The Reform of Matrimonial Property Law in England during the Nineteenth Century

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In a period of less than one hundred years from the middle of the eighteenth century, England changed from a predominantly rural society in which land was the determinant of status and power to an urban industrial society where the emphasis was on individual achievement. Personal relationships, property relationships and business relationships were all legally redefined during the nineteenth century. The changes in the law relating to marital property are here interpreted as part of the same pattern.

By 1850 it was clear that the move to an industrial-capitalist society in Britain was almost complete. The population was predominantly urban and wage-earning rather than rural and in tied labour or cottage industries. The industrial economy was such that it was generating its own surplus for re-investment and the tie between wealth and land had been drastically frayed. The new wealth in industrial enterprise raised the standards of living for most sections of the community and more money became available for consumer goods than ever before. This increase in production and exchange opened up a whole range of occupations and business enterprises in the retailing and service industries which had never existed previously. The middle classes grew numerically and became an important economic force within the community.

Political reforms of the period reflected this changing interest structure. Thomson says of the Reform Act of 1832[1] which was the first of the acts to extend the franchise:[2]

> The full significance of 1832 in the history of the country is appreciated only if it is seen as the central change in this many-sided transformation of an agricultural nation ruled by squires, parsons and wealthy landowners into an industrial nation dominated by the classes produced by industrial expansion and commercial enterprise.

Both the 1832 Reform Act and the 1867 Reform Act eroded the principle that it was property rather than persons which Parliament represented. After 1867, for the first time, the boroughs had more voters than the counties.

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1. All references in this paper are to English statutes and parliamentary sources.
2. D. Thomson, *England in the Nineteenth Century* (Harmondsworth, Middlesex, 1950) 73.

Just as the moves for political and constitutional reforms met with opposition from the conservative elements in government and the wider society so did the move for reform of the law relating to married women's property. It is no coincidence that the first Married Women's Property Act was passed in 1870 after the membership of the House of Commons had been broadened[3] by the 1867 Reform Act.

Throughout the nineteenth century women formed a substantial part of the workforce. Women from the middle and lower classes tended to work before they married but did not continue after marriage. Normally only women from poorer families worked after marriage, although there were also many women who were widows or had been deserted by their husbands who had to find employment of necessity. The census in 1861[4] showed that out of the three million married women in the population, 800,000 of them were working for wages or earning in some other way. Also the number of single women was large in the nineteenth century because there were approximately one third more women in the population than men.

I. THE MOVE TOWARD REFORM

It was within this social context that the law relating to married women's property came to be questioned in the 1840s and 1850s. The emphasis of the old common law, and to a lesser extent equity, on wealth in real property was inappropriate in the new industrial society. A wage-earning single woman in the nineteenth century had an autonomy which she had not had under the old system. She was free to use her wages as she wished, could rent her own lodgings, and buy clothes and trinkets and other items of personal property. If she managed to accumulate any assets she could set up in business, enter into contracts and sue in the courts to recover money owing to her or to defend her reputation. She could leave her property by will to a person of her choice. Admittedly, she could not vote, could not enter various professions and was prevented from taking up many pursuits because of social pressures, but she was still an individual and had far more freedom than she would have had as the daughter of a tied labourer or a family in a cottage industry in the seventeenth and eighteenth centuries.

In contrast with this, her married sister lived in another world. If she was a wage-earner, her husband was entitled, legally, to take her wages. If she accumulated enough from her earnings to buy furniture or clothes for her children, her husband could dispose of them as he wished. If she inherited any money not settled to her separate use then her husband could take it unless by some unlikely event she knew about a wife's equity to a settlement and could go to court. She could only make a will with her husband's permission and he could revoke it at any time. If she went into business she was handicapped by her inability to sue and forever subject to the risk of her husband pocketing the proceeds. If she had managed to save any money prior to her marriage it became

3. In a form considerably modified by the old guard in the House of Lords.
4. Census 1861: Out of 3,488,932 married women, 2,650,096 wives were engaged in unremunerative domestic duties in the home. The Census of 1871 and 1881 did not give a comparable breakdown in the figures.

her husband's immediately the marriage vows were spoken. If she put money into a savings account in her own name her husband had authority to withdraw it. The Equitable Pioneer Co-operative Society at Rochdale had a policy of not surrendering the money in a wife's account to her husband but there seems no doubt that if a husband had contested this stand in Court he would have won.[5] Although a husband had the right to all his wife's choses in possession there was absolutely no obligation on him to provide for her in his will and thus he could leave his widow destitute if he so chose. The common law had hardly changed since the Middle Ages except in so far as a wife had lost her rights in her deceased husband's estate.[6] But the social system had changed and it was this which made her position so onerous. For the first time, women who were not from wealthy families had money which they had earned in their own right and a multitude of consumer goods were available for them to purchase, yet they had no rights in respect of this property.

The development of the separate estate by the Courts of Equity gave wealthier women their independence but the device was only appropriate where the property was substantial enough to be invested and the income paid to the woman. There was difficulty in finding trustees where the husband was judged unsuitable and administration costs were generally high. Any questions arising out of such settlements had to be dealt with by the Courts of Equity and here again the expense was prohibitive except to the wealthy. The Court of Chancery was notorious for delay, especially during the Chancellorship of Lord Eldon from 1801 to 1827. The wife's equity to a settlement[7] was also not generally available as a result of ignorance and expense and was in any case inappropriate in most of the cases affecting the wage-earning classes as it was available only for restricted classes of property.

It must be emphasized that in the majority of instances where a marriage was reasonably harmonious, a wife presumably did not feel unjustly treated. The incomes of the parties would support the household and the wife and family would inherit by will or intestacy on the husband's death. The gravest injustices occurred when marriages did not work well. In these circumstances, because the husband had legal control over all property of the marriage he could call the tune as he wished. A husband could desert his wife, leave her unprovided for, but still lay claim to all her earnings and property. If a wife was deserted she was subject to so many incapacities at law that it was almost impossible for her to secure her legal rights, even against persons other than her husband.

5. Minutes of Evidence taken before the Select Committee on the Married Women's Property Bill 1868 by Mr. John Ormerod, 67.
6. A wife's right to dower (a proportion, usually one third) in her husband's real and personal estate was eroded during the 18th century and early 19th century by conveyancing devices designed to make land more readily alienable, and later by statutes such as the Dower Act 1833 and the Uniform Administration of Intestates Estates Act 1856.
7. Probably available since the early 17th century. Where a husband was obliged to come to Chancery to ask for possession of his wife's equitable personalty then that court would ensure that part of that property was first settled to the wife's separate use if she was in need of provision. This was the wife's "equity to a settlement", later extended to cover an equitable interest in real property as well. From 1801 a wife was granted the right to make an application for her equity so as to prevent personalty falling directly into the hands of her husband.

