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Book Review: Married Women and Property Law in Victorian Ontario, by Lori Chambers

BOOK REVIEW

Married Women and Property Law in Victorian Ontario

BY LORI CHAMBERS

(Toronto: University of Toronto Press, 1997)¹ x + 237 pages.

Married Women and Property Law in Victorian Ontario is essential reading for all those interested in the history of changes to women's rights in Canada. In this well-written monograph, Lori Chambers carefully describes most of the major legal transformations to the rights of married women to property in Ontario throughout the nineteenth century. It adds to Constance Backhouse's research into the *Married Women's Property Acts*,² differing in some interpretations, in its detailed focus on one province (Ontario), and in Chambers' use of accounts of cases drawn directly from court records. What is left out is any extended discussion of changes in widows' rights to dower, or of legislation concerning wives and life insurance.

The book begins with a clear description of married women's legal incapacity under the common law. For those familiar with the workings of the nineteenth-century common law, little in this chapter³ is new or surprising. However, Chambers provides an excellent summary of the degree to which marriage rendered women non-persons without control over even their own property. In subsequent chapters she describes women's use of equity courts to claim alimony,⁴ the practice of making marriage settlements,⁵ and the legislation passed in 1859, 1872-1873, and 1884 that gave a growing number of married women some control over their property.⁶ Other chapters focus on conflicts between

¹ [hereinafter *Married Women and Property Law*].

² C. Backhouse, "Married Women's Property Law in Nineteenth-Century Canada" (1988) 6 *Law & Hist. Rev.* 211, reprinted in B. Bradbury, ed., *Canadian Family History: Selected Readings*, (Toronto: Copp Clark Pitman, 1992).

³ "'So Entirely under His Power and Control': The Status of Wives Before Reform" in *Married Women and Property Law*, *supra* note 1, 14.

⁴ "'A Life that is Simply Intolerable': Alimony and the Protection of Wives" in *Married Women and Property Law*, *supra* note 1, 28.

⁵ "'To Properly Protect Her Property': Marriage Settlements in Upper Canada" in *Married Women and Property Law*, *supra* note 1, 53.

⁶ See "'If the Laws Were Made More Salutory': The Act of 1859" in *Married Women and Property Law*, *supra* note 1, 70; "'The Difference Between Women's Rights and Women's Wrongs': The Acts of 1872 and 1873" in *ibid.*, 92; and "'A Thing of Shreds and Patches': The Act of 1884" in *ibid.*, 137.

the rights of wives and the claims of creditors in two different periods,⁷ on husbands who abused their positions as trustees of their wives' goods,⁸ and on the limited usefulness of rights to separate property for women whose violent husbands might coerce them into giving up property.⁹ Throughout the book, the reader will find excellent examples of individual stories that illustrate the dilemmas faced by married women without property rights, thus clarifying the impact of coverture on real women's lives. There is moving evidence to convince the reader that incest, cruelty within marriage, and marital break-up are not just twentieth-century phenomena. And the book brings together information on the role of Ontario women in the fight for changes to married women's rights—a role that was relatively modest compared to the struggles in the United States and England, but that drew on the successes of those struggles.

Although Chambers is less celebratory about the degree to which these law reforms were the result of women's actions, her approach to this topic builds on the feminist legal historiography of the 1980s regarding similar changes in the United States and England.¹⁰ Whereas Lee Holcombe and Mary Shanley, writing in 1983 and 1989 respectively, interpreted the passage of such laws in England as important, if limited, feminist victories, the main agents of change in Chambers' book are judges and legislators, perhaps in large part because the Canadian women's movement emerged later.

Chambers' central argument is that the *Married Women's Property Acts* were inherently limited in their emancipatory potential. She cites three main reasons. First, their primary goal was, and remained, the protection of wives. The legislation, she argues, aimed

⁷ See "Many Frauds Not Previously Practicable': Creditors and the Acts of 1859 and 1872" in *Married Women and Property Law*, *supra* note 1, 105 [hereinafter "Creditors and the Acts of 1859 and 1872"]; and "Lending Aid or Encouragement to Fraudulent and Dishonest Practices': Wives and Their Creditors After 1884" in *ibid.*, 148 [hereinafter "Wives and Their Creditors After 1884"].

