## Remarriage Statistics

**Marriages by Age and Number of Present Marriage of Bride and of Groom:** Total of 10 Reporting States, 1952.

**Table 9, Page 75, Vital Statistics of the United States, 1952, Vol. I**


<table>
<thead>
<tr>
<th>Age</th>
<th>Marriage of Bride</th>
<th></th>
<th></th>
<th></th>
<th>Marriage of Groom</th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Total</td>
<td>First</td>
<td>Second</td>
<td>Third</td>
<td>More</td>
<td>Total</td>
<td>First</td>
<td>Second</td>
</tr>
<tr>
<td></td>
<td>207,206</td>
<td>157,915</td>
<td>40,227</td>
<td>7,007</td>
<td>1,057</td>
<td>207,206</td>
<td>160,046</td>
<td>38,879</td>
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<tr>
<td>Under 15 years</td>
<td>369</td>
<td>363</td>
<td>-</td>
<td>-</td>
<td>6</td>
<td>1</td>
<td>1</td>
<td>-</td>
</tr>
<tr>
<td>15 years</td>
<td>1,457</td>
<td>1,448</td>
<td>8</td>
<td>-</td>
<td>1</td>
<td>12</td>
<td>12</td>
<td>-</td>
</tr>
<tr>
<td>16 years</td>
<td>7,484</td>
<td>7,400</td>
<td>42</td>
<td>-</td>
<td>42</td>
<td>220</td>
<td>218</td>
<td>-</td>
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<tr>
<td>17 years</td>
<td>12,400</td>
<td>12,221</td>
<td>113</td>
<td>-</td>
<td>66</td>
<td>1,517</td>
<td>1,503</td>
<td>5</td>
</tr>
<tr>
<td>18 years</td>
<td>25,990</td>
<td>25,332</td>
<td>433</td>
<td>5</td>
<td>160</td>
<td>8,074</td>
<td>8,017</td>
<td>17</td>
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<tr>
<td>19 years</td>
<td>21,599</td>
<td>20,877</td>
<td>586</td>
<td>20</td>
<td>116</td>
<td>13,400</td>
<td>13,271</td>
<td>66</td>
</tr>
<tr>
<td>20 years</td>
<td>17,974</td>
<td>17,101</td>
<td>765</td>
<td>26</td>
<td>81</td>
<td>15,164</td>
<td>14,949</td>
<td>136</td>
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<tr>
<td>21 years</td>
<td>19,970</td>
<td>18,459</td>
<td>1,370</td>
<td>43</td>
<td>96</td>
<td>22,502</td>
<td>22,015</td>
<td>376</td>
</tr>
<tr>
<td>22 years</td>
<td>14,142</td>
<td>12,623</td>
<td>1,391</td>
<td>64</td>
<td>59</td>
<td>17,339</td>
<td>16,696</td>
<td>543</td>
</tr>
<tr>
<td>23 years</td>
<td>10,126</td>
<td>8,510</td>
<td>1,478</td>
<td>84</td>
<td>48</td>
<td>14,648</td>
<td>13,768</td>
<td>787</td>
</tr>
<tr>
<td>24 years</td>
<td>8,152</td>
<td>6,479</td>
<td>1,521</td>
<td>110</td>
<td>84</td>
<td>14,041</td>
<td>12,897</td>
<td>1,042</td>
</tr>
<tr>
<td>25 years</td>
<td>6,425</td>
<td>4,780</td>
<td>1,477</td>
<td>117</td>
<td>12</td>
<td>11,594</td>
<td>10,233</td>
<td>1,286</td>
</tr>
<tr>
<td>26 years</td>
<td>5,327</td>
<td>3,673</td>
<td>1,470</td>
<td>162</td>
<td>7</td>
<td>9,452</td>
<td>8,008</td>
<td>1,331</td>
</tr>
<tr>
<td>27 years</td>
<td>4,626</td>
<td>2,799</td>
<td>1,599</td>
<td>193</td>
<td>14</td>
<td>8,103</td>
<td>6,616</td>
<td>1,369</td>
</tr>
<tr>
<td>28 years</td>
<td>4,203</td>
<td>2,458</td>
<td>1,597</td>
<td>194</td>
<td>13</td>
<td>6,998</td>
<td>5,840</td>
<td>1,501</td>
</tr>
<tr>
<td>29 years</td>
<td>3,498</td>
<td>1,852</td>
<td>1,380</td>
<td>224</td>
<td>15</td>
<td>5,797</td>
<td>4,227</td>
<td>1,405</td>
</tr>
</tbody>
</table>
## APPENDIX A—Continued

### Marriage of Bride

<table>
<thead>
<tr>
<th>Age</th>
<th>Total</th>
<th>First</th>
<th>Second</th>
<th>Third or more</th>
<th>Not Stated</th>
</tr>
</thead>
<tbody>
<tr>
<td>30 years</td>
<td>3,337</td>
<td>2,873</td>
<td>1,601</td>
<td>1,289</td>
<td>319</td>
</tr>
<tr>
<td>31 years</td>
<td>4,798</td>
<td>4,098</td>
<td>2,571</td>
<td>2,224</td>
<td>374</td>
</tr>
<tr>
<td>32 years</td>
<td>5,363</td>
<td>4,603</td>
<td>3,053</td>
<td>2,571</td>
<td>432</td>
</tr>
<tr>
<td>33 years</td>
<td>4,798</td>
<td>4,098</td>
<td>2,571</td>
<td>2,224</td>
<td>374</td>
</tr>
<tr>
<td>34 years</td>
<td>5,363</td>
<td>4,603</td>
<td>3,053</td>
<td>2,571</td>
<td>432</td>
</tr>
<tr>
<td>35 years</td>
<td>5,000</td>
<td>4,282</td>
<td>2,818</td>
<td>2,414</td>
<td>586</td>
</tr>
<tr>
<td>36 years</td>
<td>4,798</td>
<td>4,098</td>
<td>2,571</td>
<td>2,224</td>
<td>374</td>
</tr>
<tr>
<td>37 years</td>
<td>5,000</td>
<td>4,282</td>
<td>2,818</td>
<td>2,414</td>
<td>586</td>
</tr>
<tr>
<td>38 years</td>
<td>4,798</td>
<td>4,098</td>
<td>2,571</td>
<td>2,224</td>
<td>374</td>
</tr>
<tr>
<td>39 years</td>
<td>5,000</td>
<td>4,282</td>
<td>2,818</td>
<td>2,414</td>
<td>586</td>
</tr>
<tr>
<td>40 years</td>
<td>4,798</td>
<td>4,098</td>
<td>2,571</td>
<td>2,224</td>
<td>374</td>
</tr>
<tr>
<td>41 years</td>
<td>5,000</td>
<td>4,282</td>
<td>2,818</td>
<td>2,414</td>
<td>586</td>
</tr>
<tr>
<td>42 years</td>
<td>4,798</td>
<td>4,098</td>
<td>2,571</td>
<td>2,224</td>
<td>374</td>
</tr>
<tr>
<td>43 years</td>
<td>5,000</td>
<td>4,282</td>
<td>2,818</td>
<td>2,414</td>
<td>586</td>
</tr>
<tr>
<td>44 years</td>
<td>4,798</td>
<td>4,098</td>
<td>2,571</td>
<td>2,224</td>
<td>374</td>
</tr>
<tr>
<td>45-49 years</td>
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<td>2,818</td>
<td>2,414</td>
<td>586</td>
</tr>
<tr>
<td>50-54 years</td>
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<td>4,282</td>
<td>2,818</td>
<td>2,414</td>
<td>586</td>
</tr>
<tr>
<td>55-59 years</td>
<td>4,798</td>
<td>4,098</td>
<td>2,571</td>
<td>2,224</td>
<td>374</td>
</tr>
<tr>
<td>60-64 years</td>
<td>5,000</td>
<td>4,282</td>
<td>2,818</td>
<td>2,414</td>
<td>586</td>
</tr>
<tr>
<td>65-69 years</td>
<td>4,798</td>
<td>4,098</td>
<td>2,571</td>
<td>2,224</td>
<td>374</td>
</tr>
<tr>
<td>70-74 years</td>
<td>5,000</td>
<td>4,282</td>
<td>2,818</td>
<td>2,414</td>
<td>586</td>
</tr>
<tr>
<td>75 years and over</td>
<td>5,000</td>
<td>4,282</td>
<td>2,818</td>
<td>2,414</td>
<td>586</td>
</tr>
<tr>
<td>Not stated</td>
<td>224</td>
<td>97</td>
<td>105</td>
<td>17</td>
<td>14</td>
</tr>
</tbody>
</table>

*Note: States included: Alabama, Delaware, Iowa, Maine, Michigan, New Hampshire, Ohio, Oregon, Tennessee, and Vermont.*
APPENDIX B

Miscellaneous Statutes

PART 1. THE MODEL PROBATE CODE (1946).

"§33. Gifts in fraud of marital rights.

"(a) Election to treat as devise. Any gift made by a person, whether dying testate or intestate, in fraud of the marital rights of his surviving spouse to share in his estate, shall, at the election of the surviving spouse, be treated as a testamentary disposition and may be recovered from the donee and persons taking from him without adequate consideration and applied to the payment of the spouse's share, as in case of his election to take against the will.

"(b) When gift deemed fraudulent. Any gift made by a married person within two years of the time of his death is deemed to be in fraud of the marital rights of his surviving spouse, unless shown to the contrary.

"Comment. This section makes no attempt to define the expression "in fraud of marital rights." It is believed that only by judicial decision can that be done. Among the situations which courts would have to classify in this connection is that where a married person sets up an inter vivos trust reserving to himself a life estate and a power to revoke the trust. It has sometimes been held that such a transfer could be set aside at the instance of the surviving spouse, particularly where it deprived the settlor of most of his estate. It is sometimes said that the transfer is set aside because it is illusory. See 44 Mich. L. Rev. 151 (1945). But it is believed to be more satisfactory to say that it is fraudulent as to the share of the surviving spouse. A similar problem arises where a married person sets up a so-called savings bank trust. It is believed that no statute could adequately indicate all cases which might properly be regarded as actually or constructively fraudulent as to the share of the surviving spouse.

"Subsection (b) lays down an aid in determining whether a gift is fraudulent where the proof is slight. Under this section it is possible to show that a gift made
within two years of the death of a married person is not fraudulent, but the burden of proof is upon the person asserting the absence of fraud."

PART 2. REPORT OF THE COMMISSION ON REVISION OF THE LAWS OF NORTH CAROLINA RELATING TO ESTATES (1939).

"SECTION 5. Wife's Power to Set Aside Transfers in Fraud of Her Rights. —

"(a) From the effective date of this act, any gratuitous transfer of property, whether real or personal, by a husband shall be deemed in fraud of his wife, unless she join therein or assent thereto in writing, if:

"(1) the husband retain a power to revoke the transfer, whether exercisable by him alone or in conjunction with any other person, or (2) the transfer be in contemplation of the husband's death and take place within one year prior thereto.

"(b) A gratuitous transfer by the husband in which the wife did not join or to which she did not assent in writing shall, if made within one year prior to his death, be presumed to be in contemplation of death, but such presumption may be rebutted.

