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## THE RIGHT OF ELECTION

JOSEPH A. COX †

FROM the early days of recorded history, there has existed a policy of the law to provide for the surviving wife by setting aside a specified portion of her deceased husband's estate for use during her widowhood. Evidences of such policy are found in the Babylonian,<sup>1</sup> Hebraic,<sup>2</sup> Roman<sup>3</sup> and Saxon<sup>4</sup> laws. And in England, "at least as early as the reign of Henry II [1154-1189], a man's goods were divided upon his death into three equal parts, of which one went to his children, another to his widow, and the third in accordance with his testament."<sup>5</sup> In England, where land was the primary form of wealth, this policy manifested itself in common-law dower.

Under the right of dower the law granted to the widow the life use or income of a third of the lands of which her husband had been seized of an estate of inheritance at any time during the marriage.<sup>6</sup> While early deemed a favorite of the law<sup>7</sup> and as late as 1926 referred to as "perhaps the most highly and widely cherished property right resulting

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<sup>1</sup> DRIVER & MILES, *THE BABYLONIAN LAWS* 334-35 (1952); Urch, *The Law Code of Hammurabi*, 15 A.B.A.J. 437, 440 (1929).

<sup>2</sup> HOROWITZ, *THE SPIRIT OF JEWISH LAW* §214 (1953).

<sup>3</sup> SOHM, *THE INSTITUTES* §111, at 538 (3d ed., Ledlie 1907).

<sup>4</sup> Wait v. Wait, 4 Barb. 192, 202 (N.Y. Sup. Ct. 1848); 1 SCRIBNER, *DOWER* 6 (2d ed. 1883).

<sup>5</sup> Cahn, *Restraints on Disinheritance*, 85 U. PA. L. REV. 139 (1936). See 3 HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 550-56 (4th ed. 1935); 2 POLLOCK & MAITLAND, *THE HISTORY OF ENGLISH LAW* 348, 362 (2d ed. 1911).

<sup>6</sup> N.Y. REAL PROP. LAW §190; Wait v. Wait, *supra* note 4, at 201-02; 1 POWELL, *REAL PROPERTY* §119, at 441 (1949); 2 WARREN, *WARREN'S WEED ON THE NEW YORK LAW OF REAL PROPERTY* 69-70 (4th ed. 1951). On the origin and development of dower, see 3 HOLDSWORTH, *op. cit. supra* note 5, at 189-97; 2 POLLOCK & MAITLAND, *op. cit. supra* note 5, at 420-28; 1 SCRIBNER, *DOWER* cc. I, II (2d ed. 1883); WALSH, *OUTLINES OF THE HISTORY OF ENGLISH AND AMERICAN LAW* §30 (1923).

<sup>7</sup> BACON, *THE READING UPON THE STATUTE OF USES* 38 (Rowe ed. 1804). See Fern v. Osterhout, 11 App. Div. 319, 323, 42 N.Y. Supp. 450, 452 (3d Dep't 1896); 2 THOMPSON, *REAL PROPERTY* §869, at 584-85 (perm. ed. 1939).

from marriage,"<sup>8</sup> by the twentieth century, dower in New York as a practical matter afforded almost no protection to the widow—it was "in most cases, an illusion and deception."<sup>9</sup> The right of dower did not exist in personal property which, since the turn of the century, was likely to constitute all or a large part of a man's wealth.<sup>10</sup> Dower could be defeated by taking title to real estate in the name of another or of a corporation, the shares of which are personal property.<sup>11</sup> The unimportance and insignificance of dower are further shown by the fact that only nine actions to admeasure dower were commenced in New York County from 1923 to 1927, and in 1925 and 1927 not a single action was brought. In Kings County the average number of actions per year for the same period was only five.<sup>12</sup> But while inconsequential and inadequate, dower and the somewhat related protected expectation of the husband with regard to the wife's realty, known as curtesy,<sup>13</sup> constituted "serious

<sup>8</sup> *Byrnes v. Owen*, 243 N.Y. 211, 216, 153 N.E. 51, 52 (1926).

