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Paul L. Sayre

Indiana University School of Law

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HUSBAND AND WIFE AS STATUTORY HEIRS

AT common law husband and wife were not heirs of each other. Dower and curtesy were interests in land arising out of marriage and existing *inter vivos*. They became consummate in the survivor upon death, but they were not inheritable interests which belonged to the deceased while he lived and passed to his heirs when he died. Furthermore, dower and curtesy were primarily provisions for the support of the surviving spouse. In both cases they were life interests only and were designed to carry on the obligation of support in the case of dower, or to give a reasonable provision for the survivor co-extensive with his rights during marriage, in the case of curtesy. By the common law scheme the wife's personalty belonged to the husband as an incident of the marriage, while the realty of both spouses passed to their blood relatives upon death, subject to a life interest in one-third of the husband's realty in the case of the wife, and a life interest in all the wife's realty, if there were issue born alive, in the case of the husband. During marriage the husband was legally bound to support his wife, and she obtained a life interest in one-third of his realty to continue this support when he died, while the husband had an absolute right to all the profits as well as the management of his wife's realty during life, and under the doctrine of curtesy he obtained a life interest in all her realty if he survived.

Dower and curtesy in their common law form and without supplementary legislation have not survived to the present day. In England their utility was largely destroyed by the creation of jointures, first at law and later by separate equitable estates for married women, which were given in lieu of dower. While dower and curtesy had largely lost their usefulness, they remained to embarrass conveyancers and to cause uncertainty of title and burdensome litigation, as well as expense and inconvenience.¹ Moreover, at common law, dower could not be barred except by levying a fine, a process which was remunerative to the Crown,

¹ I REPORT OF THE REAL PROPERTY COMMISSION (1829) 16-19.

but exceedingly expensive for the individual.² This defect was remedied by the Dower Act of 1834, which provided for the destruction of dower by deed or will,³ leaving dower and curtesy as interests that arose only upon intestacy.⁴ Even in this limited form, they were formally abolished by the Real Property Acts of 1925.⁵ Thus in England today there is no legal duty which will prevent a husband or wife from refusing to provide for the survivor. In practice, of course, people of property make any necessary provision by jointure upon marriage, or by other forms of property settlements. It is fair to say, however, that even these marriage settlements likewise seem designed primarily to provide for the reasonable maintenance of the survivor, as in the case of dower and curtesy, rather than to effect a fair division of the property of either spouse.

In the United States the development of common law dower and curtesy has had a decidedly different course. Although we do not have the social practice of antenuptial agreements, we have statutes designed to increase the amount of property covered by dower and curtesy so as to make these interests more than life provisions for the surviving spouse. Usually our statutes provide that the survivor shall have an absolute interest in one-third of the realty and the personalty of the deceased. Quite significantly, also, the wife often receives her interest free from the claims of creditors, as dower was at common law.⁶ This is more than a rough approximation of a provision for the survivor's life, since it is not fair to say that the interests of the children, who take as heirs, are merely provisions for their lives, and where there are two or more children, the widow under our statutes obtains as much or more than any child. Furthermore, our statutes have made the surviving husband and wife heirs of each other on intestacy. According to the usual scheme of intestacy, the wife inherits all the property when there are surviving neither children, nor father or mother, nor brother or sister of the deceased.⁷ Fre-

² See the commentary by J. Tyrrell in 1 *id.* 490-92.

³ 3 & 4 WM. IV, c. 105, § 4 (1834).

⁴ 3 & 4 WM. IV, c. 105, §§ 4-6 (1834).

⁵ 15 GEO. V, c. 23, § 48 (1925).

⁶ *Tate v. Jay*, 31 Ark. 576 (1876); *Roan v. Holmes*, 32 Fla. 295 (1893); 1 STIMSON, AMERICAN STATUTE LAW (1881) § 3262.

⁷ 1 STIMSON, AMERICAN STATUTE LAW (1881) §§ 3109, 3119, 3262.

quently she inherits one-half or more of all the property in every case where the deceased does not leave children.⁸

We shall have occasion to refer to these statutory provisions as (1) statutory dower, and (2) statutory heirship. The interest to which the surviving spouse is entitled under the law, and which the deceased cannot take away by deed or will, is statutory dower. The interest which the surviving spouse takes as heir in the intestate property is his interest as statutory heir. For instance, if the husband gives all his property to a charity, and makes no provision for his wife, the widow is entitled to her statutory dower in spite of this will. In most states this is one-third of the realty and one-third of the personalty. If, however, the gift to the charity was void under the local statute governing charitable gifts, and if the deceased left no blood relatives of his immediate family, the widow would then inherit all his property as statutory heir. In brief, her interest as statutory heir can be taken from her by will, but if the testator does not dispose of his property by will, she may receive much more as statutory heir than under her statutory dower right.

In conjunction with the widow's extraordinary position as heir under modern statutes, as compared with the common law situation where she was not an heir at all, we have already noted that under modern statutory dower she is a forced heir as to one-third of all her husband's property, while of course the other heirs may be excluded by deed or will. In view of this situation, one cannot but ask why it is that dower and curtesy are extended in the United States, and private agreements for their destruction are not employed, while in England dower and curtesy were first circumvented and then abolished, and private schemes in place of them have been extensively used. If we seek to explain this on the ground that social customs and obligations are different in England, we must consider that several of the Canadian provinces also have abolished dower and curtesy.⁹ At the present time our

⁸ 1 *id.* §§ 3119, 3123; 1 WOERNER, ADMINISTRATION (1920) § 67.

⁹ See, e.g., BRIT. COL. REV. STAT. (1924) c. 71, § 9. But a disinherited widow has an equitable claim to support. BRIT. COL. REV. STAT. (1924) c. 256. This equitable claim to support may be a solution of the problem of common law dower and curtesy. Thus in British Columbia and several other provinces, dower and curtesy are abolished, but if the widow is not sufficiently provided for by her husband's will, she may apply to a court of equity. The court is authorized to

statutory dower and curtesy and our statutes making husband and wife heirs of each other are liberally interpreted by the courts and vigorously enforced.¹⁰ Are we to assume that even modern statutory dower is to continue a "favorite of the law," as common law dower once was, or is it likely that in the United States there will arise private agreements in lieu of dower among the people generally, and that statutory dower and curtesy will be privately circumvented and finally abolished?

Although common law dower and curtesy have been superseded by more extensive statutory provisions in the United States, the decisions of the courts in construing dower and curtesy are still used in the interpretation of our present statutes. Consequently, the legal rules and principles incident to the common law system are usually applied to the present statutory system. Moreover, these legal principles are applied under modern conditions when it is possible for either spouse to make a gift *inter vivos* to the other, when the wife may acquire property and make contracts as if she were unmarried, and when provision for the surviving spouse by way of insurance and living trusts is the rule rather than the exception. Under these circumstances it would be strange if the common law principles of dower and curtesy were always to apply to our statutory provisions without occasioning

determine whether the provision made is adequate, and to grant an increased allowance from the husband's estate if necessary. These statutes both in terms and in the manner of administration by the courts give the widow reasonable protection for her support in view of the amount of the estate involved. Such provision is of course more than the "necessary allowance" given under the Austrian code. AUSTRIAN CIVIL CODE (1898) § 798.

We shall not venture to discuss this solution of the problem for two reasons: (1) These statutes give the courts of equity rather wide and uncertain powers in disposing of estates according to the needs of the widow. It does not appear that such discretion by a court of equity is necessary in order to protect the widow, and it does not seem likely that such legislation would meet with favor in the United States if equally good results could be secured without qualifying in any way the freedom of testation. (2) Such statutes do not cover a compulsory fair division of the testator's estate, which is implied in community property and in the statutory dower and curtesy of today, and by which the surviving spouse takes an absolute one-third interest in both realty and personalty. It is in keeping with our customs to have a division of the testator's property which shall be approximately fair in most cases. Not to provide at all for a compulsory division or to handle such division by antenuptial agreements would amount to a radical change, and would be equally out of keeping with our social structure.

¹⁰ 2 TIFFANY, REAL PROPERTY (2d ed. 1920) § 1895.

some inconsistencies and some unfortunate results. In the following pages we shall first examine some of the legal situations in which statutory dower and curtesy and statutory heirship of the surviving spouse are subjected to common law interpretation. Except with respect to the claims of creditors, these situations occur most significantly where there is a partial intestacy. Secondly, we shall consider the effect of statutory dower and curtesy upon the claims of creditors. And in this connection also we shall discuss the need of protecting creditors by changes in our statutes, as well as the advisability of other changes in statutory dower and curtesy and statutory heirship for husband and wife.

