Married Women's COMMON LAW RIGHT To Their Own SURNAMES

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On October 9, 1972, the highest court of Maryland handed down what is by far the most important recent decision on the issue of whether or not a woman may retain her pre-marriage name as her "legal" name during marriage.[1] In a five-to-one decision the Maryland Court of Appeals, in the case of STUART v. BOARD OF SUPERVISORS OF ELECTIONS FOR HOWARD COUNTY[2] reversed the circuit court of Howard County and directed the same to promptly order the election board to restore the name of Mary Emily Stuart, who is married to Samuel H. Austell, Jr., to the registry of voters in Howard County. The Court of Appeals held that a Maryland statute requiring county officials to file the former and present names of female residents whose names were changed by marriage did not abrogate the common law. At common law, should a woman adopt her husband's surname at marriage, her name would be changed in fact, but not by automatic operation of the law.

On March 2, 1972 Ms. Stuart registered to vote under her maiden name, telling the registrar that she was married but did not use her husband's surname. She was allowed to register, but on March 16, 1972, she received a letter from Election Board Chairman Daniel L. Downey indicating that unless she reregistered under the name of Mary Austell her registration would be cancelled. The position of the Board that a married woman must vote in her husband's surname was based upon an informal opinion of the Attorney General.[3]

The Attorney General said, citing 38 Am. Jr., *Name*, § 10; 65 C.J.S., *Names*, § 3c; 35 A.L.R. 417 (1925), that upon marriage the legal name of a woman becomes that of her husband, and that record keeping, "proper voter identification" and the prevention of possible voting fraud justified requiring married women

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1. Ms. Stuart retained her birth-given name, but the principle of the case would seemingly apply to any pre-marriage name.

2. ___ Md. ___, 295 A.2d 223 (1972). Three amicus briefs were filed in the case which the writer highly recommends.

3. Informal Opinion dated April 7, 1971, to Willard A. Morris, State Administrative Board of Election Laws, signed by Assistant Attorney General Francis X. Pugh. The state argued that Ms. Stuart could vote in her own name only if she got a court order "changing" her name to her maiden name.

in Maryland to vote in their husbands' names.[4] The opinion stated that although Maryland had adopted the common law rule that a person could assume whatever name she/he pleased in the absence of a statute to the contrary, Md. Stat. Art. 33, § 3-18(a)(3) had abrogated this right in the case of married women. This section requires the proper county officials to file with "respective boards the former and present names of all female residents . . . over the age of twenty-one years, whose names have been changed by marriage."[5]

The Court of Appeals of Maryland held that nothing in the above statute abrogated the common law right to change names or compelled all married women to vote in their husbands' surnames. Maryland had "heretofore unequivocally recognized the common law right of any person, absent a statute to the contrary, to 'adopt any name by which he may become known.' "[6]

Ms. Stuart chose to retain her birth-given name. While she was entitled to adopt her husband's surname, in accordance with custom, she had evidenced a clear intent[7] to use another name exclusively and consistently subsequent to her marriage as her full legal name. The mere fact of her marriage did not, as a matter of law, operate to establish the custom and tradition of the majority as a rule of law binding upon all. The court held that those who choose to adopt their husbands' name undergo a "change of name by marriage," in fact, but not in law.[8]

STUART was decided a few months after the much publicized case of FORBUSH v. WALLACE,[9] in which the Supreme Court in a one sentence, *per curiam* affirmance upheld the constitutionality of Alabama's unwritten "regulation" of issuing drivers' licenses to applicants in their legal names, and the "common law rule" that the legal name for a woman upon marriage was the surname of her husband unless changed by court decree.

The validity of the so-called "common law rule" was not at issue in FORBUSH[10] as it was in STUART. Ms. Forbush, who had never assumed the surname of her husband and who thus was commonly known by her maiden name of Forbush, averred that she and the class she represented were denied equal protection of the laws by Alabama's "common law" rule.[11]

The three-judge district court began its analysis by noting that "Alabama has adopted the common law rule that upon marriage the wife by operation of law takes the husband's surname."[12] After this one-sentence disposition of the common law, the court then held that, since the State provided a "simple, inexpensive" means by which a person, including a married woman, could change her/his name in court, the injury to the plaintiff and those similarly situated was *de minimus*, and less inconvenient than the cost to Alabama of changing its 35-year-old practice of requiring married women to apply for drivers' licenses in their husbands' surnames.[13]

Balancing the interests, the court concluded that requiring Ms. Forbush to use the name which was "legal" had a rational basis and was not in violation of the Fourteenth Amendment's equal protection clause.

In a footnote the Maryland Court of Appeals said that it was not bound by the interpretation of the Alabama common law in FORBUSH.[14]

THE COMMON LAW

The general rule at common law referred to in STUART, ignored in FORBUSH, and

4. *Id.*

5. Md. Stat. Art. 33, sec. 3-18(a)(3).

6. *Supra* note 2, at 226.

7. While there was evidence of an ante-nuptial agreement between Ms. Stuart and Mr. Austin, the Maryland court treated it as evidence of Ms. Stuart's intent to retain her name and not a condition of her doing so.

8. *Supra* note 2, at 228.

9. 341 F. Supp. 217 (M.D. Ala. 1971), *aff'd per curiam*, 415 U.S. 970 (1972).

10. *Id.*

11. Complaint, Civil Action No. 3394-N, filed June 16, 1971, U.S. District Court for the Middle District of Alabama, Northern Division, at 4.

12. 341 F. Supp. at 221.

13. *Id.* at 222.

