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

Elbridge D. Phelps†

C. Election to Take Against the Will as Barring the Widow from Sharing as Heiress in Intestate Property

REFERENCE has already been made to the difficulties arising when the widow has elected to take under the will, and for some reason or other, intestate property also remains to be disposed. Further difficulty arises in those cases where the widow elects to take against the will and yet claims to share in intestate property. Shall her claim be allowed under those circumstances?

At first blush, the argument made in connection with the other situation to the effect that intestate property must be disposed of according to the intestate statute would seem to apply here. However, there are certain considerations which tend to lead, at least on a policy basis, to a contrary result in some instances. For example, suppose the statute provides, as many modern statutes do, that any provision made by the husband in his will for his wife shall bar her dower or other statutory share in his realty and her share in his personalty, unless within due time and form she shall renounce the will, in which case she shall be entitled to some given fractional interest, less than half, in his estate. Suppose further that a second statute provides that if a husband dies intestate and without issue, his wife shall be entitled to one-half of his estate. Of course no question arises where the statutory forced-heir and intestate shares are the same, as they are in some states. Here, however, we are supposing that they are different. If the husband dies fully testate and without issue and his wife elects to renounce his will, it seems clear that the first statute only is applicable; most of the cases agree that the widow’s renunciation does not operate to render the whole estate intestate, but rather that the will is to be carried out as nearly as may be.111 On the other hand, something must happen to the share which the will purported to give to the widow. Of course if the will makes an alternative disposition in case the widow

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111 Gardner, Wills, 2d ed., 548 (1916); Atkinson, Wills 87 (1937); 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).
elects against it, or if the residuary clause is framed sufficiently broadly, there is no logical difficulty. Assuming, however, that no such foresighted provision has been made, the property might conceivably be said to be intestate, and the question thus arises as to whether the widow is entitled to share therein under the statute purporting to define the share of the widow on intestacy.\textsuperscript{112} Frequently the statute provides, or the court will say, that the widow is entitled to what is given her under the will or to what is given her by the statute, but not to both. This is not conclusive upon the subject, however, for it can fairly be said that the statement means just what it says and no more. That is, if the widow would take the benefit given by the renunciation statute, she must give up her claim to the devise or bequest in her favor under the will. But to say that the widow must give up her rights under the will is not to say that she must give up her rights as heir if she is such under the statute. The argument hence is that as to any intestate property, the usual rules regarding the devolution of intestate property must be applied, and that just as an heir cannot be excluded from the inheritance by words signifying that intention, neither can mere renunciation of the will by the widow operate to bar her from taking her intestate share in property which remains undisposed by will.

At this point it is desirable to distinguish two specific situations: (1) The will disposes of all the property and upon renunciation the only property in question is that which the will purported to give to the widow—a rare case under modern sequestration doctrines. (2) The will either omits to dispose of some of the property or the disposition it purports to make is for some reason invalid; upon renunciation, therefore, the property in question will be both that which the will purported to give the widow and that which it failed to dispose.

\textsuperscript{112} Such property is commonly sequestered by the court and applied to make up the share due the widow under the renunciation statute, or to compensate other beneficiaries whose interests had to be taken to make up the widow's share. ATKINSON, \textit{Wills} 87 ff. (1937). Technically the latter doctrine is difficult to justify in view of the rule that undisposed property must devolve as the law directs, irrespective of the testator's intention. Notwithstanding, it seems to be almost universally employed, and hence it is only in case a surplus thereafter remains that a problem arises in the case put, and it will be discussed only on this supposition. No doubt such a situation will occur but rarely, however. For a discussion of the related doctrine of acceleration, see 2 \textit{Property Restatement}, appendix, 48 ff. (1936); Nichols, "Widow's Renunciation and Acceleration of Distribution," 17 Va. L. Reg. 177 (1911). The widow's election against the will may in some cases so destroy the plan of disposition that the court will declare the whole will a nullity. 2 \textit{Property Restatement}, § 231 (1936).
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1. Where the Widow’s Renounced Gift is the Only Intestate Property

In the first situation there seem good reasons to exclude the widow from sharing in the property as heiress or distributee, even though technically it may be said to be intestate property and remains after the widow has received her renunciation share. Here the widow, by her own act of renunciation, has caused the so-called intestacy to occur. It seems somewhat anomalous, therefore, to allow her to share beneficially in a state of affairs which she has brought to pass by her own act, and which has caused the disappointment of the testamentary scheme and consequent injury to the other testamentary beneficiaries. As an additional argument against allowing the widow to share in this situation, it is to be remembered that under the renunciation statute supposed at the outset, she has taken a fractional interest in the whole estate, including both the property passing to others under the will and that which would have passed to her thereby. To allow her also to take a share as statutory heir is to permit her to take two interests out of the same property. The policy of the renunciation statutes was to prevent a husband from cutting his wife off with a pittance and to secure to her a reasonable provision in any event; beyond that, however, it has commonly been supposed that the testator is free to dispose of his property as he wishes. To allow the widow to renounce and recover her appropriate interest under the statute, and then to allow her to share also in this so-called intestate property which has been rendered intestate by her act alone, is to enable her to write the testator’s will to a degree far beyond that contemplated by the statutory enactments in her favor. The very fact that the renunciation statutes give the widow a fractional interest in the whole estate, rather than a mere interest in property passing by the will, may be thought to indicate that the legislature intended that interest to be all that she should be entitled to out of the estate. Moreover, it has been held inequitable to allow the widow to share as heir in property purported to be given her under a will which she has renounced.

Decisions in point seem relatively rare. No case is found which decrees to the widow any share as heir in property derived under the

118 An analogy might be drawn here with the case where an heir or devisee murders the ancestor or testator in order to get at the inheritance or devise. In such cases he is commonly denied the right to share. See 3 Vernier, American Family Laws, § 202 (1935).

circumstances of this first situation. On the other hand, without making
the distinction between the two situations as suggested herein, several
courts have denied that the widow has any intestate rights in this sort
of property. For instance, in *Fife v. Fife*\(^{115}\) testator gave his wife and
seven children each one-eighth of his estate. The widow renounced.
The court held that the one-eighth interest given her by the will
became intestate property and descended to the children as heirs. It
reasoned that when the widow renounced, the entire estate was not
rendered intestate, and that at that time the dower act fixed the
widow's rights as dower in his lands and one-third of his personalty
after the payment of debts. The statute of descents was held inappli-
cable to the widow because it only had reference to intestate estates.
Though the result reached by the court here is thought to be proper,
a gap in the reasoning by which it is reached lies in the fact that the
court makes the statement that the widow's share under the will became
intestate on her renunciation, and yet it denies that the statute of
descents had any application. Normally a statute of this sort is deemed
pertinent to any intestate property and is not confined to cases where
the decedent died wholly intestate. Perhaps a stronger argument in
support of the decision might be made on the basis that the widow
should not be allowed to profit through an intestacy caused by her
own act. By renouncing, she contravened her husband's intention; to
allow her in addition to take a share in the intestate property so re-
sulting would be to further disappoint his expectations. In *Harris v.
Harris*\(^{116}\) testator disposed of all his property; his wife dissented from
the will. The court held that since the widow renounced all claims to
the provision made for her in the will, she was entitled only to the
provision made for her by the statute upon renunciation—a one-third
interest—and not to the one-half interest awarded to widows whose
husbands died intestate and without issue. In this connection another
argument against the widow's taking under these circumstances might
be suggested. By her renunciation she has elected to take against the
expressed intention of her husband; she therefore is clearly barred from
any benefits under the will. On the other hand, intestate statutes are
framed on the theory that they will effectuate a presumed intention
on the part of the decedent. Having renounced an expressed intention
on her husband's part, it would seem that the widow would scarcely
be warranted in claiming under the law which merely purports to

