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FEMINISMS: THE EVOLUTION

'[...] in all respects as if she were a *feme sole*': married women's long road to a legal existence

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HAMLET: Farewell, dear mother.
KING: Thy loving father, Hamlet.
HAMLET: My mother. Father and mother is man and wife, man and wife is one flesh, so my mother.

Hamlet, IV. 3. 52–55[1]

Hamlet is not only giving words from Scripture a twist in order to discomfit his step-father, he is also stating a fundamental principle of English common law that would endure unchanged for another four centuries, not disappearing completely until well into the twentieth century. It was a principle that was already well established by the end of the thirteenth century when the English jurist Bracton was writing his *De Legibus et Consuetudinibus Angliæ* [On English Laws and Customs], in which he states: '*vir et uxor sunt quasi unica persona, quia caro una et sanguis unus sunt* [man and wife are as if a single person, because they are one flesh and one blood]'. The doctrine was supposedly grounded in Scripture: Genesis 2. 24 declares that a man 'shall leave his father and mother, and cleave unto his wife: and they shall be one flesh', while Jesus is reported as saying that '[f]or this cause shall a man leave his father and mother, and shall cleave to his wife: and they twain shall be one flesh? Wherefore they are no more twain, but one flesh. What therefore God has joined let no man put asunder' (Matthew 19. 5–6) and '[...] for this cause shall a man leave his father and mother, and cleave to his wife: And they twain shall be made one flesh, so then they are no more twain, but one flesh. What therefore God has joined, let not man put asunder' (Mark, 10. 7–9).[2] It is beyond the scope of this article to discuss whether the doctrine of the legal unity of husband and wife genuinely had a theological basis or whether Bracton and his medieval predecessors were putting a retrospective theological gloss on a custom, the evolution of which may have had more to do with changing demographics as Western European society became more patriarchal.

The overall effect of the common law was to put the married woman at a considerable disadvantage in comparison to her unmarried or widowed sister: married women were,

1 From the *Arden Shakespeare Complete Works*; see Bibliography.
2 Quotations from the Bible are from the Authorised Version of 1611.

together with 'infants' (the legal term for anyone under the age of majority (Mozley & Whitely, 1962: 181)), felons and lunatics, classed in law as being 'persons under a disability'.[3] The purpose of this article is, first, to explain the nature of this 'disability' and its effect, and then to outline briefly the campaign initiated by a mid-Victorian feminist to introduce legislation which would redress the position. It is not the purpose of this article to comment from a sociological viewpoint on either the changing demographics of the period or the relative merits and demerits of the arguments for and against the several Bills that were brought into Parliament in the course of the campaign; it is simply to give background information which may assist the reader of English literature, particularly literature of the eighteenth and nineteenth centuries.

The legislation which resulted from the campaign was the Married Women's Property Acts 1870–1908;[4] however, I shall focus on the Bills unsuccessfully introduced in 1857, first in the House of Lords and later, after the General Election of April that year, in the House of Commons, and on the second attempt to get legislation through Parliament, between 1868 and 1870, which culminated in the Married Women's Property Act 1870. Despite the fact that the 1870 Act was hardly an unmitigated success so far as its supporters were concerned and despite the fact that adult women would not all be completely equal in the eyes of the law until well into the twentieth century, this Act can be seen as an early step on the road to women's equality.

When I was an articled clerk some fifty years ago and studying law, I heard the tale, possibly apocryphal, of elderly solicitors still practising in the mid-1880s, who retired rather than reconcile themselves to what they perceived to be the folly of the changes introduced by the Married Women's Property Acts. It was not only practitioners of the law who entertained this attitude: similar sentiments were probably harboured by many married men at the time, as John Galsworthy illustrates in his *Forsyte Saga*. This is the overarching title given to the three novels and two 'interludes' that chronicle the fortunes of the extended Forsyte family from

[3] The term 'disability' is 'generally used to indicate an incapacity for the full enjoyment of ordinary legal rights; thus persons under age and mentally disordered persons are under a disability' (Mozeley & Whiteley: 112). It is worth remembering that, for several centuries, the age of majority was twenty-one for a male person but fourteen for a female one. I make no apology for the age of this and other legal texts to which reference is made in this article, since they are giving an historical exposition of laws which have now been abolished.

[4] The Acts were, in chronological order, the Married Women's Property Act 1870 (33 & 34 Vict. c. 93), the Married Women's Property Act, (1870) Amendment Act 1874 (37 & 38 Vict. c. 50), the Married Women's Property Act 1882 (45 & 46 Vict. c. 75). the Married Women's Property Act 1884 (47 & 48 Vict. c. 14), the Married Women's Property Act 1893 (56 & 57 Vict. c. 63), the Married Women's Property Act 1907 (7 Edw. 7, c. 18) and the Married Women's Property Act 1908 (8 Edw. 7, c. 27). Of these, the most important is the 1882 Act, which repealed the two earlier Acts and re-enacted their provisions. The subsequent Acts cleared up some ambiguities and deficiencies in the 1882 Act, which had become manifest with the passage of time.

the mid-1880s to the 1920s and early 1930s. *The Man of Property*, the first novel, was written about thirty years after the 1882 Act came into force, when there were probably still men alive who could remember the earlier 'golden age'. Its first chapter introduces the reader to many of the Forsytes by bringing them together in 1885 to celebrate the engagement of young June Forsyte. Of one of her uncles, Nicholas Forsyte, then in his early seventies, it is said that '[h]e himself had married a good deal of money, of which, it being the golden age before the Married Women's Property Act, he had mercifully been enabled to make a successful use' (Galsworthy, 1951: 27). A similar comment is made in the first chapter of *In Chancery*, the second novel, in the context of another family gathering in the 1890s: '[Nicholas], of course, had never really forgiven the Married Women's Property Act, which would have so interfered with him if he had not mercifully married before it was passed' (Galsworthy, 1962: 13)[5].