14. *Supra* note 2, at 226.

affirmed by English and American cases and legal authorities is that any person, including married women, minors and bastards, may adopt whatever name she/he pleases if the name is adopted for an honest and nonfraudulent purpose.[15] A person is not bound to retain the name given her/him at birth but can change her/his name without going through legal proceedings. The chosen name constitutes the "true" or "legal" name of the individual, as if she/he had acquired it at birth. A person's "true" or "legal" name was early determined to be that by which the individual is known in the community. "The name acquired by repute was the 'true' name."[16]

Surnames are of relatively recent origin in English law, and of much less permanence than first or Christian names.[17] At common law it was even more common for men, retaining their Christian names, to assume their wives' surnames at marriage than for wives to retain their own surnames.[18]

In cases where an individual was known by several names in her/his lifetime, courts had to determine as a question of fact which name was the "true" name of the party in question. This was particularly so in the case of bastards who at common law had no names except those they gained by repute.[19]

The common law right to adopt the name of one's choice entitled married women to assume the surnames of their husbands.[20] Although it was the custom, a married woman was not compelled to take the name the law entitled her to.[21] Should she assume her husband's name, it was considered merely a change of name in fact, not a legal consequence of marriage.[22]

The right to retain one's name was extended, in the case of EARL COWLEY v. COUNTESS COWLEY,[23] to a married woman's retaining the name of a previous husband, an aristocrat, while married to another, a commoner. The English House of Lords dismissed the petition of the first husband to enjoin his former wife from continuing to use his name, holding that "the

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15. "Name," 19 R.C.L. 1325; Ex Parte Snook, 2 Hilton's Report, New York 566 (1859); HALSBURY'S LAWS OF ENGLAND, vol. 23, Names and Arms, Change of; Davies v. Lowndes, 1 Bing. N.C. 618 (1835); DuBoulay v. DuBoulay, L.R. 2, E.C. 430 (1869).

16. TURNER-SAMUELS, THE LAW OF MARRIED WOMEN 347 (1957).

17. COKE, Litt. 32.

18. There are more numerous examples of a man taking his wife's surname. This is not always due to excessive feminism on the wife's part, but to a variation of the old names and arms clause, by which the husband of an heiress may well be required to assume her name. The idea here is to give continuity to the ownership of the property and to preserve an historic name. Many are the instances hidden under the thick branches of a family tree, in which a man's name has been sacrificed in order that the family themselves, and future ages also, may be deluded into assuming that the male line identity has been kept up from a remote period. PINE, THE STORY OF SURNAMES 23 (1966).

19. Sullivan v. Sullivan, 161 Eng. Rep. 728, 2 Hag. Con. 238 (1818), *aff'd*, 3 Phill. Ecc. 45 (1819); Wilson v. Brockley, 161 Eng. Rep. 937, 1 Phill. Ecc. 132 (1810); Wakefield v. MacKay, 161 Eng. Rep. 937, 1 Phill. Ecc. 134, S.C. 1 Hag. Con. 394 (1807).

20. (I)t is well established that marriage confers a name upon a woman which she is absolutely entitled to use even after the marriage has been dissolved by divorce or nullity. Furthermore, she may on a subsequent marriage continue to use her previous husband's name. *Supra* note 16, at 345-346.

In England (followed by the United States of America) practice has crept in, though apparently comparatively recently, for a woman upon marriage to merge her identity in that of her husband, and to substitute his name for her father's, acquiring the new surname by repute. 'The change of name is in fact rather than in law, a consequence of the marriage.'

EIVEN, A HISTORY OF BRITISH SURNAMES 391 (1941). *See also* REANY, THE ORIGINS OF ENGLISH SURNAMES 82-85 (1967), for a discussion of the common use of married women of surnames different from those of their husbands in the fourteenth century; and for a discussion of different customs regarding married women's surnames and the history of surnames in general *see* MORDACQUE, HISTORY OF THE NAMES OF MEN, NATIONS AND PLACES (1964).

21. In England, custom has long since ordained that a married woman takes her husband's name. This practice is not invariable; not compellable by law . . . . a wife may continue to use her maiden, married, or any other name she wishes to be known by. *Supra* note 16, at 345. See also *Married Women's Surnames*, 63 S. AFR. L. J. 53 (1949).

22. When a woman on her marriage assumes, as she usually does in England, the surname of her husband in substitution for her father's name, it may be said that she acquires a new name by repute. The change of name is in fact, rather than in law, a consequence of the marriage. 19 HALSBURY'S LAWS OF ENGLAND 829 (3d ed. 1957).

23. Cowley v. Cowley (1901) A.C. 450.

law of this country allows any person to assume and use any name, provided its use is not calculated to deceive and to inflict pecuniary loss."[24] The court noted that even a stranger may assume the patronymic of a family, no matter what annoyance it may cause the family.

This common law right still prevails in England.[25]

THE EARLY FEMINIST CRUSADE

The right to one's own name has been a cause dear to American feminists, who in 1921 formed the Lucy Stone League, named for the renowned crusader for women's rights who kept her maiden name when she married Henry B. Blackwell in 1855. The League and the National Woman's Party led a vigorous and successful fight in the 1920's to secure the common law right of American women to retain their own surnames at marriage.[26]

When Mrs.[27] Stone married she consulted several attorneys about the legality of keeping her own name, and was assured by the future United States Chief Justice Salmon P. Chase that common law permitted her to do so.[28] Yet when she attempted to vote in a school election in 1879 she was denied her right to do so in the name she had used exclusively for sixty years because, as her daughter put it, "a small Boston official thought he knew more about law than the Chief Justice of the United States."[29] According to Alice Stone Blackwell, her mother thought school suffrage was

> too small to be worth going to law about; also, she believed that the later she brought her action, the more likelihood there would be of a favorable decision, since public opinion in behalf of equal rights for women was constantly growing.[30]

Yet many years later when numerous prominent women elected to follow Stone's example in the early twentieth century they also met with strong resistance, this time from officials in the federal government.

