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## RESTRAINTS ON DISINHERITANCE

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In approaching the history of compulsory shares accorded by the common law to a decedent's widow and children, one finds that the tale is discontinuous, the moral correspondingly recondite. Such restraints upon disinheritance did, however, attain so high a level of development in the period 1100-1700 A. D. that they can scarcely fail to shed light upon our 20th century statutes and jurisprudence.

It is not necessary to trace the growth of similar rules under the ancient legal systems. Limitations upon free testation are at least as old as the Code of Hammurabi.<sup>1</sup> They are, of course, familiar to the civil law, with its ancient *pars legitima*,<sup>2</sup> or modern *légitime*.<sup>3</sup> The value of these precedents would be greater were it not for the modern civil law marital community, as well as certain other differences in the respective tenure systems.

At least as early as the reign of Henry II, a man's goods were divided upon his death into three equal parts, of which one went to his children, another to his widow, and the third in accordance with his testament. If he left no widow, the share of the children was one-half, and he might dispose of the other half. So also if he left a widow but no children. These shares were called "reasonable parts", recoverable by the writ *de rationabili parte bonorum* until the consolidation of the ordinary's jurisdiction. The institution was expressly sanctioned by Magna Charta and flourished rather generally until the reign of Charles I. Fifty years later it survived in York,

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1. HARPER, CODE OF HAMMURABI (1904) 59, §§ 168-172; Urch, *The Law Code of Hammurabi* (1929) 15 A. B. A. J. 437.

2. CODE OF JUSTINIAN: C. 3. 28. 30-36; HADLEY, INTRODUCTION TO ROMAN LAW (1888) 314 *et seq.*

3. 10 BAUDRY-LACANTINERIE, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL (1905) 312 *et seq.*; CIVIL CODE OF FRANCE (Wright, 1906) art. 913-930; DE LANGLADE, CONFÉRENCE DU CODE CIVIL (1805) 161-211; LA. CIV. CODE (Merrick, rev. 1898) art. 1493-1518.

Wales and London only. By 1700 the custom was limited to London and was known as the "Custom of London".<sup>4</sup> It was abolished by Act of Parliament in 1724.<sup>5</sup>

The origins of the custom are largely conjectural, as are indeed the reasons for its ultimate disappearance. According to Holdsworth the custom was destroyed by the impact of a logical dilemma. At common law the husband was the owner of his wife's goods. If, then, he owned them, he could not with consistency be restrained in bequeathing them.<sup>6</sup> A more persuasive theory is that of Burn,<sup>7</sup> whose explanation (shunning such verbal refinements) links the history of the custom with sociology and economics. The Norman military tenures and primogeniture, he argues, required some such restraint as the rule of "reasonable parts" to afford support and maintenance to daughters and younger sons. In later centuries, however, when armies were put on a professional basis and money payments were substituted for military service, inequalities among children became less harsh. Hence the compensative force of the custom was no longer needed. But Burn perhaps presses his theory a bit far when he attributes the survival of the custom in the province of York to the continual incursions of the Scots.

If we call to mind the many evidences of economic and political individualism which accompanied England's emergence as an imperial power and the expansion of its foreign commerce, the ultimate abolition of the custom appears logical, if not inevitable. Unimpeded flow of goods, incitement of individual initiative—these were the necessary concomitants of the course of mercantile empire. The implications of this development have often been traced in the field of religion (rise of Protestantism), of government (parliamentarism, libertarianism), of philosophy (Descartes, Leibniz), so that here a simple reference will suffice. Men had burst forth from the mediaeval collectivism of the feudal system and had begun to learn of their inalienable rights, while forgetting their inescapable obligations.

The final *coup de grace* is not difficult to understand. No tax, no sumptuary legislation, no statutory restraint can long survive in a legal enclave. The City of London was losing citizenry and revenue because of the inhibitions of this custom. Merchants did their business in the City, earned their livelihoods there, but, disliking the custom, refused to join the

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4. 3 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1922-32) 550-556; 2 BL. COMM. \*491-4. The custom did not extend to grandchildren. *Fowke v. Hunt*, 1 Vern. 397 (Ch. 1686); *Northey v. Strange*, 1 P. Wms. 144 (Ch. 1716). The custom continued in the province of York until 1692 [4 W. & M., c. 2 (1692)]; 2, 3 ANNE, c. 5 (1703)], and in Wales until 1696 [7, 8 WM. III, c. 38 (1696)].

5. 11 GEO. I, c. 18 (1724).

6. HOLDSWORTH, *op. cit. supra* note 4, 550-556.

7. 4 BURN, ECCLESIASTICAL LAW (9th ed. 1842) 564-603.

corporation.<sup>8</sup> Two courses were possible: to extend the custom throughout the land or to abolish it. It was abolished.

This record of six hundred years is history in that larger and more fruitful sense which connotes criticism of the present and admonition for the future. We shall avail ourselves of the incidents of the Custom of London and the precedents thereunder in evaluating the modern American statutes and decisions.