To understand the purpose and effect of the Married Women's Property Acts (and also Nicholas Forsyte's attitude to them), we need to understand the effect of the common law as articulated by Bracton as quoted above and the way it developed in modern times. Sir William Blackstone, another English jurist, this time writing in the 1760s, summed up the position of the married women as follows:

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during her marriage or at least incorporated into that of her husband, under whose wing, protection and cover she performs everything'. (Blackstone, 1803: 442)

He goes on to remind the reader that, in the 'law-french (*sic*)' of the day, the married woman was called a '*feme-covert*' (an unmarried or widowed woman being a '*feme-sole*') and that her condition during her marriage was called her 'coverture', terms which are still in use long after Blackstone compiled his Commentaries. Note that the act of marriage did not create a *new* legal persona comprising husband and wife in equal measure: the woman's legal persona was *suspended* during coverture, subsumed in that of her husband, and would only be revived if she survived him (and then, of course, only for as long as she remained a widow; if she remarried, she once again become a non-person in the eyes of the law). One of the consequences of not having a legal persona was this: a married woman, at law, could not possess anything. This is illustrated by another quotation from Shakespeare and one which

[5] *The Man of Property* was first published in 1906 and *In Chancery* in 1920. John Galsworthy (1867–1933) trained as a barrister and was called to the bar in 1890, although he never practised. He was also the son of a solicitor, from whom he probably heard anecdotal evidence about contemporary reaction, from both the legal profession and the lay public, to the Married Women's Property Acts.

George Shaw-Lefevre cited in 1868, when the attempt to introduce reforming legislation was first renewed after the abortive campaign of 1857 (Hansard 1868a: 1017):[6]

> PORTIA Myself, and what is mine, to you and yours
> Is now converted. But now I was the lord
> Of this fair mansion, master of my servants,
> Queen o'er myself: and even now, but now.
> This house, these servants, and this same myself
> Are yours, – my lord's!
>
> *The Merchant of Venice*, III. 2. 165–71

Shaw-Lefevre subsequently observed, during the debate that took place in the House of Commons on the second reading of the Married Women's Property Bill on 10 June 1868, that 'the words of the marriage service were not now in harmony with the existing law, because they declared that the husband endowed his wife with all his worldly goods, whereas, in fact, everything which the wife possessed became her husband's' (Hansard 1868b: 1373). However, it oversimplifies the position to say that *jure maritii* or by virtue of the marriage everything that a woman owned when she married or to which she might subsequently be entitled, e.g. by inheritance, automatically became the property of her husband, who then enjoyed any income from it and was free to dispose of it as he saw fit either during his life time (*inter vivos*) or by his Will.[7] This, with one exception, was true of the wife's moveable property or 'personalty', which would include investments, securities, savings valuables and such like. The exception was such articles of clothing and personal adornment as were appropriate to the wife's social status (technically known as her 'paraphernalia'), which the husband could dispose of neither *inter vivos* nor by Will, since such articles automatically became the wife's property if she survived her husband.[8]

The position with regard to immovable property, that is, land and buildings, was more complicated because of the distinction that English law makes between freehold and leasehold interests in land, the former being realty, the latter being 'chattels real' and classed as

[6] George Shaw-Lefevre (1831–1928) was called to the bar (Inner Temple) in 1855 and served as Liberal M.P. for Reading (1863–1865).

[7] A husband could, of course, leave all his personalty, which would include any personalty he had acquired *jure maritii*, to his widow but he was not obliged to do so. If a husband died intestate, that is, without making a Will, his widow was, according to the Statue of Distributions 1670 (22 & 23 Car. 2, c. 24), entitled to either one third or one half of his personalty depending on whether or not there was issue of the marriage. The rules of succession on intestacy are now those prescribed by the Administration of Estates Act 1925 (15 & 16 Geo. 5, c. 23), which came into force on 1 January 1926. The surviving spouse now receives a statutory legacy of a prescribed amount and a life interest in one half of the residue.

[8] However, although her paraphernalia reverted to her if she survived her husband, a wife could not make an *inter vivos* disposition of it while he was alive.

personalty.[9] It should also be borne in mind that, prior to 1540, the law did not permit any testamentary devise of freehold land; freehold land could only be inherited pursuant to the common law rules of succession. In simple terms, the law of succession with regard to freehold land generally had the effect that the eldest male inherited to the exclusion of all his siblings, male or female. Further, the rule of succession *per stirpes*, whereby the heir of a son who has predeceased his father inherits in his place meant that a younger son could never inherit, unless his elder brother had already died, without leaving a descendant who would qualify as his heir. In the absence of any male descendants, the females inherited equally (the technical term for them was 'coparceners'), subject to the *per stirpes* rule (see further, Cheshire, 1962: 768–72).[10] After her marriage, a woman's freeholds did not vest in her husband absolutely *jure maritii*; that is to say, although he had the benefit of them during his lifetime, on his death they reverted to her. Even after the law permitted the alienation of freeholds by testamentary devise, he could not dispose of them by his Will, and his ability to dispose of them *inter vivos* was restricted.[11] If she died first, any freeholds that were estates of inheritance devolved to her heir, subject in certain circumstances to the husband's life interest.[12] So far as the wife's leaseholds were concerned, her husband had the benefit of them during their joint lives; if she predeceased her husband, the residue of the term of years granted by the lease then vested in him absolutely *jure maritii*, so in this respect, they were

[9] It is beyond the scope of this article to explain the reason for this distinction. For a fuller discussion, see e.g. Cheshire, 1962: 37.

[10] These rules could, however, be varied by local custom. For example, in Kent, there was a custom known as 'gavelkind', according to which land descended, upon intestacy, to all sons equally; elsewhere in England, there was the custom known as 'Borough-English', according to which land descended to the youngest son, to the exclusion of all others (see Cheshire 1962: 16–17). The Statue of Wills (32 Hen. 8 c.1) did relax the law considerably but it was not possible to make testamentary dispositions of all freehold land until the Tenures Abolition Act 1660 (12 Car. 2 c.64) came into force. After this, the common law rules of succession effectively became the rules that operated as regards the devolution of freehold land in the case of intestacy only. The common law and all customary laws regulating succession to realty on intestacy were abolished by the Administration of Estates Act 1925. There is now no distinction between realty and personalty and the descendants of the deceased have equal rights in the estate, subject to the *per stirpes* rule and to the rights of a surviving spouse.