\(^{115}\) 320 Ill. 270, 150 N. E. 630 (1926). See also Shoup v. Shoup, 319 Ill. 179,
149 N. E. 746 (1925), and Kilgore v. Kilgore, 319 Ill. 298, 149 N. E. 754 (1925).
\(^{116}\) 139 Md. 187, 114 A. 909 (1921).
express and effectuate a presumed intent. Under the circumstances present under the facts of the first situation here referred to, it is believed that the courts have reached a proper result.\footnote{See also Gamble v. Rooney, 192 Ind. 454, 134 N. E. 199 (1922), and the strong language in Appeal of Sims' Estate, 162 Okla. 35, 18 P. (2d) 1077 (1933).}

2. \textit{Where There is Intestate Property Other than the Widow's Renounced Share}

Conceding that the widow should be restricted to the one interest in the case just discussed, the same arguments do not necessarily apply throughout the whole of the second situation above suggested, i.e., where the will either omits to dispose of some of the property, or some disposition it purports to make is for any reason invalid. Of course, as to the property given by the will to the renouncing widow, the same arguments as made in the first situation apply here, but they are not necessarily applicable to the property omitted to be, or invalidly, disposed. As to this latter property, the widow's act of renunciation did not operate to render it intestate. Testator's intention with reference to the recipient of that property will not be defeated by allowing the widow to share in it as intestate property; rather his intention must be said to have been defeated by his own failure properly to dispose of it. Then, too, this sort of property is truly intestate. No court apparently has been willing to divert this class of intestate property to the compensation of testamentary beneficiaries who were disappointed by the widow's renunciation, though courts have done so with the property purported to be given the widow herself by the will. Even though a court were willing to take this broad step, undoubtedly cases would arise in which the property rendered intestate by reason of the invalid disposition would take care of the disappointed parties and to spare. Further, because the disposition has unfortunately run aground, a pure windfall will result to the heirs under the usual decisions. In view of what has just been pointed out, and since by hypothesis none of the testamentary beneficiaries will be prejudiced by allowing the widow to share, no particular reason is perceived for excluding the widow from her share in the harvest, especially since she is termed a favored heir. In addition there is the compelling rule that the testator's intention is of no moment whatsoever where he fails to dispose of the property; in that event the course dictated by the law must prevail. Apparently, too, the renunciation statutes were designed to prescribe the widow's sole rights in the estate.
Under the facts and circumstances of this second situation, there is a decided split of authority among the courts. Several deny the widow any right to share in any intestate property once she has renounced the will. For instance, in *Lewis v. Shannon* 118 a disposition in the will was held invalid and the property covered thereby held intestate. The next of kin of the testatrix were allowed to share this property to the exclusion of her husband who had renounced. The court rested its decision on the ground that the statute provided that in case there was a will, the surviving spouse should have his election to take thereunder, or to take the use for life of one-third of the deceased's estate; if there were no will and no surviving children, he might have the whole estate. The court said this latter part of the statute could not apply in the principal case for there was in fact a will involved. Upon the husband electing to take against the will, the court thus concluded that the statute thereupon gave him the life use of one-third of the estate only, and did not purport to make provision in cases of partial intestacy, nor to give more than one-third under any circumstances when there was a renunciation.

In an Iowa case, a similar result was reached. 119 There the deceased left only his wife, brothers, and sisters. The wife renounced the will. A bequest to charity was held invalid, and the widow claimed to share therein. In denying her claim, the court remarked inter alia that under the Iowa statute:

"The decedent cannot, by the provisions of his will, in any manner deprive the widow of her distributive share of one-third of his estate. . . . Subject to the right of her distributive share, the decedent could by will freely dispose of all the rest of his estate to others. This is true whether the decedent leaves issue or not. . . . This one-third distributive share, the widow takes under the Code, as a matter of contract and of right, and not by inheritance. . . . The law in this state recognizes one instance, and one only, where the widow of a decedent is entitled, as a matter of law, to a larger amount than her distributive share of one third. The single instance . . . [is] where the decedent dies intestate and where he leaves no issue. In such event . . . [subject to debts, etc.] the surviving widow takes all of the estate to the amount of $7,500, and one-half of the estate in excess of that amount. In


119 In re Noble, 194 Iowa 733, 190 N. W. 511 (1922). Quotation from 194 Iowa at 735, 736, 737, 739. See also Leighton v. Leighton, 193 Iowa 1299, 188 N. W. 922 (1922).
the instant case the decedent did not die intestate. He attempted to dispose of all his estate by will. The widow, having renounced the will and elected to take her distributive share, became entitled to her one-third interest . . . in the entire estate of said decedent. This must be set aside to her. After this has been done, the remainder of the estate is to be disposed of under the terms and provisions of the will. . . . The word "intestate" signifies a person who died without leaving a valid will. . . . The widow renounced the will and elected to take her distributive share. . . . This is all she can obtain from the estate of a decedent who leaves a will. . . . The widow . . . cannot participate in a void legacy. . . . There being no residuary legatee, it must pass to the heirs of the decedent.”

While the Massachusetts court adopted a slightly different argument, it arrived at a similar decision. In the course of its opinion in *Boynton v. Boynton,*120 it remarked:

“the widow may waive the provisions for her benefit in her husband’s will and thereupon she takes the portion of his property she would take if he had died intestate. . . . She then participates in his estate and takes her interest in all of his estate, that which he attempted to dispose of by will as well as that which is intestate property. She cannot subsequently take a second time. In the case at bar, the widow’s share having been allotted to her, she cannot now receive an additional share. If she had not waived the provisions in the will, her estate would be entitled to her proportionate share of the lapsed legacy; but by her waiver, her estate is not entitled to any portion of it.”

On the other hand, a few courts have seen no difficulty in adopting the position contended for herein, namely that although she has renounced, if the widow is a statutory heir she shall be permitted to share in any property as to which a bona fide intestacy has occurred, either by virtue of an improper or invalid testamentary disposition or a complete omission to dispose of the property by will. For instance, in *Blatt v. Blatt*121 the Colorado court pointed out that the statute authorized the widow to renounce her husband’s will, and upon so doing entitled her to one-half the estate. Having renounced, the other

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120 266 Mass. 454 at 461, 165 N. E. 489 (1929). For a like result where the wife, by outliving all but one legatee under her will, died intestate as to a large part of her estate, and her renouncing husband was held to what the renunciation statute gave him, see In re Hollinger's Estate, 259 Pa. 75, 102 A. 410 (1917).