"Comment. Paragraph (a): The value to the widow of the power to dissent is jeopardized if her husband retains power to strip himself of his property for the purpose of defeating her claim. Under existing law, a husband may place all or the greater part of his property in a revocable trust, and it will not be included in determining the widow's share on dissent despite the fact that at all times the husband will have retained substantial control over the property and though his estate is obliged to pay estate taxes upon it. Moreover, a husband is now free to give away all his personal property on his deathbed, and his widow will have no claim to any share in it. The above section is designed to protect the widow against such abuses of her husband's power by enabling her to reach a gratuitous transfer, made without her joinder or written assent, if the transfer were revocable or were in contemplation of the husband's death and within one year thereof, the two types of situations in which the normal instinct to retain title to one's property does not operate to protect the widow. This does not give the widow as much protection against
gratuitous transfer as is accorded her husband's creditors, but it is submitted that she is certainly entitled to no less.

"Paragraph (b): In view of the difficulties of proving that a transfer is in contemplation of death, the widow is assisted by the creation of a rebuttable presumption to that effect if the transfer is made within a year of the husband's death. Under the preceding paragraph, a widow cannot reach transfers made more than a year prior to the husband's death, even though they were made in contemplation of death, unless the husband has retained a power of revocation.

"(c) A widow may institute an action against any transferee of property transferred by the husband in fraud of his wife to have the property so transferred adjudged assets of the husband's estate, for the purpose, if she has dissented from the husband's will, of increasing her share upon dissent or, if the husband died intestate, of increasing her intestate share. If, in such action, it be adjudged that the property was transferred in fraud of the wife, the court shall order that so much of the property as may be necessary adequately to secure the widow's claim, be, in the case of real property, impressed with a lien in her favor to be satisfied out of such property when her claim shall have been ascertained upon the settlement of the estate, or, in the case of personal property, be delivered to the personal representative to hold for a like purpose, or, in the case of either real or personal property, that the defendant give bond in an amount sufficient to secure payment of the widow's claim. The value of the property at the time of the husband's death shall be ascertained upon a proceeding for the settlement of the husband's estate to which the transferee shall be a party, and the amount so ascertained shall be added to the husband's estate for the purpose of computing the widow's claim, which, if the husband died intestate, shall be computed in the same manner provided in Sections 1 and 2 of this Article for the determination of the widow's claim upon dissent. The transferred property shall be applied to the satisfaction of the widow's claim in the proportion that it bears to the total net value of the husband's estate, including therein the value of all property adjudged to have been transferred in fraud of the wife, but excluding therefrom the value of such property as may have been received by the widow upon the husband's
death. If, for any reason, the widow cannot obtain satisfaction for that portion of her claim attributable to such transfer, no recourse therefor may be had by her against other property in the husband’s estate or which had been the subject of another transfer by him.

"Comment. This paragraph provides an action, in the nature of an action for a declaratory judgment, to be brought by the widow against the husband’s transferee to determine whether the property transferred falls within the terms of paragraph (a) of this section and, if so, to declare the transferred property assets of the husband’s estate for the purpose of increasing her share either on dissent or in case of the husband’s intestacy (a point which will be discussed below). It will not be possible in this action to determine the extent of the transferee’s liability. A transferee should not be held liable to the widow if she has received upon the death of her husband sufficient property so that, even though the transferred property is added to his estate, she will still have received her intestate share therein. Again, if the widow has received some property upon her husband’s death, even though it may not be sufficient to satisfy her intestate share, it is still fair that the transferee should be credited with a proportionate share of that which the widow has received. These are matters which involve the beneficiaries of an estate passing by will or intestacy as well as the widow and the transferee, and the appropriate time for their determination is the settlement of the estate. Accordingly, it is provided above that, upon rendition of a judgment for the widow in the action brought by her, the court shall give supplemental relief in the form of orders assuring the preservation of the transferred property, or the giving of security in lieu thereof, to protect the widow’s interest until the extent of her claim can be determined upon the settlement.

“The determination of the widow’s claim involves the same computations provided for the case of a dissent where no transfer is involved, except that the husband’s estate is increased by the value of the property transferred, thus automatically increasing the widow’s share. In order to apportion the credit for the property for which the widow must account fairly as between the beneficiaries of the estate and the transferee, it is provided that the property received by the latter shall be
liable only in the proportion it bears to the net estate, including the transferred property and excluding the property received by the widow. Thus, suppose a husband dies testate, leaving an estate of $100,000 but making no provision in his will for his wife. Before his death he had made a transfer in fraud of her of $60,000. She obtains $40,000 proceeds of life insurance payable to her. For the purpose of determining her claim on dissent, the estate is valued at the sum of these items, or $200,000. Her share, assuming there be no children, would be one-half that sum, or $100,000, of which she has received $40,000, leaving her claim on dissent for $60,000. For this claim $160,000 is available, $100,000 in the estate and $60,000 in transferred property. The estate is liable, therefore, for \( \frac{\%}{3} \) of that claim or $37,500, and the transferred property for \( \frac{\%}{3} \), or $22,500.

"Since there is a risk that transferred property may have been dissipated or sharply diminished in value between the time of the transfer and the wife's action, and since the transferee, who is subjected to personal liability by the succeeding paragraph under certain circumstances, may not be able to respond in damages, it would subject the estate to a considerable risk of loss if it were liable to satisfy any share of the transferee's liability. Provision has, accordingly, been made against this contingency.

"As above noted, this action is available to the widow even though the husband dies intestate. There is just as great a risk in that case that a widow may be left penniless by a hostile husband who strips himself of his property by antemortem transfers. Her right to share in his intestate estate is valueless if that estate contains little or no property. The provisions governing the widow's share on dissent are equally adaptable to meet this situation, so the grant of power to the widow to reach transferred property in this situation presents no procedural difficulty.

"(d) If it be adjudged in any action brought under this section that the transfer was made in fraud of the wife but the transferee shall himself have transferred the property or, the property being personalty, it shall have been received and retained by the transferee in, or removed by him to, another jurisdiction and he shall refuse or fail to deliver over such property to the personal representative or give adequate bond therefor, as the court may have ordered, the court shall forthwith adjudge him personally liable
for such portion of the widow's claim as may be found in the proceeding for the settlement of the estate to be attributable to the property transferred to him. The widow may join in any such action, or institute a separate action against any subsequent transferee unless he or a previous transferee shall have been a bona fide purchaser for value of the property. To the extent of the property received by him, any such subsequent transferee shall be subject to the same liability as the original transferee. If the husband, the original transferee, or any subsequent transferee had transferred the property to two or more transferees in such manner as to render the transfers substantially one transaction, the widow, or a defendant transferee, may join the transferees participating in such transaction as parties defendant in the action, but the liability of each shall be limited to the extent of the property received by him.

"Comment. Although it is anticipated that the widow's claim, established as provided in the preceding paragraph, would normally be satisfied out of the property transferred to the defendant, precaution must be taken to protect her against subsequent transfers by the husband's transferee and the risk, in the case of personal property, that the property will be outside the state. Accordingly provision is made herein for the imposition of a personal liability against the defendant in such event by a judgment in the nature of a declaratory judgment fixing the fact of his liability but leaving the amount thereof to be determined subsequently in the settlement of the estate. Provision is also made to reach property in the hands of a subsequent transferee and to impose personal liability upon him where such might be done against the original transferee. However, a transfer for consideration cuts off the right of the widow to proceed against the transferee paying consideration or any subsequent transferee from him. If the transfer is a genuine sale or incumbrance for consideration, the transferee is protected even though he may have had notice of the character of the original transaction, since no requirement that a subsequent transferee must take without notice is imposed.

"The power to reach subsequent transferees will not materially affect the stability of titles. In the first place, the number of transactions which could possibly be affected is closely restricted by the terms of paragraph (a)
of this section. Secondly, any genuine purchaser is protected by the fact that he has given consideration. Finally, the succeeding paragraph provides a limitation on the time in which the widow may bring an action which will remove any remaining uncertainty within a period not longer than that usually absorbed in the administration of an estate. Certainly the power granted under this section introduces an element of uncertainty in titles which is insignificant in comparison to that arising from the power of the husband's creditors to reach property conveyed in fraud of their claims.

"Provision is also made in this section to enable the widow to join a subsequent transferee in an action against the original transferee and, where transfers had been made to two or more transferees in a single transaction to join all such transferees. Such joinder does not, however, operate to increase the liability of any party so joined."

"(c) No action shall be instituted by the widow under this section after the final settlement of the estate or after two years from the date of the husband's death, and any such action shall abate upon her death. A defendant may be restrained by injunction from transferring the property during the course of the action, and, where justice shall require, the personal representative or some other person may be appointed receiver of the property.

"Comment. This paragraph establishes special limitations on the bringing of the action and authorizes the court to protect the widow's interest in the property by injunction or, when necessary, by the appointment of a receiver.

"Section 6. Waiver by Wife in Lifetime of Husband. — During the lifetime of the husband and whether before or after marriage, a woman may waive the right to dissent from her husband's will or to bring an action under Section 5 of this Article to reach property which has been transferred by him. Any such waiver, whether made before or after marriage, shall be by an instrument in writing, duly approved as is required for conveyances of land, and upon her separate examination in the manner provided by law for contracts between husband and wife affecting any part of the real estate of the wife.

"Comment. This section authorizes a means whereby a husband may safeguard his testamentary and anti-
mortem transfers from the exercise of the widow's power to dissent from his will or to reach property transferred by him which would otherwise be subject to Section 5 hereof. Such waivers would normally, although not necessarily, be made by wives in connection with settlements of property upon them. Certain formalities are prescribed in this section for the protection of the widow. Elsewhere provision is made to debar the widow from exercising the power to dissent or to reach transferred property where she has feloniously and intentionally killed her husband or where she has been guilty of marital misconduct."

PART 3. INTERNAL REVENUE CODE OF 1954 — (ESTATE TAX PROVISIONS).

"Sec. 2035. Transactions in Contemplation of Death.

(a) General Rule. — The value of the gross estate shall include the value of all property . . . to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, in contemplation of his death.

(b) Application of General Rule. — If the decedent within a period of 3 years ending with the date of his death (except in case of a bona fide sale for an adequate and full consideration in money or money's worth) transferred an interest in property, relinquished a power, or exercised or released a general power of appointment, such transfer, relinquishment, exercise, or release shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this section and sections 2038 and 2041 (relating to revocable transfers and powers of appointment); but no such transfer, relinquishment, exercise, or release made before such 3-year period shall be treated as having been made in contemplation of death.

"Sec. 2036. Transfers with Retained Life Estate.

(a) General Rule. — The value of the gross estate shall include the value of all property . . . to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in
money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death —

(1) the possession or enjoyment of, or the right to the income from the property, or

(2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

"Sec. 2037. TRANSFERS TAKING EFFECT AT DEATH.

(a) General Rule.—The value of the gross estate shall include the value of all property . . . to the extent of any interest therein of which the decedent has . . . made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, if —

(1) possession or enjoyment of the property can, through ownership of such interest, be obtained only by surviving the decedent, and

(2) the decedent has retained a reversionary interest in the property . . . , and the value of such reversionary interest immediately before the death of the decedent exceeds 5 per cent of the value of such property.

