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THE WIDOW'S RIGHT OF ELECTION IN THE ESTATE OF HER HUSBAND*

Elbridge D. Phelps†

BEFORE launching into the discussion proper, and in order to avoid confusion and misunderstanding later on, it is deemed wise at once to mark out boundaries within which it is proposed to confine the treatment of the subject here involved. Accordingly, in that which follows, attention will be centered largely on the necessity for election by a widow under modern statutes which allow her to take against her husband's will, and on the effects of her election or non-election upon her interest in her husband's estate. In so far as a surviving husband has identical rights, they will be adverted to, but no attempt will be made to work out the variations in this regard. At any early point in the discussion a cursory reference to inchoate dower and to the necessity for election between inchoate dower and certain testamentary dispositions will be made, but merely as a background for the later exhaustive discussion of the widow's elective rights under modern statutes. Excluded from the discussion will be anything more than a general reference to the effects on third parties brought about by the election or non-election of the widow. Excluded also will be any attempt to discuss the technical procedures often set up by statute to govern the widow's election, either in the normal case or in the abnormal case where the widow is non compos mentis or a minor. No effort will be made to consider the general problem as regards those states having the community property system. Within these limits, discussion will now turn to the doctrine of election generally.

I
THE DOCTRINE OF ELECTION GENERALLY

A. Its Origin and Definition

In considering the doctrine of the widow's right of election as applied to wills, it seems proper to look briefly at a few historical items intimately connected with election generally. Like many of the

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doctrines of our law, the doctrine of election antedates the common-law period, and it seems to be generally accepted today that it had its beginnings in the civil law.\(^1\) Under that law it appears that a testamentary gift of property which the testator knew was not his own, was not void, but rather cast on the heir, if he claimed as such in the estate, the duty of procuring the subject of the gift from its owner, if it was not already his own, or of giving the donee the reasonable value in money.\(^2\) Later, it was possible for the testator, by an express direction in the terms of his gift, to impose the obligation of procuring the bequest or its value on any person deriving a benefit under his will to the extent of the benefit received.\(^3\) It seems quite certain that under the early civil law, the doctrine of election was confined to wills,\(^4\) but under the common law it has been held to apply to deeds as well.\(^5\) According to Professor Pomeroy’s reading of the Roman law, the doctrine had no application unless the donor was aware that he was dealing with property not his own.\(^6\) In our equity jurisprudence, however, the doctrine applies irrespective of the testator’s knowledge as to the ownership of the property with which he dealt.\(^7\) On the other hand, the French Code omitted altogether to adopt the doctrine.\(^8\)

In our law, election has been defined as “the obligation imposed

\(^1\) See Mr. Swanston’s note to Dillon v. Parker, 1 Swanst. 359 at 396, 36 Eng. Rep. 422 at 434 (1818); I Pomeroy, Equity Jurisprudence, 4th ed., § 463 (1918). As to a similar doctrine in Scotch law, known as the doctrine of “approbation and reprobation,” see Codrington v. Codrington, L.R. 7 H. L. 854, 45 L.J. (N.S.) 660 (1875). Generally, see Alvarez, “The Hereditary Rights of the Surviving Spouse under the Civil Code,” 11 Phil. L. J. 1 (1931); Register, “Property Rights of the Surviving Husband or Wife under the French Civil Code,” 30 Yale L. J. 23 (1920).

\(^2\) I Swanst. at 396, 36 Eng. Rep. at 437 (1818), citing Inst. lib. 2, tit. 30, s. 4; tit. 24, s. 1; Dig. lib. 30, l. 39, s. 7; l. 104, s. 2; l. 71, s. 3; lib. 32, l. 30, s. 6. 3 Story, Equity Jurisprudence, 14th ed., § 1454 (1918). Apparently he might avoid this responsibility by forfeiting his own claims. I Swanst. at 397, 36 Eng. Rep. at 437 (1818); 3 Story, Equity Jurisprudence, 14th ed., § 1455 (1918).

\(^3\) I Swanst. at 396, 36 Eng. Rep. at 434 (1818).


\(^5\) “The rule of election, however, I take to be applicable to every species of instrument, whether deed or will...” Per Lord Redesdale in Birmingham v. Kirwan, 2 Sch. & Lefr. 444 at 450 (1805); I Pomeroy, Equity Jurisprudence, 4th ed., § 470 (1918).

\(^6\) I Pomeroy, Equity Jurisprudence, 4th ed., § 463 (1918).


\(^8\) I Pomeroy, Equity Jurisprudence, 4th ed., § 463, note (1918), citing French Civil Code, § 1021.
upon a party to choose between two inconsistent or alternative rights or claims in cases where there is a clear intention of the person from whom he derives one that he should not enjoy both; it thus presupposes a plurality of gifts or rights, with an intention, express or implied, of the party who has a right to control one or both, that one should be a substitute for the other.\footnote{9}

The foundation of this equitable doctrine of election has been said to be the intention, implied or express, of the author of the instrument to which it is applied.\footnote{10} In the case of wills, this intention to dispose of that which is not the testator's must be clearly manifest,\footnote{11} and not conjectural.\footnote{12} Professor Pomeroy, however, points out that in cases where the testator erroneously supposes that the property he is giving away is his own, it is logically impossible for him to have the actual intention which the doctrine would impute to him, since he in fact believes that he has a dispositive power over the property.\footnote{13} Professor Pomeroy therefore urges that the whole theory and process of election can best be explained as a practical application of the maxim that he who seeks equity must do equity.\footnote{14} Such a basis, he feels, avoids criticisms to the effect that the doctrine is arbitrary and technical and its application an unwarranted exercise of power by a chancery court.

Quite probably the doctrine was developed to take care of the situation where $T$ (estator) gave $D$ (evisee) certain property which belonged to $O$ (owner) and then gave to $O$ an independent gift. Under such circumstances it is easy to see how a court developed the theory that $T$ must have intended $O$ to acquiesce in the gift to $D$ if $O$ were to claim his own gift from $T$. Later it came to be applied to all cases of inconsistent claims under any instrument.

As regarded a woman's interest in her husband's property, the common-law notion was that immediately upon the husband's becoming seized of any realty, his wife acquired a present, though inchoate, dower interest of which she could not be deprived without her consent, and which ripened into dower consummate on her husband's death. It

\footnote{9} 3 Story, Equity Jurisprudence, 14th ed., § 1451 (1918); see also Moore v. Baker, 4 Ind. App. 115, 30 N. E. 629 (1892); Weeks v. Weeks, 77 N. C. 421 (1877).
\footnote{13} 1 Pomeroy, Equity Jurisprudence, 4th ed., § 464 (1918).
\footnote{14} 1 Pomeroy, Equity Jurisprudence, 4th ed., § 405 (1918).
was thus but a step for a court to assimilate the election doctrine to this theory of the widow's dower interest as "property not owned" by her husband, and to hold that when he purported by will to give certain of his property, unencumbered, to another, while making a separate provision for her, she was put to a choice between claiming that testamentary interest and her vested dower interest in the other property. Such a result, however, was more commonly justified on the basis of inconsistency between the two interests, or on the ground that her husband could not possibly have intended her to have both. Hence the prevailing common-law rule was that in the absence of such inconsistency or other consideration to the contrary, a testamentary provision in favor of the widow was a bounty to be received in addition to dower.\footnote{See notes 21 to 31, inclusive, post.}

With regard to modern forced-heir statutes,\footnote{In jurisdictions which have abolished common-law dower, statutes commonly provide that on a spouse's death, testate or intestate, the survivor shall be entitled to a given interest in the deceased's estate. This has come to be known as a forced share and its recipient as a forced heir, inasmuch as the decedent may not by will deprive the non-consenting survivor of that interest. In its simplest form such a statute merely provides that one spouse shall not devise away from the survivor more than a given fractional part of his estate. For an example of such a statute, see Wyo. Rev. Stat. (1931), § 88-101.} however, the theory is not so clear. By virtue of such legislation the widow is not given an inter vivos interest in her husband's property; it merely secures to her a designated interest if, on his death, he has failed to make a minimum provision in her behalf. Consequently, it cannot be said so neatly that something belonging to the widow has been given to a third party so as to warrant an election on her part. On the other hand, these statutes may be thought of as at least giving the widow such a conditional or possible interest that a court is justified in treating them on a basis similar to dower for the purpose of requiring an election, and on such a theory the same results may be obtained under modern conditions.

B. The Rule of Election as Regards Wills

As has already been intimated, the doctrine of election is one which has become of especial significance in the realm of decedents' estates. The law early threw up certain protective devices in favor of wives who should become widows; and when a husband made a provision for his wife under his will, a question frequently arose as to whether that provision was exclusive, or whether the beneficences of the law might
be taken in addition. It is to resolve this sort of difficulty that the doctrine of election has been repeatedly invoked.

Going back to the situation at common law, it was well established that dower was an interest in the husband's lands, given for the protection of the wife. Over this interest the husband had no control; he could neither dispose of it during his lifetime, nor direct its disposition at his death. As to the reasons and policy which prompted this benevolent intervention of the law in the widow's behalf, we need not here inquire; suffice it to state the proposition generally. Not infrequently, however, it must be presumed that the burden imposed by the law was onerous to the husband, and that likewise it did not always serve a beneficial purpose as regards the wife. Consequently, though the husband could not directly affect the interest, it came to be well established that he might by antenuptial agreement or jointure, or by conditional provision in his will, avoid the interest, not by his own act, to be sure, but by the free acquiescence and consent of the wife.

Sometimes, however, in the case of wills, a disposition would be made in favor of the wife without its expressly being stated to be in lieu of her dower interest. It was precisely here that the doctrine of election came to be effectively employed. Perhaps no better statement of the matter can be found than in the words of Lord Redesdale in the early case of *Birmingham v. Kirwan*:

"The general rule is, that a person cannot accept and reject the same instrument. . . . The principle, then, that the wife cannot have both dower and what is given in lieu of dower, being acknowledged . . . the only question in such cases must be, whether the provision alleged to have been given in satisfaction of dower was so given, or not. . . .

"As the right to dower is in itself a clear legal right, an intent to exclude that right, by voluntary gift, must be demonstrated either by express words, or by clear and manifest implication. If there be anything ambiguous or doubtful, if the court cannot say that it was clearly the intention to exclude, then the averment that the gift was made in lieu of dower cannot be supported. . . . the result of all the cases of implied intention seems to be, that . . .

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27 I Tiffany, Real Property, 2d ed., § 226 (1920); 17 L. R. A. (N. S.) 866 (1909).
28 I Tiffany, Real Property, 2d ed., § 225 (1920).
19 2 Sch. & Lefr. 444 at 449, 452, 453 (1805).
20 As already pointed out, however, Professor Pomeroy has suggested that the real rationale of the doctrine lies in the grand equitable principle that he who seeks equity must do equity. See note 14, supra.
the instrument must contain some provision, inconsistent with the assertion of a right to demand [the legal interest]."

Modern statutes have tended to ring certain changes upon the common-law concepts, as statutes always do, but they have not failed to inject new problems and difficulties which will be adverted to later. Perhaps the chief changes wrought by the statutes lie in the reversal of the common-law rule that provisions in a will were presumed to be a bounty and in addition to dower unless expressly or impliedly provided to the contrary, in the defining of cases in which elections shall be made, by whom they shall be made, in what manner and time they shall be made, etc.