I

Even a cursory examination of the current digests will disclose the large number of cases involving partial intestacy which appear in the reports every year. A situation frequently encountered is that of a void or lapsed legacy. Most jurisdictions now provide that after-acquired realty will pass by the will, but in others this still causes a partial intestacy. Or the testator may dispose of life interests in property and not dispose of the fee, thus making it apparent on the face of the will that there must be a partial intestacy. There are two instances which very often occur under modern conditions: (1) where one has created a living trust which later turns out to be invalid; (2) where the testator has his life insurance paid to his estate and does not name the beneficiary in his will. It is true that a well drawn residuary clause will in most jurisdictions catch this property, but it is significant to note that some residuary clauses are not extensive enough and that the testator may well omit a residuary clause, especially where he thinks he has disposed of most of his property in a living trust and undertakes to cover only a few things in his will. Another frequent cause of partial intestacy is where the residuary clause itself fails. Finally, a partial intestacy arises where the testator has just before his death conveyed property as gifts in order to avoid inheritance taxes. Where these attempted transfers are not completed *inter vivos*, the property will pass to the testator's heirs. Here, again, the testator thinks he has already transferred his property, and hence is not likely to guard against

a partial intestacy. Any instance, however, in which the testator leaves a will and also leaves property not covered by the will, involves the problem of partial intestacy, which we shall now consider.

A. If the Surviving Spouse Elects to Take Under the Will,
May He or She Also Share in the Intestate Property?

We may answer this question inclusively by saying that the surviving husband or wife, like any other heir, will inherit the intestate property according to the terms of the statute, unless he or she is excluded from this inheritance by some method known to the law. It appears from the cases that the following methods are the only ones recognized by the courts, or indeed urged upon the courts, by which an heir may be excluded from intestate property: (1) a direction in the will excluding the heir from intestate property; (2) a gift to the heir upon the condition that he relinquish his intestate interest; or (3) the doctrine of equitable election, by which the heir is conclusively presumed to acquiesce in the disposal of his intestate property under the terms of the will because he has accepted a gift in the will; (4) the provisions of the statute which may be construed to mean that if the surviving spouse accepts a provision in the will he or she is precluded from taking any interest under the intestate laws. The legal principles involved in all these cases are the same whether the husband or wife survive; hence, for the sake of brevity, we shall refer only to the surviving wife.

Directions in the will. There were some very early decisions which seemed to hold that a testator by an express direction in his will might disinherit one who was entitled to take under the intestate laws.¹¹ These cases have long since been overruled. As early as 1797, Lord Chancellor Loughborough stated the law succinctly:

"Neither an heir at law, nor by parity of reason next of kin, can be barred by anything but a disposition of the heritable subject or personal estate to some person capable of taking. Notwithstanding all words of anger or dislike applied to the heir, he will take what is not

¹¹ *Breton v. Pachell*, 1 P. Wms. 548 (1706); 11 *VINER, ABRIDGMENT* (1792) 185.

disposed of. It is impossible to make a different rule as to the personal estate with regard to what is not disposed of. . . . [There] being a legal intestacy, am I to control the statute of distributions? How can the court possibly do that? I must close the will and cannot look at it."¹²

It is well established now in both England and the United States that an express disinheritance of any person has no effect whatever upon the interest which that person will take under the intestate laws.¹³ Consequently, if the testator wishes to disinherit a statutory heir, he must actually transfer his property to some one else by deed or will. In the United States the widow is a most favored heir; and there is no authority for holding that the widow may be excluded from inheriting upon partial intestacy by any express or implied direction of the testator. His fiat cannot affect the passing of the intestate property, since this is determined by the statute.

Gifts on condition. One may always dispose of property belonging to the devisee if he makes a gift to the devisee in his will on the express condition that the devisee shall have this property only if he confirms the disposition of his own property made by the terms of the will.¹⁴ Under the decisions it is clear, however, that a gift on condition will not be presumed, nor will the courts employ the doctrine of conditional gifts to work out some general purpose that they wish to further. If the gift is not clearly on an express condition, the devisee will take it absolutely.¹⁵ Undoubtedly the testator may make a gift to his widow or to any heir upon condition that she relinquish her interest in the intestate property; and if the gift is accepted, the intestate interest will be lost. We shall not venture to discuss this method of depriving the widow of her interest upon partial intestacy because where the testator refers to intestate property in this connection, it is usually apparent that he does so under the erroneous belief that he may deprive any heir of intestate property by a mere direction, and the reports do not show a single case involving the interests of

¹² *Pickering v. Stamford*, 3 Ves. 492, 493-94 (1797).

¹³ *Tea v. Millen*, 257 Ill. 624, 101 N. E. 209 (1912); *In re Trimble's Will*, 199 N. Y. 454, 92 N. E. 1073 (1910); 1 TIFFANY, REAL PROPERTY (2d ed. 1920) § 499.

¹⁴ 2 JARMAN, WILLS (4th ed. 1881) 2-4.

¹⁵ *Burdis v. Burdis*, 96 Va. 81, 30 S. E. 462 (1898).

the widow upon partial intestacy in which it was even urged upon the court that the gift was made upon the express condition that the widow relinquish her interest in the intestate property.

The doctrine of equitable election. If the husband provides for his wife in his will, it is held that such provision is presumed to be in addition to dower unless the contrary appears from the will itself, since dower is a property interest of the wife which the husband cannot transfer by deed or will. Subject to this general presumption, however, there grew up the doctrine of equitable election by which "he who accepts the benefit under a deed or will must adopt the whole conditions of the instrument, conforming to all its provisions and relinquishing every right inconsistent with it."¹⁶ If the testator gives to another land in which his wife has dower, and intends the devisee to take the land free from dower, and if he makes provision for his wife in the will which she accepts, then the courts of equity consider that it would be inconsistent for her to accept the gift if she intends to deny her husband's attempt to convey his land free from her dower. Granted that he has no legal right to convey land free from dower, the widow must acquiesce in this disposal of her property interest if she accepts the provision in her husband's will. Equitable election may apply to property not covered by the will, since the testator may be presumed to dispose of another's property, either because he erroneously thinks it is his, or, as in a gift on condition, he intends to make the gift in his will only if the devisee acquiesces in the disposal of his own property in keeping with the testator's direction. The essential difference between a gift on condition and the operation of equitable election is this: in a conditional gift the testator expressly makes the gift upon the condition of the transfer of the devisee's property, while under the doctrine of equitable election he calmly disposes of the beneficiary's property as if it were his own, and this disposition must be approved by the devisee if he accepts the gift in the will.

It may be asked how is one to know under the doctrine of equitable election whether the testator intends by this principle to convey only property covered by the will free from his wife's dower by means of her acceptance of the provision in the will, or whether he intends the doctrine of equitable election to apply to

¹⁶ 1 JARMAN, WILLS 443.

intestate property also, so that he would mean the provision for his wife in his will to be in lieu of her intestate property, as well as of her dower interest in the property covered by the will. We shall see later that the answer to this question has caused great difficulty in the decisions. At this point it is sufficient to note that there is a well recognized and definite presumption in the law, namely, that under the doctrine of equitable election the testator is always presumed to intend to affect property in which he has at least a partial interest, unless it expressly appear that he intends to affect property wholly belonging to others. For instance, Lord Thurlow, in *Read v. Crop*,¹⁷ held that where the testator made provision for his wife in lieu of dower, and by his will devised his lands in four named counties to her for life and to his children upon her decease, he meant by this devise to affect only land in the counties named which he owned himself subject to his wife's dower, and he did not mean to bar his wife under the doctrine of equitable election from taking certain lands which he and his wife owned jointly. This case reveals fully the force of the presumption, since one might well argue that if the testator devised lands in certain named places, he intended to affect not only his own lands but lands held by his wife jointly with him. In cases of partial intestacy, however, this presumption indeed is to be expected in keeping with the testator's usual intent; for usually he intends his will to control only property covered by the will, and the doctrine of equitable election applies to carry out the intent to convey his land free from dower where his wife accepts the provision made for her in the will.

Apart from qualifying circumstances, it seems somewhat extraordinary for a man to purport to convey land which he knows at his death will belong to another, even though he has made a gift to this person in his will. Consequently, in our problem of partial intestacy, we must conclude that the doctrine of equitable election can never cause the widow to lose her interest in the intestate property unless the testator uses such expressions in his will that his intent cannot be limited to the property covered by the will, but must necessarily also include the intestate property. A final difficulty is presented by the statement that the doctrine applies

¹⁷ 1 Bro. C. C. 492 (1785).

on partial intestacy because the testator's intestate property on his death belongs to his heirs, and he has no interest in it. There may seem to be a verbal inconsistency here, but legally the statement is accurate. When one dies leaving any intestate property, such property belongs in law to those who are entitled to it under the statute; it does not belong to the testator in the sense that the testate property belongs to him, since he cannot affect it by his will except in such manner as he might affect property which belonged to someone else and in which he never had an interest.