(b) Special Rules.—For purposes of this section, the term "reversionary interest" includes a possibility that property transferred by the decedent —

(1) may return to him or his estate, or

(2) may be subject to a power of disposition by him,

but such term does not include a possibility that the income alone from such property may return to him or become subject to a power of disposition by him. The value of a reversionary interest immediately before the death of the decedent shall be determined (without regard to the fact of the decedent's death) by usual methods of valuation, including the use of tables of mortality and actuarial principles, under regulations prescribed by the Secretary or his delegate. In determining the value of a
possibility that property may be subject to a power of disposition by the decedent, such possibility shall be valued as if it were a possibility that such property may return to the decedent or his estate. Notwithstanding the foregoing, an interest so transferred shall not be included in the decedent's gross estate under this section if possession or enjoyment of the property could have been obtained by any beneficiary during the decedent's life through the exercise of a general power of appointment (as defined in section 2041) which in fact was exercisable immediately before the decedent's death.

"Sec. 2038. Revocable Transfers.

(a) In General.—The value of the gross estate shall include the value of all property. . . . To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death.

(b) Date of Existence of Power.—For purposes of this section, the power to alter, amend, revoke, or terminate shall be considered to exist on the date of the decedent's death even though the exercise of the power is subject to a precedent giving of notice or even though the alteration, amendment, revocation, or termination takes effect only on the expiration of a stated period after the exercise of the power, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised. In such cases proper adjustment shall be made representing the interests which would have been excluded from the power if the decedent had lived, and for such purpose, if the notice has not been given or the power has not been exercised on or before the date of his death, such notice shall be considered
to have been given, or the power exercised, on the date of his death.

"Sec. 2039. Annuities.

(a) General. — The gross estate shall include the value of an annuity or other payment receivable by any beneficiary by reason of surviving the decedent under any form of contract or agreement entered into after March 3, 1931 (other than as insurance under policies on the life of the decedent), if, under such contract or agreement, an annuity or other payment was payable to the decedent, or the decedent possessed the right to receive such annuity or payment, either alone or in conjunction with another for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death.

(b) Amount Includible. — Subsection (a) shall apply to only such part of the value of the annuity or other payment receivable under such contract or agreement as is proportionate to that part of the purchase price therefor contributed by the decedent. . . ."

"Sec. 2040. Joint Interests.

The value of the gross estate shall include the value of all property . . . to the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: Provided, That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person:
Provided further, That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants.

"Sec. 2041. Powers of Appointment.

(a) In General. — The value of the gross estate shall include the value of all property (except real property situated outside of the United States) —

(2) Powers created after October 21, 1942. — To the extent of any property with respect to which the decedent has at the time of his death a general power of appointment created after October 21, 1942, or with respect to which the decedent has at any time exercised or released such a power of appointment by a disposition which is of such nature that if it were a transfer of property owned by the decedent, such property would be includible in the decedent's gross estate under sections 2035 to 2038, inclusive. A disclaimer or renunciation of such a power of appointment shall not be deemed a release of such power. For purposes of this paragraph (2), the power of appointment shall be considered to exist on the date of the decedent's death even though the exercise of the power is subject to a precedent giving of notice or even though the exercise of the power takes effect only on the expiration of a stated period after its exercise, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised.

(3) Creation of another power in certain cases. — To the extent of any property with respect to which the decedent —

(A) by will, or

(B) by a disposition which is of such nature that if it were a transfer of property owned by the decedent such property would be includible in the decedent's gross estate under section 2035, 2036, or 2037,
exercises a power of appointment created after October 21, 1942, by creating another power of appointment which under the applicable local law can be validly exercised so as to postpone the vesting of any estate or interest in such property, or suspend the absolute ownership or power of alienation of such property, for a period ascertainable without regard to the date of the creation of the first power.

(b) Definitions. — For purposes of subsection (a) —

1) General power of appointment. — The term "general power of appointment" means a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate; except that —

(A) A power to consume, invade, or appropriate property for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent shall not be deemed a general power of appointment.

(C) In the case of a power of appointment created after October 21, 1942, which is exercisable by the decedent only in conjunction with another person —

(i) If the power is not exercisable by the decedent except in conjunction with the creator of the power — such power shall not be deemed a general power of appointment.

(ii) If the power is not exercisable by the decedent except in conjunction with a person having a substantial interest in the property, subject to the power, which is adverse to exercise of the power in favor of the decedent — such power shall not be deemed a general power of appointment. For the purposes of this clause a person who, after the death of the decedent, may be possessed of a power of appointment (with respect to the property subject to the decedent’s power) which he may exercise in his own favor shall be deemed as having an interest in the property and such interest shall be deemed adverse to such exercise of the decedent’s power.

(iii) If (after the application of clauses (i) and (ii)) the power is a general power of appointment and is exercisable in favor of such other person — such power shall be deemed a general power of appointment only in respect of a fractional part of the property subject to such power,
such part to be determined by dividing the value of such property by the number of such persons (including the decedent) in favor of whom such power is exercisable.

For purposes of clauses (ii) and (iii), a power shall be deemed to be exercisable in favor of a person if it is exercisable in favor of such person, his estate, his creditors, or the creditors of his estate.

(2) Lapse of power. — The lapse of a power of appointment . . . during the life of the individual possessing the power shall be considered a release of such power. The preceding sentence shall apply with respect to the lapse of powers during any calendar year only to the extent that the property, which could have been appointed by exercise of such lapsed powers, exceeded in value, at the time of such lapse, the greater of the following amounts:

(A) $5,000, or

(B) 5 per cent of the aggregate value, at the time of such lapse, of the assets out of which, or the proceeds of which, the exercise of the lapsed powers could have been satisfied.

"Sec. 2042. PROCEEDS OF LIFE INSURANCE.

The value of the gross estate shall include the value of all property —

(1) Receivable by the executor. — To the extent of the amount receivable by the executor as insurance under policies on the life of the decedent.

(2) Receivable by other beneficiaries. — To the extent of the amount receivable by all other beneficiaries as insurance under policies on the life of the decedent with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. For purposes of the preceding sentence, the term ‘incident of ownership’ includes a reversionary interest (whether arising by the express terms of the policy or other instrument or by operation of law) only if the value of such reversionary interest exceeded 5 per cent of the value of the policy immediately before the death of the decedent. As used in this paragraph, the term “re-
versionary interest" includes a possibility that the policy, or the proceeds of the policy, may return to the decedent or his estate, or may be subject to a power of disposition by him. The value of a reversionary interest at any time shall be determined (without regard to the fact of the decedent's death) by usual methods of valuation, including the use of tables of mortality and actuarial principles, pursuant to regulations prescribed by the Secretary or his delegate. In determining the value of a possibility that the policy or proceeds thereof may be subject to a power of disposition by the decedent, such possibility shall be valued as if it were a possibility that such policy or proceeds may return to the decedent or his estate.

"Sec. 2043. Transfers for Insufficient Consideration.

(a) In General.—If any one of the transfers, trusts, interests, rights, or powers enumerated and described in sections 2035 to 2038, inclusive, and section 2041 is made, created, exercised, or relinquished for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration in money or money's worth, there shall be included in the gross estate only the excess of the fair market value at the time of death of the property otherwise to be included on account of such transaction, over the value of the consideration received therefor by the decedent."

PART 4. THE COMPULSORY PORTION: GERMANY.

(taken from Wang, The German Civil Code, (1907))

"2303. If a descendant of a testator is excluded from succession by disposition mortis causa, he may demand his compulsory portion from the heir. The compulsory portion is equal to one-half of the statutory portion.

"The same right belongs to the parents and spouse of the testator, if they have been excluded from succession by a disposition mortis causa.

"Note to S. 2306. A compulsory beneficiary has a right to his compulsory portion free from all charges. Where his share in the inheritance which is subject to a limitation or charge is greater than his compulsory portion, he may either claim his compulsory
portion free from all charges, or accept his share in the inheritance subject to the limitation or charge.

"2315. A compulsory beneficiary shall deduct from his compulsory portion any benefit which has been conferred on him by the testator by a juristic act *inter vivos*, with the direction that such benefit shall be deducted from his compulsory portion. The value of such benefit is added to the estate in calculating the value of the compulsory portion. The value of such benefit is determined as at the time at which the benefit was conferred.

"Note to s. 2315. Such direction may be either express or implied. As the testator was under obligation to furnish an ‘advancement’ to his child, he could not have directed the advancement to be deducted from the child’s compulsory portion. 1624.

"2325. When a testator has made a gift to a third party (a), a compulsory beneficiary may claim, by way of augmentation of his compulsory portion, (b), the amount whereby the compulsory portion would be increased if the object given were added to the estate.

"A consumable thing is estimated at the value which it had at the date of the gift. An object other than a consumable thing is established at the value which it had at the time of the accrual of the inheritance; if its value at that time is greater than its value at the date of the gift, only the latter is taken into consideration.

"The gift is not taken into consideration if, at the time of the accrual of the inheritance, ten years have elapsed since delivery of the object given; if the gift was made by the testator to his surviving spouse, the period does not begin to run until the dissolution of the marriage.

"Notes: (a) That is, to a person who is not a compulsory beneficiary. For a gift made to a ‘compulsory beneficiary,’ see 2327. (b) Ergänzung des Pflichteils.

"2326. The compulsory beneficiary may claim an augmentation of his compulsory portion even if one-half of his statutory portion has been given to him. If more than one-half of his statutory portion has been given to him, such claim is barred to the extent of the excess in value which he has received.

"2327. Where the compulsory beneficiary has himself received
a gift from the testator, the value of the gift shall be added to the estate in the same manner as if it were made to a third party (c), and shall at the same time be deducted from the compulsory beneficiary's augmentation of his compulsory portion. The value of a gift to be deducted in the manner provided for by 2315, shall be deducted from the total value of the compulsory portion and of any augmentation of such portion.

"Where the compulsory beneficiary is a descendant of the testator, the provision of 2051, par. 1, applies mutatis mutandis (d).

"Notes to 2327: (c) 'Third Party' here means 'a person who is not a compulsory beneficiary.'

(d) The period of ten years specified in 2325, par. 3, does not apply to this case.

"2328. If an heir is himself a compulsory beneficiary, he may refuse augmentation of another compulsory beneficiary's portion to the extent that he is not deprived of his own compulsory portion, including what would accrue to him by way of augmentation of his own compulsory portion.

"2329. In so far as an heir is not liable for augmentation of a compulsory portion, the compulsory beneficiary may, under the provisions relating to the return of unjustified benefits (e), require any donee of the testator to return the gift for the purpose of making up the deficiency. If the compulsory beneficiary is sole heir, he has the same right.

The donee may refuse to return the gift by payment of its value. Among several donees a prior donee is liable only in so far as a subsequent donee is not liable.

(e) See 818-822.

"2330. The provisions of 2325 to 2329 do not apply to gifts which are made in compliance with a moral duty or the rules of social propriety (f)

(f) See notes (m) and (n) to 534

(m) E.g., a gift made to a poor relative by blood

(n) E.g., a reward for voluntary service

"2331. A gift made out of any common property under the regime of general community of goods, community of income and profits, or community of moveables, is deemed to have been made by both spouses in equal shares. If, however, the gift was made to a person who is a descendant of one only of the spouses, or of
whom one only of the spouses is a descendant, or if one of the spouses has to make compensation to the common property for the value of the gift, it is deemed to have been made by such spouse alone.

These provisions apply *mutatis mutandis* to a gift made out of any common property under the regime of continued community of goods (g)

(g) Cf. 1483.