## II

In the first quarter of the 19th century a movement began among the American states to supplement common-law dower with an elective share for the widow in her husband's estate. This movement continued and gained recognition in New York as recently as 1929.<sup>9</sup> Thirty-six states have extended the widow's compulsory share to personal as well as real property, and only five states (all in the West and Southwest) afford her no protection at all.<sup>10</sup> Louisiana alone, with its civil law institution of forced heirship, provides a compulsory share for children.<sup>11</sup>

Some study of the procedural technique of these statutes will indicate the value of their accomplishments and the consequences of their defects. The variations among the statutes are not so great that it is impossible to speak of a *composite* procedure in much the same sense as we employ the phrase "the American common law". There is this difference, however, between the composite statutory framework and the body of the composite common law: the majority rule as to the latter has generally the prestige of durability and survival. That cannot be said in dealing with a body of diverse statutes. Many of the statutes are too recent to have proved their worth or to have revealed their defects. Nor as between statutes is there that sharpness of competition which prevails between alternative rules of the common law. It will therefore be wise to treat exceptional statutes with an emphasis upon their qualitative significance rather than as juridical sports.

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8. 2 BL. COMM. \*491-4; 11 GEO. I, c. 18, § 1 (1724) recites: "Whereas great numbers of wealthy persons, not free of the city of London, do inhabit and carry on the trade of merchandize and other employments within the said city, and refuse or decline to become freemen of the same, by reason of an ancient custom within the said city, restraining the citizens and freemen of the same from disposing of their personal estates by their last wills and testaments." *Id.* at § 17 recites: "And to the intent that persons of wealth and ability, who exercise the business of merchandize and other laudable employments within the said city, may not be discouraged from becoming free of the same by reason of the said custom, it is enacted", etc.

9. N. Y. CONS. LAWS (Cahill, 1930) c. 13, § 18.

10. Only five states (North Dakota, Oklahoma, South Dakota, Texas and Wyoming) have no compulsory provision for the widow. The appropriate local statutes will be found in Prentice-Hall Trust Service, as follows: as to statutory shares for children—1 Prentice-Hall 1932 Trust Serv. ¶ 1009; as to dower and curtesy—2 *id.* at §§ 2731-2732; as to Homestead and Exemption statutes—*id.* at ¶ 2734; as to widow's elective share—*id.* at ¶ 2735.

11. LA. CONST. (1921) art. iv, § 16; LA. CIV. CODE ANN. (Dart, 1932) arts. 1493, 1621.

In this fictitious composite state, the owner of substantial property has died testate. He leaves surviving him a widow and three children. The three children are five, seven and ten years of age respectively. The widow is a thoroughly experienced housewife whose contact with her husband's affairs consists in having acted as hostess to his customers and having received from him a weekly allowance for the support of the household and similar necessities. Decedent's will, for some presently irrelevant reason, has left virtually all of his property to someone other than the family group.

The widow is accorded a fixed period in which to elect to take her statutory share in lieu of the provisions of the will. This fixed period is roughly approximate to the term for administration of the estate but in many states is somewhat less. The children have no right of election, nor can any election be made on their behalf by the widow. The fact that she has the duty of supporting the children has no statutory bearing upon the amount of her share. If, through ignorance of her rights, she does not exercise her right of election, there is no fund from which support for the children can be derived, except limited homestead allowances designed for the maintenance of the family during the executorial period.

If, at the time of his death, decedent owned any interest in real property, the widow's elective share is generally the equivalent of common-law dower, that is to say, a life estate in one-third of said realty. This life estate is alienable and subject to sale by commutation. The practical significance of dower varies inversely with the degree to which title to real property is held in decedent's name; hence, the now general practice of holding realty in corporate form has reduced dower to an almost accidental benefit. The typical urban testator dies seized of virtually no real property. The rural testator, on the other hand, leaves real property and its adjuncts as the most important element of his estate, a factor which requires specific treatment through compulsory homestead statutes.

As to personal property (which forms the great mass of American wealth), the widow's right of election has a cruder form. She simply takes outright her intestate share, usually one-third.<sup>12</sup> Here, too, no provision is made for children or other dependents,<sup>13</sup> nor does the statutory mechanism attempt to secure to the widow a lasting provision for her own support. Her share is based upon capital values as distinguished from income productiveness.<sup>14</sup> It is handed to her en masse.

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12. The widow's compulsory share does not extend to personal property in Delaware, Georgia, Iowa, New Jersey, North Dakota, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Texas and Wyoming.

13. In Missouri the elective share is conditioned upon the survival of at least one child of the marriage. See *infra* note 27.

14. As will be observed *infra*, the New York statute permits the widow's elective share to be placed in trust. "In the computation of the value of the provisions under the will, the capital value of the fund or other property producing the income shall be taken and not the value of the life estate." N. Y. CONS. LAWS (Cahill, 1930) c. 13, § 18g.

The dangers inherent in this system will be quickly perceived by those who have had an opportunity to observe the speedy consumption of life insurance proceeds payable in lump sums. Experts in the life insurance field generally estimate seven years for the duration of such lump sum payments. It would not be difficult to conjecture a much shorter term of exhaustion where the property is received, not in cash, but in multiform investments of varied worth and stability, including, for example, unimproved land, minority holdings in close corporations, speculative stocks and the like.