[11] Since he only had a life interest, he could not convey the same interest as his wife had enjoyed before her marriage unless she were a party to the conveyance.

[12] A married woman could not make a Will, since she had no property upon which it could operate. Her heir would, therefore, be her heir determined in accordance with the common law or customary rules of succession discussed in the previous note. An 'estate of inheritance' is one that may devolve upon successors (heirs) *ad infinitum*. Prior to 1926, there were two freehold estates of inheritance: the estate in fee simple and the estate in fee tail, the difference between them being that the fee tail could only be inherited by specified descendants of the original grantee, never by his or her ascendants or collateral relatives. For a fuller explanation of the term 'freehold' and the common law concept of estate, see Cheshire 1962: 27–36. If there had been issue of the marriage *capable* of inheriting the wife's freeholds, the widower retained his life interest; the technical term for him was a 'tenant by the curtesy (or courtesy) of England'.

treated like personalty, but if her husband died first, the residue of the term reverted back to her, so the position was similar to that of realty.

Bromley comments that the common law, at least insofar as it applied to freeholds, made sense in the context of the early Middle Ages, when freehold land was subject to an obligation on the part of the owner to perform certain 'feudal duties'.[13] These varied depending on the particular tenure by which the land was held but might include an obligation to perform acts which would not normally be expected of a woman, such as to bear arms on behalf of the lord to whom the duty was due or carry out a ceremonial role (Bromley 1962: 400). However, the same justification cannot be pleaded for leasehold land, personal possessions, investments and the like; in any case, by the sixteenth century many such duties had been commuted to payment of a fixed sum, which became hardly worth collecting as its value decreased with inflation.

By the thirteenth century, if not earlier, the rigidity of common law principles was being mitigated by the Chancellor through his court of equity. The position of a married woman *vis à vis* her property was improved as the equitable doctrine of the married woman's separate estate evolved. By the sixteenth century, it was well established that if property of any description was given to a woman expressly *for her separate use*, although it then vested in her husband *jure maritii*, he was regarded not as the beneficial owner but as a trustee.[14] In other words, the husband might be regarded as the owner at law but the wife remained the beneficial owner in equity with all the rights of a *feme sole*. The advantage of this to a married woman was not only that she did have some rights, so far as the management of her property was concerned, but she also had a cause of action in equity if her husband abused his position as trustee. Clearly, not every man was a wastrel who managed to squander his wife's wealth and there was many a man who looked after his wife's assets wisely, but a married woman was still beholden to her husband in many respects, had to rely on the complexities of the law

[13] It is beyond the scope of this article to explain the feudal system of land tenure and the different free tenures which obtained in England from the Conquest until 1660, when the Tenure Abolition Act (12 Car. 2 c.64) abolished all free tenures except socage tenure. For a fuller explanation, see e.g. Cheshire 1962: 12–22. However, it may help the reader without a legal background to know that the term 'free' does not mean that the land was no longer burdened by the obligation to perform the feudal duty but that it was capable of being inherited (see footnote 12 explaining the term 'estate of inheritance'), whereas land held under a non-free tenure, which eventually came to be known as 'copyhold', could not be inherited.

[14] An example of this can be found in the Will of my great-great-great-great grandfather William Field, which he made three years before his death in 1796. He gave the sum of £335 (about £300,000 today) on trust to pay the income from it to one of his married daughters during her life, expressly directing that 'the same shall be for her *sole and separate use* and not subject or liable to the debts, contracts or engagements of her present or any future husband' (P.C. Canterbury).

for the protection of her property and lacked the complete autonomy as regards the management of her affairs enjoyed by the *feme sole*.[15]

However, the common law affected not only woman from the wealthy and leisured classes: since the term 'property' was all-inclusive, it could include earnings. The law thus affected and could cause real hardship to women who earned money from their own labour, not just women from the working class *stricto sensu*, who increasingly became a significant part of the work force after the Industrial Revolution, but also women who used their talents to earn money — writers, artists, musicians and the like. The equitable doctrine of separate estate did not protect earnings, since they could not made be subject to condition that they were for the separate use of the woman to whom they were due. Also, people of modest means were unlikely to involve themselves in complex and costly legal arrangements to protect small amounts of capital.

This was the situation when, in 1854, Barbara Leigh Smith (1827–1891, subsequently Barbara Leigh Smith Bodichon after her marriage in 1857 to the French physician Dr. Eugène Bodichon, whom she met in Algeria) published *A Brief Summary in Plain Language of the Most Important Laws concerning Women together with a Few Observations thereon*.[16] Bodichon was, in the words of one of her biographers, a feminist, an artist and a rebel. Hers was an unusual upbringing: her parents, Anne Longden and Benjamin Leigh Smith defied convention by living openly as husband and wife until the former's death in 1834 despite never having married, but the stigma of illegitimacy does not seem to have been an impediment to Bodichon. She was an accomplished artist, having studied art at Bedford College when in her early twenties, and was well thought of in her day. Among her many achievements, she is distinguished as being the co-founder, with Emily Davies, of Girton College in 1869.[17]

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[15] For more detailed explanations of the common law and the equitable doctrine of separate estate, see Bromley 1962: 404, Cheshire & Fifoot 1960: 356–59 and Cheshire 1962: 839–40.

[16] Bodichon subsequently published a revised and extended version (see Barbara L.S. Bodichon, *A Brief Summary in Plain Language of the Most Important Laws concerning Women together with a Few Observations thereon,* 3rd edn. revised with additions (London: Trübner & Co, 1869)).