Before proceeding further it may also be of value to survey briefly a few general propositions with regard to questions of the widow's election. In the absence of statutory regulation or of an express statement of the testator's intention with regard to the widow's share, the cases again and again reiterate the proposition that to put the widow to her election, the testator's intention to that effect must be deducible by clear and manifest implication from the will, founded on the fact that her other claims would be inconsistent with, or so repugnant to, the terms of the will as necessarily to disturb or defeat them. Numerous


For cases where under such a rule, inconsistency and repugnancy has been found and an election required, see the following: Herbert v. Wren, 7 Cranch (11 U. S.) 370 (1813); Alling v. Chatfield, 42 Conn. 276 (1875); Warren, Exr. v. Morris, 4 Del. Ch. 289 (1871); Brown v. Pitney, 39 Ill. 468 (1866); Snyder v. Miller, 67 Iowa 261, 25 N. W. 240 (1885); Mohn v. Mohn, 148 Iowa 288, 126 N. W. 1127 (1910); In re Stevens' Estate, 163 Iowa 364, 144 N. W. 644 (1913); Pemberton v. Pemberton, 29 Mo. 408 (1860); Norris v. Clark, 10 N.J. Eq. 51 (1854); Stewart v.
other criteria also are applied by the courts in an effort to reach the proper conclusion in these cases. For instance, where the testator has failed to make an express statement of his intention, some courts feel that fact itself is an indication that he intended the testamentary provision as a bounty. To others, the extent and value of the testamentary grant is of strong significance. Still others support the proposition that a bequest of personalty clearly evidences testator's intention not to bar dower, whereas a devise of reality shows the contrary. A testamentary scheme in which an equality of interest predominates is sometimes held to evince an intention to bar dower; so also where the


As indicative of an intention to bar dower: Anthony v. Anthony, 55 Conn. 256, 11 A. 45 (1887); Stewart v. Stewart, 31 N. J. Eq. 398 (1879); Brooklyn Trust Co. v. Dais, 122 N. J. Eq. 182, 192 A. 849 (1937); Blackmon v. Williams, 113 S. C. 437, 102 S. E. 324 (1920); Atkinson v. Sutton, 23 W. Va. 197 (1883).


In re Green's Estate, 16 Del. Ch. 470, 142 A. 825 (1928). See also Fulton v. Fulton, 30 Miss. 586 (1856), as well as the remarks in Brown v. Pitney, 39 Ill. 468 (1866), where a statute was involved, and Bunker v. Bunker, 130 Me. 103, 154 A. 73 (1931). The theory may be that since at common law dower was an interest in land only, the gift of another species of property could not be said to evince an intent to bar the legal interest in the realty, but that this occurred only when the gift was of an estate in realty.

Chalmers v. Storil, 2 V. & B. 222, 35 Eng. Rep. 303 (1813); Roberts v. Smith, 1 Sim. § St. 513, 57 Eng. Rep. 203 (1823); McLeod v. McDonnel, 6 Ala. 236 (1844); Waters v. Howard, 1 Johns. (Md. Ch.) 112 (1847); Griggs v. Vehite, 47 N. J. Eq. 179, 19 A. 867 (1890); Helme v. Strater, 52 N. J. Eq. 591, 50 A. 333 (1894); Dodge v. Dodge, 31 Barb. (N. Y.) 413 (1860); Closs v. Eldert, 16 Misc. 104, 37 N. Y. S. 353 (1896); Petition of Durfee, 14 R. I. 47 (1882); In re Purcell, 25 R. I. 553, 57 A. 377 (1904); Bailey v. Boyce, 4 Strob. Eq. (S. C.) 84 (1850); Callaham v. Robinson, 30 S. C. 249, 9 S. E. 120 (1888); Bannister v. Bannister, 37 S. C. 529, 16 S. E. 612 (1892); Bomar v. Wilkins, 154 S. C. 64, 151
value of the other dispositions would be lessened or defeated by the allowance of the dower claim in addition. A power of sale or a disposition in trust may evidence an intention to bar dower. A few courts have discovered an intention to exclude dower in a disposition of specific property by name, whereas a disposition in general terms has been found to show that testator intended to dispose of his estate only, which the court construed to be subject to dower. Giving the residue of the estate to the testator's children, or devising the widow a fee or life interest in certain realty, has in some cases not been thought


27 Herbert v. Wren, 7 Cranch (11 U. S.) 370 (1813); Warren v. Morris, 4 Del. Ch. 289 (1871); Snyder v. Miller, 67 Iowa 261, 25 N. W. 240 (1885); Mohn v. Mohn, 148 Iowa 288, 126 N. W. 1127 (1910); Stewart v. Stewart, 31 N. J. Eq. 398 (1879); Adis v. Adis, 2 Johns. Ch. (N. Y.) 448 (1817); In re Frazer, 92 N. Y. 239 (1883); Duncan v. Duncan, 2 Yeates (7 Pa.) 302 (1798). For cases in which trusts were involved, see In re Evans' Estate, 145 Minn. 252, 177 N. W. 126 (1920); Trautz v. Lemp, 329 Mo. 580, 46 S. W. (2d) 135 (1932); Tobias v. Ketchum, 32 N. Y. 319 (1865); In re Lakner's Will, 125 Misc. 654, 211 N. Y. S. 174 (1925); In re Trombley's Estate, 142 Misc. 255, 255 N. Y. S. 93 (1931); Rhode Island Hospital Trust Co. v. Briggs, 52 R. I. 254, 160 A. 197 (1932). Contra: Fuller v. Yates, 8 Paige (N. Y.) 325 (1840); Sanford v. Jackson, 10 Paige (N. Y.) 266 (1843); Konvalinka v. Schlegel, 104 N. Y. 125 (1887); Kimbel v. Kimbel, 14 App. Div. 570, 43 N. Y. S. 900 (1897); In re Fairchild's Will, 138 Misc. 363, 245 N. Y. S. 617 (1930); McDermid v. Bowhill, 101 Ore. 305, 199 P. 610 (1921); Scott v. Vaughan, 83 S. C. 362, 65 S. E. 269 (1909).

28 In re Moore's Estate, 62 Cal. App. 265, 216 P. 981 (1923), where the disposition was of the "714 Ceres Ave., property"; Pemberton v. Pemberton, 29 Mo. 408 (1860); Job Haines Home for Aged People v. Keene, 87 N. J. Eq. 509, 101 A. 512 (1917), where the disposition was of "the house and premises where I now reside"; Penn v. Guggenheimer, 76 Va. 839 at 847 (1882).

29 Havens v. Havens, 1 Sandf. Ch. (N. Y.) 324 (1844).


so conclusive as to bar dower. Statutes account for the results in some instances. 82

C. The Necessity for Election Under Modern Statutes

In modern law, the matter of the necessity for an election by a spouse is largely controlled by statute. To be above reproach, one would be compelled to say that since none of the statutes are identical, they are all different, and that hence the provisions of each must be consulted. However, in order to give some sort of a complete picture here, and with this word of warning, a few general statements will be made with the hope that the reader will not too harshly criticize the effort. Very generally it may be said that these statutes permit an election between (1) provisions in the will and some type of dower in land or absolute interest in real and/or personal estate; (2) pro-

Contra: Rowley v. Sanns, 141 Ind. 179, 40 N. E. 674 (1895); In re Estate of Foster, 76 Iowa 364, 33 N. W. 135, 41 N. W. 43 (1887); Stark v. Hunton, 1 N. J. Eq. 216 (1831); but see Lewis v. Smith, 9 N. Y. 502 (1854).

82 For a few interpretations of such statutes, see Smith v. Baldwin, 2 Ind. 404 (1850); Wilson v. Moore, 86 Ind. 244 (1882); Young v. Boardman, 97 Mo. 181, 10 S. W. 48 (1888).

Practically without exception courts have found such inconsistency as will call for an election between dower and the provisions of the will whenever it appears that testator's testamentary disposition is based on a scheme of equality. That is, the widow must elect when giving her dower would prevent the equality of participation in the estate intended by the testator as between her and other testamentary beneficiaries. The mere fact that the husband gives a testamentary annuity to his wife, charged on lands in which she would normally have dower, and which are devised to others by the will, is not sufficient to put her to an election between the annuity and her dower. See generally on the foregoing, 1 Pomeroy, Equity Jurisprudence, 4th ed., § 498 ff. (1918). For the effect on a statutory allowance of an election to take under the will, see 4 A. L. R. 391 (1919). Unless there is an inconsistency between the two claims, the widow need not elect between a testamentary provision and her homestead rights. 2 Page, Wills, 2d ed., § 1195 (1926). Nor, in the absence of a statute, is a widow bound to renounce a will which makes no provision for her. Election implies a choice, and there of course can be no real choice between dower or statutory interests and a will which makes no provision for the surviving spouse: Chaplin v. Leapley, 35 Ind. App. 511, 74 N. E. 546 (1905); Tyler v. Wheeler, 160 Mass. 206, 35 N. E. 666 (1893). Statutes commonly raise presumptions of election in case the person entitled to an election fails to exercise his right. Ill. Rev. Stat. (1937), c. 41, § 11; Kan. Gen. Stat. Ann. (1935), § 22-246. Likewise, modern statutes frequently provide a specific procedure for election by persons under disability. Ala. Code (1928), § 10596.

See generally on the widow's election between provisions under her husband's will and other rights the following: 51 Am. Dec. 579 (1886); 92 Am. St. Rep. 695 (1903); 18 L. R. A. (N. S.) 272 (1909); 22 A. L. R. 437 (1923), supplemented in 68 A. L. R. 507 (1930). As to what amounts to an election to take under or against the will, see 49 L. R. A. (N. S.) 1072 (1914).
visions in the will and an outright intestate or qualified intestate share; (3) provisions in the will and forced-heir guaranties; (4) dower or intestate share and a jointure or pecuniary provision; (5) between some type of dower and some absolute interest in the estate, upon a renunciation of the testamentary provisions. Sometimes, too, a combination of two or more of these may be permitted.

In four states no specific provisions requiring or controlling election are to be found. The statutes of fourteen states provide that upon dissent to the will the spouse shall be entitled to some life use or absolute interest in a part of the real and/or personal property of the estate. Some thirteen states have statutes providing that a spouse may dissent in any case and take such interests in the estate as would be given on intestacy. A few of these statutes also provide upper limits so that the election device may not be used by a spouse to secure a lion's share of the estate. At least two states require a dissent from the will as a condition precedent to claiming the benefit of the local forced-heir statute, while two others provide that the statutory share shall be awarded unless claim is made under the will. A few statutes ambiguously provide that if a devise or pecuniary provision is made by the will in lieu of dower, there shall be an election; this without defining whether the provision must be expressed to be in lieu of dower, or whether it is sufficient if it is impliedly in lieu of dower. Others merely say that there must be an election under or against the will of a deceased spouse. Most statutes declare that a failure to elect in conformity with their provisions shall be taken to be an election to accept the testamentary or pecuniary provision or jointure, but in three states, failure to accept the will confines the spouse to certain statutory interests. Most of the election statutes contain some

88 North Dakota, Oklahoma, South Carolina, and South Dakota.
84 Delaware, Florida, Georgia, Illinois, Kentucky, Maryland, Michigan, Missouri, Montana, New Jersey, New York, Oregon, Vermont, and Virginia.
85 Alabama, Kansas, Maine, Massachusetts, Michigan, Mississippi, Nebraska, North Carolina, Ohio, Pennsylvania, Tennessee, West Virginia, and Wisconsin.
86 See, for example, Ala. Gen. Acts (Ex. sess. 1932), No. 304, p. 307.
88 For example, see Ind. Stat. Ann. (Burns, 1933), §§ 6-2319, 6-2325; Utah Rev. Stat. (1933), § 101-4-4.
89 For example, see Ark. Dig. Stat. (Pope, 1937), § 4410; Minn. Laws (1935), c. 72, § 47; R. I. Gen. Laws (1923), § 4311.
40 For example, see Iowa Code (1935), § 12007.
41 For example, see Ark. Dig. Stat. (Pope, 1937), § 4411, and the statutes adverted to at note 38, supra.
time limit within which the election must be made. This limit is generally fixed as within a given time after the testator's death, after the probate of the will or the issuance of letters of administration, or within some time after the issuance of a citation to elect; the date for publication of notice to creditors or for the expiration of the period for filing claims is also sometimes the deadline adopted.

