that as woman "being clad with a husband, could no more be a curator than a minor could be, not having a person in law." A. Fraser in his *Parent and Child* tells us:—"A Curator is a person appointed to assist a minor in the administration of his property with his advice and counsel." The term, he further explains, "is applied to the guardians of lunatics and also, but not so correctly, to a husband in relation to his wife."

The general rule of law was that a married woman could grant no personal obligation*—with certain

* Marquis of Montrose, 1695. A wife has no person.

exceptions such an obligation was null and void because in law a woman had no person. (Harvey v. Chessels-Bells cases (1791) per Lord Justice (Braxfield).)

In another case the Court laid it down that a married woman "has no person in law as distinct from her husband." (Colquhoun v Colquhoun 1804.)

The husband is the ruler and governor of his wife, and it is considered her duty in all things lawful to obey him, as many eminent men have declared. "The wife," says Grotius, "is but a part of the husband's family; and, therefore, it is the husband's right to appoint laws in his own house." "The husband," says Lord Stair, "is lord head and ruler of the wife by the express ordinance of God, Genesis iii. 16, where the Lord says to Eve, 'Thy desire shall be towards thy husband, and he shall rule over thee.'" He then shows that marriage was instituted before the Fall, the woman was made for man, and not the man for woman, and that in their conjugal society the man governed his wife.

It is interesting to note that if a wife violates any of her conjugal obligations, the husband in Scotland is not entitled to use personal chastisement to compel obedience, though, at the same time, he has effective remedies, as he can thrust her out of doors, while her only remedy is a separate aliment and judicial separation under the same circumstances. At the end of four years she can sue for divorce on account of desertion, if there is no just cause for the husband's refusal to live with her.

Difference between the Situation of a Wife and a Minor with Curators

The curatory of a minor ceased at majority, that of a married woman formerly continued throughout the married life. It now ceases at majority, but the

husband must himself be major and not subject to incapacity in order to be curator to his wife. An ordinary curator, before entering into office, is bound to make up an inventory of his ward's effects, a husband is not. A minor cannot grant a gratuitous deed in favour of his curator, while a wife who has attained majority may; that is to say, a wife may legally make a gift to her husband of anything that is hers.

Married Women

The wife assumes her husband's name and from henceforth drops her own. The wife enjoys her husband's rank and right of precedency, unless these be merely official or professional. If the husband be a peer his lady, though by birth a commoner, is entitled to the privileges and precedency of a peeress; but if, on the dissolution of the marriage, she marry a commoner, she henceforth loses the rank which her first marriage gave her, although by courtesy she is commonly addressed by the title which she bore previous to her second marriage.

A husband is his wife's curator no longer unless she is a minor. A wife who is the holder of property is now entitled to exercise the rights of proprietor without his consent or assistance.

The act of marriage formerly vested in the husband two distinct rights over the property of his wife. In England this is called his marital right, and right of management; in Scotland they were called his *jus mariti* and his right of administration. In Scotland the *jus mariti* gave to the husband all the movables (or personal property) of his wife and also all rents of heritage, unless where the husband's rights were legally excluded; but nothing that can be called heritable or real by the law of Scotland fell under this.

The wife has now power to contract and this power carries with it the capacity to sue and to be sued. The mutual rights of husband and wife have been considerably altered by the various MARRIED WOMEN'S PROPERTY ACTS.

In Scotland the Act of 1881 abolished the *jus mariti* as to marriages within its scope, but left the right of administration in the husband exactly as it was (except as to the income of heritage or real property, with regard to which his right of administration was abolished), and, therefore, his concurrence in any action was still necessary, and a wife could only sue without the husband in exceptional cases, e.g. where she was living apart or in actions directed against him. In these cases the Court often appointed a Curator *ad litem*, answering to the English "next friend," to concur and sue in her name. "The husband is then," Mr. Brodie Innes tells us, "by Common Law the perpetual Curator of the wife. This gives him a right of management over all her property and she cannot sue without his concurrence, nor can she be sued unless he is cited for his interest. . . . In exceptional cases the Court will leave to any person whom she may name to concur with her and to carry on the action in her name."

Until the latest Married Women's Property Act, the husband, as head of the family, enjoyed the right to control the management of his wife's estate. In virtue of this right, unless it was renounced or excluded by deed or statute, his consent was required to validate her deeds. The administration must be exercised for the benefit of the wife. In many cases it was excluded by statute.

1. Under certain sections of the Conjugal Rights Act, 1861, where the wife had obtained a Protection Order.

2. Under the Married Women's Property Act, 1877, in the case of wages and earnings of Married Women.
3. Under the Married Women's Property Act, 1881, in the case of rents and produce of heritable property in Scotland belonging to the wife.