Unfortunately, the courts do not discuss the question of whether a widow may take intestate property if she elects to take under the will, upon the analysis which we have presented here, namely, that she will always take intestate property in addition to the interest which she takes under the will, unless she loses it either by accepting a conditional gift, or because of the doctrine of equitable election. The courts, however, discuss the question on the basis of "intent." But it is difficult to ascertain the meaning given to this term. It seems clear that it cannot mean that the widow should lose her intestate interest because of an express exclusion in the will, since we have seen that there is no modern authority to support the proposition that the testator by his mere fiat can affect the intestate property at all. Furthermore, it seems equally clear that by intent they are not thinking of a conditional gift, since we have seen that no cases have held that the widow lost her intestate interest because the provision in the will was accepted by her as a conditional gift. By necessary exclusion, therefore, we must conclude that the courts have in mind some application of the doctrine of equitable election, and by the use of "implied intent" they mean that the gift in the will must be considered as given to the widow not only in lieu of her dower interest in the property covered by the will, but also in lieu of her intestate interest. Under our analysis there has been no case which on its facts could have resulted in a decision that the widow lost her intestate interest by accepting a gift under the will. The result of the cases, however, everywhere in the United States and England today, in nearly all of the factual situations which have come before the court thus far, is that the widow cannot take her intestate interest if she accepts a testamentary gift. We shall

therefore review the cases on the basis of the analysis which appears in the decisions.

In most of the cases, the courts talk about equitable election in addition to their general statements that the testator intended to exclude the widow from the intestate property. Where they do so, however, they do not make any distinction between equitable election as it applies to property covered by the will, and the case where the testator is presumed to have indicated the disposition of property not covered by the will. Expressions by which the testator gives specific property, or all his property for life, do not reveal any intent which definitely applies to the property not covered by the will.¹⁸ Since the presumption is that the testator meant to affect only testate property which he could dispose of, rather than intestate property not mentioned, it seems clear that we really have in these cases no implied intent to exclude the widow from the intestate property.

A more difficult question arises where the testator gives his wife a proportional interest in all his estate for life, or in fee, in lieu of dower. In *Appeal of Jackson*¹⁹ the testator gave his wife "in lieu of her dower, if she so elect, the equal one-third part of all my estate both real and personal during her natural life." He then made certain small bequests but made no disposition of the balance of his property. The widow failed to renounce the will, and the court held that she was barred from any share in the intestate property because: "There is no intestacy of any por-

¹⁸ *Walker v. Upson*, 74 Conn. 128, 49 Atl. 994 (1902) (holding that the widow is barred from intestate realty if she takes under the will); *Hatch v. Bassett*, 52 N. Y. 359 (1873) (widow may take intestate personalty if she also takes under the will). *Contra*: *Harmon v. Harmon*, 80 Conn. 44, 66 Atl. 771 (1908); *Matter of Hodgman*, 140 N. Y. 421, 427, 35 N. E. 660, 661 (1893) (where provision was made for the widow in the will "in full satisfaction and recompense of and for her dower or thirds which she may or can in any wise claim or demand," the widow is barred from the intestate property). *Cf.* *Pinckney v. Pinckney*, 1 Bradf. 269 (N. Y. 1849). Where the gift to the widow is not made expressly in lieu of dower, the courts usually say that the widow is impliedly barred from the intestate property. See *Smith v. Perkins*, 148 Ky. 389, 146 S. W. 758 (1912). But this is held not to apply where the widow is the only heir. *Cf.* *Armstrong v. Berreman*, 13 Ind. 422 (1859). For a full collection of the cases and a discussion of them in terms of the analysis given by the courts, see ANN. CAS. 1918B 986. See also ROOD, WILLS (2d ed. 1926) § 757k, where many of the cases are listed according to states.

¹⁹ 126 Pa. 105, 17 Atl. 535 (1889).

tion of the estate as to her. She gets one-third of it all, including that portion of which the testator died intestate.”²⁰ Except where there is an expression giving the widow a proportional interest in the estate, the Pennsylvania courts hold that the widow is not barred from her intestate interest.²¹ *Appeal of Jackson* was decided expressly on the ground that the giving of this proportional interest indicated that the testator intended his wife to have a proportional interest in both his testate and intestate property. The basis of the actual decision seems to be the supposed direction in the will limiting the widow to one-third of the intestate property. We have already noticed that this is impossible, since the testator by his fiat alone cannot affect his intestate property.

If it be urged, however, that *Appeal of Jackson* can be justified under the doctrine of equitable election, we must answer that the words given may surely apply only to testate property, and hence the presumption must be that the testator intends to affect only his own property covered by the will rather than the property which will pass to others on intestacy. This seems more clear when we remember that even if the testator did intend to dispose of his wife's intestate interest by employing the doctrine of equitable election, he could not accomplish very much by so doing. If the gift in the will is less than the widow's dower interest, she may well elect to take against the will, and hence avoid equitable election entirely. Furthermore, in the usual case the testator gives his wife as much or more by the will than she would get under her dower right; and in this case he could not change the share she would have in the intestate property, even though he employed equitable election. For instance, suppose the widow has a statutory dower right of one-third of the personalty and the realty of her husband. If the husband gives her “a one-third interest in all my estate,” it will make no difference whether he thereby intends to include intestate property or not. If he does intend the expression to cover intestate property, then she will get one-third of the testate and one-third of the intestate property, and in return for this she will have to surrender the third of the intestate property that she would get under the law. But the result

²⁰ 126 Pa. at 108-09, 17 Atl. at 535.

²¹ Carman's Appeal, 2 Penny. 332 (Pa. 1882); Reed's Appeal, 82 Pa. 428 (1876).

would be the same if the words were read to apply only to testate property, since she then would get a third interest in the intestate property anyway. Or if the testator gives his wife a larger share of his estate by will than she would get by statutory dower, the doctrine of equitable election can operate only to the extent of her interest as heir in the intestate property.²² Intestate property that does not go to the widow passes to the other heirs, and they are not affected by the fiat of the testator, unless it is accomplished by a gift to them.

Some cases in England and the United States have held that the wife is barred from her interest in intestate property where there is a devise of realty in which the wife had dower, but not where there is a bequest of personalty.²³ This result is based on the theory that equitable election could not apply where the husband gave the wife merely personalty, inasmuch as she had no dower interest in personalty anyway. Such reasoning involves perhaps an overemphasis on the theory that equitable election turns upon compensation rather than forfeiture, and that there could be no occasion for compensation by the widow to a disappointed legatee where the gift to her was of personalty, since she had no dower interest in the personalty, and hence had nothing to give up. But it does not explain the American cases where the wife has a statutory dower interest in the personalty and also inherits it as heir. The decisions seem to be erroneous upon principle, since equitable election requires that if the wife is a devisee, and land in which she has dower is willed to another, then she must give up her dower interest. But the results reached are defensible if we say, as in the previous cases, that the will affects only the personal property it covers, unless by some condition it purports to affect other property; hence the widow can take intestate personalty whether the gift to her in the will is realty or personalty, unless the testator precludes this by a gift on condition or under equitable election. Some courts hold that the

²² In *Pickering v. Stamford*, 3 Ves. 332, 492 (1797), the court held that where the will was intended to include all the property, and there was a lapsed legacy, the wife might take her dower interest in this intestate property even though she elected to take under the will and the gift was made in lieu of dower. In *Lett v. Randall*, 2 De G. F. & J. 388 (1855), the opposite result was reached where the intestacy appeared on the face of the will. These cases were followed in England up to the passage of the Dower Act.

²³ See cases cited *supra* note 18.

giving of a life interest in realty to the widow does not deprive her of her rights of dower or inheritance in the intestate property, and they reach the same result where the widow is the beneficiary under a trust or is given an annuity charged upon realty. This is a good result, but the reasoning erroneously turns on "implied intent," as in gifts of personalty which we have discussed.