II

The Effects of Election

Throughout the foregoing discussion an attempt has been made to point out generally why and when the widow must make an election during the process of settlement of her husband's estate. Assuming that a case for election by the widow has been made, we shall now consider the effects of her action from the standpoint of (1) an election to take under the will, and (2) an election to take against the will. Except for a few general allusions as to the effects on third parties, attention will be centered on the consequences of an election upon the widow herself.

Before treating these two heads specifically, a few general statements with regard to them should be made. As regards an election to take under the will, the usual rule is that dower or statutory interests in the widow's favor are thereby barred as to land or other property passing under the will to other beneficiaries, though the rule at common law was originally to the contrary. That rule rested on the theory

42 To the effect that the expiration of the statutory time limit bars dower except for good cause, see Dillen v. Fancher, (Ark. 1938) 113 S. W. (2d) 483.

43 In the interest of certainty and expediency, it has generally been held that any election, once made by a person with full knowledge of all the facts, is irrevocable and will bind the party and his privies: Adams v. Adams, 39 Ala. 274 (1864); Brown v. Brown, 55 N. H. 106 (1875); Job Haines Home for Aged People v. Keene, 87 N. J. Eq. 509, 101 A. 512 (1917); Penn v. Guggenheimer, 76 Va. 839 (1882); 1 Pomery, Equity Jurisprudence, 2d ed. § 516 (1918). However, if the statute allows a given time in which an election may be made, it has been held that an election may be withdrawn before the expiration of that period if no one will be prejudiced thereby. Ward v. Ward, 134 Ill. 417, 25 N. E. 1012 (1890). Upon proper petition, an election procured by fraud or inadvisedly made may be set aside. Whitesell v. Strickler, 167 Ind. 602, 78 N. E. 845 (1906). It has also been held that an election, though technically completed, can have no effect in those cases where the provisions of the will and the claim of dower or statutory interest are consistent. Brown v. Brown, supra.

44 Cain v. Cain, 23 Iowa 31 (1867); Van Guild v. Justice, 56 Iowa 669 (1881); Colgate's Exr. v. Colgate, 23 N. J. Eq. 372 (1873); Smith v. Bone, 7 Bush (70 Ky.) 367 (1870); Willey v. Lewis, 113 Wis. 618, 88 N. W. 1021 (1902).
that the widow's dower was "a clear legal right" of which she could not be deprived without her consent.\textsuperscript{45} Normally, therefore, unless the will expressly indicated that the provision therein made was in lieu of dower, the widow was allowed both interests on the theory that the testamentary provision was a bounty.\textsuperscript{48} On the other hand, if it appeared that the provisions of the will were so inconsistent with or repugnant to the will that to allow the widow both interests would defeat or disturb the will, and thereby disappoint testator's general intent, the widow would be required to choose which interest she would take.\textsuperscript{47} Modern statutes, however, commonly make effective as an election to take under the will, a failure to renounce in conformity with the law.\textsuperscript{48} Where the widow has elected to take a testamentary provision in her favor in lieu of dower, she has sometimes been treated as a purchaser for value, and not as the mere recipient of the testator's bounty.\textsuperscript{49} Consequently, when part of the property given her under the will has been taken to pay debts, there is some authority for allowing her reimbursement from the balance of the estate.\textsuperscript{50} Having elected to take under the will, a widow has been denied homestead rights as against her husband's creditors,\textsuperscript{51} but she is commonly awarded her statutory allowance for support and maintenance during the administration period.\textsuperscript{52} Election to take under a will in fact invalid cannot of course be effective to render it valid.\textsuperscript{53}

To a certain extent, courts also have been troubled with the question of the theory on which a widow takes upon renunciation of the will, and some little diversity of opinion has arisen. The argument has sometimes been made that upon renunciation, the estate, at least as to the widow, is to be treated as intestate,\textsuperscript{54} and that she therefore may claim the share she would have been entitled to had her husband died without any will. This approach has been rejected almost uniformly,

\textsuperscript{45} 2 SCRIBNER, DOWER, 2d ed., 439 ff. (1883).
\textsuperscript{46} 2 PAGE, WILLS, 2d ed., § 1190 (1926).
\textsuperscript{47} THOMPSON, WILLS, 2d ed., §§ 471, 475 (1936).
\textsuperscript{48} For example, see Ark. Dig. Stat. (Pope, 1937), § 4411.
\textsuperscript{49} Richie v. Cox, 99 Ill. App. 369 (1901); Isenthart v. Brown, 1 Edw. Ch. (N. Y.) 411 at 413 (1832).
\textsuperscript{50} Overton v. Lee, 108 Tenn. 505, 68 S. W. 250 (1902).
\textsuperscript{52} In re Cowell's Estate, 164 Cal. 636, 130 P. 209 (1913); Bowman v. Olrick, 165 Ind. 478, 75 N. E. 820 (1905).
\textsuperscript{53} Dean v. Mumford, 102 Mich. 510, 61 N. W. 7 (1894).
\textsuperscript{54} Davis v. Mather, 309 Ill. 284, 141 N. E. 209 (1923); Gamble v. Rooney, 192 Ind. 454, 134 N. E. 199 (1922); In re Grobe's Estate, 101 Neb. 786, 165 N. W. 252 (1917).
however, on the ground that intestate statutes are applicable only in cases of bona fide intestacy, and that the mere act of renunciation on the part of the widow cannot operate to render the whole estate intestate. 55 If the statute does not state what interest the widow shall take upon renunciation, it is generally held that she is confined to that portion of the estate as to which she is a forced heir; 56 if the statute does designate the interest, she is entitled to that rather than to an intestate share, and moreover she is sometimes confined thereto even though there is genuine intestate property also. 57 In some states, too, the forced heir and intestate shares are the same.

Another vexed question is whether election to take against the will demands an absolute forfeiture or merely imposes an obligation to indemnify those who are disappointed under the will. While it is not proposed to deal thoroughly with the subject here, a few remarks may be pertinent. It is commonly said that taking against the will bars all interest under it as regards the person making the renunciation. 58 As to other testamentary beneficiaries, however, the instrument nor-

55 Falligant v. Barrow, 133 Ga. 87, 65 S. E. 149 (1909); In re Hartmann's Estate, 16 Del. Ch. 466, 141 A. 695 (1928); McMurphy v. Boyles, 49 Ill. 110 (1868); Shoup v. Shoup, 319 Ill. 179, 149 N. E. 746 (1925); Kilgore v. Kilgore, 319 Ill. 298, 149 N. E. 754 (1925); Fife v. Fife, 320 Ill. 270, 150 N. E. 650 (1926); Perkins v. Little, 1 Greenl. (1 Me.) 148 (1820); Gatchell v. Curtis, 134 Me. 302, 186 A. 669 (1936); Gordon v. James, 86 Miss. 719, 39 So. 18 (1905); Whyde v. Lunn, 15 Ohio App. 297 (1921); In re Hollinger's Estate, 259 Pa. 75, 102 A. 410 (1917); In re Lucas' Estate, 277 Pa. 553, 121 A. 315 (1923); In re Little, 22 Utah 204, 61 P. 899 (1900). But see In re Taylor's Will, 55 Ill. 252 (1870), to the effect that if the will makes no provision for the widow, and she renounces, as to her the estate is to be considered intestate. And see In re Pursell's Estate, 244 Pa. 407, 90 A. 637 (1914), where the court held that upon renunciation by a surviving spouse, as to him there were no devisees or legatees to be considered, but that the estate was to be distributed as that of an intestate. And see Ruh's Exrs. v. Ruh, 270 Ky. 792, 110 S. W. (2d) 1097 (1937). For the effect of a renunciation on the rest of the will, see 27 L. R. A. (N. S.) 602 (1910).

56 In re Little, 22 Utah 204, 61 P. 899 (1900), and see also Perkins v. Little, 1 Greenl. (1 Me.) 148 (1820). For a definition of a forced heir and example of a forced heir statute, see footnote 16, supra.

57 In re Hollinger's Estate, 259 Pa. 75, 102 A. 410 (1917), and see the discussion of "Election to Take Against the Will as Barring the Widow from Sharing as Heiress in Intestate Property," to appear in a second installment of this article.

58 If the widow renounces, she cannot claim the benefit of a power of sale contained in the will: McReynolds v. Jones, 30 Ala. 101 (1857); nor of a provision that her share shall be free of liens: Ashelford v. Chapman, 81 Kan. 312, 105 P. 534 (1909); nor of a conversion clause: Barnett's Admr. v. Barnett's Admr., 1 Metc. (58 Ky.) 254 (1858); Pacholder v. Rosenheim, 129 Md. 455, 99 A. 672 (1916); Gilson v. Gilson, 11 Ohio Cir. Ct. (N. S.) 49 (1908); Geiger v. Bitzer, 80 Ohio St. 65, 88 N. E. 134 (1909); Estate of Hart, 13 Phila. (Pa.) 226 (1879).
mally is held to remain operative, though of course their shares may be decreased in value by the widow’s action; nevertheless, the court is obliged to carry out its provisions as near as may be. A review and discussion of the early English cases led Mr. Swanston to state that in the event of an election to take against the will, courts of equity will sequester the benefit given by the instrument to the non-conforming beneficiary in order to compensate those who are disappointed by his election, but upon their satisfaction any surplus should not be treated as undisposed, but should pass instead to the renouncing beneficiary. In his opinion, a theory of compensation, effectuated by sequestration through the intervention of the court, tends to carry out testator’s intention, while a theory of forfeiture tends to defeat it. Subsequent writers have concurred in this construction.

A. Election to Take Under the Will as Barring Dower in Lands Aliened by the Husband Alone

Turning to particular effects produced by an election to take under the will, an interesting and vexing question has often been presented in the case of lands aliened without the wife’s consent during the marriage. The problem may arise in a variety of settings, such as where the husband alone makes a straight conveyance of the premises, or where he makes a mortgage which is subsequently foreclosed and the land sold, or where the premises are sold on execution for the debts of the husband. In any of these cases, at the death of the husband, shall a widow who has elected to take the provision made for her in his will be allowed also to assert dower in such properties? Probably the weight of authority supports the proposition that the widow cannot recover dower therein, but there is respectable authority to the contrary.

