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MATRIMONIAL PROPERTY
THE FORCED SHARES

A. INTRODUCTION

"The forced share" is a term used to describe that type of legislative provision by which a disinherited surviving spouse is given by law a predetermined portion of the deceased spouse's estate. Alternative names commonly used for the same type of enactment include; "the widow's share", "the non-barrable share", "the statutory share", or "legal rights of inheritance" which is the term used by the English Law Reform Commission in their Working Paper #42.

It is the general purpose of this report to point out and discuss the pros and cons of forced share legislation. A more particular purpose is to examine the workings of the forced share provision contained in the Manitoba Dower Act, R.S.M. 1970, c. D-100 which is the only such provision in a Canadian jurisdiction.

The approach of the report will be to first discuss the social policy behind legislation which interferes with testamentary freedom. This will necessarily involve a comparison of the two major types of such legislation, the forced share and legislation of the type found in Alberta's Family Relief Act, R.S.A. 1970, c. 134. This will be followed by a discussion of the two major problems that arise under forced share legislation; the disruption of the testamentary scheme and the frustration of the purpose of the legislation by the testator's evasion tactics. With this background, the Manitoba experience will be examined closely.

B. FORCED SHARE A FAMILY RELIEF?

1. The Social Policy

The social policy of which forced share legislation is one application can be said to have two branches. Both branches arise out of the same social fact. This is the fact that in the marriage partnership the roles of the parties are usually such that one party, most often the husband, engages in wealth-building activities while the other party, the wife, functions in a capacity which is usually of at least equal importance in the success of the marriage but which is not generally of a wealth-building nature. If when the marriage is dissolved by the death of the wealth-building party, the survivor is disinherited, she will be without maintenance and will take no share of the estate which her efforts helped to compile.

The first branch of the policy is concerned with the provision of maintenance for the surviving spouse. A forceful expression of the branch of the policy is found in the following excerpt from the Report of the Commissioners to Investigate Defects in the Law of Estates, New York Legislative Document No. 69, (1930), page 86:

> There is a glaring inconsistency in our law which compels a man to support his wife during his lifetime and permits him to leave her potentially penniless at his death.

The first branch of the policy, therefore, is simply that it is socially desirable that the estate of the deceased partner of a marriage, that of the husband in the usual case, be used to some extent to maintain the party

who survives. The desirability of such a policy is particularly strong where there are infant children of the marriage. If the surviving spouse must leave her household duties to enter income-producing activities, the chances decrease that the children, deprived of normal maternal attention, will develop into desirable citizens

The second branch of the social policy is concerned with ensuring that the surviving spouse receives a 'fair share' of the wealth that has been built up during the marriage. The goal under this branch can be said to be to guarantee the surviving spouse a return on the investment of her energies in the marriage.

It may be noted that the discussion so far has assumed that the wife is the surviving spouse. The legislation that arises out of the social policy just described makes no distinction between a surviving wife and a surviving husband. Generally the rights of both are the same. It is recognized, however, that the policy as described above, particularly the first branch, would not generally apply to the circumstances of a surviving husband. However it is by no means impossible that a disinherited surviving husband could find himself in need of protection, as, for example, where a substantial portion of the family wealth had been put in the wife's name. In the interest of simplicity it will continue to be assumed that the surviving spouse is the wife.

2. The First Branch of the Policy: The Provision of Maintenance

The first branch of the social policy has been the motivation for a number of different legislative provisions.

In his book, *Fraud on the Widow's Share* (1960), W. D. Macdonald has listed several enactments that the legislatures of various jurisdictions have designed from time to time to either provide maintenance or to encourage its provision. The list includes (see page 29 of Macdonald):

(1) Widows' Pensions.

Alberta first enacted such a provision in 1952, the Widow's Pensions Act, R.S.A. 1955, c. 369. The Act provided a pension of not more than $40 a month to Alberta widows between the ages of 60 and 65 whose total annual income, with the pension included, did not exceed $720. These restrictions as to age and income probably made the Act of little consequence. This and the fact that it would seem more just to place the burden of maintaining widows on the estate of the husband rather than on the taxpayer probably contributed to the repealing of the Act in 1967.

(2) Estate Tax Incentives

In some jurisdictions a testator is encouraged to leave a greater portion of his estate to his widow because lower estate duty rates are applied to such bequests.

(3) Homestead Legislation

Alberta's Dower Act, R.S.A. 1970, c. 114 provides the surviving spouse with a life estate in the matrimonial home. This provision may be of limited effect in achieving the goal of the social policy because it is common in modern times that the husband will own no real property.

(4) Family Allowance Legislation

Some American jurisdictions have enacted legislation under which temporary relief can be granted to a surviving family out of the estate during the process of administration. Such provision is not deducted from the widow's distributive share as it is considered an administrative expense. However the relief is only temporary.

(5) Statutory Restrictions on Gifts to Charities.

In some American states such restrictions are imposed not for the purpose of discriminating against charities but to encourage provision for the surviving family. In fact the restrictions are not operative unless there are surviving children in many states. The protection resulting from this type of legislation is minimal because evasion is usually a simple matter.

(6) Provision for Revocation of Will by Remarriage

Such a provision is found in the Alberta Wills Act, R.S.A. 1970, c. 393, s. 16(a). The protection afforded a new wife by this provision is lost very easily by the execution of a new will.

(7) Anti-lapse Legislation

Enactments of the type contained in the Alberta Wills Act, R.S.A. 1970, c. 393, s. 34, provide a limited degree of protection to the surviving family except the wife but evasion is simply a matter of expressing an intention contrary to the section.

(8) Provision for Action against the Estate for the Maintenance of Surviving Children

Such legislation, empowering a state agency to take action against the estate on behalf of a disinherited child is apparently common in the United States.

The last six of these common legislative provisions show that legislatures have not been hesitant to interfere with the husband's "freedom of testation". However none of them have achieved any substantial satisfaction of the need recognized in the first branch of the social policy discussed above. Many legislatures have responded by enacting provisions which by effecting a more direct interference with testation, come much closer to success.

The forced share is such legislation. Typically, a forced share provision provides that where the testator has failed to leave a certain portion (usually a third) of his estate to his widow, and has not made one of the alternate provisions which the enactment deems to be adequate, the executors must pay to the widow a fixed portion (usually one-third) of the estate. The widow is usually given the right to elect to take either whatever legacy was provided for her in the will or the statutory share. If she elects the latter, the provisions of the will in her favour are deemed to lapse.

Far from being a recent innovation, the forced share existed in medieval English law. Under that law the husband's testamentary powers extended only to one-half of his personalty if he was survived by a wife, or to one-third if he was survived by a wife and children. In the former circumstance the other half automatically went to the surviving wife and in the latter circumstance, one-third went to the wife and one-third went to the children.

This customary forced share began to die in the 16th century in most of England and was finally abolished in London by statute in 1724 (11 Geo. 1, c. 18, s. 17). (See William F. Fratcher, *Protection of the Family Against Disinheritance in American Law* (1965) 14 International and Comparative Law Quarterly 293 at 295.) In modern times, the forced share has returned for use in 39 states of the United States. (These are listed in Pager, *The Spouse's Nonbarrable Share: A Solution in Search of a Problem* (1966) 33 University of Chicago Law Review 681, footnote 4.) As mentioned earlier, Manitoba is the only Canadian province to have a forced share provision. It will be discussed in detail below.

An alternative statutory interference with testation has been developed in Commonwealth jurisdictions to achieve the same purpose, i.e., the provision of maintenance for the surviving widow and family. This is family maintenance legislation of the type enacted in Alberta in the Family Relief Act, R.S.A. 1970, c. 134. Under such legislation a widow, or some other dependent of the deceased, who feels that she has not received adequate provision under the will from her husband's estate, makes application to the court which in accordance with the legislation, considers all of the circumstances of the case and decides what a fair distribution of the estate would be. Much of the governing law in the family relief system is the case law that has been developed by the courts for the consistent exercise of discretion. However variation is still great and it is possible to find cases where on apparently similar facts different judges have come to very different conclusions.

This element of judicial discretion is the primary and obvious difference between the two systems. Whereas the

family relief system might be described as providing a result tailored to the situation, the forced share system provides a rough and ready solution which is intended to do substantial justice in most cases.

The major advantage of the forced share system is the simplicity of its administration. With rigid standards set by the legislation a widow's rights can be determined very easily and it is very infrequently that problems requiring judicial interpretation will arise. Expensive court attention to each application is a necessary feature of the family relief legislation.

However the simplicity of the forced share system gives rise to its major disadvantage: the result achieved by the operation of the legislation bears no relationship to the need of the surviving spouse. One of the major reasons for the statutory interference with the testator's own disposition of his estate is that the widow's needs must be satisfied. Yet that need is not taken into account as a factor in determining the extent of the interference. A widow who is independently wealthy and may have been disinherited by her husband for that very reason is not deprived of the right to elect to take the statutory share of her husband's estate even though she needs nothing. Possibly even less satisfactory is the situation where the disinherited widow has nothing whatsoever of her own and must settle for one-third of her husband's small estate when a greater portion could satisfy her needs.

Statutes enacted by the Alberta Legislature over the years have been generally of the family relief type. The first such statute, however, displayed hybrid characteristics.

This was The Married Women's Relief Act, S.A. 1910 [2nd session] c. 18. Under it a widow could apply for relief only if she received less under the will than she would have received if her husband had died intestate. The court would consider the application and "make such allowance to the appellant out of the estate of her husband disposed of by will as may be just and equitable in the circumstances" (s. 8). However such allowance could not exceed the widow's intestate share (*McBratney* v. *McBratney* [1919] 3 W.W.R. 1000 (S.C.C.)). This Act was repealed in 1947 and was replaced by the Testator's Family Maintenance Act, S.A. 1947, c. 12, which is the forerunner of the Family Relief Act, R.S.A. 1970, c. 134.

3. The Second Branch of the Policy: A 'Fair Share' of the Estate

A basic policy difference between family relief legislation and forced share legislation may exist in the fact that the former is confined to the satisfaction of the widow's need for maintenance. The judge in applying the Family Relief Act may "order that such provision as he deems adequate be made out of the estate of the deceased for the proper maintenance and support of the dependants or any of them" (R.S.A. 1970, c. 134, s. 4(b)). There is no attempt by the family relief system to ensure that the wife be rewarded for her contribution to the building up of the estate.

