

Catholic University Law Review

Volume 10 | Issue 2

Article 3

1961

Married Women and Their Property Rights: A Comparative View

Joseph F. English

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

Recommended Citation

Joseph F. English, *Married Women and Their Property Rights: A Comparative View*, 10 Cath. U. L. Rev. 75 (1961).

Available at: <https://scholarship.law.edu/lawreview/vol10/iss2/3>

This Article is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact edinger@law.edu.

MARRIED WOMEN AND THEIR PROPERTY RIGHTS: A COMPARATIVE VIEW

*By Joseph F. English**

The law of marital property is so intimately related to the social and economic life of a nation that it, more than any other branch of private law, affects the nation's character and sets the course for its legal development.¹ Maine stated a similar idea more succinctly when he asserted that "there is a relation between civilization and the proprietary capacities of married women . . ."²

Legal systems which deal only in human rules have found difficulty in solving the legal problems of married women; they hesitate to delve into the intimate aspects of the relationship of husband and wife which, from its very nature, should be as free from prying and as privileged from disclosure as the purpose of the relation permits. But married women, as well as their husbands, own and acquire property and enter into contracts. In adjusting the proprietary rights of husband and wife and in regulating their dealings with third persons, legal systems have attempted to effect a balance between protecting the wife and the family without, at the same time, unduly weakening the powers of the husband as head of the family unit, or the rights of third persons who come into contact with it.³

During the Middle Ages most of the Western World attempted to strike this balance through a scheme of marital property based upon the idea that a community is created by the marriage.⁴ Traces of such a scheme can be found in the Code of Hammurabi.⁵ But as the system of community property appeared on the continent, it was Teutonic in origin, having been brought by the Visigoths to Spain and Southern France and by the Franks to Northern France after the decline of the Roman Empire.⁶ From France, but mostly from Spain came the community systems that now prevail in several of the United States. Under the Spanish system, all property acquired onerously during the marriage—whether through the common efforts and talents of husband and wife, or through the individual efforts and talents of only one of them—was divided equally between them as co-owners, as conjugal partners. All property owned by either of them at the beginning of the marriage and all property acquired individually during the marriage by either of them by lucrative title, i.e., by gift or inheritance, remained separate property.⁷

* ASSOCIATE PROFESSOR OF LAW, The School of Law, The Catholic University of America.

¹ BRYCE, *STUDIES IN HISTORY AND JURISPRUDENCE* 769 (1901).

² MAINE, *EARLY HISTORY OF INSTITUTIONS* 340 (1888).

³ HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 520, 521 (3rd ed. 1927).

⁴ 2 *AMERICAN LAW OF PROPERTY* 121 (Casner ed. 1952).

⁵ Lobingier, *The Marital Community: Its Origin and Diffusion*, 14 *A.B.A.J.* 211 (1928).

⁶ Kirkwood, *Historical Background and Objectives of the Law of Community Property in the Pacific Coast States*, 11 *WASH. L. REV.* 1 (1936).

⁷ Loewy, *The Spanish Community of Acquests and Gains and its Adoption and Modification by the State of California*, 1 *CALIF. L. REV.* 32, 37 (1913).

At an earlier time, the courts considered the husband to be the absolute owner of the community property, the wife having a mere expectancy which was dependent upon her surviving her spouse.⁸ Apart from a California refinement, however, it is well settled today that the interest of the wife is a present, vested interest; she and her husband are both co-owners. The husband does have the right of management over the community property, but in exercising this right he acts as the agent of the community and not as the sole proprietor of the community assets. He has the power to convey, transfer, lease or encumber the property, but statutes in most States provide that the wife must join in such acts. When the community is dissolved by death, the surviving spouse is generally entitled to at least one-half of all community assets. Though each spouse can generally dispose of his or her own share of the community property by will as he sees fit, he cannot infringe upon the interest of the other spouse by testamentary provisions.⁹

Though the management and control of all community property was vested in the husband as head of the house, the wife retained complete control over all her separate property. Control in the husband is the traditional view under both the community property and the common law systems, but under the latter his powers extend to all of the wife's property.¹⁰

On this point, the common law took a different tack and reached an individualistic port. By stressing in its law of marital property the theological concept that husband and wife are one flesh, it deduced that the control, management, use and possession of all of his wife's property is in the husband, and that the wife by herself is not competent to perform a legal act with respect to her person or property.