The New York statute,<sup>15</sup> prepared with great care in 1929, apparently seeks to offset this menace by permitting the testator to leave his widow's elective share in the form of a trust for her life or in the form of a legal life estate. The latter is, of course, an alienable and commutable interest. It is a moot question whether the framers of the New York statute made this provision for the protection of the widow rather than with a view to greater freedom of testamentary disposition on the part of the husband. In any event, the election as to the form of the widow's share is left entirely to the testator, without regard to the social interests involved. The dangers inherent in this system come to light very conspicuously whenever the widow, surviving the husband, dies before the children have attained years of self-support. In such case her right to receive income ceases with her death, and the children are not even assured of such unexhausted remnant as may be available in states where the elective share must be paid outright.

This composite American statute also imposes certain conditions upon the widow's right to demand her minimum share. These conditions largely relate to her conduct vis-a-vis her husband during his lifetime. If, for instance, she has deserted him, she forfeits this right.<sup>16</sup> Conditions of this sort appear entirely equitable as long as the state regards the widow as the sole person whose rights are entitled to legislative protection. It seems odd, however, that no thought has been given to the possibility that the widow who has forfeited her right of election may have in her custody the decedent's children, who are entirely innocent of her offenses.

Of course, there are other respects in which these statutes fail to provide for unusual circumstances. The right of election is in many states accorded to the surviving husband as well as to the surviving wife. The underlying theory of this privilege to the surviving husband is not clear, unless it be some notion that the rights of the spouses should be mutual and reciprocal. Here too, the carefully framed New York statute may work strange results. It provides that the husband who has failed to support his wife shall forfeit his right of election. No allowance can be made for the existence of economic depressions or prolonged periods of general unem-

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15. N. Y. CONS. LAWS (Cahill, 1930) c. 13, § 18 *et seq.*

16. *E. g.*, the New York statute cited *supra* note 15.

ployment. The husband who has thus forfeited his right of election cannot exercise it on behalf of the children, who are thus orphaned and impoverished by one and the same circumstance. The fact that the husband may have supported his children though not earning enough to support his wife does not prevent the forfeiture, even though the wife has lived on her own income or separate earnings.

Now, we will possibly be accused of sparring with buckram men. It may be urged that these instances are remote and unusual and that the natural affections of parents can be sufficiently counted upon to insure post-mortem provision for children. That such is the normal trend of human motivations can hardly be contested. It may be that in ninety cases out of one hundred the parental instinct will operate more cogently and earnestly than any statutory admonition. Of course, legislative compulsion would nonetheless be warranted in the other ten cases. But the problem is not confined to them. The considerations already suggested clearly indicate that something more than healthy motives is needed in every instance. Inheritance contains no magic. Its golden wand cannot metamorphose a bereaved housewife into an experienced business woman with a knowledge of investments. And whatever capacity she may have is as mortal as Socrates of the syllogism. Her promise to live until her children grow up would be flimsy indeed. Moreover, if she be devoted to her children, the risk of early dissipation of her share is all the greater. She may love them so much as to deny them nothing—except a store for the future. It is not necessary to call up the instance of David Copperfield to illustrate the need for an effective system of allotting and distributing the family's funds.

Superficially, therefore, the Custom of London has been restored in substance through most of the United States, except in so far as children are concerned. In satisfying its essential social purpose, however, merely to extend the present statutory scheme would not suffice. A change in technique is necessary, that is to say, a change designed better to implement the social interests which inheritance is intended to satisfy. One of these interests is, of course, our general feeling that a child has a reasonable expectancy from his father and our repugnance to the disappointment of that expectancy (unless provoked).<sup>17</sup> Another such interest is our desire to promote family solidarity, the primal cell of communal solidarity.<sup>18</sup>

17. Justinian had listed eighteen reasons for which a parent could lawfully disinherit a child and nine grounds for which a child might disinherit his parent. N. 115. 3, 4; I. 2. 13. 1; I. 2. 18. The French Civil Code has no provision for disinheritance. The Louisiana Code contains elaborate provisions. LA. CIV. CODE (Merrick, rev. 1898) art. 1617-1624. The New York statute deprives the surviving spouse of the right of election under specified conditions. N. Y. CONS. LAWS (Cahill, 1930) c. 13, § 18. A daughter marrying under eighteen without her father's consent lost her orphanage part under the Custom of London. *Foden v. Howlett*, 1 Vern. 354 (Ch. 1685). *Contra*: *Hill v. Blankett*, Rep. Temp. Finch 248 (Ch. 1675).

18. See COSENTINI, *FILOSOFIA DEL DIRITTO* (1930) 262.

Perhaps the chief reason for these contradictions is that we have never been willing to accept dependence as the gravamen of inheritance. Our theories of inheritance, historically, include:<sup>19</sup>

(A) Consanguinity, originally the readjustment of property administration within the same social unit, the shifting of the *patria potestas*.

(B) Return of property to its source, which is the theoretical basis of the following systems: community property, dowry, ancestral property, and probably dower. The donor or co-earner is the heir.

(C) Perpetuation of family solidarity, as exemplified by the system of entails and by the average citizen's will.

(D) Dependence, which regards a man's estate as the continuation of his personality and the successor to his social obligations.

