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Ann Ellen Acker

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THE ABOLITION OF DOWER: AN OCCASION FOR RE-EXAMINING THE SURVIVING SPOUSE'S* RIGHTS IN ILLINOIS

On January 1, 1972, the bill abolishing the age-old estate of dower in Illinois took effect.¹ The passing of dower will alter many routine aspects of the practice of law in Illinois. The complication of ascertaining outstanding dower rights during title search will be eliminated. Real estate transactions will be simplified since the signature of the vendor's spouse will no longer be necessary for the conveyance of clear title. No longer will the divorce lawyer concern himself with providing the financial equivalent of dower, and thus there will be a lesser degree of contention in divorce settlements.

In a very important sense, however, the repeal of dower in Illinois has broader significance. It affects directly the property interests of the spouse² which arise as a result of the marital relationship. The abolition of the indefeasible protection³ of dower calls for reflection on the public policy of Illinois with respect to the surviving spouse, review of the actual benefits afforded by the state, and re-evaluation of current statutory and case law in the area.

THE PROTECTION OFFERED BY DOWER AT COMMON LAW

Under the common law, a widow was entitled to an estate for life in a third of the lands of which her husband had been seized in fee simple and fee tail during the marriage. This estate for life was termed her dower interest.⁴ While her husband lived, the wife possessed a

* Although this Note is directed at the problem of the widow's share in her spouse's assets, the material discussed in the succeeding pages applies equally to the surviving husband. As more and more women become financially self-sufficient and accumulate substantial estates, the problem of the surviving widower may become more acute.

1. House Bill Number 535, 77th General Assembly (1971).

2. Statistically, widows are much more prevalent than their male counter-parts. In 1969, 3.6% of the male population over eighteen years of age were widowers. In the same year 13.2% of females over eighteen were widows. (Statistical Abstract of the United States (1970)). The problem of the widow is therefore of more real concern. For a theoretical analysis of the necessity for providing for the widow *qua* widow see MACDONALD, *FRAUD ON THE WIDOW'S SHARE* (1960) [hereinafter cited as MACDONALD].

3. The right of dower was indefeasible since it could not be destroyed by any unilateral act of the husband.

4. See generally, Haskins, *The Development of Common Law Dower*, 62 HARV. L. REV. 42 (1948).

mere expectancy, known as inchoate dower,⁵ which was contingent upon her husband predeceasing her. Upon the death of her husband, the wife's inchoate right of dower became consummate. The effect of the consummation of her right was not to give her an estate in the land; this did not occur until her dower was actually assigned and set off by metes and bounds.⁶

Common law dower provided a real protection to the wife since her interest in the realty could not be defeated by an unilateral act of her husband. He could not defeat her dower by inter-vivos transfer or by will, although he could obtain a voluntary release of the right. The primary function of common law dower was to insure a measure of economic security to the widow,⁷ although it often had the additional effect of promoting family unity⁸ and protecting the social position of the woman among the landed classes. In an age when real property was the main source of wealth, common law dower admirably accomplished its primary purpose.⁹ Since the great portion of the husband's fortune was in realty, a one-third estate for life in his lands amply provided for the wife in the event of his death.

Illinois codified the right of common law dower in section 18 of its Probate Act.¹⁰ Section 18 provided that a surviving spouse was entitled to a third part of all the real estate of which the decedent was seized of an estate of inheritance at any time during the marriage. The interest offered by section 18 differed from common law dower in two important aspects: (1) the right to consummate dower vested only when the right was perfected as provided in section 19,¹¹ and (2) the estate of dower was extended to both husband and wife.¹²

CONTEMPORARY VIABILITY OF THE ESTATE OF DOWER

In his *Comentaries*, Blackstone notes that dower proves to be a "clog on alienations" and is "otherwise inconvenient to families."¹³ This in-

5. 2 POWELL, REAL PROPERTY § 209 (1950).

6. *Id.*

7. *Id.* at § 217.

8. Since land was the chief source of subsistence, a widow would frequently have been destitute without some rights in the land of her husband. The estate of dower afforded support for the widow and the younger children who, because of primogeniture, took no right in their father's land. Because of the widow's dower interest, she and her younger children could remain on the land near the eldest son.

9. Note, *Protection of the Surviving Spouse's Right Under Elective Statutory Shares*, 18 VAND. L. REV. 2090 (1965).

10. ILL. REV. STAT. ch. 3 § 18 (1969). See, *In re Taylor's Will*, 55 Ill. 252 (1870) for an excellent summary of the history of dower as it existed in the Northwest Territory and in the early days of Illinois statehood.

11. ILL. REV. STAT. ch. 3 § 18 (1969).

12. *Id.*

13. BLACKSTONE, COMMENTARIES 136 (Andrews ed. 1896).

convenience caused by the wife's dower interest, primarily related to the alienability of real property, was considered justified when dower provided a significant benefit to her. In the present day context, however, there are many factors which lead legislatures to the conclusion that dower is an insufficient protection, and is, therefore, outmoded.