There is really nothing to say that the forced share system has the rewarding of the wife as a goal any more than does the family relief system. However in as much as it does not seem to be particularly suited to the provision of need (since the disposition to the widow often has no relation to her need, as noted above) and in as much as it has the

effect, intended or not, of rewarding the wife, it is possible to speculate that the forced share system has a basis in the second branch of the policy. Yet, if this is true, it does not seem to be very well suited to providing even this because the testator may have built up his estate during a former marriage and his wife at death having very little to do with it. Nevertheless she will be rewarded under the forced share system as if she had. This situation is one where evasion seems justified as will be discussed below.

4. Choosing the more Suitable System: A Statistical Determination

On the basis of effectiveness in achieving the intended result, the family relief system would seem to be the more desirable of the two systems. If price were no problem who wouldn't rather own a tailor-made suit rather than one off the rack. However price is always a consideration and it may be that practicalities make the forced share system more attractive. The question that must be answered is, "How great is the need of surviving spouses for protection against disinheritance?" If the need is widespread the rough justice provided by the forced share system may be the best in practical terms. If the need is not widespread but exists in a few individual cases the individual attention that is a feature of the family relief system may be more appropriate than the forced share. An attempt to answer the question by an examination of published data on patterns of testamentary behaviour collected in various American studies was made by Sheldon J. Plager in his article "The Spouse's Nonbarrable Share: A Solution in Search of a Problem" (1966) 33 University of Chacgo Law Review 681. The discussion below is based on that article.

Early in the article Plager demonstrates the danger that is involved in basing conclusions on statistical data. He notes that Macdonald, in his book *Fraud on the Widow's Share*, supports the thesis that the need for protection for the surviving spouse is not only large but growing by observing first that the number of evasion litigations (and therefore presumably the number of evansions) is growing at a rate two times as great as the population. While the population has doubled since the turn of the century the number of evasions has quadrupled (Macdonald, page 7). Plager points out that the comparison should not be between increase of evasion legation and population but rather it should be between increase in evasion litigation and increase in testacy or estates. If that comparison is made it is seen that the rate of evasion litigation has increased from 6 per 10,000 wills in the early part of the century to 10 in 10,000 wills at mid-century. This cannot be said to be a significant alteration in testamentary behaviour--and certainly does not indicate a need for greater protection.

Another factor which Macdonald points out in support of the theory that the need for protection is great is that the divorce rate is significantly increased. This is significant because it means that there is a higher remarriage rate which creates a situation ripe for disinheritance. The husband feels an obligation to the children of his first marriage and leaves his estate to them rather than to his new wife. Plager points out, however (and Macdonald also discussed the argument) that the high divorce rate indicates that potential cases of disinheritance have been avoided since after the divorce there is no spouse to disinherit. Plager notes that both conclusions are consistent with available statistics and in that circumstance neither should be trusted.

The article then goes on to describe statistics which tend to support the thesis that there is not a widespread need for protection against disinheritance of the surviving spouse.

Firstly it is noted that there seems to be an increased use of means of transmission of wealth at death other than wills. A study revealed that a married man is less likely to have an estate at death than an unmarried man. Yet men with wealth were married in the vast majority of cases. A possible interpretation is that much wealth is passing by 'will substitutes' such as joint ownership of realty, survivorship bank accounts, revocable *inter vivos* trusts, and life insurance. On the basis of estate tax records and other statistical sources the article concludes that a very large number of joint tenancies involve husbands and wives; that over half of the money in revocable *inter vivos* trust eventually passes to the wife, and that wives receive between 80% and 97% of the life insurance benefits. Plager observes:

> It must be remembered, however, that the evidence regarding each of these mechanisms is fragmentary and probably insufficient to provide a basis for judging the proportion of the total assets of married decedents which is transmitted in this fashion. (page 697)

The second point Plager makes is that testacy is generally increasing in proportion to intestacy. Also, studies show that the wealthier the person the more likely he is to have a will. Accordingly a high percentage of all wealth passes at death according to a will. There was no statistical support for the proposition that marital status had anything to do with whether a man choose to die testate or intestate.

[This is not inconsistent with the observation mentioned above that a married man is less likely to have an estate at death than an unmarried man.] It also appeared that surviving spouses are generally doing quite well in the competition for the testator's favour. One study showed a shift over a century from the granting of life estates to a surviving spouse to the granting of "fee-dispositions". Studies also showed that the vast majority of testators left their property to the surviving spouse. One of the statisticians was lead to conclude from this ". . . that there is no need in practice for the nonbarrable share for the surviving spouse; the surviving spouse is given much more than the statutory 1/3 in the very high percentage of wills." (page 712).

The third observation that the article makes involves the frequency of elections against the will. A survey of 84 probate lawyers in Illinois revealed that in the 1,513 probate proceedings in which they were involved, there was a surviving spouse in 717. There were only 19 of these surviving spouses that elected against the will which was 1% of the total number of proceedings and 2.6% of the proceedings where there was a surviving spouse. Some of these elections were made in circumstances where there was no attempt to disinherit. Plager concludes that only in somewhat less than 2% of the cases was there "a felt need for protection from disinheritance, intentional or inadvertent" (713).

The author warns that there was really not enough empircal evidence to support strong conclusions. There is a need for the exercise of caution because ". . . [t]he vagaries of human behaviour are never adequately described in mathematical terms." However he feels justified in making the following conclusion:

> The married testator on the whole shows little inclination to avenge himself at death for the slights and frictions of marital bliss. If the balance is struck it is not done so publicly. For the total society this has real meaning: the need for the surviving spouse's choice between the deceased spouse's testamentary largeness and the legislatively-decreed share is not a need of massive proportions. The machinery designed to satisfy this need need not be massive and insensitive; on the contrary, the dimensions of the need are such as to compel the conclusion that the machinery should be keyed to individuation and able to adjust its impact to the circumstances calling it into play. (page 715)

The conclusions reached in the above discussed article are interesting whether or not they can be said to be sufficiently supported by evidence, because they show a methodology which if used to gather statistics for this jurisdiction might possibly reveal useful facts with respect to the testamentary behaviour of Albertans. With such information, the choice of family relief or forced share might be easily made.

C. PROBLEMS ARISING UNDER FORCED SHARE LEGISLATION

1. Disruption of the Testamentary Scheme

One attractive feature of the family relief system is that the judge can determine what part of the estate is to bear the burden of whatever order he has made in favour of an applicant. In the forced share system the renunciation of a gift under a will and the election in favour of the statute must affect the remainder of the distributive scheme automatically. There is no judge to

apportion the burden so as not to relieve beneficiaries upon whom it would rest most heavily. Problems concerning this disruption have often led to litigation and the result is the development of a complicated set of rules. The rules that have developed under the Illinois forced share provision offer an interesting example. They were discussed in an article by M. D. Schnebly, "Renunciation of a Will by the Surviving Spouse" 1951, University of Illinois Law Forum 396. That article forms the basis of the following discussion.

(1) Distortion of the Testamentary Scheme

Where the renunciation of the will by the surviving spouse affects each beneficiary under the will disproportionately, the disruption is said to be a distortion. Three examples of situations displaying distortions are set out below.

Case I - Distortion on Renunciation of an Absolute Interest

The testator devises one piece of realty to his wife absolutely, another piece to A absolutely and the residue of his estate which includes another piece of realty is devised to B. If the widow renounces the will, and elects to take her statutory share the land devised by the will to her will fall into the residue. Assuming that under the particular statute involved the widow's forced share includes one-third of each parcel of land (which is the case under the Illinois statute) the widow will take one-third of the devise to A and one-third of the land in residue (which includes one-third of the land originally devised to her). B will be compensated for the loss of a fraction of the land originally in residue by the falling of two-thirds of the renounced land into residue. A will not be compensated at all. Since

the effect upon A and B is not the same, this is a distortion. Of course B will lose one-third of the personalty in residue to the widow. But there still may be distortion because if the residue is large enough, specific legatees of personalty may not suffer any loss as a result of the renunciation because the statutory share is made up as much as possible out of the residuary personalty.

Case II - Distortion on Renunciation of a Life Interest

The testator devises a life estate in realty to his wife, remainder to A. He bequeaths a pecuniary legacy to B and C and his residuary personalty to D. When the widow renounces the will, A loses one-third of his remainder interest, B and C lose nothing probably, and D loses some portion of the residue personalty. There is thus a distortion. If A's life interest is accelerated he may be more than fully compensated since a present interest might be worth more than a future interest.

Case III - Distortion on Renunciation of a Life Interest

The testator devises Blackacre to his wife for life and the remainder is given to A. Whiteacre is devised to B. If the wife renounces, A and B both lose one-third of the lands. If A's interest is accelerated he may be compensated for his loss and since B cannot be so compensated there would be a distortion. As a result the rule in Illinois is that a future interest will not be accelerated when a surviving spouse renounces her life interest unless there would be no resulting distortion and there is no manifestation of an intention contrary to such acceleration in the will.

(2) Acceleration of the 'Defeasibly Vested Remainder' and the 'Contingent Remainder'

Where the testator drafts his will in the following way, he is said to have granted a defeasibly vested remainder: "I devise Blackacre to my wife for life and after her death to A in fee but if A shall die before my wife, then to B." If the following words are used, the remainder is said to be contingent: "I devise Blackacre to my wife for life and after her death to A in fee if he shall survive my wife and if he shall not survive her to B." The distinction is subtle if it exists at all except in the minds of lawyers. But in Illinois it makes an important difference which wording is used if the widow renounces. Assuming that there is no distortion or contrary intention expressed in the will, a defeasibly vested remainder can be accelerated on renunciation. However a contingent remainder cannot be accelerated prior to the satisfaction of the condition because this would defeat the intention of the testator. Schnebly feels that this unqualified rule is not just. The question of whether or not the remainder should be accelerated upon renunciation of the life interest should not depend upon the subtle interpretation of words that the testator may have chosen with less care than is being used by the lawyer in reading them.

> Such a remainder should be accelerated wherever acceleration would not defeat the desire that it may reasonably be assumed the testator would have had if he had taken thought of the possibility of renunciation.
> (Schnebly, page 410)

Thus where the condition was that the remainderman reach a certain age, acceleration might properly be denied. If the

condition were surviving the holder of the life estate it might reasonably be expected that had the testator contemplated the possibility of renunciation he would have desired acceleration in that event.