<sup>9</sup> 1928 LEG. DOC. NO. 70, COMBINED REPORTS, N.Y. COMMISSION TO INVESTIGATE DEFECTS IN THE LAWS OF ESTATES 15 (reprinted 1935) (hereinafter cited as COMBINED REPORTS).

<sup>10</sup> *Id.* at 14. It is further pointed out that examination of the records of the New York County Surrogate's Court showed that ninety-six per cent of intestates left no real property. *Ibid.* See also Powell & Looker, *Decedents' Estates*, 30 COLUM. L. REV. 919, 936-45 (1930).

<sup>11</sup> *Phelps v. Phelps*, 143 N.Y. 197, 38 N.E. 280 (1894); *Matter of Fox*, 250 App. Div. 31, 293 N.Y. Supp. 468 (2d Dep't 1937), *aff'd mem.*, 275 N.Y. 604, 11 N.E.2d 777 (1937); *Poillon v. Poillon*, 90 App. Div. 71, 85 N.Y. Supp. 689 (1st Dep't 1904). See Note, 25 COLUM. L. REV. 938 (1925).

<sup>12</sup> 1928 LEG. DOC. NO. 70, COMBINED REPORTS 16-17.

<sup>13</sup> At common law the husband had a right to the profits of his wife's land, but this right ceased upon her death unless a child of the marriage capable of inheriting from the wife had been born alive. In that event the husband became entitled to a life estate in the realty of which his wife died seized. *Matter of Starbuck*, 63 Misc. 156, 116 N.Y. Supp. 1030 (Surr. Ct. 1909), *aff'd*, 137 App. Div. 866, 122 N.Y. Supp. 584 (2d Dep't 1910), *aff'd mem.*, 201 N.Y. 531, 94 N.E. 1098 (1911). See Barry, *Modernizing the Law of Decedents' Estates*, 16 VA. L. REV. 107, 122 (1929). Unlike dower, curtesy could be defeated by the wife's conveyance or devise to others. *Matter of Starbuck*, 137 App. Div. 866, 870, 122 N.Y. Supp. 584, 587 (2d Dep't 1910).

On the origin and development of curtesy, see 3 HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 185-89 (4th ed. 1935); 2 POLLOCK & MAITLAND, *THE HISTORY OF ENGLISH LAW* 414-20 (2d ed. 1911); WALSH, *OUTLINES OF THE HISTORY OF ENGLISH AND AMERICAN LAW* § 31 (1923).

In this country dower and curtesy never existed in three states, and by 1925 dower had been abolished in twenty-four states and England, and curtesy in thirty-six states and England. See 1928 LEG. DOC. NO. 70, COMBINED REPORTS 67-80; 1 SCRIBNER, *DOWER* c. II (2d ed. 1883); 3 VERNIER, *AMERICAN FAMILY LAWS* 345-70 (1935).

clogs on the alienation of real estate. The old bugaboo of the common law marriage ruined many a conveyance."<sup>14</sup>

Even at the beginning of the second quarter of this century, New York afforded complete freedom of testamentary disposition except for the impediment of the ineffectual right of dower,<sup>15</sup> the limitation on charitable bequests contained in Section 17 of the Decedent Estate Law<sup>16</sup> and the minor family exemptions.<sup>17</sup> There was then a marked distinction between the devolution of real estate and the distribution of personal property as assets of an estate. Two separate systems of descent and distribution were in operation.<sup>18</sup> In the case of intestate succession, when the decedent was survived by issue, his widow received one-third of his personalty together with a right of dower in the realty; when the decedent was survived by no issue but by parents or brothers, sisters, nephews or nieces, the widow's share of the personal property was increased to one-half with the same right of dower existing.<sup>19</sup>

Although generally in the forefront of social legislation, New York tolerated the ". . . glaring inconsistency in our law which compels a man to support his wife during his lifetime and permits him to leave her practically penniless at his death. . . ." <sup>20</sup>

<sup>14</sup> Cummins, *Recent Reforms in the Inheritance Laws of New York*, 16 A.B.A.J. 785, 786 (1930).