Now, there is abstract merit to each of these concepts, and, although they may be unequal in social utility, each serves to indicate some part of the ramified purposes which the institution of inheritance is designed to satisfy. The public would subscribe to them all.

However, this is still not the complete picture. Recent centuries have introduced a new and disparate element. It is the concept of individuality rationalized in many ways:

(E) It would be robbery to deprive a man of the right to dispose by will of that which he owns. The soul is immortal and must not be deprived of the exercise of its rights.<sup>20</sup>

(F) There would be no incentive to ingenuity, productiveness and thrift unless a man could direct the enjoyment of his property after his death.

(G) Continuity is the essence of progress; without inheritance, history could not proceed.<sup>21</sup>

These latter doctrines are customarily set in balance against the social interests outlined above. They are urged as primary purposes of our law of inheritance, and it is argued that such restraints as would satisfy, for exam-

19. One of the most scholarly expositions is that of L. Miraglia, concluding in a vindication of the relevant provisions of the Italian Civil Code. MIRAGLIA, *COMPARATIVE LEGAL PHILOSOPHY* (1912) 732-773. A parity of reasoning characterizes KOHLER, *PHILOSOPHY OF LAW* (1914) 191-206, and GAREIS, *SCIENCE OF LAW* (1909) 202-5. Von Ihering is most enthusiastic and regards inheritance as the pillar of civilization. VON IHERING, *LAW AS A MEANS TO AN END* (1913) 161 *et seq.* Considerable material of value is to be found in RATIONAL BASIS OF LEGAL INSTITUTIONS (1923) 413-464, particularly the essay by O. K. McMurray, *Modern Limitations on Liberty of Testation*, at 452. A middle view is represented by R. T. Ely as to both inheritance and estate-taxation. ELY, *PROPERTY AND CONTRACT IN THEIR RELATION TO THE DISTRIBUTION OF WEALTH* (1914) 421-432, 432-443. Omitting the texts of various schools of Marxists, the more radical program is outlined by Morton, *The Theory of Inheritance* (1894) 8 HARV. L. REV. 161; and M. R. COHEN, *LAW AND THE SOCIAL ORDER* (1933) 27-31, reviewing H. E. READ, *THE ABOLITION OF INHERITANCE* (1919). The views of Bentham, Mill and similar theorists are sufficiently summarized by Ely, Morton and McMurray.

20. See MIRAGLIA, *op. cit.* *supra* note 19, at 748-750, following Leibniz and Rosmini.

21. *Ibid.* STAMP, *SOME ECONOMIC FACTORS IN MODERN LIFE* (1929) 27-85.

ple, the needs of dependents are incompatible with the expression of free individuality and the exercise of private ownership.<sup>22</sup>

This incompatibility is more fancied than real. We shall dodge the question of the immortality of the soul (concerning which the statutes are ambiguous and the reported cases nil). It does seem, however, that as the desire to provide daily sustenance for one's dependents is so strong an incentive to productiveness and thrift, it need be no less so when permanent provision is ordered. Productiveness and thrift in opposition to that duty could scarcely be social productiveness or commendable thrift.

The argument from historic continuity, far from opposing, patently bulwarks the theory contended for. Restraining the testamentary disposition of property preserves and continues its use. Inheritance as an institution must not be confused with liberty of the will. The immortality of the soul does not imply the immortality of caprice.<sup>23</sup>

Dependence as a criterion of inheritance has been largely obfuscated by the allied concept of consanguinity. Once, perhaps, these were co-terminous, but no more. The widow's elective share rests presumably upon a base of dependence, but she may receive it in the very face of her own personal wealth. In general, the state says to the widow, "We give you this compulsory or elective share because you need it, but we will not ask how much you do need or whether you need anything at all."

A minority of the American states have attempted in limited fashion to resolve these contradictions. In Alabama<sup>24</sup> and Mississippi<sup>25</sup> the separate estate of the wife is deducted from or taken into consideration in fixing her elective share. In Louisiana the "marital portion" (which is in addition to any community property) applies only if the decedent died rich, leaving the surviving spouse in necessitous circumstances.<sup>26</sup> In Missouri the elective share is conditioned upon the survival of at least one child of the marriage.<sup>27</sup> In Vermont the widow receives such part of the personal property as the probate court may assign to her "according to her circumstances and the estate and degree of the deceased", but not less than one-third.<sup>28</sup>

22. In France, the *légitime* has been opposed as causing an uneconomic division of cultivated estates. Charmont, *The System of Compulsory Partition of Estates: Its Economic and Social Consequences* in RATIONAL BASIS OF LEGAL INSTITUTIONS (1923) 430. See F. DE LANGLADE, CONFÉRENCE DU CODE CIVIL (1805) 189, and H. DE BALZAC, LES PAYSANS (1853) 134. Dr. M. R. Cohen also accuses it of operating to decrease growth of population. COHEN, REASON AND NATURE (1931) 421. The causal factors involved are, of course, quite complex, but Dr. Cohen's statement seems counter to the experience in many populous lands in which the same institution prevails. An examination of the birth rates in the various states and countries will indicate the difficulties inherent in generalization (1936 TIMES WORLD ALMANAC 271).