In 1924 Dr. Marjorie Mason Jarvis, a physician in the Washington, D.C. area, discovered when she went for her paycheck that her surname had been changed to that of her husband on the government payroll. Her protest was referred to J. H. McCarl, Comptroller General of the United States, who issued a statement that a married woman's "legal" name was that of her husband, and that all married women employed by the Government must sign their husbands' surnames to the payroll.[31]

The Lucy Stone League, the National Woman's Party and three major New York newspapers denounced McCarl bitterly, claiming that no law required a woman to assume the surname of her husband. On August 18, 1924, the New York Times editorialized:

> A misguided department chief in Washington last week ruled that women working under him couldn't, as well as wouldn't, get a pay check if they were

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24. *Id.* at 460. *See The Name of a Married Woman. May on Remarriage, A Divorced Woman Continue to Use the Surname of the Former Husband?* 66 S. AFR. L. J. 189 (1949), wherein the author laments that the law of England does not sufficiently protect the interests of a divorced husband regarding his name.

25. An alteration of name made bona fide is effective for all purposes in English law .... there is nothing of a permanent or exclusive nature about surnames. For one great name which has persisted down the centuries, there are many, many more which have been altered and altered again, and which have passed through numerous changes. EIVEN, *supra* note 20.

26. Lyle, "Origin of the Lucy Stone League," unpublished paper, The Lucy Stone League, 133 East 55th Street, New York, N.Y. 10022; GRANT, ROSS, THE NEW YORKER AND ME 128-129 (1968); Hale, "The First Five Years of the Lucy Stone League" (1926); *Wives Debate Rights to Maiden Names*, New York Times, May 18, 1921, at 20, col. 1.

27. After her marriage Lucy Stone preferred to be called "Mrs." and signed legal documents as "Lucy Stone, wife of Henry B. Blackwell." Letter to the Editor from Alice Stone Blackwell, New York Times, April 26, 1925, Sec.II, at 6, col. 7.

28. BLACKWELL, LUCY STONE, PIONEER OF WOMEN'S RIGHTS 171 (1930).

29. *Id.*

30. *Id.*

31. *Woman Must Take the Name of Husband in Federal Office*, New York Times, August 14, 1924, at 1, col. 2; *McCarl Decision Stirs Lucy Stone League*, New York Times, August 15, 1924, at 13, col. 5; *Asserts Woman Has Right to Own Name—National Woman's Party Starts Fight Against Controller General McCarl's Ruling*, New York Times, Sept. 16, 1924, at 23, col. 3; *Feminists Deny That Wife Must Bear Husband's Name*, New York Times, Sept. 28, 1924, Sec. VII, at 12, col. 1; SMITH, THE STORY OF OUR NAMES 16 (1950).

married, unless they abandoned their maiden names and let the cashier put their husbands' on it . . .

As the department chief has no warrant in law for his ruling, resistance to it will be easy for anybody who is willing to take a little trouble in defense of a small but unquestionable right.[32]

The New York World, on August 15, 1924, exclaimed:

Who or what is the Government of the United States and who is J. R. McCarl that that they should dictate to any citizen on a subject so purely personal? This is an instance of the sort of bureaucratic snooping and invasion of civil liberty which brings a Government into disrepute with those who must live under it.[33]

Marjorie Jarvis never pursued her case, but after the issue arose again in 1925 when another "Lucy Stoner,"[34] well known journalist Ruby A. Black, demanded a passport in her own name, the federal government ceased to object to married women working in their own names.

The National Woman's Party, represented by Burnita Shelton Matthews,[35] made a test case of the issue of Miss Black's passport. They demanded and received a hearing before Secretary of State Kellogg and were accompanied by Mrs. Helen Normanton, a British citizen who, although married, held a passport in her own name. The decision was to grant Ruby Black her passport. The document granted to her read "Ruby A. Black, wife of Herbert Little," and was given to her as an "emergency measure."[36] Feminists were infuriated with this qualification upon the right of a married woman to her own passport and Miss Black at first refused to accept the document, saying: "There is no more use of requiring me to describe myself as the wife of Herbert Little than for him to disclose that he is the husband of Ruby A. Black."[37] She later agreed to accept the passport but never used it.

The first Federal Code of Regulations printed in 1938 provided for married women to procure passports in their "maiden" names upon submitting affidavits to the effect that they used their own names exclusively.[38] This provision was deleted in 1966 when the entire passport section was revised. Present passport regulations provide that one who has changed her/his name without formal court proceedings shall submit evidence that the adopted name has been used publicly and exclusively over a long period of time.[39] Present Passport Office interpretation of this section requires a married woman who first assumes her husband's name and then reverts to her own name to use both names on her passport for a period of ten years.[40]

In 1926 an assistant register of copyright in Washington announced that married women must register copyrights in their husbands' surnames "in accordance with the general recognized practice of all Government offices."[41] Quoted as saying that deviation from such practice would "cause confusion as to the copyright records and probably embarrass the copyright claimant herself if the copyright came into litigation,"[42] William D. Brown informed a Denver woman who for twenty years had been obtaining copyrights in her own name that from that time forward she would have to copyright

32. *Not to Be Changed By the Ruling*, New York Times, August 18, 1924, at 12, col. 5.

33. Hale, *supra* note 26, at 14.

34. WEBSTER'S DICTIONARY (3d ed. unabridged 1961) defines a "Lucy Stoner" under "L" as a woman who retains her maiden name. During the early part of the century the term was used much as "Women's Libber" is today.

35. Judge Matthews, retired from the district court of the District of Columbia to which she was appointed by President Truman, is still active and sits on the bench in various courts.

