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THE NATURE OF THE RIGHT TO INHERIT PROPERTY

There has never been much argument as to whether the right to inherit property is a civil or a natural one. Since that right is generally accepted as civil, the cases in point are almost unanimously in accord. In *In re Stanford's Estate* [1] the court considered it "elementary law" that the right of inheritance was entirely a matter of statutory enactment and within the control of the legislature, and that it was only by virtue of statute that an heir was entitled to receive any of his ancestor's estate. This line of thought is followed in Illinois in *In re Estate of Speed* [2] where it was said that while the right to inherit property under the Statute of Wills and Descent was property, it was so only because the legislature had seen fit to create the right and that none could inherit property, or take by devise or bequest, except by statute. The court concluded that consequently such right might at any time be abrogated by the same power that created it.[3] But these cases do no more than hold that the right of inheritance is a civil right. They speak of it as an incontrovertible fact. They offer no proof at all; it is simply a statement that, because the right exists in the statutory law of all nations, it is a civil right.

In *Blackstone's Commentaries* [4] is found the most intelligent argument for the proponents of the civil right theory.

"The right of inheritance, or descent to the children and relations of the deceased, seems to have been allowed much earlier than the right of devising by testament. We are apt to conceive at first view

1 126 Cal. 112, 58 Pac. 462, 45 L. R. A. 788 (1899).

2 216 Ill. 23, 74 N. E. 809, 108 Am. St. Rep. 189 (1905).

3 See, also: Knowlton v. Moore, 178 U. S. 41 (1900); In re Magnes' Estate, 32 Colo. 527, 77 Pac. 853 (1904); Kochersperger v. Drake, 167 Ill. 122, 47 N. E. 321 (1897); State v. Hamlin, 86 Me. 495, 30 Atl. 76 (1894); Appeal of Nettleton, 76 Conn. 235, 56 Atl. 565 (1903); In re Vanderbilt's Estate, 172 N. Y. 69, 64 N. E. 782 (1902); Eury's Ex'rs v. State, 72 Ohio St. 448, 74 N. E. 650 (1905).

4 2 Bl. Comm. 11.

that it has nature on its side; yet we often mistake for nature what we find established by long and inveterate custom. It is certainly a wise and effectual, but clearly a political, establishment; since the permanent right of property, vested in the ancestor himself, was no *natural,* but merely a *civil,* right. It is true that the transmission of one's possessions to posterity has an evident tendency to make a man a good citizen and a useful member of society. . ."

But Blackstone in this statement seems to have lost sight of the two-fold nature of man. Each individual has two purposes. As an individual, he has a duty to himself; and as a member of society, he has a social purpose. What Blackstone speaks of as an "evident tendency" is actually the duty man owes to society—to be a good citizen and to be a useful member. The duty he owes to himself is self-preservation and self-perfection. Because the ownership of property is an aid to the fulfillment of the first, it is natural that man should hold it; and because the right of property is an extension of the right of self-preservation and of the right to self-perfection, that right itself becomes a natural right.

Blackstone's statement of the nature of the right of inheritance is criticized by Mr. Christian, who said of it:

"I cannot agree with the learned commentator that the permanent right of property vested in the ancestor himself (that is, for his life) is not a natural, but merely a civil right . . . I have endeavoured to show . . . that the notion of property is universal and is suggested to the mind of man by reason and nature, prior to all positive institutions and civilized refinements. If the laws of the land were suspended, we should be under the same moral and natural obligation to refrain from invading each other's property as from attacking and assaulting each other's persons. I am obliged also to differ from the learned judge, and all writers upon general law, who maintain that children have no better claim by nature to succeed to the property of their deceased parents than strangers, and that the preference given to them originates solely in political establishments. I know no other criterion by which we can determine any rule or obligation to be founded in nature than its universality, and by inquiring whether it is not, and has not been, in all countries and ages, agreeable to the feelings, affections, and reason of mankind. The affection of parents towards their children is the most powerful and

universal principle which nature has planted in the human breast; and it cannot be conceived, even in the most savage state, that any one is so destitute of that affection and of reason, who would not revolt at the position that a stranger has as good a right as his children to the property of the deceased parent. . . . In the earliest history of mankind we have express authority that this is agreeable to the will of God himself:— *'And behold, the word of the Lord came unto Abraham, saying, This shall not be thine heir; but he that shall come out of thine own bowels shall be thine heir'.*"