The radical changes in society in the nineteenth century ensured that agitation for reform of the law was inevitable. Public debate on the question seems to have suddenly accelerated around 1850. It is apparent from the publications of the 1850s that there had been a growing realisation since the 1830s, especially among wage-earning women, of the disadvantages of their position. But working class women were uneducated and without access to publishers and editors of newspapers. Once the better educated women from the middle and upper classes began to speak out the debate became a public one. Women such as Caroline Norton and Sarah Siddons the actress, whose marriages had not been successful publicised the difficulties and injustices imposed on them by the law. Both of these women had earnings which were appropriated by their husbands.

Caroline Norton's story illustrates well, if extremely, the myriad difficulties which she faced. She had been married in 1827 at the age of nineteen and bore three children. The marriage was an unhappy one; her husband cruelly assaulted her on many occasions and eventually she left him. The injustice of the law relating to married women was graphically impressed upon her when her husband took her young children away from her, placing them with his sister for some time and then with his mistress. One of the first campaigns in which she became involved was directed towards giving a mother some rights in respect of the custody of her children. At common law a father had absolute rights of guardianship and custody of his legitimate children to the complete exclusion of his wife. Mrs. Norton assisted Serjeant Talfourd in a campaign to modify this rule and finally in 1839 the Infants Custody Act was passed which gave a mother rights to apply to the Court of Chancery for the custody of her children up to the age of seven years. She was libelled by the *British and Foreign Review* over her association with Talfourd in promoting the Bill and was told by her lawyers that as a married woman she could not sue without the consent of her husband. Throughout the marriage her income earned by writing was used to support the household. Under her marriage settlement Mr. Norton was entitled to income from the trust fund only with Mrs. Norton's consent. She gave this consent as part of the terms of a deed whereby he was to guarantee to pay her £500 a year. Mr. Norton was able to raise the money immediately with his wife's signature on the deed but she was unable to enforce his promise to pay income to her. When she inherited a separate estate of £480 per year from her mother, Mr. Norton cut off the promised income altogether. Mrs. Norton was advised that she could not sue her husband at common law, and the only way to attempt to enforce her husband's obligations at all, was to pledge her husband's credit for goods she needed. The whole affair was then ventilated in the court room when a coachbuilder sued Mr. Norton for the cost of repairs to his wife's carriage.[8] The case, and especially Mrs. Norton's evidence was reported widely in the newspapers and she gained much public support. In 1854 she published privately *English Laws for Women in the Nineteenth Century* in which she illustrated the need for reform by relating her own experiences, and in 1857 she published *A Letter to the Queen on Lord Chancellor Cranworth's Marriage and Divorce Bill* covering much the same ground. This second pamphlet was widely circulated among M.P.s and lawyers.

8. *Thrupp* v. *Norton* heard in Westminster County Court, August 1853.

Other pamphlets were written, public meetings held and petitions drawn up and circulated. The Law Amendment Society[9] prepared a report on the issue in 1856. They rejected the French system of community of property on the grounds of unfamiliarity and complexity and came out in favour of a system of separate property between husband and wife, taking as their example the success of the separate estate allowed by the Courts of Equity. So already the lawyers' view of possible reform advocated an extension of the equitable principles of the separate estate to the property of all married women. This continued to be the basis of legal thinking on the subject throughout the nineteenth century. These proposals were favourably discussed in such papers as the *Law Magazine and Review* and in the *Westminster Review* and thus received a wider public.

The issue was finally raised in Parliament in the House of Commons in June 1856 by Sir Erskine Perry.[10] He is reported[11] as having said[12]

> during the session no less than 70 petitions had been presented complaining of the law as it affected the property of married women. Some of these petitions bore the signatures of the most thoughtful portion of society; the most marked one of the whole, perhaps, was the one which he presented before Easter, which was signed by 3,000 women, amongst whom were ladies who had made the present epoch remarkable in the annals of literature.

He was careful to dissociate himself, as Caroline Norton had done, from the idea that he "entertained any moral or theoretical notions on the position which women ought to occupy in society".

The motion he proposed was[13]

> That the rules of common law which gave all the personal property of a woman in marriage, and all subsequently acquired property and earnings, to the husband, are unjust in principle and injurious in their operation.

Perry received some support for his proposals although the Attorney-General expressed himself in favour of a Bill rather than dealing with the matter piecemeal in the form of abstract resolution. And there were several comments of the tenor of Mr. J. G. Philimore who argued[14] "what could be more desirable for women to know than that, if they acted foolishly and contracted imprudent marriages they must bear the consequences".

There was an awareness shown in the debate that English society had undergone radical change and that the law was not appropriate to the new social circumstances. It was emphasized that the richer members of society were able to make use of the separate estate endorsed by the Courts of Equity, but

9. This was a general law reform body. For example in the late 1840s and early 1850s it had considered the question of law reporting.
10. A Liberal M.P. Member for Devonport; called to the Bar in 1834; Judge of the Supreme Court at Bombay 1841; Chief Justice in Bombay from September 1847 to 1852.
11. At this time all parliamentary debates were reported in the third person.
12. Gt. Brit. Parliamentary debates s3v142 (1856): 1273.
13. Ibid., 1277.
14. Ibid., 1282.

that the poorer members of society were forced back on the common law. The property of the poorer classes was in the form of wages and it was totally inappropriate for the type of intervention which the Courts of Equity could provide. Perry said:[15]

> [The different principles of law and equity] tended also to show that for the rich there was one law and for the poor another; but then that description was not strictly applicable. It was [sic] accurate to divide society into two classes of rich and poor. There were a great mass, perhaps the bulk of the community who were happily removed above poverty, but who were not yet rich enough to go into the Courts of Equity; and this class had a strong claim upon the legislature to be put in the same position with respect to the rights of property as the more wealthy.

Perry expressed doubt that the law would be changed after hearing the speech of the Solicitor-General but he withdrew the motion on the assurances of the Attorney-General.

Two bills were presented in 1857. The first was brought in in the House of Lords by Lord Brougham but was dropped after the first reading; and the second was presented by Perry in the House of Commons on 14 May. Both bills proposed very similar and far-reaching changes. Lord Brougham's Bill gave all real and personal property of a married woman to her separate use, whereas Perry's bill more directly, provided that

> From and after the passing of this Act, a married woman shall be capable of holding, acquiring, alienating, devising and bequeathing real and personal estate, and of suing and being sued as if she were a feme sole.

The intention of both bills seems to have been to give a woman complete independence, autonomy, and responsibility during marriage. She could sue and be sued and could not shelter behind her husband so as to avoid liability on contracts. In allowing a married woman to hold property as a feme sole rather than to her separate use, Perry's Bill went further than even the 1882 Married Women's Property Act.

In the House of Lords, Lord Brougham had referred to the greater justice received by married women under French law and in the debate on the second reading of the bill in the House of Commons Mr. Monckton Milnes explained the property system operating in France whereby the majority of married couples held property in community, but where necessary, a wife could apply to the Court and have her property secured to herself. He then continued:[16]

> Perhaps it might be said that this would be a more desirable state of the law than that which was now proposed to be enacted, but he did not think so, as it was not applicable to the state of domestic life in this country, and might tend to familiarize people to an objectionable

15. Gt. Brit. Parliamentary debates s3v142 (1856): 1274.
16. Gt. Brit. Parliamentary debates s3v146 (1857): 1517.

> degree with the idea of separation between man and wife. At the same time, he believed that the rejection of a measure like the present would lead to the adoption of such a state of things as he had just described [i.e. a community system as in France].