121 79 Colo. 57, 243 P. 1099 (1926).
half of the estate was left undisposed, the will having in terms given her the whole estate for life, but making no disposition of the remainder. Since it was undisposed property, it was held to pass under the intestate statute. Several Indiana cases have reached a like result. Likewise, the Mississippi court has construed the renunciation statute of that state as entitling the dissenting spouse to one-half only of the estate of the wife passing by will, but as in no way limiting or circumscribing the right of the husband as sole heir at law to inherit property under the intestate laws if not disposed by the will.

As already pointed out, the chief argument against the position taken by these latter courts is that upon renunciation, the widow has received a share in the whole estate, including both testate and intestate property, and therefore should not be allowed more. Technically, the argument seems correct, but to allow her the intestate share in no wise prejudices any other person taking under the will, for bona fide intestate property of this sort will, of necessity, be distributed to the other heirs, and not to beneficiaries under the will. Thus to deny the widow's claim will merely serve to enhance the share of such heirs to whom any portion whatever, under the circumstances, is a pure windfall. Surely the widow, as an heir favored by the law, is entitled to her share along with the others.

3. Cross Elections

Another question which has arisen in a few instances is whether there may be cross elections. That is, if the will of the husband makes provision in both realty and personalty in favor of his wife, may she elect to take the provision made in the realty under the will, and take under the statute as to the personalty, or vice versa?

It has been stated that where the will gives the wife both real and personal property, she must take either under or against the will as a unit; she cannot take under the will as to the realty and under the statute as to the personalty. In support of this statement, however, only one case is cited. That was a case in which the Michigan court

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122 Lindsay v. Lindsay, 47 Ind. 283 (1874); Dale v. Bartley, 58 Ind. 101 (1877). It might be thought that the late case of Gamble v. Rooney, 192 Ind. 454, 134 N. E. 199 (1922), repudiates these older decisions. However, on the basis of the distinction noted between the two situations under which the renunciation of the widow may occur, it is believed that the cases are entirely consistent.

123 Cain v. Barnwell, 124 Miss. 860, 87 So. 484 (1921).


125 In re Bloss' Estate, 114 Mich. 204, 72 N. W. 148 (1897).
made reference to the enactment of a state statute in 1881, and re­
marked that prior thereto if the widow elected to take dower, she
usually lost all claim to both personalty and realty bequeathed and
devised by the will. The statute was thus felt to have been passed
merely to remedy this situation and to allow the widow, in case she
should elect to take against the will, to have both dower and her
statutory share of the personalty. On the other hand, the court thought
the statute did not justify the widow's acceptance of her husband's
provision in realty and her refusal of his provision in personalty; she
should not be permitted to make cross-elections by receiving that which
is favorable to her and rejecting that which is not. It is enough that she
has an election wholly to renounce the will.

Cases on the point seem rare, but the opposite result was reached
in at least one decision. There the testator had died leaving by will
to his wife, the appellee, certain realty "to be set apart as dower" and
likewise she was to have half of any bank stock dividends testator
was entitled to, as well as other personalty. She elected to take under
the law her interest in the real estate of which her husband died
seized, instead of the provision made for her in the will in lieu of
dower, and, so far as she could, the personalty bequeathed to her.
Subsequently she sued to recover dividends on the bank stock. The
court concluded that the reference to dower was to be interpreted only
as having been used in conjunction with the disposition of the realty,
and that the wife was entitled to the personalty bequeathed her, not­
withstanding her renunciation of the provisions of the will as to the
realty.

No doubt extreme cases may be put, but logically and on principle
the result attained in the Michigan case seems the more desirable. The
policy of decedent estate statutes seems to be concerned with minimums;
so long as a husband makes a certain minimum provision for his wife,
the law recognizes his freedom to dispose of the rest of his property
as he will. On such a basis it seems difficult to justify cross elections.

This statute provided that a husband's testamentary disposition should be
subject to the election of his surviving wife to take the interest given her by the will,
or to take under the statute until she received $5000, and of the residue, one-half
the sum or share she would be entitled to under the statute in case of intestacy; and
if the devise to her was made in lieu of any particular interest, her election to take
such devise or interest should not deprive her of the right to leave the disposition in
other respects unaffected and to have the benefit thereof as if the act had not been
passed.

State Bank v. Ewing, 17 Ind. 68 (1861).

See also In re Mersereau, 38 Misc. 208, 77 N. Y. S. 329 (1902).
For instance, suppose the husband makes the required gross provision for his wife by will, but it consists largely of personalty. If the widow is allowed to make cross elections, she would naturally renounce as to the realty and thus take a total share considerably greater than that intended for her by the testator and the minimum required by the statute. The husband could hardly have intended such a result. He gave her a certain provision as required by law and might reasonably suppose that if she was dissatisfied with what he gave her, she would have to relinquish that provision and take instead what the law gave her. There seems to be no warrant in allowing the widow to make the will to suit herself in such large measure as would result if cross elections were permitted. As to testamentary property, she should be confined to what the testator gave her, or what the law gives her. To hold otherwise restricts the freedom of testation purportedly available under the statute and only tends to confuse the situation.

D. Election to Take Against the Will as Barring Share in Powers of Appointment and Benefits Thereunder

One of the most interesting questions with reference to an election to take against a will arises in certain cases where powers of appointment are involved. For instance, suppose (1) that testator's will makes a provision out of his own property for his wife, and by the same instrument exercises in her favor a power of which he was the donee, or (2) that the husband makes a provision out of his own property for his wife for life and also gives her power to appoint the remainder or other interest therein on her death. The widow renounces the will in conformity with a common type of statute which makes all testamentary dispositions of a husband subject to the election of his wife to take the provision he makes for her, or in lieu thereof, to take, as the case may be, either a given fractional interest in his estate or such interest as she would have been entitled to take under the statute of descent and distribution had he died intestate. Is the widow entitled to the benefits under the power in either or both of these situations, or does her renunciation entirely nullify the will as to her?

As we have already seen in another place, it is commonly said that taking against the will bars all interest under it. 129 This broad statement, if applied to the cases above put, could well be said to conclude

the widow. On the other hand, a little thought shows that the widow should not ipso facto be said to be barred. Whether she is will depend on how we choose to interpret the "interests" which are deemed to be barred by renunciation, on policy factors, and on other considerations which subsequently will be developed herein.

Because of the apparent paucity of the cases involving the problem here raised, it will be convenient to review briefly those which are in point. One of the earlier cases is that of Piercy v. Piercy. In that case the testator died leaving his wife, but no parents, brothers, or sisters. His will directed a conversion of his estate, and gave to his wife a life interest therein, with remainder to a nephew, "except any sum thereof, less than four hundred dollars, which amount my wife, Hannah, may, as she choose, dispose of by bequest . . ." The widow renounced the will. The court concluded that her refusal to take the disposition made by her husband, and her determination to take the portion guaranteed her by the law, did not have the effect of changing or of rendering uncertain the disposition intended by the testator in favor of beneficiaries other than the wife. Hence she was confined to one-third of the property of the estate, in addition to such specific sum as was allowed to every widow. Thus without referring to it sub nomine, the court apparently decided that by virtue of her renunciation, she was precluded from exercising the power.