23. See 4 BEROLZHEIMER, SYSTEM DER RECHTS- UND WIRTSCHAFTSPHILOSOPHIE (1907) § 33.

24. ALA. CODE (1928) § 10593 *et seq.*

25. MISS. CODE (1930) § 3561 *et seq.*

26. LA. CIV. CODE (Merrick, rev. 1898) art. 2382.

27. MO. REV. STAT. (1929) § 326 *et seq.*

28. VT. GEN. LAWS (1917) § 3405 *et seq.*



It will be noted that these statutes bear solely upon the admeasurement of the share of the surviving spouse and not upon its investment or administration. They do serve to indicate the possibility of injecting a degree of flexibility and individualization into the prevailing systems.

First, there is the problem of admeasurement of the elective share. Admeasurement which represents any intelligent or equitable provision for the widow and children must be predicated upon an individualized study of the specific family group rather than upon an arbitrary statutory fraction. That study should be made by an official referee or master serving as a permanent adjunct to the probate court. It should be made on the motion of the probate court, so that ignorance of the rights of the parties shall not work a forfeiture; and notice should be served on all interested parties. The share admeasured must vary in proportion to all relevant circumstances, including not only the means of the deceased but the age, means and state of health of the widow and children, their capacity to earn their own livelihoods and the like. In the interests of freedom of testamentary disposition, a limit might be provided to the share dedicable to the support of dependents, such as one-half if there are no dependent children, two-thirds if there are dependent children. If the court should determine that neither widow nor children are dependent, then there should be no compulsory provision whatever in their behalf.

It is to be noted that emphasis has been laid upon the rights of the children. Consistency requires that these rights be recognized even if there be no surviving spouse. In such case, an arm of the court, such as a special guardian, should be appointed to represent all minor children, to investigate their circumstances and to lay their needs before the court.

In this connection, dependence as a criterion of judicial action should not be confounded with minority. A self-sustaining son eighteen years of age is no longer a dependent. An adult child afflicted with some physical or mental incapacity, such as paralysis or idiocy, is essentially a dependent. In short, equitable admeasurement of the dependents' shares involves a thoroughgoing individualized investigation and the flexibility traditional to chancery practice.

An effective analogy is offered by the homestead and exemption statutes in Massachusetts<sup>29</sup> and a number of other jurisdictions. In these states the probate or other judicial officer may, within prescribed limits, fix the allowance for support of decedent's family during the term of administration of the estate. All that is proposed here is the extension of that principle to the entire period of dependence. The exercise of discretion as opposed to the application of a rigorous mathematical formula is of the essence of chancery practice.

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29. MASS. GEN. LAWS (1921) c. 196.

Once the admeasurement has been made, the technique of its administration becomes the important question. Here too, the social interests sought to be safeguarded are paramount. The fund should be administered under vigilant supervision of the probate court, and the trustees to whom it is committed should be compelled to post a bond with sufficient sureties. As to this fund, conversion of decedent's investments into those permitted by law for trustees is requisite within the shortest period compatible with good business judgment. The trustees are to furnish annual reports to the probate court, setting forth not only the details of the operation of the trust but also the manner in which any infant or incompetent parties are maintained. Income payable to the widow for her support and for the support of dependent children should be free of the claims of creditors except for necessities.<sup>30</sup> If the widow predecease the testator or die during the continuance of the dependence of other beneficiaries, the trustees should be required to apply immediately to the court for the designation of a suitable substitute conduit for such income. The court should, moreover, be vested with discretionary authority to change the mode of payment and to direct the invasion of principal whenever justified by emergency or unforeseen circumstances. Obviously, this arrangement would continue for the widow and for incapacitated children during their lifetimes, and for children of normal health and intelligence until attainment of some such suitable age as eighteen.

At all times the persons entitled to the next eventual estate should have the right to apply to the court, on notice to all interested parties, for modification or termination of the trust, as circumstances might warrant. Moreover, all applications of this nature should, so far as feasible, be passed upon by the same referee or master whose original investigation determined the suitability of allowance, so that the initial study may be availed of. In any event, detailed case histories of each such disposition from its inception should be preserved as confidential records of the court. Appeal from the master or referee to the probate judge should be permitted, but further appeal should be restricted to questions of law.

There is nothing particularly novel in the administration here proposed, except possibly the degree of individualized supervision by the probate court. The various implements of supervision are entirely familiar to chancery procedure and could readily be combined into a working system.

The events of the current depression have clearly illuminated the paramount role played by trust investment and administration. All too many beneficiaries have come to learn the difference between the estate which the testator left and the estate which they receive. Innumerable mistakes have

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30. In some states, such as Maine, the widow's elective share is exempt from the payment of debts. *ME. REV. STAT. (1930) c. 89, §§ 13, 20.* Cf. the Custom of London as to losses during administration, *Read v. Duck*, *Prec. Ch.* 409 (*Ch. 1715*).

been made by fiduciaries, most of them in perfectly good faith. While infallibility cannot be guaranteed even by judicial supervision, the danger of loss could be materially diminished. The courts have come to recognize that from this specific administrative standpoint there are special equities and considerations in favor of the surviving spouse. The public policy which accords to her a minimum share in her husband's estate can have little force unless it is hedged about with effective administrative safeguards.