But even at this comparatively early stage in the reform movement the reference to French law was introduced more to illustrate the unusually disadvantageous position of the English wife, rather than to provide a model for reform. English conservatism even among the "radical" reformers led to the extension of the well-tried principles of the separate estate rather than the introduction of a completely new and alien approach to the issue. The English wife was never given a choice between separate property and an alternative system in which she gained rights in her husband's property just as he had always taken rights in hers. Perhaps this idea was more threatening to the English husband than merely to take away the rights he had in his wife's property, as Mr. Milnes seems to have implied. More than 100 years was to pass before even a limited form of community was introduced into English law.[17]

Supporters of the bills in both Houses gave examples of the hardship occasioned by the current law whereby deserting or drunken husbands could seize their wives' earnings and possessions; or fortune-seekers could marry wealthy women and divest them of their income and assets. Perry referred to the similar reforms which had been made in several of the American states and the favourable reception they were getting with no untoward consequences for marriage.

Opposition to the Bills varied in intensity. There were those who were totally opposed to reform such as Sir John Buller who stated that if such a Bill should become law a married woman[18]

> might with the best of intentions, lay it out, without consulting her husband, in some worthless railway shares or in some unsound speculation, and the husband might find that the whole of that property to which he had looked perhaps for maintenance of himself during his lifetime, and for the benefit of his children afterwards, had been swept away.

And yet this must have been the position in which many women found themselves in respect not only of their husband's money but also their own. Many of those who spoke in the debates agreed that there were cases, especially where women were living apart from their husbands, where the law operated unjustly, but nevertheless they were reluctant to endorse such a wholesale change as that proposed by the Bill. Everyone was conscious that a Bill allowing judicial divorce was also currently going through Parliament, and the amendments which had been made to that Bill for the protection of deserted wives were obviously thought by many to offer sufficient safeguards. Sir Erskine Perry argued that he feared the failure of the divorce Bill[19] in which case it was important that his property Bill should be passed. The Commons Bill reached its second reading in July 1857 and Perry acknowledged that he had not the slightest expectation

17. I.e. Family Provision Act 1938.
18. Gt. Brit. Parliamentary debates s3v146 (1857): 1515.
19. The Matrimonial Causes Bill, later the Act of 1857.

of having it passed in that session; but that if it should be read a second time he hoped that in the event of the divorce Bill being thrown out the House would consent to discuss the principles embodied in his Bill.

It seems therefore that even though the Bill was passed at the second reading with a majority of fifty-five, Perry appreciated that there was not enough support for his wholesale revision at this time, and that if deserted wives gained protection under the Matrimonial Causes Bill this would satisfy the immediate concern of the House. This proved to be the case, as once the Matrimonial Causes Act was passed, Parliament left property reform in abeyance for another ten years.

The proposed amendments to the Matrimonial Causes Bill initially provided that a wife who had been deserted for not less than a year should, without more, be treated as a feme sole for the protection of her property and earnings. In the House of Commons Perry pointed out that, as it stood, a husband could return every eleven months, seize his wife's earnings and possessions and then disappear again. The provision was re-drafted and became section 21 Matrimonial Causes Act 1857 whereby a wife deserted for two years or more could apply to a Police Magistrate or a Justice of the Peace, or to the High Court, for an order to protect her earnings and property. The effect of such an order was to treat a married woman as a feme sole for the purposes of the law of property, contract and of the power to sue and be sued. By sections 25 and 26 of the Act the same provisions applied if a judicial separation was in force.

These provisions did remove some of the gravest injustices but protection was only given in the very limited case of a husband's desertion for two years or more. Some of the worst instances involved drunken, cruel, adulterous or lazy husbands who did not leave but battened upon their wife's earnings, and in these cases a wife still had no remedy as the concept of constructive desertion was not recognised by the Courts until the 1860s.[20]

Nevertheless it was not until 1867 that the question of married women's property was again raised in Parliament. Then, it was mentioned as part of the whole issue of women's rights when John Stuart Mill moved an amendment to the Second Reform Bill to extend the suffrage of women who held the appropriate property qualifications.

In the autumn of 1867 a petition signed by 800 people was presented to the Social Science Association,[21] the successor of the Law Amendment Society. The Association drafted another Bill which was introduced into the House of Commons in April 1868. This was the first of a series of Bills introduced in each session from 1868 to 1870. The question was not regarded as a party issue, although support for the Bill was overwhelmingly Liberal and the majority of the opposition to it Conservative.[22] The Bill was held up by Select Committees in 1868 and 1869 but did not suffer a serious setback until the amendments

20. *Graves* v. *Graves* (1864) 3 Sw. & Tr. 350.
21. Social Science Association 1857-1886. This was the agency through which the generation of middle class mid-Victorian women were able to participate in and were trained for public work. It was involved with Poor Law reform, women's education and many other women's issues.
22. This can be ascertained most effectively from the party affiliation of members in the division in the second reading in June 1868.

made by the House of Lords in 1870. The Conservatives were in office in 1868 but the Liberals came to power in December 1868 and were still in office when the 1870 Act was passed.

The Bill introduced by Shaw Lefevre in 1868 was almost exactly similar in content to Perry's Bill of 1857. It received a second reading in June, a move to postpone the Bill being defeated only by the Speaker's casting vote. The Bill was then referred to a Select Committee under the chairmanship of Shaw Lefevre. This Committee worked remarkably quickly. Evidence was taken from witnesses between 30 June and 14 July 1868 and a Report was produced to the House on 17 July 1868. This Report was acknowledged by the Committee to be an interim one as they had not had time enough to discuss the detail of the reforming legislation but they did have sufficient material to be convinced of the need for reform. They recommended that another Committee be appointed in the next session of Parliament to consider the detail of the proposed Bill.

The evidence given before this Committee provides a valuable insight into the objections to the law which were being raised outside Parliament at the time. This evidence fell into three main categories: that relating to the law in England and the changes proposed by the Bill, that relating to the law in other common law jurisdictions where the law relating to married women's property had been recently altered, and that by persons who were in contact with working people in England and could give evidence concerning the effect of the current law on their lives.

The three lawyers[23] who gave evidence were all advocates of reform and had been involved in the drafting of the 1868 Bill. The operation of common law and equity was explained and the necessity for reform illustrated. They emphasized that the equitable separate estate gave protection to wealthy women which was not available to poorer persons. They were aware that the law operated most harshly in respect of wage-earning women, that the changes in English society had outgrown the old common law and that the equitable "devices" which had been devised could not fairly cope with the new circumstances.