36. SMITH, *supra* note 31.

37. *Women Reject Concession*, New York Times, April 19, 1925, at 5, col. 5.

38. 22 C.F.R. § 51.20 (1938).

39. 22 C.F.R. § 51.24.

40. The same requirement is made of men who change their names out of court, but not of married women who change their names to those of their husbands, or to divorced women who change their names out of court immediately following a divorce. Conversation with Passport Attorney Michelle Truit.

41. *Ruling That Authoress Must Copyright Under Her Husband's Name Stirs Women*, New York Times, Dec. 20, 1926, at 1, col. 4.

42. *Id.*

under her husband's surname. The National Woman's Party prepared to proceed as it had in the payroll and passport issues, but the Register of Copyrights quickly "modified" the ruling to allow women to copyright in their own names. He attached the qualifying condition that they explain their reasons for their request.[43]

Since the struggles in the 1920's only a few cases on the issue of women's use of their birth-given names after marriage have arisen. The Lucy Stone League, reactivated in 1949, has continued to advise women of their common law rights.[44] In the last several months cases raising the issue have arisen in different parts of the country.[45] There is still misunderstanding about the common law right of married women to retain their own names for all purposes, and American case law does not consistently follow the English common law.

AMERICAN CASE LAW

The STUART court expressly followed the 1961 Ohio case of STATE EX REL KRUPA v. GREEN[46] in its reading of the common law. In that case Blanche Krupansky, a well known attorney whose name appeared in **Who's Who In America** and who had retained her maiden name for all purposes when she married, was challenged when she sought to run for a judgeship in her own name. The court held that a statute requiring the re-registration of persons who had changed their names by "marriage or otherwise" did not apply to women who did not change their names *at* marriage.[47] The custom of married women taking their husbands' names was not compelled at common law, nor did the Ohio statute abrogate the common law right by which "a person in Ohio may adopt and use any name he wishes so long as he does so in good faith and with no intent to deceive or defraud."[48]

The STUART court also cited LANE v. DUCHAC[49] which, in 1889, said that although since her marriage a married woman was "entitled" to use her husband's name, there was no law in Wisconsin that would invalidate "obligations and conveyances," in that case, a mortgage, executed by and to her in her "baptismal name, if she chooses to give or take them in that form."[50]

STUART also cited RICE v. STATE,[51] SUCCESSION OF KNEIPP,[52] STATE EX REL BUCHER v. BROWER,[53] and WILTY v. JEFFERSON PARISH[54] as cases supporting the GREEN[55] view of the common law.

The circuit court of Howard County, Maryland, followed STATE EX REL RAGO v.

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43. *Solberg Modifies Copyright Ruling*, New York Times, Dec. 21, 1926, at 22, col. 8.

44. Legal counsel for The League is Kathryn Carlsson, author of *Surnames of Married Women and Legitimate Children*, 17 N.Y.L.F. 552 (1971). The last of the founding members of the Lucy Stone League, Jane Grant, died in March, 1972. The current president, Robey Lyle, says that today the issue of a woman's right to use her own name after marriage is "hotter than it has been since the 1920's." The National Woman's Party still exists in Washington, D.C.

45. State *ex rel.* Custer and Holdsworth v. Schaeffer, Case No. 178366, Superior Court, Hartford County, Conn. This case started with a three page legal opinion written by an assistant attorney general which said that long standing administrative practice and the possibility of confusion in registration justified requiring women to vote in their husbands' surnames. The case is being litigated on common law grounds. Gay v. Board of Registration Comm'r, Case No. 72-1157, 6th Cir., Aug. 29, 1972, is a class action involving voting and is being litigated on constitutional grounds.

46. 114 Ohio App. 497, 177 N.E. 2d 616 (1961).

47. *Id.* at 502, 177 N.E. 2d at 620.

48. *Id.* at 501, 177 N.E. 2d at 619.

49. 73 Wis. 646, 41 N.W. 962 (1889).

50. *Id.* at 654, 41 N.W. at 965. In 1921 Ruth Hale, one of the founders of the Lucy Stone League, and mother of sports commentator Heywood Hale Broun, made headlines when she succeeded in getting a deed with her husband, Heywood Broun, in her own name. *Maiden Names Score a Victory*, New York Times, May 15, 1921, at 9, col. 7. The deed was made out to "Heywood Broun and Ruth Hale, his wife," and was duly executed and recorded.

51. 37 Tex. Cr. R. 36, 38 S.W. 801 (1897).

52. 172 La. 411, 134 So. 376 (1931). In Louisiana, consistent with the French civil law from which its system derives, a married woman retains her birth name in law and bears her husband's as a matter of custom.

53. 21 Ohio Op. 208, 7 Ohio Supp. 51 (1941).

54. 245 La. 145, 157 So. 2d 718 (1963).

55. *Supra* note 46.