If it is true, as we have here suggested, that it is incorrect to say that the testator has an implied intent to exclude the widow from the intestate property, the reader may well ask upon what analogies the courts have so persistently implied this doctrine. We have already noted that a gift in a will is presumed to be in addition to dower. This, of course, is conclusively overcome where the doctrine of equitable election arises with respect to property covered by the will itself. But there are many other instances in which the courts say that they find sufficient evidence in the will to overcome the initial presumption that the gift is in addition to dower. For instance, if it appears that the widow could not have dower in addition to the gift without defeating certain legacies, or without interfering with the plan of the will, or indeed without interfering with the general intent of the will, then the gift must be considered in lieu of dower.²⁴ These are instances of implied intent taken from the whole character of the will, but they bear only upon property covered by the will. Perhaps the crux of the difficulty is that the courts make no serious distinction between such implications of intent with reference to property covered by the will and similar evidences of this intent in cases of partial intestacy. The doctrines of gifts upon conditions and of equitable election are adapted to cover cases of partial intestacy where the beneficiary also has an intestate interest because these doctrines are effective to control property clearly belonging to another, and by analogy may be extended to include intestate property, which on the testator's death will belong to others and cannot be affected by his will. On the other hand, while the implied intent of the testator may well control the question of whether the gift is in lieu of dower or not with reference to the property covered by the will, it can have no effect at all upon intestate property apart from conditional gifts or equitable election.

²⁴ *Panlus v. Besch*, 127 Mo. App. 255, 104 S. W. 1149 (1908).

There are a number of decisions which hold that apart from statute the widow may share in the intestate property although she takes under the will, regardless of the kind of property which she takes by will. This is the force of the dictum by Lord Chancellor Loughborough which we have already noticed.²⁵ Chief Justice Shaw reached the same result in *Nickerson v. Bowley*,²⁶ in which he stated that the intestate property must pass according to the law and that it must be the presumed intent of the testator that it should so pass, in spite of any words of exclusion in his will. A distinguished Illinois judge reached a like result on similar reasoning, although he did not rely upon *Nickerson v. Bowley*, and the case was not cited by counsel.²⁷ The Massachusetts case was followed in Michigan and New Jersey while an Ohio court also reached the same result independently.²⁸ These decisions are fortunate in that they refuse to acknowledge that the "intent" of the testator, either express or implied, as it appears in his will, can have any effect on the intestate property. They are inadequate in that they fail to acknowledge that the testator by a conditional gift or by the correct application of equitable election could deprive his widow of her intestate share. They reach a good result without giving legal reasons that are sufficient to insure a like result in similar cases. Indeed, the decisions by Chief Justice Shaw and Chief Justice Carter were subsequently ignored both in Massachusetts and Illinois.²⁹

²⁵ *Supra* note 12.

²⁶ 8 Metc. 424 (Mass. 1844).

²⁷ Carter, C. J., in *Sutton v. Read*, 176 Ill. 69, 51 N. E. 801 (1898).

²⁸ *State v. Holmes*, 115 Mich. 456, 73 N. W. 548 (1898); *Skellenger v. Skellenger*, 32 N. J. Eq. 659 (1880); *Mathews v. Krisher*, 59 Ohio St. 562, 53 N. E. 52 (1898). The result of these cases was summarized in Rood, *WILLS* (1st ed. 1904) § 1497: "The heirs take by operation of law without any act or will of the intestate. He can deprive them only by exercising the option the law gives him of disposing of it while he lives, or giving it to others by will. . . . It does not matter how clearly the testator or intestate has expressed his wish that it should be otherwise, the intestate property must be distributed according to law. The unfavored children will take their regular shares; and the widow must be given her share of the intestate property, though she has elected to take under the will, which declared that if she took under it she should have no more." In support of this excellent summary, however, Mr. Rood gave no legal analogies, but merely cited the cases discussed above, making no reference to the prevailing view to the contrary in both England and the United States. In the second edition, published in 1926, this statement was omitted and the cases were analyzed in the usual way. See Rood, *WILLS* (2d ed. 1926) § 757k.

²⁹ *Ellis v. Themond*, 259 Ill. 583, 102 N. E. 801 (1913); *Johnson v. Foss*, 132 Mass. 274 (1882).

Statutory provisions. We have seen in the cases of express intent and implied intent already considered that the courts in England and the United States have generally held that the widow may not take intestate property where there is a partial intestacy and she elects to take under the will. This result has been completely secured under the statutes covering election in England and in most of the United States today. Among the provisions of the Dower Act are the following:

"VII. And be it further enacted, That a Widow shall not be entitled to Dower out of any Land of which her Husband shall die wholly or partially intestate when by the Will of her Husband, duly executed for the Devise of Freehold Estates he shall declare his Intention that she shall not be entitled to Dower out of such Land, or out of any of his Land.

"IX. And be it further enacted, That where a Husband shall devise any Land out of which his Widow would be entitled to Dower if the same were not so devised, or any Estate or Interest therein, to or for the Benefit of his Widow, such Widow shall not be entitled to Dower out of or in any Land of her said Husband unless a contrary Intention shall be declared by his Will."³⁰

The seventh section of the Dower Act was obviously intended to deal with election in the case of partial intestacy. The English courts, however, have decided that the widow may not share in the intestate property where she elects to take under the will. The cases of *Rowland v. Cuthbertson*³¹ and *Lacey v. Hill*³² ignored the seventh section and held that the ninth section was conclusive in providing that the surviving spouse who took under the will was precluded from taking "any of his Land" upon partial intestacy. The court does not discuss the seventh section, which expressly provides for the case of partial intestacy. It is obvious that the interpretation of each section must be in the light of the matters with which the section purports to deal, and that the words there used must be interpreted in keeping with the questions at issue. Thus, in section nine, "any Land" is merely a short collective phrase which is intended to be considered with

³⁰ 3 & 4 WM. IV, c. 105, §§ 7, 9 (1834). These sections were impliedly re-enacted in 15 GEO. V, c. 23, § 49 (1925).

³¹ L. R. 8 Eq. 466 (1869).

³² L. R. 19 Eq. 346 (1875).

reference to the several interests listed in the first part of the sentence; that is, the section undertakes to say not only that the widow shall not have dower in her husband's land, as already provided, in case her husband wills it away from her, but also that she shall not have dower in any equitable or legal interest in land or any incorporeal hereditament in which, under the Dower Act, the widow now has a dower interest on intestacy, in case the husband wills it away from her.

Thus the meaning of the last part of section nine might more accurately have been expressed as follows: "Such widow shall not be entitled to dower out of or in any *such land or such other property interests* of her said husband unless a contrary intention shall be declared by his will." Section nine does not expressly refer to partial intestacy at all; it is dealing with testate property and covers the change in law by which the husband can deprive the wife of dower in any inheritable property covered by the will in which she had dower by force of the Act. Section seven, on the other hand, not only expressly provides for the case of partial intestacy, but enacts the very rule for which we have been contending, namely, that the surviving spouse may take intestate property unless this is specifically excluded by the terms of the will. It is significant that this statutory provision, adopted upon the basis of the report of the Royal Commission, definitely enacts this rule,³³ and so by statute reaches the opposite result from that

³³ 1 REPORT OF REAL PROPERTY COMMISSION (1829) 16-19. The interpretation of the seventh and ninth sections advanced in the text seems to be in keeping with the Dower Act as a whole and to give full effect to all the other sections. Except for the first section, which is purely introductory, the other sections of the Dower Act are as follows:

"II. And be it further enacted, That when a Husband shall die, beneficially entitled to any Land for an Interest which shall not entitle his Widow to Dower out of the same at Law, and such Interest whether wholly equitable, or partly legal and partly equitable, shall be an Estate of Inheritance in possession, or equal to an Estate of Inheritance in possession, (other than an Estate in Jointenancy,) then his Widow shall be entitled in Equity to Dower out of the same Land.

"III. And be it further enacted, That when a Husband shall have been entitled to a Right of Entry or Action in any Land, and his Widow would be entitled to Dower out of the same if he had recovered Possession thereof, she shall be entitled to Dower out of the same although her Husband shall not have recovered Possession thereof; provided that such Dower be sued for or obtained within the Period during which such Right of Entry or Action might be enforced.

"IV. And be it further enacted, That no Widow shall be entitled to Dower out

which is now reached by the courts apart from the statute, under the court's interpretation of the Dower Act, and, as we shall see, by statute also in the United States. The courts have followed *Hill v. Lacey* and *Rowland v. Cuthbertson* in using section nine of the Dower Act to exclude the widow from the intestate property. Section seven has been ignored; and this interpretation seems to be implied in the Real Property Act of 1925.³⁴

The statutes in the United States governing election in wills fall into three groups with respect to their provisions dealing with the right to take intestate property where the surviving spouse also elects to take under the will: (a) States which provide that if the widow takes any interest under the will, she is *ipso facto* excluded from a statutory dower interest, unless the testator expressly provides the contrary;³⁵ (b) states which provide that a gift of personalty in a will shall not bar the widow from taking her statutory dower interest, but that a gift of realty will so bar the widow unless the testator expressly provides the contrary;³⁶

of any Land which shall have been absolutely disposed of by her Husband in his Lifetime, or by his Will.