Evidence was called from several lawyers from various parts of the North American continent[24] where the property law had already been reformed and some degree of separate property introduced. Changes had been made in Vermont, Massachusetts and New York from the 1840s to the 1860s so that by 1868 a married woman held at least some of her property in all these states as if she were unmarried. The Committee was concerned to ask whether there were any difficulties with family expenses, any increased division in families, or any decrease in the authority of the husbands, but were assured by the deponents that the reforms were well liked and had not undermined family stability. The Committee was also concerned at the possibility of husbands defrauding their creditors by giving property to their wives. It was admitted that this could happen, but that it seemed to occur no more frequently than under the old law.

The legal evidence before the Committee was therefore strongly biased towards the adoption of a separate property system in place of the rules of

23. John Westlake, Barrister at the Chancery Bar; George Hastings, Barrister at the Common Law Bar; Arthur Hobhouse, Q.C. and Charity Commissioner.
24. C. M. Fisher, Member of the Bar in Vermont; C. Field, New York; C. H. Hill, Barrister from Massachusetts.

common law and equity. No evidence was called from any European jurisdiction with any community system of property holding. John Rose, Finance Minister of Canada, did give evidence as to the system still prevailing in Lower Canada which was based on the French law and Custom of Paris prior to the Code Napoleon. The Committee was not concerned with the consequences of the community system and directed their questions towards the operation of the alternative separate property regime in those marriages where it was chosen. The whole tenor of the evidence and the questions put by the Committee indicates that it had already decided on the mode of the reform. That issue was no longer open, and in the Committee they were merely seeking confirmation and justification for their proposals.

C. M. Fisher referred in his evidence to the widow's rights in New York to a fixed share in her husband's estate on his death, and also to the homestead rights in Vermont whereby a husband could not sell the family home without his wife's consent. These homestead rights were again referred to in a letter put before the Committee from Emory Washburn, Professor of Law at Harvard University.

The Committee, however, ignored the possibility of giving a wife any rights in her husband's estate. The failure to consider these options was to have far-reaching consequences for those 2,650,000 out of the nearly 3½ million married women in England in 1861[25] who had no earnings.

The remaining seven witnesses all gave evidence of the harsh operation of the law in respect of married women wage-earners. There was evidence from J. H. Mansfield, a London Police Magistrate, and J. Wyberg, Solicitor's Clerk to the Magistrates at Liverpool, that orders obtainable under the Matrimonial Causes Act 1857 did not give sufficient protection. Wyberg deposed that desertion was not regarded as proved if the husband was still residing in the same town as his wife; and Mansfield's evidence indicates that the principle of constructive desertion was not applied so that a wife driven out by her husband's drunkenness or beatings had no remedy. Even apart from this very restrictive interpretation of the law several deponents were of the opinion that many women did not apply to the courts through shyness, social embarrassment or lack of knowledge of the law. All were of the opinion that if women were given control over their earnings their position would be greatly improved. As the Reverend Thomas said:[26] "it would give women more reason for hope and the men more restraint".

Virtually no evidence was given as to the position of middle class women whose wealth was not great enough to warrant a settlement, but who nevertheless did not earn during marriage. One or two instances of widows being fleeced by second husbands were cited but that was all. This was a gross omission and must in some respects account for the nature of the legislation in 1870 and 1882 which gave women property rights separate from their husbands but did not give wives any rights in their husbands' property.

In short, the evidence called before the Committee and the Special Report of 1868 did not in any way consider the question afresh but merely acted as

25. Supra fn. 3.
26. Minutes of Evidence taken before the Select Committee on the Married Women's Property Bill 1868, 71.

confirmation of the need for reform along the lines of giving married women independence in respect of their property and earnings.

The 1868 Bill was re-introduced into Parliament in the 1869 Session. After its second reading in the House of Commons it was again referred to Select Committee and various minor amendments were made. The most significant of these were to clauses 12 and 13 whereby a married woman having property of her own could become liable under the Parish Poor Law for the maintenance of her husband and children. This Bill had reached its second reading in the House of Lords by the end of the session on 30 July 1869 and thus lapsed for lack of time.

It remained to be introduced yet another time in 1870. That year it was challenged by an alternative and more conservative Bill brought in by Mr. Raikes in February. The Raikes' Bill reached a second reading but was then put off for six months by which time the first Bill had been passed. The idea behind Raikes' Bill was to extend the principle of the separate equitable estate by making a husband automatically the trustee for all his wife's property. Her earnings were to be her own if she could show that over a period of six months she earned more than half the living expenses of the family. These proposals were so elaborate that they would have been inordinately expensive to operate and it was fortunate that this Bill was taken no further.

The other Bill reached its third reading in the House of Commons by May, and was sent into Committee after its second reading in the House of Lords. This House of Lords Committee made a wholesale revision of the Bill vastly reducing its scope. It was this amended Bill which finally received the Royal Assent in August and became the Married Women's Property Act 1870.

The Commons Bill had rendered a married woman capable of holding and alienating property as a feme sole. If the Bill had been passed in that form by the House of Lords it would have given married women a new independent legal status such as she did not gain in fact until the Law Reform Married Women and Tortfeasors Act 1935. The House of Lords Committee completely destroyed this effect. Instead, all that the 1870 Act did do, was give a married woman a statutory separate estate in a restricted class of property.

The property which was deemed settled to her separate use under the 1870 Act included wages, earnings and any investments made out of such earnings.[27] Also included as part of her separate estate was personal property coming to her on intestacy or money not exceeding £200 coming to her by deed or will,[28] plus rents and profits from real estate left to her under an intestacy.[29] Money in savings banks[30] and investments such as public stocks and funds,[31] company shares[32] and building society shares,[33] standing in her own name were regarded prima facie as her separate estate. But unless these came to her as separate estate, i.e. from earnings or inheritance, or were held with her husband's consent, her

27. Section 1.
28. Section 7.
29. Section 8.
30. Section 10.
31. Section 3.
32. Section 4.
33. Section 5.

husband could apply under section 9 of the Act to have them transferred and paid to him. So, for example, if a father gave £5000 to his married daughter it was not secured from her husband merely by putting it into her savings account or giving it to her in the form of company shares. At common law such a gift became property of the husband and the 1870 Act did not alter the law to this extent.

Section 9 was also used where any question arose between husband and wife as to the wife's separate property so that either could apply to the County Court or the Court of Chancery. By section 10 a married woman was enabled to take out an insurance policy upon her own life or the life of her husband for her separate use, and if she were a beneficiary under a life insurance on her husband it would be deemed a trust for her benefit for her separate use. She was given power to sue in respect of her separate property[34] and by sections 13 and 14, where she had separate property, she had a responsibility under the Poor Law for her husband and children.

By section 12 a husband was absolved from liability for debts of his wife contracted before marriage and the wife was made liable as if she were a single woman. This provision was not well thought out, as a husband could still take most of his wife's property on marriage and she could be left without the means to satisfy the debt, and the trader without a remedy.