Another problem that arises under defeasibly vested remainders is what is the effect of renunciation on the executory devise which in the above quoted wills was to B. Does the property vest in A subject to the executory devise over to B or is the devise destroyed. Illinois cases have either ignored the executory devise, said it was destroyed, or said that the possession of the property by A was defeasible. Schnebly feels that the best solution is to consider the devise destroyed. He reasons:

> Where a remainder is limited after a life estate, without a condition precedent, but with a limitation over on a certain event, the remainder is usually construed to be vested subject to a divestiture on occurrence of the stipulated event, provided that such event shall occur during the continuance of the life estate. If at the termination of the life estate by death of the life tenant the stipulated event has not occurred, the remainder becomes an indefeasible present interest. This rule is founded on the belief that a conveyer would not normally intend the fee interest to be defeasible after it has come into actual possession. If the fee interest continues to be defeasible after that time, the devisee of the fee is deprived of a considerable portion of the benefit of normal fee-simple ownership. He cannot safely invest money in improvements upon the land, and he cannot advantageously convey his defeasible interest.
>
> (page 407)

(3) Sequestration

If upon the renunciation of her life estate by a widow, the remainder cannot be accelerated because a distortion would result, or there is a contrary intention expressed in the will, or the remainder was contingent, the land may be sequestered. Sequestration is ". . . the seizure of the property by the court of equity, and its application to minimize the losses resulting from renunciation." (page 410). The property may be held in trust for the life of the widow and the income used to compensate those who suffer loss as a result of the renunciation and granting to the wife of her statutory share.

If it is an absolute interest that has been renounced, the court may divide the sequestered property among the other beneficiaries in such a way as to remedy whatever distortion may have resulted from the renunciation.

One thing that is obvious from the above described situations is that although the forced share system does have the advantage of simplicity of administration since it can operate without reference to the courts, the aftermath of an application of the system may involve problems of such a nature that litigation will be necessary to determine how the estate will be distributed subsequent to the widow's taking of her statutory share.

2. Evasion of the Statute

A problem that is common to both the family relief system and the forced share system is the evasion of the statute by the testator. Since the statutory share is taken out of the estate of the testator, he can easily evade the

statute by disposing of his estate by a variety of *inter vivos* means. If there is no estate out of which the widow can take her share, she has been effectively disinherited despite the statute.

The English Law Reform Commission notes in its Working Paper No. 42 at 238 that there may be a greater tendency for testators in a forced share jurisdiction to engage in evasionary tactics than there is for testators in a family relief jurisdiction:

> . . . a spouse who wished to disinherit the other spouse might have a stronger incentive to do so [under a forced share system] than under a system which merely entitled the survivor to claim reasonable maintenance; secondly . . . [an *inter vivos*] disposition might have a more substantial effect on a fixed right to inherit a proportion of the estate than an application for family provision, where the survivor's claim to maintenance could be charged, if need be on the whole estate.

The problem of evasion is the primary concern of W. D. Macdonald in his book, *Fraud on the Widow's Share* (1960). He discusses the judicial reaction of American courts to evasions as shown in the various tests that have been employed to determine whether a particular disposition is in fact an evasion. These tests include those based on the retention of control by the husband over transferred property, those based on the reality of the transfer and those based on the motive or intent of the husband. He notes that although the courts usually frame their judgments in terms of one of these tests, the 'equities' of the situation which include such things as the proximity of the transfer to the testator's death, the relationship of the transferee to the testatory, the size of the transfer, the needs of

the widow, and the provision made for the widow by the testator during his life, often are the real bases of the decision. Macdonald's conclusion is that various legislative proposals to remedy the evasion problem should be set aside in favour of a completely new start along the lines of the family maintenance legislation of the British Commonwealth.

Other American commentators have spoken sharply against the lack of legislative action toward remedying the evasion problem which they see as rendering forced share statutes useless. Perhaps two such statements are worth quoting:

> If the statutes creating such valuable rights for widows . . . are subject to easy evasions by transfers *inter vivos*, their utility is slight indeed. Only the poor and the stupid need conform. In view of the jurisprudence in some states, the question may well be put whether those statutes have been placed on our books for any sincere enforcement. Or do they simply represent a sort of sentimental desire of the community which must be formally registered but need not inconvenience those with means to consult competent counsel? Are these laws a mere pious wish, a sort of sanctimonious recital of what we should prefer, but will not insist upon?
>
> [Cahn, *Restraints on Disinheritance* (1936) 85 U. Pa. L. Rev. 139 at 150.]

> It may well be that legislatures have no intention of giving substantial rights to a widow whose relationship to her husband was such that a desire to disinherit her lay uppermost in his mind. It cannot be ignored that legislatures are predominantly male; and there are no statistics available to establish that marital infelicity is less prevalent among the elected. Again the emancipation of womanhood may have progressed to the point where statutory protection of the widow is out

> of step with the times. But those are reasons for repealing the statutes, not for leaving them porus.
> [Leach, *Cases and Text on the Law of Wills* 19 (2d ed. rev. 1960).]

The problem of evasion becomes more complicated and the social policy behind the forced share (as outlined earlier) becomes confused when it is observed that many evasions are laudible and not reprehensible. The primary example is the one mentioned earlier of the husband who makes *inter vivos* transfers to his children by an earlier marriage thus evading the statutory share of his second wife who had not been his wife during the time the estate was built and who has an independent source of income.

It is also worth noting that Macdonald's suggested solution of enacting family relief type legislation may not have been popularly received by American legislatures because of a reluctance on the part of these bodies to entrust as much discretion as is called for under such a system to judges of the decentralized system who are "popularly elected for short terms and paid rather low salaries." [Fratcher, "Protection of the Family Against Disinheritance in American Law", 1965, 14 International & Comparative Law Quarterly 293 at 301.]

The evasion problem is obviously a major one and it is not confined to the forced share system. Mr. Macdonald's suggestion that a new start with the family relief system is advisable may be wise but it should be noted (as it is by Macdonald in his Model Act) that evasion is a problem under that system as well though it may possibly be more easily

remedied in that system. (Professor Bowker has written a memorandum paper for the Institute which deals with the problem of evasion and its remedy in the family relief system. Since much of this memo is relevant to this discussion it has been included as Appendix A.)

D. THE MANITOBA EXPERIENCE

1. Description of the Provision

The only Canadian forced share provision is contained in the Manitoba Dower Act, R.S.M. 1970, c. D-100. The relevant provisions are attached to this report as Appendix B.

The key provision is contained in s. 15(1) which enacts that where a testator has not made provision for his wife the value of which is ". . . at least one-third of the value of his net real and personal property. . ." she is entitled to receive that ". . . share of his net real and personal property. . . ." which, when added to life insurance benefits and property conveyed to her during marriage by way of gift or advancement, equals one-third of the testators net estate. The share thereby given is in addition to the life estate in the homestead provided elsewhere in the Act.

The terms "net estate" and "net real and personal estate" are defined in the definition section, s. 2.

Section 16 sets out circumstances where the rights created by s. 15 will not be given to a widow. These circumstances are very carefully defined in the section but basically they are:

(1) where the testator, by will, trust deed or insurance, has provided for his widow an annual income of $6,000;

(2) where the testator, by will, gift or advancement or any combination, has provided for his widow property valued at $100,000;

(3) where the widow is to receive $100,000 in insurance benefits;

(4) where the testator leaves property valued at $50,000 and an annual income of $3,000 to his wife.

By s. 16(2) all of the amounts in s. 16(1) are increased by 50% for marriages occurring after July 1, 1964.

By s. 17 the widow is required to make declaration as to whether she elects to take the statutory share or the provision (if any) made for her in the will. This election must be made within a certain time period and if this time period lapses, the will is to be followed. If the widow dies before making an election, her personal representative receives the power by s. 18 to make the election and the running of the time period is suspended until the widow's will is probated or letters of administration are granted. By s. 29 a judge of the Surrogate Court can extend the period for making the election if application for such extension is made before the lapse of the period.

Under s. 19, if the widow elects to take under the Act, bequests made to her in the will become void except that

that an election against the will can have no effect on a declaration in the will that the widow is to be the beneficiary of a life insurance policy (s. 20).

By s. 21 the widow's share is to be construed as if it were a debt owed by the estate so far as other beneficiaries are concerned and is to rank in priority next after other debts owed by the estate.

The Surrogate Court is given jurisdiction by s. 28 to determine questions arising out of the application of the forced share provision. Finally, by s. 33(2) the provision is made as applicable to the husband of a testatrix as it is to the widow of a testator.

The Act was first enacted in 1919 (Dower Act, S.M. 1919, c. 26 beginning at s. 13) and is in all material respects exactly the same today as it originally was.

2. Judicial Interpretation of the Provision

Considering the relatively lengthy period, 54 years, during which the Manitoba forced share provision has been in effect, there does not seem to have been a great deal of litigation arising out of it. Of course this is consistent with what was earlier said to be the main advantage of the forced share system; its administrative simplicity. This feature has the unfortunate side effect of making an estimation of the frequency of use of the statute difficult. There have, however, been some interesting issues arise out of the legislation.

(1) Interaction of the Dower Act Provisions and the Testators Family Maintenance Act, R.S.M. 1970, c. T-50

Manitoba has not confined its efforts toward protection of the disinherited widow to the forced share provisions of its Dower Act. In 1946 it added legislation of the family relief type to its scheme in the Testators Family Maintenance Act, R.S.M. 1970, c. T-50. There is a provision in this latter Act which deals with the interaction of the two systems:

> 22. (1) No order shall be made that has the effect of reducing the interest of a husband or wife in the estate of a testator to an amount that, in the opinion of the judge, is less than the share to which the husband or wife would have been entitled under The Dower Act, should he or she elect to take under that Act.
>
> (2) The benefits given the husband or wife of a testator by an order under this Act are in lieu of the share given him or her under The Dower Act; and thereafter he or she, except as to a life estate in the homestead, has no rights under The Dower Act.

In *Re Lawther Estate* (1947) 55 Man. R. 143, where an application by the widow of a testator for an order under the Testators Family Maintenance Act was under consideration, the court interpreted the above quoted section as setting a minimum for orders under the Act. Williams C.J.K.B. said at page 160:

> I may make no order that has the effect of reducing the interest of the applicant in the testator's estate to an amount that in my opinion, is less than the share to which she would have been entitled under the provisions of the Dower Act should she elect to take under the provisions of that Act.

and later at page 161:

> In my opinion, the provision I am making by my order does not give the applicant less, but gives her more than she would have been entitled to under The Dower Act.

