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THE SEPARATE EQUITABLE ESTATE OF MARRIED WOMEN.

As said by Bishop, "Since the confusion of tongues at the Tower of Babel there has been nothing more noteworthy, in the same line, than the discordant and evershifting utterances of the judicial mind on the subject of the present subtitle. True, there has been sometimes a language which, though limited in its sphere, was tolerably plain; but no sooner was the language in the way of being understood than, lo, some conquering power of another sort came in, and all was confusion once more. Let us see, however, if we cannot draw out from the mass of discordant sound something which shall call to mind the heaven which ought to be, resting over the hell which is." (Bishop, M. W., Vol. I, p. 847).

At common law the personality of the wife became merged into that of her husband.¹ She had no separate legal existence and consequently no power or right to hold and acquire property. By marriage the personality of the wife became the husband's absolutely; and such choses in action as he reduced to possession. Of her realty he became the owner for all practical purposes, as he was entitled to all the rents and profits. She could not acquire any property without his consent, and if she so became able to do that, the property immediately became his by virtue of the marital rights.

And the reason attributed to such rights is of natural origin. By nature we find man the stronger and it thus befell to him to provide for the wife who became incapacitated by maternal duties. The husband gave support and protection to the family, and naturally as the acquisition of property was the most effective to that end, the law placed in him the

1. 1 Blackstone Comm., 442; 2 Kent Comm., 129; Coke Litt., 112b; 1 Bishop M. W., sec. 35.

personalty of the wife; for necessarily the world at large could not divide any interest that property might cause between husband and wife. For that would occasion danger to the family unity *THE LAW BASED ON SUCH REASON HAS COMPELLED ALL* the world to deal with husband and wife as one. So, by virtue of marriage the property of the wife became the husband's. Further, in consideration of the obligations that were incident to marriage the husband became bound to pay all the debts that were pending against the wife at the time of marriage, also bound to support her and maintain the children in the proper manner.²

While this was the doctrine that gave the best results to the protection and preservation of the family, still it was not entirely without defects. The husband could sell and dispose of the rights to the property which he had received from the wife, and so invest or squander it to the detriment of the family. Or he might become insolvent and the property thus acquired for the benefit of the family would be taken by creditors of the husband; and the wife was without protection, for the machinery of the law could not furnish any remedy under such circumstances.

Then Equity, at a very early date,³ meeting and reasoning for the best intent of the law, established the wife's Equity of Settlement, a doctrine based on the maxim, "he who seeks equity must do equity." That is, when the husband sought to enforce his marital rights in regard to the wife's property, or creditors seeking to enforce their claims on such property, a court of equity required a reasonable settlement out of such property in favor of the wife and children.⁴

But courts of equity made another important step in favor of the wife and created her separate Equitable Estate, a

2. 10 Ves., 90; 8 Ves., 206; 5 Myl. & cr., 103.

3. 5 M&C., 377.

4. 2 Kent Comm., 139.

property created for her sole and separate use; so settled upon her that courts of equity recognize it during her coverture as her own, unaffected by the marital rights of the husband.⁵ And as stated by Lord Cottenham in the leading case of *Tullett v. Armstrong*,⁶ "when courts established the separated estate it violated the laws of property as between husband and wife, but it was thought beneficial, so it prevailed." And the reason given, that such was a violation, is based on the idea that it was an infringement of the marital rights of the husband to have a stranger confer property upon the wife independent of the husband, over which he had no power and could assert no interest. But equity met this reasoning with the argument that an absolute owner of property might convey it to whom he pleases, and on such terms as the law would permit. As the husband had no right in the property, "it does not deprive him of any right not to confer any upon him."⁷ But after such estate was created and sanctioned by the courts of equity the laws of property became attached thereto, and the power of alienation was the next to defeat the purpose for which the estate was created; for now the wife under the moral influence of the husband, gave to him what the courts were trying to keep from him. And this is brought out clearly in *Tullett v. Armstrong*, *supra*, the Court said: "The estate for separate use as sanctioned by courts of equity has its peculiar existence only in the married state. It was to operate as a protection to married women. But the power of alienation remaining with the wife the separate estate unfettered is no protection against the moral influence of the husband, and many instances have occurred, and daily occur in which the wife, under the persuasion of influence of her husband, has been induced to exercise her power of alienation in his favor or for his benefit and thus defeat the

5. 1 Bro. C. C., 20; 4 Bro. C. C., 485; 9 Ves., 189; 3 Mad., 388.