There is no doubt that this Act remedied the worst abuses of the law. It reflects the views expressed in the House of Lords at the time of the second reading in 1870 that the injustices revealed needed to be remedied, but that the Bill from the Commons "went far beyond the necessities of the case". It is interesting to note, in this connection, that the property specified in this Act, i.e. individual earnings, stocks, shares and life insurance policies, had hardly existed prior to the nineteenth century.

II. STATUTORY REFORM AND ITS AFTERMATH 1870-1900

During the 1850s and 1860s the campaign to reform the property law was a popular movement. With the passing of the 1870 Act the issue of married women's property law was increasingly left to the parliamentary reformers. J. S. Mill had published *The Subjection of Women* in 1869 and the women's movement now had a much broader base with women's suffrage seen as the key issue. But the parliamentary reformers, at least, were not satisfied with the scope of the 1870 Act.

A Bill based on the same principles as the 1857/1868 Bills, giving a married woman her property as a feme sole, was introduced into Parliament in 1873. It was read a second time and received minor amendments in Committee but did not get any further. In debate on the Bill, the 1870 Act was described by Mr. Morgan[35] as "no more than a feeble compromise". Mr. Bourke doubted[36] "whether in the Statute book there was any Act so badly drawn, so faulty and so absurd in many of its details as the Act of 1870". He explained that the Commons had only allowed the Act to pass in its amended form from the Lords

34. Section 11.
35. Gt. Brit. Parliamentary debates s3v214 (1873): 676.
36. Ibid., 678.

because it recognised for the first time the necessity of protecting the wages and earnings of married women. The Conservative opposition quite rightly pointed out that this Bill was in no way a Bill "to amend the Act of 1870" as it was entitled, but an originating Bill. Mr. Lopes said that[37] "Hon. Members would be astonished when he told them that the Married Women's Property Act 1870 consisted of only fourteen sections and of those the measure under discussion would repeal twelve".

The reformers and the Select Committee of 1868 must however bear some of the blame for the narrow scope of the 1870 Act. In many of the parliamentary debates, and in calling evidence before the Committee, they concentrated wholly on the injustices which the law worked among wage-earning married women. If they had, as successfully, publicized the grievances of middle class married women who did not earn the Bill may possibly have retained its original character. In the form in which the Act was passed, wage-earning women were completely protected. As a class they were unlikely to inherit large sums of money, and having protected their earnings, there were no further safeguards needed when their marriages failed. The very wealthy were still protected by means of settlements but the middle class married woman gained very little at all from this enactment.

Meanwhile the conservative rearguard was impelled to set about attempting to rectify the most glaring fault contained in section 12 of the 1870 Act whereby the husband was freed from liability for his wife's ante-nuptial debts, but in many cases the wife was left without means to pay herself. A Bill to remedy this defect was introduced in 1872 and again in 1873. The successor to these Bills finally received Royal Assent in July 1874 as an Act to amend the Married Women's Property Act 1870. Although this amendment was intended to ensure the fair operation of the 1870 Act for creditors, in practice it added further complications. Under the 1874 amending Act a husband was only liable for his wife's torts and breaches of contract before the marriage, to the extent of assets he acquired from his wife at marriage. Section 6 enumerated these assets to include such wealth as the wife's personal property vested in the husband by marriage, rents and profits of the wife's real estate which the husband received, and the value of any property he received by way of marriage settlement. The way was open for many actions of disputed debt because of the difficulties of proof.

This was not the only uncertainty arising out of the legislation. Section 7 of the 1870 Act which gave a wife the right to inheritances of less than £200, section 8 which gave her the income from real estate received on an intestacy, and section 12 which absolved the husband from liability for ante-nuptial debts, only applied to those who were married after the 1870 Act was passed. The 1874 amendment similarly was not retrospective and only applied to marriages entered after 1874. Therefore, a creditor's chance of being paid often depended upon whether the woman had been married before 1870, between 1870 and 1874 or after 1874.

The 1874 amendment Act was merely a tidying exercise and the reformers were still pressing for the complete change which would assimilate the position of a married woman to that of a feme sole. Bills were introduced in 1878, 1880

37. Ibid., 673.

and 1881 but only the last of these got as far as Committee after the second reading. In the debate on the second reading of the 1880 Bill Mr. Shaw Lefevre "congratulated the House on the great change of opinion on this measure". He believed it would have been utterly impossible for such a Bill to have passed a second reading in the last Parliament, where the Home Secretary denounced it as a revolutionary measure. In this Parliament the principle was conceded, and there was not even opposition to the second reading.[38] This change in heart had been brought about in April 1880 when the Liberals ousted the Conservative government which had been in power for the previous six years. Further reform was necessary and inevitable. As Mr. Fowler had stated in 1873[39] "the Act of 1870 created a distinction between two classes, and in doing so proceeded on no principle whatever".

The Bill which was to become the Married Women's Property Act 1882 was introduced in the House of Lords in February by the Lord Chancellor. It was essentially the same Bill which had gone before the Select Committee of the House of Commons in 1881. The object of the Bill was to give a married woman all her property *as her separate property.*

Neither in parliamentary debate nor in the Select Committee of 1881 does the subtle change of emphasis in the Bill of 1881, appear to have been appreciated. The reforming Bills from 1857 to 1880 had enabled a married woman to hold, acquire and alienate property as a feme sole. The 1881 Bill and subsequently the 1882 Act allowed a married woman to hold, acquire and alienate property as her separate property without the intervention of trustees. This change in terminology was to have far-reaching effects on the interpretation of the 1882 Act.

In the House of Commons there were still those who thought the Bill was too radical and tried to hold it up but by this time they were in the minority. The support of the House for the Bill can be gathered from the interjections reported when Sir George Campbell made a speech opposing it. On rising to speak he was greeted with cries of "Oh, Oh!" and the whole tenor of his speech indicates that his stand was unpopular. He said[40] that

> In his opinion, take it all in all the Christian form of marriage under which there was complete community between the married parties for life, was the best form of marriage. But he was free to confess the current was running the other way — that the 'women righters' had been exceedingly energetic, whilst the friends of the poor married man were indolent, so that the case of the poor married man was hopeless. He felt that he was only wasting the time of the House; but he had made an attempt to obtain a small measure of justice for the poor, unfortunate married man . . .

The Bill was passed with little opposition and the Act came into force on 1 January 1883. By section 1(1) it was provided

> a married woman shall be capable of acquiring, holding and disposing

38. Gt. Brit. Parliamentary debates s3v252 (1880): 1543.
39. Gt. Brit. Parliamentary debates s3v214 (1873): 682.
40. Gt. Brit. Parliamentary debates s3v273 (1882): 1603-1604.

> by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee

and by section 2

> every woman who married after the commencement of this Act shall be entitled to have and to hold as her separate property and to dispose in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money and property gained or acquired by her in any employment, trade or occupation in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary artistic or scientific skill.

