THE ESTATE BY THE MARITAL RIGHT

By GEORGE L. HASKINS †

In England at common law a husband was entitled to the rents and profits, together with the use and enjoyment, of all the realty of which his wife was seised at the time of their marriage and of all realty of which she might acquire seisin while the marriage subsisted and before the birth of issue alive. The interest which the husband thereby acquired was a life estate, measured by the joint lives of himself and his wife, which endured until the dissolution of the marriage or until the birth of issue. Known for centuries as a tenancy "by the marital right" or *"iure uxoris,"* the estate has all but disappeared in the modern world; it has continued significance, however, as an important aspect of the background of marital estates.

It is not easy to explain in detail the origins and development of the husband's estate *iure uxoris* in English law. The early records which have come down to us tell more of his estate by the curtesy, probably because as a general rule marriage was followed by birth of issue, and the estate *iure uxoris* thereby became an estate by the curtesy. However, Glanville and Bracton recognized the existence of the husband's right to enjoy his wife's freehold lands while the marriage endured.[1] At that time, his rights pertained not only to the lands which were his wife's by inheritance, but to those she might acquire during the marriage by gift, inheritance or otherwise. He could alienate his rights to another, but he could not create an interest which would outlast the marriage, unless as a result of the birth of issue he had acquired an estate by the curtesy,[2] which was measured by his life alone. Despite his large powers to enjoy and manage her lands, he could not, save by alienation, exclude her from them.[3] Husband and

† A. B., 1935, LL. B., 1942, Harvard University. Member of the Massachusetts Bar. Associate Professor of Law, University of Pennsylvania. Author, THE GROWTH OF ENGLISH REPRESENTATIVE GOVERNMENT (1948); THE STATUTE OF YORK (1935); various articles in legal periodicals.

1. GLANVILLE, DE LEGIBUS, VI, 3; BRACTON, DE LEGIBUS, fol. 429 b. The wife's chattels real, such as a term for years, became the absolute property of the husband like her other chattels. However, if he did not alienate them in his lifetime, and his wife survived him, they became hers again free of any charges or encumbrances which he might have placed upon them. If, on the other hand, she predeceased him, they became his property absolutely. Co. LITT. *46 b, *351 a; 3 HOLDSWORTH, HISTORY OF ENGLISH LAW 527 (4th ed. 1935).

2. Such an interest would outlast the marriage after birth of issue only if the husband survived the wife.

3. BRACTON, DE LEGIBUS, fol. 166 b. If the husband excluded his wife from the enjoyment of her lands otherwise than by alienation, she might apply to the ecclesiastical court for a sentence which the royal courts would enforce by jailing him until he complied.

wife were jointly seised, and neither could be sued without the other.[4] Although the wife could not by her sole act alienate her lands during marriage, neither could the husband permanently alienate them without her joinder or consent.[5] Early charters reveal that, when a price was paid for her lands, payment was frequently made to both.[6]

To explain the basis of the husband's estate by the marital right in terms of a supposed "unity of person" between husband and wife is to repeat a hackneyed fiction and to ignore the fact that in early times in many situations the law treated the wife as a person, with independent legal rights. Glanville and Bracton, it is true, insist upon the wife's subjection to the husband;[7] and Bracton, at least, uses language reminiscent of the church's doctrine that marriage is a sacrament which makes the husband and wife one flesh.[8] Such an explanation of the basis of the husband's right has the advantage of simplicity, but it is as deceptive as it is historically incorrect.

It has been pointed out elsewhere in connection with the origins of dower that many of the elements of the law of husband and wife in medieval England are traceable to ancient Germanic usages.[9] Among those usages the idea of the husband's protection of the wife loomed large. Maitland has suggested that the presiding tendency in family law in England before the coming of the Normans was one which was "separating the wife from her blood kinsmen, teaching her to 'forget her own people and her father's house' and bringing her and her goods more completely under her husband's dominion."[10] A survey of the law of husband and wife in the thirteenth century makes it clear that in practice the central idea of marriage was one of guardianship of the wife. Even Bracton, despite his reference to the impracticable rule that husband and wife are one, recognizes in the same passage the element of guardianship: "the thing is the wife's own, and the husband is guardian, since he is head of the wife."[11] But it was a guardianship

4. BRACTON, DE LEGIBUS, fol. 429 b; 2 EYRE OF KENT 28-29 (Selden Soc. 1912).

5. 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW *407-10. In the thirteenth century, a husband frequently attempted to make a feoffment of his wife's lands in fee simple. Although the wife was powerless to complain during marriage, a writ (which became the *cui in vita*) was available to her to recover the land upon the husband's death. 2 ROTULI CURIAE REGIS 168, 196 (Palgrave ed. 1835).