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69 Ann. Cas. 1913E, 416 at 417; Dean v. Hart, 62 Ala. 308 (1878); Murphy v. Murphy, 125 Fla. 855, 170 So. 856 (1936); Gamble v. Rooney, 192 Ind. 454, 134 N. E. 199 (1922); Pittman v. Pittman, 81 Kan. 643, 107 P. 235 (1910); In re Little, 22 Utah 204, 61 P. 899 (1900).
61 l Jarman, Wills, 7th ed., 514-515 (1930), and cases there cited; Bisham, Principles of Equity, 11th ed., § 282 (1931).
62 Haynie v. Dickens, 68 Ill. 267 (1873); Richie v. Cox, 99 Ill. App. 369 (1901); Buffinton v. Fall River National Bank, 113 Mass. 246 (1873); Barnard v. Fall River Savings Bank, 135 Mass. 326 (1883). See also cases cited at notes 65, 66, and 67, post.
63 See l Tiffany, Real Property, 2d ed., § 225 (1920), citing cases pro and con.
Decisions in accord with the prevailing view are arrived at in various ways. As we have already seen, the widow might be barred of her dower if that claim was so inconsistent with the provisions of the will that to allow both interests would defeat or disturb the will and thus defeat the testator's intention as gathered from the whole document. Statutes also commonly put the widow to her election when some provision is made for her in her husband's will, unless it plainly appears that he intended her to have both interests. Under such statutes, unless there is very plain language to the contrary, the court can determine that the provision was made and accepted in lieu of dower. It is thus clear that application of one or the other of these principles will be sufficient to bar the widow's dower in lands which pass under the will. But often it has been urged that there can be no inconsistency in allowing the widow dower in lands aliened by the husband alone if she waives dower in lands which pass under the will; i.e., to allow her dower in the former property would not defeat or disturb the will, for those who take thereunder have no claim or interest of any nature in the lands so aliened by the husband. However, the answer to this has been that the widow's dower right cannot be regarded in a divisible capacity; it must be exercised in toto, or repudiated altogether.

Another argument has been based on statutes defining a widow's dower as being in all of the realty of which her husband was seized or possessed at any time during the marriage. Courts have urged that the dower as defined by such a statute is the dower in lieu of which the testamentary provision was given and accepted. Then, too, in those cases where the husband has conveyed by full warranty deed, some courts have denied the widow's claim to dower in addition to the

64 For an example of such a statute, see Del. Rev. Code (1935), § 3771.
66 Sanders v. Wallace, 118 Ala. 418, 24 So. 354 (1897); Bowers v. Lillis, 187 Ind. 1, 115 N. E. 930 (1917); Hornsey v. Casey, 21 Mo. 545 (1855); Spalding v. Hershfield, 15 Mont. 253, 39 P. 88 (1895); Palmer v. Voorhis, 35 Barb. (N. Y.) 479 (1861); Corry v. Lamb, 45 Ohio St. 203 (1887); Evans v. Pierson, 9 Rich. L. (S. C.) 9 (1855). Of course, if the statute merely gives dower in lands of which the husband died seized, the problem does not arise. For an example of such a statute, see Ga. Code (1933), § 31-101. See also Voss v. Stortz, 177 Ky. 541, 197 S. W. 964 (1917), where it was decided that the receipt of a devise by the husband under his wife's will did not bar his curtesy in land not disposed by her will.
testamentary provision given her on the ground that the estate would be opened thereby to a damage action for breach of the warranties, and that this would reduce the assets of the estate to the consequent injury and loss of beneficiaries under the will.67

On the other hand, either by a finding that the allowance of dower would not be incompatible with the will or by statutory interpretation, another line of cases has allowed the widow to recover her dower in these aliened properties. For instance, in *Corriell v. Ham*,68 the husband's will was shown to have given his widow his whole estate for widowhood or life, but if she remarried, her right was to be restricted to dower. During the marriage the husband alone had executed a mortgage on the premises in question. To recover her dower therein at his death, the widow sued defendant, who had become the purchaser at a sale had on foreclosure of that mortgage.69 In affirming a judgment for the plaintiff, the court said there was no inconsistency between the widow's claims; her assertion in the instant suit was of a marital dower right and not a claim under the will, for under no circumstances could the will pass her an interest in the land as it became effective long after the property was aliened. Moreover, the court declared that the will evinced an intention that the widow should have every possible interest for life, and hence if there were interests that she might have aside from the will, there could be no inconsistency in claiming them. In *Hall v. Smith*,70 a statute was involved which enacted that a widow, provided for in her husband's will, should not be endowed of lands of which he died seized unless within twelve months she renounced the will. It was urged that since the statute covered only lands of which the husband was seized at his death, lands aliened by him alone during the marriage must be governed by the common law, and that hence if the testator intended the testamentary benefit for his wife to be in lieu of dower in such lands, she would be barred upon acceptance thereof. The court accepted that argument, but held that the testator's conveyance of the lands in question to his various children and his charging them therewith as advancements was merely to enable them to share equally, and could not have been intended to deprive the wife of a

68 2 Iowa 552 (1856).
69 To the effect that a widow has an interest sufficient to entitle her to redeem in the foreclosure of a mortgage given by her husband alone, see May v. Fletcher, 40 Ind. 575 (1872).
70 103 Mo. 289, 15 S. W. 621 (1890).
property right which was hers and over which he had no control. Consequently, no inconsistency being found between the widow's claims and the testator's intent, she was held entitled to both interests.\textsuperscript{71} \textit{Westbrook v. Vanderburgh}\textsuperscript{72} was a case which turned on the interpretation of local statutes. One statute provided that the widow of every deceased person should be entitled to dower (or the use during her natural life) of one-third of all the lands whereof her husband was seized at any time during the marriage, unless lawfully barred. Another statute provided that if any provision be made for a woman in her husband's will, she should elect whether to accept such provision, or whether she would be endowed of her husband's lands, but that she should not have both unless such clearly appeared to have been his intention. The court decided that "husband's lands" in the second statute could mean only lands of which he died seized, for if he had previously conveyed them, they would not be his lands. Hence, ran the argument, her acceptance of the provision in the will barred her of dower only as to the lands held by the husband at his death, for by the first statute she was entitled to dower in all his lands, and the second required her to elect only as to those of which he died seized.

A Pennsylvania statute provided that a devise of any portion of a testator's estate, accepted by his widow, should be deemed and taken in lieu and bar of her dower out of his estate in like manner as if it had been so expressed. In \textit{Borland v. Nichols}\textsuperscript{73} the court admitted that, literally construed, the statutory words were sufficient to bar the widow's claim entirely, but on the basis of former decisions held that the statute was intended to be confined to lands devised or left to descend on the heir; hence as to other lands, the widow's dower was not barred. In a West Virginia case\textsuperscript{74} the local statute provided that a widow might renounce a will in which her husband had made provision for her, but if she failed to renounce, she would be limited to the provision made in the will. The court denied that the statute barred the widow of her dower in every case where she failed to renounce; rather it held that she was barred only if testator so intended, and that inasmuch as allowing her dower in the instant case would not defeat the provisions of the will, since the property in question did not pass under

\textsuperscript{71} See also Higginbotham v. Cornwell, 8 Gratt. (49 Va.) 83 (1851); and dicta in Lewis v. Smith, 11 Barb. (N. Y.) 152 (1851).

\textsuperscript{72} 36 Mich. 30 (1877).

\textsuperscript{73} 12 Pa. St. 38 (1849).

\textsuperscript{74} Shuman v. Shuman, 9 W. Va. 50 (1876), one judge concurring in the opinion, one dissenting, and one absent.
the will, testator could not have intended to put her to an election. In answer to the argument that the estate might be liable for breach of warranties in the husband’s deed, which it was claimed would thus indirectly defeat testator’s intention, the court seemed satisfied to say that this would only lessen the total estate, and would not defeat the proportions in which it was to be shared. The analysis made by the court seems weak. A much stronger argument could be based on the proposition that the testator must be presumed to have known the consequences of a breach of warranty; therefore, having in view the possibility that his estate might be sued if the warranties were breached, he can fairly be said to have anticipated a reduction in value of the testamentary dispositions he had made under his will if that contingency occurred; hence his wishes cannot be said to be defeated, if, by allowing the widow her dower, the contingency foreseen occurs. On principle, no reason is perceived why a devise accepted by the widow in lieu of dower should be interpreted as barring dower in any but testamentary properties, in the absence of express stipulation to that effect.

Then, too, a case can be supposed where the wife has flatly refused to join in the conveyance, whereupon the husband has arranged to sell at a reduced figure and to except dower from his warranties. In such a situation it seems clear that all parties expected the widow to have her dower if she outlived the husband. To deny her claim at his death would be to unjustly enrich the purchaser, for in effect he bought subject to dower, and as to him there is no reason why dower should be barred. In additional support of what may perhaps be said to be the minority rule, it may also be urged that in most cases it is unlikely that its application will inure to the hardship of the alienee, for in all probability he secured the title at a reduced figure and thus gambled on the widow’s ever having a claim to dower consummate. If he did fail to protect himself in some way, there is more reason for him to take the loss than there is to put the burden on the widow who had no part in the transaction.

Another situation where there is a split of authority is to be found where the husband has mortgaged the premises before his marriage, and thereafter a surplus from the foreclosure sale is realized. On principle, it certainly may be argued that as against all but the mortgagee the widow was entitled to dower, and that as to any surplus remaining after the satisfaction of the mortgagee’s claims, she should be given a share.76

76 See 1 Tiffany, Real Property, 2d ed., § 230 (1920), which cites cases pro and con.
A further interesting case arises where land is taken from a married man by eminent domain proceedings. The cases almost uniformly hold that the wife is not entitled to share in the condemnation award. It is sometimes urged in support of the majority rule that the property taken must of necessity be unencumbered. This is indeed true under the circumstances, and as against the taker the wife should have no claim, for the condemnation price supposedly covered any and all interests in the property taken. Such an argument, however, affords no reason for excluding the widow's claim as regards the fund which has been awarded in place of the land. There seems to be little reason why the value of the wife's interest could not be determined by mathematical expectancy tables and paid her, or at least a fund be impounded to be hers if she did outlive her husband. The condemning party or agency

76 9 R. C. L. 589 (1915); 1 TIFFANY, REAL PROPERTY, 2d ed., § 230 (1920); 1 THOMPSON, REAL PROPERTY, § 838 (1924). See also 80 UNIV. PA. L. REV. 749 (1932).