⁸ "But How Are You to Exempt it From His Control?': Abuse of Trust by Husbands" in *Married Women and Property Law*, *supra* note 1, 122.

⁹ "Being Terrified and in Fear of Violence': The Limitations of Separate Property as a Protective Device" in *Married Women and Property Law*, *supra* note 1, 166.

¹⁰ Most important among these were: L. Holcombe, *Wives and Property: Reform of the Married Women's Property Law in Nineteenth-Century England* (Toronto: University of Toronto Press, 1983); M.L. Shanley, *Feminism, Marriage, and the Law in Victorian England, 1850-1895* (Princeton, N.J.: Princeton University Press, 1989); N. Basch, *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York* (Ithaca, N.Y.: Cornell University Press, 1982); and M. Salmon, *Women and the Law of Property in Early America* (Chapel Hill, N.C.: University of North Carolina Press, 1986).

more at limiting the power of abusive husbands than at making wives autonomous economic agents. Second, laws allowing women to retain and control their own separate property were of little use to those without any. Chambers repeatedly reminds the reader that separate property offered no recognition of women's contribution to the home through domestic labour and child rearing during marriage. No legislation prior to the *Family Law Act* of 1986¹¹ recognized these contributions to the accumulation of family property. Third, when wives were granted rights to their separate property, it was never as individuals with the full contractual capacity of men or unmarried women. Rather, their contractual powers were limited to the extent of their property. Chambers explains this particularly clearly with cases that reveal the problems of the origins of the concept of separate property within equity law. Behind all the changes, she suggests, lay men's "chivalry"—the "central ideological presumption that underlay these reforms."¹²

Chambers' arguments are not as different, as she implies, from those made earlier by Backhouse and other feminists writing about married women's property. An important exception is that Backhouse argued, based on reported cases, that judges nullified the potential benefits of the married women's property legislation in their decisions, while Chambers argues that cases reported in law reports were not representative. Like Backhouse, who concluded her main article on the subject by asking whether it had been worth fighting for such Acts, Chambers concludes by stressing their limitations. Both Backhouse and Chambers minimize the significance of the ways in which ideas about marriage were hotly debated and contested at this time, largely because they narrow their focus to judicial decisions and quotations from politicians. In so doing, they downplay the extent to which debates about marriage and property in nineteenth-century Canada were part of a broader international controversy that had many threads, including liberal, egalitarian, and even socialist ones that go back to William Thompson in the 1820s and John Stuart Mill in 1869, and which had echoes in Canada.¹³

Neither Backhouse nor Chambers problematizes the ways in which a language of protection (combined with narratives about bad

¹¹ S.O. 1986, c. 4 [re-enacted as R.S.O. 1990, c. F.3].

¹² *Married Women and Property Law*, *supra* note 1 at 12.

¹³ See W. Thompson, *Appeal of One Half of the Human Race, Women, Against the Pretensions of the Other Half, Men, to Retain Them in Political and Thence in Civil and Domestic Slavery* (London: Virago, 1983) (1825); and J.S. Mill, *The Subjection of Women*, ed. by S.M. Okin (Indianapolis, Ind.: Hackett, 1988) (1869).

husbands) could be used as a political and a courtroom strategy to solicit support. To argue that “protection from mistreatment, not emancipation, was foremost in the minds of women themselves”¹⁴ minimizes the manner in which women forged narratives in court that they hoped would work in their favour. It also creates a sharp dichotomy between protection and liberation. Surely protection from mistreatment could constitute liberation, and learning to manage one’s own wages and income could be a basis for economic emancipation.