In *Re Blackmore Estate* [1948] 1 W.W.R. 1001, the argument had been made that the Dower Act and the Testators Family Maintenance Act should be "read together" so that the separation of the husband and wife which by s. 22 of the Dower Act could deprive the wife of her rights to a forced share should be construed as having the same effect on her application under the Testators Family Maintenance Act. Williams C.J.K.B. in rejecting this argument said (page 1010):

> . . . it is only necessary to say that the two Acts were passed for entirely different reasons. The Dower Act, first passed in 1918, was passed to assure to the widow a life estate in the homestead, if any, and one-third of the estate. The Testators Family Maintenance Act, first passed in 1946, was to provide, in a proper case, that dependants, including the widow, should receive proper maintenance and support.
>
> A widow taking under The Dower Act might get far less than proper maintenance and support. That would be the case where there is no homestead and the value of the estate is only $2,000. In such circumstances the widow may resort to The Testators Family Maintenance Act and, if entitled, obtain relief even if the whole estate is required for that purpose. The whole estate may be entirely insufficient.

> On an application under this Act all the circumstances must be taken into consideration including the character or conduct of the applicant. This may involve matters of separation, abandonment, or desertion, as well as many other matters, but these are considered by virtue of this Act and not because of any provision of The Dower Act.

He went on to affirm his interpretation of s. 22(1) in *Re Lawther* and observed that the effect of s. 22(2) on an application under the Testators Family Maintenance Act was to make the fact that the applicant had a right to a life estate in the homestead, a fact to be considered in the determination of the application.

In *Pope* v. *Stevens* (1955) 14 W.W.R. 71 where an appeal from an order under the Testators Family Maintenance Act by the widow was heard, the Manitoba Court of Appeal considered the question of whether s. 22(1) of the Act "prescribes a floor below which an allowance to a widow must not go" (headnote) was considered. Adamson J.A. clearly expressed his opinion which is radically different to that expressed by Williams C.J.K.B. in *Re Lawther*, in the following words (page 73):

> It must be remembered . . . that orders may be made under the Act for the maintenance of dependants other than a spouse. . . . Section 22 does not say what the order shall be but says it shall not have the effect of reducing the interest of a spouse under the Dower Act.
>
> I am, therefore, of the view that the order referred to in sec. 22 of the Testators Family Maintenance Act is an order made for the maintenance of some dependant other than a spouse. The intention of the section is that such an order shall not interfere with or reduce a spouse's rights under The Dower

> Act. It does not limit the discretion given under the . . . [Act] . . . except in that respect. Had there been an intention to limit the discretion given . . . [by the Act] . . . . it would have been simple to say that an order for the benefit of the spouse shall never be less than he or she would have been entitled to under The Dower Act.

Montague, J.A. recognized the argument accepted by Adamson J.A. but refused to construe the "badly worded section" (page 84) in the same way. However he also refused to accept the argument that the provisions of The Dower Act set a minimum for orders under the Testators Family Maintenance Act.

> The suggestion that under sec. 22 a widow has a right to demand and receive as her own absolute property in possession a third of her husband's estate is inconsistent with the intention of the Act which was to ensure maintenance (page 84).

He felt that the effect of s. 22 was not to incorporate s. 13 [now s. 15] of the Dower Act into the Testators Family Maintenance Act.

> What the reference does in effect is to direct that the Dower Act shall be utilized as a means of ascertaining - calculating - the minimum amount of maintenance which a widow is entitled to have awarded to her under the Act.
>
> It is also my opinion that it is the commercial or productive value of what is ordered as maintenance by the judge under sec. 3(1) which must have a minimum limit. The provision for maintenance ordered . . . must produce for the widow at least the amount of

> income that would have accrued to her from one-third of her husband's net estate had she received such one-third as a result of electing to take under sec. 13 [now s. 15] of the Dower Act.

Both judges observed that their remarks on this question were *obiter* because, since the award ordered in the case was increased on appeal to an amount greater than one-third of the testator's estate, it was not necessary to decide the issue.

However it is submitted that neither of the approaches suggested by the judges is entirely satisfactory. The suggestion of Montague J.A. is based on his observation that the legislative intention behind the Testators Family Maintenance Act is to provide maintenance, or, in the terms used earlier in this report, the Act is motivated by the first branch of the social policy. His conclusion that the widow cannot claim one-third of her husband's estate as a right within an application under this Act is a recognition that the Act is not motivated by what was earlier termed the second branch of the social policy. He proceeds to suggest that the Dower Act does not 'set' the minimum award under the Testators Family Maintenance Act but rather provides a means of 'calculating' that minimum. The significance of this difference is that while the court is not bound to award the applicant widow more than one-third of the testator's estate, it is bound to award her that amount of the testator's estate which will produce an income at least equal to the income that would be produced by one-third of the estate. It is difficult to comprehend, it is submitted, how any sum less than one-third of the estate would produce an income equal to that which would be produced by one-third of the estate. In effect therefore, even by

this approach the provision for the widow could not be less than what she would take under the Dower Act although it would remain within the court's power to order that only the income be paid to the widow and to maintain the corpus out of her absolute control.

Even this interpretation, and most certainly the one made by Adamson J.A., it is submitted are less desirable than the one put forth by Williams C.J.K.B. in *Re Lawther*. There could be nothing more clear than the legislative intent of the Dower Act provisions. They show that the legislature in 1919 firmly desired that no widow be forced by the will of her deceased husband to take less than one-third of his estate. If in 1946 the legislature had changed its thinking to the position that no widow, except one making application for maintenance under the Testators Family Maintenance Act, be forced to take less than one-third of her husband's estate, they would have expressed that position in terms much different than those used in s. 22 of the Testators Family Maintenance Act.

There is a reference printed under section 22 of the Testators Family Maintenance Act to *Saskatoon* v. *Shaw* [1945] 1 D.L.R. 353 (J.C.C.). In this case an application under the Saskatchewan Dependants Relief Act, R.S.S. 1940, c. 111, was under consideration. That enactment is very similar to the Manitoba Testators Family Maintenance Act and the Alberta Family Relief Act except that it contains the following provision:

> 8. (2) No allowance ordered to be made to the wife of the testator shall, in the opinion of the court, be less than she would have received if the husband had died intestate leaving a widow and children.

Despite the apparent clarity of this section the argument was made that the provision should be ignored because of the apparent irreconcilability with other sections of the Act and the 'unreasonable' result it would produce in cases where very large estates were involved.

The Supreme Court of Canada rejected these arguments (Rand J. dissenting), Hudson J. used these reasons:

> The language of subsection (2) of section 8 is clear. It does not create a new or unknown right but recognizes "subject only to the provisions of section 8(1)" a state of things that had existed under the law of Saskatchewan as repeated by stated by the Legislature and the Courts over a period of 30 years. It would not be right to attribute to the Legislature an intention to reduce the pre-existing provision for the benefit of the widow, unless expressed in clear and definite language. Here the language is an affirmation and not a denial of the right. (page 357)

The report of the case at [1945] 1 D.L.R. 353 is prefaced by the following editorial note:

> This case illustrates the difficulty which may be encountered where an earlier provision giving a right is carried forward into an entirely different statutory framework which creates new rights. The majority judgements preserve an existing right not clearly abridged by the statutory language.

The case is cited by Montague J.A. in his judgment in *Pope* v. *Stevens* and the editorial note (except for the significant last sentence) is quoted. The only comment on the case however is:

> Although, with respect, I would agree with that decision, I would hold that it affords no support to the respondents in the instant case. (page 84)

It seems unlikely, it is submitted, that the Manitoba Legislature would have caused the *Shaw* case to be cited after s. 22 of the Testators Family Maintenance Act if they had desired that the section be interpreted as it has been by Montague J.A. and Adamson J.A. in the *Pope* case. A determination of this fundamental issue by the Court of Appeal or the Supreme Court of Canada would be interesting and probably welcome to Manitoba practitioners.

Is it perhaps worthy of note that the English Law Commission in its Working Paper No. 42 (October 1971) does not seem to contemplate the possibility that where a system of legal rights of inheritance (a forced share) is adopted as a supplement to family provision law the result could be anything other than the establishment of a minimum award (Page 222, para. 4.11). The Commissioners also conclude that where the interest of dependants, other than the widow, applying under family relief type legislation outweigh those of the widow who has elected to take her statutory share, the statutory share should not be exempted from being charged with the order for relief (page 254, para. 4.68). It is interesting to note that this is the direct opposite of the intention of the Manitoba Legislature in s. 22 of the Testators Family Maintenance Act according to the interpretation of that section given by Adamson J.A. in *Pope* v. *Stevens*.

(2) Conflict of Laws Issues

The definition of 'net real and personal property' as contained in s. 2(i) of the Dower Act (see Appendix B) has given

rise to a conflict of laws issue. The relevant words are "wheresoever situated". The question which arises is whether or not real and personal property not situated in Manitoba should be included in the total estate upon which the widow's statutory share is calculated.

The issue arose in *Re Elder Estate* (1936) 44 Man. R. 84 where the widow of a testator who died domiciled in British Columbia but owning real and personal property in Manitoba, elected to take under the Manitoba Dower Act. The testator had left his widow a life estate in the British Columbia homestead and certain bonds.

The court, applying the maxim *mobilia sequentur personam* ruled that the law of British Columbia would govern the devolution of that personal property situated in Manitoba and that the law of Manitoba would only apply to the devolution of the real property situate in Manitoba. Therefore only that real property could be taken as making up the net personal and real property out of which the widow's share should be calculated. The definition of net personal and real property as including such property 'wheresoever situated' could not be interpreted as including real property outside Manitoba or personal property subject to the *lex domicilii*, the law of British Columbia, because if it were, the provision would be *ultra vires* the Manitoba Legislature. Donovan J. said at page 92:

> . . . there is nothing in the statute limiting its benefits to widows resident in or whose husbands were at the time of death domiciled in Manitoba, but, on the other hand, there is nothing in it to say that the general rule of law governing the distribution or devolution of property according to the *lex domicilii* should be considered abrogated. (92)

It is interesting to note that while her election to take under the Dower Act could only be effective against real property in Manitoba because that Act could not apply to any of the other property, the court held that s. 19 of the Act operated to render void the devise of the life estate in the British Columbia homestead and the bequest of the bonds. While this may be the correct interpretation of the law, it hardly seems just because s. 19 would not operate ordinarily to render void a life estate in the homestead since the widow would ordinarily be entitled to such a life estate in addition to her statutory share.