The term "separate property" in 1882 was not necessarily understood in the sense in which we would use it today. It carried the technical meaning of an estate settled to the separate use of a married woman, as that had been evolved by the Courts of Equity. By the Judicature Acts 1873-1875 the systems of common law and equity had been combined, the rule being that in case of conflict the equitable rule would prevail. Also, the judges of the old Court of Chancery became part of the new court structure. Consequently when the 1882 Act used the term "separate property" there was a strong possibility that the Courts would give the term its technical equitable meaning. As regards section 1(1) the niceties of terminology were irrelevant. Whether a woman held property as if to her separate use or as a feme sole made no difference in practice. Property no longer had to be settled in trust to the separate use of a married woman in order to ensure that she retained the benefit of it. If a dispute did arise between husband and wife as to ownership of assets a summary procedure was provided under section 17 whereby either of them could apply to the High Court or the County Court for settlement of the dispute. By section 19 however, existing and future settlements were exempted from the operation of the Act and restraint against anticipation still allowed. It was felt at the time, that settlements with restraints on anticipation would still be used by wealthy people in order to protect a woman's capital from dissipation by her husband.

The intention of the legislature as reflected by section 1(1) and section 2 seemed to be to give a married woman all the capacity of a single woman and to make her the equal of a feme sole. This intent was, however, so clearly apparent in respect of other sections of the Act especially those dealing with her tortious and contractual liabilities. As C. A. Morrison said:[41]

> There were . . . two possible interpretations of the Act: (1) that it was not merely a property Act, but was directed at her status and gave her the same capacity as a single woman sweeping away the fiction of marital unity; (2) that it was a property Act only, with incidental changes elsewhere, and subjected her to a proprietary not a personal liability.

41. *A Century of Family Law* (ed. Graveson and Crane, London, 1957) 93.

The first approach should have meant the complete emancipation of the married woman with an accompanying increase in her legal responsibilities which were only partly recognised by the 1882 Act. The second approach was more conservative and was based on the principle of the married woman's separate estate in equity. The conflict between these approaches can be seen in judicial decisions and amendments to the Act throughout the nineteenth century.

As far as contract was concerned a married woman did seem to gain full contractual capacity under the Act. She could enter into contracts and become liable on her contracts. She could sue and be sued in contract as if she were a feme sole.[42] But by section 1(3) "every contract entered into by a married woman was deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary was shown". It was this phraseology borrowed from the principles of a married woman's separate estate at equity, which led to the courts' restrictive interpretation of the 1882 Act. Despite the provision in section 1(4) that her separate property included not only that which she possessed or was entitled to at the date of the contract but all separate property she acquired thereafter, it was held that a married woman was not liable in contract unless she had separate property at the time of the contract.

This view of the issue was taken by Pearson J. in *Re Shakespear, Deakin* v. *Lakin* in 1885.[43] He explained section 1(4) by saying that where a married woman with separate property entered into a contract[43a]

> If she afterwards commits a breach of the contract and proceedings are taken against her for the breach of contract, any separate property which she has acquired since the date of the contract, and which she has at the time when judgment is recovered against her, will be liable for the breach of contract. But the Act does not enable her, by means of a contract entered into at a time when she has no existing separate property, to bind any possible contingent separate property.

In *Palliser* v. *Gurney* in 1887[44] counsel for the plaintiff creditor argued before the Court of Appeal that *Re Shakespear*[45] was incorrectly decided, that it was opposed to the general intention of the Married Women's Property Act 1882, and ought not to be upheld. He also argued that section 1(3) threw an onus on the defendant married woman to prove that she did not have separate property when the contract was entered. But the Court of Appeal upheld the earlier decision. Lord Esher M.R. said:[46]

> It is said that this statute makes a married woman personally liable upon contracts entered into her by her in her own name; but if that was the intention it is not expressed, though it might easily have been expressed. If there are any words in the statute which express that intention they are to be found in sub-s. 2 of s. 1 . . . The section limits the capacity of

42. Section 1(2).
43. 30 Ch.D. 169.
43a. Ibid., 171.
44. 19 Q.B.D. 519.
45. 30 Ch.D. 169.
46. 19 Q.B.D. 519, 520.

> the married woman to bind herself by the words 'in respect of and to the extent of her separate property'. It is clear that she is not given an unlimited capacity to enter into and be bound by any contract . . . As to the argument founded on sub-s. 3, that sub-s. presupposes the existence of separate property, and the capacity for the married woman to contract which arises therefrom, and provides that, if that capacity exists, then the contract shall bind her separate property unless the contrary be shewn.

The equity judges had succeeded in establishing a precedent which could only be overcome by statutory intervention. It was later held that the separate property which a married woman held at the time of entering a contract must be sufficiently substantial for her to be deemed to have contracted in respect of it.[47]

This interpretation gave an unfair advantage to married women to the detriment of their creditors. The Act and the courts were criticised. In discussing one case[48] on this point it was said that "it is impossible to read the judgment of the court without seeing that it is legally correct. It is a fair deduction from the provisions of an ill-conceived and ill-drawn Act."[49] On the other hand it was also argued that it was the restrictive interpretation of the courts that was to blame:[50]

> If the courts had been guided in the construction of the Act by the general law of contract, if they had discarded the analogy of wives' general engagements in equity, and if they had firmly maintained, in the case of married women, the principle that the essence of contract is the creation, quite irrespective of the party's present means, of a personal obligation to perform a promise, there would hardly have been need for an amending Act to make wives' contracts enforceable as against property coming to them after coverture has determined.

But given the conservative approach of the courts, amendment became necessary and in 1893 an Act was passed whereby when a married woman entered into a contract she bound all separate property which she had at the time of the contract or acquired later. Property settled to her separate use with a restraint against anticipation was not included.

Consistent with the interpretation that a married woman's liability was in respect of her property and not a personal liability, was the decision of Lord Esher M.R. in 1887 in *Scott* v. *Morley*,[51] that a married woman could not be imprisoned for debt, even when she was refusing to pay out of property she did hold.

The 1882 Act did recognise the wife's contractual liabilities sufficiently to absolve the husband from liability for her pre-marital contracts except in so far

47. *Leak* v. *Driffield* (1889) 24 Q.B.D. 98; *Brannstein* v. *Lewis* (1891) 65 L.T. 449.
48. *Pelton Bros.* v. *Harrison* [1891] 2 Q.B. 422 (C.A.).
49. (1891) 7 L.Q.R. 313.
50. T. C. Williams, "A husband's liability for his wife's torts, and the Married Women's Property Act" (1900) 16 L.Q.R. 194.
51. (1887) 20 Q.B.D. 120.

as he received property from his wife by the marriage.[52] But this was unlikely to occur after the Act was in force except in the case of a marriage settlement.

Also, the wife's rights to separate property were sufficient to render valid the fears expressed by the Select Committee in 1868 that the legislation might give husbands an opportunity to defraud creditors. A gift of an interest in land had to be in writing but chattels could be transferred without documentation. In *Cochrane* v. *Moore*[53] however, the Court of Appeal held that chattels allegedly given to the wife did not become her property unless there was a delivery, and that where goods remained in a common household there could be no delivery. But a husband could still sell his goods to his wife, and in *Ramsay* v. *Margrett*[54] it was held that a receipt given for such goods did not need to be registered under the Bills of Sale Act 1878. The goods were in the apparent possession of either husband or wife or both of them, and the transaction could not be avoided as an unregistered bill of sale because the receipt when produced was evidence that the goods were in the wife's possession and not the husband's.