77 This result has been reached: Wheeler v. Kirtland, 27 N. J. Eq. 534 (1875); In re New York & Brooklyn Bridge, 75 Hun. 558, 27 N. Y. S. 597 (1894), affirmed in memo opinion in 143 N. Y. 640, 37 N. E. 823 (1894). See also annotation on the computation of the value of inchoate dower: 34 A. L. R. 1021 (1925), supplemented in 64 A. L. R. 1053 (1929). For annotation on the protection of inchoate dower against waste, see 53 A. L. R. 309 (1928). In support of the majority rule on the question, it has been urged that to allow the widow an immediate share in the proceeds would be to lay the foundation for a double recovery on her part in the same transaction. That is, she would take a share presently, and, should her husband have the balance of the award or its equivalent at his death, she would then be entitled to share in it as a part of his distributable estate. No reason is perceived for regarding this as an atrocity, however. Logically, if a married man, without having his wife join in the conveyance, sells his realty to a third person, that person takes the land subject to dower in the vendor's wife. If, then, the vendor has the proceeds at his death, his wife would take a portion thereof as her distributable share; she would likewise be entitled to recover dower from the vendee who, by accepting a deed from the husband alone, had taken his chances on her dower right ever becoming consummated. Why, then, should she be treated differently in case the property is taken by eminent domain proceedings? The condemnation award supposedly compensates for all interests in the land taken. One of these interests is the widow's dower. It would therefore seem equitable that the value of her dower be computed and impounded, payment to be made to her if and when her right should become consummate. Such a solution would give the condemning agency a good title, would do complete justice to the widow, and would give the husband all that he logically is entitled to, thus adequately protecting him. If, however, it is felt that the husband should have the use of the whole during his life, this solution might be adopted: decree that the husband invest the award in realty, to which of course the wife's dower rights would attach. This would enable the husband to use and control all of the premises during his life, and yet would adequately protect the wife if she should outlive him. If the husband was unwilling to do this, then the decree should determine the widow's share and impound it to await the contingency of her surviving the husband. Of course the
has in effect paid for the dower interest, and there is no sound reason why the husband or other parties should take it to the exclusion of the widow unless it be said that modern forced-heir and election statutes afford a widow ample protection and in the normal case the husband will adequately provide for his wife by will, so that additional protection in her behalf is not warranted in view of the inconveniences involved. Testamentary beneficiaries certainly are properly protected if, should the widow claim under the will, she is required at the husband's death and upon her acceptance of a provision in lieu of dower, to release dower in lands passing under the will, for in no event would they take any part of that which the widow might claim as dower in the condemned property. Nor by accepting a share in the condemnation award should the wife be held to have elected to take dower in the whole estate rather than under the will of her husband. If the present value of her interest is calculated and paid her at the time of the condemnation, she clearly should not be held to have made an election, for there was then no multiplicity of interests between which she might make a choice. Nor on principle should she be put to any election at her husband's death except as between interests under the will and interests under the law in testamentary properties. 

B. Election to Take Under the Will as Barring the Widow From Sharing as Heiress in Intestate Property

Under modern conditions, perhaps the most important aspect of the problem arising under the head of the effect of an election to take under the will is whether the widow may, in addition to her testamentary benefit, share in property which has become intestate either through lapse, a failure to dispose of it by will, invalidity of the testamentary disposition, or otherwise. Under these circumstances, shall the widow be barred from sharing in such intestate property as her husband's heir?  

question does not arise where dower merely consists of a given interest in lands of which the husband dies seized, or where a forced-heir statute is involved, for in such cases the wife has no present interest in realty sold by her husband during his lifetime.  

A situation somewhat similar is presented where the husband owns an undivided interest in land and has procured a decree for sale in partition proceedings. Unless the decree has particularly directed the sale to be made subject to dower, it would seem that the wife should be allowed a share in the proceeds. See 1 Reeves, Real Property 662 (1909), and 1 Tiffany, Real Property, 2d ed., § 230 (1920), where cases both for and against the widow's recovery are cited.  

See generally, L. R. A. 1917D 762; Ann. Cas. 1918B 986; 93 A. L. R. 1384 (1934).  

Due to spatial limitations it is impossible to consider here the important and
The problem just suggested may arise in various ways, but in the ensuing discussion we shall look at it from the four following standpoints: (1) The husband makes a testamentary provision for his wife, using language which plainly indicates that it is all which he wishes her to have from his estate; (2) The husband makes a testamentary provision for his wife, expressly in lieu of her dower, thirds, statutory allowance, or any and all interests which she might claim in his estate were no provision made for her by will; (3) The husband makes a testamentary provision for his wife without expressly indicating his intention as to whether or not it shall constitute her sole and only share in his estate; (4) The bearing and effect of modern legislation on the question.

I. Where Language of Will Indicates Intention that its Provision be Exclusive

The result to be expected in the first of these situations can be forecast fairly well. In cases where the wife is classed as an heir of her husband for the purpose of the administration and distribution of his estate, she will apparently be allowed to take both the provision made for her in the will and the proportion of the intestate property awarded her as heir under the intestate statutes, for the rule is stated to be settled quite definitely that an heir cannot be excluded from the inheritance by mere words expressing a design to disinherit; in addition there must be a valid disposition of the property to someone else. Since the intestate statutes were designed to dispose of all property not duly passed by last will and testament, it would seem that the mere

related question of spouses as heirs of each other under modern conditions and statutes. For valuable information on this point, see the following: Zacharias, "Husband and Wife as 'Heir' Under Testate Succession," 12 CHICAGO-KENT REV. 264 (1934); Sayre, "Husband and Wife as Statutory Heirs," 42 HARV. L. REV. 330 (1929); Simes, "The Meaning of 'Heirs' in Wills," 31 Mich. L. Rev. 356 (1933); 16 Col. L. Rev. 329, 348 (1916); 19 Corn. L. Q. 154 (1933); Baensch, "Husband and Wife as Heirs of Each Other," 9 Marq. L. Rev. 99 (1924); 4 Ill. L. Rev. 282 (1909); L. R. A. 1918A 1108; Ann. Cas. 1915D 1178; 15 L. R. A. 300 (1892); 30 L. R. A. 593 at 596 (1896).

60 Denn ex dem. Gaskin v. Gaskin, 2 Cowp. 657 at 661, 98 Eng. Rep. 1292 (1777): "though the intention is ever so apparent, the heir at law must of course inherit, unless the estate is given to somebody else." To the same general effect, see: Back v. Kett, Jacob 534, 37 Eng. Rep. 952 (1822); Parsons v. Millar, 189 Ill. 107, 59 N. E. 666 (1901); Ames v. Holmes, 190 Ill. 561, 60 N. E. 858 (1901); Tea v. Millen, 257 Ill. 624, 101 N. E. 209 (1913); In re Trumble's Will, 199 N. Y. 454, 92 N. E. 1073 (1910); Crane v. Doty, 1 Ohio St. 279 (1853); Bane v. Wick, 14 Ohio St. 505 (1863); Wood v. Mason, 17 R. I. 99, 20 A. 264 (1890); Philleo v. Holliday, 24 Tex. 38 (1859).
fiat of the testator, without more, should in no case be sufficient to bar an heir, and especially a widow who is said to be a favored heir under the law. However, either on the basis of effectuating the testator's intent or on the ground that the expressions used, though themselves not specific on the point, compelled the conclusion that the testamentary provision was made conditional on the heir's taking it in lieu of all other interests, courts have in some cases excluded the heir.\(^8^1\)

2. Where Testamentary Provision is Expressly in Lieu of All Other Interests

The second situation, i.e., where the husband makes a testamentary provision for his wife expressly in lieu of any other interest in his estate, in spite of the apparent definiteness of the language used, often raises difficult problems. At least two solutions have been offered and followed by the courts. (a) Some courts treat the provision as made

\(^8^1\) See Hoyle v. Stowe, 2 Dev. (13 N. C.) 318 (1830), to the effect that while the rule is that there must be a disposition to some other party capable of taking, because in the nature of things the heir takes what is not given away, yet it is clear that the rule can apply only in cases where there is but a single heir. Such an heir cannot be barred by mere words of exclusion, for if he could in that way be prevented from taking, there would be no one to take. However, when there is a class of heirs, the exclusion of one, or of all but one, still allows the devolution of the property, and hence the necessity for the rule ceases, and in such case the exclusion by mere words is good.

See also the recent and interesting case of Strauss v. Strauss, 363 Ill. 442, 2 N. E. (2d) 699 (1936), noted in 14 CHICAGO-KENT REV. 386 (1936). In that case testator created a testamentary trust for the use of his son, Albert. After certain other dispositions, the residue was left to testator's seven named children, Albert being expressly excluded. All through the will a careful distinction was kept between Albert and the other seven children, and in various places it was reiterated that Albert was to have only the one provision. One of the seven children predeceased the testator, and without issue, yet the will was never altered. Albert successfully contended in the lower court that the deceased's share lapsed and became intestate property in which he should be allowed to share. On appeal, however, the judgment was reversed on the theory that testator's intention ought to be effectuated if possible, and that this could be done by treating the seven children, though individually named, as a class. A strong dissent, however, pointed out the fact that no words of survivorship were used which would show that testator had the intent to make the residuary legatees a class within that term's legal meaning; moreover, although the will expressed a strong intention to exclude Albert, it did not disclose who should take, and therefore the dissenting judge thought the usual rule that an heir cannot be disinherited except by giving the property to another should be applied. He also referred to the fact that since the case was one of lapse through the predeceasing of the legatee, the testator had ample opportunity to supply a new legatee and yet did not do so. In answer to this argument, however, it may be said that quite possibly in point of fact testator believed his will was sufficient to carry out his intention, and therefore felt no impulse to change it.
upon a condition, and by application of the equitable doctrine of elec-
tion require the surviving wife to choose between that gift and the
intestate or other interest she would have taken had there been no
will. (b) Others hold that the language used is applicable only to the
extent of the testamentary properties. The latter is believed to be the
correct conclusion.

Before considering these decisions in detail, let us look first at the
analogous case of dower. Where the testamentary provision has con-
isted of realty and has been made expressly in lieu of dower interests,
some courts have tended to be conservative and thus have held that the
language used must be taken at its face value if testator’s intent is to
be fully effectuated. Their position is that the testamentary gift was
made in lieu of dower, and that means all dower, whether in lands
passing to other devisees under the will or in lands which for some
reason failed to pass thereunder. This result has apparently been
reached whether the property in which the widow seeks dower was
merely undisposed by will or whether it became intestate through the
failure of some disposition by virtue of its invalidity, lapse, or other-
wise. 82 On the other hand, some courts, and even in the very cases in
which dower in the realty was denied, have proceeded to the conclu-
sion that the distributive share in personalty was not barred. In one
case 83 this position was explained as follows:

“In this State, when a widow elects to take a legacy in lieu of
dower, she is considered in the light of a purchaser, and by force
of the statute . . . if she fails within the time limited to give notice
that she declines to accept such legacy, ‘she shall be debarred of
her dower.’ . . . It follows that when, as in this case, the testa-
mentary provision for the widow is nothing more than a bare
purchase of her right of dower, the completion of that purchase by
formal acceptance of the legacy or by force of the statute in case
of neglect to decline the legacy, bars her claim of dower, but
cannot bar her from claiming that share of the intestate personalty
to which, independently of the will, she is entitled by the statute
of distribution.”

Another court has put the result on the ground that “dower” or
“dowery” has never been used to signify a widow’s distributive share
in the personalty, and that therefore a testamentary gift in lieu thereof
could not be stretched to cover interests other than technical dower in

82 Ellis v. Dumond, 259 Ill. 483, 102 N. E. 801 (1913); Durham v. Rhodes,
23 Md. 233 (1865); Adams v. Adams, 5 Metc. (46 Mass.) 277 (1842).
83 Nelson v. Pomeroy, 64 Conn. 257 at 262, 29 A. 534 (1894).
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realty. Still others have held that to bar the distributive share, the testamentary gift would have to be made not only in lieu of dower, but in lieu of all other rights in the estate. Similar results have been reached when the testamentary gift has been found by implication to be in lieu of dower.