The history of the legal relations between husband and wife shows that one civilization recapitulates the history of another. The constant element is the progression of the wife's position, from one of subjection to her husband to that of complete equality with him in matters of proprietary and legal capacity.¹¹ In tracing this progression our fixed starting point is the Roman law; it made the pattern repeatedly used throughout legal history of the property rights of married women. On this point Maine said, "the law of the continent of the proprietary relations of husband and wife is in the main Roman law, very slightly transmuted."¹²

From the time of the Twelve Tables perhaps, to that of Gaius who wrote on this subject during the second century, two forms of marriage existed: with *manus* and without *manus*. By marriage with *manus*, a conception of marriage developed by the earlier Roman law, a wife became subject to her husband's control as *paterfamilias* and a member of his family, with the legal status of a daughter. Whatever she acquired belonged to her husband and if she succeeded to the inheritance she did so as a child, taking a daughter's share.¹³ As a Roman wife, however, custom and public opinion placed her in a position of influence and honor.¹⁴

⁸ 2 AMERICAN LAW OF PROPERTY 168 (Casner ed. 1952).

⁹ *Id.* at 169-180.

¹⁰ *Id.* at 174.

¹¹ 1 BRYCE, *op. cit. supra* note 1, at 856.

¹² MAINE, *op. cit. supra* note 2, at 307.

¹³ WALTON, HISTORICAL INTRODUCTION OF THE ROMAN LAW 170-172 (2d ed. 1912).

¹⁴ *Id.* at 186.

The plebian marriage without *manus*, "co-emptio" a non-religious form, was said to be a "sale to the husband by the same form as if she were a slave", a symbolic sale, however, in the presence of five witnesses and taking the form of mancipation, the method of transfer used during the earlier law in sales of chattels and fictionally used in this form of marriage.¹⁵ The notion that the form of the marriage is properly that of a sale prevailed on the continent and in Anglo-Saxon England at a later period, a matter which will be subsequently discussed.

After the first century of the Empire there are few evidences of marriage with *manus*,¹⁶ in fact, by the time Roman Law reached its maturity adult women were completely emancipated and were freed from the control of their husbands or fathers. The status of *feme covert*e was wholly foreign to Roman ideas of this age. A married woman, in contemplation of law, remained as though she had never married; she did not become a member of her husband's family. Generally the husband had no remedy for injuries to the marital relation or to the person of his wife. Marriage produced little effect on a wife's property and whatever she acquired during the marriage belonged to her alone. She was the equal of her husband in the capacity to control, manage, or dispose of her own property, and the principle of separation of property was applied to such an extent that neither had any right to succeed to the property of the other on death. The husband was not liable for her debts of any kind. The only restriction on the capacity of married women was that imposed by a statute enacted during the reign of Claudius and prohibiting them from acting as sureties.¹⁷ This independent position of married women in the matured Roman law was never attained under the common law of England. In a general way it was approached, however, as the result of the modification of the common law by the equity Chancellors during the eighteenth century and by the Married Women's Property Acts of the nineteenth.

The Romans did, however, develop a scheme of marital property called the dotal system. Under this system two institutions existed: the *dos* and the *donatio propter nuptias*.

The *dos* had its origin in the husband's obligation to support his wife and to defray the household expenses. It became common for the father of the bride, the bride herself, or some third person to provide a fund for these purposes and the support of the widow at the end of the marriage. While the legal ownership and possession of the fund were in the husband, his interest was limited to the right of user with the obligation to account. He could not alienate or mortgage any part of the *dos* that consisted of reality, even with his wife's consent and, by the time of Justinian, it was not subject to the claims of creditors.¹⁸ What originally had been voluntary became obligatory. During the reign of Augustus a statute was enacted which compelled parents, if financially able, to create *dotes* for their marriageable daughters.¹⁹

¹⁵ 2 SHERMAN, ROMAN LAW IN THE MODERN WORLD 59 (3rd ed. 1937); WALTON, *op. cit. supra* note 13, at 176.

¹⁶ BUCKLAND & MCNAIR, ROMAN LAW AND COMMON LAW 31 (1936).

¹⁷ Property rights of a married woman under the matured Roman Law are discussed in: 2 SHERMAN, *op. cit. supra* note 15, at 60-64; WALTON, *op. cit. supra* note 13, at 173; BUCKLAND & MCNAIR, *op. cit. supra* note 16, at 31-32; SOHM, THE INSTITUTES OF ROMAN LAW 370-371 (4th ed. 1892, translated by Ledlie).