If the right of inheritance is a natural right, the question may be raised, as was done in *Henson v. Moore,*[5] In what heir or class of heirs does this right inhere? Does it belong to the decedent's wife, to his children, or to his collateral heirs? To the Illinois court, the power of the legislature to designate the interest which a man's heirs shall take in his property is inconsistent with any indefeasible natural right of succesSon. In answering the query of the court, it is necessary first to point out that it has never been contended that collateral heirs enjoy a natural right of inheritance. Neither is it here contended that the wife has a natural right. Hers is a civil right, arising out of the civil duty upon the husband to support her. With these heirs eliminated, the difficulty proposed in *Henson v. Moore* is reduced to a minimum. The right would inhere in each child, if there be more than one; and, being a natural right, it would be possessed equally by all. The court was probably misled through a faulty interpretation of the word "designate." Certainly, if the word means to deny, there is an insurmountable inconsistency between the legislature's right to designate inheritances and an "indefeasible natural right of succession." But a careful interpretation of the existing statutes shows that the legislatures regulate, — they do not deny, — this right. As Justice Winslow said, in *Nunnemacher v. State:*[6]

"It is true that these rights [to take property by inheritance or will] are subject to reasonable regulation by the Legislature; lines of descent may be prescribed, the persons who may take as heirs or

5 104 Ill. 403 (1882).
6 129 Wis. 190, 108 N. W. 627, 630 (1906).

devisees may be limited, collateral relatives may doubtless be included or cut off . . . and there may be much room for legislative action . . . The fact that these powers exist and have been universally exercised affords no ground for claiming that the legislature may abolish both inheritances and wills, turn every fee simple title into a mere estate for life, and thus, in effect, confiscate the property of the people once every generation."

It is common to find the proponents of the civil right theory calling upon history to support them, and to find that their "history" consists almost entirely of reported cases, each one of which refers to some earlier one in which it was said that the idea that the right of inheritance is a civil right is "elementary." A few go beyond the reported cases, but the arguments remain in substance simply this: "Because we have always, from the earliest days, said so, it must be true." In *Magoun v. Illinois Trust & Savings Bank* [7] Mr. Justice McKenna quoted from Blackstone:

"By the common law, as it stood in the reign of Henry II, a man's goods were to be divided into three equal parts. . . ."

And in *United States v. Perkins* [8] the court referred to the Code Napoleon, which limited the descent of a decedent's estate under varying circumstances. But these arguments do no more than to recognize the state's right to regulate, not to deny, the right of inheritance.

Were these proponents to go back far enough, were they to interpret what they would find in the only way it can properly be interpreted, they would learn that the historical arguments are overwhelmingly on the other side of the question.

It must be chiefly from history that this question is determined. And "from the historical standpoint the idea that all rights of property and rights to transmit the same by inheritance . . . have their origin in the positive enactments of law by an established government cannot stand the test.

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7 170 U. S. 283, 290, 291 (1898).
8 163 U. S. 625, 627 (1896).

Governments have, indeed, from the earliest times, regulated the exercise of these rights, prescribed ways and forms for their exercise, and protected them by positive law; and so they do now. From this universal exercise of the right of regulation the idea of governmental right to create and destroy may have arisen, . . ." [9]

The desire to inherit, to hold property, to give it to children, is as natural in man as is the craving for food. It is desired as something which will tend to make life more pleasant, something which will make easier the accomplishment of his duty to himself, the preservation of his life and his self-perfection, and that to his dependents, their support. From a time when the memory of man runneth not to the contrary, man has striven to acquire property; and he has engaged in battle to protect and preserve it for his descendants.

As the ancestors claimed the right to hold property even before the inception of governments, so also did their posterity claim the right to inherit. "The right of descendants, or some of them, to succeed to the ownership has been recognized from the dawn of human history. The birthright of the first born existed long before Esau sold his right to the wily Jacob; and the Mosaic law fairly bristles with provisions recognizing the right of inheritance as then long existing, and regulating its details. The most ancient known codes recognize it as a right already existing. . . ." [10]

So blind have the courts been in their failure to make proper and necessary distinctions between the right of inheritance and the right of testamentary disposition (which undoubtedly is a civil right), that they have much maligned the case of *United States v. Perkins,* by citing it as authority for the civil right theory. It is patently an authority for the

[9] Nunnemacher v. State, 108 N. W. 627, 629 (Wis. 1906), *per* Winslow, J.
[10] Nunnemacher v. State, 108 N. W. 627, 629 (Wis. 1906), *per* Winslow, J.

opposite point of view. "Though the general consent of the most enlightened nations has, from the earliest historical period, recognized a natural right in children to inherit the property of their parents," the court says, "we know of no legal principle to prevent the legislature from taking away or limiting the right of testamentary disposition by imposing such conditions upon its exercise as it may deem conducive to public good." Their error lies in their failure to get the full import of the last part of the sentence quoted in their hurry to get past the first which expressly mentions the right of inheritance to be a natural one.