6. See examples in 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW 411 n. 1, 2 (2d ed. 1911).

7. GLANVILLE, DE LEGIBUS VI, 3; BRACTON, DE LEGIBUS, fol. 414 a; BRACTON'S NOTE BOOK No. 1685 (Maitland ed. 1887).

8. BRACTON, DE LEGIBUS, fol. 429 b.

9. Haskins, *The Development of Common Law Dower*, 62 HARV. L. REV. 42 (1948).

10. 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW *401.

11. BRACTON, DE LEGIBUS, fol. 429 b. See 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW *403.

exaggerated by feudalism, which made of it a profitable right for the benefit of the guardian.[12] Whatever tendencies there may have been in twelfth-century England in the direction of a system of community between husband and wife,[13] similar to that prevailing in some areas of France, those tendencies were repressed by the royal judges, who helped to make the law of the great the common law for all. A latent idea of community may have persisted, as Maitland suggests,[14] and perhaps the canonists' doctrine of marriage as a sacrament may have colored or made acceptable the newer trend; but it was above all the influence of the king's justices which helped to harden and elaborate the earlier, vague and primitive notions of protectiveness inherited from the Germanic law.

The principle of guardianship explains both the wife's personal subjection to her husband and his rights over her property. It explains certain of the husband's responsibilities towards his wife, as his liability for her debts incurred before marriage and for her torts committed before and after marriage. It also explains why the wife, though "under the rod", continued to be treated as a person who had certain rights and powers, such as the right to refuse her assent to permanent alienations of her land.[15] Finally, it explains why, upon the husband's death and the guardianship ended, her land came back to her.[16]

The rules with respect to the husband's rights in his wife's land appear, therefore, less as the rules of ownership than of guardianship. It was only gradually, as the judges came to elaborate the system of estates, that the husband's rights were brought within the conceptions which were being applied to other interests in land. That process has not been explored in detail, but it is clear even by the fourteenth century that the language of guardianship in the legal records was giving way to the terminology of estates, so that the fusion of ideas which had gone into the creation of the husband's right was becoming almost wholly obscured.

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12. Guardianship was nearly always a source of profit. Even in a father's rights over a child there was some connotation of profit, since he could sell the marriage of his heir apparent. Ratcliffe's Case, 3 Co. 37 (K. B. 1592).

13. 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW *399-400.

14. 2 *id.* *405.

15. So well established were her rights that it is possible to detect a fear that even if she did join him in a conveyance, her participation might be of no avail. See the deeds cited in 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW *409 n., in which the wife pledges not to dispute the validity of the deed should she outlive her husband.

16. The husband's absolute power over his wife's chattels personal which did not return to her or her heirs upon his death may seem inconsistent with a principle of guardianship. Holdsworth suggests that the husband's rights in this respect developed as a consequence of the church's acquiring jurisdiction over succession to movables. 3 HOLDSWORTH, HISTORY OF ENGLISH LAW 524 (4th ed. 1935). See also 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW *400.

By the time the common law took definite shape, the husband's estate by the marital right entitled him to the use and occupation, together with the rents and profits, of all the freehold realty of which his wife was seised at the time of marriage or of which she might become seised during the marriage before birth of issue. His estate was a life estate measured by the joint lives of himself and his wife, which endured until the marriage was terminated by divorce [17] or by the death of either party, or until issue was born alive. Upon the birth of issue alive his estate was converted into an estate by the curtesy initiate, which was measured by his own life and was not defeated by the death of his wife before him. The estate by the marital right was widely recognized in the United States in the eighteenth and nineteenth centuries.

