SOUTH AUSTRALIA

ELEVENTH REPORT

of the

LAW REFORM COMMITTEE
of
SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

—

LAW RELATING TO WOMEN AND WOMEN'S RIGHTS

1970

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The Members are:

THE HONOURABLE MR. JUSTICE ZELLING, C.B.E., *Chairman.*
S. J. JACOBS, Q.C.
K. P. LYNCH.
J. F. KEELER.

The Secretary of the Committee is Mr. H. G. Edwards, c/o Adelaide Magistrates' Court, Adelaide, South Australia.

ELEVENTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA

To:

The Honourable L. J. King, Q.C., M.P.,
Attorney-General for South Australia.

Sir,

The question of the reform of the law relating to women and their rights in various circumstances was referred to us by your predecessor.

At common law a woman until she was twenty-one was under the protection of her father who had certain rights akin to proprietary rights in her during her infancy. In addition from when she was married, whether before or after twenty-one, her husband had, except where customs such as the custom of London provided otherwise, an absolute right to her person and to her property, and he could chastise the one and dispose of the other. The parties were united during marriage. They were as was said by Lord Coke two souls in one body. Quite apart from the proprietary rights adverted to above, the unity of the spouses rule was carried out to its logical conclusion both in matters of procedure and in matters of substance.

Most of this has by now been swept away but certain survivals still remain. Being survivals they are of necessity a group of disparate topics and we accordingly deal with them one by one. Certain questions such as the effect of the unity rule in relation to conspiracy and publication of libel will be dealt with separately.

1. *Powers of Attorney*

Married women give powers of attorney every day of the week but all the older precedent books warn that the validity of such powers is doubtful as a power of this kind is neither contract nor property, and therefore is one of the heads of the hydra-headed common law which has not been struck off by the married women's property legislation. We recommend that the matter be rectified by an amendment to our Law of Property Act, 1936, to incorporate section 129 (1) of the English Law of Property Act, 1925, 15 & 16 Geo. V c. 20 which reads as follows:—

> "129. (1) A married woman, whether an infant or not, has power, as if she were unmarried and of full age, by deed, to appoint an attorney on her behalf for the purpose of executing any deed or doing any other act which she might herself execute or do and the provisions of this Act, relating to instruments creating powers of attorney apply thereto."

2. *Actions in Tort*

We have already submitted a memorandum with regard to actions in tort between husband and wife arising out of motor vehicle accidents which is the Fourth Report of this Committee.

We turn now to the wider position. With three possible exceptions we see no reason why husbands and wives should not be able to sue one another in tort in exactly the same way as any two persons who are

not married could do. The exceptions are as follows:—actions in ejectment, actions in libel and slander and assault. With regard to the second and third of these, we think that it is a sufficient safeguard to enact the provisions of the Imperial Act 10 & 11 Eliz. II c. 48 s. 1 (2) which reads as follows:—

> "1. (2) Where an action in tort is brought by one of the parties to a marriage against the other during the subsistence of the marriage, the court may stay the action if it appears—
>
> (*a*) that no substantial benefit would accrue to either party from the continuation of the proceedings; or
>
> (*b*) that the question or questions in issue could more conveniently be disposed of on an application made under section seventeen of the Married Women's Property Act, 1882 (determination of questions between husband and wife as to the title to or possession of property);"

The only relevant alteration would be the substitution of a reference to section 105 of our Law of Property Act, 1936, for section 17 of the English Married Women's Property Act, 1882.

The first is more troublesome because as Lord Goddard has pointed out, if a husband had complete freedom of action to sue in ejectment he could eject his wife and family from the matrimonial home. We think it preferable to provide that actions in ejectment shall not lie as between husband and wife and leave the parties to the remedies provided by section 105 of the Law of Property Act.

3. *Gifts and Bequests to Three Persons, Two of Whom Are Husband and Wife*

The law is as set out in Theobald on Wills 12th Edn. paragraph 824 as follows:—

> "*Gifts to husband and wife and third person.* Before 1926, if a gift was made to a husband and wife and a third person, the husband and wife took a moiety between them, and the third person took the other moiety. Sometimes slight differences in wording were relied upon to exclude the rule. The rule did not apply where the husband and wife were members of a class; in that case each took a share. The rule was unaffected by the Married Women's Property Act, 1882. But the rule is abrogated in respect of dispositions made or coming into operation since December 31, 1925, by section 37 of the Law of Property Act, 1925."