"V. And be it further enacted, That all partial Estate and Interests, and all Charges created by any Disposition or Will of a Husband, and all Debts, Incumbrances, Contracts, and Engagements to which his Land shall be subject or liable, shall be valid and effectual as against the Right of his Widow to Dower.

"VI. And be it further enacted, That a Widow shall not be entitled to Dower out of any Land of her Husband when in the Deed by which such Land was conveyed to him, or by any Deed executed by him, it shall be declared that his Widow shall not be entitled to Dower out of such Land.

"VIII. And be it further enacted, That the Right of a Widow to Dower shall be subject to any Conditions, Restrictions, or Directions which shall be declared by the Will of her Husband, duly executed as aforesaid.

"X. And be it further enacted, That no Gift or Bequest made by any Husband to or for the Benefit of his Widow of or out of his Personal Estate or of or out of any of his Land not liable to Dower, shall defeat or prejudice her Right to Dower, unless a contrary Intention shall be declared by his Will." 3 & 4 Wm. IV, c. 105 (1834).

Yet the English textwriters support the interpretation of the courts. See THEOBALD, WILLS (8th ed. 1927) 889.

³⁴ 15 GEO. V, c. 23, § 49 (1925).

³⁵ See, e.g., ALA. CIV. CODE (1927) §§ 10593-94. See *Hilliard v. Benford's Heirs*, 10 Ala. 977, 990 (1846). Statutes of this type are collected in 1 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) § 494 *et seq.*

³⁶ See, e.g., WIS. STAT. (1927) § 233:13; *Hardy v. Scales*, 54 Wis. 452, 11 N. W. 590 (1882). Statutes of this type are collected in 1 POMEROY, *op. cit. supra* note 35, § 496 *et seq.*

(c) states with statutes which are phrased in terms of common law dower and curtesy, requiring that the surviving spouse shall be barred of dower or curtesy where the gift in the will is not made expressly in addition to dower.³⁷ The statutes listed in our third group, since they turn on common law interpretation of dower and curtesy, do not present any new issues. The second group of statutes has somewhat similarly been considered under the decisions in England and in some of our states, which hold that a gift of personalty shall not bar the legatee from inheriting on partial intestacy. This result seems sound insofar as it gives alleviation in the case of a gift of personalty, but these statutes themselves should not be interpreted to preclude the widow from her interest in the intestate property where she does take a devise of realty under the will, because these statutes in terms refer only to the property covered by the will.

The first group of statutes are the most unqualified. The most comprehensive statute in this group, that of Indiana, provides as follows:

"Whenever any personal or real property be bequeathed to any wife, or any pecuniary or other provision be made for her in the will of her late husband, such wife shall take under such will of her late husband, and she shall receive nothing from her husband's estate by reason of any law of descent of the State of Indiana, unless otherwise expressly provided in said will, unless she make her election to retain the rights in her husband's estate given to her under the laws of the State of Indiana, which election shall be made in the manner hereinafter provided."³⁸

The Indiana courts have held that the words of this statute preclude the surviving spouse from sharing the intestate property where she takes under the will.³⁹ Other states with statutes less comprehensive than this have reached the same result.⁴⁰ It is true that this section says in terms that if the beneficiary takes under the will, "she shall receive nothing from her husband's estate by reason of any law of descent of the State of Indiana."

³⁷ These statutes obtain in only a few states. They do no more than change the common law presumption. See MASS. GEN. LAWS (1921) c. 189, § 8.

³⁸ IND. ANN. STAT. (Burns, 1926) § 3356.

³⁹ *Beshove v. Lyle*, 114 Ind. 8, 16 N. E. 499 (1888).

⁴⁰ See cases and statutes collected in 1 POMEROY, *loc. cit. supra* note 36.

This might seem expressly to cover a share in intestate property upon partial intestacy. In interpreting the words of this section, however, we must note that the word "descent" in the Indiana statutes is used to cover statutory dower, which is an interest existing *inter vivos*, and hence cannot accurately be said to "descend" according to the common law use of this word.⁴¹ The Indiana decisions expressly hold that the word "descent" is not to be considered in its common law significance where it is used in statutes of descent in that state.⁴² In using the word "descent," therefore, the legislature may have had in mind no more than the barring of statutory dower and curtesy in the property covered by the will. It is also true that the statute says the widow taking under the will "shall receive nothing from her husband's estate." This may be regarded as specifically covering intestate property. It seems fair to say, however, that the entire section is dealing with the doctrine of election, and that this doctrine may at least apply only to the property covered by the will. Nowhere in the section is there a specific reference to intestate property; and we should not interpret it as applying to intestate property, just as we have concluded, in the cases not involving the statutes, that no expression with reference to the testator's property in which he excludes his widow from her dower, if she takes under the will, should apply to intestate property unless he makes this gift upon a condition, or specifically undertakes to dispose of her intestate property so as to involve equitable election.

If this is the law apart from statute, then the wording of the statute in turn should involve intestate property specifically if it is to bar the widow from her intestate interest; otherwise we are taking unwarranted liberties with the words of the statute, since we are interpreting them to change the course of descent that is specifically set forth in statutes of equal solemnity and much greater antiquity. Moreover, the decisions in Indiana repeatedly declare that the statutes of descent cover every possible case of inheritance upon intestacy.⁴³ Real property lawyers justly consider that the statutes affecting the inheritance of

⁴¹ See IND. ANN. STAT. (Burns, 1926) § 3337.

⁴² *Rocker v. Mitzer*, 171 Ind. 364, 86 N. E. 403 (1908).

⁴³ *Cloud v. Bruce*, 61 Ind. 171 (1878); *Bruns v. Cope*, 182 Ind. 289, 105 N. E. 471 (1914).

property cannot be uncertain or left in confusion without causing serious injury. Is it fair to say that the legislature would intend to change its own statutes of descent in the case of partial intestacy except by express words, particularly where we find that the words the legislature used can reasonably apply to testate property alone? There is not one of these statutes but can be interpreted to apply only to testate property, and there is not one of them which in express terms applies to intestate property. It is submitted that these unqualified terms should be read as applying to property covered by the will, and not to intestate property, which by statutes equally sanctified passes to the intestate heirs.

B. If the Surviving Spouse Elects to Take Under the Law,
May He or She Also Take the Intestate Property as
Statutory Heir?

If the widow elects to take under the law and to renounce the provision in her husband's will in her favor, she is undoubtedly entitled to the common law or statutory dower interest in all of her husband's property. Modern statutes usually state in terms that the widow is entitled to a certain proportionate interest in all the husband's property, and the significance of this is that it cannot be taken from her by will. Hence if she elects to disregard the will, she takes dower under the law in all his property. At common law no difficulties of construction arose, since the widow was not an heir in any case and since she was entitled to her dower interest in all his property in every case. But as has been mentioned,⁴⁴ the statutory heirship of the surviving spouse has had a significant effect upon the interpretation of her statutory dower at the present time. In some states the statutory dower interest of the widow is precisely the same as her interest as heir, regardless of who the other heirs may be. In these jurisdictions, as at common law, no question of interpretation arises. Where there are no near relatives of the intestate, the widow is in most states entitled to a much larger interest as heir. If she elects to take under the law and against the will, we have the question whether she is entitled only to her statutory dower interest in this intestate property or to her larger interest as statutory heir.

⁴⁴ See *supra* pp. 331-32.

It is submitted that in such cases she should take only her statutory dower interest and not her share as statutory heir. This result is opposed in most states on two grounds: (a) since she is an heir under the law she is entitled to take as heir in intestate property;⁴⁵ (b) in the case where she is the only heir and would be entitled to all the property on intestacy, the property would go to the state if she were allowed only a one-third interest, and this result is undesirable because the statutes say that the property is to escheat to the state only where there are no heirs.⁴⁶ The first argument does not apply, since the widow has elected by her own act to take not as heir, either express or statutory, but under her statutory dower right. She has expressly elected to take against the will of her husband, and property passing by intestacy passes under the law, which is based upon the presumed intent of the deceased. If she elects to take statutory dower, she has expressly taken against the disposition of his property which the law says is in keeping with his presumed intent where it is not covered by his express will. Since such intestate laws are based generally on such presumed intent, is it to be assumed that the testator would intend his widow to take all his property as sole heir, in the case of his intestate property, when it appears that he has given her so little in his actual will that she was dissatisfied with it and insisted upon her statutory allowance?