An outstanding decision of recent appearance is *Matter of Curley*.<sup>31</sup> In this case the construction of the New York statute<sup>32</sup> was before the court. There was no express language in the statute which in any way qualified the well-established rules (1) that a testator has the right to designate the type of investments which his trustees may make and (2) that a testator has the right to exempt his trustees from posting a bond for the faithful performance of their duties. Nonetheless, the court held that a restriction of these rights was implicit in the statute. A trust for the benefit of the widow which permitted the trustees to invest in non-legal securities and exempted them from posting a fiduciary's bond was held not to be such a trust as the statute required.

Whether this decision is a sound construction of the language of the New York statute is beside the point. Its significance lies in focusing attention upon the practical implications of administrative technique. If the rights of the beneficiary are conditioned upon the trustees' administrative discretion and the trustees' ultimate solvency, those rights may prove thin indeed. The procedure proposed above is designed to effectuate, so far as practically possible, the public policy embodied in statutes of this type. In fine, it is urgent that chancery simply resume its historic functions: that it be individualized, sensitive, vigilant.

### III

Ultimately, the value of legal customs and enactments, as found in actual operation, must depend upon the effectiveness of the tools which

31. 245 App. Div. 255, 280 N. Y. Supp. 80 (2d Dep't, 1935), *mod'g* 151 Misc. 664, 272 N. Y. Supp. 489 (Surr. Ct. 1934), *aff'd*, 269 N. Y. 548, 199 N. E. 665 (1935).

32. N. Y. CONS. LAWS (Cahill, 1930) c. 13, § 18 *et seq.*

Since this article was written, the New York State Legislature has taken a significant step in the direction proposed herein by adopting a new section 125 to the Decedent Estate Law. This section provides in substance that the attempted grant to an executor or testamentary trustee, or the successor of either, of any of the following enumerated powers or immunities is contrary to public policy:

(a) the exoneration of the fiduciary from liability for failure to exercise reasonable care, diligence and prudence;

(b) the power to make a binding and conclusive fixation of the value of any asset, for the purposes of distribution, allocation or otherwise;

(c) the power to name a successor to serve without bond. N. Y. CONS. LAWS (Cahill, Supp. 1936) c. 13, § 125.

This provision was supplemented by adding subdivision (h) to section 18 of the Decedent Estate Law, which in effect reverses *Matter of Curley*, but gives the Surrogate full power to enforce for the protection of the surviving spouse an equitable distribution and allocation of assets and to enforce the lawful liability of the fiduciary notwithstanding any exculpatory language of the will to the contrary. N. Y. CONS. LAWS (Cahill, Supp. 1936) c. 13, § 18.

courts or legislatures may provide. Customs decay and laws die because they are not or cannot be adequately implemented. If enforcement is awkward, impractical or embarrassing, the tool is removed. The law remains on the statute-books, vain as a fine machine without the connecting belt or rod. That is precisely the condition which threatens our restraints on disinheritance. The machine of enforcement has broken down at the most vital point of operation: the control over transfers inter vivos.

A moment's consideration demonstrates the importance of this particular topic. If the statutes creating such valuable rights for widows (and children) are subject to easy evasion by transfers inter vivos, their utility is slight indeed. Only the poor and the stupid need conform. In view of the jurisprudence in some states, the question may well be put whether these statutes have been placed on our books for any sincere enforcement. Or do they simply represent a sort of sentimental desire of the community which must be formally registered but need not inconvenience those with means to consult competent counsel? Are these laws a mere pious wish, a sort of sanctimonious recital of what we should prefer but will not insist upon? There are interesting indications in the decided cases.

Out of the huge body of jurisprudence dealing with transfers inter vivos,<sup>33</sup> it will be profitable to select that of one or two states, so as to discover the trend historically rather than quantitatively. Vermont offers a coherent and representative narrative, initiated by the Act of 1821.<sup>34</sup>

The earlier cases indicated a sincere judicial concurrence in the philosophy of the statute. In *Thayer v. Thayer* (1842)<sup>35</sup> the court held that lack of consideration for the transfer created an inference of fraud. The extreme of this tendency was reached in *Nichols v. Nichols* (1889):<sup>36</sup> "The intent to defeat the marital rights of the oratrix by both grantor and grantees in the deed in question is necessarily presumed from their knowledge that such rights would be defeated by the conveyance. Both are presumed to have intended the natural results of their acts."

Then the pendulum swung sharply back. In *Dunnett v. Shields* (1923)<sup>37</sup> the court, repudiating the *Nichols* case, held that actual (not presumptive) intent to defraud must be proved. In *Patch v. Squires* (1933)<sup>38</sup> the court exacted proof of fraud "beyond a reasonable doubt" and said, "The presumption is in favor of innocence and not of guilt." This is a far

33. Collected in Note (1929) 64 A. L. R. 466 *et seq.*

34. Vt. Laws 1821, § 70, c. 3, p. 55, reading: "It is hereby further enacted, That the widow of any deceased person shall be entitled to her apparel, and to such portion of the personal estate—which shall not be less than one-third that shall remain, after the payment of the debts and funeral charges of such deceased—as the Probate Court shall judge proper to assign her, according to her quality and degree."