Realistically, a life estate in one-third of a husband's realty does not provide for the widow's needs. Land is no longer the primary source of wealth in the United States.¹⁴ Our economy has been transformed by the Industrial Revolution, which eliminated land as the chief form of productive wealth. Today, securities and shares in industrial enterprises are the predominate forms of assets, and the average person owns only a single residence.¹⁵ Vast numbers die without owning any real estate at all, and their estates will be composed of personal property which dower does not reach.¹⁶

This reasoning however, is considerably weakened in Illinois and other large agricultural states where many individuals still earn their living off the land.¹⁷ Indeed, a small farmer may possess little else than his acreage; he is at least land rich. Dower, then, would seem to be of value in states which still retain a large agrarian population.

The standard rejoinder is that a great portion of real estate is held in forms to which dower does not apply.¹⁸ It is "black letter" law that a widow has no dower interest in land of which her husband was seized in joint tenancy with one other than his spouse.¹⁹ Upon the death of the husband, his entire interest passes to the other co-tenant.²⁰ In Illinois, there is an even more sophisticated method of holding real estate free from any claim of dower known as the land trust.²¹ The husband places his realty in the land trust naming himself beneficiary. The

14. 1 AMERICAN LAW OF PROPERTY § 5.5 (A.J. Casner ed. 1952).

15. *Id.*

16. ATKINSON, WILLS § 30 (2d ed. 1953).

17. In 1960, 6.2% of the entire Illinois population lived on farms. There were 30,700,000 acres of land devoted to farming, roughly 80% of the total land area of Illinois. There were 124,000 farms of the average size of 236 acres. (United States Department of Agriculture, Illinois Agricultural Statistics 11 (1971)). A number of states which have strong agricultural interests have refused to abandon common law dower or its statutory equivalent. Laufer, *Flexible Restraint on Testamentary Freedom*, 69 HARV. L. REV. 277, 279 (1955).

18. See American Bar Association, *Committee on Community Property and Jointly Held Titles to Real Property, Section of Real Property, Probate and Trust Law* (1952); Hines, *Real Property Joint Tenancy*, 51 IOWA L. REV. 582 (1966); Garrett, *Land Trusts*, 1955 U. ILL. L. FORUM 625, 655.

19. 1 AMERICAN LAW OF PROPERTY § 5.14 (A.J. Casner ed. 1952).

20. *Id.*

21. See generally, Garrett, *Land Trusts*, 1955 U. ILL. L. FORUM 625, 655; Garrett, *Recent Developments in Land Trust Law*, 10 DEPAUL L. REV. 467 (1961); Turner, *Some Legal Aspects of Beneficial Interests under Land Trusts*, 39 ILL. L. REV. 216 (1945). The land trust is also utilized in Virginia, Florida, North Dakota and Indiana.

trust is comprised of two basic instruments: a recorded deed in trust and an *unrecorded* trust agreement. Although the recorded deed gives the trustee full ownership of both legal and equitable titles, the trust agreement limits his powers greatly.²² The trustee is given the authority to convey the land upon the beneficiary's direction and to sell the property at the end of twenty years. The beneficiary has the power to manage the property along with the right to receive rents, as well as the proceeds of any mortgage or sale.²³

Illinois decisions have consistently held that the interest which the beneficiary has in a land trust is not real property, but personal property.²⁴ Since dower does not apply to personal property,²⁵ the land trust is an excellent device for evading the attachment of inchoate dower. Yet the probability that the small farmer is even aware of the existence of the land trust device is questionable. It is not unreasonable, therefore, to assume that dower serves as a real protection to a given number of the farming community. This assumption, however, is often met with a practical criticism. Even if the husband's wealth were to be in income producing realty to which dower applied, a one-third interest for life is not enough to sustain the wife.

Insufficiency alone would not lead the legislature to seek the repeal of section 18. Dower, however, produces adverse effects on the marketability of realty and the rights of creditors. The existence of dower impedes free alienability of property. Because of dower, it was necessary for the wife of the vendor to join in the transfer if clear title was to be conveyed. If the vendee demanded unencumbered title, an unwilling wife could effectively bar a sale.²⁶ Dower also gave the surviving spouse an interest in her husband's realty to the detriment of his creditors.²⁷ She was given preference over creditors²⁸ on debts she may have assisted in incurring and from which she probably benefited.²⁹

The restraint on marketability of land which dower created, the tedi-

22. Note, *Illinois Land Trusts*, 18 DEPAUL L. REV. 875 (1969); W. GARRETT, *LAND TRUSTS* 1 (1971). Garrett, author of the Chicago Title and Trust Company's pamphlet, *LAND TRUSTS*, reports that the land trust is widely used in Cook County and is increasingly used in downstate Illinois.