[17] Her married life was also unconventional, in that she divided her time between this country and Algeria, where her husband lived. For detailed accounts of her life and work, not only as an early feminist and social activist but also as a gifted artist, see, e.g: Hester Burton, *Barbara Bodichon, 1827–1891* (London: John Murray, 1949); Jacquie Matthews 'Barbara Bodichon: Integrity in Diversity (1827–1891)' in *Feminist Theorists: three centuries of key women thinkers*, ed. by Dale Spender (New York: Pantheon, 1983), pp. 90–123; *Women, the Family and Freedom: the Debate in Documents*: *Volume I, 1750–1880*, ed. by Susan Groag Bell and Karen M. Offen, (California: Stanford University Press, 1983) Sheila R. Herstein, *A mid-Victorian feminist* (New Haven: Yale University Press, 1985; Clarissa Campbell Orr *Women in the Victorian Art World* (Manchester: Manchester University Press, 1995), pp. 167–86; Pam Hirsch *Barbara Bodichon: Feminist, Artist and Rebel* (London:

Bodichon does indeed, in *A Brief Summary*, summarise concisely the then current law, as it concerned (1) unmarried women, (2) married women, (3) separation and divorce and (4) illegitimate children and their mothers. She then highlights the disparity in the treatment of unmarried and married woman, first commenting that, despite becoming an independent human creature once she had attained the age of twenty-one, a woman was, if she married, 'again considered an infant — she is placed under '*reasonable restraint*' — she loses her separate existence and is merged with that of her husband' (Bodichon 2001: 31; original emphasis) and then observing that women would be better served if they were educated to manage their own affairs and made responsible for doing so, so that they did not have to rely on either complex legal arrangements or the goodwill of their husbands.[18] She comments on the particular hardship the obligation to hand over her earnings to her husband caused a working class woman and compares the system that then obtained in England with that in other countries. She seems, however, hopeful that a spirit of change is abroad:

> The spirit, which made Blackstone and admirer of, rather than a critic on, every law because it was *law*, is exchanged for a bolder and more discriminating spirit, which seeks to judge calmly what is good and to amend what is bad. (Bodichon 2001: 30; original emphasis)

She was, no doubt, encouraged in this hope by the knowledge that in 1844 the Law Amendment Society had been founded by James Stewart and others with the object of initiating reforms to the law; meetings of the Society, which between its inauguration and 1857 was instrumental in procuring the enactment of 'no fewer than forty statutes' (McGregor: 19), were frequently chaired by Lord Brougham, Lord Chancellor from 1830-1834 and a staunch supporter of the Reform Act 1832. Another founder member of the Society was Matthew Davenport Hill, whose sisters brought Bodichon's booklet to his attention. As a result, the Society espoused the cause of married women's property rights and a campaign began. Together with a group of friends who met regularly and became known as 'The Ladies of Langham Place', Bodichon initiated a petition, printed copies of which were deposited in various locations in London and elsewhere, and seventy copies, together with the

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Pimlico, 1999). Girton College now holds an important collection of Bodichon's personal papers and a large number of books from her library.

[18] A 'man of goodwill' might well be minded to enter into some kind of arrangement with his wife but she would not be able to enforce it against him or third parties, since, as Blackstone explains, a married man could neither grant anything to his wife nor enter into a covenant with her for 'the grant would be to suppose her a separate existence: and to covenant with her would only be to covenant with himself'; equally, the parties could not enter into a pre-nuptial agreement, since 'all compacts made between husband and wife when single are voided by their intermarriage' (Blackstone 1803: 442).

signatures (estimated to be around 3,000) appended to them, were eventually bundled together to be presented to Parliament on 10 March 1856. [19]

Sir Erskine Perry and Lord Brougham, who presented the petition in the House of Commons and in the House of Lords respectively, subsequently led the debates on the petition that took place in both Houses on 10 June. The Society then drafted the Married Women's Property Bill which was brought in for its first reading in the House of Lords on 13 February 1857 by Lord Brougham (Hansard 3, 144: 605–19) but was lost along with other unfinished business when Parliament was prorogued on 21 March and, indeed, dissolved in preparation for the General Election held a few weeks later.[20] Sir Erskine Perry reintroduced the Married Women's Bill in the next Parliament on 14 May (Hansard 1857a: 266–81; McGregor: 22, n.12) but its progress was short-lived and seems to have been hampered somewhat by the introduction of the Married Women's Reversionary Interests Bill by a pair of M.P.s, euphoniously named Mr. Malins and Mr. Mullings (Hansard 1857b: 1182–84). This Bill was read for a second time on 8 June, when Sir Erskine Perry tried, unsuccessfully, to have any further debate on it postponed to a date when his Bill was being debated (Hansard 1857b: 1293). Mr. Malin's Bill was next debated in Committee on 18 June (Hansard 1857b: 2078), but the second reading of Sir Erskine Perry's Bill in the House of Commons, which it passed, objections from Mr. Malins notwithstanding, did not take place until 15 July (Hansard 1857c: 1515–23).[21] On 19 August, Mr. Malins reported to the House that their Lordships in the Upper House had recommended certain amendments to his Bill; these he regretted but, clearly anxious to preserve his Bill, he advised the House to accept (Hansard 1857c: 1866-84), with the result that his Bill was enacted as the Married Women's Reversionary Interests Act 1857 (28 & 29 Vic., c. 43) before Parliament rose on 28 August at the end of the

[19] The full text of the petition is quoted in Carlyle's Collected Letters (1979: 33–36). The petition appears to have been sent to Jane Carlyle, the wife of Thomas Carlyle; as she was a signatory to one copy, together with other luminaries, such as Elizabeth Barrett Browning, Mrs. Gaskell and Harriet Martineau, as well as Bodichon (then simply 'Miss Leigh Smith') and her friend Bessie Raymer Parkes. The source notes and footnotes on the relevant web-page have provided the information regarding the presentation of the petition to Parliament and the subsequent debate.

[20] Sir Thomas Erskine Perry (1806–1882) was called to the bar (Inner Temple) in 1834 and initially worked as a law reporter. He was knighted in 1841 upon being appointed Judge of the Supreme Court of Bombay, of which he was Chief Justice 1847–1852. On his return to England, he stood for Parliament as a Whig and was returned as the Member for Devonport in 1854, serving for five years. Henry Brougham, First Baron Brougham & Vaux (1778–1868) was called to the bar (Lincoln's Inn) in 1808 and served as Lord Chancellor under the Whig Lord Grey (1830–34). The 1857 Election returned the Whigs, then in government and led by Lord Palmerstone, to power with an increased majority and they were returned again in the Elections of 1859 and 1865, although the complexities of politics at the time then resulted in there being a succession of Conservative Prime Ministers, even though there had been no further General Election.