LIPSKY,[56] in deciding against Ms. Stuart's common law right to use the name of her choice. LIPSKY[57] on facts almost identical to those of GREEN[58] and STUART, prohibited an attorney from voting in her own name, saying "it is well settled by common-law principles and immemorial custom that a woman upon marriage abandons her maiden name and takes the husband's surname."[59] LIPSKY is the *only* American case which squarely discussed the issue of whether common law requires a woman, against her and her husband's wishes (they had an ante-nuptial contract that Rago would retain her name), to assume her husband's name. The LIPSKY court based its interpretation of the common law on no English authority, as the STUART court pointed out, but on the cases of FREEMAN v. HAWKINS,[60] BACON v. BOSTON ELEVATED RAILROAD COMPANY,[61] CHAPMAN v. PHOENIX NATIONAL BANK[62] and IN RE KAYALOFF.[63]

FREEMAN[64] was also cited as legal authority by Comptroller McCarl in 1924 for his ruling that married women had to work in their husbands' surnames.[65] In that case a married woman who had assumed the surname of her husband was served in her maiden name. Because she was a non-resident, she was served by publication. When judgment was rendered against her by default, Mrs. Freeman objected to its validity, claiming that her name had been Freeman since her marriage. The highest court of Texas held that "if there had been actual service on Mrs. Freeman, under the name of 'Mary E. Robison,' it might have been her duty to appear, even though cited in the wrong name."[66] Here, however, she "had no knowledge of the pendency of the suit against 'Mary E. Robison,' or opportunity to defend it."[67]

The judgment rendered by such service was voided, in effect on due process grounds. The court then added, however, that it did not have jurisdiction to render a judgment binding on Mary E. Freeman where Mary E. Robison was cited to appear, since, on "the marriage of Mary E. Robison the law conferred on her the surname of her husband."[68] The court did not impose a name on Mrs. Freeman.

In a later ruling in Texas, in RICE v. STATE,[69] the court did not even mention FREEMAN[70] when it dismissed a rape indictment as fatally defective because it did not affirmatively negative the idea that the victim was not the wife of the accused although her surname was different than that of the defendant. The court held that "There is nothing in our statute requiring or compelling the wife to take or assume the name of her husband,"[71] adding that such is "generally the case, yet the wife might retain her own name . . . whether marriage shall work any change of name at all is, after all, a mere question of choice."[72]

For its contrary reading of the common law, LIPSKY[73] also relied on CHAPMAN v. PHOENIX NATIONAL BANK[74] which involved the confiscation of stocks registered in the maiden name of Verina S. Chapman, wife of

56. 327 Ill. App. 63, 63 N.E. 2d 642 (1945).

57. *Supra* note 51.

58. *Supra* note 60.

59. 327 Ill. App. at 67, 63 N.E. 2d at 644.

60. 77 Tex. 498, 14 S.W. 364 (1890).

61. 256 Mass. 30, 152 N.E. 35 (1934).

62. 85 N.Y. 437 (1881).

63. 9 F. Supp. 176 (S.D.N.Y. 1934).

64. *Supra* note 60.

65. *Supra* note 31.

66. 77 Tex. at 500-501, 14 S.W. at 365.

67. *Id.*

68. *Id.* at 501, 14 S.W. at 365.

69. *Supra* note 51.

70. *Supra* note 60.

71. 37 Tex. Cr. R. at 38, 38 S.W. at 802.

72. *Id.*

73. *Supra* note 56.

74. *Supra* note 62.

Reverend Chapman, by the United States on the grounds that the stock had been used for the purpose of aiding and abetting the insurrection and rebellion of the Southern states. A default judgment was rendered against "Ver. S. Moore." Verina Chapman was in North Carolina at the time of the New York judgment, had no notice of the action, and moved to vacate the judgment.

The court noted that there were many errors in the proceedings. It was possible to infer from the information that "Ver. S. Moore" was a man, since the person was described as "having committed disloyal and treasonable acts by holding various offices which are exclusively filled by men."[75] A further defect in the notice given was that the defendant's surname for the three years since her marriage had been Chapman, not Moore. The court then said, according to the common law, "upon marriage . . . her maiden surname is absolutely lost, and she ceases to be known thereby."[76] The court did not impose a name on Mrs. Chapman.

IN RE KAYALOFF[77] followed CHAPMAN.[78] There a professional musician well known by her maiden name petitioned for her naturalization certificate in her maiden name, claiming she would suffer pecuniary loss if she were denied the certificate in that name. The case is short, the facts do not clearly state whether or not the petitioner used both her maiden and her husband's names, nor did the court address itself to the issue of whether or not a woman who chooses to use her own name exclusively may do so, but said "a woman at her marriage takes the surname of her husband"[79] under New York law.

In BACON v. BOSTON ELEVATED RY. CO.,[80] the plaintiff's recovery from the defendant railway company was precluded because her car was registered in her maiden name, and she was known exclusively otherwise by her husband's name. The facts stated that she averred that her real name was her husband's surname. Her car, since it was not registered in her real name, was illegally registered and a nuisance on the highway.

It is LIPSKY[81] and the above cases upon which it relies which form the basis for the statements in 38 Am. Jur., *Name*, § 10 and 65 C.J.S., *Names*, § 3c, cited by the Maryland Attorney General in Ms. Stuart's case, that upon marriage a woman takes the surname of her husband as a matter of law. The Maryland Attorney General also relied upon 35 A.L.R. 417 (1925), although most of the cases cited therein reached only the question of the correct *first or Christian* name of a married woman and whether a married woman should be recognized as "Mrs. John Jones" or as "Mary Jones." That authority has disposed of the issue of the correct "legal" name by stating that the law has always only recognized a first and a last name, the prefixes "Miss," "Mrs." and "Mr." being no part of a name, but only descriptive of the individual.[82] That description was of limited value, as, when women won the right to vote, the New York Board of Elections ruled that married women must register in their own first names plus the surnames of their husbands

75. *Id.*

76. *Id.*

77. *Supra* note 63.

78. *Supra* note 62.

79. *Supra* note 63 at 176. Where a woman used her maiden name for professional purposes, one court has said such name is an assumed name, where her estate is probated in her husband's surname. Kotechi v. Augusztiny, 487 P. 2d 925 (1971).

80. *Supra* note 61.

81. *Supra* note 56.