In Fiske v. Fiske a trustee was to convey certain property to whomsoever X should designate by will, and in default of appointment, to X's heirs. X devised all his property to his executor with directions to pay the income therefrom to his wife for life. The widow renounced the will in conformity with a statute which allowed her thereupon to take as though her husband had died intestate. The court said:

"In this will a very important provision for the widow is the appointment of this property to the trustee with a gift of the income of it to her for life. It is none the less a provision made for her in the will that it includes an appointment of property which does not belong to the testator, and which in theory of law, when the appointment takes effect, passes under the original instrument of conveyance. Under the instrument, the testator has an absolute right to control the property by an appointment by will and the appointment is a necessary part of the provision which the will makes for her. The provision through the appointment cannot be

180 19 Ind. 467 (1862).
separated from the other provisions in her favor, so that she can retain the one and waive the other. The statute does not authorize the waiver of some of the provisions made for a widow in the will, and the retention of others.\textsuperscript{132} ... If we inquire under the other branch of the statute to what portion of her husband's estate she would have been entitled if he had died intestate, we reach the same result. She would have been entitled to no part of this property, for it was no part of her husband's estate after his decease, and in default of appointment by will it would have passed under the trust deed to his heirs at law.\textsuperscript{133}

In a brief syllabus opinion, the New York court recently likewise held that the power of appointment was ineffective upon renunciation.\textsuperscript{134} Reference was made to the fact that the provision made in the will for the wife was expressed to be in lieu of dower. Said the court:

"One of those provisions for the benefit of Mrs. Henderson was the appointment, and it was the only manner in which the donee intended to exercise his power—that is, to make the enjoyment of that appointment a condition of taking any part of his estate. Mrs. Henderson elected to reject and the rejection applied to every provision of the will that was beneficial to her, whether those provisions related to property the title to which vested in her husband, or merely to property over which he had the power of appointment."

In \textit{Kates' Estate},\textsuperscript{134} a Pennsylvania case of only a few years ago, the situation was that the testator had an estate of his own and also a general power of appointment over a portion of an estate left by his father, but held by him under such circumstances that in default of appointment by him, the property was effectually disposed of by the father's will. The donee's will recited that it was made to dispose of his own property and that over which he had any power of appointment. His widow elected to take against the will, and her claim to one-third of both properties was allowed in the orphan's court. On appeal this decision was reversed. The court remarked that to affirm the decree would be to award the widow a greater interest in her father-in-law's estate than her husband had directed she should have; moreover it would also defeat, pro tanto, the will of the father-in-law under which the power was created because the appointed estate was in

\textsuperscript{132} See the cases cited at note 129, supra.
\textsuperscript{134} In \textit{re Kates' Estate}, 282 Pa. 417, 128 A. 97 (1925).
fact his and any attempt to appropriate it to a person not intended would be an evasion of his private dominion over his own property. Probably more reliance was placed on a construction of the election statute, however. That statute provided that when any person died testate, leaving a surviving spouse who should elect to take against the will, such survivor should be entitled to those interests in all the estate of the decedent which he or she would have been entitled to had the testator died intestate. The court thus concluded that the only “interests” that could be included under this statute were those which the deceased had in real or personal property on his own account, and that the phrase “as he or she would have been entitled to had testator died intestate,” qualified the entire preceding clause of the statute and not merely part of it.\(^\text{185}\) In reiterating former opinions, the court stated that the widow’s election destroyed the will as to her, and that she must take under the law only what would have been hers had her husband died intestate; her choice was thus will or no will. Consequently, even though testator had essentially merged the properties in his disposition, the widow would not be allowed to assert that he was to be considered testate for the purpose of blending his estate with that over which he had the power of appointment, and intestate for the purpose of enabling her to take one-third of both. Probably the same result would have been reached under that other common type of election statute which provides that upon renunciation, the widow shall be entitled to a given fractional interest in her husband’s estate. Under such a statute the court would probably stress the words “husband’s estate” and conclude that the property passing under the power which he exercised was not part of his estate.

In such cases as Kates’ Estate, there are apparently two theories under which the widow might purport to claim. (a) She might renounce her husband’s will as to his property, and yet claim to take under the will as to the appointed property on the theory that it was no part of his estate, but that he was merely a conduit through which it passed, whereas her election was effective merely as to the provision for her made out of his estate. (b) The widow might do precisely what was attempted in the principal case: renounce the will as a whole, and yet claim an intestate share both in the husband’s estate proper and

\(^{185}\) The statute, as quoted by the court at 282 Pa. 421, read: “When any person shall die testate, leaving a surviving spouse who shall elect to take against the will, such surviving spouse shall be entitled to such interests in the real and personal estate of the deceased spouse as he or she would have been entitled to had the testator died intestate.”
in the appointed property. As will be pointed out more fully in a later part of this discussion, while there is some force in the first argument, it is believed that except as regards special powers, the better position would require a renunciation effective to bar all interests under the will. The second argument is clearly out of order under the facts of the principal case, for upon the widow's renunciation of the appointment, the case should be said to stand as if her husband had defaulted in appointing the property. Consequently, the original donor's disposition in default of appointment would become immediately operative to pass the property and hence there was nothing left which could be said to be intestate property in which the widow might claim. Even if the donor had not made a disposition in default of appointment, the donee's widow would be no better off, for again the situation should be said to be as though the donee had failed to appoint, and the property would thus pass as intestate property of the donor.

A case of the sort suggested as the second hypothetical situation at the outset of this section is closely paralleled by that of Christian v. Wilson's Executor. There testator's will left his property in trust and directed that a portion of the income be paid to his wife for life, with power in her to appoint the remainder at her death, and with an alternative disposition in default of the exercise of the power. The provision for the widow was stated to be in lieu of dower and other legal and equitable rights in any claims against testator's estate. The widow elected to take under the law, but asserted the right to exercise the power. The court, however, held that the power of appointment died with the renunciation. This result was clearly motivated by a fear on the part of the court that if the widow's claim were allowed, she might exercise the power in favor of her own estate, and that this would be unfair, since it would virtually permit her to eat her cake and have it too.

In support of the cases just reviewed, certain other arguments may be made. Suppose, for instance, that testator, having a private

186 153 Va. 614, 151 S. E. 300 (1930). See Lonergan's Estate, 303 Pa. 142, 154 A. 387 (1931), where the court dodged deciding whether by renouncing the widow lost her right to appoint.

187 It should be noted, however, that here the power to be exercised was over testator's own property, and might have been exercised in the widow's own favor. When the widow renounced, she took her statutory share in the whole estate, including that over which the testamentary power had been intended to operate. She thus seems to be sufficiently protected under the decision. It is in those cases where the appointed property is not part of the husband's estate, i.e., where he is merely donee of the power, and out of which the widow therefore is entitled to no statutory share, that the real difficulty arises.
estate of $400,000, by will exercises a power, of which he is the donee, in favor of his wife so as to pass to her property worth $500,000. Out of his own estate he devises to her a small piece of realty or other negligible interest. If she renounces the will, she will take say one-third of testator's own estate. If she is allowed in addition to claim the benefit of the power in her favor, it can well be argued that testator's intention will clearly be upset, whereas the usual rule is that a testator's intention as expressed in his last will is to be effectuated if at all possible. Undoubtedly courts have been tacitly influenced by this or similar arguments, although they have not openly based their decisions on this ground. Then, too, there is also room to press arguments to the effect that to allow the widow both interests will result in hardship to the immediate heirs or next of kin by reducing the shares which they would otherwise take. They may quite properly urge that the election statutes are strong weapons in the hands of the widow, and were designed to protect her from harsh property dispositions at the whim of her husband, but not to enable her to jockey around a fair provision and take a lion's share at the manifest expense of his relatives or other named beneficiaries. This is perhaps one of the strongest arguments in favor of confining her to the one claim.