At common law the husband could alienate his wife's lands without her consent, and he was under no obligation to account for the purchase price received from their sale.[18] His estate was also subject to execution for his debts.[19] However, whatever interest a purchaser might acquire was subject to the same defeasibility as the husband's own estate, and upon the latter's death the property returned to his widow free of all claims and encumbrances.[20] If the wife died first, the property passed immediately to her heirs or devisees, likewise free of all claims of the husband,[21] unless by birth of issue alive his estate had been elongated. The husband had the same rights in his wife's equitable estates as he had in her corresponding legal interests.[22]

A mark of the origin of the estate *iure uxoris* survived in the fact that the husband and wife were regarded as jointly seised of the estate for most purposes, despite the fact that the husband was said to be the owner of a distinct estate. Thus, as at early common law, both were required to sue for permanent injuries to the freehold,[23] and both had to be named as defendants in any real action.[24] For purposes

17. Barber v. Root, 10 Mass. 260 (1813).

18. Co. LITT. *325 b; Eaton v. Whitaker, 18 Conn. 222 (1846).

19. 2 KENT, COMMENTARIES *131; Beale v. Knowles, 45 Me. 479 (1858); Nicholls v. O'Neill, 10 N. J. Eq. 88 (1854).

20. Flagg v. Brown, 25 N. H. 49 (1852); Co. LITT. *325 b; *see* Mellus v. Snowman, 21 Me. 201 (1842). The husband's personal representative had a right to emblements in any growing annual crops planted or sown by the husband. Bennett v. Bennett, 34 Ala. 53 (1859).

21. Co. LITT. *351 a; 2 KENT, COMMENTARIES *130-131.

22. Rex v. Holland, Aleyn 14 (K. B. 1647); *In re* Bellamy, 25 Ch. D. 620 (1883); Dunn v. Sargent, 101 Mass. 336 (1869). "Equity followed the law, not by treating her interest under the trust as a chose in action, but by treating her equitable interest in the subject matter of the trust as the law treated the same subject matter." 1 SCOTT, TRUSTS § 146 (1939).

23. 2 KENT, COMMENTARIES *131.

24. *Ibid.*

of adverse possession, the statute of limitations ran against both of them so as to bar the wife as well as the husband.[25] For purposes of recovering for damages to the rents and profits, the husband alone was required to sue, since the injury was to his present possessory interest.[26]

Reference has already been made to the husband's rights over his wife's chattels real, such as leasehold estates.[27] Of these she could not, of course, be seised, since they were estates less than freehold; consequently the husband did not have in them an estate by the marital right. Such interests were so far treated as chattels that the husband could alienate them in his wife's lifetime completely free of her claims, and the proceeds would be wholly his.[28] Yet they were so far treated as realty that the husband was entitled to their use and enjoyment during his wife's life; but if he had not alienated them in his lifetime, they returned to her upon his death free of any charges which he might have created.[29] If she predeceased him, they became his absolutely.[30]

The hardening process through which the common law went as the writ system grew to maturity brought with it an increasing rigidity in the rules applicable to husband and wife. Rules which in an earlier period had developed in response to social conditions fostered by feudal and royal policy now became fixed principles from which the law affecting the status of married women was logically and inexorably deduced. The latent idea of community and equality, which had persisted for a time after the close of the twelfth century, was destroyed, save where in certain localities that idea was too deeply rooted.[31] The growing rigidity of the common law in this field meant that opportunity for development was checked. Systems recognizing a community between husband and wife have shown themselves adaptable to new ideas developed by a changing society, but in England such adaptability became almost impossible. Even in land held by another to her use the

25. Melvin v. Proprietors of the Merrimac River Locks and Canals, 16 Pick. 161 (Mass. 1834). One or two cases in the United States have repudiated this view as to joint seisin and have stated that the wife's interest is a reversion, so that an adverse possessor cannot run the statute against her until the estate by the marital right is terminated. Mellus v. Snowman, 21 Me. 201 (1842); *see* Shortall v. Hinckley, 31 Ill. 219 (1863); Thompson's Heirs v. Green, 4 Ohio 216 (1854). Such a view, however, is not in accordance with the common law.

26. Wyatt v. Simpson, 8 W. Va. 394 (1875); 2 KENT, COMMENTARIES *131.

27. See note 1 *supra.*

28. Co. LITT. *46 b, *351 a; Allen v. Hooper, 50 Me. 371, 374 (1862).

29. Co. LITT. *46 b, *351 a.

30. *Ibid.* Despite some initial uncertainty as to the testamentary capacity of married women (see 2 ROTULI PARLIAMENTORUM 149), it became settled by the fifteenth century that the wife had only such testamentary capacity as her husband allowed her. LYNDWOOD, PROVINCIALE, III, 13 (1679), ad. v. *propriarium uxorum;* BROOKE, ABRIDGEMENT, tit. *Devise,* pl. 34.