¹⁸ SOHM, *op. cit. supra* note 17, at 372-374.

¹⁹ MAINE, *op. cit. supra* note 2 at 336.

The *dos* changed the proprietary relation of the spouses and modified the principle of separate property, inasmuch as control over some of the wife's property was now in the husband during the marriage.²⁰ All other property of the wife not part of the *dos* or the *donatio propter nuptias* was called parapherna; over this she had complete control.²¹

The parapherna is the *biens sepaes* of French law and the separate property of a married woman under the statutes of the nineteenth century in England and the United States and though similar to the wife's separate use estates recognized as valid by the Equity Chancellors of the eighteenth century, it differs from them in that they required a settlement for their creation.²²

A counter part of the *dos* was the *donatio propter nuptias* provided by the parents of the husband primarily for the purpose of making adequate provisions for the bride after the dissolution of the marriage.²³ It was the result of a social experiment of the Christian emperors in an effort to increase marriages and to better the marital relations of husband and wife.²⁴ Under the mature Roman law it, like the *dos*, became obligatory. By Justinian's time, it was so well established that whenever the *dos* was increased a corresponding increase in the *donatio* was called for. Such changes were permitted by statute; otherwise the rule forbidding gifts between husband and wife would have been violated,²⁵ a rule that may be compared to that of the English restraint on alienation of property which had been set aside for the separate use of a married woman.²⁶

Other than the rule prohibiting one spouse from suing another for theft, the *dos* and the *donatio propter nuptias* are the only institutions of the Roman law which relaxed the principle of the separate property of husbands and wives.²⁷ The dotal system has survived in the "regime dotal" of French law; in fact it has been a favorite provision in the property settlements of married women all over the continent of Europe.²⁸ The thought that a husband need not have control over all of his wife's property is also reflected in the decisions of the Equity Chancellors of the eighteenth century who sustained trusts created to provide separate estates for married women and thus freed them from the control of husbands.²⁹

Most of the continental legal systems rejected the Roman emphasis on the individuality and separateness of husband and wife. Today they stress, in their property law, the fact that marriage creates a conjugal community. Out of this stress, the system of community property sprung. In the Anglo-American sphere, however, the stress upon the unitary aspect of husband and wife produced a different result.

The primitive organization of the Anglo-Saxon people was based upon the

²⁰ SOHM, *op. cit. supra* note 17, at 372.

²¹ 2 SHERMAN, *op. cit. supra* note 15, at 69.

²² MAINE, *op. cit. supra* note 2, at 319-320.

²³ SOHM, *op. cit. supra* note 17, at 380.

²⁴ MAINE, *op. cit. supra* note 2, at 336.

²⁵ MUIRHEAD, HISTORICAL INTRODUCTION TO THE PRIVATE LAW OF ROME 376 (3rd ed. 1916).

²⁶ See DICEY, LECTURES IN THE RELATION BETWEEN LAW AND PUBLIC OPINION IN ENGLAND 378 (2d ed. 1914).

²⁷ See SOHM, *op. cit. supra* note 17, at 371-381.

²⁸ MAINE, *op. cit. supra* note 2, at 319-320.

²⁹ Kagan, *The Nature of Dowry in Roman Law—Rights of Husband and Wife*, 20 TUL. L. REV. 561-562 (1946).

tie of kinship called the "maegth". During the earlier part of the legal history of these people, an unmarried woman was under the protection of her "maegth"; after marriage she became a member of another group called the "household" composed of the husband, the wife and the children. The bride did not pass entirely from the influence of her kinsmen and they remained liable for her wrongs and could seek redress from those who injured her. In such matters the husband and wife were strangers.³⁰

In its primitive form the Anglo-Saxon marriage had the aspects of a commercial transaction, a "bride sale" by her kinsmen to the intended husband for a price called the *weotuma*. The payment of the *weotuma* to the bride's kinsmen gave binding effect to the contract and legal character to the marriage. It is doubtful, however, if the Anglo-Saxon form of marriage contemplated an actual sale. The formalities of a commercial transaction were not strictly followed and the *weotuma* was fixed by law and not as a result of a bargaining process, its amount being determined by the social standing of the woman. Specific relief for breach of the marriage contract was not available to the husband, although he could bring an action for damages for failure to deliver the woman. The price paid was not for the transfer of the person of the woman as though she were a chattel, but the right of protection and authority, a notion similar to that of the Roman "manus".³¹