82. 57 Am. Jur. 2d, Sec. 8, *Names, Prefixes and Suffixes*; 65 C.J.S. *Names, Prefixes and Suffixes*, Sec. 5 and cases cited therein. Presumably, the same rule applies to the appellation "Ms."

rather than as "Mrs." followed by their husbands' full names.[83] Since it was possible that a man could have more than one wife during his lifetime, the identification problems seemed obvious to administrators.

The first or Christian name cases do not turn on the common law right to a name of one's own choosing, but on other factors, such as notice.

In UHLEIN v. GLADIEUX,[84] the court held that under Ohio law where the first name of a party is unknown, personal service is necessary. The lien on Lucy Roger's property was voided because residence service on her and her husband was made in the name "Wm. Rogers and Mrs. Wm. Rogers whose first name is unknown." The court recognized one Christian name and one family surname and said that at marriage the wife takes the husband's surname. To distinguish her from the husband she is called "Mrs." not as a name but as a mere title. The person's real and legal name, therefore, was "Lucy Rogers" and not "Mrs. Wm. Rogers."[85]

Where notice is not at issue, the rules concerning first names and prefixes have been more flexible. One court, deciding that a witness could be properly designated as "Mrs. Fred Steenburg" rather than as "Alena Mary Steenburg," referred to this practice of taking the husband's first name preceded by "Mrs." as a social custom and noted that that name was not the name of the witness in a strict sense.[86] In the Alabama case of ROBERT V. GRAYSON,[87] the court held that although Hattie Jones was the proper name of a deceased woman who had assumed her husband's surname at marriage, because she was properly identified her estate could nevertheless be probated in the name "Mrs. J. C. Jones."

In 1926 the Wisconsin Attorney General said that a married woman who wished to run for public office in the name of her husband preceded by the designation "Mrs." could do so if she used such name exclusively during her term of office.[88]

And in 1934 the Oklahoma Supreme Court allowed a woman married to an I. L. Huff to run for public office in the name of Mrs. I. L. Huff. The court held that if she was commonly known by that name, she could run under that name.[89]

The Louisiana court, however, held that a woman who wished to run against her husband Vernon J. Wilty, Jr., could not do so as "Mrs." Vernon J. Wilty, Jr., but had to run in her own first and last names.[90]

Further confusion in the interpretation of the common law right to change names has resulted from decisions on service of process made not on a "Mrs." but in the birth-given name of one who has assumed her husband's surname.

There are numerous cases in which married women who had assumed their husbands' surnames and were commonly known by the same attempted to void judgments against them on the grounds that they were improperly served because notice of publication or personal service was given them in their birth given or former husbands' names. In these cases, however, no name was imposed upon the woman. The courts recognized as valid the name by which the woman was commonly known.

The most frequently cited of these cases is FREEMAN v. HAWKINS.[91] In CLAXTON v. SIMONS[92] the same panel that decided STATE EX REL. KRUPA v. GREEN[93] held that service

83. Hale, *supra* note 26, at 7; *Voohis Would Bar "Mrs." From the Ballot: Says the Law Doesn't Recognize the Title* New York Times, Oct. 19, 1924, Sec. II, at 1, col. 4.

84. 74 Ohio St. 232, 78 N.E. 363 (1906). Comptroller McCarl relied on this case in 1924. *See* note 31 *supra*.

85. *Id.*

86. Carroll v. State, 53 Neb. 431, 436, 73 N.W. 939, 940 (1898).

87. 233 Ala. 658, 173 So. 38 (1937).

88. 15 OP. ATT'Y GEN. 277 (1926).

89. Huff v. State Election Bd., 168 Okl. 277, 32 P.2d 920 (1934).

90. *Supra* note 54.

91. *Supra* note 60.

92. ___Ohio___, 177 N.E. 2d 511 (1961).

93. *Supra* note 46. The court distinguishes Green from the case, and discusses Lipsky. The decision distinguishes between the case of a woman who is known only by her pre-marriage name, and of a woman who takes her husband's name and is then served in her old name.

on a woman in the surname of her first husband was fatally defective since she had assumed the surname of her second husband and was commonly known by that name.

The court said that the defendant "did not intend to retain her former name of Mrs. Gertrude Simon . . . but upon her marriage to Louis Balogh, she intended to be known and was known thereafter as Mrs. Gertrude Balogh."[94] Since the "name by which a person is known is the name by which he must be designated in an action brought against him where service is other than personal service,"[95] the service here, not being in the name by which she was known, was void. In addition, the residence service was attempted on her in the name of Simons when in fact her former husband's name had been Simon.

In MORRIS v. TRACY[96] the court disallowed service on a woman in her maiden name where she had been known by her husband's name for twenty years. The plaintiffs, in addition, were able to suggest no reasons why service was attempted in the woman's maiden name, leading the court to wonder if the service "were really intended to give her notice of the pendency of the suit."[97]

In SOUSA v. FREITAS,[98] an unusual example of inadequate notice, a woman's estranged husband had changed his name out of court without her knowledge and had given notice of his divorce action against her to her by publication in his new surname. The court, not surprisingly, invalidated the divorce judgment. While California adopts the view that anyone may change her/his name without legal proceedings, the court held there is nothing in the law that provides that the legal name of a wife becomes changed, *ipso facto*, when her husband assumes another name in the absence of her "consent, acquiescence, or concurrent change by herself."[99]

94. *Supra* note 92.

95. *Id.* at 514.

96. 58 Kan. 137, 48 P. 571 (1897).

97. *Id.* at 140-141, 48 P. at 572.

98. 10 Cal. App. 3d 660, 89 Cal. Rptr. 485 (1970).

99. *Id.* at 667, 89 Cal. Rptr. at 490.

