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HUSBAND AND WIFE AS HEIRS OF EACH OTHER

BY EMIL BAENSCH*

THIS phrase is unknown to the common law, which claims to be based on the authority of God and His word that "they twain shall be one flesh," and that "one flesh" was the husband. The wife's claims to personal property were wholly ignored, her interest in real estate handicapped by restrictions rooted in feudalism, and the ceremonial "obey" amplified nigh unto slavery. A. W. Calhoun, in his *Social History of the American Family*, well defines her as "an unrecorded cipher lost in the oblivion of domestic toil and the bearing of children."

After floundering through the Articles of Confederation period, the Fathers found it necessary to draft a constitution, but as to laws of property and inheritance they were content with the common law of England with which they were familiar. Soon, however, dissatisfaction became noticeable, first finding expression in the equity courts who tried, to the extent of their power, to modify the injustice of the common law. Then came voices from the frontier, which Professor Paxson calls the "propagating bed for new ideas and new social experiments," and where there was developed that phase of the American spirit modernized in the slogan of a "square deal." Then, too, we note the beginning of co-education—and thus the stage was all set for an active and persistent propaganda.

In 1821 Maine declared that a woman abandoned by her husband might enter into contracts and convey property. In 1836 a bill was presented in the New York Legislature to remove the common law disabilities of married women. It was defeated. But defeat only increased the zeal of the proponents, and twelve years later, in 1848, within a few days of each other, New York and Pennsylvania adopted the "married women's enabling acts." During the next decade not a year passed without some state doing likewise. Virginia, in 1877, was the last state to do so. Old England, too, saw the light, although, with proverbial John Bull slowness, not until a generation later, passing a similar though not as generous a law in 1870.

This success is chaptered as "the social revolution of 1848," and hailed as a "wondrous social revolution." But it was more, so much more that no one is rash enough to prophesy the ultimate cultural, economic, political, even physical results of this much praised "emanci-

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pation." It was an economic revolution, for women swarmed into industry and commerce and the professions, bringing to every community the increasing problems of the "married woman employee," a problem the solution of which may possibly be aided by the vaudeville jokester portraying the wife as the breadwinner and the husband as the cradle rocker. Recent returns from Texas and Wyoming portend a political revolution, bringing machine puzzles to politics and word puzzles to politeness. What shall we call Her Excellency? We use "mayoress" and therefore, at first blush, we should call her "governess." But that would degrade Ma as well as those whom she rules. Apparently we must enlarge our vocabulary and, borrowing from the Old French, use the sonorous "governoress."

These newly established rights did not harmonize with the inheritance rights of the common law, as adopted and declared in the statutes of the older states. Again we note the frontier's activity as it moved westward and developed a more distinct and typical American character, unhampered by the traditions of the common law. As a California lawyer expressed it to the writer, "We look upon dower and curtesy as you do upon wager of battle and benefit of clergy." Justice suggested a larger and more definite share for the widow, and the "square deal" required that the widower be placed on an equality with the widow as to rights of inheritance. The movement was greatly accelerated by the Louisiana Purchase, which brought us the French law, and by the Mexican War, which brought us the Spanish law, each based on the civil law; and here, in the Far West and in the Southwest, the common law came in contact and in conflict with the civil law, and the "descent" and "distribution" of the former gave way to the "succession" of the latter. As a result every state west of the Mississippi except Oregon and Arkansas, every mid-west state except Wisconsin, several New England, Middle and Southern states, in fact, all but a bare dozen of the forty-eight states, give to the husband the same rights of inheritance in his wife's estate that she has in his. There you meet the "surviving spouse" instead of only the "widow."

As to the property rights of women, Wisconsin kept pace with the other states. The Ordinance of 1787 established the common law in what is now Wisconsin. In 1846 a movement for statehood resulted in a constitutional convention. An article, borrowed from Texas, giving married women the right to hold property, was adopted after many days of heated debate, Marshal Strong, leader of the opposition, resigning in disgust. In the campaign for ratification this article furnished one of the main targets for the opposition. This law will disrupt

the family for it is the apple of discord though covered with gold. The position of woman in the Latin nations was contrasted with her treatment in America. It has been borrowed from the civil law which does not recognize the moral and sacred nature of marriage, but treats it as a mere civil contract. The consensus of historians was presented that when the laws relating to rights of married women were the most amplified, Rome was the most corrupt and immoral. At the ensuing election the constitution was decisively rejected, sixty per cent of the voters registering "No."