The Anglo-Saxons also borrowed the Germanic custom of the "morning-gift", which was described by Tacitus. Originally, this was a gift of personal property of little value made by a husband to his bride after the marriage. The customary size of the gift, however, gradually increased until eventually it became sufficient to provide for her maintenance during the marriage.³²

For centuries Anglo-Saxon custom assured a widow of certain rights in her husband's property. In the earliest times it consisted of the right to remain in her husband's house and to sit at the hearth, a right which until as late as the thirteenth century in certain parts of England was called "free bench."³³

According to the gavelkind custom of Kent the "free bench" was a name for the right to enjoy one-half of her husband's land during her widowhood.³⁴

Gradually the form of the marriage lost its commercial aspect and became consensual. By the time of Ine and Alfred the *weotuma* was no longer paid to the bride's kinsmen but to the bride herself, pursuant to the terms of the prospective husband's betrothal covenant which contained not only his promise to marry but also promises to his wife of a position of dignity as his consort, and to make a settlement on her, including a grant of realty. Though the bride's kinsmen made a profit out of the transactions, they were willing to forego this; their primary purpose was to assure the bride of respectful treatment as wife and widow.³⁵

The settlement merged the *weotuma* and the "morning-gift" which now lost

³⁰ 2 HOLDSWORTH, *op. cit. supra* note 3, at 36, 87-90.

³¹ YOUNG, THE ANGLO-SAXON FAMILY LAW, ESSAYS IN ANGLO-SAXON LAW 163-170 (1876).

³² 1 AMERICAN LAW OF PROPERTY 618 n. 1 (Casner ed. 1952).

³³ *Ibid.* at 618 n. 2.

³⁴ YOUNG, *op. cit. supra* note 31, at 170-177.

³⁵ 2 HOLDSWORTH, *op. cit. supra* note 3, at 87-89; 2 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 365 (2d ed. 1952).

its gratuitous aspect. If no "morning-gift" was agreed on, the law assigned one and what was once purely voluntary was not assured to the bride. By the settlement the bride was provided for during the marriage and after its termination, if she survived her husband. The nuptials were celebrated in the presence of a priest who confirmed the union and blessed the couple and the bride was handed over to the husband, a retention of the old idea that what was being transferred was the "mund", the right of protection.³⁶ Out of the fusion of the *weotuma* and the "morning-gift" developed the "dos and ostium ecclesiae" of the Norman and later periods. But this fusion was not effected during the Anglo-Saxon period and they remained until the eleventh century separate gifts.³⁷

On marriage the husband became the active guardian of his wife and with her the co-possessor of her property. She did not lose her legal capacity as she and her husband together could alienate her property. Gifts of realty could be and were regularly made between them. Neither could alienate the wife's property without the other's consent and the property of neither was liable for the wrongs of the other. The guardianship of the husband had to be reconciled with the protective right that remained in the bride's next-of-kin to watch over her person and her property. They could prevent the alienation of her property if they thought she was being wronged or the terms of the marriage settlement were not being complied with. Succession was determined by the settlement, and if it was silent on this matter, the law assigned to the widow a part of her deceased husband's estate. If the husband outlived his wife he took no part of her estate except the "morning-gift." If the marriage terminated by divorce, which seems to have been recognized, the wife was entitled to either one-half of the property or a child's share depending on whether or not she retained custody of the children; if there had been no children, she retained her own property as well as the morning gift. If the ground for the divorce, however, had been the infidelity of the wife, the husband kept all of the property.³⁸

Institutions similar to that of the Anglo-Saxon people prevailed at this time throughout the European continent; only the language was changed. The payment of the purchase price ("pretium nuptiale") was so essential to the validity of the marriage that the wife of a man who failed to pay it was considered a concubine. This situation was changed by the law of the Ripuarians and other barbaric laws, which assigned a "pretium" if none had been provided. What started as a mere right to sit ("Beisitz") at the fireplace, became a portion of the husband's estate so large that, among the Visigoths and Lombards, it had to be limited to a fixed share.³⁹ The customary "morning-gift" of the Anglo-Saxons resembled that of the continental husband. Its real purpose was to ratify the marriage and to take from the husband the right to renounce. Because its voluntary character facilitated divorce, the gift, under the influence of the church, became a right and duty. The "pretium" and the "morning-gift" in time merged to become the equivalent of the common law dower of English law.⁴⁰ The property brought to the mar-

³⁶ 2 HOLDSWORTH, *op. cit. supra* note 3, at 88-89; YOUNG, *op. cit. supra* note 31, at 172-174.