Service by publication in a prior surname to a married woman who had adopted her husband's surname is not always ruled invalid. It has been upheld when the service was made in a name by which the woman was known in the community. In JONES v. KOHLER[100] an Indiana court attempted to distinguish FREEMAN[101] in refusing the claim of a married woman that a judgment against her should be voided. Notice of a quiet title action by publication was made against a married woman in the surname of her former husband, Jackson. At the time notice by publication was made the claimant had remarried and assumed the surname of Jones. She claimed the decree was void as to her because notice was given to her as Mary Jackson. At the time of publication, however, Ms. Jones was not in the state, and no one knew of the death of her first husband or of her remarriage.

The court said that if "a person is known by more than one name, it is a common rule that service of process by either name is sufficient."[102] Since the statute did not expressly require, as did the statute in FREEMAN, that notice contain the names of the parties to the action, there was here "the additional fact that the party served by publication was known by the name in which she was served."[103] Notice to married women in their maiden names was also upheld in later Indiana[104] and California[105] cases.

Rules governing service in civil suits, which usually require that the real name of the person be the name used in giving notice by publication and other non-direct means, are more strict about names than are the indictment rules, where personal service is required.

100. 137 Ind. 528, 37 N.E. 399 (1894).

101. *Supra* note 60.

102. 37 N.E. at 400.

103. *Id.*

104. Pooler v. Hyne, 213 F. 154, *cert. denied*, 238 U.S. 620 (1914).

105. Bogart v. Woodruff, 96 Cal. 609, 31 P. 618 (1892); Emery v. Kipp, 154 Cal. 83, 97 P. 17 (1908).

In STOKES v. STATE,[106] for instance, a Texas court held that although Eliza Comella Stokes had not assumed the given name or initials of her husband, and was not generally known by or called "Mrs. G. W. Stokes," she could be so named in an indictment if in fact she was occasionally known as such.

STATUTORY ABROGATION

Almost every state has a statutory provision for change of name.[107] In absence of language to the contrary these statutes do not abrogate the common law right to change one's name at will and only provide a means of making a record of a change.

Where, as in Maryland, the common law right to change name without legal proceedings is recognized, name change statutes do not abrogate the common law right. The California court in SOUSA v. FREITAS,[108] for instance, held that the "purpose of the statutory procedure is to have, wherever possible, a record of the change," but that names could be changed without legal proceedings at common law.

Ms. Forbush did not attempt to use or test Alabama's name change statute and never conceded that the statute was either "simple" or "inexpensive."

Some state name change statutes specifically state that the provision is an exclusive means of changing one's name.[109] Others prohibit married women from changing their names pursuant thereto.[110] Almost every state has a divorce name change statute, providing another means for a change of name. Some of these statutes provide for a change only if the woman has no children or receives no alimony.[111]

It is becoming common for married women to utilize the general state name change statutes to keep their own names after marriage, overlooking their common law right to change or keep their names without formal proceedings. Where a state prohibits married women from changing their names by statute, and has a restrictive divorce name change statute, a simple name change petition may meet with great resistance from a local judge.

Statutes in derogation of the common law should be strictly construed.[112] At least where married women are not prohibited from utilizing the state name change statute, it would seem that in absence of a specific requirement that at marriage a woman must take the surname of her husband, a divorce statute could not be construed to abrogate the common law right to the name of one's choice. At the time GREEN[113] and LANE v. DUCHAC[114] were decided, permitting women to retain their birth given names after marriage, Ohio and Wisconsin had statutes providing for a change of name at divorce.

The Wisconsin divorce statute, for example, provides that the court may, where alimony jurisdiction is terminated, permit a wife to resume her maiden name or the name of a former deceased husband, or the name of husband of a former marriage of which there are children in her custody, if she has no children of the marriage being dissolved.[115] Wisconsin had a divorce name change statute in 1924 when the Attorney General wrote

> While a married woman generally takes and uses her husband's surname, there is nothing in the laws of this state that

106. 46 Tex. Cr. R. 357, 81 S.W. 1213 (1904). To a similar effect is Peterson v. Little, 74 Iowa 223, 37 N.W. 169 (1888); Davis v. State, 11 S.W. 647 (Tex. App. 1889).

107. *See* "Right of Married Women to Retain or Regain Their Birth Names," New York Civil Liberties Union, 84 Fifth Ave., New York, N.Y., for a complete list of the country's name change statutory provisions and a summary of state cases and statutes on the issue of married women's names. Only Hawaii has a statute requiring a married woman to take her husband's surname as her legal name.

108. *Supra* note 98.

109. *Supra* note 107.

110. *Id.*

111. *Id.*

112. *See* Pound, *Common Law and Legislation*, 21 HARV. L. REV. 383 (1908); but where legislation is remedial, a liberal construction is warranted, Jung v. St. Paul Fire Dep't Relief Ass'n, 223 Minn. 402, 27 N.W. 20 (1947).

113. *Supra* note 46.

114. *Supra* note 49.

115. Wis. Stat. § 247.20.

> affirmatively requires it, although the general rule of such custom is recognized in the divorce laws . . . Marriage is purely a civil contract under our laws (Sec. 1218, Stats.), which does not change the identity of the parties to it. [116]

The Wisconsin general name change statute does not exempt married or divorced women with children or alimony from its provisions and provides that "any resident, whether a minor or of full age" upon petition to the appropriate court may, "if no sufficient cause is shown to the contrary, have his name changed or established."[117]

A petition "establishing" the birth-given name of a married woman who had never changed her name, as her legal name, was recently granted in Madison, pursuant to this section.[118] In another case a married woman changed her name from her maiden name to a hyphenated name.[119] In still another case a remarried woman who had children in her custody from her first marriage changed her name to her birth given name.[120] And in one case a Milwaukee judge, hesitant about granting a name change to a married school teacher did so "being very much concerned about the implications of a man and wife living in a community with different surnames."[121] Since, however, "the Court does not make the law but only interprets it," until "the legislature, in its wisdom, sees fit to amend the law so that married persons shall be required to use the same surname, this Court feels constrained to allow the petition."[122]

Even where the courts have recognized the statutory right of a married woman to change her name, some have attempted to require her to obtain the consent of her husband in order to utilize the statute.