“2332. The claim to compulsory portion is barred by prescription in three years from the time at which the compulsory beneficiary has knowledge of the accrual of the inheritance and of any disposition whereby his compulsory portion is injured; in the absence of such knowledge, in thirty years from the accrual of the inheritance.

Any claim which a compulsory beneficiary has against a donee under 2329 is barred by prescription in three years from the accrual of the inheritance.

The prescription is not suspended by the fact that such claims may not be enforced until after a disclaimer of the inheritance or legacy (h).

(h) See 2306 *et seq.*

“2333. A testator may deprive a descendant of his compulsory portion.

(1) If the descendant makes an attempt against the life of the testator or his spouse, or of any of his descendants;

(2) If the descendant has been guilty of wilful corporal ill-treatment of the testator or his spouse; in the case of ill-treatment of his spouse, however, only where the descendant is also descended from such spouse.

(3) If the descendant has been guilty of any crime, or any serious wilful offence against the testator or his spouse;

(4) If the descendant maliciously commits a breach of his statutory duty to furnish maintenance to the testator;

(5) If the descendant leads a dishonourable or immoral life contrary to the testator’s wishes.”

And see Schuster, “The Principles of German Civil Law” 626 *et seq.*. (1907).
PART 5. THE COMPULSORY PORTION: SWITZERLAND
(taken from Switzerland, The Swiss Civil Code, English version with vocabulary and notes by Ivy Williams (1925))

"471. The compulsory portion is as follows:
   1. for a descendant three-quarters of his statutory share of inheritance;
   2. for the father or mother one-half
   3. for a brother or sister one-quarter
   4. for the surviving spouse the whole of his statutory share where there are statutory co-heirs with him, and one-half of it where he is sole heir.

"473. A testator can by testamentary disposition leave to his surviving spouse the usufruct in the whole of the share of the inheritance devolving on their common descendants.

Such usufruct is taken to be in satisfaction of the right of inheritance conferred by law on the surviving spouse where descendants take as co-heirs with them.

The surviving spouse loses half his usufruct if he re-marries.

"474. The devisable portion of the estate is determined by its value at the death of the testator.

In this computation the debts of the deceased, his funeral expenses, the cost of sealing the inheritance and of making an inventory, and that of maintaining for one month the members of the deceased’s household must first be deducted from the gross value of the estate.

"475. Gifts made by the deceased inter vivos are included in the value of the estate in so far as they are subject to reduction. 1

"476. Where the life of the deceased is insured and he has undertaken by an agreement inter vivos or by will or pact to assign the policy to a third person, or has gratuitously transferred it in his lifetime, the redemption value of the policy at the date of the death of the insured is added to the value of the estate.

"527. The following gifts are subject to the same reduction as testamentary dispositions:

   1. Gifts inter vivos made by the deceased as satisfaction of the donee's right of inheritance or by way of dower or for the donee's outfit or as a division of the

1 See ss. 527 et seq.
donor's estate, where they are not liable to be brought into hotchpot; ²

2. Alienations in consideration of a renunciation or sale of rights of inheritance; ³

3. Gifts which the donor had full liberty to revoke and those which he made within the five years preceding his death, with the exception of presents made on occasions where they are customary;

4. Alienations made by the deceased with the evident intention of evading the rules restricting his freedom of disposition.

"528. A donee who has acted bona fide is liable to restore only the amount by which he is still enriched by the gift at the date of the opening of the succession.

Where the benefit received by virtue of a testamentary pact has to be reduced, the beneficiary is entitled to claim the return of a proportionate part of what he gave in consideration of the benefit.

"529. Where the life of the deceased is insured and he has undertaken by an agreement inter vivos or by will or pact to assign the policy to a third person or has gratuitously transferred it in his lifetime, the redemption value of the policy is subject to reduction.

"530. Where a testator has burdened the inheritance with usufructs and rent-charges to such an extent, that according to the presumed duration of these rights, their capitalized value would exceed the devisable portion of the estate, the heirs can either demand that they shall be reduced to their proper limit, or redeem them by surrendering the devisable portion of the estate to those entitled.

"531. The appointment of a reversionary heir is not binding on an heir who is entitled to a compulsory portion, in so far as it constitutes a burden on that portion.

"532. Reductions are made in the first place in testamentary dispositions and then in gifts inter vivos, beginning with the latest in point of time and continuing in that order until the compulsory portions are fully restored.

² They must be brought into hotchpot, unless the testator directs otherwise (see s. 626).
³ I.e., as under s. 495.
“533. The action for reduction must be brought within one year from the time when the heirs had cognizance of the infringement of their rights, and in any case not later than ten years from the opening of the will in respect of testamentary dispositions, and from the death of the donor in respect of other gifts.

Where a disposition has been declared void and an earlier one has in consequence revived, the period runs from the date of the declaration of nullity.

The claim for a reduction can always be pleaded as a defence to an action.”
APPENDIX C

Antenuptial Transfers

The basic policy underlying the "maintenance and contribution" formula is also suggestive of the proper approach to the problem of antenuptial transfers.

We concluded earlier¹ that antenuptial transfers should be given separate treatment. Nevertheless, the antenuptial transfer cases have striking points of similarity with the cases dealing with postnuptial transfers. Some of the antenuptial transfer cases even utilize the illusory transfer doctrine.² Moreover, we find in the antenuptial transfer cases a familiar irresolution on matters of basic policy. There is indecision on matters of proof and on the scope of the action. Two problems will be examined. First, on matters of proof: should the courts follow the rule of (a) "actual fraud," (b) "presumed fraud," or (c) some other rule? Second, as to the scope of the action, does the wife's remedy affect transfers of personalty, or of realty where inchoate dower has been abolished?

We may obtain a better appreciation of these problems if we examine the origin and social utility of the wife's remedy.

Historically, the wife's action to set aside antenuptial transfers in "fraud" of her marital rights stems from an English doctrine that developed solely for the protection of the husband. As far back as the seventeenth century, Chancery would set aside secret conveyances by the fiancee whenever she had induced the proposal of marriage by her pecuniary, if not physical, assets.³ The justification was entirely mercenary: in those days the husband was legally responsible for the wife's debts, had practical ownership

¹ See text, pp. 181–182, supra.
² See note 24, infra.
of her personality, and had an estate during coverture in her freeholds, which entitled him to the rents and profits.\(^4\) Eventually the reliance factor was dropped; he could have the transfer set aside even though he had married without knowing that the woman owned the property concerned.\(^5\) The wife, however, was refused any remedy with respect to secret antenuptial conveyances made by her potential husband to evade her dower from attaching. It was felt that she did not need this protection, apparently in view of the then prevailing custom of making antenuptial jointures and settlements in lieu of dower. That custom not obtaining in this country, the American courts utilized the English rule (which protected the husband) to permit the American wife\(^6\) to set aside her husband’s secret antenuptial conveyances of realty.\(^7\)

(a) Matters of Proof

The American cases,\(^8\) following the English lead, eventually discarded the requirement of reliance. One early American case


\(^5\) Taylor v. Pugh, 1 Hare 608, 66 Eng. Rep. 1173 (1842).

\(^6\) The action is also available to the husband: see, e.g., Gedart v. Ejdrygiewicz, 305 Mass. 224, 25 N.E.2d 371 (1940), 14 U. Cin. L. Rev. 451 (1940) (woman assures man her realty “all pay up,” then mortgages it to her daughter three days before the marriage).

\(^7\) The cases are reviewed in Chandler v. Hollingsworth, 3 Del. Ch. 99, 115 (1867); also see Brégéy and Wilkinson, supra note 3; 26 Am. Jur., Husband and Wife §185-95 (1940); Note, 40 Mich. L. Rev. 300 (1941).

\(^8\) The basic inquiry is whether the transfer was in contemplation of marriage: Bozarth v. Bozarth, 399 Ill. 259, 77 N.E.2d 658 (1948): Chase v. Phillips, 208 Mass. 245, 95 N.E. 266 (1911), writ of error dismissed, 223 U.S. 715 (1912) (transfer made while woman still married to her first husband; valid); Griffin v. Griffin, 225 Mich. 253, 196 N.W. 884 (1923); Noe v. Noe, 359 Mo. 867, 224 S.W.2d 77 (1949) (three years before marriage). But the transfer may be invalidated even though the potential husband had no particular woman in mind: Higgins v. Higgins, 219 Ill. 146, 76 N.E. 86 (1905). In the Higgins case a widower deeded his farm to his six children, reserving a life estate. He then went East to visit relatives and married the plaintiff there two days after being introduced; also see Jarvis v. Jarvis, 286 Ill. 478, 122 N.E. 121 (1919) (conveyance of realty twenty-two months before marriage). The statutes of limitation applicable to the widow’s request for dower or statutory share begin to run at the husband’s death: Breshears v. Breshears, 360 Mo. 1057, 232 S.W.2d 460 (1950). If the transfer was for consideration the attacking spouse will be required to show that
even stated that the wife need not have known that the potential husband owned the property concerned. Most of the cases adopt the doctrine of "presumed fraud": a secret transfer in contemplation of marriage will be presumed to be fraudulent, regardless of whether the wife relied on the husband's apparent ownership. The presumption may be overcome, however, by evidence of a worthy purpose, e.g., to make reasonable provision for children of a prior marriage.

the grantee was in collusion: Dorrough v. Grove, 60 So. 2d 342 (Ala. 1952).

The transfer is set aside only to the extent of the wife's claim: Breshears v. Breshears, 360 Mo. 1057, 232 S.W.2d 460 (Mo. 1950) (transfer 5 days before marriage, with the marriage license in his hands); Hanson v. McCarthy, 152 Wis. 181, 139 N.W. 720 (1913); but cf. Collins v. Collins, 98 Md. 473, 57 Atl. 597 (1904); Clavin v. Clavin, 41 N.Y.S.2d 377 (Sup. Ct. 1943), aff'd without opinion, 267 App. Div. 760, 45 N.Y.S.2d 937 (1st Dep't 1943); Rubin v. Myrub Realty Co., 244 App. Div. 541, 279 N.Y. Supp. 867 (1st Dep't 1935); Lestrang v. Lestrang, 242 App. Div. 74, 273 N.Y. Supp. 21 (2d Dep't 1934).

The suit being in equity, relief is not automatic. The wife may be estopped if she discovered the transfer before the glide to the altar; Clark v. Clark 183 Ill. 448, 56 N.E. 82, 75 Am. St. Rep. 115 (1900). But not, says a California case of fifty years ago, if she has been seduced and "got with child"; Murray v. Murray, 115 Cal. 266, 273, 47 Pac. 37, 89 (1896) ("to her the alternative was marriage, or the continued state of concubinage, and the bastardy of her offspring"). In Cook v. Lee, 72 N.H. 569, 58 Atl. 511 (1904) the plaintiff who was with child by her fiances, married him knowing of the transfer; held, plaintiff widow could be reinstated as judgment creditor, a status she had attained in connection with her breach of promise suit before marriage; also see Taylor v. Taylor, 197 N.C. 197, 148 S.E. 171 (1929) (seduction, but relief not predicated thereon).