[21] In the meantime, questions had been asked, on 29 June in both Houses, about the Indian Mutiny, reports of which had just reached the United Kingdom.

Session. Sir Erskine Perry's Bill, however, was lost and was not reintroduced in the next Session.[22] This, as Shaw-Lefevre would later explain, was not for want of interest or support but because it was assumed that certain provisions of the Matrimonial Causes Act 1857 passed that same year had 'remedied to a small degree the evils then complained of [...] [and], as something had been done, it was not desirable to renew the discussion on the broader question' (Hansard 1868a: 1016).[23]

Three General Elections and about a decade after the initial campaign, the National Association for the Promotion of Social Science, with which the Law Amendment Society had by this time amalgamated, was again instrumental in drafting new legislation when the campaign was revived in the late 1860s, and the publication of John Stuart Mill's *The Subjection of Women* in 1869 did much to inject 'powerful intellectual stimulus to the reform movement' (Cretney 2003: 95).[24] Stuart Mill, together with Shaw-Lefevre and Russell Gurney, made the first attempt to get legislation onto the Statue Book in 1868;[25] the Bill which they introduced, as Shaw-Lefevre explained in his speech when it was read for the first time, was substantially the same as the 1857 Bill prepared by the Law Amendment Society which had passed its second reading by 120 votes to 65 (Hansard 1868a: 1016).[26] The House of Commons read the Bill for a second time on 10 June and referred it to a Special Committee of the House, but the Bill was then lost, having failed to complete its remaining stages before the end of the Session (Hansard 1868b: 1352–78).

Russell Gurney, Jacob Bright and Thomas Headlam reintroduced the Bill about a year later in the next Session — by which time there had been a General Election and the newly formed Liberal Party, under Gladstone, had been returned (Hansard 1869a: 331).[27] Again this

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[22] Perhaps it was the fact that Sir Erskine Perry's Bill had foundered that provided the impetus for the appearance in March 1858 of *The English Women's Journal*, a magazine intended to give a voice to not only the campaign for married women's property rights but also other feminist issues such as women's suffrage. The magazine was started by Bodichon with Rayner Parkes and then appeared monthly until August 1864.

[23] In the event, the particular provisions in this regard of the Matrimonial Causes Act (20 & 21 Vict. c. 85), popularly known as the Divorce Act, proved to be unsatisfactory in practice.

[24] John Stuart Mill (1806–1873), the influential contributor to social theory, was associated with the Liberal Party and was M.P. for City and Westminster from 1865-1868. When introducing the Bill in 1868, George Shaw-Lefevre mentions a speech that John Stuart Mill had made in Parliament the year before, in which he had advocated the claims of the women rate payers to the suffrage (Hansard 1868a: 1015).

[25] Russell Gurney (1804–1878) was called to the bar (Inner Temple) in 1828 and was Recorder for London from 1856 as well as the Conservative M.P. for Southampton from 1865 until his death. As well as introducing the Married Women's Property Bill, he was instrumental in introducing the Bill which was enacted as the Medical Act 1876, the Act which allowed a woman to practise as a medical doctor.

[26] Shaw-Lefevre gives a useful exposition of the common law and its modification over the centuries by equity in his speech (Hansard 1868a: 1016–20).

[27] The 1868 Election was the first after the Representation of the People Act 1867 (30 & 31 Vict., c. 102), popularly known the Reform Act 1867. Shaw-Lefevre's other commitments prevented him from sponsoring the

attempt failed, not because of opposition to it but because the Bill ran out of time and had not completed all necessary stages in both Houses by the time the Session came to an end. However, on this occasion, the Bill did get as far as its second reading in the House of Lords, having got through all its stages in the House of Commons.[28] Finally, the same three brought in the Bill for a third time on 11 February 1870 (Hansard 1870a: 192). Alas, although the resulting Married Women's Property Act 1870 did set the wheels of change in motion, a 'drastic amendment of the House of Lords [had] made it a pale shadow of what even the most moderate reformer had wanted' (Cretney 2003: 95).

Whilst there is no doubt that most damage to the Bill was done by the House of Lords, it is clear from the debate when it was read for the second time in the House of Commons that there were also Members of that House who entertained considerable misgivings about the radical changes which the Bill proposed. The problem seems to be that the effect of Bill as drafted (as had also been the case as regards the Bills introduced not only in 1868 and 1869 but also in 1857) went far beyond what was necessary to remedy the injustice which was the purported prime aim of its supporters: to mitigate the common law insofar as it was causing not inconsiderable hardship and distress to married women least able to benefit from the protection afforded by the Court of Chancery and the equitable doctrine of separate estate, namely women from the lower-middle and working classes, in that such a woman could not protect her wages from being seized and squandered by her husband, if he were so minded and even if they were living apart.[29] None of the opponents of the Bill in either House denied that this could and did happen all too frequently nor had they anything against the principle that it was a state of affairs which required urgent attention. What concerned them was that the proponents of the Bill seemed to be using this very laudable motive as a way of introducing legislation that would radically alter a fundamental principle of the common law and they feared that insufficient consideration had been given to all possible consequences. Mr. Raikes, the M.P. for Cheshire, no doubt spoke for many when he voiced his suspicion, during the Bill's second reading in the House of Commons that those outside Parliament who

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Bill when it was reintroduced in 1869 and Stuart Mill was not an M.P. in the new Parliament. Jacob Bright (1821–1899) was the son of a Quaker industrialist from Lancaster and worked in the family cotton-spinning business before entering Parliament as M.P. for Manchester in 1867. Thomas Emerson Headlam (1813–1875) was called to the Bar (Inner Temple) in 1831. He was the M.P. for Newcastle-upon-Tyne, first as a Whig and then as a Liberal, from 1847–1874.

[28] It was read in the House of Commons for the second time on 14 April (Hansard 1869b: 760–98) and for the third time on 21 July (Hansard 1868c; 401–05), the debate having been adjourned from 9 July; its second reading in the House of Lords was on 30 July (Hansard 1869c: 979–87).