The second argument is technically unsound, and can best be explained by the abhorrence which the law is said to have for escheat. It is technically unsound because it cannot be said that the surviving spouse is an heir of the testator for this particular case if by electing to take against the will she has expressly said that she intends to take not as heir but in terms of her statutory dower allowance. There can be no doubt of the significance of this difference when we consider the elementary case that if she were merely a statutory heir, the testator could will all his property away from her. Thus, where the statutes say that property shall escheat to the state only where there is not an heir, they mean by "heir" one who takes upon intestacy, not one who has a property interest in the estate of the deceased while he

⁴⁵ *Gamble v. Rooney*, 192 Ind. 454, 134 N. E. 199 (1923); *New England Trust Co. v. Morse*, 243 Mass. 39, 136 N. E. 835 (1923).

⁴⁶ *Cf. Armstrong v. Berreman*, 13 Ind. 422 (1859).

lived, which he could not bar by deed or will. So far as abhorrence of escheat *per se* is concerned, this common law attitude, while fully justified in feudal times, should not influence this case in modern times, when we take much of all estates in inheritance taxes, and by the Real Property Acts of 1925 in England all intestate property goes to the state when the deceased leaves neither widow nor near relatives.⁴⁷ Moreover, under the majority view, we are confronted with this extraordinary result: if the wife elects to take under her husband's will, she is precluded from taking any share in the intestate property; while if she elects to defeat the will and take her statutory dower, she is also permitted to take as intestate heir. The result of this is that in all cases of partial intestacy the advantage lies with the widow who elects to defeat the will and take statutory dower. On the other hand, the position advanced here would permit the widow to take under the will and also to take her share of the intestate property, while if she elects to defeat her husband's expressed intent and take against the will, she is limited to her statutory dower. The testator's express will and his presumed will, as indicated in the intestate law, should be complementary. If the widow elects to take her statutory dower, she should be held to take the interest which is hers by marriage and is unaffected either by her husband's will or by the laws of intestacy.

A few states, however, have reached the conclusion contended for here.⁴⁸ Since the widow's interest as statutory heir is greater

⁴⁷ 15 GEO. V, c. 23, § 46 (1925).

⁴⁸ *In re Noble*, 194 Iowa 733, 190 N. W. 54 (1922); *Harris v. Harris*, 139 Md. 187, 114 Atl. 909 (1921).

Courts of equity have always held that the widow was not bound by her election to take under the will unless she had been duly informed of her rights both under the will and under her dower and had had an adequate knowledge of the character and extent of the estate. See 1 SCRIBNER, DOWER (2d ed. 1864) 484-88. Furthermore, if the title to the property which she took under the will in lieu of dower should later prove defective, she had a right in equity to renounce the provisions of the will and take her dower. See *ibid.* at 494-95. There are statutes in nearly all of the states by which these rights are specifically secured to the widow with rather detailed provisions about the kind of information concerning the estate to which the widow is entitled, as well as the time within which she is allowed to make her decision. Even within the terms of such statutes, however, it remains true that the widow may elect to take under the will with serious injury to herself where she is not allowed to take the intestate property as heir; and it is submitted that she may take against the will with undue advantage to herself if she is

than her statutory dower interest, they hold consistently that the widow shall take only her statutory dower interest in intestate property where she elects to take against the will. The reason given for this, however, seems unsound. It is said that the widow by the terms of the statute is to take a certain interest "in the estate of the intestate." Hence the court concludes that she cannot take as heir where she takes against the will in a case of partial intestacy, since the deceased did not die "intestate."⁴⁹ It is submitted that this is sophistry. The deceased dies testate with respect to the property covered by the will, and he dies intestate with respect to the property not covered by the will. There is nothing in the common law understanding of these terms nor in the fair intent of the legislature to cause any significance to be attached to the use of the term "intestate" in the statute as meaning a case in which the deceased died wholly intestate. Furthermore, this argument proves too much, because we have had to deal with similar statutes where the husband died partially intestate and the widow elected to take under the will. In these cases we have insisted that the widow should take the intestate property unless she is excluded by some method known to the law.

It is not necessary to use this technical argument from the precise words of the statute in order to reach this result. If the widow takes against the will, she should take only her statutory dower interest in the intestate property because that is the interest which the statute gives her whether the testator leaves a will or not, and that is the interest which she has expressly elected to

permitted to take as statutory heir also. For instance, the amount of the intestate property may be small compared with the property covered by the will. In this case the widow's interest, as well as her natural wishes, may cause her to take under the will, although she thereby loses the intestate property.

It is clear, therefore, that the present majority rule is contrary to the testator's usual intent and contrary to the purposes of the intestate laws; it would be superficial, as well as erroneous, to suggest that it is only sentiment which would keep the widow from protecting her reasonable interests under the majority rule at present. In the first place, it is not "sentiment" in a depreciating sense that causes the widow to carry out the will of her husband which represents in large measure the result of his life's work and aspirations, together with what he supposed was the full approval and coöperation of his wife. In the second place, as in the instance given above, the monetary interest of the widow, as well as the requirements of fair dealing, make it necessary for her to take under the will, although she thereby loses her interest as heir in a smaller part of her husband's property.

⁴⁹ *In re Noble*, *supra* note 48.

take. On the other hand, her interest as statutory heir is one which she has expressly relinquished, since she has claimed her statutory dower which is hers apart from her husband's will or intestacy. Under the analysis submitted here, she could have taken the provision in the will and the intestate property as heir, but she elected not to do so. It is not necessary to discuss the philosophy and economics that may be the presumed basis for the intestate laws. Certainly the controlling element is to have the property pass, subject to the interests of the state and the general policy of the law, as nearly as possible in keeping with what would have been the deceased's intent had he made a will. It is submitted that one has to deny this intent characteristic of the intestate laws if he is to say that the widow is still an heir as to intestate property when she has elected to stand upon her rights of statutory dower and has thereby defeated both the express and implied will of the testator.⁵⁰

Conclusion

We have seen that under the prevailing view the widow who elects to take under the will is not permitted to share in the intestate property; while if she elects to defeat the will, she is given both her statutory dower and statutory share of the intestate property. Thus the widow who entertains a reasonable respect for her husband's memory and elects to take under the will, which has probably been drawn only after careful thought by both the husband and wife, is precluded from taking her intestate interest in case of partial intestacy, even though it is evident from the will that the husband tried to do everything he could for his wife. On the other hand, if the widow elects to defeat her husband's will in order, as she hopes, to get more by taking her statutory dower right, she is then allowed to share in the intestate property, although it could hardly be said that her

⁵⁰ Under the analysis submitted above in this article, it would seem clear that the widow should not lose her dower in land conveyed by her husband *inter vivos* subject to dower, where she also takes under the will, unless the will, under equitable election, expressly excludes her from this interest, which is no longer dower in her husband's land, but dower in lands of the alienee. A majority of the cases, however, hold the contrary. See *Westbrook v. Vanderburgh*, 36 Mich. 30 (1877). *Contra*: *Hall v. Smith*, 103 Mo. 289, 15 S. W. 621 (1891). The cases are collected in *ROOD, WILLS* (2d ed. 1926) § 757k.

husband would be anxious for her to share in it, since she had renounced the provision made for her and taken what the law gave her, in defiance of the will. One practical result of this may be that the widow who acts in a civilized manner will receive less than the widow who presses her claims as graspingly as possible.

There are perhaps three explanations for the results which the courts have reached in the situations we have considered: (1) The doctrine of equitable election arose at a time when dower had ceased to be a "favorite of the law" and had become a source of inconvenience to conveyancers and a cause of litigation which the courts of equity were anxious to destroy. For instance, the chancellor had developed his doctrine that equitable estates after the Statute of Uses were not subject to dower, although they were subject to curtesy, and that a lease for a term of years which extended after the husband's death also was not subject to dower. These doctrines have never been defended analytically, nor have their injuries to the widow been justified. As a matter of explanation, therefore, although not of justification, it is not difficult to understand why the courts would be equally anxious to destroy dower in case of partial intestacy where the widow elects to take under the will. (2) A second explanation is the one that has been given in defense of the decision in *Lett v. Randall*,⁵¹ namely, that the testator intended "to buy dower for his heirs." Even as an argument in general explanation, this has no application at the present time when his wife not only has statutory dower, but is a favored heir on intestacy. As we noted at the beginning, doctrines which had some justification under common law curtesy and dower became grotesque in view of the statutory changes which everywhere prevail today. How can it be said that the testator "intends" to bar his wife's intestate interest for his "heirs" when today his wife is the most favored of all his heirs? (3) It may be urged finally that although there is no analytical justification for the courts' decisions in these cases, the courts nevertheless use the analogy of some of the principles recognized in the law in order to reach a result which is desirable; hence they are making law through the application of recognized principles to analogous cases. But under modern conditions, is there any occasion for wishing to reach this result? Is there any reason to

⁵¹ *Lett v. Randall*, 2 De G. F. & J. 388, 391n. (1855); see note 22, *supra*.

believe that the husband intends to bar his wife's interest in the intestate property, if he does not refer specifically to intestate property, when the same presumption under a similar gift in the will would not be made in the case of his son or some other heir?