<sup>15</sup> See 1928 LEG. DOC. No. 70, COMBINED REPORTS 16.

<sup>16</sup> *Id.* at 18, where it is pointed out that "a man leaving a wife or children or parent may give one-half of his estate to charity, and the other half to a stranger, entirely ignoring those dependent upon him."

<sup>17</sup> N.Y. Surr. Ct. Act § 200. See 2 BUTLER, *NEW YORK SURROGATE LAW AND PRACTICE* c. 27 (1941); 4 JESSUP-REDFIELD, *LAW AND PRACTICE IN THE SURROGATES' COURTS IN THE STATE OF NEW YORK* c. 59 (rev. ed. 1949). There also exists the seldom asserted widow's right of quarantine. N.Y. REAL PROP. LAW § 204; see 2 BUTLER, *op. cit. supra* § 1582; 4 JESSUP-REDFIELD, *op. cit. supra* §§ 3042-43.

<sup>18</sup> See 1928 LEG. DOC. No. 70, COMBINED REPORTS 13-15.

<sup>19</sup> Formerly N.Y. DECED. EST. LAW § 98; N.Y. REAL PROP. LAW § 190. See EAGER, *INTESTATE SUCCESSION IN THE STATE OF NEW YORK* 53, n.1 (1926), where it is stated that until 1919 (Laws of N.Y. 1919, c. 295), even in the case of personalty there was a difference in the rights of a surviving husband or widow. Until such 1919 amendment to New York Decedent Estate Law § 100, a surviving husband was entitled to the entire unbequeathed personal estate of his deceased wife, where the wife left no descendants, and he took to the exclusion of parents, brothers, sisters, nephews, or nieces of the wife. His right to the entire estate was derived from the common law and was unaffected by statute until the 1919 amendment.

<sup>20</sup> 1928 LEG. DOC. No. 70, COMBINED REPORTS 18.

Amidst this setting of injustice, anachrony, and anomaly, the clarion call for legal reform was sounded in 1926 by Surrogate James A. Foley.<sup>21</sup> At the following legislative session in 1927 an act was passed establishing a commission to investigate defects in the law of estates.<sup>22</sup> This commission was composed of four surrogates and three members of the bar, all appointed by the governor, and eight members of the legislature.<sup>23</sup> It worked thoroughly and tirelessly. It held hearings throughout the state.<sup>24</sup> It submitted proposed legislation, which was introduced in February, 1928,<sup>25</sup> but was not pressed for passage.<sup>26</sup> Its primary purpose was to arouse interest and to evoke discussion and consideration among lawyers and others.<sup>27</sup>

The proposed statute provided for a new Section 18 of the Decedent Estate Law entitled, "Election against or in absence of testamentary provision."<sup>28</sup> In substance the section provided that a surviving spouse<sup>29</sup> should have a personal right of election to take his or her share of the estate

<sup>21</sup> "Suggestions for Improvements in the Law of Estates," an address delivered on April 22, 1926, before The Association of the Bar of the City of New York; reprinted in 7 LECTURES ON LEGAL TOPICS, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK 277-92 (1926).

<sup>22</sup> Laws of N.Y. 1927, c. 519.

<sup>23</sup> 1928 LEG. DOC. NO. 70, COMBINED REPORTS 11. The commission selected Surrogate Foley as chairman. *Ibid.*

<sup>24</sup> See Cummins, *Recent Reforms in the Inheritance Laws of New York*, 16 A.B.A.J. 785 (1930); O'Shea, *Surviving Spouses in New York*, 8 ST. JOHN'S L. REV. 245 (1934); Twyeffort, *The New Decedent Estate Law of New York*, 6 N.Y.U.L.Q. REV. 377, 396 (1926).