On the other hand, certain arguments to the contrary may be made, and it is precisely here that the distinction drawn at the outset of this section comes into bold relief. If the husband, in addition to making a testamentary provision for his wife out of his own property, exercises in her favor a power of which he is the donee, and she is denied the benefit of the power upon her renunciation, repercussions may be produced all around. The property so appointed, never having been part of the husband's estate, cannot be called upon to contribute a share toward the amount due the widow upon her renunciation; all she can demand is the share provided by the renunciation statute from her husband's estate alone. Turning this share to the widow will also reduce the quantum of the estate available to other beneficiaries under the will. Moreover, the appointed property will pass down a foreign line of distribution, either to the takers in default, if any, appointed by the original donor, or to his heirs as his intestate property, thus creating a situation wherein no fund is left available to compensate the testamentary beneficiaries who are disappointed by the widow's election. If, however, the case is one in which the husband has made a testamentary disposition in favor of his wife and has also given her power to appoint some of his property, it is easier to say that the power should fail upon the widow's renunciation. This because upon the widow's election against the will,
she takes a renunciation share in testator’s whole estate including that property over which he gave the power. It may well be said that she is thus amply provided for and protected.

Then, too, in those cases where the wife wishes to claim benefits as the appointee of a power which her husband as donee has exercised by will in her favor, it could be argued that her renunciation of the will operates only on property dispositions made for her benefit under the will, and that the exercise of the power in her favor does not come within this category. As said in *Ledebuhr v. Wisconsin Trust Company*, 188

"The principle is familiar that the appointee under a power takes under the instrument creating the power, not under that executing it. His title rests upon the act creating the power and takes effect as if created by the original instrument."

A recent New York case 189 likewise indicates the nature of the exercise of a power of appointment. In that case the testator in his lifetime had set up a trust in which plaintiff was trustee; he reserved therein power to appoint the remainder of the trust property by will. In his will he appointed his five sisters to share the remainder. His widow elected to take against the will and the question arose as to whether she was entitled to any portion of the trust fund. The court held that she was not, stating that the property was no part of her husband’s estate, but that it had passed directly to the sisters under the trust agreement in conformity with the established proposition that persons named in the execution of a power of appointment take under the authority of the instrument by which the power was created and with the same effect as if they had been originally named in the deed of creation. Had the power in the case just cited been appointed in favor of the wife, however, might she not have pressed the same arguments as those sustained in behalf of the appointees therein, even though she renounced?

In *Huddy’s Estate* 140 testatrix had by will left certain property in trust for the benefit of a granddaughter for life, with power in such life tenant to appoint the remainder. The granddaughter married and by will left half of her residuary estate to her husband for life or until remarriage, remainder to her brothers and sisters. The husband re-

188 112 Wis. 657 at 661, 88 N. W. 607 (1902).


140 236 Pa. 276, 84 A. 909 (1912).
nounced the will under a statute which provided that a surviving husband might elect to take against the will of his deceased wife such share and interest in her real and personal estate as she might have taken in his estate, had she been the survivor. Another statute made the will of a donee of an unrestricted power effective as an exercise of that power. The court allowed the husband to share in the property covered by the power on the theory that his election affected only the distribution of the "real and personal estate" of his deceased wife, whereas the property under the power "is not and never was the real and personal estate" of his wife.

As an additional argument for allowing the renouncing spouse to share in the appointed property, this situation can be supposed: If the husband as donee of a power made a deed exercising the power in favor of his wife, or giving her a power to appoint certain of his own property, and on the same day executed his last will, giving her a share in part of his estate thereby, there seems little doubt but that she would be entitled to take fully under each instrument. Is there not, then, considerable warrant in saying that there should be no difference in the result merely because he incorporated the contents of the deed—the appointment—in his last will? There is probably little question but that modern forced-heir and election statutes were intended to govern only testamentary dispositions of property which would normally be classed as part of the testator's own estate. Hence, by excluding the surviving spouse when both dispositions are made by will, but not when they are made by separate instruments, is not violence being done the election statutes by attempting to adapt their language to a situation which it is pretty clear was not in the minds of those who drafted them? Moreover, is it not preferring form to substance?

There are certain other arguments and intimations of authority that could be said to lead to the same conclusion. Before calling attention to these, however, and before accepting them as broad, ultimate truths, it will be well to allude briefly to two types of powers frequently involved in cases of the sort here brought in question and which differ sufficiently to warrant the diverse conclusions reached in the situations in which they appear. A general power is one which the

141 Forced heir statutes commonly provide that one spouse shall not devise away from the survivor more than a given fractional amount of his estate; for example, see Wyo. Rev. Stat. (1931), § 88-101. Election statutes commonly provide that if the surviving spouse is dissatisfied with the provision for him made in the will of the other, he may renounce the will and take some specified share in the testator's estate. For example, see Neb. Comp. Stat. (1929), § 30-107.
donee may exercise in favor of any person, including himself and/or his estate. A special power, on the other hand, is one which the donee may exercise only in favor of the members of a limited class of persons, excluding himself and/or his estate.\(^{142}\) On the basis of this distinction, there is considerable force in urging that in those cases where a special power is given the widow-donee under the husband’s will, a renunciation of her testamentary share in his estate should have no effect on her ability to exercise the power. Since by definition a special power is one which cannot be exercised in favor of the donee, she could in no case directly profit from her act. Hence her appointment in conformity with the terms of such a power would not divest other testamentary beneficiaries of a share in the estate to her advantage, as manifestly would be the case if the power given her were general and she appointed in her own favor. Moreover, when a special power is involved, it may be fairly inferred that the situation is one involving circumstances under which her husband would have desired her to exercise the power whether she took it under the will as to her own individual share or not. In all probability the matter had been carefully discussed during his lifetime, and she, better than anyone else, is in a position to dispose of the property in full accordance with his wishes.

The results in the group of cases immediately following thus may likely be explained on the ground either that a type of special power is involved, which, as just pointed out, should not be cut off by a mere renunciation of the will, or is sufficiently similar to justify a like conclusion.

