Comparative Studies
in Continental and Anglo-American Legal History

Vergleichende Untersuchungen zur kontinentaleuropäischen
und anglo-amerikanischen Rechtsgeschichte

Band 10

Marriage, Property, and Succession

Edited by
Lloyd Bonfield

Duncker & Humblot · Berlin

Marriage, Property, and Succession

Comparative Studies in Continental and Anglo-American Legal History

Vergleichende Untersuchungen zur kontinentaleuropäischen und anglo-amerikanischen Rechtsgeschichte

Herausgegeben von

Prof. Dr. Dr. h. c. mult. Helmut Coing

und

Prof. Dr. Dr. h. c. Knut Wolfgang Nörr

Band 10

Marriage, Property, and Succession

Edited by
Lloyd Bonfield

Duncker & Humblot · Berlin

Gedruckt mit Unterstützung der Gerda Henkel Stiftung, Düsseldorf

Die Deutsche Bibliothek – CIP-Einheitsaufnahme

Marriage, Property and Succession / ed. by Lloyd Bonfield. —
Berlin: Duncker u. Humblot, 1992
(Comparative Studies in Continental and Anglo-American
Legal History; Bd. 10)
ISBN 3-428-07369-X
NE: Bonfield, Lloyd [Hrsg.]; GT

Satz: Klaus-Dieter Voigt, Berlin 21
Druck: Berliner Buchdruckerei Union GmbH, Berlin 61
Printed in Germany

ISSN 0935-1167
ISBN 3-428-07369-X

Table of Contents

Introduction

When this *Arbeitsgruppe* first met its task was to construct a method for studying an aspect of the law of property in comparative perspective. The task was a daunting one, because it was believed that the complexities of property law were so extensive that any attempt to systematize them to allow the deduction of comparisons would become hopelessly bogged down in detail. In short, the forest would not be seen for the trees.

We attempted to avert the problem by narrowing our focus. Our concern was narrowed to the legal arrangements of intergenerational succession to property. We would focus upon the landed classes of Europe from the later middle ages until the mid-eighteenth century, and contrast inheritance law in the various jurisdictions. Inheritance law we defined as the pattern of succession to land directed by positive law. The concept of positive law over our differing legal orders would no doubt vary; but what we wished to ascertain was the recognized pattern of succession established by the jurisdiction's legal order.

That inheritance law as we have defined it existed does not necessarily mean that it was unwaveringly followed. We also expressed an interest in determining the extent to which inheritance practice actually followed inheritance law. By inheritance practice we mean the patterns of distribution that were actually implemented. The issue which we raise here, the distinction between inheritance law and practice is of particular interest to historians of English law and society because fairly early on in English legal history (as I discuss in my contribution to this volume) conveyancing devices were contrived to circumvent the operation of the canons of inheritance. For lawyers this development was significant because the ability to fashion individualized inheritance strategies through the creation of settlements had a profound affect upon the course of English property law. Much of the litigation touching the land law involved the elaboration of interests created in settlements. The complexity of property law in some ways reflected the multifarious goals or strategies desired by heads of landed households.

Social and economic historians have observed with great interest the research of legal historians in the area of inheritance. To them the tension between inheritance law and inheritance practice sheds much light on the structure of power in the society, both political and economic. Inheritance practice can be an important factor in establishing and therefore explaining family

structure. Finally, the patterns of distribution themselves assist us in understanding the internal dynamics of the family; who gets how much and when is a very important question. It enables historians to speculate, for example, on the value of women (the size of their portion is evidence of the affection fathers maintain for daughters; in societies where women bring substantial property into a marriage they wield a greater degree of power within the family); or opportunities for younger sons (where the portion is in land and is substantial will they retain gentle status; if it is in cash will they become enterprising merchants or professionals).