The assumption of marital unity did, however, remain sufficiently strong for the courts to hold that although a husband and wife could contract with one another, there would be an assumption that a domestic arrangement would not be enforceable as a contract for want of intention to create legal relations.[55]

The alterations in a wife's tortious liabilities brought about by the 1882 Act also led to a division of opinion as to its effect. By section 1(2) a wife could sue and be sued in all respects as if she were a feme sole and her husband need not be joined with her as plaintiff or defendant. By sections 13, 14, 15 a married woman was made liable for torts committed prior to marriage and any liability on the part of her husband lay only to the extent that he had received property from his wife at the time of the marriage. The courts were left to resolve the question of whether a husband thereby retained any liability for torts committed by his wife during the marriage. The more conservative element wished to treat the statute as affecting only a married woman's proprietary interests therefore leaving the husband with a joint liability for his wife's torts if he was joined in the action. The alternative interpretation was that the Act had done away with the concept of marital unity and that a married woman ought to be regarded as a feme sole in all respects entirely independent of her husband.

In *Seroka* v. *Kattenburg* (1886)[56] and in *Earl* v. *Kingscote* (1900)[57] the Court held that where a husband had been sued with his wife, for her tort, he would be liable if judgment was entered against the wife. Section 1(2) stated that the husband "need not be joined" not that he "could not be joined".

There were those who argued against these decisions[58] on the grounds that prior to the Act the husband's liability had only arisen out of her procedural incapacity and the fact that her husband took ownership and control of her property. It was emphasized that the liability had been essentially her own.

52. Section 13.
53. (1890) 15 Q.B.D. 57.
54. [1894] 2 Q.B. 18 (C.A.).
55. *Balfour* v. *Balfour* [1919] 2 K.B. 571.
56. 17 Q.B.D. 177.
57. [1900] 1 Ch. 203.
58. E.g. T. C. Williams (1900) 16 L.Q.R. 191.

If her husband had died she had then become fully liable, and if she had died, her husband's liability ceased. Judgment could only be obtained against the husband and wife jointly, never the husband alone, and a wife remained personally liable and could be imprisoned for debt. Therefore, once the 1882 Act had come into force, giving a wife her separate property and the capacity to sue and be sued, there was no logical reason in maintaining the husband's liability. This view was supported in dissenting judgments in 1909[59] and in 1923[60] but did not prevail and in the House of Lords in *Edwards* v. *Porter*[61] in 1925 it was finally settled that a husband, if sued with his wife was liable for her torts committed during marriage.

It was evidently felt that actions between husband and wife in tort would not be conducive to marital harmony as by section 12 of the 1882 Act spouses could not sue one another in tort except in so far as this was necessary for the protection of the wife's separate property. This section clearly placed a limitation on a wife's legal independence of her husband but was also to be disadvantageous to husbands especially with the advent of the motor car and personal injury insurance. A wife did gain the right to sue her husband for negligence resulting in personal injuries which happened prior to their marriage[62] but a husband could still not sue his new wife in similar circumstances. These inequities were not finally resolved until the Law Reform (Husband and Wife) Act 1962.

A further effect of the "equitable estate" interpretation of the Act was to limit the property which could be disposed of by a married woman under a will. Section 1(1) provided that she could dispose of real and personal property as if she were a feme sole but this section was interpreted in accordance with the idea that the Act gave her rights in respect of her separate property and did not enlarge her personal capacity *per se*. Therefore, it was held that although she could make a valid will during marriage, once that marriage was dissolved, by divorce or death, the same will was ineffectual to dispose of property acquired after the end of the marriage because it could not form part of her separate estate.[63] This anomaly was dealt with by section 3 Married Women's Property Act 1893 so that her will, whenever executed operated upon all property which she had at the time of her death.[64]

Another adverse feature of the Act was that the capacities which a married woman gained under the Act were not matched by her liabilities. She eventually became fully liable for her contracts but only after the amendments of 1893. And she did become liable to the parish under the Poor Law for the maintenance of her husband, children and grandchildren.[65] But she could only be made bankrupt in respect of a trade carried on separately from her husband[66] and thus retained a privilege not enjoyed by other debtors. Further, although she could be sued

59. Fletcher Moulton L.J. in *Quenod* v. *Leslie* [1909] 1 K.B. 880, 887.
60. Younger L.J. in *Edwards* v. *Porter* [1923] 2 K.B. 538 (C.A.).
61. [1925] A.C. 1.
62. *Curtis* v. *Wilcox* [1948] 2 K.B. 474.
63. *Re Bowen, James* v. *James* [1892] 2 Ch. 291; *In re Greene, Mansfield* v. *Mansfield* 43 Ch.D. 12.
64. *Re James Hole* v. *Bethune* [1910] 1 Ch. 157.
65. Sections 20, 21 of the 1882 Act. Extended to parents in 1908.
66. Section 1(5).

alone in tort, her husband could also be joined by the plaintiff in the action and made liable on the judgment. This "vicarious" liability of the husband was criticized many times after 1882 but not removed until the Law Reform (Married Women and Tortfeasors) Act 1935. This was one area however, under the 1882 Act where the legislature and judiciary acknowledged, albeit unconsciously, the practical economic dependence of the majority of married women on their husbands. The wife did not thereby gain any benefit from her husband for herself but those whom she had wronged in tort were given more chance of recovering compensation, just as a person similarly wronged by an employee can seek compensation from the employer's heavier purse.

The special nature of the property relationship between husband and wife was also recognised in respect of third parties by section 3 which provided that a wife who lent her husband money for his business would rank in the case of bankruptcy after all other claims were satisfied.

As between themselves, the special nature of their relationship was acknowledged only by section 17 which provided a procedure whereby either spouse could apply for an order to determine legal or equitable title as to any property between the marriage partners. Neither party was regarded as acquiring rights in the other's property merely by virtue of the marriage relationship. In this sense at least a separate property system had been instituted which was to remain unchallenged until the mid-twentieth century.

III. THE SOCIAL REALITY OF THE SEPARATE PROPERTY SYSTEM AND THE MOVE TOWARDS COMMUNITY

It is difficult to make a fair assessment of the nineteenth century reforms of the law relating to married women's property. They did not adequately or justly deal with the social realities of the position of married women. They were however consistent with other social and legal attitudes of the period which emphasized the equality of persons before the law, without regard for their differing material circumstances. Prior to about 1830, the intervention of the courts of Equity and the use of conveyancing fictions had been sufficient to cope with the slow social changes since the sixteenth century, but the radical change to an urban industrial society warranted more drastic reform. The model taken for this reform was the individualistic laissez-faire philosophy of the late eighteenth and early nineteenth centuries. Although a married woman did not gain full legal capacity as a feme sole until the Married Women (Joint Tortfeasors) Act 1935, the whole movement for reform was based on an individualistic premise.[67] By the 1882 Act the concept of marital unity was abolished except in minor areas such as tortious liability. The husband completely lost the rights he had once had in his wife's property and a wife gained no rights in her husband's property. A system of separate property was far more acceptable to the Victorian man than a move towards community. The whole idea of a community property

67. The move to completely separate property and legal independence for married women was completed by two further statutes. In 1949 the Married Women (Restraint Upon Anticipation) Act finally abolished restraints on anticipation, and since the Law Reform (Husband and Wife) Act 1962, spouses have been entitled to sue one another for any tort, although the court may stay the action if it appears "that no substantial benefit would accrue to either party".

system was alien to English thinking. And those husbands who jealously guarded their rights to their wives' property were unlikely to concede readily to a system which would have given wives rights in their husbands' property.