Notwithstanding such decisions, it would seem to be fully as logical to say that when a testator makes a disposition in favor of his wife in lieu of her dower, he means she must take the provision on condition that she release her dower interest in property which the testator wishes to pass by his will to other beneficiaries. It is hardly probable that in the normal case a testator intentionally makes a will as to part of his property and leaves the rest to descend by inheritance. It thus appears likely that the testator makes all his dispositions on the basis of what is passing under the will and does not contemplate the application of his language as used therein to other properties. Consequently, it is believed that in cases of this sort, policy and common understanding favor confining testamentary language to properties directly covered and passed by the testament, and that it should not be extended to reach interests anterior thereto, at least unless language is used which under no circumstances could be interpreted except with reference to extra-testamentary properties. The result contended for was reached in Re McEwen. There the husband’s will gave his wife one thousand dollars in lieu of dower, and after making certain small legacies, directed a conversion of his estate into a fund to be invested for certain uses. A portion of the fund remained undisposed. The widow claimed and was allowed a share therein, the court remarking:

“I think that this testator intended to prevent his wife asserting dower in the lands in question, to the prejudice of the scheme of his will, i.e., an immediate sale of the lands; and that, having elected to accept the benefit offered by the will, she cannot assert any claim against the lands; but as to the proceeds of the lands not disposed of, he died intestate; and that the widow has the same right in the surplus as if the testator, on the face of his will, had

86 Bennett v. Packer, 70 Conn. 357, 39 A. 739 (1898); Vernon v. Vernon, 53 N. Y. 351 (1873).
87 23 Ont. L. Rep. 414 at 419-420 (1911).
declared, that it was to be so distributed. ...The testator, by his will, has said to his widow, 'I give you $1000 if you bar your dower on the sale by my executors of this land, and the proceeds are then ... to be divided between you and my sons as the law directs.'"

A few other cases have also reached the conclusion that the mere fact that the testamentary provision was made in lieu of dower does not prevent the widow from asserting a dower interest in lands not disposed by the will.\(^88\)

Apart from the question whether a widow who has elected to take under the will may have dower in the intestate realty, we are likewise confronted with the question, more pertinent today, whether she may share as heir or distributee in any intestate property. Classified on a broad fact situation basis, though the results are largely similar, the cases here fall into two general groups: (a) those cases where the will entirely fails to dispose of some of the property, and (b) those cases where the will purported to dispose of the whole estate, but one or more dispositions have failed.

(a) Cases Where the Will Fails to Dispose of Some of Testator's Property

This situation frequently develops as to property which the testator thought he had effectively disposed by inter vivos gift or otherwise, but which is discovered subsequently to have been invalid, or where he gives a life estate but neglects to dispose of the fee, or where he inadvertently omits to make any disposition whatsoever of the property. In this class of cases, probably a minority of courts have reached the conclusion that the general doctrine that no one can accept and reject the same instrument applies. Therefore, having accepted the benefit of the testamentary provision, which they interpret as having been made in complete satisfaction of all claims on the estate, they hold that the widow is barred from participating in the intestate property.\(^89\) That

\(\text{\(^{88}\) See the discussion of the analogous problem of taking under the will as barring dower in land aliened by the husband alone, p. 249 ff.}
\(\text{\(^{89}\) Lett v. Randall, 3 Sm. & G. 83, 65 Eng. Rep. 572 (1855); Raines v. Corbin, 24 Ga. 185 (1858); In re Westerbeke's Estate, 143 Misc. 221, 256 N. Y. S. 860 (1932); Ford v. Whedbee, 21 N. C. 16 (1834). See also Crossman v. Crossman's Estate, 100 Vt. 407, 138 A. 730 (1927). To the effect that the wife may by contract make impossible her sharing in an undisposed residue, see Dakin v. Dakin, 97 Mich. 284, 56 N. W. 562 (1893). In Jackson's Appeal, 126 Pa. St. 105, 17 A. 535 (1889), testator's will gave his wife one-third of his whole estate in lieu of dower if she should so elect, but failed to dispose of a large part of the estate. The widow died a few days}
this sort of argument does violence to the election doctrine has been recognized by some of the well considered cases. As pointed out in *Pinckney v. Pinckney* the election doctrine is founded upon the principle that a person shall not be permitted to claim under an in-

after the testator without having made any election. Her administrator claimed to share in the undisposed property on her behalf. The court held that under the circumstances, the widow must be presumed to take under the will. However, the court denied the administrator’s claim on the theory that there was no intestacy as to the widow. The argument was that she took under the will a full one-third of the whole estate, including that portion which was not disposed; since she was presumed to have accepted a share in the whole estate, she would not be allowed to later make another claim to any part of the estate. The court distinguished *Carman’s Appeal*, 2 Penny. (Pa.) 332 (1882), on the ground that there the widow was given certain specified property, and not a lump fractional interest in the whole estate. This certainly seems a tenuous distinction. It was also sought to distinguish *Reed’s Appeal*, 82 Pa. St. 428 (1876), on the ground that in that case a lapsed legacy was not covered by the will at all, and as to that there was a clear intestacy.

*Chahoon’s Estate*, 12 Pa. Dist. 229, 28 Pa. Co. Ct. 421 (1903), was a case where testator left his residuary estate in trust to pay the income to his wife for life or widowhood, then the corpus to a charity. The latter bequest was void by law, and the property thus left intestate. *Jackson’s Appeal*, supra, was asserted in bar of the widow’s claim to share therein. The court distinguished that case on the ground that having been presumed to have elected to take the share given her under the will in the whole estate in lieu of dower, she excluded herself, as her husband intended, from any share in the remainder, nor could there be any intestacy as to her in an estate in which she had no rights. In the principal case, however, the court stressed the point that testator apparently had no thought of intestacy, for his will purported to dispose of his whole estate. Hence, reasoned the court, as to the corpus of the trust he died as though he had never expressed any wish regarding its disposition and the law must thus deal with this property as it deals with any other case of intestacy. As has already been pointed out, the usual rule is that intestate property must devolve as directed by the statute of descents and distributions, for one cannot be disinherited so long as the property remains undisposed. Applied to the facts of *Jackson’s Appeal*, supra, such a rule must have entitled the widow to share. If it be urged that such a result would disappoint testator’s intent there, it may be asserted that to allow the widow to share in the principal case would also disappoint his intention, for it is clear that he intended the trust corpus to go to a charity. If the conclusion reached in *Jackson’s Appeal*, supra, is proper, it is out of order here to argue that the invalidity of the disposition in the principal case should vary the result therein. Though the expression in the will was invalid to carry the property to the charity as the testator intended, nevertheless the will was properly executed so any expression of testator’s intent therein may properly be looked to if intention is all that is necessary; the intention in both cases should thus be thought of as equally efficacious. The real crux of the matter, however, lies in the fact of non-disposition; in both cases the property remained undisposed, in the one case because of failure to dispose it, and in the other because of failure properly to dispose it. To look to mere intention in the presence of undisposed property is to refuse to give effect to the statutes of descent and distribution which purport to cover all undisposed property. It is thus submitted that *Jackson’s Appeal*, supra, is in error, and that *Chahoon’s Estate*, supra, and cases like it, reach the proper result.

*1 Bradf. Sur. (N. Y.) 269 (1850).*
sttument without giving full effect to it in every respect. But when the widow claims also to share in intestate property, she is not denying the instrument effect. Both her claim, and that of any other heir or next of kin, to this intestate property is based upon the fact that the instrument itself fails to dispose of the estate. Consequently, it cannot be said that the widow is claiming something inconsistent with the will.91

As just intimated by the case above cited, a few courts have reached the conclusion that the mere fact that the testamentary provision has been made in lieu of dower and statutory interests does not prevent the widow from asserting an interest in property which for some reason has not passed by the will. This believed-to-be-salutary result was reached in *Sutton v. Read*,92 where the court remarked that,

"The will nowhere attempts to dispose of the fee in the realty. . . . In such case . . . the Statute of Descent must control, which provides that ‘all such estate, both real and personal, as is not devised or bequeathed in the last will and testament of any person, shall be distributed in the same manner as the estate of an intestate.’ . . . It is manifest that her [the widow’s] failure to elect under the statute relating to dower could affect none of her interests except her dower, and, at most, her distributive share of her husband’s personal estate."

In *Mathews v. Krisher*93 testator left a will wherein he gave all his property to his wife during widowhood as her dower, but making no disposition of the remainder. He died leaving his wife and certain next of kin, but no direct descendants. At the wife’s death, the husband’s next of kin sought to recover the remainder interest in all the estate. In denying their claim and in decreeing the whole estate to the widow’s representative, the court said:

"By its terms the [intestate] statute operates in every case ‘when a person dies intestate having title or right to any real estate or inheritance in this state’. . . . The comprehensive language in which the statute is made applicable to all cases of intestacy compels the acceptance of the rule, generally recognized that the heir at law can be disinherited only by a devise of the property to another." 94

91 See Bane v. Wick, 14 Ohio St. 505 (1863), and other cases which lay down the rule that testator’s intention has no bearing, note 94, post.
92 176 Ill. 69 at 77-79, 51 N. E. 801 (1898).
93 59 Ohio St. 562, 53 N. E. 52 (1899).
94 Ibid., 59 Ohio St. at 574. For similar results, see Waugh v. Riley, 68 Ind. 482 (1879); Beshore v. Lytle, 114 Ind. 8, 16 N. E. 499 (1887); Johnson v. Snyder,
In order further to analyze the problem, the case where the testator omits entirely to dispose of the property in question may be broken down into two additional situations. (1) The testator inadvertently omitted to dispose of the property. If this is a fact, it is useless, as well as improper, for a court to speculate as to what disposition he would have made had the omission been called to his attention. The only wise and proper course is to apply the statutory intestate formula. (2) Testator consciously failed to dispose of the property by will. This must indeed be the rare case. If, however, he actually acted in this manner, he must have contemplated the devolution of the property (a) in exact accord with the provisions of the intestate statute, or (b) in accordance with those provisions as he thought they would be interpreted by the court to conform with his mere expressions of intention, although those expressions were entirely devoid of any precise dispositive directions. In situation (a), his precise intention is fully effectuated by the strict application of the intestate statute. In situation (b), he should be held to have acted under a mistaken idea, and confusion likely will be minimized and general equity done if the court cuts the knot by applying the statute, rather than by attempting to resolve an unexpressed intent in every case. Moreover, a settled rule of the sort

82 Ind. App. 215, 142 N. E. 877 (1924); McGuire v. Brown, 41 Iowa 650 (1875); Weddington v. Adkins, 245 Ky. 747, 54 S. W. (2d) 331 (1932); Kempston, Appellant, 23 Pick. (40 Mass.) 163 (1839); Nickerson v. Bowly, 8 Metc. (49 Mass.) 424 (1844); Dole v. Johnson, 3 Allen (85 Mass.) 364 (1862); Johnson v. Gos, 132 Mass. 274 (1882); Walton v. Draper, 206 Mass. 20, 91 N. E. 884 (1910); Wall v. Dickens, 66 Miss. 655, 6 So. 515 (1889); Cain v. Barnwell, 125 Miss. 123, 87 So. 481 (1921); Skellenger's Exrs. v. Skellenger's Exr., 32 N. J. Eq. 659 (1880); Pinckney v. Pinckney, 1 Bradf. Sur. (N. Y.) 269 (1850); Edsall v. Waterbury, 2 Redf. Sur. (N. Y.) 48 (1871); Bane v. Wick, 14 Ohio St. 505 (1863); In re Estate of McDonald, 4 Ohio Dec. 396 (1895); City of Philadelphia v. Davis, 1 Whar. (51 Pa.) 490 (1836); Carman's Appeal, 2 Penny. (Pa.) 332 (1882); In re Thompson's Estate, 229 Pa. 542, 79 A. 173 (1911); Wood v. Mason, 17 R. I. 99, 20 A. 264 (1890); Demoss v. Demoss, 47 Tenn. 256 (1869).