In *Morgan* v. *Altman* (1961) 34 W.W.R. 452, Monnin J. found it necessary to disagree with the interpretation applied in *Re Elder Estate*. In that case, the husband of a woman who died owning real property in both Saskatchewan and Manitoba, elected to take under the Dower Act and against the will. The question before the court was whether the real property situated in Saskatchewan should be included in the determination of the husband's share under the Dower Act. The court, interpreting section 2(d) & (e), 13 and 21 said at page 455:

> The Dower Act imposes a restriction on the free disposition of property by a testator and is also a widow's or widower's relief and protection Act. Its provisions when read together show a definite intention on the part of the legislature to give a widow or widower one-third of the value of all net real and personal estate of the testatrix wheresoever situated. The Act does not change any specific asset whether real or personal, but only gives a third share in the testatrix' total estate on a fixed sum of money and sets out how this sum is to be computed. . . .

And at 457:

> All the Manitoba legislation has said is that the calculation of the one-third of the value of the net real and personal property of the estate of the tesatrix is made on the basis of all her estate wheresoever situated. What more natural than that it be calculated on the entire estate wheresoever situated, otherwise if a person wished to evade the provision of the section all he would have to do would be to place all his assets in real estate in one or more jurisdictions outside Manitoba, preferably in distant countries and thus frustrate the purpose of this very salutary legislation.

The court recognized that whereas the widower in the case at hand would have no problem collecting his statutory share calculated on the total value of the estate in the above manner because there were adequate assets in Manitoba, other situations might not permit easy recovery. But difficulties of collection were considered beyond the scope of the issue.

(3) The Physical Make-up of the Statutory Share

According to s. 15(1) of the Dower Act, the widow's statutory share is defined as: ". . . such share of his [the testator's] net real and personal property as . . . shall equal in value one-third of the testator's net estate."

The question which arises is, by this definition, what is to be the physical make-up of the statutory share? If there are several pieces of realty, can the widow expect to take one-third of each piece *in specie*? Though the suggestion may sound ridiculous, can she expect to take one-third of each piece of personalty? Or is the share to

consist of a sum of money equal in value to one-third of the net estate?

In s. 2(i), "net real and personal property" is defined as:

> . . . all the real and personal property wheresoever situated (including the homestead) belonging to a testator at the time of his death and the proceeds or realizations of every part thereof, after all debts, funeral and testamentary expenses, probate fees, succession duties, and inheritance taxes or other charges of a similar nature, and costs of administration have been paid, provided for, or taken into account.

This definition seems to be talking about property *in specie* and it is one-third of that which is so defined that the widow takes upon electing against the will.

The question arose in *Re Elder Estate* (1936) 44 Man. R. 84 and Donovan J. dealt with it in the following words (at page 93).

> . . . it appears that a division to allow for the widow's one-third share may readily be made in respect of each of the several parcels of land in Manitoba.
>
> If the lands were of equal value or readily divisible into one-third shares, it seems that the widow might under the wording of sec. 13 [now s. 15], whereby it is provided that the widow "shall be entitled to receive from his executor such real and personal share as" etc., have to accept a one-third portion of each of the parcels of land. It appears, however, that the lands are not readily so divisible, and that several parcels are to be disposed of and the proceeds of sale divided among five grandchildren.

It is not clear whether Donovan J. is saying that the widow cannot take one-third of each parcel because some parcels are the object of a specific devise or because the testator directed they be sold. But neither of their "reasons" seem to satisfactorily explain why the parcels were not considered "readily devisible".

Possibly s. 21 can contribute to the answering of this question. By that section, the widow's statutory share, ". . . shall, in so far as the beneficiaries under the will are concerned, be considered and construed as if it were a debt of the testator at the time of his death. . . ." By a strict interpretation of this section, the share would be paid in the same manner as a debt, i.e., out of the residue of the estate to the extent that this was sufficient and to the extent that it was not sufficient, out of general legacies and devises which would abate *pro rata*. However the section may be interpreted as only intending to fix the priority ranking of the statutory share. In fact, in another context, the *Elder* case so interpreted it (see discussion below).

It is of interest to note that under the Illinois forced share legislation the spouse's share is made up of one-third or one-half of ". . . each parcel of real estate of which the testator died seized . . . ." and one-third or one-half "of the personal estate" [See Schnebly, *Renunciation of a Will by the Surviving Spouse*, 1951, University of Illinois Law Forum 396 at 400 and 401]. Therefore the issue under discussion only arises with respect to personalty. The question has been settled by the Illinois courts. It has been held that the widow's share ". . . must be made up out of residuary personalty before resort is had to specific or pecuniary legacies." [Schnebly, 401].

The question does not appear to have been settled in Manitoba, however. The fact that such a fundamental issue remains 54 years after the enactment of the legislation perhaps justifies a doubt as to the amount of use the provision receives. The importance of the answer cannot be underestimated because if the widow is entitled to one-third of each parcel of land, the earlier discussion of distortive disruptions of the testamentary scheme and associated problems (*supra*, p. 14) will be applicable to the Manitoba provision.

(4) Time for Valuation of Share

The value of an estate may appreciate or depreciate over time from the date of the testator's death. It may be important, therefore, to know what value is to be used in calculating the widow's statutory share.

The question was decided in *Re Cowan Estate* (1931) 40 Man. R. 221 where the Court of Appeal observed that by s. 21 of the Dower Act the wife's share is payable as if it were a debt at the time of the testator's death so that if the estate depreciates drastically from the time of death, there is no effect on the widow's share.

In *Re Elder Estate* (1936) 44 Man. R., Donovan J. considered the issue. He cites *Re Cowan* (which was a reversal of one of his own judgments) but distinguishes it on a point which, it is submitted, indicates that he misunderstood the case. He recognizes that s. 21 provides that the widow's share should be construed as if it were a debt of the testators at the time of his death but nevertheless concludes that no debt should be considered to have existed

until the widow's election. He also concludes that since the widow was an executrix and therefore should not benefit by the delay from the death of the testator, and since she made no indication of her intention to claim under the Dower Act prior to her election under it, her share should be calculated on the values existing at the time of final judgment.

On the basis of these two conclusions, i.e., that no debt truly existed until election, and the relevant values are those existing at final judgment, he concludes that in s. 21, ". . . it is priority in right of payment rather than the amount which is referable to the date of the testator's death."

It is submitted that because of the questionable logic applied in this case, it should not be considered weighty authority and that the decision in *Re Cowan* should be accepted as correct.

(5) Disruption of the Testamentary Scheme

The question of the effect of an election against the will where the testator had provided his wife a life estate has been considered by the Manitoba courts in *Re Thorvaldson Estate* (1951) 59 Man. R. 69. In that case the testator's trustee was instructed to pay to the widow out of the residue of the estate, an annuity for life and on her decease to divide the estate among the testator's children. When the widow elected to take under the Act, the question arose as to whether the effect of the election was to accelerate the distribution to the children of their shares in the estate. The court held that . . .

> [t]he election by the widow under the Dower Act operates, in effect, as a disclaimer of the benefits given to her by the will and, therefore, had the effect of accelerating the distribution to the children of their respective shares in the estate . . . . The postponement of the distribution of the corpus was to secure the monthly payments to the widow. The reason, for the postponement being at an end, the post-ponement should end also. (headnote)

A rather novel type of disruption of the testamentary scheme arising out of the operation of the forced share provision of the Manitoba Dower Act was pointed out by Mr. R. B. Cantlie, Chairman of the Manitoba Subsection of the Wills and Trust Section of the Canadian Bar Association in a letter to the editor of (1965) 35 Manitoba Bar News which was printed at page 349.

Mr. Cantlie noted that it was common for a testator to leave his entire estate to his widow provided that she survived him for more than 30 days. By electing to take under the Dower Act, a widow who died within the 30 days could, to some extent, frustrate the intention behind the 30-day survival condition. By electing to take the statutory share the widow, or more likely her personal representative, could cause one-third of the testator's estate to be diverted into the widow's estate and to the beneficiaries of her will. If these people were not also beneficiaries of the testator, a substantial disruption of his testamentary scheme would result.

Mr. Cantlie goes on to suggest a possible method of avoiding this result. He suggests that the testator should provide a $6,000 annual income for his wife which would not be subject to the 30-day survival condition. If the widow survived longer than 30 days this annuity would merge with

the gift of the rest of his property. But if she died within 30 days, she and her personal representative would be precluded by s. 16(1) from making an election against the will and the annuity would be apportioned according to the length of time she survived so that something less than $500 would pass into her estate. For marriages occurring after July 1, 1964, the annuity would have to be $9,000 because of the provision in s. 16(2)(a).

(6) Evasions

Only one case was found where the court dealt with an attempted evasion of the forced share provision of the Dower Act. This was *Shinbone* v. *Minuk* (1927) 36 Man. R. 530 where the Manitoba Court of Appeal decided that an attempted evasion of the Dower Act by a wife in whose name property purchased by her husband had been put, failed because the trust she created to accomplish it was not in writing as required by the Statute of Frauds so that the property resulted back to her where it could be attached to satisfy her husband's statutory share.

(7) Contracting Out

The final issue which has arisen for adjudication under the forced share provision of the Dower Act is whether or not it is possible for a widow to contract out of the provision.

In *Pope* v. *Stevens* (1954) 14 W.W.R. 71 (C.A.) Montague J.A. held since all mention of "contracting out" or "release" found in the Dower Act referred to the disposition of a homestead; "[t]he maxim *expressio unius est exclusio alterius* applies and any other contracting out is impliedly negatived" (page 83). A purported waiver and release of her forced

share rights by a wife in a separation agreement was therefore ineffective.

The question again arose in *Stern* v. *Sheps* (1968) 69 D.L.R. (2d) 76 (S.C.C.) affirming 61 D.L.R. (2d) 343 (Man. C.A.) which affirmed 57 W.W.R. 122. Monnin J.A. in the Manitoba Court of Appeal distinguished *Pope* v. *Stevens* by observing that since an application under the Testators Family Maintenance Act was under consideration in that case so that the only issue was the amount of the award, the comments of Montague J.A. on the contracting out issue could only be considered *obiter*. He also noted that whereas Montague J.A. was considering the effect of a purported release by a married woman, the issue before him concerned the effect of an ante-nuptual contracting out. The main argument was that such an agreement was contrary to public policy, but it was held by Monnin J.A. that:

> . . . the ante-nuptial agreement was not contrary to public policy. There is nothing in the Dower Act to indicate an intention on the part of the Legislature to interfere with the freedom of persons who contemplated marriage to contract themselves out of benefits under the Act.
> (348)

Hull J. in the Supreme Court of Canada expressly adopted these reasons of Monnin J.A.