In \textit{McGee v. Vandeventer}\(^{143}\) testator by will left certain property to his wife, and other property to such charitable uses as she should appoint. She elected to take against the will and it was urged that she thereby lost the opportunity to exercise the power. In denying this

\(^{142}\) See 1 SIMES, FUTURE INTERESTS, § 246 (1936); 1 TIFFANY, REAL PROPERTY, 2d ed., § 315 (1920). Hence a power to \textit{D} to appoint Blackacre to whomsoever he will may be said to be a general power, while a power to \textit{D} to appoint Blackacre to any or all of the children of \textit{X} would be a special power. Such powers have also been defined in this way: “A power is general . . . if (a) being exercisable before the death of the donee, it can be exercised wholly in favor of the donee, or (b) being testamentary, it can be exercised wholly in favor of the estate of the donee. A power is special . . . if (a) it can be exercised only in favor of persons, not including the donee, who constitute a group not unreasonably large, and (b) the donor does not manifest an intent to create or reserve the power primarily for the benefit of the donee.” 3 PROPERTY RESTATEMENT, § 443 (1938). For other definitions, see N. D. Comp. Laws (1913), §§ 5386-5391.

\(^{143}\) 326 Ill. 425, 158 N. E. 127 (1927). Quotations following from 326 Ill. at 432, 433.
contention, the court used words broad enough to have warranted the
eexercise of even a general power in her own favor:

"Her [the wife's] renunciation was a rejection of the provision
made for her, and its effect was to obliterate from the will such
provision, leaving the other provisions operative on the part of the
estate not including her statutory interest."

In this case the court touches upon what is perhaps one of the strongest
arguments in favor of allowing the widow to renounce and yet claim
the benefit of a power under the will. That argument, already ad­
verted to, is that it can quite fairly be said to be hard on the widow
to have to renounce appointed interests in those cases where the ap­
pointed property will not be included in the assets from which she
will take her statutory renunciation share. On the other hand, if she
is allowed to take both, others whom the testator intended to benefit
will perhaps suffer, so our result may have to depend on a question of
policy—upon which party shall the loss be thrown? In the same case,
however, the court uses other language which would seem to deny a
widow's right to exercise a general power on renunciation, and it is
thus difficult to predict which result this court would adopt were such
a case to arise:

"The renunciation ... had no effect on the power. ... The widow
may act as executrix or trustee of a trust or donee of a power in
which she has no beneficial interest unless it appears by the will
that the execution of the trust or the exercise of the power is
dependent on her acceptance of the provision of the will for her
own benefit."

In Spaulding v. Lackey\textsuperscript{144} the Illinois court, quoting with approval
from the McGee case, held that a widow who had renounced her
husband's will was not relieved from obligations under a clause in the
will which directed her to select a monument for her husband's grave.
And in Macknet's Exrs. v. Macknet\textsuperscript{145} the widow who had elected to
take against the will was permitted to act as testamentary guardian and
to receive income for the support, maintenance, and education of her
daughter under a provision of the will. In answer to the argument that
her renunciation nullified the will as to her, the court said:

"Although the widow may incidentally reap some advantage
from her guardianship, the provision is rather to be regarded as
made for the benefit of Hattie [the daughter] than for the benefit
of her mother."

\textsuperscript{144} 340 Ill. 572, 173 N. E. 110 (1930).
\textsuperscript{145} 24 N. J. Eq. 277 at 296 (1873).
Had no provision been made for the daughter, however, the legal obligation for her care and support would have devolved upon her mother, so it appears that under this holding the widow in fact took a real and substantial benefit under the will, though she had elected to take against it. Perhaps it may not be too broad a statement to say that when particular benefits as regard others than the renouncing widow cannot be conferred except on the basis of a gift or direction to her under the will, her election against the will should not be permitted to nullify the benefits so sought to be conferred.

Until election statutes expressly include or exclude the powers situation, or the testator expresses his intention so as to clearly resolve the question, decisions apparently ought to be based largely on considerations of policy. Apart from the cases of special powers discussed above, and with the exception of borderline cases, courts which have denied a widow both interests have probably followed the wisest and safest course. On principle, it would seem that the average testator who exercises a power in favor of his wife and also makes some provision for her out of his own estate, probably feels that he has made a wise and fair provision in her behalf. Could he be consulted, the writer has the suspicion that he would say, "I made a fair provision for her. If she insists upon overriding my judgment and disturbing my whole scheme of disposition, I think she should be confined to the very least that the law preserves to her." As pointed out earlier, the policy of the law has been to equip the widow with a weapon with which she may enforce a fair property disposition in her favor, but it was certainly never contemplated that she would turn the weapon into a device by the clever manipulation of which she might override her husband's intention and procure an enlarged estate.

III

SUGGESTIONS FOR A MODERN ELECTION STATUTE

In conclusion a few suggestions may be made with reference to alterations and improvements in statutory law with regard to the widow's election. Frequently difficulties which have been pointed out in the foregoing pages have occurred merely because there was no definite and controlling rule available to cover the situation. Of course, cases have arisen where there was a definite rule and the trouble ensued because the rule no longer accorded with the necessities and practices of modern life. Generally speaking, however, the wisest solution of our problem would be the complete revision of our decedent estate laws in the light of modern conditions. Inasmuch as many
policy factors are involved, the resolution of which will depend on local conditions, no attempt will be made herein to draft a comprehensive statute. However, in that which follows, an effort will be made to point out briefly the more important matters which it is believed should be included in any modern decedent estate law, modified or expanded, of course, to meet the needs of a given locality.

A. Dower and Curtesy

It is believed that dower and curtesy, though landmarks in the law and undoubtedly once of great merit and use, are not adapted to modern conditions and should be abolished. That this is true is due to many factors, chief among which probably are the freedom of women under modern law and the growing trend toward personal property as the predominant form of wealth. Nor does it appear that new systems of distribution can be built successfully on these old timbers; rather the only satisfactory procedure seems to involve completely razing the old structure, and the construction of a new edifice upon the foundations of the necessities of modern conditions. It is significant that dower already has been abolished in twenty-four states. While dower of the common-law variety has been barred in these states, it must be admitted that in some of them, a husband’s property is still bound in some way, as in Indiana where the wife is entitled to one-third of his realty in fee on his death. Curtesy has been abolished in thirty-six states, but in twenty of these there is some statutory substitute. If not already dispensed with, any statutory revision should include the abolition of these interests.

B. Authorization of Election

Some definite provision should be made for election by a surviving spouse. While the rules governing this sort of thing will undoubtedly

146 By the use of these terms here, reference is intended to be made only to those interests of an inchoate nature to which spouses are entitled during life, and which become absolute on the death of one of the spouses. The idea is that these inchoate interests under modern conditions are only aggravations and are not necessary adequately to protect the spouses.


148 See 1 POWELL, CASES AND MATERIALS ON TRUSTS AND ESTATES, c. 2, especially at pp. 36, 54 (1932).


have to be varied to a certain degree, depending on local conditions, the following may be suggestive: "On the death of any spouse leaving a surviving spouse, a right of election shall be given such survivor to take, in lieu of any provision made in the will in his (or her) favor, or in the absence of testamentary provision in his (or her) favor, such share in the decedent's estate as he (or she) might have taken had there been a total intestacy."\(^{151}\)

C. Limitations on the Spouse's Right of Election

The broad right of election stated above undoubtedly should be qualified in certain respects.

1. Maximum Proportion

If freedom of testation is to be preserved, the restriction must be made that in no case in which the widow elects to take against the will, she shall take more than a given net proportion of the estate, after the payment of debts, expenses, and taxes.\(^{152}\) Strictly, such a provision will be necessary only if certain statutory guaranties, such as are now given a widow, are continued. It will be unnecessary if her sole claim in the estate is limited to her renunciation share. The suggestions made in section 2, following, also provide another out in this regard.

