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Curtesy—Its Abolition in Missouri

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CURTESY—ITS ABOLITION IN MISSOURI.

Law may be studied from either the analytical or historical viewpoint. The analytical school with such advocates as Austin and Bentham goes back of any law or laws and studies human legal relationships while the historical school with such supporters as Maine and Savigny is interested primarily in the history or evolution of law. Savigny says, "Law is not isolated but is connected with human relations." The idea embraced within this statement has received marked expression during the last two years in the changes that have been made in the law of both State and nation. This is indeed true of measures passed at the last regular session of the Missouri Legislature. Certain of these are the so-called "Women's bills," concrete examples of the evolution of law. The Missouri Legislature in the passage of these measures was not, however, taking unprecedented action, for similar statutes, commonly called Married Women's Acts, have been enacted in most, if not all, of the States. The statutes differ, but they all attempt to enlarge the rights of married women in respect to real estate. It was perhaps the expression of a desire to equalize the property rights of men and women which caused the Missouri Legislature at its regular session to pass a law abolishing the husband's curtesy and giving him dower instead. For purposes of comparison it is well to consider the view taken by other leading American States upon the right of curtesy.

In New York, by virtue of the passage of an act for the protection of married women, the husband has no estate or interest or right whatever, absolute or conditional, except that on the death of the wife, after issue born, the husband has an estate for life as tenant by the curtesy. In Pennsylvania the husband has his right of curtesy, although there shall be no issue of the marriage, in all cases where the issue,

if any, would have inherited. The act passed by Massachusetts, abolishing curtesy at common law, gives the husband the right, upon the death of his wife, to hold for his life one-third of all land owned by her at any time during coverture. Closely following this view is the statute of Illinois which provides that the estate of curtesy is abolished and the surviving husband or wife is endowed with one-third part of all the lands of which the deceased husband or wife was seized. In those States whose reports are contained in the Southwestern Reporter, Texas, Kentucky, and Missouri have abolished the right of curtesy and given dower instead. The common law right of curtesy prevails in Tennessee, but during the life of the wife this estate is not subject to the debts of the husband nor can it be alienated without the consent of the wife. The Arkansas Constitution of 1874 abolished estates by curtesy initiate and left only the possibility of an estate by curtesy consummate.

The statutes above mentioned as well as similar ones in and not retrospective. Thus if a particular estate by the other States have practically all been held to be prospective curtesy initiate had vested at the time of an enactment, it is held that that estate is not divested by the statute even though future estates by the curtesy initiate are abolished. This interpretation seems to be based on the theory that the Legislature has no power and, therefore, never intended to divest vested estates.[1]

Practically all of the statutes which have been passed affecting man's curtesy right prohibit the sale by the husband of his estate by the curtesy initiate without the consent of his wife, and protect the property from levy and sale to pay the debts of the husband. Decisions are not uniform as to the effect of those statutes upon the husband's estate by the curtesy initiate, but they fall into three classes:

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1. Mitchell v. Violett, 104 Ken. 77; Jackson v. Jackson, 144 Ill. 274; Peck v. Ward, 18 Pa. 509; Denny v. McCabe, 35 Ohio St. 576.

1 They abolish curtesy *initiate* but not *consummate.*

2. They abolish curtesy *consummate;* hence, *initiate.*

3. They abolish neither, but *increase women's* and *decrease men's* rights.

Ajudicated cases in New York, Arkansas and Delaware seem to support Class 1. That is to say, that curtesy initiate is abolished but curtesy consummate is not. In a New York case the Court said: "Since the acts allowing married women to sell and devise their lands, a husband's right as tenant by the curtesy initiate, as to the lands acquired since the passage of those acts, consists simply of a status, which is never a vested right, and is not separately alienable during coverture, but may be modified or annulled by the death of the wife." [2]

The view taken in Michigan, Colorado and Illinois of statutes similar to those mentioned seems to be that they abolish curtesy consummate, therefore initiate, as mentioned in Class 2. In a Michigan case the Court says: "That the wife shall have full and absolute control of her real and personal estate with power to contract, sell, transfer, mortgage, convey, devise, and bequeath the same in the same manner and with the like effect as if she were unmarried." In a Colorado case the Court says: "It has long been settled by repeated decisions of our courts, that under our laws the husband has no vested right, inchoate or otherwise, by reason of the marital relation, in the property belonging to his wife, and that she holds an absolute legal estate in her real and personal property, whether owned at time of marriage or acquired during coverture, as free from any common law right of her husband as if unmarried. As to her separate estate she has no husband." The Act in Illinois to revise the laws in relation to dower expressly provides that the estate by curtesy is hereby abolished and the surviving husband or wife

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2. Hurd v. Cass, 9 Barb. 336; Lloyd v. Planter's Mutual Insurance Co. Ass'n, 80 Ark. 486; Hampton v. Cook, 64 Ark. 353; Albany Co. Sav. Bank v. McCarty, 149 N. Y. 71.

shall be endowed with the third part of all lands whereof the deceased husband or wife was seized.[3]