Both *Pope* v. *Stevens* and *Sterns* v. *Sheps* were cases interpretting the Dower Act as it read before 1964. An addition to the Act in that year makes the issue discussed above, purely academic. The amendment reads:

s. 23. Nothing in this Act prohibits or restricts a wife from, either before or after the marriage, and for valuable consideration, releasing, or contracting out of, her rights under this Act other than those that may be released under section 6.

Brian Burrows.

APPENDIX A

W. F. Bowker, "Evasion of the Family Relief Act," (a memorandum paper prepared for the Alberta Institute of Law Research and Reform, 1969. Published in Cases on the Law of Wills, 1969, a casebook compiled for use in the Faculty of Law, University of Alberta, with the assistance of L. W. Kiehbauch, on the basis of a syllabus prepared by Professor W. F. Bowker.)

I shall have occasion to refer to an excellent American study, Macdonald, "Fraud on the Widow's Share" (1960), hereinafter called "Macdonald" and perhaps to Wright, cited above.

It is possible for a husband to circumvent the policy of the Act by getting rid of his assets in his lifetime. (I shall speak of the husband though our Act works both ways except on intestacy.) This can be done either by outright disposition (including irrevocable trust) or by various devices short of outright disposition whereby the husband retains control of the assets but yet has dealt with them in such a way that they are not part of his estate at death.

The Judgment of Riley J. in Re Dower, (1962) 35 D.L.R. (2d) 29 illustrates the outright gift. Collier v. Yonkers is analogous in that it illustrates the irrevocable trust. In that case, the wife set up a trust of $100,000, the income payable to herself for life and the capital to go on her death to her children. She died over four years later with an estate of about $4,000. The husband argued that the trust was part of the estate but the Appellate Division held it was not.

I might note here that Alberta's Act, like Ontario, has a provision not found in the Uniform Act or in most Acts. This provision defines "will" to include "any will, codicil or other instrument or act by which a testator so disposes of real or personal property or any interest therein that the property or interest will pass on his death to some other person". This seems to be an effort to catch various devices such as the revocable trust, the joint bank account and the declaration in favour of an ordinary beneficiary under an insurance policy. However, the cases say that although such acts or instruments may be a will, the property which they pass is not a part of the estate. Thus the extended definition of "will" is a dead letter.

Re Naylor [1940] 1 D.L.R. 716 (Ont. S.C.).
Re Young [L955] O.W.N. 789, (Ont. C.A.).
Dumoulin v. Dumoulin, unreported (17 Can. Bar Rev. 233 at 237-8).
Kerslake v. Gray [1957] S.C.R. 516.
Collier v. Yonkers (1967) 61 W.W.R. 761, (Alta. A.D.).

It is relevant to note the different devices that testators have used to circumvent the wife's claim. They can be divided into two categories. I have already mentioned the first, in which the husband divests himself of all interest in the property, such as the outright gift and the irrevocable trust. In the second category he retains "substantial control" over the property.

The number of reported Canadian, Australian and New Zealand cases on evasions is not large. I have found none from England under its 1938 Act. In the Antipodes the problem is recognized as a genuine one. In 1953, the Minister of Justice of New Zealand wrote Macdonald (p. 297) that New Zealand has not "been indifferent to the problem". The only reason why nothing has been done to amend the legislation is that we have not succeeded in devising a practical method of avoiding disposition made to defeat claims without causing as many anomalies and injustices as are cured. The question was last considered a year or so ago by our Law Revision Committee which decided that no practical remedy was possible." In 1955 New Zealand revised its Act but only to the extent of including a donatio mortis causa (sec. 2(5), Wright at 236).

The reported cases consider the following types of disposition and, in every case, the property has been held not to be part of the estate:

A policy of insurance where the beneficiary is a preferred beneficiary.

Re Dalton & Macdonald [1938] 2 D.L.R. 798 (B.C.C.A.).

A policy of insurance even where the beneficiary is an ordinary beneficiary.

Kerslake v. Gray, supra.

Nomination of nieces as beneficiary of two pension funds.

Re Young, supra.

An assignment of a policy of insurance by the insured to his secretary.

Re Naylor, supra.

A transfer of land by a testator to himself and his housekeeper in joint tenancy. Gillanders J.A. treated the husband as owning an undivided half interest in the land at his death. I doubt that this is correct.

Olin v. Perrin [1946] 2 D.L.R. 461 (Ont. C.A.).

A transfer of land and of a bank account by testator to himself and his wife jointly. She did not have to bring them into account when she applied for relief.

Re Maxwell (1962) 38 W.W.R. 23 (Sask. Q.B.).

A gift of money by the testator, evidenced by an instrument in writing. Although the instrument may have been a will within the extended definition, the property was not property passing at death.

Dumoulin v. Dumoulin, supra.

A deposit of money in the name of the testator in trust for his daughter and a like deposit for his son. Held, the bank accounts may be taxable on death but are not part of the estate for present purposes because they are property settled by the testator in his lifetime.

Re Paulin [1950] Victoria Law Reports 462.

Outright gift of farm and livestock to one of four children, made three months before death. This is the case which holds that a dependant cannot invoke the Statute of 13 Elizabeth and which Riley J. followed in Re Dower.

Re Thomson [1933] N.Z. Law Reports Supplement 59.

In the United States, almost every conceivable device has been used to cut down the widow's statutory share: bank accounts in trust, joint bank accounts, joint property, revocable trusts, designation of beneficiaries of insurance and pensions, inter vivos gifts (perhsps incomplete or colourable), promises to pay without consideration etc. Macdonald's discussion is exhaustive.

I shall now describe the efforts of the Uniformity Conference to deal with the problem of evasion.

(1) When Re Dower came before the Conference (1964 Proc. 86) it was referred to the Alberta Commissioners for report.

(2) The Alberta Commissioners reported as follows (1965 Proc. 113).

> While we are satisfied that the decision is legally correct, we do have sympathy for a dependant in the position of Mrs. Dower. The question is, can any fair and workable legislative solution be found? It would be unacceptable to provide that a person cannot dispose of all or any of his property without the consent of his "dependants". Such a provision would require legislation embodying the principles of The Bulk Sales Act. Any such legislation would cause much inconvenience if obeyed and could easily be evaded. We also doubt if there would be very many cases of this nature. It is, therefore, our opinion that no consideration be given to altering The Testators Family Maintenance Act because of this decision.

I think the Alberta Commissioners (including myself) gave up too easily. We were thinking in terms of a provision to set aside absolute gifts; in other words, to "recapture" the assets, with all the difficulties of tracing and hardship to the donee.

The Conference disposed of the Alberta Report as follows: "The subject was referred to Dean Leal (of the Ontario Commissioners) with a request that he draft an amendment to the Act for discussion at the next meeting of the Conference." (1965 Proc. 34)

(3) In 1966 Dean Leal reported as follows: (1966 Proc. 103)

> The solution to this problem would appear to lie in recapturing part or all of the testator's estate in a proper case by inserting in the Act a definition of "estate" which would extend its usual meaning to include property disposed of by the testator by way of absolute gift within a given period prior to his death; to bring into his estate property over which he had the power of disposition at his death; and specifically to bring back into the estate the assets of revocable inter vivos trusts and the proceeds of life insurance policies subject, at his death, to a revocable beneficiary designation; and property disposed of by the deceased within a given period prior to his death for partial consideration to the extent that the value of the property at the date of the disposition exceeds the consideration paid or to be paid.

All of these interests are deemed to be property passing on the death of the testator for the purpose of estate taxation and succession duties and, adopting the wording of the Estate Tax Act, the relevant provisions would read as follows:

> "2(ba) "estate" means the property owned by the deceased at the date of his death and includes, without restricting the generality of the foregoing.
>
> (i) all property of which the deceased was, immediately priot to his death, competent to dispose;

(ii) property disposed of by the deceased under a disposition operating or purporting to operate as an immediate gift inter vivos, whether by transfer delivery, declaration of trust or otherwise made within three years prior to his death;

(iii) property comprised in a settlement whenever made, whether by deed or any other instrument not taking effect as a will, whereby the deceased has reserved to himself the right, by the exercise of any power, to restore to himself or to redeem the absolute interest in the property;

(iv) property disposed of by the deceased under any disposition made within three years prior to his death for partial consideration in money or money's worth paid or agreed to be paid to him to the extent that the value of such property as of the date of such disposition exceeds the amount of the consideration so paid or agreed to be paid;

(v) any amount payable under a policy of insurance effected on the life of the deceased and owned by him, where the beneficiary of such policy was not, immediately prior to the death of the deceased, designated irrevocably under the provisions of Part V of The Insurance Act, Revised Statutes of Ontario, 1960, c. 190, as amended by 1961-62, c. 63."

The foregoing five heads correspond closely to the Estate Tax Act, Sec. 3(1) (a) (c) (e) (g) (m).

In a supplementary report, Dean Leal reported that the New South Wales Law Reform Commission was considering a similar proposal and also an alternative whereby the Court might set aside or restrain dispositions made for the purpose of defeating an existing or anticipated order under the Act (1966 Proc. 105).

The Conference asked the Ontario Commissioners to "make a further study and report with a Draft Act for consideration at the next meeting" (1966 Proc. 22).

(4) In 1967, the Ontario Commissioners reported (1967 Proc. 219). They withdrew their specific suggestions of 1966:

> "The specific provisions suggested for implementing the recommendations contained in the Report of August 2, 1966 and those of the Supplementary Report of the same date have been rejected to this draft. The former are too broad inasmuch as they make reference to classes of property which would be administratively difficult to recapture and the latter because they would apply only to dispositions made or proposed to be made to defeat the policy of the Act. The above draft is based upon the amendments to The Decedent Estate Laws (New York) by Laws of New York, 1965, c. 665 dealing with the similar problem of bolstering the suriving spouse's elective right."