31. *Cf.* HEMMEON, BURGAGE TENURE IN MEDIAEVAL ENGLAND 144-146 (1914).

wife's rights were little different from those she had in land of which she had the legal interest. The incapacities of a married woman became proverbial in English law.

To remedy the harshness of the old law equity stepped in early in the modern period. The sixteenth and seventeenth centuries in England was a period of great change and social upheaval. Strong sentiments developed that the rules affecting married women should be modified,[32] and in two directions courts of equity began to afford relief. In the first place, if before marriage a woman had entered into a contract with her intended husband providing that she was to have a limited power of disposition over her property, such contracts were occasionally enforced.[33] In the second place, if property were conveyed after marriage to friends of the wife in trust for her, chancery gave effect to them, if the settlement were reasonable,[34] or if it had been made with the husband's consent.[35]

Towards the end of the seventeenth century equity ceased to look to the reasons for a settlement made to the wife's use and recognized that with regard to such interests she had the capacities of a feme sole,[36] provided the settlement had been made with the husband's approval.[37] The next step was taken soon afterwards, when it was insisted that if a husband, his creditor, or assignee, sought the aid of equity in reaching the wife's equitable assets, such as, property in the hands of trustees, relief would not be granted until an adequate settlement had been made out of the property for her separate use and benefit.[38] That insistence was merely an application of the principle that he who seeks equity must do equity, and was the origin of the wife's so-called equity to a settlement, which noticeably modified the husband's rights during marriage. Thus, equity fastened on the husband's right to receive the property of his wife an obligation to make an arrangement which was fair to the wife and the issue of the marriage. The purpose was usually accomplished in the eighteenth and

32. Legacies given to a woman conditional on her surviving her husband provide examples of this sentiment. See 2 NORTH COUNTRY WILLS 148 (Surtees Soc. 1912).

33. Avenant v. Kitchin, Choyce Cases 154 (1581-82); Palmer v. Keynell, 1 Ch. Rep. 118 (1637-38); 5 HOLDSWORTH, HISTORY OF ENGLISH LAW 310-311 (4th ed. 1935).

34. Fleshward v. Jackson, Tothill 94 (1623-24); Georges v. Chancie, Tothill 97 (1639). *Cf.* Povy v. Peart, Tothill 98 (1590).

35. 5 HOLDSWORTH, HISTORY OF ENGLISH LAW 312-14 (4th ed. 1935).

36. Doyly v. Perfull, 1 Cas. Ch. 225 (1673).

37. Sir Edward Turner's Case, 1 Vern. 7 (Ch. 1681); Pitt v. Hunt, 1 Vern. 18 (Ch. 1681).

38. Earl of Salisbury v. Bennet, Skin. 285, 288 (K. B. 1691); *cf.* Lupton v. Tempest, 2 Vern. 626 (Ch. 1708).

nineteenth centuries by requiring that a new trust be set up for the separate use of the wife and the issue of the marriage, if any.[39] The equity to a settlement was widely recognized in the United States,[40] as well as in England, prior to the enactment of Married Women's Property Acts, but has now become obsolete in consequence of that legislation.

The equity to a settlement did not furnish the wife adequate protection. Consequently, beginning in the eighteenth century, courts of equity permitted property settled upon trustees for the benefit of the wife and designated for her "sole and separate use" to be free during coverture from the husband's control and from liability for his debts. To be effectual the provision had to be expressly made by the settlor of the trust; otherwise, the husband acquired immediately an interest in her equitable estate. As Scott says, "this was a most remarkable piece of judicial legislation, since it effected a revolution in the economic position of married women by making it possible for a married woman to be economically independent of her husband."[41] Eventually, in the nineteenth century, parliament seconded the efforts of the courts in freeing the wife's legal and equitable estates from the husband's control.

To create a separate equitable estate in the wife, it was the general practice to convey property to third parties as trustees. Property might also be conveyed to the husband, as trustee for his wife's sole and separate use, or even to the wife herself.[42] A trust for separate use could be created for a woman when she was single, and the property would be protected from her husband when she married.[43] The effect of a separate use trust was to protect the wife's property except as against her own acts. She could sell it, or mortgage it,[44] or assign it to her husband. Ordinarily, therefore, the instrument creating such a trust would impose a prohibition on her alienation of the property—a restriction which was uniformly enforced, at least in England, in order to prevent the husband's acquiring such property by persuasion.[45] The wife's separate equitable estate has now become obsolete both in

39. See further, 2 POMEROY, EQUITY JURISPRUDENCE §§ 1114-1118 (5th ed. 1941); 1 SCOTT, TRUSTS § 146.2 (1939); STEWART, HUSBAND AND WIFE §§ 190-196 (1887).