³⁷ YOUNG, *op. cit. supra* note 31, at 175.

³⁸ *Id.* at 177-178; 2 HOLDSWORTH, *op. cit. supra* note 3, at 89-90.

³⁹ BRISSAUD, A HISTORY OF FRENCH PRIVATE LAW 750-751 (1912, translated by Hornell).

⁴⁰ *Id.* at 754-755.

riage by the bride followed the pattern of the Roman *dos* and the "maritagium" of the Norman Period.⁴¹

Northern France built upon the customs of the country and Southern France upon the written law of Rome; in Germany, except as regards land rights, the ancient Teutonic customary laws were gradually supplanted by the code of Justinian. French law waited for Napoleon to unify it, and German law did not become applicable to the entire German Empire until the appearance of the German Civil Code of 1900.⁴² England as did Rome pioneered a legal system of marital property.

At the beginning of the thirteenth century it was not easy to distinguish the marital property system that prevailed on the continent from that which had developed in England. But during this century English law took a decided turn and rejected the idea of a community of property between husband and wife.⁴³ Two facts produced this result.⁴⁴ The first was the surrender by the English royal courts to the ecclesiastical courts of all jurisdiction over chattels owned by a person at his death. Having so restricted their thinking about chattels, the royal courts concerned themselves only with the present fund of property and the problems arising out of it during the marriage. Since they were not concerned with its future distribution, they so enlarged the husband's control over his wife's chattels that, by the end of the thirteenth century they considered them as being owned by the husband, the wife's proprietary interest having been transferred on marriage. This product of split jurisdiction is the most characteristic feature of the common law of marital property.

The second fact that contributed to the rejection of the community idea by the common law of England is found in the influence that the nobility and the wealthy class had in the formation of the common law of marital property. The community property system developed out of the customs and practices of those low in the social and economic scale—those peasant spouses in France, for example, who, working side by side, believed that together they contributed to the common good of the marital community.⁴⁵ In England, on the other hand, "with its centralized justice, the habits of the great folks are more important than the habits of the small," and out of their wishes and desires developed the unitary concept of marital property.⁴⁶ The gradual changes in English marital law were made pursuant to the plans of those who could afford recourse to the courts, and to the desires of wealthy fathers in seeking to protect their daughters about to be married from profligate husbands.⁴⁷

The basic features of the unitary concept are the independence and rights of the husband and the incapacity and subordination of the wife.

⁴¹ 2 POLLOCK & MAITLAND, *op. cit. supra* note 35, at 15-16. The "maritagium" was a provision for a daughter and her issue necessitated by the English rule of primogeniture.

⁴² 1 BRYCE, *op. cit. supra* note 1, at 776-778.

⁴³ 2 POLLOCK & MAITLAND, *op. cit. supra* note 35, at 402.

⁴⁴ 3 HOLDSWORTH, *op. cit. supra* note 3, at 524-525.

⁴⁵ *Id.* at 524-525.

⁴⁶ 2 POLLOCK & MAITLAND, *op. cit. supra* note 35, at 402.

⁴⁷ 1 BRYCE, *op. cit. supra* note 1, at 821-822.

When the common law reached what Pollock and Maitland called its "final form,"⁴⁸ the ownership of all chattels owned by a woman at her marriage passed to her husband by operation of law. Her choses in action became his when he reduced them to possession. Before a child was born the husband was entitled to the income, use, and enjoyment of his wife's realty during the marriage. This right was called the "iure uxoris" or tenancy "by the marital right". On the birth of a child the term of the tenancy was increased for the duration of his life and was called a tenancy "by the law of England" and "by the curtesy of England". During its term the husband had the same power over this estate as did those who owned life estates created by conveyance or devise. But there was no complete merger of the spouses' real property; the ultimate ownership of her realty remained in the wife and during the marriage it could be labelled a reversion subject to a life estate.⁴⁹