2. Alternative Statutory Benefits

In order adequately to take care of the spouse of the average testator, and to expedite matters generally, it may be wise to give the surviving spouse both an absolute right of election and a limited right of election. By the former is meant the right to renounce the will and to take in lieu of the provisions therein made, a share designated by

\(^{151}\) No reason is perceived why the elective share and the share on intestacy should not be the same. However, the quantum of this share is fraught with considerations of policy and will necessarily vary with local conditions; consequently, it cannot be fixed definitely here. It might be suggested, however, that in the absence of issue, a surviving spouse should be given three-fourths of the estate, subject to debts, expenses, and taxes; if issue, the spouse to have one-half under the same restrictions. If it is thought that this is too large a proportion in the case of estates of great wealth, it should be remembered that less may be agreed on through marriage settlements or other contracts. People possessed of such large estates are in a position to secure competent legal advice to aid them in such disposition as accords with their notions, and such releases as are necessary can be properly prepared.

\(^{152}\) In Mississippi and New York the fraction is set at one-half. Such provision prevents the widow from turning a statutory beneficence into a weapon whereby she may write the testator's will and thus procure an unwarranted share in the estate for herself.
statute; by the latter is meant the right, after the exercise of the absolute election, to choose between alternative benefits under the statute. After several years of study and investigation by a commission especially appointed for that purpose, New York adopted a statute embracing the foregoing distinctions. For instance, it is there provided: 188

"(b) Where the intestate share is over twenty-five hundred dollars and where the testator has devised or bequeathed in trust an amount equal to or greater than the intestate share, with income thereof payable to the surviving spouse for life, the surviving spouse shall have the limited right to elect to take the sum of twenty-five hundred dollars absolutely which shall be deducted from the principal of such trust fund, and the terms of the will shall otherwise remain effective.

"(c) Where the intestate share of the surviving spouse in the estate does not exceed twenty-five hundred dollars, the surviving spouse shall have such right to elect to take his or her intestate share absolutely, which shall be in lieu of any provision for his or her benefit in the will.

"(d) Where the will contains an absolute legacy or devise, whether general or specific, to the surviving spouse, of or in excess of the sum of twenty-five hundred dollars, and also a provision for a trust for his or her benefit for life of a principal equal to or more than the excess between such legacy or devise and his or her intestate share, no right of election whatever shall exist in the surviving spouse.

"(e) Where the will contains an absolute legacy or devise, whether general or specific, to the surviving spouse in an amount less than the sum of twenty-five hundred dollars, and also a provision for a trust for his or her benefit for life of a principal equal to or more than the excess between said legacy or devise and his or her intestate share, the surviving spouse shall have the limited right to elect to take not more than the sum of twenty-five hundred dollars inclusive of the amount of such legacy or devise, and the difference between such legacy or devise and the sum of twenty-five hundred dollars shall be deducted from the principal of such trust fund and the terms of the will shall otherwise remain effective.

"(f) Where the aggregate of the provisions under the will for the benefit of the surviving spouse including the principal of a trust, or a legacy or devise, or any other form of testamentary provision, is less than the intestate share, the surviving spouse shall

have the limited right to elect to take the difference between such aggregate and the amount of the intestate share, and the terms of the will shall otherwise remain effective.”

Provisions of this sort seem much better adapted to modern conditions than do those of many statutes heretofore in effect which merely authorize election in case a certain flat provision is not made by will for the surviving spouse. The New York statute enables a husband to leave a large part of his estate in trust for the benefit of his wife, and thus relieves her of the burden of investment and care of her portion, and yet secures to her, if she chooses, a cash sum which she may handle as she sees fit. It also preserves a spouse’s freedom of testation by preventing an unscrupulous wife, by jockeying with broad election statutes, from upsetting his entire scheme of disposition.

3. No Cross Elections

There should be no right to make cross elections. That is, a spouse should not be permitted to claim the benefit of a devise of realty under the will and a share in the personalty under the statute, or vice versa. The spouse who resorts to the use of the cross-election device will not normally do so because what is given her under the will is an unfair provision, but rather because she wishes to squeeze every penny possible out of the estate. There is no justification in this.

4. Failure to Elect

Definite provision should be made to cover the case where an election is available, but is omitted to be made. In such case it should be settled that unless the testator declares that the surviving spouse shall take statutory interests, if they are available, in addition to the testamentary provisions, the survivor shall be presumed to have accepted the testamentary provisions in his favor in lieu of all other claims, unless he renounces them in the manner provided by statute.

The presumptive acceptance of the testamentary provisions in lieu of all other claims herein contemplated should of course be made broad enough to govern the case which arises when the surviving spouse himself dies without having entered a formal election in court, either because of his injury in a common disaster or otherwise. While the general provision suggested above might be sufficient, inasmuch as this

154 See Mass. Gen. Laws (1932), c. 191, § 15, providing that on the widow’s election against the will, she shall take the same share she would have been entitled to had her husband died intestate, except that any amount over $10,000 derived in this way shall be put in trust and she shall have only the income therefrom for life.
situation arises more frequently than is commonly supposed, it is be-
lieved that much difficulty will be avoided if a specific stipulation is
included to cover this particular contingency.

5. Effect of Misconduct of Surviving Spouse

Although there has been no reference to it heretofore, allusion
ought to be made, for the sake of completeness, to misconduct on the
part of a spouse. At common law, an absolute divorce operated to bar
the wife's dower and other rights in her husband's property, but
adultery or desertion or a bigamous marriage apparently did not have
that effect. However, today statutes commonly provide that an adul-
terous wife, unless reconciled with her husband, is barred of her dower,
or rights in his personal estate, or both. Modern statutes likewise
often deprive a murderer of all interests he might otherwise have in
the property of his victim. With the exception of New York, no
state has been noted as having comprehensive statutes which place
similar restrictions on the election right. Since, however, the whole
theory of election can probably be said to be bottomed on the feeling
that spouses are quasi-partners, and that on the death of one, the
survivor normally merits a share in the estate left as having been the
product of their joint efforts, it would seem that an unworthy spouse
should likewise be denied the right to elect, and should be confined to
such testamentary benefaction as the deceased spouse deemed fit to give.
The recent New York statute 157 may be taken as indicative of possible
categories of exclusion in this regard. It denies the right of election
(1) to a spouse against whom or in whose favor a final decree or judg-
ment of divorce, recognized as valid by the law of the state, has been
rendered; (2) to a spouse against whom a final decree or judgment
of separation, recognized as valid by the laws of the state, has been
rendered; (3) to a spouse who has procured, without the state, a
final decree or judgment dissolving the marriage with the testator,
where such decree or judgment is not recognized as valid by the law
of the state; (4) to a husband who has neglected or refused to provide
for his wife, or has abandoned her; (5) to a wife who has abandoned
her husband. In addition, the murder of one spouse by the other, or
uncondoned adultery, might be suggested.