It was recognised by writers such as J. S. Mill[68] that women's emancipation depended on a multiplicity of factors including not only the obvious issues such as the franchise, property rights and admission to professions, but also education and social attitudes. The argument was nevertheless a laissez-faire one and rested on the assumption that once freed from legal and practical restraints, women would find their appropriate level in society.

Dicey is correct in describing the nineteenth century reforms as extensions of the rules of equity "framed for the daughters of the rich . . . extended to the daughters of the poor."[69] In this sense of relying on familiar forms it was a conservative and not a radical reform. Dicey described the legal reality of the reforms but not the social reality.

The settlements of women from wealthy families were sufficient to give them satisfactory incomes and thus practical independence from their husbands. The property of the poor wage-earning married woman was adequately protected even by the 1870 Act. She and her husband would not own any real property. All their possessions were acquired, and living expenses met, out of their weekly wages. The wife had control of her wages, ownership of assets she acquired out of them, and the right to any small amount of money she might inherit. She was on an equal footing with her husband. The middle class woman may have gained the same legal rights, but they did not give her any independence if she owned no property. In practice she could keep any money she may have saved out of her earnings before marriage and also any inheritance or presents from her family. But from approximately 1880 to 1950 only about ten percent of married women were in paid employment. Most women were therefore not in any position to acquire separate property. It was the husband who acquired the matrimonial home, furniture and other property of the middle class family and he had absolute legal title to it. A wife had no claim on her husband's property unless he died intestate.

No inroads were made into the concept of separate property of husband and wife until the Family Provision Act was passed in 1938. This Act enabled a surviving spouse to make application for an award out of the estate of the deceased spouse. In cases where the surviving spouse had been inadequately provided for under the will of the deceased or on intestacy the Court exercised a discretion to award reasonable maintenance. No capital however could be vested in the applicant. This statute can be seen as the first step in the movement towards the establishment of community of property in marriage which has gradually gathered force in the second half of the twentieth century.

It is difficult to pinpoint the reasons why the turning point should be the 1960s. After all, the inequitable position of the married woman vis-à-vis her husband had been a social fact since the late nineteenth century. Cretney[70] suggests that the main factor has been the growth of owner occupation of housing

68. *On the Subjection of Women* (London, 1868).
69. *Law and Opinion in England in the Nineteenth Century* (London, 1914) 395.
70. S. M. Cretney, *Principles of Family Law* (1st ed, London, 1974) 149.

(financed by instalment mortgage) coupled with inflation which has led to a substantial increase in property values over the years. If we compare other jurisdictions with a similar history of marital property law, we see the same movement to community occurring, but not linked with an increase in owner occupation.[71] Inflation may have some effect but surely it has affected all sectors of the economy equally so an increase in the selling price of a house does not mean an increase in the purchasing power of that price. However, this increase in the value of assets commonly held by married couples may have influenced attitudes to the law just as the new wealth in earnings and consumer goods influenced change in the nineteenth century.

The number of wage-earning married women has increased markedly since the late 1960s.[72] This may have influenced opinion by providing a comparison between the property position of those married women who earn and those who do not, in much the same way as the contrast between the position of single women and married women contributed to the movement for reform in the nineteenth century. Also the women's liberation movement of the 1960s and 1970s has done much to emphasize the value and importance of traditional women's work in raising children and running a home.

But it would seem that the increase in the rate of marriage breakdown since the 1960s[73] has been the most important factor in impressing upon women the disadvantages of their position as regards marital property. While marriages remain intact the question of ownership of marital assets is rather irrelevant if the use of them is shared. The fact that the move towards community first found expression in cases of divorce gives support to this argument.

In the late 1950s and 1960s[74] Lord Denning M.R. attempted to give a wife a share in her husband's property by giving a fair, large and liberal interpretation to section 17 of the 1882 Act where application was made under that section in cases of marital breakdown. Lord Denning M.R. argued that a wife could acquire an equitable interest in the matrimonial home, legally owned by her husband by fulfilling her role as a mother and housekeeper. These cases were overruled by the House of Lords in 1970[75] on the grounds that the legislature in 1882 could hardly have intended an instruction to the judge to make an order "as he thought fit", to include such an interpretation of an equitable interest.

In the 1970s the legislature intervened to give a spouse rights in property legally owned by the other spouse but only in restricted circumstances, on application to the court, and in the court's discretion. The first statute to do this was the Matrimonial Proceedings and Property Act 1970[76] which gave such

71. As for example in New Zealand where owner occupation has always been high.
72. In England in 1951 there were 26% of married women working. By 1971 the figure had risen to 42%.
73. *De facto* breakdowns as well as *de jure*. See C. Gibson "The Association Between Divorce and Social Class in England and Wales" (1974) XXV British Journal of Sociology, 79; and R. Chester "Contemporary Trends of English Marriage" (1971) 3 Journal of Biosocial Science 389.
74. E.g. *Hine* v. *Hine* [1962] 3 All E.R. 345; *Appleton* v. *Appleton* [1965] 1 All E.R. 44.
75. *Pettit* v. *Pettit* [1970] A.C. 777.
76. It came into force at the same time as the Divorce Reform Act 1969.

rights solely on divorce and judicial operation. This Act has been followed by the Inheritance (Provision for Family and Dependants) Act 1975 which brings a spouse's rights to property division on death into line with those available on divorce. A more substantial step towards community property will be taken if the recommendations of the Law Commission First Report on Family Property[77] are implemented. The proposal is that the matrimonial home will be co-owned by husband and wife in all cases except where the parties contract out. This would however only affect the fifty-two percent of married couples who are in fact home owners.[78]

But as yet the basic property rights in marriage are still governed by the 1882 Act. Any future reforms are unlikely to reinstate any principle of marital unity in respect of procedural rules relating to married women or the legal capacity of married women. The Law Commission has expressly rejected a complete move to full community property with its attendant difficulties as to rights of disposing of property during marriage. If women do continue to become more independent, then a separate property system becomes more appropriate. It is an easier system to administer and only results in injustice where spouses are for practical purposes on an unequal footing.

77. Law Commission No. 52.
78. Todd & Jones *Matrimonial Property* (Office of Population Censuses and Surveys, Social Survey Division, London, 1972)