<sup>25</sup> A. Int. No. 1030. The commission report and the proposed legislation were anticipated in an address by Surrogate Foley on January 20, 1928, before the New York State Bar Association. 1928 LEG. DOC. NO. 70, COMBINED REPORTS 145.

In addition to the proposed right of the surviving spouse to take against the will of the decedent, discussed in the text, the bill proposed, *inter alia*, a uniform rule of succession to real and personal property, the abolition of dower and curtesy, the concentration of the vesting of estates in nearer and more dependent relatives, removal of restraints in the conveyance of real estate and the conferring upon administrators, executors and trustees of a statutory power to sell, mortgage or lease lands. See ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, COMMITTEE ON AMENDMENT OF THE LAW, BULL. NO. 5, memo. no. 94; Note, 28 COLUM. L. REV. 1088 (1928).

<sup>26</sup> The bill was, however, passed by the Assembly on March 22, 1928. N.Y. LEGISLATIVE RECORD AND INDEX 165 (1928).

<sup>27</sup> See Slater, *Reforms in the New York Law of Property*, 52 NEW YORK STATE BAR ASSOCIATION REPORTS 187, 190-91 (1929).

<sup>28</sup> [1928] A. Int. No. 1030.

<sup>29</sup> The rights of the husband and the wife were made uniform and reciprocal, and the right of election made mutual. 1928 LEG. DOC. NO. 70, COMBINED REPORTS 20. Thus there is no distinction as regards the right of election be-

as in intestacy,<sup>30</sup> subject only to the following limiting conditions: (a) such election should be in lieu of all testamentary provision, if any, and of any right of dower or curtesy; <sup>31</sup> (b) where the intestate share was over \$25,000 and the surviving spouse by the will was given a life interest in an amount equal to or greater than that share, the right of election would be limited to \$25,000 absolutely, to be deducted from the principal of the trust fund, and the terms of the will would otherwise remain effective; <sup>32</sup> (c) where such share was less than \$25,000, the right to elect to take it absolutely would exist regardless of any such provision; <sup>33</sup> (d) where a legacy or devise of \$25,000 to the surviving spouse was coupled with a trust of the difference between \$25,000 and the intestate share in which the surviving spouse was given a life interest, there would be no right of election; <sup>34</sup> (e) where a legacy or devise less than \$25,000 was made to the surviving spouse, coupled with a trust of the difference between that legacy or devise and the intestate share, the right of election would be limited to take not more than \$25,000 outright, the difference between the legacy or devise and \$25,000 to be deducted from the principal of the trust fund.<sup>35</sup> Excluded from the benefits of the right of election was a surviving spouse against whom or in whose favor, a final decree of divorce recognized in New York had been rendered, or against whom a final judgment of separation recognized in New York had been rendered, or who had procured an out-of-state final judgment dissolving the marriage which was not recognized in New York, or was guilty of abandonment, or who, being the husband, had neglected

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tween a wealthy widower and a penniless widow. See Cahn, *Restraints on Disinheritance*, 85 U. PA. L. REV. 139, 145-46 (1936).

<sup>30</sup> The 1928 bill, A. Int. No. 1030, provided for a new § 83 of the Decedent Estate Law which set forth, *inter alia*, the intestate share of a surviving spouse. That share was one-third of the entire estate where there was more than one child (or his issue) surviving; one-half where only one child or his issue survived; \$5,000 and one-half the balance, if no descendants but one or both parents survived; \$10,000 and one-half the balance where the parents were dead and only brothers, sisters, nephews and nieces survived. Where the collaterals were more remote, the surviving spouse took the entire estate.

<sup>31</sup> [1928] A. Int. No. 1030; N.Y. DECED. EST. LAW § 18(1)(a).

<sup>32</sup> N.Y. DECED. EST. LAW § 18(1)(b).

<sup>33</sup> *Id.* § 18(1)(c).

<sup>34</sup> *Id.* § 18(1)(d).