[29] However, the original Petition to Parliament in 1856 gives no special weight to this point; it is simply one grievance amongst all the others (Carlyle's Collected Letters 1970: 33–36).

supported the Bill included many who embraced 'the novel principle of civil equality between the sexes' and opined that the Bill's principal defect was the way in which 'imaginary rights were mingled with real wrongs'; he also pointed out an inherent inequality between husband and wife that would result, in that there was nothing in the Bill that would oblige a wife to apply any part of her separate property towards supporting the family, as the husband was obliged to do at common law (Hansard 1870b: 889). In the Upper House, the Earl of Shaftesbury 'was not prepared to say that the Bill was not a good one but he did say that it ought to be very maturely deliberated' (Hansard 1870c: 609–10); Lord Penzance, more forthright, was concerned that the provisions of the Bill, if it were enacted as it had come up to them from the Lower House, would 'subvert the principle upon which the marriage relation had hitherto stood and its tendency would be to cause increased discord' (Hansard 1870c: 603) a sentiment with which Lord Westbury agreed, adding that only 'a very small part of the Bill related to the main evil requiring redress and in the remainder were many extravagant enactments' (Hansard 1870c: 606). The mind of the House is summarised by Lord Lyveden, when he said that throughout the discussion 'all arguments had been against the Bill, except to one point—namely, that a profligate husband ought to be prevented from throwing away the property of his wife' and that '[*i*]*n the position in which the House was placed* it was essential that should come to some conclusion as to the course they should adopt' (Hansard 1870c:618; added emphasis).

The position was that this Bill, like its predecessors, was running out of time: the Session was due to end on 10 August; their Lordships were not unmindful of the fact that this was the third attempt in as many years to redress by legislation what they perceived to be the 'main evil' addressed by the Bill but they feared that that, if they sent the Bill back to the Lower House too much cut down, it would be rejected and the opportunity to bring relief to a sizeable proportion of all married women would be lost.[30] In the event, the Bill did pass its second reading and was referred to a Select Committee of the House of Lords, whose amendments, which did indeed cut out everything in the Bill that did not directly address the 'main evil', were debated and approved by the Lords in Committee on 18 July (Hansard 1870d: 395–401) and sent back to the Lower House. The Lords' fears proved to be unfounded: despite the 'temper in which [the Bill] had been sent up' (Hansard 1870c: 606), the House of Commons did accept the Lords' amendments on 3 August, albeit 'with regret'

[30] Lord Cairns states that according to the 1861 Census there were 3,000,000 married women in England, of whom some 800,000 earned wages (Hansard, 1870b:601).

(Hansard 1870d: 1488–89), so when the 1870 Act came into force, its principal effect was merely to give a married woman the legal right to property earned by her own industry and talents.[31] However, there were probably many who concurred with Russell Gurney, when he declared that 'legislation on [that] subject could not end with [that] Bill, as there would yet remain much to be remedied' (Hansard 1870d: 1488–89); the campaign continued.[32]

On being returned to power in the General Election of 1880, Gladstone pledged to introduce further reforms as regards married women's property. A Bill was introduced which again more or less repeated the provisions of the unsuccessful Bill of 1857 (McGregor: 22), and the Married Women's Property Act 1882, which came into force on 1st January 1883, was the outcome. As well as repealing the 1870 Act and re-enacting its provisions, the 1882 Act provided that, as regards a woman married on or after that date, all her property, no matter when acquired, would remain hers and she was free to deal with it as she saw fit, but, as regards women who were already married on that date, this would only apply to property which they acquired after 1882; any property which they already owned was still subject to the old law. The Act also enabled a married woman to give a valid receipt for what was lawfully hers. This has greater significance than might appear: at common law, a married woman could not give a valid receipt except to a limited extent, so a receipt given by a married woman for monies due to her under a Will or by virtue of an intestacy did not operate as a sufficient discharge for the executors (or administrators in the case of an intestacy) from their legal duties; This could have legal consequences for them if it were later claimed that the estate had not been properly administered, so executors/administrators would always insist on a receipt signed by both the married woman and her husband and refuse to release anything to her without such a receipt, unless they were expressly authorised by the Will to accept her receipt (the Will of William Field previously mentioned makes just such a provision as regards receipts for the income which would be paid to his married daughter from the trust fund set up for her). This had two consequences for a married woman who was separated

[31] Married Women's Property Act 1870, s. 1. The Act also allowed her to keep small legacies (i.e. not exceeding £200, or about £118,000 in today's terms; it was not possible to bring an action in equity in respect of assets worth less than this amount), sums received by virtue of intestacy irrespective of the amount and rents and profits from real property which she had inherited as heiress under the common law rules of devolution (but not from real property which had been settled on her *inter vivos* or by testamentary devise) (s.7). The House of Lords had proposed that the Act came into effect on 1 November 1870 but Russell Gurney, when recommending that the Lord's amendment be accepted, felt that the Act should take effect immediately it received the Royal Assent, which it presumably did before the end of the Session on 10 August.

[32] It is unlikely that Nicholas Forsyte and his like would have been much troubled by the eventual provisions of the 1870 Act, although the realisation that the campaign was by no means over might have made them shift uneasily.

from her husband: first, the practical one that she might have no knowledge of his whereabouts, which would mean delay while enquiries were made; the other that he would then be put on notice of her inheritance and be able to insist on taking control of it, thus depriving her of the wherewithal to support herself independently. In his speech supporting the motion that the Bill be read a second time, Gurney cites such a case that had come to his notice (Hansard 1870b: 881).

This looks as though it is the end of the matter, but there remained a few points which meant that married women were still not quite on the same footing as their unmarried sisters: a woman still remained for legal purposes a 'person under a disability' in certain circumstances (along with, as will be recalled, infants, felons and lunatics). As Bromley observes, the Married Women's Property Acts are 'typical of so much English legislative reform in that they have created extensive exceptions to the old rules without striking at the root of the trouble by abolishing outright the fundamental principle on which the anomalies are based' (Bromley, 1962: 259). Instead of simply abolishing the common law doctrine and hence the consequences that flowed from it, the 1882 Act merely gave statutory effect to the equitable doctrine of separate estate as regards *all* of a married woman's property, instead of certain types of property, as the 1870 Act had done. Whilst women were henceforth freed from the need to enter into complex legal arrangements to protect their property, since the Acts gave them full rights of possession, marriage notwithstanding, neither the 1870 nor the 1882 Act fully addressed all the consequences that flowed from the doctrine that 'husband and wife is one flesh', which, it will be remembered, has the effect that 'the very being or legal existence of the woman [was] suspended during her marriage or at least incorporated into that of her husband' (Blackstone, 1803: 442).