The pre-1926 law would appear to be still the law in South Australia and accordingly we recommend the enactment of section 37 of the Imperial Law of Property Act, 1925, 15 Geo. V c. 20 which reads as follows:—

> "37. A husband and wife shall, for all purposes of acquisition of any interest in property, under a disposition made or coming into operation after the commencement of this Act, be treated as two persons."

We think it proper to add that if this section is passed it will probably have the result of reversing the decision of Bray, C.J. in *In re Lamshed deceased Dawes v. Grace and others* (*L.S.J.S.* 2/10/69) on a question of

hotchpot. However it would seem from a perusal of His Honour's judgment at page 3 that he felt constrained to hold as he did by reason of an old decision of Lord Hardwicke and that his intuitive approach, unfettered by authority, would have been to decide the matter in the opposite way to that in which he felt compelled by authority to decide.

4. *Savings from Housekeeping and Profits from Boarders*

With regard to savings, the law is that if a wife makes savings from an allowance made to her by her husband for housekeeping or for her dress expenses, such savings and any articles purchased out of them will be regarded as belonging to the husband unless it can be shown that it was his intention that they should be a gift from him:— See the decisions of the Court of Appeal in *Blackwell v Blackwell* 1943 2 *A*11 *E.R.* 599 and *Hoddinott v. Hoddinott* 1949 2 *K.B.* 406. The law as to this was altered in 1964 by an Imperial Statute: The Married Women's Property Act, 1964 (1964 Statutes Ch. 19), section 1 of which reads as follows:—

> "1. If any question arises as to the right of a husband or wife to money derived from any allowance made by the husband for the expenses of the matrimonial home or for similar purposes, or to any property acquired out of such money, the money or property shall, in the absence of any agreement, between them to the contrary, be treated as belonging to the husband and the wife in equal shares."

We recommend that our Law of Property Act be amended by inserting a similar section.

With regard to profits made by the wife which contain a component arising out of her own labour it would appear from the decision of the Supreme Court of this State in *In re Palmer's Question*: *Palmer v. Palmer* 1952 *S.A.S.R.* 218 *at* 223 that the whole of the earnings belong to the husband notwithstanding the labour component supplied by the wife.

We think that this is inequitable. It is not, we think, possible to adopt the "equality is equity" principle of the English Married Women's Property Act, 1964, in this situation as there are numerous unknown factors such as who owns the home, who provides the bedding and linen, whether it is a bed and breakfast arrangement or full board and so on and we therefore recommend that a section be added to the Law of Property Act reading:—

> "Where a wife keeps boarders or lodgers during the continuance of any marriage the profits arising therefrom shall be divided between husband and wife in such shares as may seem just and equitable to the Court on the hearing of an application by either spouse and such an application shall be deemed to be a question between husband and wife as to the title to or possession of property within the meaning of section 105 of the Act."

5. *Loss of Consortium*

It was held by the House of Lords in *Best v. Samuel Fox & Co. Ltd.*, 1952 *A.C.* 716 that a married woman whose husband has been injured by a negligent act or omission has no right or action against the negligent person in respect of the loss of or impairment to consortium consequential to the injury.

The decision of the House of Lords is squarely based on the old property right which a husband had in his wife and we think that there should be an amendment to the Wrongs Act in effect reversing this decision and providing that a wife has the same right of action in respect of loss of or impairment to consortium in tort as her husband would have in the same circumstances. We desire to add that in speaking of consortium here we are not referring to the narrow concept of a wife's right to consortium dealt with by the High Court in *Wright v. Cedzich* 43 *C.L.R.* 493 but in the wide sense used in *Best v. Samuel Fox* (supra)

6. *The Right of a Husband to Chastise His Wife*

It would appear from the judgment of Mr. Justice Abbott in *Natale v. Natale L.S.J.S. 8th February,* 1957 that although the general right to chastise went in *The Queen v. Jackson* 1891, 1 *Q.B.* 671 that the learned Judge thought that it survived sufficiently to be used as a defence in a matrimonial case in cruelty. We think that this decision is so far outside the general stream of the law on the topic that it probably would not be followed (see for example *The Queen v. Miller* 1954, 2 *Q.B.* 282 *at* 292) but we draw the attention of the Government to this anomalous decision in case it is thought necessary to put the matter beyond doubt.

7. *Actions for Seduction*

Two actions for seduction were known to the common law both actions available only to the parent and not to the girl seduced. The first was based on the notion of services rendered by her to him either actual or notional and the second, if the seduction happened in the parent's home, on the old law of trespass ab initio because the father had given his leave and licence for the seducer to come to the home but not to seduce his daughter therein.