<sup>35</sup> *Id.* § 18(1)(e). See 1928 LEG. DOC. NO. 70, COMBINED REPORTS 19-20.

or refused to provide for his wife.<sup>36</sup>

The proposed legislation was generally received in a spirit of constructive criticism.<sup>37</sup> Objection was voiced to the proposal of giving the surviving spouse the privilege of withdrawing out of the trust fund so large an amount as \$25,000 where the intestate share was over that sum.<sup>38</sup> It was pointed out that no provision was made concerning minor dependent children,<sup>39</sup> or settlements previously made in favor of a wife,<sup>40</sup> and that it was desirable to provide whether the elected share was to be deducted from general or specific legacies or from the residue, and what effect partial intestacy should have.<sup>41</sup> Finally, the proposed legislation was criticized for its failure to mention inter vivos transactions or their effect upon the right of election.<sup>42</sup>

The revised bill submitted to the 1929 legislature embodied several changes from the original draft.<sup>43</sup> The amount which the surviving spouse was, in certain cases, entitled to withdraw out of a trust fund was reduced from \$25,000<sup>44</sup>

<sup>36</sup> N.Y. DECED. EST. LAW §§ 18(3)-(5).

<sup>37</sup> See, e.g., ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, COMMITTEE ON AMENDMENT OF THE LAW, BULL. No. 5, memo. no. 94 (1928). "Recognizing that this bill in some respects should be modified and assuming that it will be modified to become effective September 1, 1929, the bill is approved." *Id.* at 174.

<sup>38</sup> See Note, 28 COLUM. L. REV. 1088, 1094-97 (1928).

<sup>39</sup> *Id.* at 1094.

<sup>40</sup> ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *op. cit. supra* note 37, at 170.

<sup>41</sup> *Id.* at 170-71. That the Decedent Estate Commission did consider the problem is noted in Matter of Byrnes, 149 Misc. 449, 451, 267 N.Y. Supp. 627, 629-30 (Surr. Ct. 1933).

<sup>42</sup> See 52 NEW YORK STATE BAR ASSOCIATION REPORTS 214-38 (1929) (comments by members of New York State Bar Association following address by Surrogate George A. Slater on "Reforms in the New York Law of Property," *id.* at 187. These comments are revelatory in the light of the subsequent history of § 18).

Such omission was apparently not unintentional, since, with few exceptions, legislatures have hesitated to protect the surviving spouse's share from inter vivos transactions, due partly to an unwillingness to interfere with the alienability of property and partly to the belief that a person possessing modest means will not part with his estate during life so as to deprive his widow after his death. See Derby, *Disinheritance in New York*, 6 N.Y.U.L.Q. REV. 247, 254 (1929); Comment, 44 MICH. L. REV. 151 (1945).

The Decedent Estate Commission itself recognized ". . . the advantage of much constructive criticism and suggestion, to which it has given its careful consideration. . . ." 1929 LEG. DOC. No. 62, COMBINED REPORTS 178.

<sup>43</sup> [1929] A. Int. No. 1293; [1929] S. Int. No. 937; 1929 LEG. DOC. No. 62, COMBINED REPORTS 175, the proposed § 18 of the Decedent Estate Law being set forth at 186-88.

<sup>44</sup> See text at notes 32-35 *supra*.

to \$2,500.<sup>45</sup> In no event was the surviving spouse entitled to more than one-half of the net estate after deducting debts, administration expenses and any estate tax (provided the full intestate share did not exceed \$2,500, in which event such spouse could claim it in full).<sup>46</sup> A husband or wife during the lifetime of the other could waive the right of election to take against any last will or against a particular last will.<sup>47</sup> Since the proposed legislation was to become effective on September 1, 1930,<sup>48</sup> the right of election was given to the surviving spouse only where the testator died after August 31, 1930, leaving a will thereafter executed.<sup>49</sup> The common-law estate of curtesy was abolished in the real property of a wife dying after August 31, 1930;<sup>50</sup> and the inchoate right of dower or endowment of a widow in lands in which her deceased husband had an estate of inheritance, was abolished after August 31, 1930, except that a widow married to a man before September 1, 1930, continued en-