But that the right of inheritance is a natural right may be supported from the natural law. By the natural law—which is a participation of the eternal law in rational beings, the light, as it were, by which man knows what is good to be done and what is evil to be avoided—there is in the parent a natural duty in regard to the support and education of his children. This obligation arises from the fact that the parents are responsible for the life of the child. And because of the correlative nature of rights and duties, the children have a corresponding natural right to have this duty respected. The correlation of this right and duty is the foundation of the family theory of property, which "assumes that as man acquires property largely in order to leave it to his children, for whom he ought to provide, there is reasonable ground for demanding the perpetuity of the means of family support." [11] This theory asserts that the father is not the sole beneficial owner of his property, that his possessions must serve a society consisting of the children as well as the parents. With this same disposition of mind, Professor Richard T. Ely writes:

"F. H. Geffcken says that the law of inheritance 'in its foundation and purpose is the material continuity and safety of the family.' The German philosopher, Trendelenburg, in his work on *Natural Law,* says

[11] SELIGMAN, ESSAYS IN TAXATION (1925) 130.

that the right of inheritance exists first of all for the preservation of the family, and that the wishes and purposes of the decedent come second in order of importance." [12]

It is probably because of this line of thought that we find in parts of continental Europe "the survival of the . . . institution of compulsory children's share [and in some jurisdictions of the United States laws which prohibit the bequeathing of more than a certain portion of the estate to charitable or public uses when there is a child or a widow]. . . ."[13]

St. Thomas Aquinas says, in his *Summa Theologica*: [14]

"By the intention of nature marriage is directed to the rearing of the offspring, not merely for a time, but throughout its whole life. Hence it is of natural law that parents should lay up for their children, and that children should be their parents' heirs."

And in his *A Manual of Modern Scholastic Philosophy* [15] Cardinal Mercier adds that the father's property "is a joint possession belonging to all the members of the [family]. . . . And therefore the children have a certain right to it during the lifetime of the parents. But this right is suspended while the parents are alive . . . . On the death of the parents the right of the children comes, *ipso facto,* into effect; and this is the right of inheritance."

Upon the nature of the right in the child to inherit his father's property, the contentions of both sides have merit. Regardless of the courts' confirmed opinions, the question is yet open for conclusive proof. So long as the courts approach it with a closed mind, they will never prove beyond rebuttal that it is not a natural right. In their present attitude, as though they were omniscience itself, they settle back upon their benches, clear their throats, and in a mighty voice declare that the right to inherit is civil. But whether

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12 ELY, PROPERTY AND CONTRACT IN THEIR RELATION TO THE DISTRIBUTION OF WEALTH (1914) 427.

13 SELIGMAN, *op. cit. supra* note 11, at 131.

14 Pt. III, Supp. q. 67, Art. 1.

15 Vol. 11, p. 314.

it is or not can make no difference in existing laws, whether of descent or of taxation. As Justice Dodge said, in his dissenting opinion in *Nunnemacher v. State,* "Whether such transmission rests on inherent right such as the government cannot take away, or upon a mere privilege which the legislature might accord or deny, in its discretion, as so generally asserted by high authority both legal and economic, I deem a wholly academic question here. If the former, the transfer, like other transfers of property, is a customary and proper subject of taxation. If a mere privilege, resting in grant by the legislature, still that grant has been made, and a legal right of inheritance has been established, and the statute under consideration obviously provides merely for a tax upon a recognized and existing right, not for the revocation or denial of such right even in part." As Justice Dodge says, if the right is natural, nevertheless, the state may control it by virtue of the police power. The only time that this problem might become important is at such time when a theory of government whose adherents denied the existence of all property rights should sweep the country. The people are willing to see an expansion of public property along certain lines; but if legislation was enacted which made collective public property in capital and land dominant, depriving them of their right to inherit, they would rise in arms to test the government's prerogative, and that without regard to whether it is a civil or a natural right.

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