35. 14 Vt. 107 (1842).

36. 61 Vt. 426, 431, 18 Atl. 153, 154 (1889).

37. 97 Vt. 419, 123 Atl. 626 (1923).

38. 105 Vt. 405, 409-410, 165 Atl. 919, 920-921 (1933).

cry from the *Nichols* case, and possibly the reaction would not have been so harsh had not the action been so dogmatic.

What constitutes fraud? The majority view throughout the United States is that intent to diminish or destroy the wife's elective share is not fraudulent intent. It is not fraud to seek to deprive the widow of any interest in the estate.<sup>39</sup> That is the husband's prerogative.

What, then, is fraud? Fraud, says the majority, is to attempt destruction of the widow's share by a colorable (as distinguished from a real) transfer. To pretend to alienate property, while retaining all indicia of ownership and control; to go through the motions and forms of conveyance when no genuine shifting of economic benefit is intended: these are fraud.<sup>40</sup> In other words, although the courts do not say as much, they will not set aside fraudulent transfers; they will merely disregard shams and pretenses. As has been held in a line of cases culminating in *Beirne v. Continental Trust Company*,<sup>41</sup> even if the husband's conveyance reserves to him the enjoyment of income during his life and a power of revocation, it is valid against the wife's elective share. In short, any conveyance can defeat her share, even a conveyance which takes practical effect solely upon his death. It is only with shadows and ghosts that she can joust.

Obviously, the rule of the *Nichols* case evinces an extreme solicitude for the wife which, though commendable, would seriously imperil commercial transactions and jeopardize an undue proportion of property titles. In the balancing of interests here involved, it seems clear that the interests of commerce, on the one hand, and of security of tenure, on the other, outweigh those of the wife. We cannot forever inquire into the sufficiency of consideration, or the precise gain or loss involved in every sale.

Four types of transfer are dealt with in the cases:

(A) Out and out gifts in good faith, having the necessary effect of diminishing the wife's share (*Nichols* case).

(B) Transfers in good faith, but involving the reservation of either income, enjoyment, control or power to revoke or amend (*Beirne* case).

(C) Transfers made with intent to diminish or defeat the right of election (minority rule).<sup>42</sup>

(D) Sham or pretended transfers (majority rule).

The quest of a tenable rule will remain hopeless as long as the forest of judicial presumptions is permitted to remain. Instead of a realistic exam-

39. Note (1929) 64 A. L. R. 466, 472; *Potter Title & Trust Co. v. Braum*, 294 Pa. 482, 144 Atl. 401 (1928).

40. Cases are collected in Note (1929) 64 A. L. R. 466. *Hays v. Henry*, 1 Md. Ch. 337 (1848).

41. 307 Pa. 570, 161 Atl. 721 (1932).

42. A line of Kentucky cases lays just emphasis upon the degree of disparity between grantor's worth and the property given away. *Manikee v. Beard*, 85 Ky. 20, 2 S. W. 545 (1887); *Murray v. Murray*, 90 Ky. 1, 13 S. W. 244, 8 L. R. A. 95 (1890); *Wilson v. Wilson*, 23 Ky. L. Rep. 1229, 6 S. W. 981 (1901); *Payne v. Tatem*, 236 Ky. 306, 33 S. W. (2d) 2 (1930).

ination of the actual facts before them, the courts have indulged in presumptions of fraud, on the one hand, or of innocence, on the other. Thus the issue has been badly obfuscated and the light of reason deflected to an a priori tangent. If the law has any genuine concern in the support of the widow and other dependents, it must cast aside presumptions and look at the facts.

Viewed in this light, there is nothing at all to support the broad rule of the *Nichols* case. Defendants "are presumed to have intended the natural results of their acts", says the learned court. If this were true, how surpassingly benevolent must Pharaoh have been, who drove the Israelites out to their promised land! Instances could be multiplied; the presumption is belied every time a man steps on a banana peel and falls. And the presumption of innocence in civil matters is as misleading as that of guilt.

Clearing the road of this juridic timber, we can see a few simple facts. A public policy has been enunciated: the wife is to have a minimum share in her husband's "estate". The extent of the husband's "estate" remains to be delimited. Along its periphery lie certain transfers, shading off into alien territory. We have determined that presumptions shall not suffice to demarcate the boundary-lines and have therefore rejected the rule of the *Nichols* case. The mere effect of the transfer (A above) cannot be a conclusive criterion. So, too, we shall readily agree that the "estate" should and must include property transferred through sham or pretense (D above). This leaves us two regions for naturalization or exclusion, to wit: (B above) transfers in good faith, but involving the reservation of either income, enjoyment, control or power to revoke or amend (*Beirne* case), and (C above) transfers made with intent to diminish or defeat the right of election (minority rule). Are they part of the transferor's "estate"?