As a result, the interaction of statute law and common law produced anomalies, some of which were addressed by amending legislation. For example, at common law, a husband became liable for any pre-nuptial contracts which his wife had made and which remained undischarged, a perfectly reasonable provision since the property upon which a creditor might levy execution in the event of her default was now vested in the husband. The 1870 Act simply abolished this rule, which only worked to the disadvantage of creditors, since the limitations of the Act meant that much of a woman's property, apart from that which had been protected by being settled on her for her separate use, was still vested in her husband on marriage, so the wife had little property on which execution could be levied. The 1874 Act

hastily redressed the position by repealing the relevant part of the earlier Act but limiting the husband's liability to the value of the property which had vested in him *jure maritii*.

Neither the 1870 nor the 1882 Act addressed one consequence of a woman's legal person being suspended during her coverture, which was that she alone could not bring a civil action for damages unless her husband were joined as co-plaintiff, as if he had also suffered injury; conversely, an action could not be brought against her unless he were joined as co-defendant, as if he had also committed the tort. Further, although the 1882 Act and its successors did extend somewhat the married woman's capacity to contract, something which by and large she could not do at common law and could only do in equity to the extent that the contract related to property which had been settled on her for her separate use, her liability in contract was of a proprietary nature (i.e. the property concerned could be seized to satisfy the liability) not a personal one (i.e. she could not be made bankrupt or committed to prison if she failed to satisfy a judgment debt for breach of contract).[33] Her liability in tort and contract would continue unchanged until section 1 of the Law Reform (Married Women and Tortfeasors) Act 1935 provided that the married woman, the *feme covert*, should:

> (a) be capable of acquiring, holding and disposing of any property; and
> (b) be capable of rendering herself, and being rendered, liable in respect of any tort, contract debt or obligation; and
> (c) be capable of suing and being sued, either in tort or in contract or otherwise; and
> (d) be subject to the law relating to bankruptcy and to the enforcement of judgments and orders,
>
> in all respects as if she were a *feme sole*. (quoted in Cheshire & Fifoot, 1960: 358)[34]

In all respects? Not quite. By the early nineteenth century, a practice had evolved for the further protection of property which had been settled on a wife for her separate use. It was recognised that a spendthrift and domineering husband could still prevail upon his wife to realise assets or transfer them to him, when they could be seized by his creditors. It became customary to make assets settled on a woman for her separate use subject to a condition known as a 'restraint upon anticipation'. Although it was not possible to make such a provision in any instrument creating a settlement executed on or after 1st January 1936, settlements already existing at that date were unaffected. In the post-war economic climate, it was felt that this restraint could be overly burdensome, so restraint upon anticipation was

[33] See further Bromley 1962: 259–67, Cheshire & Fifoot 1960: 356–59 and Gibson's 1964: 35–38, 362.
[34] Law Reform (Married Women and Tortfeasors) Act 1935 (25 & 26 Geo. 5, c. 30).

fully abolished by virtue of the Married Women (Restraint upon Anticipation) Act, 1949 — nearly ninety years after Bodichon and her colleagues began their campaign.[35]

The campaign by and on behalf of married women for the return of not only their rights as regards their property but also their very legal existence lacks the drama and the high-profile personalities that attended the later campaign for women's suffrage but is, I argue, no less important. The moves to introduce legislation in 1857, 1868–1870 and 1882 could be construed as evidence of a subtle change in the attitude of the Legislature towards women: earlier legislation had been concerned to protect them physically by regulating the hours that women could work and prohibiting them from being employed to work in particular environments, such as mines; the 1857 Bill and its successors, as well as addressing a manifest injustice that bore heavily on a particular category and class of woman, the working married woman from the poorer classes, did endeavour to promote equality at least between women by allowing a married woman the same freedom to enjoy what was lawfully hers and hers alone as was enjoyed by the *feme sole.* This, I suggest, does indicate a willingness to see women not merely as the 'weaker vessels' in need of protection but as persons in their own right, with all the consequences that flowed from that concept.

History is full of 'what ifs'. What if the Bill had not run out of time in 1857, would it have got onto the Statute Book then? On the evidence of its progress in 1870, probably not, at least not as drafted, but it is not inconceivable that a cut-down version similar to the 1870 Act might have been achieved. And what if it *had* got onto the Statute Book as originally conceived, if not in 1857 but at least in 1870, would this have made any difference to the campaign for women's suffrage? Again, it is impossible to say, but it is worth remembering that one of the objections to that campaign was that, if women's suffrage in some form were introduced, it would not be possible to exclude married women but, since a married woman was, in Blackstone's words, 'under the protection and influence of her husband' and, in any case, had no legal existence, it would be tantamount to giving a married man two votes. This argument might well have been less cogent, had married women been in charge of their own property earlier in the century.