<sup>45</sup> [1929] A. Int. No. 1293; [1929] S. Int. No. 937; N.Y. DECED. EST. LAW §§ 18(1)(b)-(f). In connection with this change in the withdrawal privilege, the Decedent Estate Commission stated: "It was claimed that the withdrawal of such an amount [\$25,000] might impair trusts which would yield an adequate income for the spouse particularly in moderate estates. The Commission has, therefore, determined that the amount which may be taken in cash against a trust created for the widow shall be reduced to \$2,500. In many of the instances where this amount may be inadequate for immediate necessities, the trust principal will probably be substantial, or power to invade will be expressly given." 1929 LEG. DOC. NO. 62, COMBINED REPORTS 179-80. It appears that the sum of \$2,500 was a compromise. See Derby, *Disinheritance in New York*, 6 N.Y.U.L.Q. REV. 247 (1929).

The Commission rejected a proposal, such as is found in the Pennsylvania statute, which would have permitted the surviving spouse to elect to take the entire intestate share outright as against the terms of the will. 1928 LEG. DOC. NO. 70, COMBINED REPORTS 19. In several states a surviving spouse was given the privilege, in varying forms, to take a share against the provisions of a will. See BEECHLER, ELECTIONS AGAINST WILLS c. III (1940); 1930 LEG. DOC. NO. 69, COMBINED REPORTS 251. The trust idea was adopted in order "to permit the decedent to place such share in trust so as to safeguard the principal of the trust against a spendthrift spouse." Slater, *Reforms in the New York Law of Property*, 52 NEW YORK STATE BAR ASSOCIATION REPORTS 187, 196 (1929).

<sup>46</sup> [1929] A. Int. No. 1293; [1929] S. Int. No. 937; N.Y. DECED. EST. LAW §§ 18(1)(a), (c).

<sup>47</sup> N.Y. DECED. EST. LAW § 18(9).

<sup>48</sup> [1929] A. Int. No. 1293; [1929] S. Int. No. 937. This effective date was sought so that "... the legislature of 1930 will be able to consider any necessary and desirable amendments before the ultimate taking effect of the act." 1929 LEG. DOC. NO. 62, COMBINED REPORTS 180.

<sup>49</sup> [1929] A. Int. No. 1293; [1929] S. Int. No. 937; N.Y. DECED. EST. LAW § 18(1).

<sup>50</sup> [1929] A. Int. No. 1293; [1929] S. Int. No. 937; N.Y. REAL PROP. LAW § 189.

dowed of a third part of the lands in which her husband, prior to such date, was seized of an estate of inheritance during the marriage.<sup>51</sup>

This final proposal received the unanimous<sup>52</sup> assent of both branches of the legislature. In approving the bill<sup>53</sup> in the presence of representatives of the League of Women Voters,<sup>54</sup> Governor Franklin D. Roosevelt characterized it as "a new charter of women's rights," and Surrogate Foley hailed it as "the greatest reform in the law of property of New York State in one hundred years."<sup>55</sup>

Implementation and interpretation of Section 18 have been primarily the work of the courts.<sup>56</sup> Legislative amendment has been sparse. A 1930 amendment<sup>57</sup> provided that an agreement made before September 1, 1930, wherein one spouse waived or released all rights in the estate of the other should be deemed to release the right of election granted in the section. This same subdivision relating to releases was again amended in 1947<sup>58</sup> so as to provide a single comprehensive statement of the requirements of a valid waiver of a surviving spouse's right of election. A 1931 amendment<sup>59</sup>

<sup>51</sup> N.Y. REAL PROP. LAW § 190. For a recent application of this provision, see *Matter of Braun*, 200 Misc. 23, 108 N.Y.S.2d 620 (Surr. Ct. 1951).

<sup>52</sup> See Barry, *Modernizing the Law of Decedents' Estates*, 16 VA. L. REV. 107, 108 (1929).