The unitary concept flows from the legal fiction that husband and wife are one person. Bracton tells us that husband and wife "are quasi one person, for they are one flesh and blood", a statement which he immediately qualifies by pointing out that "the thing is the wife's own and the husband is guardian as being the head of the wife".⁵⁰ The complete text emphasizes the "real working principle" to be not the unity aspect of the statement which seeks to merge the wife's legal personality into that of her husband, but rather the aspect of guardianship: the husband is a compensated guardian of his wife and her property and his rights in his wife's land "can be regarded as an exaggerated guardianship".⁵¹

The guardianship theory is reminiscent of the Germanic ideas prevalent in England before the Norman conquest, and is similar to those of the earlier Roman law under *manus*, that marriage transferred to the husband the right of protection. It is used to explain the wife's subjection to the husband, his control over her property, his liability for her pre-marital debts and for her torts, why she, though "under the rod" had certain rights, e.g. to refuse to agree to the permanent sale of her land by her husband, and why, upon her husband's death, the property returned to the wife, or to her heirs, if she predeceased her husband.⁵² But it does not explain why an adult unmarried woman fully competent for all purposes of private law,⁵³ should on the day of her marriage suddenly become incompetent and practically incapable of performing a legal act; nor does it explain why adult married women needed or received protection.⁵⁴ Undoubtedly the unity doctrine "played a part in developing some of the rules of law",⁵⁵ including those placing even the husband under a legal disability: he could not convey property to or

⁴⁸ 2 POLLOCK & MAITLAND, *op. cit. supra* note 35, at 403-405.

⁴⁹ WALSH, A HISTORY OF ANGLO-AMERICAN LAW 148-150, 390 (2d ed. 1932).

⁵⁰ BRACON, DE LEGIBUS, fol. 429b.

⁵¹ 2 POLLOCK & MAITLAND, *op. cit. supra* note 35, at 406. Bryce explains the wife's position as the "result of a compromise between the three notions of absorption, of a sort of guardianship, and a kind of partnership of property in which the husband's voice normally prevails." BRYCE, *op. cit. supra* note 1 at 819.

⁵² Haskins, *The Estate by the Marital Right*, 97 U. of Pa. L. Rev. 345, 347 (1949).

⁵³ 2 POLLOCK & MAITLAND, *op. cit. supra* note 35, at 437.

⁵⁴ See, Tunc, *Husband and Wife Under French Law: Past, Present, Future*, 104 U. PA. L. REV. 1064, 1067 (1956).

⁵⁵ Williams, *Legal Unity of Husband and Wife*, 10 MOD. L. REV. 16, 30 (1947).

contract with his wife nor could she devise land to him because it would be assumed that she had been coerced; except in conjunction with her husband, she could not sue for injuries to her person or property and she could not be sued; and she could not convey her property during the marriage except by "fine" a fictitious and compromised lawsuit in which she was examined separately by the judge to make sure she was acting freely.⁵⁶

The unity doctrine is, however, "inconsistent with most of the respective property rights of the spouses at common law".⁵⁷ It was not applied by the Equity Courts⁵⁸ and is at variance with the views of the ecclesiastical courts which recognized the "wife as a moral unit, to be treated therefore as a legal unit,"⁵⁹ who could sue and be sued without the joinder of her husband.⁶⁰

During the later part of the eighteenth century, the Equity Chancellors materially improved the position of many married women by making it possible for them to be economically independent of their husbands. By a remarkable piece of judicial legislation, they recognized and protected the separate equitable estate of married women. By using the trust device, a father or any other person could prevent a son-in-law from acquiring any rights in property given to his wife.⁶¹ But this device protected only the wealthy woman; the "rank and file of English women remained under rules worthy only of an Oriental community."⁶² By upholding the validity of the trust the chancellors "recognized that the old idea of the unity of the husband and wife was becoming obsolete" and set the stage for the legislative reforms of the next century.⁶³

During the nineteenth century, a period of great legislative activity and reform, statutes were enacted improving the status not only of the wealthy, but of all, married women.⁶⁴ The Married Women's Property Acts not only abolished the *sure uxoris*, the husband's estate by marital rights, thus giving wives almost unlimited control over their own property, but these acts also removed the many legal disabilities which had been imposed on wives by the unity doctrine.

