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Then and Now in the Law of Property

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FOR MANY PEOPLE, the past is merely a cabinet of curiosities to be examined in greater or less detail as time allows, before getting to the serious business of the present. But the past has an unsettling way of cropping up in the present, even in so practical a field as property law. "Then" may suddenly become "now."

THEN . . .

Long ago and far away, in England hundreds of years ago, when a landed gentleman died, his widow was provided for by dower, a life estate in one-third of all the real property of which her husband was seised of an estate of inheritance during coverture[1] – in the case of a large landowner, a comfortable provision for the rest of her life. His eldest son was his sole heir by right of primogeniture,[2] keeping

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[1] 2 William Blackstone, *Commentaries on the Laws of England* *129-30 ("Tenant in *dower* is where the husband of a woman is seised of an estate of inheritance, and dies; in this case, the wife shall have the third part of all the lands and tenements whereof he was seised during the coverture, to hold to herself for the term of her natural life.") (italics in original).

[2] Limitation of inheritance to the eldest son was actually the product of the interaction of three canons of inheritance described by Blackstone:

the family property intact for the next generation. Of course, if his family had engaged in the sophisticated estate planning of the day, his land was likely entailed, that is, limited to him and the heirs of his body, a safeguard to prevent him or any of his descendants from losing the entire estate.[3] If his younger son had been provided for by entering a monastery, the young man was treated as if dead, his assets (if any) administered like those of any other decedent.[4]

NOW . . .

Dower survived into modern times – it's not entirely gone from American law even now[5] – but in most states it has been replaced by the spouse's elective share, applicable not only to real property but also to an increasing array of personal property.[6] Re-

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> "I. The first rule is, that inheritances shall lineally descend to the issue of the person last actually seized, *in infinitum;* but shall never lineally ascend . . . .
>
> II. A second general rule or canon is, that the male issue shall be admitted before the female . . . .
>
> III. A third rule, or canon of descent, is this; that where there are two or more males in equal degree, the eldest only shall inherit; but the females all together."

Id. *208, *212, *214. Although failing male issue, multiple daughters could inherit, they took "all together," as tenants in coparcenary. Id. *187-91.

[3] A tenant in tail could not alienate any interest greater than a life estate. Not only did the fee tail protect the estate from spendthrift heirs, but also during the ages when the punishment for treason included the forfeiture of estates, it protected the families of those on the losing side of civil conflict. See id. *116. The U.S. Constitution prohibits forfeiture except for the life of the traitor. U.S. Const. Art. III, § 3.

[4] 2 Blackstone, *Commentaries* *132 (Death is "either a civil or a natural death. The civil death commences, if any man . . . enters into religion; that is, goes into a monastery, and becomes there a monk professed: in which case[] he is absolutely dead in law, and his next heir shall have his estate."). See also id. *121.

[5] "In only four jurisdictions – Arkansas, Kentucky, Michigan, and Ohio – does dower exist as it was known to the common law." Jesse Dukeminier et al., *Wills, Trusts, and Estates* 476 n. 1 (8th ed. 2009).

[6] See, e.g., Uniform Probate Code § 2-202 et seq. (1990, as amended 2008). Neither dower nor the elective share is known in community property states,

cently, dower has made an unlikely reappearance. In 2004, Congress passed the American Indian Probate Reform Act,[7] the latest effort to remedy the problem caused by forcing Native Americans to accept the European settlers' system of property law. Over the century since the passage of the Dawes Act in 1887,[8] Indian allotments splintered into uneconomic fragments, divided equally among the heirs at each generation.[9] Under the new law, Indian trust land may be devised only to other Native Americans or to the tribe.[10] In case of intestacy, the decedent's spouse is guaranteed one-third of the trust personalty and a life estate in all the lands owned by the decedent[11] – in other words, dower enlarged and made gender-neutral, to suit modern sensibilities.

New-fangled dower is not restricted to descendants of the first peoples. The Qualified Terminal Interest Property trust, familiarly known to estate lawyers as the QTIP trust, is a product of tax reform in 1982. So long as the donor spouse creates a trust giving the surviving spouse support for life (a "terminal interest"), the property qualifies for favorable tax treatment. While not restricted by gender, it is commonly used to provide for widows.[12] As one scholar has recognized, "with QTIP, the new federal law of dower was born."[13]

Primogeniture faded early in Britain's American colonies. By the

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where acquisitions during marriage are presumed to be owned equally by both spouses.

[7] 25 U.S.C. § 2206.

[8] General Allotment Act of 1887, ch. 119, 24 Stat. 388 (named for Sen. H.L. Dawes (R.-Mass.)) (making allotments inheritable, but not alienable or devisable).

[9] For the extreme fractionation of Native American allotments, see Hodel v. Irving, 481 U.S. 704 (1987) ("The average tract has 196 owners and the average owner undivided interests in 14 tracts."). See also Michael Heller, *The Tragedy of the Anticommons*, 111 Harv. L. Rev. 621 (1998).

[10] 25 U.S.C. § 2206 (a)(1).