An interesting suggestion is made in the early case of City of Philadelphia v. Davis, 1 Whar. (51 Pa.) 490 (1836), with regard to the question of the court's looking to the testator's intent. The law of Pennsylvania made a will ineffective as to after-acquired realty. Apparently to comply with this statute, testator executed various codicils to cover lands which he purchased from time to time; subsequent to the last codicil, however, he purchased still other land and died without changing the will. At his death his heirs took possession of this latter property, and the city, which was the residuary beneficiary, brought ejectment. Judgment was affirmed in the heirs. In arriving at its conclusion, the court pointed out that testator's intention could be looked to only as it appeared in valid parts of the will and with reference to property covered by the will. Inasmuch as the property in question was not included under the will, the will and its codicils were invalid as to it, and therefore any expressions of inten-
here contended for would have the advantage of standardizing the law so that modest testators would know precisely the effect of certain stereotyped forms of dispositions, with the result that much uncertainty, and probably much litigation, would be eliminated.

Although courts have seldom referred to the argument, certainly it may be urged that failure to dispose of the property by will fairly lays the ground for application of the rule, already adverted to, that an heir cannot be excluded by mere words. That is, inasmuch as the testator is given an opportunity to dispose of his property by will, in cases where he fails to do so completely, would it not be wiser, in view of the policy of the intestate statutes, to distribute this intestate estate in accordance with that law? Of course it can be, and often is, answered that the testator's intention is the prime consideration, and that it should be effectuated whenever possible; but with this the suggestion just made would not necessarily be at odds. The intestate statutes are framed upon the supposition that an average testator would make largely similar dispositions of his property and among like objects of his bounty. Consequently, in a case where testator has failed to disclose his express intent by omitting to dispose of the property, would not quite just results on the whole be reached by applying the test of presumed intent according to the statute, rather than for the court to fumble about with the particular facts of the individual case in an effort to ascribe an intent to testator's language? In this connection, the reasoning of an early Ohio case seems most cogent. The court there even went so far as to admit that it appeared clear that the testator intended to deny any further participation to a daughter than was expressly given her in the will. However, his will failed to make disposition of some twenty thousand dollars worth of personalty, and in reaching the conclusion that the daughter was entitled to share therein, the court said:

"But it is very clear that even the expressed intention of the testator cannot be regarded in the absence of such disposition. ... If the owner, therefore, for any reason, fails in his lifetime to designate who shall succeed to it [his property], the law steps in at his death and supplies the omission, and casts it upon the heir at law. ... To allow a testator to leave his property undisposed of, and by will to control the course of descent and distribution, would

\[\text{tion contained therein were irrelevant. While all courts have not agreed with this approach, yet logically the argument that testamentary expression of intent can be applicable only to testamentary property carries force.}\] 96 Crane v. Doty, 1 Ohio St. 279 (1853).
be to allow him to repeal the law of the land. It must go by devise or descent. . . . 'Conjecture is not permitted to supply what the testator has failed to indicate; for, as the law has provided a definite succession in the absence of disposition, it would be unjust to allow the right of this ascertained object to be superseded by the claim of any one, not pointed out by the testator with equal distinctness.'\(^7\)

(b) Cases Where the Will Purports to Dispose of the Whole Estate, but Part of the Gifts Have Failed

The other group of cases embraces those situations wherein the will purported to cover the testator’s whole estate, but where an intestacy as to a portion has developed. This may occur where the will has created a trust which for some reason is subsequently held invalid, or where there is a lapse, or where the residuary clause is not ample enough in scope, or for some other reason fails. Here, too, some courts have applied doctrines which have led to the exclusion of the widow from any share in the intestate property.\(^8\) As has already been intimated, such a result seems unfortunate; that its soundness is open to question is indicated by the fact that many courts have allowed the widow to share in the intestate property under such circumstances.\(^9\) For instance, in Armstrong v. Berreman, Adm.,\(^10\) testator’s will was

\(^7\) Ibid., at 282, 283, 284, quoting 1 JARMAN, WILLS, 2d Am. ed., 315-316 (1849). Similar reasoning could be applied to the cases where to the testator’s knowledge a lapse has occurred and the will contains no residuary clause or the testator does not attempt to make a new disposition.

\(^8\) Harmon v. Harmon, 80 Conn. 44, 66 A. 771 (1907); Bullard v. Benson, 1 Dem. Surr. (N. Y.) 486 (1883), modified, 96 N. Y. 499 (1884); In re Bloodgood’s Estate, 129 Misc. 398, 222 N. Y. S. 345 (1927); In re Hungerford’s Will, 135 Misc. 385, 237 N. Y. S. 713 (1929); In re Accounting of Benson, 96 N. Y. 499 (1884); Lee v. Tower, 124 N. Y. 370, 26 N. E. 943 (1891); Matter of Hodgman, 140 N. Y. 421, 35 N. E. 660 (1893); Matter of Silsby, 229 N. Y. 396, 128 N. E. 212 (1920); Matter of Hills, 264 N. Y. 349, 191 N. E. 12 (1934).

\(^9\) Collins v. Collins, 126 Ind. 559, 25 N. E. 704, 28 N. E. 190 (1890); State v. Holmes, 115 Mich. 456, 73 N. W. 548 (1898); Lefevre v. Lefevre, 59 N. Y. 434 (1875); Duncklee v. Butler, 38 App. Div. 99, 56 N. Y. S. 491 (1899); In re Kelsey’s Estate, 184 N. Y. S. 68 (Surr. Ct. 1920); In re Hayman’s Estate, 136 Misc. 199, 239 N. Y. S. 588 (1930); In re MacIntyre’s Will, 164 Misc. 895, 300 N. Y. S. 173 (1937); Vernon v. Vernon, 53 N. Y. 351 (1873); Kaser v. Kaser, 68 Ore. 153, 137 P. 487 (1913); Hodges’ Estate, 5 Pa. Co. Ct. 283 (1888); Chahoon’s Estate, 12 Pa. Dist. 229, 28 Pa. Co. Ct. 421 (1903), and see note 89, supra, for a discussion of this case and Jackson’s Appeal, 126 Pa. St. 105, 17 A. 535 (1889); Grim’s Appeal, 109 Pa. St. 391 (1885); In re DeSilver’s Estate, 142 Pa. St. 74, 21 A. 882 (1891); Fowler’s Estate, 281 Pa. 459, 126 A. 817 (1924); Seabrook v. Seabrook, 10 Rich. Eq. (S. C.) 495 (1859), and reporter’s note.

\(^10\) 13 Ind. 422 (1859).
interpreted as disposing only a life estate in his property in favor of his widow, though it had purported to dispose of other interests. At her death intestate, there being no issue, his next of kin sought to recover the remainder interest. In denying this claim, the court referred to the fact that the statute provided that if a husband or wife died intestate, leaving no child and no father or mother, the whole of his estate should go to the surviving spouse; the court stated its belief that the legislature intended that all property should pass in accordance therewith unless otherwise disposed by the will, rather than that its application should be restricted to cases where no will had been made. Thus in so far as there was any property remaining, undisposed by will, the court was of the opinion that its owner may be said to have died intestate and to that extent the statute should be applied. Pressed upon the court also was another statute providing that if lands should be devised to a woman or other provision should be made for her in her husband's will in lieu of dower, she should elect whether to take such devise or provision or whether to retain her right to one-third in her husband's lands, but she should not be entitled to both unless a clear intention to that effect was found in the will. However, such statute, thought the court, was merely intended to prevent her from taking the third of the estate allowed by law and also the provision in the will intended to be in lieu of the statutory share. Consequently, it could have no application where, as in the principal case, the surviving wife claimed the whole estate as heir.

In applying similar statutes to allow the widow to share in certain intestate property, the Massachusetts court argued that the intestate statute applied to estates as it found them, and that any property not disposed by will came within the scope of that statute. Nor was the court impressed by the argument that the fact that the testator gave his widow only a life estate showed an intention on his part that she should not take more; it remarked that in any event, a testator is presumed to know the law and thus to know that property not disposed must pass as the law directs, and not having chosen to dispose of his property by will, his intention, although expressed in the will, cannot defeat the law. Upon being pressed with the same argument, and it being urged that therefore a gift should be construed to the heirs by implication, the Rhode Island court reached a like conclusion, answering succinctly that

"the intention of the testator is to govern so far only as he has communicated it by his will, either in terms or by implication; but

101 Nickerson v. Bowly, 8 Metc. (49 Mass.) 424 (1844)."
if he has left intestate estate, the disposition of it is governed, not
by his will, but by the statute, the same as if he had made no
will." 102

On the other hand, in these cases where the testator attempts to
dispose the whole of his property, but for some reason the disposition
fails, it may be thought that the arguments heretofore advanced in
favor of allowing the widow to share in intestate property are not so
clear. Of course, the whole difficulty could be shrugged off with the
argument that the testator was presumed to know the law and there­
fore to know that the disposition he had made in his will was invalid
as a matter of law, and that hence the property covered thereby must
go by intestacy. From the standpoint of fact, however, such a position
is clearly untenable. There is perhaps more warrant in saying that he
intended to confine the widow to the provision made for her in the
will in these cases than in those where he completely omits to dispose
of some of the property; this on the theory that he did know of the
intestate laws as regards the latter cases, whereas in point of fact he
cannot be said to have known of the invalidity of a particular clause in
the will through which certain property would be rendered intestate,
for it can hardly be supposed that he would knowingly make an invalid
provision. Moreover, the disposition, though invalid, while it shows
that he did not intend his wife to share therein, also shows clearly that
he did not intend the statute of descent and distribution to be operative
at all with reference to the property in question, so there seems no
more warrant for excluding the wife than other heirs when the dis­
position fails. We have become so obsessed with effectuating, by hook
or crook, the testator’s intent that we fail to recognize that in a case
like this, the fact of non-disposition is the important and controlling
consideration.