<sup>53</sup> Laws of N.Y. 1929, c. 229.

<sup>54</sup> See Barry, *supra* note 52, at 109.

<sup>55</sup> Twyeffort, *The New Decedent Estate Law of New York*, 6 N.Y.U.L.Q. REV. 377 (1929).

Surrogate Slater, addressing the Federation of Bar Associations convention in December 1931, waxed even more ecstatic: "The new law is the law of reason as applied to human society. The new law reduces what is reason to public policy. . . . The Legislature refashioned the old law, and it was made to keep pace with the intelligence and morals of the times." Slater, *The Work of the Revisers of 1930*, reprinted in 1933 LEG. DOC. NO. 55, COMBINED REPORTS 793, 798.

<sup>56</sup> In the first two cases to reach the Court of Appeals it was held respectively that a testamentary gift in trust to pay the income to the widow during her life or until she remarried was not a trust for her "benefit for life" within the meaning of subdivision 1(e) [*Matter of Byrnes*, 260 N.Y. 465, 184 N.E. 56 (1933)], and that a codicil executed after the effective date of the statute had the effect of republishing the will so as to make § 18 applicable [*Matter of Greenberg*, 261 N.Y. 474, 185 N.E. 704 (1933)].

<sup>57</sup> Laws of N.Y. 1930, c. 174, § 1, amending N.Y. DECED. EST. LAW § 18(9).

<sup>58</sup> Laws of N.Y. 1947, c. 379. See 1946 LEG. DOC. NO. 65(H), REPORT, N.Y. LAW REVISION COMMISSION 227-66; 1947 LEG. DOC. NO. 65(A), *id.*, 21-26.

<sup>59</sup> Laws of N.Y. 1931, c. 562, § 1. The net estate was that left after the deduction of debts, administration expenses and any estate tax. See text at note 46 *supra*.

provided that the words "intestate share," when used in the section, should in no event be construed to mean more than one-half of the net estate. In 1933,<sup>60</sup> funeral expenses were included among the deductions in ascertaining the net estate. A 1955 amendment<sup>61</sup> redefined "intestate share" by providing that estate taxes should be disregarded.

Following the decision in *Matter of Curley*,<sup>62</sup> wherein it was held that a trust for the benefit of the widow which permitted the trustees, *inter alia*, to invest in non-legals and exempted them from posting a bond, did not fulfill the statutory requirements, a new paragraph was added in 1936 to subdivision one.<sup>63</sup> The amendment largely dissipated the effect of the decision. The same legislature clarified subdivision seven relating to limitations of time within which the election must be made.<sup>64</sup> In 1939, sub-paragraph (f) of subdivision one was amended to provide that:

In every estate the surviving spouse shall have the limited right to withdraw the sum of twenty-five hundred dollars if the intestate share is equal to or greater than that amount. Such sum shall, however, be inclusive of any absolute legacy or devise, whether general or specific. Where a trust fund is created for his or her benefit for life, such sum of twenty-five hundred dollars or any necessary part thereof to make up that sum shall be payable from the principal of such trust fund.<sup>65</sup>

It is generally agreed among those specializing in the field covered by Section 18 that it has worked fairly well. But room for betterment undoubtedly exists. Omissions in the section itself as well as some judicial decisions construing it call for continuous appraisal, with legislative action essential to obtain the desired results.

<sup>60</sup> Laws of N.Y. 1933, c. 650, § 1(a).

<sup>61</sup> Laws of N.Y. 1955, c. 487, amending N.Y. DECED. EST. LAW § 18(1)(a). ". . . [T]he words 'intestate share' wherever used in this section shall be construed to mean the surviving spouse's share of the estate as in intestacy or one-half of such net estate, whichever is smaller. In computing such net estate all estate taxes shall be disregarded, but nothing herein contained shall be construed as relieving such surviving spouse from contributing to all such taxes the amounts apportioned against him or her pursuant to the provisions of section one hundred twenty-four of this chapter." *Ibid.*

<sup>62</sup> 245 App. Div. 255, 280 N.Y. Supp. 80 (2d Dep't), *aff'd mem.*, 269 N.Y. 548, 199 N.E. 665 (1935).