Ontario's new proposal did not cover property that the testator had absolutely given away in his lifetime. It was confined to a variety of dispositions or devices whereby the testator retained some control over the property until his death. The proposed Amendment covers:

(a) gifts mortis causa;

(b) money deposited, together with interest thereon, in an account in the name of the testator in trust for another or others with any chartered

bank, savings office or trust company, and remaining on deposit at the date of the death of the testator;

(c) money deposited, together with interest thereon, in an account in the name of the testator and another person or persons and payable on death pursuant to the terms of the deposit or by operation of law to the survivor or survivors of such persons with any chartered bank, savings office or trust company, and remaining on deposit at the date of the death of the testator;

(d) any disposition of property made by a testator whereby property is held at the date of his death by the testator and another as joint tenants with rights of survivorship or as tenants by the entireties;

(e) any disposition of property made by the testator in trust or otherwise, to the extent that the testator at the date of his death retained, either alone or in conjunction with another person or persons by the express provisions of the disposing instrument, a power to revoke such disposition, or a power to consume, invoke or dispose of the principal thereof. The provisions of this subsection shall not affect the right of any income beneficiary to the income accrued and undistributed at the date of the death of the testator;

(f) any amount payable under a policy of insurance effected on the life of the deceased and owned by him, where the beneficiary of such policy was not, immediately prior to the death of the deceased, designated irrevocably under the provisions of Part V. of The Insurance Act, Revised Statutes of Ontario, 1960, c. 190, as re-enacted by Statutes of Ontario, 1961-62, c. 63.

The New York law of 1965 from which this is taken does not include clause (f). The New York law is attached to this memo as Appendix A.

In discussing the Ontario Report, the Conference thought all insurance should be included under clause (f) even where the beneficiary is irrevocably designated. (1967 Proc. 26). The Conference then resolved "that the matter be referred to the P.E.I. Commissioners for incorporation in the Draft Revision or Draft Amendments which they are to prepare for the next meeting of the Conference". (1967 Proc. 26) (P.E.I. had undertaken another problem in connection with the Uniform Act, namely to consider its extension to intestacy (1967 Proc. 24).

(5) In 1968 the P.E.I. Commissioners presented their report. It brings forward the amendment proposed by Ontario in 1967, including the exception respecting irrevocably designated beneficiaries. I recall no discussion of the Draft and the Proceedings for 1968 are not yet published. However, the Secretary of the Conference on 24th January confirmed my memory that the subject had been referred to the Saskatchewan Commissioners for further study and report. There the matter stands.

May I now set out my ideas as to the form an Amendment should take. I agree with the general lines of the proposal now before the Uniformity Conference. However, I do not think we should abandon the effort to deal with outright gifts. The solution does not lie in setting them aside but rather in making the donee partly responsible for the maintenance of the dependant, assuming the dependant is entitled to maintenance and it cannot be provided out of the estate strictu sensu.

The most helpful proposal I have seen is that of Macdonald. His Model Act (Chapter 22) is too long to set out here. The provisions designed to prevent evasion provide that if the estate is insufficient to provide for appropriate maintenance, then the Court may order a transferee of property to contribute to that maintenance. He is obliged to do so only if the transfer to him was unreasonably large. The Draft Act then sets out criteria of an unreasonably large transfer.

This Model Act does not contain any long list of specific transactions but rather defines transfer in a way that includes "gift, gift causa mortis, revocable or irrevocable trust, creation of any joint interest, contract to make a will, and any contract, such as life insurance under which the decedent purchased benefits payable at his death."

In connection with outright gifts, there is a cutoff of gifts made more than three years before death and in the case of gifts in which the deceased did retain a substantial beneficial interest, the cutoff date is ten years before death.

If we do not adopt some such proposal as Macdonald's but confine ourselves to the Draft now before the Uniformity Conference, the transactions in Re Dower and Collier v. Yonkers are not affected at all. Indeed if we do adopt his proposal the transactions in both of these cases may still be outside Macdonald's proposal because the transactions, at least in part, were before the cutoff date.

It is legitimate to ask - why did New York, after years of study, confine its provisions to dispositions over which the testator kept control until death, excluding outright gifts and irrevocable trusts? The answer, I think, lies in the fact that under New York law the widow has an election between her statutory share and the will. In a scheme of this kind the legislature cannot reach property which the testator has put out of his control unless it sets aside the gift or trust. This is a rather drastic step as everyone recognizes. Macdonald's Model Act, on the other hand, is like the Commonwealth Statutes, which do not give the widow an election between the will and her statutory share (save for Manitoba). They provide for maintenance for the widow and are flexible. The principle of Macdonald's proposal is this: if there is not enough money in the estate to provide maintenance, the Court may reach dispositions made before death, including absolute dispositions, to the extent of saying that the donee must contribute to the widow's maintenance. Thus in Re Dower, the gifts would not be set aside but the donees might be ordered to secure to the widow monthly payments fixed by the Court. This is not a "recapture" of assets and assures maintenance to the wife without undue disruption of the donee's affairs.

A P P E N D I X "A"

Laws of New York 1965, Chapter 665

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The decedent estate law is hereby amended by inserting therein two new sections, to be sections eighteen-a and eighteen-b to read, respectively, as follows:

S18-a. Testamentary provisions

1. Where a person dies, after August thirty-first, nineteen hundred sixty-six and leaves a surviving spouse who exercises a right of election pursuant to section eighteen-b of this chapter, the following transactions effected by such decedent at any time after the date of the marriage and after August thirty-first, nineteen hundred sixty-six, whether benefiting the surviving spouse or any other person, shall be treated as testamentary provisions and the capital value thereof, as of the date of death of the decedent, shall be included in the net estate for the surviving spouse's elective right:

(a) Gifts causa mortis.

(b) Money deposited after August thirty-first, nineteen hundred sixty-six, together with all dividends credited thereon, in a savings account in the name of the decedent in trust for another or others with a banking organization, savings and loan association, foreign banking corporation or bank or savings and loan association organized under the laws of the United States, and remaining on deposit at the date of death of the decedent.

(c) Money deposited after August thirty-first, nineteen hundred sixty-six, together with all dividends credited thereon, in the name of the decedent and another person or persons and payable on death pursuant to the terms of the deposit or by operation of law to the survivors or survivor of such persons, with a banking organization, savings and loan association, foreign banking corporation or bank or savings and loan association organized under the laws of the United States, and remaining on deposit at the date of death of the decedent.

(d) Any disposition of property made by the decedent after August thirty-first, nineteen hundred sixty-six whereby property is held at the date of his death by the decedent and another or others as joint tenants with right of survivorship or as tenants by the entirety.

(e) Any disposition of property made by the decedent after August thirty-first, nineteen hundred sixty-six, in trust or otherwise, to the extent that the decedent at the date of his death retained either alone or in conjunction with another person or persons by the express provisions of the disposing instrument, a power to revoke such disposition, or a power to consume, invade or dispose of the principal thereof. The provisions of this section shall not affect the right of any income beneficiary to the income undistributed or accrued at the date of death.

2. Nothing in this paragraph shall affect, defeat or impair the right of any person entitled to receive (a) payment in money, securities or other property under a pension, retirement, death benefit, stock bonus or profit sharing plan, system or trust or (b) money payable by an insurance company or a savings bank authorized to conduct the business of life insurance under an annuity or pure endowment contract or a policy of life, group life, industrial life or accident and health insurance, or a contract by such insurer relating to the payment of proceeds or avails thereof or (c) payment of any United States savings bond payable to a designated person.

3. Transactions described in paragraphs (c) or (d) of subdivision one of this section shall be treated as testamentary provisions under this section to the extent that the funds on deposit were the property of the decedent immediately before the deposit or the consideration for the property held as joint tenants or as tenants by the entirety was furnished by the decedent. The surviving spouse shall have the burden of establishing that the funds or property, or any portion thereof, belonged to the decedent. Where the other party to a transaction described in paragraphs (c) or (d) is a surviving spouse, such spouse shall have the burden of establishing the amount of his contribution, if any, and for the purpose of this subdivision, the surrogate's court may accept such evidence as is relevant and competent, whether or not the person offering such evidence would otherwise be competent to testify in the absence of this section.

4. The provisions of this section shall not prohibit any corporation or person from paying or transferring any funds or property, or any portion thereof, to any person otherwise entitled thereto unless there has been served personally upon such corporation or person a certified copy of a temporary order enjoining such payment or transfer made pursuant to this subdivision by the surrogate's court having jurisdiction of the estate of the decedent or another court of competent jurisdiction. Personal service upon the corporation or person holding any such fund or property of a certified copy of such temporary order shall be a defense to any action or proceeding brought against such corporation or person with respect to the fund or property during the period such order is in force and effect. Upon application of the surviving spouse or other interested party and upon proof that the surviving spouse has, pursuant to subdivision six of section eighteen-b of this chapter, exercised his right of election, the court having jurisdiction of the estate of the decedent or other court of competent jurisdiction may make such temporary order. Unless the court in its discretion shall dispense therewith, notice of such application shall be given to such persons and in such manner as the court in its discretion may determine.

APPENDIX B

Dower Act, R.S.M. D-100, sections 2(h), (i), 15, 16, 17, 18, 19, 20, 21, 28, 29, 33(2)

Section 2(h) and (i)

(h) "net estate" means all the net real and personal property of a testator, together with all moneys paid or payable after the testator's death under or by virtue of insurance policies on the life of the testator to or for the benefit of the wife or any child of the testator, and together with any property owned at the time of the testator's death by the wife for her own use or then held in trust for her, and which is property (or the proceeds or investments of property) that the testator had during his life after marriage conveyed to the wife or for her benefit as a gift or by way of advancement;

(i) "net real and personal property" means all the real and personal property wheresoever situated (including the homestead) belonging to a testator at the time of his death and the proceeds or realizations of every part thereof, after all debts, funeral and testamentary expenses, probate fees, succession duties, and inheritance taxes or other charges of a similar nature, and costs of administration, have been paid, provided for, or taken into account;

Section 15

WIDOW'S SHARE OF ESTATE

Widow to receive one-third of estate of testator on his death in addition to life estate in homestead.