6. 4 Myl. & C., 377.

7. 4 Myl. & C., 390.

purpose intended for her." So equity, again using its extraordinary power, held that as the estate was a creature of equity that same power might modify it to meet the ends for which it was intended, and accordingly gave validity to a clause restraining the power of alienation.⁸

It was first held that restraints upon alienation when married women were given the equitable ownership of property were void the same as in case of legal estates.⁹ For at common law every person *sui juris* that held interest in property had the power of alienation,—*jus disponendi*. And equity hitherto had not questioned that power.¹⁰ And a married woman was considered as *sui juris* in regard to her separate estate and had full power of alienation, until Lord Thurlow in *Pybus v. Smith*,¹¹ expressed such reluctance in rendering a decision in favor of creditors of the husband, holding the separate estate of the wife liable on a bond in which she had joined her husband. As said by Lord Eldon, in *Parks v. White*,¹² "Lord Thurlow made the decision in *Pybus v. Smith*, *supra*, with great reluctance, thinking the act proposed unrighteous."

Thus, as stated by Professor Gray, in his "Restraints and Alienation," page 125: "When in the interest of married women the doctrine of separate use and restraint upon anticipation came into existence, the interests of alienation of which it sought to restrain were life interests. It was only in *Baggett v. Meux* (1844)¹³ that the question as to the validity of a clause against anticipation upon a gift of an absolute interest came up. In this case the legal estate in land was devised to a married woman in fee for her separate use,

8. 3 Bro. C. C., 340; 2 Russ. and M., 197; 18 Ves., 429; 2 Merlu., 487.

9. 1 Beau., 1; Jac., 606.

10. 1 Ves. jr., 48; 3 Bro. C. C., 9.

11. 3 Bro. C. C., 340.

12. 11 Ves. jr., 222.

13. 1 Colly Ch. C., 138.

with a direction that she should not sell or encumber it. She did encumber it. Vice Chancellor Knight Bruce held that a restraint on anticipation was equally valid upon a fee simple as upon a life estate, and that the encumbrance was void. This decision was confirmed by Lord Lyndhurst in *Baggett v. Meux*.¹⁴

But the law looked with an evil eye upon all restraints in a grant of a fee, for it is the very purpose and essence of that estate that the control be entire, and therefore repugnant to the grant. It was only after a long line of decisions¹⁵ that it became firmly established, that the exception to the invalidity of restraints upon alienation of a fee, or absolute interests, in the case of married woman's separate estate was valid. And when it thus became firmly fixed as a sound doctrine courts even desired to take it further, and it was even intimated in *re Riddley*¹⁶ that the rule against perpetuities should be held not to apply to restraints on alienation by married women, though the decision was the other way on authority.

So was the extraordinary power of equity exercised in bold defiance to common law doctrines. In brief, we have followed the evolution of the married woman's equitable interests—wife's equity of settlement, wife's separate equitable estate, and the necessary steps for her control over that. It now remains to be seen what the law will do in case no provision of restraint is made, and what equity will uphold when such provision is inserted in the instrument of conveyance. In the first instance the laws of property affect the estate of married women as they do any estate of a *sui iuris*, and her power of alienation is absolute. In the second we have the application of the exception to the cardinal principle of the

14. 1 Phill. Ch., 627.

15. 3 Ves. jr., 488; 8 Ves., 175; 4 Bro. C. C., 483; 15 Ves., 595; 9 Ves., 497.

16. 11 Ch. D., 645.

common law (that gives absolute power with absolute interest), giving validity to a clause against alienation. Generally, the doctrine is held that a married woman is considered in equity a *feme sole* with respect to her separate property, and consequently has absolute dominion and power of alienation unless restrained by the instrument by which she became entitled to it.¹⁷ And the rule, that where a specific mode of disposition is made, that she is not limited to that mode of disposing or alienating it, is also sustained generally in England.¹⁸ The maxim, "*expressio unius exclusio alterius*," must yield. Accordingly to these cases, as the natural inference that an unqualified gift carries with it unqualified rights of disposition.