The Committee felt that these actions served no useful purpose at the present day but on enquiry being made from the Italian and Greek communities in this State, strong representations were made to the Committee that having regard to the feelings entertained by members of those communities on the subject of the seduction of girls, it would be unwise to change the law and the Committee accordingly recommends that no action be taken.

8. *Actions of Enticement and Harbouring*

These were thought to be obsolete until the decision in *Marchioness of Winchester v. Fleming* 1958 1 *Q.B.* 259. They are based squarely on the property which a husband had in his wife. We do not see that they serve any useful purpose at the present day. They have recently been abolished in New Zealand and we think that they should be abolished here.

9. *Breach of Promise*

It is hardly logical to give a right to damages for breach of the anterior contract but not for breach of the principal contract. The Committee were divided on this subject: some consider that the action is archaic and is used too often to try and compel an unwilling party into an unwanted marriage: others think that it prevents people taking the law

into their own hands and provides one means of the redistribution of engagement presents, although it must be conceded that this last could be equally well done by an ordinary action in conversion or partition if the gifts are joint. A majority of the Committee recommends the abolition of the action.

10. *Restraint Upon Anticipation*

Lord Thurlow devised the equitable restraint upon anticipation of the income of a married woman and in the days when a husband had an absolute right to his wife's property it was a most useful weapon in the defence of the wife. We can not see that it serves any useful purpose today. It was abolished in England in 1949 (see the Married Women (Restraint upon Anticipation) Act, 1949, 12, 13 & 14 Geo. VI c. 78) and we recommend that similar legislation be enacted here.

11. *The Deserted Wife's Equity*

Mainly due to the efforts of Lord Denning, the Courts for some years protected a deserted wife whom a husband either on his own or collusively with others tried to turn out of the matrimonial home. Provided there are divorce proceedings pending, there is sufficient power in the Commonwealth Matrimonial Causes Act, 1959, to prevent this being done. However, in many cases this particular argument arises before there are any proceedings in divorce and accordingly in England the dissenting view of Lord Denning has been made law by Statute by the Matrimonial Homes Act, 1967. However, the enforcement of such a right in this State poses special problems in relation to land under the Real Property Act, 1886 (see the judgment of Mr. Justice Ligertwood in *Maio and Another v. Piro* 1956 *S.A.S.R.* 233) and accordingly unless the Government prefers us to bring down a report earlier we propose to deal with this problem in relation to the general revision of the Real Property Act which has been referred to us.

12. *Loss of Shared Income where the Relationship Arises Partly from Marriage and Partly from Partnership*

It seems to be settled by the judgment of Mr. Justice Devlin (as he then was) in *Burgess v. Florence Nightingale Hospital for Gentlewomen and, Another* 1955 1 *Q.B.* 349 that where a husband and wife are in partnership the carrying on of which is facilitated by the fact of their being married, no damages are awarded to the surviving spouse on this account if one of them is killed by a wrongdoer. This has been followed in later cases. The reason given by Mr. Justice Devlin at page 346 is the old and fallacious one that there would be no end to the compensation that would have to be paid by the wrongdoer (see his judgment at the top of page 356). There are in fact quite a number of partnerships which are facilitated by the fact that the parties are husband and wife and the dancing partnership in Burgess's case was a typical example. We would have thought that there was no answer to the argument put by counsel for the husband and summarized at page 361 of Mr. Justice Devlin's judgment. We think that the Wrongs Act ought to be amended to provide that where a wrongdoer causes the death of one spouse and the spouses were before their death engaged in a business which was facilitated by the spousal relationship, this is not to be a ground for refusing to award damages under this head of damage to the surviving spouse.

We have not dealt in this report with the wider issues of community of property or with any right to divide assets obtained during marriage equally between spouses on death as is dealt with in the English Matrimonial Property legislation of 1969. We felt that these issues raised wide and fundamental matters and ought to be the subject of separate referral if it was desired by the Government that we should enter into them.

The Committee would like to express its thanks and appreciation to Her Honour Justice Mitchell and to Mrs. Iris Stevens of the Crown Law Office who acted as commentators in relation to this matter.

We have the honour to be

HOWARD ZELLING.
S. J. JACOBS.
K. P. LYNCH.
JOHN KEELER.

Law Reform Committee of South Australia.

A. B. JAMES, GOVERNMENT PRINTER, SOUTH AUSTRALIA 200—1.76 G