155 For example, see Del. Rev. Code (1935), § 3775; N. C. Code Ann. (1931),
§ 4099.

156 3 Vernier, American Family Laws, § 202 (1935). For examples of such

157 See N. Y. Decedent Estate Law (13 McKinney, Supp. 1938), § 18 (3),
(4), (5).
D. Applicability of the Right of Election

In view of the policy of equality of the sexes recognized both by society and by the law in recent years, a modern estates law should make uniform and reciprocal the election and inheritance rights of the husband and wife. If any need for deviation is felt necessary in a particular case, it can be accomplished by contract between the parties.

E. The Mechanics of Election

Situations in which election will normally be necessary will arise with reference to two broad classes of spouses: (1) those who are normal and sui juris and (2) those who are under disability, such as insanity, minority, etc. Obviously the statute should make separate provisions for election by persons in each of these classes.

i. Normal Persons

In regard to the first class, there should be a definite provision with regard to the manner in which the election shall be made. Probably the simplest and most effective procedure would be to adopt a simple statutory form for the election which should be signed by the party entitled to elect, witnessed and/or notarized, and filed with the probate court as part of the probate record of the estate.\(^{158}\) For convenience, a copy should be required to be served on the executor.

The time within which such action must be taken at present varies widely among the various jurisdictions. Probably most of the states now providing for election have statutes requiring election to be made within a given time after admission of the will to probate. The time might also be fixed with reference to the issuance of letters of administration, or to the expiration of the time for presentation of claims against the estate, or to the date of the testator’s death. The only important thing is that some definite time be fixed. Nor should a provision be omitted allowing an extension of time for election in case the will is contested, or other litigation involving the estate arises which would prevent an election being made with full knowledge of the ultimate situation; in this event, an extension can well be reposed in the discretion of the probate court.

\(^{158}\) For example, the form might be this: “I, A.B., widow [or husband] of C.D., deceased, late of ———, do hereby renounce any and all provision for me made in the will of my said deceased husband [or wife], and elect to take in lieu thereof my statutory share as provided by section ——— of the Laws of the State of ———.” [To be signed, witnessed and notarized.]
2. Persons under Disability

Since members of the second class of spouses are incompetent to elect themselves, some provision must be made for an election on their behalf. The guardian or committee of such a person might be authorized to make the necessary election, subject to the approval of the court, or the election might be left to be exercised by the court alone. In localities where the press of business on the court is not too great, this latter method is perhaps preferable. Mutatis mutandis, the form of the written election, the time within which it must be executed, the manner in which it is to be filed, etc., can be said to be the same as outlined with respect to the first class of spouses.

F. Waiver of Election Rights

Inasmuch as election statutes are enacted on a policy basis in the interest of surviving spouses, no reason is perceived why the spouses may not agree, either before or after marriage, to waive their election rights under the statute, either wholly or partially. Of course the usual rules relative to setting aside agreements induced by fraud, improper influence, and the like, ought to be applied here as in any other case, but within such limits a release of the rights seems proper. To avoid inconveniences and misunderstandings, authorization to this effect, as well as a form of procedure, should appear in the statute.

G. Election as Concluding Other Interests

In view of the confusion in the matter at the present time, the statute should also make provision for the effects on intestate succession of an election (1) to take under the will, and (2) to take against the will. As has already been pointed out, in the first situation, unless testator expressly makes his provision for the surviving spouse conditioned on a release of that spouse's interest in intestate property, the survivor ought to be allowed to take his testamentary share and also any share to which he would normally be entitled in intestate property; this both on principle and notions of uniformity and certainty. The result most desirable under the second situation is not so clear, but as adverted to above, there is strong reason for allowing the survivor likewise to share in the intestate property. Of course, if the spouse is by statute confined to one sole interest on renunciation, the provision suggested in this paragraph may be thought unnecessary. In any event, however, some definite rule should be laid down.\textsuperscript{159}

\textsuperscript{159} See the discussions on the effect of an election to take under or against the
Some definite enactment ought also to be made with regard to
the situation where the testator's will gives the surviving spouse some
of testator's own property and also exercises in the survivor's favor a
power of appointment, or makes him the donee of a power. Except
when the testator expressly declares that even in case of dissent from
the will, the survivor is to take the appointed property or to exercise
the power, unless a special power is involved, the exercise of which
would not inure to the benefit of the surviving spouse, the statute
should probably render an election against the will conclusive to bar
every interest passing to the surviving spouse by virtue of the will,
unless the legislature is convinced that policy dictates a contrary
statute. 160

H. Contribution on the Spouse's Renunciation

Some provision ought also to be made determining what disposi­
tion of the property is to be made if the widow elects to take against
the will. That is, who pays the widow's share? It is obvious that no
cut and dried rule can be laid down which will begin to cover the many
diverse situations which may arise here. The solution adopted by the
New York statute is one of the best. 161 There it is provided that when
an election is made by a spouse, the will shall be valid as to the residue
remaining after the statutory elective share has been deducted, and that
the terms of the will shall as far as possible remain effective. This has
been interpreted to mean that the legatees, remaindermen, etc., must
contribute ratably to the withdrawn share of the widow. 162

I. Abolition of Other Statutory Interests

There is a feeling in the mind of the writer that homestead, exemp­
tion, and statutory allowance rights in favor of spouses should be abol­
ished as such. It would seem that a good deal of superfluous statutory
matter, as well as difficult construction problems, are involved through
their recognition, and that much confusion would be removed if they
were dropped out of the books. After making so bold a suggestion, it
is entirely proper to advocate an alternative protective device for
spouses. A spouse's intestate share is at present often subject to debts,

will on the widow's right to share in intestate property as heiress, supra at page 255 ff.
160 See discussion of the problem of election to take against the will as barring
share in powers of appointment and benefits thereunder, at page 410 ff., supra.
162 See Matter of Byrnes, 149 Misc. 449, 267 N. Y. S. 627 (1933), and O'Shea,
(1934).
expenses, etc., for the reason that these other interests are given him as a preferred interest. Why not do away with them, and yet substantially protect the spouse by giving him some fractional interest of the intestate share to which he is entitled by election or otherwise, as a preferred claim? If this were coupled with a provision authorizing pre-payments, chargeable against this interest, to be made during the administration period, no reason is perceived why the spouse would not be adequately provided for, and yet the whole situation clarified and simplified. Many times on the death of one spouse, there is nothing left to hold the survivor to the old homestead; hence if he were given a cash share he might be much better off than if saddled with the burden of specific property.

Decedent estate laws embracing some or all of the above suggestions, it is believed, would be more adequate to handle present-day situations. The New York statute, evolved after much study and investigation under the able leadership of Surrogate Foley, is a notable achievement, and should have the effect of stimulating improvement in the estate laws of other jurisdictions. Certainly any state contemplating a revision of its estate laws should give the New York enactment careful consideration. It is hoped also that the discussion which has been presented here has served both to point out a few of the problems which still remain, and to suggest possibilities for their solution to the end that the administration of estates may be improved in every possible way.

In order properly to provide for a dependent spouse of a testator of small means, it will be necessary also for the statute to assure the surviving spouse a minimum share in any event. For example, the statute might provide that the widow should take all the estate up to $1500 in value, and a given fractional share in any value over that sum.