There is much in this book that is useful. The book is based largely on the usual sources of legal historians—the Acts touching on married women’s property, legal treatises and commentaries, and reported cases. Chambers also draws on unreported cases. A major strength of the book is its convincing demonstration of the dangers of relying on reported cases to determine the patterns of judgments being made. The cases selected for the law reports were not necessarily representative, although they were frequently lessons in proper behaviour.¹⁵ Chambers demonstrates the unrepresentative nature of reported judgments in three areas of the law. First, she explains that although 33 cases granted alimony in Ontario between 1837 and 1890, only 3 of these were reported, whereas 3 of 5 cases where alimony was not granted were published.¹⁶ Second, during the 1870s wives succeeded in most cases that they brought against creditors, yet reported cases stressed the problems that early legislation posed for creditors.¹⁷ By the 1880s, after the laws had more clearly allowed all women who had property to keep it separate, the majority of unreported cases were decided in favour of creditors, while reported cases tended to describe women who had succeeded in retaining their own property separate from delinquent husbands.

These comparisons are valuable and remind researchers to be wary of making assumptions about the representivity of case reports. Yet, there are limitations both to Chambers’ argument and to her documentary base. She argues that unrepresentative cases were published in law reports to teach women that adultery and other violations of the marriage contract did not pay;¹⁸ to ensure that men

¹⁴ *Married Women and Property Law*, *supra* note 1 at 6.

¹⁵ *Ibid.*

¹⁶ *Ibid.* at 51.

¹⁷ *Ibid.* at 159-62.

¹⁸ *Ibid.* at 128.

fulfilled their side of the bargain; to publicize the exceptional;¹⁹ and to push for changes to the law. While law reports could clearly serve many functions, Chambers restricts her argument to methodological considerations—*i.e.*, you cannot use reported cases to understand the majority of decisions—rather than querying the complex roles that law reports played in shifting understandings of legal practitioners and the wider community.

How much, for example, did decisions reported in law reports circulate in the community? Would they have had any impact on ordinary people's behaviour, or only on the actions of those making the decisions? Some discussion about who read these decisions and how they served the functions she attributes to them would have strengthened her argument. Even more interesting would have been speculation about how ordinary women told stories about court cases to each other in ways that helped others frame the scripts of their demands, though sources for such a study might be hard to find. Even knowing whether those cases that were not published in law reports were reported in local newspapers would be another way of thinking about how information about judgments and potentially successful courtroom strategies might have circulated—formally and informally—within communities.

The original court documents that Chambers uses provide moving examples of wives' dilemmas, as well as of their agency and occasional echoes of their voices. They breathe life into the manuscript. Yet at no point does Chambers clearly explain how many cases she found, ponder on their representivity, or justify the truth claims that she makes from them. She claims that "every relevant extant case at the Archives of Ontario was examined, and it is assumed that the extant cases are representative"²⁰ without explaining why this assumption might be valid. The number of cases used in some chapters is rather small and frequently drawn from a limited range of counties in the province. By carefully reading between the footnotes and the text it appears that the chapter on alimony is based on a solid number of 300 petitions for alimony submitted between 1837 and 1890. However, only 38 of these apparently ever reached court.²¹ She found only 20 unreported cases concerning marriage settlements, apparently from throughout the province.²² In the chapter on the growing problem of fraud that followed

¹⁹ *Ibid.* at 51.

²⁰ *Ibid.* at 186, n. 8

²¹ *Ibid.* at 51.

²² *Ibid.* at 58.

the passage of the 1859 and 1872 Acts,²³ Chambers states that "[t]he unreported court documents for this study included all extant records for York, Wentworth, Frontenac, Lambton, Brant and Norfolk counties for the period from 1859 to 1900."²⁴ Nowhere does she explain what proportion of Ontario counties this represented. Nor, in this chapter, does she report how many cases there were. Only 16 cases are explicitly cited in the footnotes. Chapter Seven,²⁵ which clearly illustrates the ways in which men abused their positions as trustees of their wives' estates, is based on 17 cases of litigation drawn from 6 counties, although Chambers also discusses 125 protection orders from Huron and York counties. Chapter Nine²⁶ is based on what looks like a more solid number of 130 cases.