As to (B) the answer comes promptly. It has been furnished by our estate tax legislation,<sup>43</sup> in which economic realities outweigh legalistic refinements. If a man creates a trust reserving the enjoyment, control or power to revoke, the corpus of that trust is part of his "estate", that is, part of the property the economic benefits of which shift to someone else by reason of his death.<sup>44</sup> It is his in every essential meaning of that term—his to enjoy, to control, to revoke; ergo, his to devote to the support of his widow. Title is in a trustee, but the title is an empty skin. The juice of the fruit remains with the grantor.

So, too, as to (C) above, transfers made with intent to defeat the widow's share. If we cast aside presumptions, and require proof of actual intent to defraud, what warrant can there be for such transfers? The state has declared a significant social policy, and the grantor has deliberately

43. 43 STAT. 304 (1924); 44 STAT. 71 (1926), 26 U. S. C. A. § 441 (d) (1935).

44. See Note (1936) 84 U. OF PA. L. REV. 400.

sought to nullify that policy. Under the existing precedents, the law's teeth have been drawn; it can frighten only the poor, the unlettered, the stupid.

For these defects the cure by statute is not difficult. Except for the rights of bona fide purchasers for value, transfers made (a) subject to the enjoyment or control of the decedent or (b) with intent to diminish or defeat the rights of his dependents should be judicially voidable.<sup>45</sup> The probate court may direct the executor to sue for the return of such property, if the remaining estate proves insufficient for support of dependents (but not otherwise). If there be several such transfers aggregating more than the required fund, perhaps some such pragmatic rule would prove desirable as that the funds be dedicated to maintenance of dependents in order inverse to their seniority of transfer.

Such a statute would, of course, reverse the majority doctrine which we have outlined. It has been shown that the growth of that doctrine was largely a reaction to excessive presumption. Whatever the sympathies of the courts, the existing laws lost their teeth because they were attempting to devour everything in sight, including a mass of entirely defensible conveyances. Where, as in New York, no such record of judicial extension prevails, the right of election is enforced with considerable forthrightness and courage.<sup>46</sup> The Custom of London was equally effectual.<sup>47</sup> Fraud is so old a villain that courts should find little difficulty in recognizing his face.

45. The Civil Code of Louisiana authorizes the wife to sue for her community interest in any property fraudulently sold or disposed of by the husband "on her satisfactorily proving the fraud". As to the legitimate or forced portion of children, etc., any transfer of property exceeding the disposable quantum is reducible to its legal limit by suit of the heirs after the death of the donor or testator. LA. CIV. CODE (Merrick, rev. 1898) art. 2404 *et seq.* Thus the *légitime* is accorded a broader safeguard than the community interest of the wife.

46. *Lestrangle v. Lestrangle*, 242 App. Div. 74, 273 N. Y. Supp. 21 (2d Dep't, 1934); *Rubin v. Myrub Realty Co.*, 244 App. Div. 541, 279 N. Y. Supp. 867 (1st Dep't, 1935); *Bodner v. Feit*, 247 App. Div. 119, 286 N. Y. Supp. 814 (1st Dep't, 1936). A new departure is represented by *Matter of Bommer*, 159 Misc. 511, 288 N. Y. Supp. 419 (Surr. Ct. 1936), in which the elective right of the widow was likened to her interest in community property. The important holding of this case is that though the will may accord to the widow property rights of a value equal to her minimum statutory share, she may nonetheless elect to take against the will if the benefits in question consist of property which is so illiquid or burdensome that she cannot employ it to fair advantage. Other cases have, however, brought to light certain lacunae in the legislation. *Matter of Clarke*, 149 Misc. 374, 268 N. Y. Supp. 253 (Surr. Ct. 1933); *Matter of Yarme*, 148 Misc. 457, 266 N. Y. Supp. 93 (Surr. Ct. 1933), *aff'd without opinion*, 242 App. Div. 693, 273 N. Y. Supp. 403 (2d Dep't, 1934); *Matter of Schurer*, 157 Misc. 573, 284 N. Y. Supp. 28 (Surr. Ct. 1935); *Matter of Green*, 155 Misc. 641, 280 N. Y. Supp. 692 (Surr. Ct. 1935), *aff'd without opinion*, 246 App. Div. 583, 284 N. Y. Supp. 370 (1st Dep't, 1935). See also editorial and comments in N. Y. L. J., Aug. 16, 1935, p. 478, col. 1, Aug. 21, 1935, p. 520, col. 2, Aug. 28, 1935, p. 584, col. 3.

47. No fixed rule can be drawn from the cases under the custom. Some held that any voluntary conveyance was void as to the wife and children. *City v. City*, 2 Lev. 130 (K. B. 1675). Some went off on the reservation of enjoyment to the grantor [*Smith v. Fellows*, 2 Atk. 62, 377 (Ch. 1740)], some on the ground of sham [*Hall v. Hall*, 2 Vern. 277 (Ch. 1692)]; *Coomes v. Elling*, 3 Atk. 676 (Ch. 1747); *Fairebeard v. Bowers*, 2 Vern. 202 (Ch. 1690); *Edmundson v. Cox*, 2 Eq. Co. Abr. 275 (Ch. 1716)]. In one case, the Chancellor cancelled the deed entirely, because of reservation of enjoyment. *Smith v. Fellows*, *supra*. The plaintiff seems to have prevailed in most cases.