9 Chandler v. Hollingsworth, supra note 7. Most of the later cases appear to require knowledge.

10 E.g., Ward v. Ward, 63 Ohio St. 125, 57 N.E. 1095, 51 L.R.A. 858 (1900).


In Wilson v. Findley, 228 Iowa 1281, 275 N.W. 47 (1937), the marriage took place ten days before the husband's death; held, valid.
In recent years there has been some disposition to restrict the action by doing away with the presumption of fraud. Under the new approach the plaintiff spouse is required to prove actual reliance on the other spouse's apparent ownership of the property in question. For example, in *Kirk v. Kirk* it was stated: "Either spouse may challenge, as fraudulent, a conveyance of real estate or a gift of personal property made during a treaty of marriage, but mere proof of the conveyance or gift, without the knowledge of the other party, does not constitute a prima facie case of fraudulent transfer. In addition, it is necessary for the party alleging it to prove the fraud, or 'actual fraud,' to use an expression common in the decisions. Mere conjecture or suspicion does not take the place of evidence." What the court meant by "evidence" may be gleaned from the next paragraph of the decision: "Or did he make the conveyance, not to satisfy a bona fide obligation, but with the intention of depriving her of rights which, expressly or by implication, he induced her to believe she would receive by marrying him?" In other words, the "actual fraud" requirement appears to impose a stiff burden of proof on the claimant. Certainly she must prove active or implied representations of property ownership on his part; presumably she must prove that she was induced to marry him in reliance on those representations.

The "actual fraud" doctrine has received support in other cases, and has been endorsed in a carefully written article. It is not yet clear that it is the prevailing trend. Probably all Ameri-

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14 *Id.* at 208, 16 A.2d at 50.

15 "The old doctrine was utterly unreasonable. Suppose the intended husband was worth millions in city property and owned hundreds of lots, and should convey on the eve of his marriage one or a few of such lots and not disclose it. Would the deed be ipso facto void? Yes, by the doctrine of some cases. We conclude, therefore, that the facts and circumstances of this case may be considered in determining whether the giving of that deed was fraudulent." *Dudley v. Dudley*, 76 Wis. 567, 579, 45 N.W. 602, 606 (1890). *Accord*: Connelly v. Ford, 202 Mich. 558, 561, 168 N.W. 411, 412 (1918); Noah v. Noah, 246 Mich. 324, 224 N.W. 611 (1929); Tracy v. Thatcher, 135 Kan. 615, 11 P.2d 691 (1932); cf. Butler v. Butler, 21 Kan. 521, 30 Am. Rep. 441 (1879).

can courts would permit recovery upon proof of "actual fraud"; but there is still substantial authority for the "presumed fraud" rule, in which the burden is on the transferee to show that the transfer was for a reasonable purpose or in pursuance of a moral obligation. The "actual fraud" rule favors the transferee; the "presumed fraud" rule favors the wife.

Neither rule is entirely satisfactory. The "actual fraud" rule may not interfere "with the power of a chancellor to draw reasonable inferences from all the evidence in the case," but it presupposes too high a degree of financial shrewdness in the average bride, whether it be a first or a second marriage. She should be able to feel assured that support will be forthcoming; she should not be forced to bargain for it. In marriage the woman takes on the responsibilities of homemaking. In return she looks to her husband for support and for security in her old age. It is true that many women out of necessity continue to work during the early years of marriage; but it is also true that her homemaking responsibilities would be more easily discharged if she did not have to work. Consequently the husband is obliged to provide for his wife during coverture and to give her at least a designated fraction of whatever "estate" he leaves at death. Thus in these antenuptial transfer cases the emphasis should be on the husband's duty of support, not on the presence or absence of the husband's scienter. Whatever the husband's motive for the transfer and whatever the wife's motive for the marriage, the wife has a justifiable complaint about unreasonably large antenuptial transfers.

But note that the wife's quarrel should lie only with unreasonably large antenuptial transfers. This is important. We must bear in mind that antenuptial transfers are more apt to precede a second marriage, when the parties frequently marry for companionship and convenience. The husband, being older, has had a chance to acquire an estate; and it is only natural that he should wish to make some provision for the children of his first marriage. Probably the normal estate planning here would involve some inter vivos provision for the children of the first marriage, plus a

17 Id. at 76.
18 See Chap. 2, note 27, supra.
life estate for the widow, with remainder on her death to his children. The second wife should expect no more.

Tested by these considerations, neither the "actual fraud" rule nor the "presumed fraud" rule appears to carry out the desired community policy. The wife should not have to prove actual reliance: marriage settlements and antenuptial contracts are not so common that either the first or the second wife should feel impelled to call for an audit before she says "I do." On the other hand, the "presumed fraud" rule is too generous to the wife. We should not encourage "nuisance" litigation over settlements on children of a prior marriage. These settlements are quite normal; thus the burden should be on the wife to prove that the secret transfer was unreasonably large, not on the children to overcome a presumption that it was fraudulent. In brief, our basic policy on postnuptial transfers is the key to proper judicial controls on the potential husband's antenuptial transfers. "In discharging his duty to his children, he must not be recreant to his equally binding duty to his future bride." For example, let us assume that children of a former marriage received $10,000 by a secret antenuptial transfer. Let us also assume that the claimant is by now the transferor's widow, and that the jurisdiction concerned has adopted the Suggested Model Decedent's Family Maintenance Act. This statute affects postnuptial transfers only, but the underlying policy applies also to antenuptial transfers. In such a jurisdiction the widow logically should not prevail against her deceased husband's antenuptial transfers unless she first can show that she is entitled to maintenance and that the estate is inadequate to provide for her needs. Her next step in "family maintenance" jurisdictions (and her first step in "statutory share" jurisdictions) should be to prove that the transfer was in an unreasonably large amount under the circumstances prevailing at the time of the transfer. If she can do this the court should then be permitted to require the donees to contribute any amount that it deems fair, up to the full amount that was transferred. Norm-

19 The wife is in a stronger position if the transfer was in evasion of an antenuptial contract; see, e.g., Newton v. Pickell, 201 Ore. 225, 269 P.2d 508 (1954); but cf. Chap. 17, note 18, supra.

20 Arnegaard v. Arnegaard, 7 N.D. 475, 491, 75 N.W. 797, 802, 41 L.R.A. 258 (1898).

21 See note 28, infra.
ally this will approximate the excess over what the court considers would have been a reasonable transfer. If any amount up to $6,000 would have been reasonable, then the donees could be ordered to return $4,000. But the court should have discretion to name any amount it thinks fair, in order to balance the equities between the parties.\textsuperscript{22}

(b) Scope of the Action

But what if personalty was transferred — or realty, in a jurisdiction in which inchoate dower is abolished — and the suit is brought in the husband’s lifetime? In these circumstances the cases suggest that the wife could set the transfer aside if “actual fraud” is proved.\textsuperscript{23} When there is no “actual fraud,” \textit{i.e.}, representations inducing reliance, the converse appears to be true: the courts will not presume fraud with reference to transfers of this sort, apparently on the theory that the decree would be unenforceable. In \textit{Petty v. Petty}\textsuperscript{24} the wife sued in the husband’s lifetime to set aside a transfer of land and slaves made after the engagement. She prevailed as to the land. With respect to the slaves, however, the court said that she “has no such right or interest in them during the coverture, as to authorize her to ask an annulment of the deed to them. And should such decree be rendered, . . . the title would re-vest in the husband, and he would have the right to sell or give the estate to whom he pleased the next moment.”\textsuperscript{25} And a leading article has stated: “Certainly

\textsuperscript{22} The fact that the fiance was financially independent would suggest that the transfer was a reasonable one. The wife’s need at the time of the litigation would be a factor to be considered in deciding on the amount of contribution, whether the jurisdiction concerned operates under the statutory share or under family maintenance legislation.

\textsuperscript{23} \textit{E.g.}, Kirk v. Kirk, 340 Pa. 203, 16 A.2d 47 (1940).

\textsuperscript{24} 4 B. Mon. 215 (Ky. 1843).

\textsuperscript{25} The court did concede that she might have an action on the death of her husband. And perhaps she may win, with or without reference to the fact that personalty is involved, on the ground that the antenuptial transfer is “illusory,” \textit{i.e.}, that excessive control was retained (see cases, \textit{infra}). If the transfer was a reasonable one, however, what difference does it make that it is “illusory?” In fact, retention of a life estate inures to the wife’s favor, since it provides more funds from which she could be supported during coverture. Colorable or sham or testamentary transactions are, of course, void in any event: Alexander v. Zion’s Sav. Bank & Trust Co., 2 Utah 2d 317, 273 P.2d 173 (1954).
fraud should not be presumed from a gift the day before the wedding when it could not have been attacked if made the day after." 28


20 Bregy and Wilkinson, "Antenuptial Transfers as Frauds on Marital Rights in Pennsylvania," 90 U. PA. L. REV. 62, 75 (1941), citing Fritz Estate, 135 Pa. Super. 463, 5 A.2d 601 (1939). In the Fritz case a sealed note executed three days before marriage was upheld against the widow on the reasoning of the Pennsylvania postnuptial cases. Bregy and Wilkinson, at p. 70, cite 13 R.C.L. $104 for the point under discussion, as also does a well-written note in 20 CORNELL L. Q. 381, 383, note 9 (1935); but the text in 13 R.C.L. cites chiefly dicta: Butler v. Butler 21 Kan. 521, 382, 30 Am. Rep. 441, 445 (1879) (suit in lifetime involving realty, dictum as to personality); Kelly v. McGrath, 70 Ala. 75, 45 Am. Rep. 75 (1881) (mortgage executed the day before marriage; wife, suing in husband prevails as to her dower and homestead rights); Arnegaard v. Arnegaard, 7 N.D. 475, 485-86, 75 N.W. 797, 800 (deed of realty held fraud on wife's homestead rights; dictum that were it not for the homestead rights plaintiff widow would have no ground for complaint). Also see Bynum v. Prudential Ins. Co. of America, 77 F. Supp. 56 (E.D.S.C. 1948) (group insurance benefits to common law wife, later formal marriage; valid under South Carolina "mistress" statute); Holzbeierlein v. Holzbeierlein, 91 F.2d 250 (D.C. Cir. 1937) (bakery business and land transferred by man before his second marriage; wife, suing in husband's lifetime, wins as to realty but loses as to personality); Note, 14 U. CIN. L. REV., 451, 452 (1940).