Today the wife inherits both realty and personalty as a favored heir; the common law analogies by which the husband might want to free his estate from dower for the benefit of his blood relatives no longer apply. And in their usual results the decisions of the courts represent the direct antithesis of what the testator probably intended. Usually, of course, the husband does not expect to die partially intestate, and where he does contemplate any intestacy, he considers that the property will go according to the law to his heirs, of whom his wife is one. Usually the testator has attempted to provide for his wife as fully as his property permitted; it would be a cruel thing for him to contemplate that in case property should come to him and should not be covered by his will, his wife would then have no share in the intestate property, and her loyalty in taking under the will would be the cause of her own injury. Indeed it was his astonishment at the result in these decisions which first caused the writer to inquire into their analytical validity. In the absence of some affirmative evidence to the contrary, therefore, we must refuse to suppose that the courts would venture to make new law in order to reach a bad result.

II

The problems of interpretation where property passes by will or by intestacy affect mainly the interests of creditors. This field of the law is considerably affected by statute, many jurisdictions providing that the dower interest is not free from debts of the husband, as it was at common law. Others, however, by judicial decision alone have held that the dower interest is free from the claims of creditors under the modern statutes since dower was free from creditors at common law.⁵² It would seem

⁵² Often the courts make the result turn on whether the statute gives the widow dower in land of which her husband was "seized during marriage" (as in common law dower), or whether the statutory dower is in land of which the husband died seized. Cases are collected in 1 *TIFFANY, REAL PROPERTY* § 222.

It may be said that since dower is an inchoate estate which the husband cannot transfer by deed, it must be a separate estate unaffected by his debts. This is

that this is a question which should be covered by statute in every case. Perhaps where the legislature has not dealt with it the analogy of the common law must be applied to statutory dower, but it must be conceded that the results in the two cases are very different. Thus at common law the dower interest was only a one-third interest in the land for life. Accordingly the creditors had the great bulk of the estate from which to enforce their claims. Under modern statutes, however, it is a rather serious thing to let the widow take one-third of the realty in fee free from the claims of creditors, regardless of the amount of property involved. To except one-third of a man's total estate, regardless of its value, from the claims of creditors may result at the present time in great injury to his creditors, and at the same time leave the widow decidedly more than reasonable protection for life.

A. Should Statutory Dower and Curtesy Pass as Separate Estates Free From the Claims of Creditors?

At common law, the husband's marriage made him liable for his wife's antenuptial debts, and during coverture she could contract no further debts. Hence his curtesy did not come to him free from any of her debts. But in nearly all jurisdictions now, statutory curtesy passes free from the wife's postnuptial debts.⁵³

probably fair, although if the courts had held that statutory dower passed subject to the husband's debts unless it were expressly provided otherwise, this would not have been an unreasonable interpretation, since dower is not a separate estate in the sense that it may be transferred separately by the owner during the life of the husband. States which provide by statute that the widow shall have dower only in lands of which her husband died seized have in effect destroyed dower as an estate in land and have made it no more than forced heirship. Consequently, the proposal made here is less radical than the present law in many states. The proposal offered is that dower be retained as an inchoate estate in keeping with the common law as a protection to the widow against a voluntary conveyance *inter vivos* by the husband, but that it be subject to his debts, except for the minimum allowance to the widow.

At the present time when the wife can control her property during marriage and when land itself is subject to creditors during the debtor's life and on his death, it is clear that many of the purposes of common law dower are no longer involved. Insofar as dower covers a minimum protection for the widow, it should be free from creditors; but insofar as it represents a fair division of his estate, it should be subject to creditors, just as her inheritance would be subject to creditors if the husband had owned only personality.

⁵³ See e.g., IND. ANN. STAT. (Burns, 1926) § 3345. See also notes 54-55, *infra*.

The surviving husband is thus often favored more than the surviving wife, although surely this was never the intent of the legislature. By historical analogy erroneously applied, the courts reach a result by which the just claims of creditors are defeated in order to give an extraordinary advantage where it is not needed. For example, a statute may provide that the surviving husband shall take a one-third interest in his wife's realty, "subject to her antenuptial debts."⁵⁴ The courts have interpreted this to mean that he takes this property free from her postnuptial debts. From the history of this statutory provision, it does not appear that it was anything more than a statement of the common law that the husband was liable for his wife's antenuptial debts. The statute was passed before the Married Woman's Property Acts, and hence applied to common law conditions.

Apart from special exceptions, the rule everywhere is that one's own property is liable for the debts that he himself contracts. Yet under the prevailing view, a married woman may pile up any amount of debts during marriage, and on her death her husband will take his interest in her realty free from these debts. Consequently, the married woman could be the main purchaser for the family, and in the absence of proved fraud, the inheritance of the husband would be free from the debts in which he had benefited. It seems fair to say that the statute covering curtesy applied to the common law conditions which obtained when it was passed, and that the wife's land should not be inherited free from her own debts, whenever contracted. This disregard of the legitimate interests of creditors in this instance seems to show again the tendency of the courts to construe the modern statutory dower and curtesy in a literal manner without regard to the differences between these modern provisions and common law dower and curtesy. Furthermore, the interpretation of these statutes is usually made purely on a basis of the local law, and without a consideration of the decisions in other states where similar statutes obtain.⁵⁵

There are several instances in which the dower interest is con-

⁵⁴ *Kemph v. Belknap*, 15 Ind. App. 77, 43 N. E. 891 (1895).

⁵⁵ Generally, as in *Rocker v. Mitzer*, *supra* note 42, the states have held that statutory curtesy is free from the wife's postnuptial debts. Cases are collected in 1 TIFFANY, REAL PROPERTY § 243.

strued advantageously to the widow, although the result thus reached may be doubtful where the widow is given a large proportion of the property free from the claims of creditors. This is true where the widow is allowed to have the mortgage debt paid from the personalty, if there is personalty not disposed of, in preference to the sale of the land itself, although she joined in the mortgage deed.⁵⁶ A similar result is reached where the courts treat the widow's dower interest in land mortgaged by a deed signed by both husband and wife as if the widow were mortgaging her separate property for the husband's debt, and hence under the law of suretyship would be entitled to exoneration in full.⁵⁷ The result in both these situations seems sound analytically, and perhaps fortunate where common law dower obtains, but the effect on creditors or on the interests of others in the estate may be unfortunate where the widow receives a large interest free from her husband's debts. In these cases the best solution would seem to be not a change of the rule of law, but a change in the statute, making the provision for the widow subject to creditors.

B. Proposed Statutory Changes

We ventured to suggest at the beginning that we were dealing with a field of law in which considerable statutory changes might well be adopted at this time. First, should we not have reasonable uniformity in all intestate laws in the several states in keeping with our uniform statutes in commercial law? In Canada the several provinces have gone far in adopting their uniform intestate statutes.⁵⁸ Granted that some diversity may be permissible or even desirable, it would certainly result in preventing much confusion and occasional injustice if there was reasonable conformity in the intestate laws, with reference particularly to statutes affecting husband and wife. Secondly, is our present general plan by which the widow receives a *proportion*, usually one-third of the realty and personalty, of the estate under statutory dower or as

⁵⁶ *Hays v. Cretin*, 102 Md. 695, 62 Atl. 1028 (1906). *Contra*: *Gibson v. Crehore*, 5 Pick. 146 (Mass. 1827).

⁵⁷ *Gore v. Townsen*, 105 N. C. 228, 11 S. E. 160 (1890). *Contra*: *Hawley v. Bradford*, 9 Paige 200 (N. Y. 1841).

⁵⁸ See (1925) CANADIAN B. A. REP. appendix B and C.

statutory heir, a good one? Is it helpful to the widow, where her husband leaves \$5,000 in realty, to give her a one-third interest in fee? In practice this necessitates the expense of partition, with the result that a small estate is almost wholly lost to the widow as well as to the other heirs. And if the heirs by agreement avoid a court partition, we still have the vicious circle of the French *legitim*, or forced heirship: on the one hand, no one of the heirs is financially able to take the whole farm or urban property and pay the other heirs in money for their interests; on the other hand, a physical partition of the small farm or urban lot is economically injurious to all the heirs.⁵⁹ Should not the interests of the surviving spouse, as well as the extent to which these interests pass free from the claims of creditors, vary with the *amount* of property involved?⁶⁰

In England and in some American jurisdictions, the property passing to the surviving spouse on intestacy does vary with the amount involved. The immediate proposal here is that this principle be adopted uniformly for intestate property in the several states, and that it also be applied to statutory dower and curtesy. The writer ventures to put these suggestions into definite proposals on the assumption that the form given here is merely for purposes of discussion to illustrate the principles involved.