Historians have long been interested in the affects of law on society and economy, and as legal historians we are also concerned with the impact of a society's cultural values upon both inheritance law and practice. It borders on the platitudinous to assert that law molds and is molded by culture. Inheritance law and practice is in large measure in the forefront of the debate. Some historians have seen the ability of English property owners to transmit property freely as an important component of English cultural values, and it has been argued that the individualism that such a system exhibited was particular to England. While alleged, this thesis has never been tested against the reality of continental practice. Our comparative dialogue has addressed this important question of comparative legal history and has found the distinctiveness of England thesis, so far as it pertains to inheritance practice, wanting.

For example, the similarities between practice in England and Holland in the early modern period is striking. The ability to circumvent intestate succession patterns by antenuptial contract or will seems to have left the landowners of Holland with at least as much flexibility in crafting estate plans as their English neighbors. As Professor Feenstra notes the ability to choose between the law of two regions and to combine aspects of both patterns was tantamount to allowing parents to create individualized succession patterns. Where England and Holland seem to have diverged was in the latter's acceptance of community property and the institution of the *fideicommissum* to create long term settlements.

Similar conclusions can be reached for the Low Countries. Professor Godding surveys the inheritance and marital property regimes of the southern portion of the Low Countries from the twelfth to the eighteenth centuries. The redaction of local customs in the early seventeenth century transported the customs of the middle ages to the end of the Ancien Regime. Professor Godding believes that they manifest a desire on to protect the patrimony on the part of all families with land, and not just the elite. In the style of Jean Yver, Professor Godding systematizes the customs, but recognizes that they explain actual practice only imperfectly; as he notes, *les acts juridiques* must be scrutinized. Professor Godding describes the means by which custom could be evaded through testaments or mortgages.

Under the influences of Roman law rather than customary law, Italian inheritance law appears to the student of common law to be more complex, and the question of the extent of individual rights to control disposition more difficult to ascertain. In his contribution, Professor Bellomo reports on the primary elements of the juridical structure of Italian family law in the later Middle Ages. In particular, he explains the property relationships and transfers that arise upon marriage, and the various constituent parts of the family patrimony. Parental power, the extent of *patria potestas* and emancipation, seems to be far stronger than in northern Europe. But Professor Bellomo also describes the limitation upon individual will, a wider 'kinsman law' which arose with the passage of later legislation.

The situation seems to be the same in northern Italy. In her contribution on fifteenth and sixteenth century Lombardy, Professor Zorzoli concludes that testators could create settlements of family land that even excluded family members from their legitimate share through the use of the *fideicommissum.* The purpose of these settlements was to insure that land would remain in the family, and in particular, to exclude the female heir. Interestingly, the development occurs at the same time that courts in England are beginning to allow the barring of entails, and therefore encouraging freedom of alienation.

As noted above, the ability to make testaments in Holland (Feenstra) and the southern portion of the Low Countries (Godding) insisted upon by the Church as early as the twelfth century enabled the heads of landed families to infuse flexibility into the inheritance practice in the areas in which succession was guided by customary law. The transnational nature of the Church (at least until the reformation) and its ability to intermeddle in property matters (as it did in promoting the right of testation) must have been a unifying factor across western Europe. Professor Helmholz observes the extent to which strategies of inheritance could be implemented by will in later medieval England. The common law had a fixed pattern of succession to freehold property which until 1540 could not pass by will. But the institution of feoffments to uses, the oft-mooted analog to the *fideicommissum,* could vary succession arrangements, by allowing the *cestui que use* to dispose of his or her interest by will. Helmholz explores the extent to which English law borrowed from the *ius commune* in infusing flexibility into succession arrangements. Finding references to civilian commentators in both English ecclesiastical and common law courts, Helmholz argues that the *ius commune* may have contributed to the increased flexibility of succession arrangements permitted in the later middle ages and post-reformation England.

Also focusing on testaments Professor Sheehan directly addresses the issue initially proposed: the extent to which property owners sought to circumvent fixed rules of succession to property. Sheehan argues that early on English property holders began to regard their personal and real estate as separate