On the other hand, authority does exist for permitting the wife or the widow to set aside antenuptial transfers of personality. See, e.g., Beere v. Beere, 79 Iowa 555, 44 N.W. 809 (1890) (bill of sale of personality three days before "shotgun" marriage, husband abandoning wife the next day); Collins v. Collins, 98 Md. 473, 57 Atl. 597 (1904) (husband transfers all his property twenty days before marriage; wife sues
The nature of the wife’s “interest” in the husband’s personalty should not be a decisive factor in these antenuptial transfer cases. Even if we assume for the sake of argument that a woman may not complain of transfers made the day after marriage, it does not follow that she has no ground for complaint if one of her reasons for marriage is a belief that her husband has a reasonable amount of property. To be sure, the golddigger cannot complain if the mine has been salted: but in these antenuptial transfer cases there is actual value, deliberately spirited away. Moreover, here we have the additional element of active or implied misrepresentation, in circumstances calling for full disclosure. And is the wife any less injured because the property transferred happened to be bonds instead of Blackacre? Possibly most cases involving unreasonably large transfers also entail “actual fraud,” but the wife may find this latter factor difficult to prove. If she can show that it was an unreasonably large transfer, made secretly, why should she be prejudiced because she did not demand that her fiancé pass his accounts? True, she married him “for better or for worse”; but that refers to future shocks and reverses. To say that she must lose because the decree would be unenforceable than to say that she loses because she has no “interest” in his personalty during coverture. But courts and commentators agree, cryptically, that the wife would win if there was “actual fraud.” How would the decree be any more enforceable in that situation? The problem seems to have been ignored, probably because in most cases the husband is dead at the

at his death, prevails; semble, actual fraud); Duncan’s Appeal, 43 Pa. 67 (1862) (husband prevails in wife’s lifetime); Martin v. Martin, 282 Ky. 411, 138 S.W.2d 509 (1930) (antenuptial gift of personalty set aside on husband’s death, to extent of statutory share); LeStrange v. LeStrange, 242 App. Div. 74, 273 N.Y. Supp. 21 (2d Dep’t 1934) (trust of realty and transfer of bank deposit to sons of former marriage the day after marriage license issued; wife sues in husband’s lifetime; held, void, stressing element of misrepresentation); cf. Rubin v. Myrub Realty, 244 App. Div. 541, 279 N.Y. Supp. 867 (1st Dep’t 1935), stating that the wife’s position in these cases is strengthened by the “increased rights” given her under §18 of the New York Dec. Es. Law; Matter of Schurer, 157 Misc. 573, 284 N.Y. Supp. 28 (Surr. Ct. 1935), aff’d without opinion, 248 App. Div. 679, 289 N.Y. Supp. 818 (1st Dep’t 1936) (distinguishes the Rubin and LeStrange cases because of “definite misrepresentation therein”).

27 Enforceability was not discussed in the LeStrange case, note 26, supra.
time of the suit.\textsuperscript{28} Even if he is alive,\textsuperscript{29} however, the matter of enforceability should not overtax the ingenuity of equity. If realty was transferred, and inchoate dower is not available, the decree could establish an equitable lien\textsuperscript{30} on the property that was returned to the husband, enforceable for her support during his lifetime or upon his death.\textsuperscript{31} With reference to personalty,

\textsuperscript{28} Of fifty cases involving antenuptial transfers, selected at random, the recalcitrant spouse was alive at the time of the suit in only eleven cases: Holzbeierlein v. Holzbeierlein, 91 F.2d 250 (D.C. Cir. 1937); Kelly v. McGrath, 70 Ala. 75, 45 Am. Rep. 75 (1881); Deke v. Huenkemeier, 260 Ill. 131, 102 N.E. 1059, 48 L.R.A. (N.S.) 512 (1913), later appeal, 289 Ill. 148, 124 N.E. 381 (1919); Beere v. Beere, 79 Iowa 555, 44 N.W. 809 (1890); Hamilton v. Smith, 57 Iowa 15, 10 N.W. 276 (1881); Butler v. Butler, 21 Kan. 521, 30 Am. Rep. 441 (1879); Petty v. Petty, 4 B. Mon. 215 (Ky. 1843); Griffin v. Griffin, 225 Mich. 253, 196 N.W. 384 (1923) (divorce suit); LeStrange v. LeStrange, 242 App. Div. 74, 275 N.Y. Supp. 21 (2d Dep't 1934); Taylor v. Taylor, 197 N.C. 197, 148 S.E. 171 (1929) (action to obtain alimony without divorce); Duncan's Appeal, 48 Pa. 67 (1862). Most of the cases examined involved second marriages, with the transfer being made to children of the first marriage. In many of the cases the wife was considerably younger than the husband, and (naturally, under the prevailing tests) willing to admit that it was a marriage of convenience. In LeStrange v. LeStrange, 242 App. Div. 74, 75, 273 N.Y. Supp. 21, 22 (2d Dep't 1934), at the time of the marriage the husband was sixty-eight, the wife's age not stated. Each had been married before. Said the court: "Evidently the agreement to marry was a practical one, and the parties wished to have a separate home and live their lives free from the conflicts arising through living in the home of younger people." In Re Ramsey's Estate, 98 N.Y.S.2d 918 (Surr. Ct. 1950), the husband, aged sixty-seven, conveyed away his farm three days before his marriage to plaintiff, aged twenty-six, and reserved a life estate; held, valid.

\textsuperscript{29} The wife's position on discovery of the transfer is awkward. She has an action for fraud and deceit against her husband, but in the circumstances it is not an appropriate remedy: her concern is more with the property transferred. She cannot get a divorce or an annulment because of the husband's misrepresentation of his financial position; but see Shoufeld v. Shoufeld, 260 N.Y. 477, 184 N.E. 60 (1933) (false statement by the woman that she had $6000; annulment granted, three judges dissenting). The Shoufeld case was called "border-line" in Berardino v. Berardino, 156 Misc. 203, 206, 280 N.Y.S. 15, 16 (1935). And if she waits until her husband dies the donee may have squandered the property or transferred it to a purchaser for value without notice.


\textsuperscript{31} The decree could be recorded, to prevent sales to bona fide purchasers. It could be enforceable to the same extent and amount as is afforded her by the local forced share statute. Presumably the land could be sold during the husband's lifetime, subject to the wife's interest.
the decree could direct that a specified amount be used to purchase property to be held in tenancy by the entireties; or that the same amount be put into an irrevocable trust, with the income to the husband for life, remainder to the wife, and, in the event that the wife predeceases the husband, with power of appointment in the husband. As further alternatives, the husband could be directed to make suitable improvements in or on the homestead; in aggravated circumstances the husband could be forced to purchase life insurance payable to the wife, with proviso for cashing in or changing beneficiaries if the wife predeceases him; or, if the wife needs the money immediately for support, an order could be made requiring that it be paid directly to her.

Use of the "reasonableness" test would no doubt tend to restrict the frequency and extent of the widow's recovery, since she is usually a second or third wife. Nevertheless, the suggested test would ensure that she would win or lose on the equities of the case. Recovery would not hinge on the state of mind of either

An alternative to the lien would be an injunction against further unreasonably large transfers.

Also equivalent to the widow's forced share in the husband's personality.

The reasoning here is that the wife may request return of the property to her husband, but normally she should not be entitled to secure it for herself.


A singular case is Gellatly v. United States, 71 F. Supp. 857 (1947). When a plaintiff widow became acquainted with the 77 year old Gellatly he was worth several millions, an eccentric who "wore white velvet trousers and a red velvet coat." He had already decided to devote his fortune to augmenting his valuable art collection, and to present the collection to an institution that could preserve and display it in his name. The plaintiff believed Gellatly to be wealthy. The court stated that "she frankly admits that she thought the marriage would give some assurance of being able to care for the needs of her [invalid] daughter"; that "he permitted her to believe that he was a man of means"; and that he led her to believe he intended to make provision for her maintenance "at his death." The formal transfer to the Smithsonian authorities took place June 13, 1929, with a supplementary transfer in August 1930. On 2 September 1930 he wrote plaintiff an offer of marriage, having been acquainted with her for five years. At the time of his death in 1931 the art collection was worth some four millions, his estate "practically nothing except some small articles, including an umbrella and a suit case." Mrs. Gellatly had to
the man or the woman at the time of the transfer, on whether the husband is alive or dead at the time of the litigation, on the fortuitous nature of the wife’s “interest”35 during coverture, or on the type of property that is involved.

borrow money to pay for the funeral. The Smithsonian Institute refused any relief, whereupon various bills were introduced in Congress over a period of years to give her relief. One such bill was referred to the Court of Claims in 1944. The court held that the widow, as administratrix, had no grounds in law or equity to set aside the transfer. No reason was given, other than the fact that the Smithsonian Institute had “lived up to their agreement” with the decedent; nor was there any discussion of the antenuptial transfer case-law.

35 The “interest” of course represents the judgment of the state legislature. Nevertheless, the forced share purports to be the equivalent of common law inchoate dower, as far as protection against disinheritance is concerned. Imposition of a restraint on the property after it is returned to the husband is justifiable because of the husband’s reprehensible antenuptial transfer.
APPENDIX D

Contracts To Make A Will

(a) Introductory Remarks

The contract to make a will is another device that merits separate treatment. Litigation over spouses' rights in these contracts almost invariably concerns antenuptial contracts, usually made long before the marriage to the surviving spouse; and, of course, no contract may be enforced unless consideration is present. Here also, however, the case-law is confused; here also we deal almost invariably with second and third marriages; and here also the solution to the problem of spouses' rights is suggested by the policy underlying the maintenance and contribution formula.

A contract to make a will concerns a promise by A to B that A will leave a legacy or devise either to B or to a designated third party. The most obvious but the most important thing that can be said about this arrangement is that it is a contract, not a will. The substantive and formal validity of the arrangement depends on the law of contracts; B's remedies are contract remedies. If A dies without having made the promised devise, B may obtain contract damages or quasi-contractual recovery from A's estate or he may obtain the property concerned by a suit in the nature of specific performance. If A makes the promised will it is usually and properly held that A still has the power to revoke the will.

The contract to make a will may be a reciprocal arrangement.

Two testators, normally spouses, may make a common ("mutual") disposition of their respective property. The usual plan, whether the spouses sign separate wills or one "joint" will, is to give the surviving spouse a life estate, with remainder to the children. These arrangements do not imply *per se* that the survivor has made a contract not to revoke. When the contract can be proved, however, the more enlightened, more practicable view is that the arrangement is just another species of contract to make a will. Under this view the survivor can revoke, but the beneficiaries of the contract still have their contract remedies against his estate.

The contract to make a will is quite popular with laymen. The promisor retains full use of the property concerned during his lifetime. In return for his promise he may obtain material support, companionship, personal services. The device is useful in marriage settlements, particularly between older people; it also is used in adoption proceedings, separation agreements, and divorce settlements. Partners employ it to dispose of partnership assets; and corporations find it valuable in schemes for deferred compensation of high-salaried personnel.

(b) **Rights of the Surviving Spouse**

The great majority of the cases involving spouses' rights concern contracts entered into before the marriage with the surviving spouse — generally before the promisor even met the surviving spouse.\(^2\) The cases involving these "antenuptial" \(^3\) contracts usually concern a promisor who was fairly well along in years at the time the contract was made; and almost without exception the marriage concerned was a second or third marriage. Cases involv-

\(^2\) Presumably a contract made in *contemplation* of the marriage could be set aside under the rules relating to antenuptial transfers. See Appendix C, *supra.*

\(^3\) We must distinguish between (a) contracts between a spouse and a third party, and (b) antenuptial and postnuptial contracts between the spouses themselves. Contracts in class (b) which regulate or waive succession rights between the spouses are usually upheld, as between the parties thereto, if the terms are fair and made after full disclosure; Atkinson, *Wills,* §31 (2d ed. 1955). Local statutes entail exceptions to this rule; e.g., Tucker v. Zachary, Okla., 269 P.2d 773 (1954) (postnuptial agreement). We are concerned with contracts in class (b) only when they restrict the succession rights of a later-acquired spouse of one of the parties.
ing first marriages appear to be restricted to “postnuptial” contracts.\(^4\)

The promisee has prevailed in almost two-thirds of the cases. The more recent cases, however, reveal a trend in favor of the surviving spouse.\(^5\) The decisions contain a variety of rationales—some of a flexible nature, others quite arbitrary. Since the issue usually arises in a suit for specific performance by the contract beneficiary,\(^6\) a common rationale when the widow prevails\(^7\) is that an equity court in its discretion may refuse specific performance when that remedy would be unfair to innocent\(^8\) third persons.\(^9\) A similar flexible approach is to consider the “equities”\(^10\) of the parties to the litigation: in some instances the courts refer to the duration\(^11\) of the marriage between the decedent and the surviving spouse, and the merits otherwise of the contract.