The unity doctrine itself has fallen into judicial disfavor. In 1956, an Australian court found it to be only "an ex post facto explanation and not a source of the state of early English law. . . ."⁶⁵ And in 1960, the United States Supreme Court refused to apply it and hold that man and wife are so much one that they cannot form a conspiracy; the court said that to so hold would be but a blind imitation of the past.⁶⁶

Paralleling these changes in a married woman's status and legal capacity with respect to her own property were changes in her rights with respect to her husband's property. Historically, English law has always sought to assure widows suitable support and maintenance after their spouses' death by assigning them a certain share in their husbands' property. The *weotuma* and the "morning-gift" served this

⁵⁶ 4 POUND, JURISPRUDENCE 299-300 (1959).

⁵⁷ McCurdy, *Personal Injury Torts Between Spouses*, 4 VILL. L. REV. 303, 305 n. 20 (1959).

⁵⁸ *Id.* at 305 n. 20.

⁵⁹ 4 POUND, *op. cit. supra* note 56, at 299.

⁶⁰ *Ibid.* at 299 n. 156; Bennett's Case, 2 ROLLE ABR. 298 (1618).

⁶¹ 2 SCOTT, THE LAW OF TRUSTS 1016 (2nd ed. 1956).

⁶² ALLEN, LAW IN THE MAKING 336 (6th ed. 1958).

⁶³ 2 SCOTT, *op. cit. supra* note 61, at 1016.

⁶⁴ DICEY, *op. cit. supra* note 26, at 382.

⁶⁵ See, *Tooth v. Tillyer*, 1956 Argus L. R. 891.

⁶⁶ *United States v. Dege*, 364 U.S. 51 (1960).

purpose in their day.⁶⁷ By Glansville's time dower was "that which any free man at the time of his being affianced, gives to his Bride, at the Church Door. For every Man is bound as well by the Ecclesiastical Law, as by the secular, to endow his Bride, at the time of his being affianced to her".⁶⁸ The church door was selected because of the royal courts' insistence that publicity must accompany acts designed to create rights in land.⁶⁹ Unless she had been endowed for less at the church door a provision in the Magna Carta of 1217 extended the dower interest to a one-third part of all of his land and not merely that of which he was seised at the time of the marriage.⁷⁰ By the early part of the fifteenth century dower reached the shape it retained for many centuries: a one-third interest for life in the land of which her husband was seised during the marriage in fee simple or fee tail inheritable by her issue. By the end of the thirteenth century it was settled that the husband could not by alienation defeat the dower right of his wife, though it could be released by means of a "fine", a court proceeding brought for this purpose and during which the wife was examined separately to assure that her consent was being given freely. By the time of the reign of Henry IV chattels were excluded as a source of dower.⁷¹

Because it was a cloud on title and limited the estate which descended to heirs, various methods of avoiding dower were resorted to.⁷² The common devices were jointures, trusts and powers of appointment, which could give to the husband all of the advantages of an estate of inheritance and, at the same time, defeat the wife's dower by exercising the power.⁷³

The jointure arose out of the Statute of Uses of 1536. Before this date it was the usual practice for a bridegroom to make an ante-nuptial marriage settlement on his future wife as a substitute for dower. It usually consisted of a conveyance to the husband and wife jointly called a jointure. At this date most of the land in England was held to uses and the equity courts refused to allow dower out of the equitable estates; hence the reason for the pre-marital settlement. But the Statute of Uses converted these uses into similar legal estates to which dower would extend. This would result in a windfall to the wife. To provide against this result the Statute contained a provision that a woman who had a jointure should not also be entitled to dower. A wife may, of course, bar her dower here by joining with her husband in a conveyance or by executing a release. Equity by giving effect to a devise by a husband to his wife in lieu of her dower which put his wife to the election to take either, which barred her rights in the other, modified a rule firmly established by the seventeenth century that dower could not be barred, except by a settlement which came within the Statute of Uses.⁷⁴

The English Dower Act of 1834 put dower under the husband's control. Under this statute there was no dower in land conveyed or devised by the husband or in which he devised any estate or interest for the benefit of his wife unless a contrary interest was expressed in her will. When dower attached it did so subject to all mortgages or other liens to which the property was subject at the husband's

⁶⁷ Haskins, *The Development of Common Law Dower*, 62 Harv. L. Rev. 42 (1948).

⁶⁸ GLANVILLE, DE LEGIBUS, VI, I. (1900 translated by Beames).

⁶⁹ *Id.* at 94 n. 2.