As long ago as 1856 a South Carolina court acknowledged its jurisdiction to change the name of a married woman without her husband's consent, but declined to do so, expressing its concern that such a change would interfere with possible reconciliation of the estranged couple.[123]

In a recent case a judge asked the twenty-eight year old petitioner who appeared in court without an attorney to go home and get a note from her husband. She engaged lawyers who successfully argued that requiring a petitioner to have the consent of her spouse was adding a requirement to the name change statute, and the judge granted the change without further protest.[124]

CONCLUSION

Under the common law of England a married woman is entitled but not compelled to assume her husband's surname as her own. The United States follows the common law of England, but there is much confusion in this country regarding this particular common law right.

It has been customary for women to assume their husbands' surnames in the United States, and record keepers who are confronted with a woman who says she is married but does not use her husband's surname are often confused.

The federal court in FORBUSH v.

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116. 13 OP. ATTY. GEN. 632, 633 (1923). A full opinion on the subject is now being written by the Wisconsin Attorney General's office.

117. Wis. Stat. § 296.36. New Mexico's name change statute is almost identical to that of Wisconsin providing for a name establishment.

118. In the Matter of the Establishment of the Name of Priscilla Ruth MacDougall, Case No. 135463, Dane County Circuit Court, Wis., petition granted May 1, 1972 by Honorable Norris Maloney.

119. Petition of Cynthia Jean Cantwell to change her name to Cynthia Jean Mary Taylor Cantwell-Ingleheart, Case No. 13451, Dane County Circuit Court, Wis., petition granted April 28, 1972 by Honorable Richard Bardwell.

120. In the Matter of the Petition of Virginia Kaeser Maraniss to Change Her Name to Virginia Kawser, Case No. 136069, Dane County Circuit Court, Wis., petition granted May 10, 1972 by Honorable William S. Sachtjen.

121. Susan Beck Walter, for a change of name to Susan Mary Beck, Case No. 394832, Milwaukee County Circuit Court, Wis., petition granted May 9, 1972 by Honorable Gerald Bolleau.

122. *Id.* at 1.

123. 9 Rich. Eq. 535 (1856).

124. *In re* Camara, Case No. 125025, Super. Ct. Cal. July 2, 1971. "Memorandum of Points and Authorities in Support of Petition for Change of Name," Bender and Waite, 5377 College Ave., Suite 105, Oakland, Calif.

WALLACE[125] justified Alabama's requirement that a woman use her husband's name when dealing with a state agency on the grounds of administrative convenience. A Maryland official disagreed with this in the wake of the STUART decision, noting that vehicle laws require licensees to notify the administration of any change of address. In ruling that Ms. Stuart must retain her driver's license in the name Mary Stuart, Deputy William T. S. Bricker said that to permit a woman to continue her license in her maiden name rather than change the record of the administration would in addition enact a saving for and not an expense to the State.[126]

Fifty years ago the Lucy Stone League expressly decided against striving for legislation regarding name changes, preferring to leave the common law alone. Since the 1920's the United States, and its various agencies, have grown considerably, and record-keeping problems have burgeoned. With this in mind, the Special Committee on Equal Rights of the Wisconsin Legislature has given preliminary approval to a bill which provides for a choice of surname on the marriage certificate itself by both persons at the time of marriage. The bill provides that at marriage the partners shall choose as their legal surnames one or the other of their names as a joint surname, their own pre-marriage names, a combination of their surnames, or any prior surname. This bill does not reach the problem of married women, using their husbands' surnames, who wish to reassume their former names, or men who wish to change their names.[127]

Two female legislators have introduced a similar record keeping bill in Maryland. The committee considering the bill questioned whether or not it would abrogate the common law of Maryland.[128]

Several European countries have already enacted provisions similar to these, and other legislation has been proposed in other states.[129]

There can be no question that when the Equal Rights Amendment is ratified no woman can be compelled to change her legal name each time she marries. Until that time, a better appreciation of our common law tradition might be the solution for women who wish to retain their own names at marriage.

125. *Supra* note 9.

126. Opinion by Deputy William T. S. Bricker, Oct. 19, 1972. In Wisconsin a woman who first uses her husband's name, then reverts to her birth-given name without going to court, can get a new license, which is required by statute to be in one's legal name, in her birth-given name. A cross reference is made to her husband's surname which she had used. There have been no reported administrative difficulties.

127. LRB-561/4. The bill will thus provide a state record of the choice of names at the time of marriage and give the partners a state document which presumably will have the effect of a court order which can be shown in other states. Without such legislation it is conceivable that the Honorable Blanche Krupansky of Ohio or Mary Stuart may be confronted with the situation of having their names changed by a change of residence, were they to move to Alabama for example.

128. *Name Changing Bill Questioned In Panel*, Wash. Post. Oct. 20, 1972. *Bill Seeks Name Option For Married* The Sun, Oct. 20, 1972; Letter from Delegate Lucille Maurer to writer.

129. Ginsburg ed., *Symposium on the Status of Women in Various Countries*, ___ Am. J. Comp. L. ___ (1972). *See* Hughes, *And Then There Were Two*, 23 HASTINGS L. J. (1971) for a summary of prior proposed legislation in the states. The author is not a lawyer and the writer disagrees with her reliance on Chapman, Freeman and Lipsky for an accurate statement as to the common law.