\(^{5}\) E.g., Tod v. Fuller, 78 So. 2d 713 (Fla. 1955); Wides v. Wides’ Ex’r, 299 Ky. 103, 184 S.W.2d 579 (1944); In re Erstein’s Estate, 205 Misc. 924, 129 N.Y.S.2d 316 (Surr. Ct. 1954). Contra: Komarek Estate v. Komarek, 177 Kan. 659, 282 P.2d 446 (1955); In re Davis’ Estate, 171 Kan. 605, 237 P.2d 396 (1951).

\(^{6}\) But it also may arise in accounting proceedings, In re Erstein’s Estate, 205 Misc. 924, 129 N.Y.S.2d 316 (Surr. Ct. 1954); in partition suits, Baker v. Syfritt, 147 Iowa 49, 125 N.W. 998 (1910); in suit to quiet title, Sonnicksen v. Sonnicksen, 45 Cal. App. 2d 46, 113 P.2d 495 (1941); and in proceedings to construe the will in the lifetime of the testator, Underwood v. Myer, 107 W.Va. 57, 146 S.E. 896 (1929).

\(^{7}\) The successful spouse prevails only to the extent of her dower or elective share; Ver Standig v. St. Louis Union Trust Co., 344 Mo. 880, 129 S.W.2d 905 (1939).

\(^{8}\) On the significance of the plaintiff spouse’s knowledge of the contract, at the time of the marriage, see p. 575, infra.

\(^{9}\) Owens v. McNally, 113 Cal. 444, 45 Pac. 710 (1896); In re Arland’s Estate, 131 Wash. 297, 230 Pac. 157 (1924); cf. Wides v. Wides’ Ex’r, 299 Ky. 103, 184 S.W.2d 579 (1944).

\(^{10}\) Wides v. Wides’ Ex’r, 299 Ky. 103, 184 S.W.2d 579 (1944); Ruch v. Ruch, 159 Mich. 231, 124 N.W. 52 (1909); Ver Standig v. St. Louis Union Trust Co., 344 Mo. 880, 129 S.W.2d 905 (1939); Ralyea v. Venners, 155 Misc. 539, 280 N.Y. Supp. 8 (Sup.Ct. 1935); In re Arland’s Estate, 131 Wash. 297, 230 P. 157 (1924); cf. Poor v. Logan, 252 S.W.2d 1 (Ky. 1952).

beneficiary's case. But references to the financial condition of the surviving spouse are relatively infrequent.\textsuperscript{12} And not all courts use the term "equity" as descriptive of some appealing feature of the particular litigant's case. Sometimes it appears from the context that the court is thinking of the moral claim of widows in general, or of contract beneficiaries in general.

Other rationales are less pliant, less sensitive to the individual circumstances of the case. For example, some courts have concluded that when the contract was made the parties thereto must necessarily have contemplated that enforcement would be subject to the elective rights of the later-acquired spouse.\textsuperscript{18} And the promisee will lose, of course, if he is characterized as a legatee: \textit{qua} legatee he is subordinate to the widow.\textsuperscript{14} Other courts, less concerned with the doctrinal niceties, merely take it for granted that the contract is subject to the widow's claim,\textsuperscript{15} or that the estate that was to be willed away was the net estate after deducting the widow's claim.\textsuperscript{16}

The favorite rationale when the decision is for the promisee is that at the time of the marriage the property concerned \textit{belonged} to the promisee.\textsuperscript{17} The "stream can not rise higher than its source";\textsuperscript{18} neither, say these decisions, can the widow have any rights in property that before the marriage the husband-to-be had contracted to give to a third party. This notion seems particularly


\textsuperscript{13} \textit{E.g.}, Owens v. McNally, 113 Cal. 444, 45 Pac. 710 (1896); \textit{cf.} Wides v. Wides' Ex'r, 299 Ky. 103, 184 S.W.2d 579 (1944).

\textsuperscript{14} \textit{E.g.}, In re Hoyt's Estate, 174 Misc. 512, 21 N.Y.S.2d 107 (Surr. Ct. 1940).


\textsuperscript{16} Wides v. Wides' Ex'r, 299 Ky. 103, 184 S.W.2d 579 (1944).

A statute declaring that marriage revokes a man's will does not aid the widow since the promisee's rights stem from the contract, not the will; Rundell v. McDonald, 41 Cal. App. 175, 182 Pac. 450 (1919), \textit{later appeal}, 62 Cal. App. 721, 217 P. 1082 (1923); Mosloski v. Gamble, 191 Minn. 170, 253 N.W. 378 (1934).

\textsuperscript{17} \textit{E.g.}, Lewis v. Lewis, 104 Kan. 269, 178 Pac. 421 (1919); Dillon v. Gray, 87 Kan. 129, 123 Pac. 878 (1912).

\textsuperscript{18} Baker v. Syfritt, 147 Iowa 49, 62, 125 N.W. 998, 1003 (1910).
appealing when the contract related to real estate, in a jurisdiction in which inchoate dower is available. Dower has also been refused on the reasoning that the decedent held the land as a "trustee" for the promisee, or that the contract to devise is analogous to a contract to sell.

It is not unnatural that the cases on our present problem reflect a variety of inflexible clichés, e.g., that the contract removes the affected property from the decedent's estate, or that the beneficiary is in the nature of a legatee. Nor is it unnatural that even those courts that are disposed to consider the "equities" are vague as to the criteria that determine the significance of any given "equity." These phenomena are to be expected when the community decision on widow's support, as announced in the statutory share, bears no relation to need and ignores the problem of inter vivos transactions. The statutes being arbitrary, a like attitude on the part of the courts is not entirely reprehensible.

(c) Policy Considerations

The apparent diversity in judicial thinking has its parallel in the views of commentators. Professor Sparks tends to be critical of the cases enforcing spouses' rights, particularly when the contract concerns less than the entire estate or when it was made

19 Baker v. Syfritt, 147 Iowa 49, 125 N.W. 998 (1910); Harris v. Harris, 130 W. Va. 100, 43 S.E.2d 225 (1947).
20 Harris v. Harris, 130 W. Va. 100, 43 S.E.2d 225 (1947); also see Sonnicksen v. Sonnicksen, 45 Cal. App. 2d 46, 113 P.2d 495 (1941).
21 Burdine v. Burdine's Ex'r, 98 Va. 515, 36 S.E. 992 (1900); Harris v. Harris, 130 W. Va. 100, 43 S.E.2d 225 (1947).

The analogy is debatable since the widow would seem to have a stronger case when the contract was to make a devise. In the contract to sell, the consideration is money. Whether it is paid before or after the promisor's death it may, and probably will, augment the estate available for the widow's share. In the contract to devise, however, the consideration frequently is not monetary, and usually is given during the promisor's lifetime.

Also used is the theory that the contract is in the nature of an inter vivos transfer which if made in "good faith" removes the property from the estate available to the widow: e.g., Brindisi v. Stallone, 259 App. Div. 1080, 21 N.Y.S.2d 29 (2d Dep't 1940); cf. Crofut v. Layton, 68 Conn. 91, 35 Atl. 783 (1896). But see In re Erstein's Estate, 205 Misc. 924, 129 N.Y.S.2d 316 (Surr. Ct. 1954).

22 Sparks, Contracts to Make Wills, 173 (1956). Most of the cases involving spouses' rights concern all of the estate. But an amount
after the marriage to the surviving spouse. 23 Professor Rheinstein takes the opposite view. "But it would be strange," he says, "if the public interest in protecting a surviving spouse against disin­
heritance would have to yield to the private interest of a third
party with whom the spouse who later happens to be the pre­
deceasing one has, before or after marriage, concluded a contract
to make a will . . . it must also be irrelevant whether or not the
existence of the contract to make a will was known to the sur­
viving spouse at the time of the marriage." 24

Both views have merit, since the beneficiary and the surviving
spouse are each entitled to protection. The difficulty with each
view is that it leads to stress on the rights of one party at the ex­
pense of the other, without regard to the individual equities.
Complete protection for one party may in many cases entail un­
necessary hardship to the other party. The beneficiary, on the
one hand, undoubtedly relies on the contract being fulfilled. The
consideration that has been "paid" may in some instances be purely conceptual, but in other instances it may be quite sub­
stantial. The deserving widow, on the other hand, must be pro­
tected since she relies, or is entitled to rely, on the financial sup­
port that society has provided by way of dower and the statutory share. Both parties being worthy of protection, it follows that
the one suffers if there is overemphasis on the privileges or expec­
tations of the other. Consequently I believe that the preferred position lies somewhere between the two views. Probably both
writers would agree that implicit (although perhaps not explicit) in either view is the proviso that neither party should prevail in all circumstances. There being a conflict of interests, of policy consider­
ations, the courts should have an approach that reconciles the two points of view. I believe that our conclusions as to the community values that are implemented in dower and the statu­
tory share have application to antenuptial and postnuptial con­

comprising less than the entire estate may be unreasonably large, as far as the spouse's claim is concerned. And when the contract affects designated property, that property may in actuality be the entire estate, as in Rundell v. McDonald, 41 Cal. App. 175, 182 Pac. 450 (1919), later appeal, 62 Cal. App. 721, 217 Pac. 1082 (1923).

23 Sparks, op. cit. supra note 22 at 177.

tracts to make a will, as well as voluntary antenuptial and post-nuptial transfers. The Suggested Model Decedent’s Family Maintenance Statute affects only voluntary postnuptial transfers, but the basic approach relates also to contracts to make a will. As far as spouses’ rights are concerned, the fact that the contract to make a will normally is made before marriage should be no more decisive than in the case of voluntary antenuptial transfers. To be sure, the contract beneficiary is not a mere voluntary transferee: he has paid consideration. But the nature and amount of the consideration should be a circumstance to be considered, not a factor that per se should foreclose the widow. “[I]t would be a rare case where some consideration could not be worked into the arrangement.”

I suggest the following approach. Jurisdictions that adopt the family maintenance type of legislation should not permit the claimant to attack the contract to make a will unless she can show that she is entitled to maintenance and is not otherwise adequately provided for. The next step in these jurisdictions—and the first and only step in jurisdictions operating under the statutory share—should be to balance the equities between the surviving spouse and the contract beneficiary. By “equities” I mean circumstances or factors that militate in favor of one party or the other under the maintenance and contribution formula. The two most important equities, of course, would be the spouse’s need and the nature and amount of consideration “paid” by the promisee. Also relevant would be such factors as the widow’s treatment of the decedent, her knowledge or otherwise of the contract at the time of the marriage, and hardship to the beneficiary.

25 The reasons for excluding the contract to make a will are set out at p. 366, supra; see also Suggested Model Decedent’s Family Maintenance Act, §1(d) (comment), text, p. 306, supra.