Cases from Indiana, Maryland, North Carolina, and Mississippi seem to support the view stated, *supra,* as Class 3, viz., that statutes such as those under consideration abolish neither curtesy initiate nor consummate but that they increase women's and decrease men's rights. An Act to secure the rights of married women was passed in the Commonwealth of North Carolina April 11, 1848. It provided that the property of a married woman should not be subjected to execution for any debt against her husband, or on account of any interest he may have, or may have had therein, as tenant by the curtesy, but the same shall be exempted from levy and sale during the life of said wife. In Maryland a decision based upon a statute passed in 1841 held that no real estate hereafter acquired by marriage shall be liable to execution during the life of the wife for debts due by her husband. An Indiana case holds that by statute no real estate whereof any married woman was or may be seized or otherwise entitled to at the time of her marriage, or which she has or may fairly acquire during her coverture, or any interest therein, shall be liable for the debts of her husband, but the same and all interests therein, and all rents and profits arising therefrom, shall be deemed and taken to be her separate property, free and clear from any and all claims of the creditors or legal representatives of her husband, as fully as if she had never married; but that the statute should not be so construed as to aply to debts contracted by such married woman before marriage, and in all such cases her said property shall be first liable therefor. Statutes very similar to those quoted above have been held to merely prevent the vesting of an estate in the husband until the death of the wife, and in this way her estate is protected,

3. Hathon v. Lyon, 2 Mich. 93; Tong v. Marim, 15 Mich. 60; Brown v. Clark, 44 Mich. 309; Deutsch v. Rohlfing, 22 Colo. App. 543; Knight v. Lawrence, 19 Colo. 425; Schuler v. Henry, 42 Colo. 367; Jackson v. Jackson, 144 Ill. 274.

but it is said that estates by curtesy initiate are not abolished but merely made contingent, instead of vested estates.[4]

Taking up, now, more specifically the subject of curtesy in Missouri it is found that when the land located within the Louisiana Purchase was transferred from France to the United States the law of Spain prevailed within that territory. And previous to the Territorial Act of July 4, 1807, the Spanish Law of Community existed in the territory of Missouri. By this law the husband and wife became partners in all estates, real and personal, which they respectively possessed. All property subsequently acquired by them was considered as the fruits of their joint industry and went into the partnership. On the dissolution of the partnership by death the surviving party and the representatives of the deceased each took back what was brought on his or her side into the partnership in *value* of personal estate, in *kind* of real estate, and what remained, considered as profits, was divided equally. By the Territorial Act of July 4, 1807, the Spanish Law of Community was abolished and the wife was given dower in lieu of her interest under the Spanish Law. As a tenancy by the curtesy is recognized by the same act, it must be intended that the husband's right in the community was taken away at the same time and the curtesy given as a part equivalent for it.[5] In the year 1816 the common law of England and all the statutes of the British Parliament in aid of, or to supply defects of the common law made prior to the 4th year of James 1st, of a general nature and not local to that kingdom and not contrary to the laws of this territory nor repugnant to nor inconsistent with the constitution or the laws of the United States, was adopted by the Territorial Assembly as the rule of decision in Missouri, until altered.[6] From the statement

4. Anderson v. Tydings, 8 Md. 427; Junction Co. v. Harris, 9 Ind. 185; Steward v. Ross, 50 Miss. 776; Hill v. Nash, 73 Miss. 849.

5. Riddick v. Walsh, 15 Mo. 519.

6. Lindell v. McNair, 4 Mo. 380.

supra, it is seen that a study of curtesy must be made as it existed at common law.

Under the common law an estate by the curtesy is a free hold estate limited by operation of law to the husband for life in the lands and tenements of the wife, of which she was seized of an estate of inheritance during coverture.[7] The requisites of such an estate are: 1. Lawful marriage; 2. Seisin of wife during coverture; 3. Birth of living child during lifetime of wife; 4. Death of the wife. Provided the requisites are fulfilled the estate of curtesy becomes initiate upon the birth of issue, born alive and capable of inheriting, and consummate at death of wife. The seisin of wife during coverture may be either in law or fact.[8] The necessity for birth of issue is set out in Richter v. Bohusack, cited below.[9] Curtesy attaches to equitable estates as well as freehold estates.[10] The case of Robinson v. Lakenan, cited below, holds that a husband has curtesy in an equity of redemption, and by executing a deed of trust with his wife conveying his wife's property he releases his right of curtesy only as against the trustees therein and those claiming under them.[11] A husband is not entitled to curtesy in lands of which his wife is reversioner, when she dies before the termination of the precedent estate.[12] A deed granting to a married woman, to her sole and separate use "free and clear of any and all marital rights of her present or any husband she may have hereafter," excludes a husband's right of curtesy in the land.[13] By virtue of R. S. Mo. 1909, Sections 8304 and 8309, it is held that a married woman during coverture may convey her separate