15(1) Notwithstanding anything contained in The Wills Act, the widow of every testator who by his will has not left her property or otherwise provided for her to the value of at least one-third of the value of his net real and personal property, is entitled to receive from his executor such share of his net real and personal property as, together with all moneys paid or payable under or by virtue of any insurance policies on the life of the testator to her or for her benefit and for her own use, and together with any property owned at the time of the testator's death by her for her own use or then held in trust for her, and which is property (or the proceeds or investments of property) which the testator had during his life after marriage conveyed to her or for her benefit as a gift or by way of advancement, shall equal in value one-third of the testator's net estate, and in addition, is entitled to the life estate in her husband's homestead under the provisions of this Act hereinbefore set out.

Computation of capital value of annuity payments, etc.

15(2) Where periodic payments become payable to a widow of a testator on the death of her husband, by way of annuity, superannuation allowance, pension, or other death benefits, that are payable to her or for her benefit under insurance policies on the life of the testator, for the purpose of computing the value of the net estate of the testator the capital value of those periodic payments at the date of the death of the testator shall be computed on the basis

(a) of the life expectancy of the widow according to the mortality tables in use at the date of the death of the testator for the purchase of individual life annuities under the Government Annuities Act (Canada) as fixed under that Act; and

(b) of the interest rate in use at the date in respect of the purchase of the annuities to which reference is made in clause (a), as fixed under the Government Annuities Act (Canada).

Section 16

Exception where: Testator has provided life income of $6,000.

16(1) Subject to subsection (2), section 15 does not apply to any of the following cases:

(a) Where the testator has provided an annual income for his wife during her life of not less than six thousand dollars, whether the provision be by settlement (before or after marriage) or trust deed, or by the will of the testator, or by insurance policies on the life of the testator, or partly by one of such methods and partly by another.

(b) Where the testator has by his will left to his wife, or for her benefit and for her own use, property of the value of not less than one hundred thousand dollars over and above any encumbrances.

(c) Where the testator, during his lifetime, has conveyed after marriage to his wife or for her benefit, and for her own use as a gift or by way of advancement, property of which (or of the proceeds or investments of which) she is at the time of his death the legal or equitable owner, and which property or proceeds or investments is or are then of the value of not less than one hundred thousand dollars over and above any encumbrances thereon.

(d) Where the testator has by his will left to his wife, or for her benefit and for her own use, certain property and had also during his lifetime conveyed after marriage to her, or for her benefit and for her own use, as a gift or by way of advancement, property of which (or of the proceeds or investments of which) she is at the time of his death the legal or equitable owner, and the aggregate value of the property left by the will and such other property, proceeds, and investments is not less than one hundred thousand dollars over and above any encumbrances thereon.

(e) Where the wife receives, or is to receive, for her own benefit under or by virtue of insurance policies on the life of her husband an amount of not less than one hundred thousand dollars, whether payable in instalments or otherwise.

(f) Where, at the time of the death of the testator, any two or more of the following; viz.,

(i) moneys which the wife of the testator receives, or is to receive, for her own benefit, under or by virtue of any insurance policy or policies on the life of the testator, whether payable in instalments or otherwise;

(ii) property left by the will of the testator to his wife or for her benefit and for her own use;

(iii) property (or the investments or proceeds thereof) which during the lifetime of the testator, after marriage, he conveyed to his wife, or for her benefit and for her own use, as a gift or by way of advancement, and of which she is at the time of his death the legal or equitable owner;

aggregate in value not less than one hundred thousand dollars over and above any encumbrances.

(g) Where, at the time of the death of the testator, any one or more of the following; viz.,

(i) moneys which the wife of the testator receives, or is to receive, for her own benefit, under or by virtue of any insurance policy or policies on the life of the testator, whether payable in instalments or otherwise;

(ii) property left by the will of the testator to his wife, or for her benefit and for her own use;

(iii) property (or the investments or proceeds thereof) which during the lifetime of the testator, after marriage, he conveyed to his wife, or for her benefit or for her own use, as a gift or by way of advancement, and of which she is at the time of his death the legal or equitable owner;

is or are in the aggregate of the value of not less than fifty thousand dollars over and above any encumbrances, and in addition, the testator has provided an annual income for his widow during her life of not less than three thousand dollars, whether the income be provided by settlement (before or after marriage) or trust deed, or by the will of the testator, or by insurance policies on the life of the testator, or partly by one of such methods and partly by another.

Application of subsec. (1) to marriages after 30th June, 1964.

16(2) In the case of a wife whose marriage to a testator is solemnized on or after the first day of July, 1964,

(a) in the application of clause (a) of subsection (1), the words "six thousand" where they appear therein shall be construed as if they were "nine thousand";
(b) in the application of clauses (b) to (f) of subsection (1), the words "one hundred th ousand", wherever they appear therein shall be construed as if they were "one hundred and fifty thousand"; and
(c) in the application of clause (g) of subsection (1),
    (i) the words "fifty thousand" where they appear therein shall be construed as if they were "seventy five thousand"; and
    (ii) the words "three thousand" where they appear therein shall be construed as if they were "four thousand five hundred".

Section 17

ELECTION BY WIDOW

Widow's election where husband left will.

17(1) Subject to subsection (8) and to section 29, in a case to which section 15 applies, the widow shall elect

(a) before the expiry of three months after notice has been served upon her by the executor of the will requiring her to elect; or
(b) where she herself is an executrix, before the expiry of three months after probate of the will has been granted; or
(c) where clause (a) or (b) does not apply, before the expiry of five years after probate of the will has been granted;

whether she desires to take under this Act or the will; and, if within such time no election is made by her, or if within such time she elects to take under the will, she shall be deemed to be a consenting party to the provisions of the will; and the will shall be in all respects in full force and effect and the provisions thereof be carried out in the same manner, and to the like effect, as if this Act had not been passed; and the widow has no rights except as given her under the will.

Am.

Form of election.

17(2) An election as aforesaid to be made by a widow shall be in writing signed by the widow or her executor or administrator and may be in the form following, or words to that effect, namely:

(a) (if election is to take under the will) In the matter of the estate of
I hereby elect to take under my husband's will. A.B.
(b) (if election is to take under this Act) In the matter of the estate of
I hereby elect to take under The Dower Act, and not under my husband's will.
A.B.

Election shall be filed.

17(3) Subject to section 29, such an election shall be filed within the time foresaid and not thereafter in the Surrogate Court; and the registrar of the Surrogate Court shall give to any person applying therefor a certificate under his hand and the seal of the court showing what election, if any, has been made pursuant to this Act.

Where notice to elect not given to widow.

17(4) Where notice to which reference is made in subsection (1) has not been given by the executor within one year from the granting of probate, except where the widow herself is an executrix, any person interested in the estate may, on notice to the widow and to the executor, apply to the judge of the Surrogate Court for an order directing the widow to elect within such time as the judge may direct.

Effect of failure to comply.

17(5) Failure to comply with the terms of the order shall in all respects have the same effect as non-compliance with a notice served upon the widow by the executor as provided in subsection (1).

Procedure where widow fails to elect.

17(6) Where a widow has failed to elect in writing within the time hereinbefore stated, the executor or any person interested in the estate of the testator may apply to the judge of the Surrogate Court for an order declaring that the widow has failed to elect as required under this Act.

Procedure in case of dispute as to election by widow.

17(7) Where a dispute or doubt arises as to whether a widow has duly elected or failed to elect to take under the will or under this Act, it shall be determined by order of a judge of the Surrogate Court on application made to him by any person interested.

Effect of section.

17(8) Nothing in this section deprives a widow of the benefit of section 14.

Section 18

Death of widow before election.

18 Where the widow dies before she has elected in writing under section 17, the remaining time in which an election could have been made by her had she continued to live does not run against her personal representative until probate of her will or letters of administration of her estate have been granted; and the executor or administrator of the widow has the same power of election as the widow would have had had she continued to live; but, if the widow was herself the executrix of her husband's estate, her executor or administrator must, in any event, elect within six months after her death, or within such further time as the judge of the Surrogate Court may order under section 29.

Section 19

If widow elects to take under this Act, bequests to her in the will become void.

19 If a widow, in pursuance of the provisions hereinbefore contained, elects to take under this Act and not under her husband's will, except as hereinafter otherwise expressly provided, every bequest, gift, or devise made or given to her or for her benefit in the will is void and of no effect, and the will shall in all respects be treated and construed as if every such bequest, gift, or devise were not contained therein.

Section 20

Declaration in will as to life insurance to wife not affected by widow's election to take under this Act.

20 Notwithstanding anything in this Act, where by his will a testator has made a declaration or appropriation, under The Insurance Act, of a policy of insurance on his life for the benefit of his wife, the declaration or appropriation is not affected or prejudiced if the widow elects to take under this Act and not under the will; but she is entitled, notwithstanding the election, to receive the insurance moneys pursuant to the declaration or appropriation.

Section 21

Share of widow in husband's estate to rank in priority next after debts.

21 Where a widow becomes entitled to receive under section 15 from her husband's executor the share of his net real and personal property for which provision is made in that section, that share shall, in so far as the beneficiaries under the will are concerned, be considered and construed as if it were a debt of the testator at the time of his death, and is payable next after all the debts of the deceased, and has priority over all bequests, gifts, and devises contained in the will.

Section 28

Judge to determine certain questions.

28 All questions in dispute or of doubt as to value mentioned in sections 14, 15, or 16, or as to the value or amount of the net estate, or of the net real and personal property, of a testator, or as to a matter requiring determination under sections 15 and 16, or as to the lands and premises comprising a homestead, or comprising a dwelling house and the lands and premises appurtenant thereto that a widow is entitled to elect as the homestead of her deceased husband under subsection (4) of section 4, or as to any matter or question requiring determination under this Act for which provision is not otherwise made, shall be determined by order of the judge of a Surrogate Court upon application made to him by any person interested.

Section 29

Extension of time for election.

29 If in the circumstances of the case he deems it just to do so, a judge of a Surrogate Court, on application made by the widow or by any person interested, and made before the expiry of the period within which

(a) the widow is required to make an election under subsection (4) of section 4, or subsection (1) of section 17; or

(b) the executor of the will of the widow or the administrator of her estate is required to make an election under section 18;

or before the expiry of any extension of such a period under this section, may extend the period for such further period and upon such terms and conditions as he deems reasonable.

Section 33(2)

Rights of husband in wife's estate.

33(2) Every married man, on the death of his wife, is entitled to the same interest in the estate of his wife as that to which, by this Act, a married woman becomes entitled in the estate of her husband on his death; and in this Act the word "testator" includes a married woman, the words "married woman" are interchangeable with "married man", the word "husband" with "wife" , the word "widow" with " widower", and the word "her" with "his".