26 In re Erstein’s Estate, 205 Misc. 924, 932, 129 N.Y.S.2d 316, 324 (Surr. Ct. 1954).

27 See text, pp. 44–46, supra.

28 In jurisdictions using the statutory share the upper limit of recovery would be governed by the fractional amount of the estate permitted under the statutory share.

It should be immaterial, of course, that the promisor made the
promised will or died intestate.\textsuperscript{30} The courts should find no insuperable difficulties in balancing the equities. Some cases, of course, will be easier to decide than others. Thus a needy and deserving widow should prevail when the beneficiary's claim depends more on "inheritance" than on substantial consideration.\textsuperscript{81} Not so, however, if the beneficiary had given all of the property concerned to the decedent in return for the promise to make a will. In other cases, with the equities more in balance, a partial award to the widow may be indicated. In brief, the path of the courts should be cleared of preconceived dogmas. Relief for the surviving spouse should be discretionary, and avowedly so.\textsuperscript{82}

Analysis of the existing case-law indicates that the suggested approach is a practicable one. Indeed, it would seem that the courts consciously or subconsciously pay much more attention to the equities of the case than would be suspected from the announced rationale. To test this theory I tried to discover the break of the equities in the individual cases dealing with spouses' rights in contracts to make a will. In other words, from the given facts I tried to decide what result would have been reached in each case under the approach suggested above. Cases in which the actual decision is clearly consistent or inconsistent with the equities under this approach are classified as "consistent" or "inconsistent," respectively. When an element of doubt appears the case is classified either as "probably consistent" or "probably inconsistent." "Not clear" means that I could not decide one way or the other. In most instances cases falling under this last classification had insufficient facts; in a few cases the known equities appeared to be in equilibrium. The breakdown of cases, grouped with reference to the party that actually prevailed, is as follows: \textsuperscript{33}


\textsuperscript{31} See In re Arland's Estate, 131 Wash. 297, 230 Pac. 157 (1924).

\textsuperscript{32} See Dillon v. Public Trustee of New Zealand, L.R. [1941] A.C. 294 (family maintenance legislation).

\textsuperscript{33} CASES FAVORING THE SURVIVING SPOUSE. Consistent. In re Arland's Estate, 131 Wash. 297, 230 Pac. 157 (1924). Probably consistent, Tod v. Fuller, 78 So.2d 713 (Fla. 1955); Fleming v. Fleming, 194 Iowa 71,
A. Cases Favoring Spouse

Consistent ........................................ 1
Probably consistent ............................... 4
Not Clear .......................................... 7
Total cases ...................................... 12

184 N.W. 206 (1921), writ of error dismissed, 264 U.S. 29 (1924); Wides v. Wides' Ex'r, 299 Ky. 103, 184 S.W.2d 579 (1944) (widow willed home for life and about one-sixth of $60,000 estate; her financial position not clear); In re Hoyt's Estate, 174 Misc. 512, 21 N.Y.S.2d 107 (Surrogate Ct. 1940). Not clear. Owens v. McNally, 113 Cal. 444, 45 Pac. 710 (1896); Buehrle v. Buehrle, 291 Ill. 589, 126 N.E. 539 (1920); In re Erstein's Estate, 205 Misc. 924, 129 N.Y.S.2d 316 (Surrogate Ct. 1954); cf. Mayfield v. Cook, 201 Ala. 187, 77 So. 713 (1918); Ward v. Ward, 94 Colo. 275, 30 P.2d 853 (1934); Poor v. Logan, 252 S.W.2d 1 (Ky. 1944) (suit in decedent spouse's lifetime); Gall v. Gall, 19 N.Y. Supp. 332 (1892) (contract not proved).


Dicta bearing on our problem are found in the following cases: Favoring the surviving spouse: Alban v. Schnieders, Adm'r, 67 Ohio App. 103, 84 N.E.2d 302, 304 (1940) (contract not proven); Fields v. Fields, 137 Wash. 592, 248 Pac. 369 (1926) (contract not proven);
APPENDIX D

B. Cases Favoring Beneficiary

Consistent ................................................. 8
Probably consistent ................................. 3
Probably inconsistent ................................. 1
Not clear .................................................... 9
Total cases ............................................. 21

Summary

Total cases ............................................. 33
Consistent, or Probably consistent ............... 16
Probably inconsistent ................................. 1
Not clear .................................................... 16

Admittedly this classification of cases is far from conclusive. The dearth of reported facts is reflected in the number of cases grouped under "not clear." And when sufficient facts are given, the classification represents at best one person's reaction to those facts. Nevertheless, the findings do suggest that courts are already groping toward the desired approach, and that it is a workable one. It reconciles the conflicting policy interests; it also provides a working reconciliation of the reported cases. Far from being in hopeless confusion, the cases tend to fall in line when tested in this manner. Of the thirty-three cases, only one decision appears to be clearly inconsistent with the equities.

(d) Effect of the Wife's Knowledge of the Contract at the Time of Marriage

Should it matter that at the time of the marriage the wife was aware of her husband's contract to will his property to a third person? The cases leave the impression that this is a serious question indeed. Some courts and some commentators 34 say that the wife's actual knowledge of the contract is a decisive bar to her recovery. 35 It has even been suggested that constructive notice

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34 E.g., Sparks, Contracts to Make Wills, 174 (1956).

35 Sonnicksen v. Sonnicksen, 45 Cal. App. 2d 46, 113 P.2d 495 (1941); Price v. Craig, 164 Miss. 42, 143 So. 694 (1932); Burdine v. Burdine's Ex'r, 98 Va. 515, 36 S.E. 992 (1900).
would suffice, at least when the contract affects realty.\textsuperscript{36} We cannot always tell from these cases whether the knowledge factor is conclusive or whether it is tossed in for makeweight effect.\textsuperscript{37} When the spouse prevails, her lack of knowledge is sometimes considered decisive,\textsuperscript{38} and is often mentioned as a point in her favor.\textsuperscript{39}

A commendable attitude toward the knowledge factor is exhibited in the recent Kentucky case of \textit{Wides v. Wides, Ex'r.}\textsuperscript{40} Here a husband, in anticipation of being divorced, contracted to make a will leaving his property to his wife and four children. The contract was incorporated in the divorce judgment. Three years later he remarried, the second wife being in ignorance of the contract. Before he died he made a will leaving his second wife their home for life and approximately one sixth of his $60,000 estate. The widow elected to take her statutory share. The court took the view that enforcement of the promisee's rights was a matter for equitable discretion. Stressing the wife's lack of knowledge of the contract, the court stated:

\begin{quote}
The husband had sought to be fair to all. He devised only a reasonable part of his estate to his second wife and the balance to his divorced wife and children equally as provided in his separation agreement or contract. Our conclusion is that to adjudge recovery of the entire estate or its equivalent in money to them to the exclusion of the second wife's statutory rights would be inequitable and contrary to the spirit and intent of the statutes reflecting the public policy of the State.\textsuperscript{41}
\end{quote}

\textsuperscript{36} Smith v. Smith, 340 Ill. 34, 172 N.E. 32 (1930) (but court suggests that any fair contract would defeat the spouse); Larrabee v. Porter, 166 S.W. 395 (Tex. 1914) (but court states that equities not particularly in widow's favor); \textit{cf.} Harris v. Harris, 130 W.Va. 100, 43 S.E.2d 225 (1947) (possession of a building).

\textsuperscript{37} \textit{E.g.}, Ruch v. Ruch, 159 Mich. 231, 124 N.W. 52 (1909) (stress on equities).


\textsuperscript{39} Owens v. McNally, 113 Cal. 444, 45 Pac. 710 (1896); \textit{Ver Standig v. St. Louis Union Trust Co.}, 344 Mo. 880, 129 S.W.2d 905 (1939); \textit{In re Arland's Estate}, 181 Wash. 297, 230 Pac. 157 (1924); \textit{cf.} Mayfield v. Cook, 201 Ala. 187, 77 So. 713 (1918); Dillon v. Gray, 87 Kan. 129, 123 Pac. 878 (1912).

\textsuperscript{40} 299 Ky. 103, 184 S.W.2d 579 (1945).

\textsuperscript{41} \textit{Id.} at 114, 184 S.W.2d at 584.
When the case was later reinstated on the trial docket evidence as to the wife's knowledge of the contract was rejected. This ruling was affirmed on appeal, on the ground that "the widow's innocence was a matter of considerable equity, yet it was and is not controlling in and of itself. The paramount factor is the policy of the law to protect a widow. . . ." 42 Although the ruling on the evidence seems inconsistent with the ratio decidendi, the court's philosophy is good. These cases usually involve second marriages, 43 but even in second marriages may we not assume that the prospective wife regards her husband as much an object of affection as a walking annuity? If this be so, should she be penalized, in a case in which she was aware of her fiance's contract to make a will, merely because her emotions supplanted her business acumen? Under the approach suggested above, her knowledge of the contract becomes merely a circumstance to be considered, relevant but not decisive.44

(e) **INTER VIVOS TRANSFERS IN "EVASION" OF THE BENEFICIARY'S RIGHTS**

We tread familiar ground when we examine the decisions dealing with the decedent's inter vivos transfers in evasion of the beneficiary's contract rights. These cases provide a striking analogy to the postnuptial transfer cases, even when no spouse's claim is involved. The case-law on this point has been ably covered by Professor Sparks.45 The problem arises chiefly in connection with contracts to devise or bequeath all or a fractional part of the promisor's property. One would assume that such a promisor impliedly undertakes not to make inter vivos transfers in an amount that would defeat the legitimate expectations of the beneficiary.46

42 Wides v. Wides' Ex'r, 300 Ky. 344, 346, 188 S.W.2d 471, 472 (1945).
43 See p. 367, supra. The marriage being a second marriage, it would seem that the widow could not characterize the usual "knowledge" bar as being a restraint on marriage; cf. 6 AMERICAN LAW OF PROPERTY §27.13 (1952).
44 Knowledge may be quite important when, as in Larrabee v. Porter, 166 S.W. 395, 404 (Tex. 1914), the marriage is "void of sentiment."
45 Sparks, CONTRACTS TO MAKE WILLS, 52–69 (1956).
46 The power of the promisor to make inter vivos transfers is of course undisputed. Recent cases on the problem include Bell v. Pierschbacher, 245 Iowa 436, 62 N.W.2d 784 (1954) (bona fide purchaser
In this situation, as well as in connection with postnuptial transfers in "evasion" of the widow's share, we encounter a judicial disposition to talk in terms of the promisor's "intent," 47 or his "good faith." 48 Here also we find the old familiar misuse of the "testamentary" label, applied in one case even to an irrevocable trust. 49 And the case-law parallels the postnuptial "evasion" case-law in another important respect: the courts appear to ask if the gift was unreasonably large under the circumstances. 50 Factors that are considered include the size and purpose of the gift, the relationship of the beneficiary to the decedent, the moral claim of the beneficiary, 51 and the amount of consideration involved. 52

will be protected); Kaplan v. Kaplan, 134 N.Y.S.2d 753, 284 App. Div. 972 (2d Dep't 1954); Richardson v. Lingo, 274 S.W.2d 883 (Tex. 1955).


49 Farmer's Nat. Bank of Danville v. Young, 297 Ky. 95, 179 S.W.2d 229 (1944) ("had the effect of a will").


51 Sparks, CONTRACTS TO MAKE WILLS, 61 (1956).

52 Id. at 65.