<sup>63</sup> Laws of N.Y. 1936, c. 234.

<sup>64</sup> *Id.* c. 114.

<sup>65</sup> Laws of N.Y. 1939, c. 343, § 1.

In view of the present value of the dollar, the privilege granted to the surviving spouse of withdrawing \$2,500 absolutely<sup>66</sup> appears unsatisfactory. A minimum of at least double such amount should be permitted to be withdrawn. Inquiry should be made concerning the desirability of providing in some manner for minor dependent children during their minority.<sup>67</sup> In view of the fact that provision for a surviving spouse and the retention of freedom of alienation have long been conflicting policies in the law of property,<sup>68</sup> the legislature should determine as a matter of policy judgment whether decedents should be permitted through the medium of such devices as the Totten Trusts<sup>69</sup> and joint accounts<sup>70</sup> to disinherit effectively the surviving spouse. In similar manner, the legislature should decide whether a surviving spouse of an intestate decedent should have rights under Section 83 of the Decedent Estate Law comparable to those conferred by Section 18.<sup>71</sup>

The Decedent Estate Commission of 1927 might well be proud of its work. Section 18 has proved a workable and just reform. To the legislature must be entrusted such amendments as experience has proven desirable.

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<sup>66</sup> N.Y. DECED. EST. LAW §§ 18(1)(b)-(f). Cf. the 1928 bill with its proposal to permit withdrawal of \$25,000. See text at notes 32-35 *supra*.

<sup>67</sup> This was one of the criticisms directed to the 1928-1929 proposals. See text at note 39 *supra*. The Decedent Estate Commission apparently partly considered the matter as Surrogate Slater expressed the hope that "this subject may be studied by a Commission and the law of the State humanized so that at least minor children may be permitted to share in a parent's estate." Slater, *Reforms in the New York Law of Property*, 52 NEW YORK STATE BAR ASSOCIATION REPORTS 187, 206 (1929). See further, Cahn, *Restraints on Disinheritance*, 85 U. PA. L. REV. 139, 144, 147 (1936); Laube, *The Revision of the New York Law of Estates*, 14 CORNELL L.Q. 461, 464 (1929); Laube, *The Right of a Testator to Pauperize His Helpless Dependents*, 13 *id.* 559 (1928).

<sup>68</sup> See Notes, 25 COLUM. L. REV. 938 (1925), 37 COLUM. L. REV. 317, 318 (1937).

<sup>69</sup> See Matter of Halpern, 303 N.Y. 33, 100 N.E.2d 120 (1951); 1951 LEG. DOC. NO. 65(M), REPORT, N.Y. LAW REVISION COMMISSION 587.

<sup>70</sup> See *Inda v. Inda*, 288 N.Y. 315, 43 N.E.2d 59 (1942). That a joint account should be declared illusory to the extent of one-half the deposit is suggested in Notes, 27 CORNELL L.Q. 569, 576 (1942), 52 YALE L.J. 656, 659-60 (1943).

<sup>71</sup> Compare *Murray v. Brooklyn Sav. Bank*, 258 App. Div. 132, 15 N.Y.S.2d 915 (1st Dep't 1939), with *Schnakenberg v. Schnakenberg*, 262 App. Div. 234, 28 N.Y.S.2d 841 (2d Dep't 1941). The question was left open in *Inda v. Inda*, *supra* note 70. See further, *Burns v. Turnbull*, 294 N.Y. 889, 62 N.E.2d 785 (1945) (mem. opinion); 3 BUTLER, NEW YORK SURROGATE LAW AND PRACTICE § 2320 (Supp. 1950); 1951 LEG. DOC. NO. 65(M), REPORT, N.Y. LAW REVISION COMMISSION 587, 629-30.