The Married Women's Property (Scotland) Act, 1920, has completely transformed the position of matters. The property, heritable or movable, of a married woman, is no longer subject to the right of administration of her husband, and that right is wholly abolished, and a married woman has, with regard to her estate, the same powers of disposal as if she were unmarried; and any deed or writing executed by her, with reference to her heritable estate in Scotland, or to her movable estate, is as valid and effectual as if executed by her with the consent of her husband, according to the previous law and practice.

A husband of full age and subject to no legal incapacity, whose wife is in minority, is her curator during her minority, but no longer, but when her husband is in minority at the date of the marriage or subject to some legal incapacity, the wife's father, or other curator if she have any, is entitled to continue to act as such until she attains majority or her husband's curatory commences.

A married woman is capable of entering into contracts, and of incurring obligations, and is capable of suing and being sued as if she were not married, and her husband is not liable in respect of any contract she may enter into, or obligations she may incur on her own behalf.

A married woman, if living apart from or deserted by her husband, is, on entering into any contract

for the supply of goods or furnishings for herself, or for her children, deemed to bind her own estate in the same way as if she were unmarried, but without prejudice to the right of the person who supplied such goods or furnishings to recover the price thereof from such husband if liable therefor in accordance with the previous law.

In the event of a husband being unable to maintain himself, his wife, if she have a separate estate or a separate income more than reasonably sufficient for her own maintenance, is bound out of such separate estate to provide her husband with such maintenance as he would, in similar circumstances, be bound to provide for her, or out of such income to contribute such sum or sums towards such maintenance as her husband would in similar circumstances be bound to contribute towards her maintenance.

Donations *inter virum et uxorem* are declared irrevocable by the donors, but—

- (a) This enactment does not take effect as regards donations made or granted before the passing of the Act until the expiry of one year from and after that date, i.e. until December 23, 1921.
- (b) Any donations completed within a year and day before the bankruptcy of the donor, in Scotland, are recoverable at the instance of the creditors of such donor.

This Act applies where the husband is domiciled in Scotland, and

1. Notwithstanding that the husband is domiciled out of Scotland the abolition of the right of administration applies to the heritable property in Scotland of his wife, and

2. The provisions relating to donations apply to all estate situated in Scotland and by the law of Scotland heritable as between husband and wife, although the donor of such an estate shall be domiciled out of Scotland.

The Act does not apply to the provisions in favour of either spouse made or reserved by Antenuptial Contract except as regards the abolition of the right of administration.

Inheritance

In Scotland no husband can completely disinherit either his wife or children, and by law a wife can claim one-third of his movable estate. By a recent Act, if a husband dies intestate and there are no children, the wife gets the first £500, and if the value does not come to £500, then she gets the whole property which he has left. The husband has not the right to one-third of the wife's movable estate on her death.

As regards heritable property in Scotland, the wife has the right of terce and the husband the right of courtesy.

TERCE—which is an expression one constantly comes across—is one of the two legal liferents known in Scotch law. It is the right which a widow has to liferent of one-third of the rents of the heritable property (with certain exceptions) in which her husband died vest as of fee, “the quhilk,” says Balfour, “is given to the wife, to the effect that gif it happin hir husband to decis befoir hir, scho may the mair easlie be maryit with an uther man.” Craig explains, while quoting this, that the real object of granting a widow terce, is to afford her an alimentary provision after her husband's death.

Separation and Divorce

In Scotland divorce is on an equal footing for man and woman. They can get it on the same grounds, namely, if they can prove adultery, or unjustified desertion. "Obstinate and malicious desertion," if continued for four years, is a ground of divorce by the law of Scotland. Divorce may be granted though the defender be abroad. Although the husband has gone abroad and acquired a foreign domicile, the wife remaining in Scotland can obtain divorce on account of desertion, or adultery. Either man or woman can obtain divorce if they can prove adultery or desertion. A wife can get a decree of separation with aliment on the ground of cruelty or of danger to life or health through her continuing to reside with her husband.

Divorce Laws of the Empire

The British Empire is full of legal and constitutional anomalies. As time goes by, it is being found that the vast Imperial fabric, built at the outset on the fealty of blood relationships in some cases, and on common ideals and mutual respect in others, needs the stronger bonds of law and statutory sanction. It was only in 1915 that an Act came into operation which established for the first time the status of citizenship of the British Empire. A statute was passed which provided a system of Imperial naturalization on a uniform and definite basis throughout the whole Empire. That Act has gone far to remedy incongruities. Now another problem has been set. A judgment of the President of the Probate, Divorce and Admiralty Division decides that decrees granted by the Courts in India dissolving marriages which had been contracted there between

residents who had an English domicile are invalid. His Lordship held that the provisions of the Indian Divorce Act, 1869, conferring authority on the Indian Courts to dissolve marriages between mere residents in India, was *ultra vires*. Thus, the test of matrimonial domicile prevails, and the reasons for that test as laid down by Lord Penzance in 1872 hold good. The difficulty of applying the rule about domicile, from the Imperial point of view, was recognized in the temporary statute which was entitled the Matrimonial Causes (Dominion Troops) Act, 1919. That Act gave a jurisdiction irrespective of domicile. The judgment of Sir Henry Duke in the present case governs the relationship between the home country and the Dominions as well as India. Professor Berriedale Keith pointed out recently that some Acts of the Dominions, especially Australia and New Zealand, authorize the Courts to grant divorces to deserted wives whose husbands have changed their domicile. The result is that, unless there is Imperial legislation in which the Dominions concur to remedy the conflict of laws, persons who have been divorced in the Dominions and in India will be guilty of bigamy if they marry again in England. The test of domicile in our law depends largely upon intention, and it is, therefore, difficult and almost metaphysical in the application.