⁷⁰ 2 POLLOCK & MAITLAND, *op. cit. supra* note 35, at 421.

⁷¹ 3 HOLDSWORTH, A HISTORY OF ENGLISH LAW 189-193 (3rd ed. 1927).

⁷² 1 AMERICAN LAW OF PROPERTY 624 (Casner ed. 1952).

⁷³ *Id.* at 712.

⁷⁴ *Id.* at 711-714.

death.⁷⁵ By the Administration of Estates Act of 1925, dower was abolished in England and the wife was given a share in the decedent's estate, real and personal.⁷⁶

The trend in the United States today is to abolish dower and to substitute therefor a statutory share.⁷⁷ Since this share is generally an absolute interest, rather than merely a life estate, and since it applies to all property in the net estate of the deceased spouse, both realty and personalty, it is usually a more generous provision for the widow than the dower rights were. But the statutory share generally protects the widow only from testamentary disinheritance. It is assertable only against the net estate of the deceased spouse.⁷⁸ His power to make *inter vivos* gifts is not restrained. Moreover, revocable trusts, survivorship bank accounts, and other will substitutes militate against the widow's share. Technically these devices transfer a present interest during the husband's life and the property is thus not part of his estate at his death; but in all of them the husband remains in substance the real owner of the property until his death. Litigation involving the right of widows to assert the statutory share against these creations has gradually increased during the last quarter of a century. The courts have attempted to formulate a rule which would strike a proper balance between the *inter vivos* rights of husbands and the testamentary rights of their spouses.⁷⁹

But the "cases leave an impression of ad hoc compromise, couched in elusive doctrine."⁸⁰ Some courts formulated the illusory transfer test which depends in large measure upon the amount of control retained by the husband till his death; other courts apply a fraud test and hold that *inter vivos* transfers will be set aside only if made for the purpose of defeating the claim of the spouse. Both tests have proven to be difficult to apply and thus objectionable, for their vagueness renders suspect all alienations during coverture and prevents the property from flowing freely in the channels of commerce.⁸¹ Pennsylvania has recently attempted a realistic solution to this problem by legislation providing that the statutory share may be asserted against all revocable transfers of the deceased spouse.⁸² Whether other legislatures will consider this too drastic a solution remains to be seen.

The American woman has now approached the position of independence and equality reached by the Roman matron. She enjoys full legal capacity with respect to her own property, and her interest in her husband's property, at least until very recent times, has been continually enlarged. Whether her position is better than that of her sister living under a system of community property here or abroad is debatable. Her sister's co-ownership in the community's assets must be weighed against her own prospective right in her husband's estate. Her sister's ownership is vested throughout the marriage but it extends only to property onerously acquired during the marriage. Her statutory share, on the other hand, is only a

⁷⁵ WALSH, *op. cit. supra* note 49, at 147.

⁷⁶ 15 Geo. V. c. 23 § 45 (c) (1925).

⁷⁷ 2 POWELL, THE LAW OF REAL PROPERTY 160 (1960).

⁷⁸ *Id.* at 160-164, 168-170; 1 AMERICAN LAW OF PROPERTY 735-738 (Casner ed. 1952). See generally, Sayre, *Husband and Wife as Statutory Heirs*, 42 HARV. L. REV. 330 (1928).

⁷⁹ MACDONALD, FRAUD ON THE WIDOW'S SHARE 3-4 (1960).

⁸⁰ *Id.* at 9-10.

⁸¹ *Id.* at 4-6; See RITCHIE, ALFORD AND EFFLAND, CASES AND MATERIALS ON DECEDENTS ESTATES AND TRUSTS 89 (1955).

⁸² PA. STAT. ANN. tit. 20, § 301.11 (1951).

prospective right which can be defeated by her husband at any time before his death but it extends to all property in her spouse's estate, whether acquired before or during the marriage and whether acquired onerously or lucratively.

Currently it appears that the progression of the married woman's status might be reversed for the first time in centuries. New methods have been devised in an attempt to cut down her rights. This attack upon the interests of married women is not surprising. History shows that married women have been forced to constantly guard against encroachments upon or reductions of their legal rights. The progression has generally been in her favor; she has consistently and steadily moved from subjection to equality. Until recent times, she has successfully repelled all assaults. Are the equities in her favor today? A count of the decided cases shows that she is heading into a strong wind.