Suppose, however, we look at the proposition from another angle,
starting again with the case of a testator who presumed he had disposed
of everything in good order by his will. When it is subsequently de­
termined that a disposition therein is for some reason invalid and the
property it purported to distribute therefore becomes intestate, the
will as conceived by its maker is clearly thrown awry. It is clear that he
intended to dispose fully his estate, and in no wise contemplated any
intestacy, for he made no alternative disposition. Consequently, it
seems the height of folly to ascribe an intention on his part to exclude
his wife from an intestate share merely because she took under the

will. To bar the wife, even when the testator’s language is quite clear to the effect that the provision made for her in the will is to be the sum total of her share, while allowing other heirs to share in the now intestate property, cannot necessarily be said to be giving effect to testator’s intention, for he did not contemplate, nor make his dispositions on the basis of, the situation as it has now arisen. It would be more sensible, and more in keeping with sound results, to allow the wife to share, and to treat even strong language indicating that the wife’s testamentary provision was all she should have, as being intended to apply only to the situation as the testator viewed it when he made the will, or at least as referring only to property covered by the will. This is especially true when consideration is given to the reasons for testator’s inclusion of such language. On this point it would seem fair to say that many of these provisions are included only on the insistence of a client whose fear has been aroused through hearing about Brother Jones’ wife doing violence to that good man’s will because something or other had not been stated with particularity. Frequently, too, the language is probably inserted to guard against the disappointment of other beneficiaries through an overreaching wife who might attempt to take both the provision in the will and certain statutory shares or allowances, which perforce would operate to decrease the shares of the testamentary beneficiaries. To exclude a grasping wife in that case on the ground of the testator’s strong language seems entirely justifiable, but that situation differs decidedly from the one here under discussion. Here it can well be said to be doing violence to testator’s words to apply them in exclusion of the wife in a situation which was not within the scope of his thinking at the time he executed the will. As already remarked, it seems far more logical to hold that his language was intended merely to prevent the wife from taking some preferred statutory share in addition to her testamentary share, rather than to bar her from a legal interest in intestate property which had arisen under circumstances beyond the testator’s contemplation.

3. Where the Will Expresses No Intention on the Subject

The third situation, in which the husband merely makes a provision for his wife without stating his intention, may raise even more difficulties. Here again we may divide the cases on the basis of the same two fact situations: (a) where the will fails to dispose of the property and (b) where the will purports to dispose of the property,

\footnote{Taking under the will bars sharing in intestate property unless testator intended otherwise. Bragg v. Litchfield, 212 Mass. 148, 98 N. E. 673 (1912);}
but fails through lapse, invalidity, or other reason.\(^{104}\) Again, however, some courts have made no material distinction between these two fact situations, and have tended to reach the same results, irrespective of which was presented. Here, even more than in the cases referred to above, a court may easily reach a conclusion by which the widow is allowed to take both the testamentary provision and a share in the intestate property. Such, in the opinion of the writer, would be the proper result. Where the testator has given no expression of his intention, courts should surely resort to that frame of reference which is applicable when no disposition of the property is made—the intestate statutes. Generally these statutes are sweeping in their terms and contain no language sufficient to warrant the conclusion that they are applicable only in cases of total intestacy; rather they appear to be pertinent to all cases of intestacy, partial or complete. Surely where the will fails to dispose of the property, the court should not embark upon conjectures as to what the testator would have done had it been called to his attention that he was omitting to include some of his property, or that a disposition he had made was invalid or had lapsed. Rather the intestate formula should be resorted to in every case. Speculation as to what testator would have done had he foreseen the contingency is idle; moreover, could it in fact be determined, it has already been pointed out that to effectuate it in the presence of undisposed property would be to nullify the statute of descent and distribution.

4. **Effect of Modern Statutes**

Today election has come to be widely affected and regulated by statutes. For this reason, it is advisable to canvass briefly this class of legislation. Professor Pomeroy suggests that there are in effect in this country two general types of legislation.\(^{105}\) In the first class he includes

Sparks v. Dorrell, 151 Mo. App. 173, 131 S. W. 761 (1910), where only personalty was involved. The widow has an election to take under the will or under the law, but not both. Brown v. Brown, 5 Ired. L. (27 N. C.) 136 (1844); McClung v. Sneed, 3 Head (40 Tenn.) 218 (1859); Walker v. Bobbitt, 114 Tenn. 700, 88 S. W. 327 (1905); Thornton v. Winston, 4 Leigh (31 Va.) 152 (1833); Dupree's Admr. v. Cary, 6 Leigh (33 Va.) 36 (1835); Hardy v. Scales, 54 Wis. 452, 11 N. W. 590 (1882); Chapman v. Chapman, 128 Wis. 413, 107 N. W. 668 (1906).

\(^{104}\) Taking under the will bars sharing in intestate property unless testator intended otherwise. Leake v. Watson, 60 Conn. 498, 21 A. 1075 (1891); Walker v. Upson, 74 Conn. 128, 49 A. 904 (1901); Grant v. Stimpson, 79 Conn. 617, 66 A. 166 (1907). If a testamentary provision fails, there is a resulting trust in favor of the heirs other than the testator’s wife. Redmond v. Coffin, 2 Dev. Eq. (17 N. C.) 437 (1833). The statute confines the widow to one interest unless the will expresses another intention. Malone v. Majors, 8 Humph. (27 Tenn.) 576 (1847).

those statutes by which any testamentary provision, in real or personal property, made by a husband in favor of his wife, is deemed to be in lieu of her dower or statutory share unless the will shows that she was to have both, or unless she renounced the will, failure to renounce the will being taken as barring her dower or statutory share.\textsuperscript{106} In the second class are included those statutes under which a devise of land by a husband to his wife is deemed to be in lieu of dower so as to put her to an election, unless the will clearly shows that she was to have both, while a bequest of personalty has no such effect unless it is made expressly in lieu of dower, or testator's intention to that effect is plainly manifest from the will.\textsuperscript{107}

The first group of statutes is of course the broader in scope. Under statutes of that sort, if the surviving spouse takes under the will, the prevailing view has apparently been to exclude her from any share in the intestate property.\textsuperscript{108} On principle, however, the assertion may be reiterated that since these statutes purport to deal with questions of

\textsuperscript{106} For the text of such a statute, see Neb. Comp. Stat. (1929), § 30-107; Kan. Gen. Stat. Ann. (1935), § 22-246. For cases involving somewhat comparable statutes, see Vaughan v. Vaughan's Heirs, 30 Ala. 329 (1857); Sanders v. Wallace, 118 Ala. 418, 24 So. 354 (1897); Warren v. Warren, 148 Ill. 461, 36 N. E. 611 (1893); Subblefield v. Howard, 348 Ill. 20, 180 N. E. 410 (1932); Fay v. Smiley, 201 Iowa 1290, 207 N. W. 369 (1926); Huhlein v. Huhlein, 87 Ky. 247, 8 S. W. 260 (1888); Perry v. Wilson, 183 Ky. 155, 208 S. W. 776 (1919); Collins v. Carman, 5 Md. 503 (1854); Yungerman v. Yungerman, 165 Md. 609, 170 A. 170 (1934); Reed v. Dickerman, 12 Pick. (29 Mass.) 146 (1831); Reid v. Campbell, Meigs (19 Tenn.) 378 (1838); In re Hansen's Guardianship, 67 Utah 256, 247 P. 481 (1926); Van Steenwyck v. Washburn, 59 Wis. 483, 17 N. W. 289 (1884).

\textsuperscript{107} For the text of such a statute, see Del. Rev. Code (1935), § 3771. For cases involving somewhat comparable statutes, see Chandler v. Woodward, 3 Harr. (Del.) 428 (1842); Tooke v. Hardeman, 7 Ga. 20 (1849); Sparks v. Dorrell, 151 Mo. App. 173, 131 S. W. 761 (1910); Stewart v. Stewart, 31 N. J. Eq. 398 (1879); White v. White, 16 N. J. L. 202 (1837).

\textsuperscript{108} Courts have commonly remarked that the terms of the statute are explicit. Stearns v. Stearns, 103 Conn. 213, 130 A. 112 (1925). Or that “Language less free from ambiguity or more clearly understandable would be hard to find, and we see no sufficient ground for the interpolation of an exception in case of property undisposed of by will.” Compton v. Akers, 96 Kan. 229 at 236, 150 P. 219 (1915). Or that it is clear that the widow must take under the will to the exclusion of all other claims, or under the statute in a like way. See generally, Ragsdale v. Parrish, 74 Ind. 191 (1881); O'Harrow v. Whitney, 85 Ind. 140 (1882); Beshore v. Lytle, 114 Ind. 8, 16 N. E. 499 (1887); McAllister v. McAllister, 183 Iowa 245, 167 N. W. 78 (1918); Smith v. Perkins, 148 Ky. 387, 146 S. W. 758 (1912); Matter of Estate of Smith, 60 Mich. 165, 27 N. W. 80 (1886); Mechling v. McAllister, 135 Minn. 357, 160 N. W. 1016 (1917); Heald v. Kilgore, 84 N. H. 309, 149 A. 866 (1930); Chamberlain v. Chamberlain, 43 N. Y. 424 (1871); Hardy v. Scales, 54 Wis. 452, 11 N. W. 590 (1882).
election and property involved under the will, they should be applied only to testateary properties. Since they do not in terms attempt to deal with intestate property, no reason is perceived for extending their applicability in that direction, especially in view of the fact that there are independent statutes of descent and distribution. To so extend these election statutes is essentially to vary the course of descent in the face of express intestate statutes which in terms apply to all cases of intestacy. At a previous point in the discussion, cases were cited in which no statutes were involved and which allowed the widow to share in intestate property on the theory that a testamentary provision in lieu of dower should be interpreted to mean in lieu of dower in testateary realty, and not in intestate realty unless the testator made his provision for her on such a condition that the doctrine of election could be invoked to put her to a choice. If this result is reached in the absence of statutes, what warrant is there for stretching election statutes to cover intestate property when in no case do they expressly apply thereto?

The second class of statutes, if interpreted literally, normally will insure sound results. Again, however, it should be emphasized that these statutes in terms refer only to testateary property. Hence they should not be expanded by construction so as to bar the widow from an interest in intestate property merely because she has accepted her testamentary provision under the will.

In the writer's opinion, the prevailing approach has been unfortunate and has clearly overlooked the basic purpose of the statutes. It will be remembered that at common law the presumption was that a testamentary provision in favor of the wife was deemed a bounty in addition to her dower rights, unless otherwise stated, or unless entirely inconsistent with such rights. With the advent of modern statutes giving the widow homestead rights, forced-heir shares, support and maintenance allowances, etc., legislatures evidently came to feel either that the old rule gave too much protection to widows, or that it was abused. They commonly provided by statute for a presumption exactly the reverse of that which obtained at common law, i.e., that the testamentary provision should be deemed to be in lieu of dower, unless otherwise expressly provided. Along with this sort of thing came statutes which prescribed the election procedure and limits. In view of all this, it seems rather clear that these

latter statutes were intended to apply only to testamentary dispositions; that is, they were intended to prevent the widow from taking the benefit of the testamentary provision in her favor, and then demanding dower or certain statutory allowances, the granting of which in her behalf would have the effect of defeating, wholly or partially, the interests anticipated by other legatees or devisees under the will.\textsuperscript{110} It can hardly be supposed that they were intended to refer to property which falls exactly within the express terms of the statutes of descent and distribution for the purpose of excluding the widow from sharing as one of the heirs, even though the shares taken by the other heirs were virtually windfalls in their favor. Surely the widow ought to be as favored as they, even though she did receive some provision under the will. Yet under the prevailing view as regards the election statutes, the other heirs have reaped an additional windfall at the expense of the widow. This indeed seems unfortunate.

\textit{(To be concluded in the January issue)}

\textsuperscript{110} See the allusion to this effect in Armstrong v. Berreman, 13 Ind. 422 (1859).