Domicile

In 1920 the following case was decided. In 1893 a Scotsman, who had contracted dissipated habits, executed a voluntary deed of separation, and, with his wife's approval, went to Australia. He lived in Brisbane from 1899 till his death in 1918. In 1902 he contracted in that city a bigamous marriage. His wife continued to live in Scotland till the date

of her death, September 1915. Held (App. judgment by the First Division) that as the husband had at the date of his death acquired a domicile in Australia the wife's domicile was also in Australia.

Whatever be its merits, the judgment shows that there is need of an adjustment of the law between the various parts of the British Empire. The effect of the judgment is serious, for, as Sir Erle Richards, who appeared for the Secretary of State for India, informed the Court, it may make illegitimate the children of hundreds of second marriages of persons who had been divorced in India since 1869.

Motherhood

In Scotland, as in most civilized communities, a child is legitimized by subsequent marriage, no matter how many years may have already elapsed between birth of child and marriage, unless there was an obstacle to legitimacy at the time of birth, e.g. the wife being then a married woman or a like impediment such as her marriage with a man other than the father in the interval.

Married Women

A married woman has not equal rights with the father as regards her child; Common Law acknowledged the predominant rights of the father. He was recognized as sole guardian and entitled to the custody of the child. If a question arises that has to be decided in the Court between the interests of the father and the child, the judge will probably, as he has the power to, put the child's interest first. The father, even if dead, can by his wishes control the child's future until the child reach years of discretion, although the mother has a joint right of

guardianship. The wishes of a dead father may overrule the wishes of a living mother as to the form of education her child is to receive, or the religion in which the child is to be brought up.

Motherhood (Unmarried)

The mother is in Scotland considered the parent and guardian of a child, if it be illegitimate. The mother has the custody of the child and is responsible for its maintenance up to the age of 16.

As regards maintenance, there is no fixed sum in Scotland for an illegitimate child, theoretically it may be anything, but in reality it is 4s. 6d. per week, because in October, 1918, the Court of Session gave a decree for that amount, and Sheriffs do not care to go beyond what has been fixed by the Court of Session. At present all payments cease on the child's attaining 14, except in the case of incapacity, when the father's liability continues. The father of an illegitimate child can offer to take and provide for it, in the case of a boy on his attaining ten years. If the offer is *bona fide* and on all grounds satisfactory, whilst the mother is not bound to part with the custody, yet if she refuses to allow the father so to provide, she then loses all claim for further payment of aliment.

In the cases of divorce and separation of married people, the amount to be contributed for the children lies, of course, entirely with the discretion of the Court, and there are no fixed amounts.

Nationality

A married woman takes her husband's nationality and, therefore, in many cases loses her own. By the British Nationality and Status of Aliens Act,

1914, she recovered some of the rights that had been taken from her in 1870. By that Act it was made law that were a British born woman married to a British man, if she were British at the time of marriage, she could not be compelled to change her nationality, even if her husband changed his and became a naturalized subject to any other country.

By an Act passed in 1918 a woman may be denationalized when her husband is denationalized, but in the case of a woman of British birth that only applies where had she been a naturalized person she could have been denaturalised, i.e. on account of some serious fault.

The widow of an alien may in widowhood resume her British nationality, provided she intends to live within the British Empire, and if she has the sanction of the Home Secretary to do so. A married woman cannot acquire a domicile different from that of her husband.

Employment

Married women may work if they wish to; no legal barrier against their doing so exists, but the right to work has to be maintained by constant vigilance. Frequently married women, in spite of there being no legal barrier, are dismissed from employment when they marry.

Conclusion

There are still inequalities and differences in the laws—until they are made equal women have a task before them. The awakening of women has been slow; men made the laws, men administered the laws, women acquiesced. Custom too long condoned men for making harsh and unequal laws,

but slowly in the hearts of men more liberal ideas prevailed so that she had no longer to have her person disposed of, her inheritance and her very earnings taken from her. As the years passed the spirit of revolt has grown deeper and stronger, her voice has been heard and her appeal has borne fruit. The shackles that bound her feet are loosened, the barriers that hemmed her in have burst, and as they fall, so woman advances, and with the advance of woman, humanity reaps the benefit. A little more effort is required to remove the legal disabilities of the married woman, and that effort will be made more easy by the Parliamentary vote now in the hands of women.

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