But the doctrines as stated above have not been entirely followed in England. Some courts holding that a right of disposition, as specifically designated in the instrument, excludes all other modes of disposition.¹⁹ The English judges deciding these cases admitted that the weight of authority is opposed to such restraint, but regretted that the law had become so settled. In *Sockett v. Wray*²⁰ a very distinct case on the point the rule as to a specified mode of disposition was upheld. Money was placed in trust for a married woman to pay her interest for life to her separate use, after her decease, to such persons as she should by any instrument in writing from time to time or by will appoint (during her present coverture) she cannot dispose of the principal at it by deed. The court held that "the omission of the words once, by deed, but by revocable act only. She did dispose of deed or deeds which are usually inserted in such powers is a strong guard and shows she was only to do it by a revocable act, and has no right to give but under that power." How-

17. 3 John Ch., 77.

18. 11 Ves., 222; 1 Sim & St., 429; 1 Ves. Jr., 189; 3 Bro. C. C., 565.

19. 3 Atk., 541; 4 Bro. C. C., 541; 3 Ves., 437; 14 Ves., 542.

20. 4 Bro. C. C., 486.

ever, today, the doctrine that a married woman has full power over her separate estate unless restrained by the instrument is the prevailing one in England.²¹ And we shall now consider the United States. There have been many contradictory decisions. The first court to uphold the doctrine that a *feme covert* limited to that mode of alienation or power over as given to her in the instrument is the case of *Ewing v. Smith*²² from the Supreme Court of South Carolina. In that case a trust estate was settled upon a wife to her separate use with the power to dispose by will only. The court was divided three to five, the majority opinion holding that a married woman was restricted to that particular mode of disposition as stated in the instrument. Chancellor Dessau-
re very elaborately reviewed the English authorities showing the well settled doctrine in England. But the Chancellor writing the majority opinion arguing against the English authority said: "Never before the revolution, no more than since was this court ever bound to servile adherence to precedents of the English Court. This court ought to be independent of every other in the exercise of its judgment * * *. It is indeed true as a general rule that an absolute right of property gives an absolute right of disposition. But this rule is applicable only to persons of full legal capacity; and it is so strange that any English judge should have ever lost sight of the common law so far as to apply it to married women." And what the able court has said may be further elucidated by Professor Gray's words in his "Restraints and Alienation," page 269, "That doctrine of repugnancy of restraints upon alienation is that it is against public policy to permit restraints to be put on transfers, which the law allows. But the common law does not allow married women to transfer their property. The separate estate which allows a transfer is the creature of equity, and it cannot be deemed

21. 86 L. J. Ch., 217 (1917); 1 Chan., 30.

22. 3 Dessau. 417.

against public policy for equity to permit its creation to be moulded by the clause against anticipation, nor the tendency of such clause is only to put the married woman where the common law always puts her." And this doctrine as laid down in *Ewing v. Smith*, *supra*, has been followed generally in the United States.²³ The courts of the United States have not only agreed with the English that a married woman is regarded as a *feme sole* as to her separate equitable estate, unless restricted by the instrument, and that, if one mode of alienation is designated, she can only act under that power, but have taken a step further; holding, that she has no power excepting that which is given by the instrument creating the estate; that is, if no mention is made of any mode of alienation she has none whatsoever.²⁴ The very often quoted and much criticised decision of Chancellor Kent in *M. E. Church v. Jaques*²⁵ (1817) has taken the lead in justifying the doctrine that a *feme covert* ought only be deemed a *feme sole sub modo*, or only to the extent given her by the instrument, on the ground that the decisions were so floating and contradictory that the court was free to adopt whatever the discretion of the court may think best. He said: "The English decisions are so floating and contradictory as to leave us the liberty of adopting the true principle of these settlements. Instead of maintaining that she has absolute power of disposition unless restrained by the instrument, the converse of the proposition would be more correct, "that she has no power but what is specially given and to be exercised only in the mode prescribed, if any such there be." The Supreme Court of Pennsylvania in *Lancaster v. Dolan*, held: "In fine, notwithstanding the case of *Newman v. Newman*, which was hastily determined, on an exception to the evidence, we are

23. 1 Barr. Pa., 111; 4 Yerg. Tenn., 375; 26 Miss., 275; 8 Leigh (Va.), 20; 5 Md., 319; 4 N. Y. Eq., 512.