7. Tiedeman on Real Property, p. 92.

8. Martin v. Trail, 142 Mo. p. 95; Harvey v. Wickham, 23 Mo. 112; Stephens v. Hume, 25 Mo. 349.

9. Richter v. Bohusack, 144 Mo. 516.

10. Alexander v. Warrance, 17 Mo. 228; Tremmel v. Kleiboldt, 75 Mo. 255.

11. Robinson v. Lakenan, 28 Mo. App. 135.

12. Martin v. Trail, 142 Mo. 85.

13. McBreen v. McBreen, 154 Mo. 323.

estate without her husband joining therein and that this defeats the right of the husband to curtesy in such property after the wife's death.[14] Statutory modification made by Rev. Code, 1825, p. 216, Sec. 4, converting estates tail into a life estate in the first taker with remainder over, of course, deprived the surviving spouse of the first taker of curtesy or dower, as the case might be.[15] During the coverture the husband's estate of curtesy cannot be sold for his debts in Missouri.[16] With reference to how this estate may be defeated, it is found that a husband and wife may contract for the relinquishment of the husband's curtesy right in the wife's property.[17] Sec. 1809, R. S. Mo. 1919, provides that in all cases of divorce from the bonds of matrimony the guilty party shall forfeit all rights and claims under and by virtue of marriage. In view of this statute a divorce granted for the fault of the husband would be a bar to his taking curtesy.

The foregoing is a very general statement of the Missouri law concerning curtesy up to the last session of the Missouri State Legislature. At that session the Act referred to in the beginning abolishing curtesy and providing in lieu thereof that widower shall have dower interest in his deceased wife's real estate was passed. This Act approved March 29, 1921, reads as follows: "The estate which a widower may have in the real estate of his deceased wife known as 'tenancy by the curtesy,' is hereby abolished, and in lieu thereof the widower shall have the same share in the real estate of his deceased wife that is provided by law for the widow in the real estate of her deceased husband, with the same rights of election and same limitations thereto; provided that nothing contained in this Act shall be so construed as to defeat any estate by the curtesy which shall have vested prior to the date of taking effect of this act."

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14. Brooks v. Barker, 228 S. W. 805.
15. Burris v. Page, 12 Mo. 358.
16. Ball v. Woolfolk, 176 Mo. 378.
17. McBreen v. McBreen, 154 Mo. 323.

Considering this Act, the first thing presenting itself is the difference between the two estates of curtesy and dower. Curtesy is an estate for life in all the lands and tenements of the wife, whereas dower is a life estate in one-third of the real property of the husband (and also now of the wife). Again, for curtesy to attach, issue must be born alive, capable of inheriting, but that is not necessary in order that dower attach. This Act though apparently small and simple bids well to give rise to many perplexing questions. With reference to the subject of divorce as a bar it is found that a wife retains dower in land of her husband if she is granted a divorce for his fault.[18] Now that men have dower right may it not be said in keeping with this decision that if a divorce is granted for fault of wife the husband will still retain dower in her land. If so, then one marked difference is set out for, according to Doyle v. Rowling, cited below, when a husband obtains a divorce from his wife for her fault, he no longer has curtesy in her lands.[19] In many cases the wife now owns her separate property free from curtesy. Particularly is this true if the wife is doubtful of her husband signing the deed, provided she wished to make a conveyance. Under the new law it is doubtful whether an arrangement such as above will bar the husband's dower. If not, his signature must be obtained when the wife wishes to make a conveyance. Previous to this statute second husbands whose wives had children by the first marriage but none by the second took no estate by the curtesy. Now it may be that they will take dower. An interesting question in connection with this subject is whether or not the husband will take the valuable right of quarantine of dower, which according to the law goes to the widow. Looking at this question with no precedents as a guide it would seem that there would be less need of the husband taking quarantine right than the widow. At the husband's death the house in which both he and wife have been living may be the only home

18. White v. Ingram, 110 Mo. 474.
19. Doyle v. Rolwing, 165 Mo. 231.

in which she has to live until the assignment of dower. At the wife's death, in the majority of cases, there would seem to be no need granting the husband the right to occupy the principal mansion house, if such there be, upon the land of the deceased wife for the reason that he may continue living in his present home. However, if the view of dower is applied to men strictly as it has been to women, decisions may hold that he is entitled to the quarantine right. A peculiar question arises because of the fact that the present statute giving a half to childless husbands was not repealed. Will this result in allowing the husband a half under the old law and the one-third, or dower interest, under the new? Does the Act, declaring that the husband's dower shall be "in lieu of" curtesy mean that it would only apply where curtesy would otherwise exist? If so, the birth of a child alive, capable of inheriting, would be necessary before the husband would take dower. The Act states that it does not affect "vested" curtesy rights. Since the words "initiate" and "consummate" are not used, a question may arise as to whether this means vested by the birth of children or vested by the death of the wife. What are the rights of a husband who obtained a divorce before 1921, but whose wife dies after 1921? By R. S. Mo. 1919, Sections 365-369, where the dower of an insane wife is conveyed provision has to be made for her support and notice published, etc. Now since men have dower right will this procedure be necessary where the dower of an insane husband is conveyed?

As time passes these and numerous other questions will arise concerning the Act abolishing curtesy and giving in lieu thereof dower. To presume how they will be decided would be but mere guesswork productive of more harm than good. It remains for their decision to be handed down by the Judge or by twelve reasonably prudent men according to all the circumstances in the case as each particular problem presents itself.

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