(1) In the case of intestate property, the surviving spouse should take all the personalty up to \$5,000, and a life interest in the realty up to \$15,000. This should be free from the claims of creditors, up to \$2,000, in the case of the widow only. Apart from this provision, all intestate property should pass under the intestate laws as they are now in each jurisdiction, subject to the claims of creditors.

(2) In case of testate property, the widow should have a compulsory right to four-fifths of the personalty and a life interest in the realty up to \$15,000, free from the claims of creditors up to \$2,000. The surviving husband should have the same interest subject to the claims of creditors.

(3) The first and second provisions should not be allowed in

⁵⁹ See Charmont, *Conflict of Interests Legally Protected in French Civil Law* (1919) 13 ILL. L. REV. 693; MIRAGALA, *COMPARATIVE LEGAL PHILOSOPHY* (Lisle tr. 1921) cc. 21-22.

⁶⁰ See 15 GEO. V, c. 23, 49 (1925); MASS. GEN. LAWS (1921) c. 190.

addition to homestead or minimum allowance laws for the surviving spouse, in states where these now obtain.

(4) In all property above the minimum provided for in the preceding sections, the present dower and curtesy statutes in each jurisdiction, subject to the claims of creditors, should prevail up to \$100,000. In estates over \$100,000, whether realty or personalty, the surviving spouse should have a one-fifth interest, subject to the claims of creditors, in the realty and personalty in all property over \$100,000.

Limited space precludes a discussion of these provisions. We may, however, make some brief references. The provisions follow in part the present English statute by which the surviving spouse takes all the intestate property up to £1,000, and the Massachusetts statute by which the interest of the surviving spouse in intestate property varies with the amount of the estate.⁶¹ The first and second sections are designed to prevent the wasteful division of small estates. For instance, if the widow has no children, she is still entitled to this small property in keeping with her needs. If she has small children, she needs the whole estate to combine with her own enterprise and frugality in supporting her family. It is obvious that merely putting the \$5,000 out at five per cent interest would not support the poorest family; hence to give the property to the widow in strict trust or guardianship for her children would be wasteful and futile and too complicated for legal enforcement in such small estates. In the final case, where the children are grown, their earning power will care for them, while the needs of the widow increase with age. Sections one and two likewise give the widow life interests in realty, and hence prevent the waste of partition in small estates. In addition, they preserve the claims of creditors and freedom of testation for the deceased, even in small estates, except insofar as the clear social interest in the minimum protection of the widow and children demands their partial abrogation. Finally, all the proposals given are intended to be subject to local qualifications. For instance, the monetary divisions of \$2,000, \$5,000 and \$100,000 in the first, second, and fourth sections might vary in different parts of the country, while each state would make many additional provisions, as in the case of a second childless wife.

⁶¹ See statutes cited *supra* note 60.

Conclusion

There have been numerous criticisms of our "grotesque inheritance laws,"⁶² and it has been asserted by high authority that the scheme of inheritance at common law could only be explained on the ground that it was designed as an insult to a system of law which was otherwise justly admired for its reason and its serviceability.⁶³ We have noted that antenuptial agreements in lieu of dower are not adapted to our people, who regard them with distaste. It is important, therefore, to retain the compulsory statutory dower and have it cover nearly all of the property where the estate is very small. On the other hand, we have long experience to prove that large estates involve complicated interests which no general rule of compulsory proportional division can handle. If we mean to preserve statutory dower for large estates, it is the part of caution to make this interest smaller, so that the parties will not be invited to destroy it by agreements, and so that it will be a reasonable provision in case the parties do not make a different agreement. For instance, the equal division of estates under community property is often commended. Yet on the continent of Europe where this doctrine obtains, it is everywhere abrogated by private agreement. Furthermore, in the United States the disposition of large estates by husband and wife is usually not in accord with the statutory provisions.

We may note, finally, that where the estate is small, the interests of the surviving spouse and all the children make it fair that the property pass to him or her. Roughly, where the estate is more than the minimum and still does not involve the complications of

⁶² Ballantine, *Our Grotesque Inheritance Laws* (1913) 25 GREEN BAG 253.

⁶³ "To give the reader an idea of the English common law on this subject [intestate law], it would be necessary to begin with a dictionary of new words; and presently, when they should discover the absurdities, the subtleties, the cruelties, the frauds, with which that system abounds, they would imagine that I had written a satire, and that I wished to insult a nation otherwise so justly renowned for its wisdom.

"It is to be observed, however, that the right of making a will reduces this evil within tolerably narrow limits. It is only the succession to the property of intestates which is obliged to pass through the crooked roads of the common law. Wills in that country may be compared to arbitrary pardons, which correct the severity of penal laws." BENTHAM, *THEORY OF LEGISLATION* (Hildreth ed. 1876) 182-83. See also MILL, *PRINCIPLES OF POLITICAL ECONOMY* (1st Am. ed. 1864) bk. 2, § 3.

great estates, it is likely that the attempted fair division of the property under modern statutory dower or community property will usually approximate the contributions of husband and wife. But where the property is very large, this is much less likely to be true. While the husband usually makes generous provision for his widow, it is unwise to compel this by statutory dower in large estates. Often the husband wants to provide for his family by a living trust or other conveyance *inter vivos*. The provisions suggested would protect the reasonable claims of the surviving spouse in all cases. The additional complications of large estates are more efficiently and more justly handled by the arrangements of the parties in each particular case.

Is it wise for us to continue an arbitrary rule of statutory dower which will be circumvented in the case of large estates?⁶⁴ On the other hand, may we not say that it is sound legislation to recognize the social interest in a minimum of protection for the individual by giving the surviving spouse all or nearly all of the property in small estates? With reference to the proposal that no statutory dower or curtesy be free from the claims of creditors except the minimum allowance for the widow, we have Professor Gray's teaching that the common law scheme of things is based upon the general assumption that he who is free to acquire must also be free to lose.⁶⁵ With the possible exception of the interpretation of estates by the entirety in some of our states at present,⁶⁶ there is perhaps no other instance in the law today where large amounts of property may be kept from sale to pay valid claims with as little social justification as in the case of statutory dower and curtesy. The analogy to the spendthrift trust is not involved.⁶⁷ The legal

⁶⁴ Dean Pound has set forth the limits of effective legal action. Pound, *Limits of Effective Legal Action* (1916) 22 PA. B. A. REP. 221; see BENTHAM, PRINCIPLES OF LEGISLATION (2d ed. 1871) c. 12.

⁶⁵ GRAY, RESTRAINTS ON ALIENATION (2d ed. 1895) preface.

⁶⁶ Note (1924) 37 HARV. L. REV. 616.

⁶⁷ It may be said that the burden is on the creditor to collect his own debts and if he fails to take security where the debtor fails to pay, he has only himself to blame. In support of this position there may be cited the bankruptcy laws, and the doctrine of spendthrift trusts which is generally recognized in the United States and is somewhat covertly enforced in England. But bankruptcy laws are generally justified on the basis of the minimum protection for the individual and the indirect advantage to commerce. And the spendthrift trust is different from the passing of statutory dower free from creditors in at least several significant respects:

basis of common law dower is that it passes free from the husband's debts, since it was the wife's inchoate property while he lived. But where the dower interest is greatly increased by statute, the legislature should also provide that it be subject to the husband's debts, except for a minimum provision for the widow. Otherwise, by historical analogy to common law dower, we reach an indefensible result. The usual basis for allowing property to pass free from the claims of creditors is the reasonable protection of the individual. This cannot be said to govern where the widow takes a third of the realty in fee free from creditors, although the testator may leave several millions in realty subject to unsecured debts, or debts secured by mortgages subject to dower; and the result seems even worse where the husband takes a third of his wife's realty free from her postnuptial debts.

Paul L. Sayre.

HARVARD LAW SCHOOL.

(1) It is created by individuals who have enough money to do such things; it is not imposed generally by statute on all property. (2) Property subject to a spendthrift trust is of course subject to all debts contracted by the trustee that are expressly made binding on the trust property itself. It is only the anticipated income which is free from claims of creditors of the beneficiary. (3) From the point of view of the beneficiary and his creditors, a spendthrift trust involves only income for the beneficiary, which is always subject to creditors if they can find it in the hands of the beneficiary. In contrast, statutory dower in some jurisdictions is imposed on all property by legislation, passes to the widow free from all debts of the husband, and frequently gives the widow an absolute interest in and complete control over realty, and thus is capital, rather than income as in the case of the spendthrift trust.