The following year another convention was called, much smaller in membership and more diplomatic in temper. As Morgan L. Martin, its president, stated: "Some members I thought quite visionary on the women's rights question as to the holding of property. We omitted such mooted questions," thus leaving it for future legislative action. The constitution it presented was ratified by the people, and today we proudly point to it as one of the oldest and most permanent in the sisterhood of states.

In the Legislature the progressive faction was somewhat more successful. Promptly, in 1850, married women were given the right to hold property. Nine years later she was granted the privilege to make her will without her husband's consent. Over a decade later, in 1872, she was allowed her individual earnings and empowered to sue in her own right. A generation passed ere conveyances between husband and wife were legalized, in 1895, and not until our own generation, in 1921, came the climax that "women shall have the same rights and privileges under the law as men in the exercise of suffrage, freedom of contract, choice of residence for voting purposes, jury service, holding and conveying property, care and custody of children, and in all other respects."

But when we turn from property rights to inheritance rights we find Wisconsin with the non-progressive minority. At the start the widow was given homestead and dower rights in the real estate and a child's share of the personal property. If no descendants survived, then she was given all the property for life, and at her death it went to her father-in-law. If he was not living it went (horrible *dictu*) to her mother-in-law and the brothers and sisters of her husband in equal shares. The widower was granted curtesy where children of the wife by him, or their descendants, survived; if none, then his share was zero.

In 1864 the Legislature recognized the unfairness of giving the widow only a life estate, where there were no descendants surviving, and that year the law was changed so that the widow, in case of no

issue surviving, would at least receive the homestead in fee.¹ This started the ball rolling, and four years later they passed the law which gives her all the estate, where no issue survive.² Then, in 1870, the widower, too, was recognized and it was enacted that when a woman dies, leaving no issue, all her estate goes to her husband.³

Thus the law remained for nearly half a century, but some symptoms of dissatisfaction were manifested in the matter of allowances. At the start, the widow was allowed: (1) the apparel and ornaments of the husband; (2) the household furniture not exceeding \$250 in value; (3) other personal property to be selected by her not exceeding \$200 in value; (4) if the inventory showed a residue not exceeding \$150 after payment of funeral charges and expenses, then this too was given to the widow for the support and maintenance of herself and minor children.

In 1901, came a small additional allowance: namely, family pictures not specifically bequeathed, and the provisions and fuel on hand for family use.⁴ Eight years later the fourth allowance was raised from \$150 to \$500,⁵ and in 1913, this was increased to \$1,000 of the estate,⁶ amended in 1919, to mean \$1,000 of the personal property.⁷ At the session of 1913 the Legislature also concluded that the second allowance, the limit of \$250 on furniture, was unreasonable, and provided that thereafter the widow receive all the furniture.⁸

¹ See ch. 270—Wis. Session Laws 1864. Wis. Stats. 2276a. (Note: Session laws of 1864 state that homestead shall descend free from incumbrances, *except* mortgage.)

² See ch. 61—Wis. Session Laws 1868: "If he shall have no issue, his estate, real and personal, shall descend to his widow; and if he shall leave no issue or widow, his estate shall descend to his father." Wis. Stats. 2270(1)

³ See ch. 121—Wis. Session Laws 1870: "If woman shall die leaving no issue, her state real and personal, shall descend to her husband, if she have one at time of her decease, etc." Wis. Stats. 2270.(2)

⁴ See ch. 76—Wis. Session Laws 1901: "Widow shall be allowed also the household furniture of deceased,—also all provisions and fuel on hand provided for family use." Wis. Stats. 3935.(1)

⁵ See ch. 56—Wis. Session Laws 1909: "If on return of inventory, value of estate shall not exceed sum of —, ct. may assign whole of such estate for use and support of widow and minor children." Wis. Stats. Ch. 318 on "Allowances and Distribution."

⁶ See ch. 520—Wis. Session Laws 1913. Wis. Stats. 3935.(4)

⁷ See ch. 411—Wis. Session Laws 1919: "Ct. may assign from residue of personal estate a sum or value not exceeding one thousand dollars for use and support of widow and minor children of deceased." Wis. Stats. 3935.(4) and (5)

⁸ See ch. 536—Wis. Session Laws 1913: "Widow shall be allowed, also all the household furniture of the deceased." (Not limited to certain value as in previous stat.) Wis. Stat. 3935.(1)

But it was in 1917 that a most radical change in the inheritance laws was proposed. In that year Senator Benfey, of Sheboygan, introduced a lengthy bill, carefully drawn by the legislative reference bureau. It abolished dower and curtesy, made husband and wife equal heirs of each other, giving each of them one third of the other's real and personal estate. It further provided that if, after payment of expenses, funeral charges, and debts, no more than \$3,000 remained, it be all assigned to the surviving spouse. The bill did not pass, but one forward step was taken in that the widow was given one third of the personal estate instead of only a child's share, as theretofore.⁹