I am not suggesting that Chambers should have written a more quantitative study or that the small number of cases she examined in some of these chapters invalidate her conclusions. However, given that one of her central arguments against previous historical work on this subject is that reported cases are unrepresentative, this book would have been strengthened by a more thoughtful discussion of why only some records remain, what proportion those remaining might represent of the full number of cases heard, whether there are problems with drawing material from such a long period, and a review of the strengths and weaknesses of her evidentiary basis.

This book began as a thesis. Like many theses, it remains rather narrowly focused. Ultimately, it is more a legal than a social history of married women's property rights. A broader contextualization of the subject would have been desirable. First, although Chambers acknowledges the international context, more consideration of the influence of this important international debate and more references to other Canadian provinces would have been helpful. It would also have been useful to know more about concrete links between women and men promoting women's rights in Ontario and feminists in other jurisdictions. And it would have been particularly interesting to learn more about Chambers' suggestion that the early interest in community property in Lower Canada was replaced by the end of the century with disdain for Quebec law.

²³ "Creditors and the Acts of 1859 and 1872," *supra* note 7.

²⁴ *Ibid.* at 213, n. 4.

²⁵ "Abuse of Trust by Husbands," *supra* note 8.

²⁶ "Wives and Their Creditors After 1884," *supra* note 7.

Second, the reader unfamiliar with nineteenth-century Canadian history is not given sufficient context to understand the broader changes that influenced and were influenced by the laws Chambers discusses. There is no discussion of how Ontario changed between 1837 and 1900. It is possible to read this book without realizing that during this period of urbanization and industrialization the working class became the largest component of the population in Ontario cities. In that context, the right of wives to keep their own wages separate was a crucial one that reshaped the marriage contract in important ways, as several American historians have argued.²⁷

Nor does Chambers discuss the particular problems of precarious members of the middle classes for whom juggling credit and protecting property was sometimes crucial to retaining a respectable lifestyle in times of economic risk. Instead, she seems to read at face value complaints about the fraud that the early married women's property legislation made possible. At one point she does suggest that "[e]vidence from fraud cases suggests that the act of 1884 provided women who owned separate property with unprecedented scope for active involvement in the marketplace and the economy."²⁸ Yet, more often she presents their role only as fraudulent, dishonest, or unscrupulous, hardly acknowledging the ways in which women might have been actively participating in individual or family-based strategies of accumulation and protection of property. In the chapters on married women and fraud,²⁹ a broader contextualization of the subject would have avoided reproducing the presentation of creditors as heroes and married women as villains found in the reported decisions.

Finally, Chambers makes important arguments about how this legislation, the court decisions, and the tenor of published cases aimed at convincing men to be responsible in their roles as providers and husbands. This fits well with James Hammerton's interpretations of the role of English judges and justices in promoting new meanings of masculinity in the same period in England.³⁰ Yet the arguments made in *Married Women and Property Law in Victorian Ontario* would lead the

²⁷ A.D. Stanley, "Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation" (1988) 75 J. Am. Hist. 471; and S.L. Zeigler, "Wifely Duties: Marriage, Labor, and the Common Law in Nineteenth-Century America" (1996) 20 Soc. Sci. Hist. 63.

²⁸ *Married Women and Property Law*, *supra* note 1 at 165.

²⁹ See "Creditors and the Acts of 1859 and 1872" and "Wives and Their Creditors After 1884," *supra* note 7.

³⁰ A.J. Hammerton, *Cruelty and Companionship: Conflict in Nineteenth-Century Married Life* (London: Routledge, 1992).

reader to believe that the growing strength of the discourse about delinquent husbands issued purely from the judiciary, when it too was part of a much broader debate about gender roles, shaped in large part by the temperance movement of the time, but influenced by other social reformers as well as the labour movement.

These reservations aside, this book will be extremely useful for students, teachers, and scholars interested in developing a clearer understanding of the law in early nineteenth-century Ontario. It is accessible, reads well, and provides excellent examples of the problems wives faced both legally and because of drunken and ne'er-do-well husbands. It will be of interest to those working in the areas of legal history, women's history, and women and the law, as well as to social historians.

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