24. 84 N. C., 661; 1 Rawle (Penn.), 231; 2 R. I., 355; 1 Strobb. (S. C.) Eq., 27; 83 Fed., 19.

25. 3 John., 77.

entirely prepared to adopt the conclusion of Chancellor Kent in *M. E. Church v. Jaques*, *supra*: That the English authorities are so floating and contradictory as to leave us at liberty to adopt the true principle of these settlements. That instead of holding the wife to be a *feme sole* to all intents as regards her separate estate, she ought to be deemed so only to the extent of power clearly given by the conveyance. That she has no power but what is absolutely given." And, there are many other States upholding this doctrine,²⁶ the United States Supreme Court included.²⁷

We may observe that *M. E. Church v. Jaques*, *supra*, after being followed in many courts, was reversed in 17 John. 548, and the doctrine of full power, when no mention is made of alienation, established: The court said, "trustees were introduced merely to avoid the common law; not to become champions of the wife against the husband. Suppose a wife, by her husband's influence, should choose to forego her settlement, the worst that could happen to her would be, that she would be in that situation which the common law would have originally placed her, and which is most consistent with the natural state, and the true policy of society. Connubial happiness is nowhere greater than in those countries where the wife relies on the affection of her husband for protection and support." And the idea of secret influence is rebutted by the argument, that when a secret influence is exercised she has the same right to seek remedy as any person *sui juris*? The court says: "A Court of Chancery protects and relieves every person from the effects of fraud, duress or undue influence; and where either is proved it will undoubtedly protect and relieve a wife, who may be more subject to it than persons in other relations of life, and whose interests, therefore, are to be more vigilantly and jealously watched than those of others." Then the three existing doctrines may be stated. (1) Full power if not restrained by the instrument,²⁸

26. 5 Tex., 169; 12 Ga., 200.

27. 2 Pet. R., 595; 83 Fed., 19.

(2) Confined to the particular mode of alienation given in the instrument,²⁹ (3) No power whatsoever but that specially given by the instrument.³⁰ Not only have these doctrines varied among the different States, but courts of the same States have varied in the application of the rules.³¹ However, the prevailing doctrines in the United States are number one and two,³² and these are the rules in Missouri.³³

Which rule makes toward the greatest social and economic good, might be answered thusly: The status of married women is rapidly undergoing changes, and while it is held generally, that the enabling acts of married women do not affect her separate equitable estate,³⁴ yet they do have the effect of giving her a certain independence and protection, and to dispense with restrictions made for her protection in these settlements. Some courts hold that the modern enabling acts of married women removing the disabilities of the common law to contract and extending their rights over their property, have removed the necessity of the doctrine against alienation in regard to her separate equitable estate. On the whole we may fairly deduct that the tendency of our civilization with its progress is toward free alienation of property and property rights, and that ultimately no restraints will be allowed. And this is in harmony with a cardinal principle of the common law, that "alienation is an inseparable attribute of property rights."

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28. 17 Ga., 612; 20 Conn., 146; 32 Ga., 604; 23 Ill., 209; 13 Md., 348; 46 Mo., 532; 47 Miss., 569; 4 N. Y. Eq., 532; 13 W. V., 572.

29. See note 28.

30. 84 N. C., 661; 1 Rawle, 23; 2 R. I., 355; 1 Strobb. Eq., 27 (N. C.); 83 Fed., 19.

31. 12 W. V., 587, overruled in 13 W. V., 572; 3 John., 77; reversed in 17 John., 548 N. Y.; 88 Mo., 229, overruled in 96 Mo., 22.

32. 23 Mo., 457; 58 Mo., 56; 32 Mo., 252; 69 Mo., 584; 46 Mo., 532; 96 Mo., 22.

33. 13 R. C. L., Hus. & Wife, sec. 156; 65 Mo. App., 117; 36 N. Y., 600; 75 Ill., 446.

34. 39 L. R. A., 806; 133 Mass., 175; 55 Me., 254; 87 Md., 161.