The language used in the Parliamentary debates and elsewhere may, no doubt, seem overly paternalistic and patronising to modern ears with its references to women as 'the weaker vessel' or 'wives of the poorer class', but allowance must be made for the idiom of an

[35] Married Women (Restraint upon Anticipation) Act 1949 (12, 13 & 14 Geo. 6, c.78). See further Bromley 1962: 404–05, 408 and Cheshire 1962: 840.

era less troubled by the need for political correctness than ours is, and we should also remind ourselves how much women owe to far-sighted — and tenacious — men of the day, who were prepared to champion women's causes and use their position both within and outside of Parliament to push for reforms. When we look back from our vantage point in the second decade of the twenty-first century, the Married Women's Property Acts may well seem, so far as the general public is concerned, of little interest, obscured as they are by the achievements of later campaigns. However, as long as the *Forsyte Saga* continues to be published, they will not be completely forgotten, even if the time may come when a footnote is required to explain Nicholas Forsyte's unforgiving attitude to the Acts and his thankfulness that his marriage had taken place long enough before they came into force for him not to be too much troubled by them.[36]

Bibliography

Arden Shakespeare Complete Works, ed. by Richard Proudfoot, Ann Thompson and David Scott Kastan (London: The Arden Shakepeare, 2001)

Blackstone, Sir William, *Commentaries on the Laws of England*, ed. by Edward Christian, 4 vols (London: Cadell & Davies, 1803), I, digital version from <www.books.google.com> [accessed 3-Mar-11]

Bromley P.M. *Family Law* (London: Butterworths, 1962)

Cheshire, G.C. and C.H.S. Fifoot, *The Law of Contract*, 5th edn. (London: Butterworth & Co., 1960)

Cheshire, G.C., *The Modern Law of Real Property*, 9th edn. (London: Butterworths, 1962)

Cretney, Stephen Michael, *Family Law in the Twentieth Century: A History* (Oxford: Oxford University Press, 2003)

Galsworthy, John, *The Man of Property* (Harmondsworth: Penguin Books, 1951)

—— *In Chancery* (Harmondsworth: Penguin Books, 1962)

Gibson's Conveyancing, ed. by R.H. Kersley (London: Law Notes Lending Library, 1964) (cited as 'Gibson's, 1964)

Hansard: the Official Report of Debates in Parliament, 1803–2005, (cited as 'Hansard'), digital version at <http://hansard.millbanksystems.com/>

—— Series 3, Volume 144,
cc. 605–19, <http://hansard.millbanksystems.com/lords/1857/feb/13/bill-presented-first-reading> [accessed: 3-Mar-11]

—— Series 3, Volume 145
cc. 266–81, <http://hansard.millbanksystems.com/commons/1857/may/14/leave-first-reading> [accessed: 3-Mar-11]
cc. 1182 –84, <http://hansard.millbanksystems.com/commons/1857/jun/04/leave-first-reading> [accessed: 3-Mar-11]
c. 1293, <http://hansard.millbanksystems.com/commons/1857/jun/08/married-womens-reversionary-interest> [accessed: 3-Mar-11]
c. 2078, <http://hansard.millbanksystems.com/commons/1857/jun/18/married-womens-reversionary-interest#S3V0145P0_18570618_HOC_90> [accessed: 3-Mar-11]

—— Series 3, Volume 146
cc. 1515–23, <http://hansard.millbanksystems.com/commons/1857/jul/15/second-reading> [accessed: 3-Mar-11]

[36] Of little interest, except, that is, to anyone wishing to take advantage of a policy of life assurance effected under section 11 of the Married Women's Property Act 1882. Such policies still have a place, even today, in the careful arrangement of their financial affairs by a married couple.

—— Series 3, Volume 147
c. 1866–84, <http://hansard.millbanksystems.com/commons/1857/aug/19/divorce-and-matrimonial-causes-bill> [accessed: 3-Mar-11]
—— Series 3, Volume 191
cc. 115–25 <http://hansard.millbanksystems.com/commons/1868/apr/21/leave-first-reading>
[accessed 11-Mar-11]
—— Series 3, Volume 192
cc. 1352–78 <http://hansard.millbanksystems.com/commons/1868/jun/10/bill-89-second-reading>
[accessed 11-Mar-11]
—— Series 3, Volume 194
c. 331 <http://hansard.millbanksystems.com/commons/1869/feb/25/leave-first-reading>
[accessed 11-Mar-11]
—— Series 3, Volume 195
cc. 760–98 <http://hansard.millbanksystems.com/commons/1869/apr/14/bill-20-second-reading>
[accessed 11-Mar-11]
—— Series 3, Volume 198
cc. 131–33 <http://hansard.millbanksystems.com/commons/1869/jul/21/married-womens-property-bill>
[accessed 11-Mar-11]
cc. 979–87 <http://hansard.millbanksystems.com/lords/1869/jul/30/married-womens-property-bill>
[accessed 11-Mar-11]
—— Series 3, Volume 199
c. 192 <http://hansard.millbanksystems.com/commons/1870/feb/11/married-womens-property-bill>
[accessed 11-Mar-11]
—— Series 3, Volume 201
cc. 878–92, <http://hansard.millbanksystems.com/commons/1870/may/18/bill-16-second-reading>
[accessed 1-Mar-11]
——Series 3, Volume 202
cc. 600–22, < http://hansard.millbanksystems.com/lords/1870/jun/21/no-125-second-reading>
[accessed 6-Mar-11]
——Series 3, Volume 203
cc. 395–401, <http://hansard.millbanksystems.com/lords/1870/jul/18/no-125-committee>
[accessed 6-Mar-11]
cc. 1488–89, <http://hansard.millbanksystems.com/commons/1870/aug/03/lords-amendments>
[accessed 6-Mar-11]

Leigh Smith, Barbara, 'A Brief Summary in Plain Language of the Most Important Laws concerning Women together with a Few Observations thereon' in *Women's Source Library: Volume III Barbara Leigh Smith Bodichon and the Langham Group*, ed. by Candida Ann Lacey (London: Routledge, 2001), pp. 21–35 (cited as 'Bodichon')

McGregor, O.R., *Social History and Law Reform* (London: Steven & Sons, 1981), published under the auspices of The Hamlyn Trust

Mozley & Whiteley's Law Dictionary, ed. John Saunders, 7th edn (London: Butterworths, 1962 (cited as Mozley & Whiteley, 1962)

Prerogative Court of Canterbury *Letters of Administration dated 7th November 1796 (with Will annexed dated 28th September 1793) in the estate of William Field deceased granted to Ann Arnold Widow* (cited as 'P.C. Canterbury'), office copy in the author's possession

The Collected Letters of Thomas Carlyle & Jane Welsh Carlyle, 35 vols (Durham, North Carolina: Duke University Press, 1970), XXXI, (cited as 'Carlyle's Collected Letters'), digital version at <http://carlyleletters.dukejournals.org/> [accessed: 3-Mar-11]