40. Gardner v. Hooper, 3 Gray 398 (Mass. 1855); STEWART, HUSBAND AND WIFE § 190 n. 11 (1887).

41. 1 SCOTT, TRUSTS § 146.1 (1939). See DICEY, LAW AND OPINION 371-395 (2d ed. 1924).

42. 1 SCOTT, TRUSTS § 146.1 (1939).

43. As to revival of the provision if the husband died or was divorced and the wife married again, see *ibid.*, notes 3 and 4 and cases cited.

44. Forbes v. Lothrop, 137 Mass. 523 (1884).

45. Tullett v. Armstrong, 4 Myl. & C. 377, 393 (Ch. 1840).

England and in the United States as a result of the legislation next to be discussed.

In England, and in all of the United States except the community property jurisdictions, statutes have been enacted which give a wife almost unlimited control over her real and personal property.[46] Known as Married Women's Property Acts, those statutes generally provide that her property shall be wholly free from the husband's claims or control. Accordingly, they have the practical effect of abolishing the husband's estate by the marital right.[47] The provisions of these statutes vary almost infinitely among themselves, differing on such questions as what kinds of "property" are protected and from what sources, as well as on the incidents of the separate estate secured.[48] The most usual type of statute states that the property which the wife holds at marriage, or which she afterwards acquires, remains her own or separate property. Despite the differences in the statutory provisions, it is clear that the husband has lost his power to control and manage the wife's property except to the extent that his right of curtesy may still affect her interest. An occasional relic of the old rules appears in those jurisdictions which require the wife to obtain her husband's consent in order to make an effective conveyance of her separate real property,[49] and in those which still require his joinder in her conveyances.[50]

The statutes which thus abolish the husband's marital rights have not abolished the wife's separate equitable estate, since the powers conferred by the former are supplementary to the latter. In effect, however, as already stated, the equitable doctrine has become obsolete, although two jurisdictions still expressly provide that equitable separate estates may still be created.[51] It is well settled that these statutes leave virtually unchanged the personal rights and duties of the marriage relationship, so that a husband has such rights of possession of his wife's property as are incidental to that relationship: for example, he

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46. 45 and 46 Vict., c. 75 (1882); 25 & 26 GEO. V, c. 30 (1935). For American statutes, see 3 VERNIER, AMERICAN FAMILY LAWS 171-185 (1935).

47. See 3 VERNIER, AMERICAN FAMILY LAWS 171-183, Table LXXXVII (1935). A trace of the continued existence of the estate by the marital right can be found in occasional decisions relating, for example, to pleading. Bishop v. Readsboro Chair Mfg. Co., 85 Vt. 141, 81 Atl. 454 (1911).

48. See in general, STEWART, HUSBAND AND WIFE §§ 217-243 (1887).

49. Where this requirement still exists, the husband generally manifests his assent by his joinder in the conveyance. 3 VERNIER, AMERICAN FAMILY LAWS 298-314 (1935).

50. *Ibid.*

51. D. C. CODE § 30-207 (1940); VA. CODE ANN. § 5139 (1942).

cannot be ousted from her dwelling.[52] At the same time, the husband's duty of support continues, regardless of the fact that he has been deprived of his wife's resources which formerly assisted him in the performance of that duty. At least two authorities have criticized the legislative policy which has resulted in the economic emancipation of married women but which has left the husband's burdens unlightened and even added to them criminal liability.[53] Nevertheless, legislative policy has been unquestionably in the direction of granting women equal rights with men in respect to their property.[54]

52. That right has received express statutory recognition in several jurisdictions. 3 VERNIER, AMERICAN FAMILY LAWS 171-183, Table LXXXVII (1935). Many statutes, however, as Vernier points out, if literally read, would make the husband a trespasser if he attempted to assert that right. 3 *id.* 170.

53. 2 BISHOP, THE LAW OF MARRIED WOMEN 526 (1875); 3 VERNIER, AMERICAN FAMILY LAWS 170-171 (1935). For the husband's criminal liability for failure to support, see 3 *id.* 112-138.

54. Compare the "equal rights" legislation adopted in Wisconsin. WIS. STAT. § 6.015 (1947).