Four years later another forward step was taken. Dower was changed to mean one third of the lands outside of the homestead, instead of only the income thereof during life. Of the homestead the widow is allowed one third of the proceeds of a sale, if such sale takes place during her widowhood.¹⁰ Curtesy was changed in that it is now extinguished by remarriage of the widower.¹¹ The change in the definition of dower, as applied to the homestead, is causing some difficulty in the drafting of final decrees. There does not seem to be any good reason why a widow should not receive dower in the homestead as well as in the other real estate. It would seem to have been much simpler to have abolished dower instead of giving it a definition out of harmony with its origin and long established meaning.

The fact that three fourths of the states treat husband and wife as equal heirs of each other shows a general trend of legislation which it would seem proper for Wisconsin to follow. Since the Benfey Bill was proposed, Pennsylvania, Rhode Island and West Virginia have joined the procession. England also, from whence we received the common law, has deemed it best to modernize her inheritance laws. After a careful investigation and much debate, Parliament adopted what is officially known as the "Law of Property Act, 1922."

This English Property Act does away with the distinction between real and personal estate, the same being "held by the personal representatives, as to the real estate upon trust to sell the same, and as to the personal estate, upon trust to call in, sell and convert into money . . . with power to postpone such sale and conversion." It

⁹ See ch. 14-Wis. Session Laws 1917.

¹⁰ See ch. 99-Wis. Session Laws 1921: "Widow of every deceased person *dying after Aug. 31, 1921*, shall be entitled to a one-third part of lands whereof her husband was seized, etc." Wis. Stats. 2159.

¹¹ See ch. 31-Wis. Session Laws 1921: "Husband on death of wife shall hold lands of which she died seized, etc.; provided further, that in case of any husband whose wife dies after Aug. 31, 1921, then any right of curtesy he may have attained shall be extinguished upon his remarriage." Wis. Stats. 2180.

then provides for the payment of costs, funeral expenses and debts, and calls the balance the "residuary estate," which, however, is "subject to the sum of one thousand pounds . . . charged in favor . . . husband or wife." It then abolishes "all existing modes, rules and canons of descent, and of devolution by special occupancy, or otherwise, of real estate, or of personal inheritance," and "tenancy by the curtesy and every other estate and interest of a husband in real estate as to which his wife dies intestate," and "dower and free bench and every other estate and interest of a wife in real estate as to which her husband dies intestate."

"The residuary estate . . . shall be distributed in the manner or held on the trusts mentioned . . . : namely, If the intestate leaves a husband or wife (with or without issue) the surviving husband or wife shall take the personal chattels absolutely, and in addition the residuary estate . . . shall stand charged with the payment of a net sum of one thousand pounds, free of death duties and costs, to the surviving husband or wife with interest thereon from the date of the death at the rate of five pounds per cent per annum until paid or appropriated." Subject to that charge, the residuary estate, where there is no issue, is held upon trust for the surviving husband or wife during life, and where the intestate leaves issue one half is thus held for the surviving husband or wife, the other half going to the issue. An echo of the ancient doctrine is heard in a section specifically providing that "husband and wife shall for all purposes of distribution and division be treated as two persons." On the other hand, the up-to-date nature of the law appears in a section defining "personal chattels" by including "motor cars and accessories not used for business purposes," but, nevertheless, leaves a bad taste in the mouth by also mentioning "wines and liquors."

In view of this strong and increasing tendency toward making husband and wife heirs of each other, we are justified in presenting to the Wisconsin solons the query, "If eventually, why not now?" In the case of a childless couple we are already committed to the new theory, but where there are children we cling to ancient doctrines and recognize only the wife. Why not wear the jewel of consistency?

Even more important is that part of the Benfey Bill, also embodied in the English Act, which gives a specified amount to the surviving spouse before distributing the estate. To this theory, too, we are practically committed, for we now allow the widow a thousand dollars of the personal property. Why not raise this to the English standard of \$5,000, include real estate and apply it also to the widower? The practical effect and the real purpose of this provision is, that,

in the case of a small estate, it all go to the surviving spouse. To distribute an estate not exceeding \$5,000 among parent and several children is really dissipating it. Giving it to the surviving spouse is of more benefit. The children will not suffer, for any one experienced in probate matters will endorse the statement that, if the children are young, parental love is a better protection than statutory regulation, and if they are mature, they can take care of themselves. It will, to some extent, ward off that dependence of aged parents on children which so often spells misery and sorrow. Let us urge the coming legislative session to live up to Wisconsin's motto in this matter of inheritance.