[11] Id. (a)(2)(A)(i) (if decedent is survived by one or more eligible heirs, the surviving spouse receives one-third of the trust personalty and a life estate in the realty).

[12] See Dukeminier, *Wills, Trusts, and Estates* 480 (note on the "estate tax marital deduction and the dependency of women").

[13] Mary M. Wenig, *Taxing Marriage*, 6 S. Cal. Rev. L. & Women's Stud. 561 (1997).

end of the seventeenth century, it had disappeared from every colony in New England.[14] The more tradition-bound Southern states moved to end the practice only after the Revolution.[15] But the American Indian Probate Reform Act also resuscitates primogeniture, and for the same reason that it arose in medieval England – to prevent the fracturing of estates. If the intestate decedent owned less than a 5% interest in a parcel, the interest is not divided further, but passes to the oldest child or grandchild – in other words, primogeniture without the preference for males.[16]

England had managed through an elaborate array of legal fictions in the fifteenth century to eliminate the fee tail as an effective device,[17] but the entailed estate enjoyed an incongruous revival in the colonial South, until it was swept away by the egalitarian impulse stimulated by the American Revolution.[18] Although primogeniture and entail are no longer in the legal toolbox, the purposes they served – keeping family estates intact and sheltered from spendthrift heirs – remain attractive. To serve their wealthy clients, lawyers turned to trusts, the modern descendants of medieval "uses." Long constrained by the abstruse Rule Against Perpetuities,[19] which limited the reach of the dead hand to no more than the next two or three generations, modern dynasts and their bankers and lawyers achieved a breakthrough in the last quarter century.[20] The repeal of

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[14] Carol Shammas et al., *Inheritance in America: From Colonial Times to the Present* 32-33 (1987).

[15] John V. Orth, *After the Revolution: "Reform" of the Law of Inheritance*, 10 Law & Hist. Rev. 33-44 (1992).

[16] 25 U.S.C. § 2206(a)(2)(D).

[17] See 2 Blackstone, *Commentaries* *116.

[18] See, e.g., John V. Orth, *Does the Fee Tail Exist in North Carolina?*, 23 Wake Forest L. Rev. 767-95 (1988).

[19] As formulated by John Chipman Gray in his classic treatise, the Rule Against Perpetuities provides that "no interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest." John Chipman Gray, *The Rule Against Perpetuities* § 201, p. 191 (4th ed. 1942).

[20] The movement to repeal the Rule Against Perpetuities was in response to the Tax Reform Act of 1986, Pub. L. No. 99-514, § 1431(a) (codified at I.R.C. § 2601), which created the generation-skipping transfer (GST) tax. For a list of states that

the Rule in more and more states, coupled with the now universal acceptance of spendthrift clauses,[21] has made possible the modern dynasty trust, "a sort of throwback to entail."[22]

Civil death passed out of English law with the dissolution of the monasteries in the 1530s, although its ghost lingers to the present day in the language of conveyancing: "to A for and during the term of his *natural* life."[23] But the legal fiction of treating a living person as if dead has proved useful in solving new problems. As the traditional law of intestate succession interacted with modern estate and inheritance taxation, heirs demanded to be allowed to disclaim their inheritance,[24] thereby avoiding the tax consequences of automatic succession while letting the property pass to the next in line. The solution was to treat disclaimants as having died "immediately before the time of distribution."[25] The same device proved useful in case a murderer would succeed to the property of the victim. At one time, when capital punishment was more prevalent, the problem caused by the operation of the ordinary rules of succession was quickly solved by the execution of the criminal. But as capital punishment

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had repealed the Rule Against Perpetuities as of the date of publication, see John V. Orth, *Allowing Perpetuities in North Carolina*, 31 Campbell L. Rev. 399 (2009). For an analysis of the role played by competition among the states to secure trust business, see Robert H. Sitkoff and Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 Yale L.J. 356 (2005). For a brief review of other instances in which jurisdictional competition was a source of change in property law, see John V. Orth, *"The Race to the Bottom": Competition in the Law of Property*, 9 Green Bag 2d 46 (2005).

[21] See, e.g., Uniform Trust Code § 502 (2000, as amended 2005) (defining a spendthrift provision as one that "restrains both voluntary and involuntary transfer of a beneficiary's interest").

[22] Adam Hirsch, *Inheritance: United States Law*, in 3 *Oxford International Encyclopedia of Legal History* 235, 239 (2009).

[23] The qualifier "natural" was needed only when civil death was possible (for abjuring the realm, entering a monastery, or attaint for treason or felony); it is now obsolete. *Oxford Companion to Law* 222.

[24] A similar problem did not arise with testate succession since a devisee like any other donee was always free to refuse to accept the gift.

[25] See, e.g., Uniform Probate Code § 2-1106.

waned and more diverse means of profiting from the death of the victim developed, increasingly sophisticated slayer statutes were adopted. Again, the solution was to treat the slayer as having disclaimed the property.[26]

Why this persistence of the past? Why does it never really die? The answer, of course, is that many of the problems of succession on death are perennial and the contraptions in the old cabinet can still be made to work. "Then" becomes "now" again.

[26] See, e.g., id. § 2-803.