23. *Id.*

24. *E.g.*, *Seno v. Franke*, 20 Ill. 2d 70, 169 N.E.2d 335 (1960); *Crawford Corp. v. Woodlawn Bank*, 382 Ill. 354, 47 N.E.2d 81 (1943); *Duncanson v. Lill*, 322 Ill. 528, 153 N.E. 618 (1926).

25. *Clark v. Hanson*, 320 Ill. 480, 151 N.E. 369 (1926).

26. T. ATKINSON, *supra* note 16.

27. Welch, *Should Dower Be Abolished in Illinois?*, 42 CHICAGO B. RECORD 435 (1961).

28. ILL. REV. STAT. ch. 3 § 23 (1969).

29. The most common example of such a debt was the mortgage the husband executed on the home where the couple resided.

ous element dower injected into title search, and the hardship dower placed on creditors of the decedent have led the legislature to conclude its continued existence was inadvisable.³⁰ It has determined that the retention of dower generates problems disproportionate to the function it serves. But it has abolished dower without providing the surviving spouse with any similarly infeasible protection.

EXISTING STATUTORY PROTECTION FOR THE SURVIVING SPOUSE IN ILLINOIS

On January 1, 1972, Illinois joined an ever-increasing number of states that have eliminated common law dower.³¹ Since the Illinois Supreme Court has repeatedly held that inchoate dower is not a vested right and may be changed or eliminated by the legislature,³² no reasonable constitutional attack on the law appears likely. A re-assessment of the remaining statutory protections for the spouse is thus in order.

30. See Note, *Does Dower Pay Its Way in Illinois?*, 1956 U. ILL. L. FORUM 487 (1956) for a study of dower litigation in the Illinois courts from 1941 to 1956. The investigation reveals that little economic advantage accrued to the surviving spouse as a result of election of dower and that only a few creditors or bona fide purchasers of land were injured by the election. The author concludes the real impact of dower is its effect on the marketability of land and the bothersome element it injects into title search.

31. E.g., Alaska, Colorado, Connecticut, Idaho, Indiana, Iowa, Maine, Maryland, Minnesota, Mississippi, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, and Wyoming.

House Bill Number 535 amended section 18 of the Probate Act (ILL. REV. STAT. ch. 3 (1969)) by abolishing the inchoate right of the spouse to take dower. As modified, section 18 reads, "[T]here is no estate of dower or courtesy. All inchoate rights to elect or take dower existing on the effective date of this amendatory act are hereby extinguished." Other sections of the Probate Act are amended to conform to the modifications in section 18. Section 11, which deals with intestate distribution, is amended to omit provisions relating to the descent of property upon election of the surviving spouse to take dower. Section 16, which provides the surviving spouse with a forced share upon renunciation of a will, is similarly modified. Section 12 is altered to delete the provision for descent if the surviving spouse of the illegitimate elects dower. Sections 19 through 40, which deal with the manner of electing and assigning dower, are all repealed. Section 223 of the Probate Act, giving the personal representative of a ward the right to join in the execution and delivery of a deed or mortgage, is modified to omit any reference to dower, as is section 230. (Section 230 specifies those persons who are necessary parties to proceedings to sell or mortgage real estate of a decedent or ward.) Section 234(d), which authorizes the court to sell or mortgage a decedent's or ward's real estate to decree the assignment of dower or order payment in its money's worth, is deleted. Companion Acts, which were signed by the Governor on July 23, 1971, eliminate all references to dower in various other statutes. (House Bill Number 536, amending ILL. REV. STAT., ch. 30, par. 18 (1969) (Conveyances Act); House Bill 537, amending ILL. REV. STAT. ch. 30 § 99 (1969) (Torrens Act); House Bill Number 539, amending ILL. REV. STAT. ch. 30 §§ 17, 21 (1969) (Husband and Wife Act); House Bill 540, amending ILL. REV. STAT. ch. 82 § 1 (1969) (Mechanics Lien Act); 541 amending ILL. REV. STAT. ch. 95 § 23.1 (1969) (Mortgage and Foreclosure Act); House Bill Number 542, amending ILL. REV. STAT. ch. 106 §§ 45, 51, 55, 59, 67 (1969) (Partition Act); House Bill Number 543, amending ILL. REV. STAT. ch. 106½ § 25 (1969) (Partnership Act).)

32. *McNeer v. McNeer*, 142 Ill. 388, 32 N.E. 681 (1892); *Schollkopf v. DeVry*, 366 Ill. 39, 7 N.E.2d 757 (1937); *Classen v. Heath*, 389 Ill. 183, 58 N.E.2d 889 (1945).

"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 practically penniless at his death."³³ Motivated by the desire to remedy the inconsistency, many states have enacted legislation granting the widow a right to elect a portion of the estate, personal and real, which her husband possesses at his death.³⁴ Typically, the estate is one in fee and not merely a life interest.³⁵ Regardless of efforts by the decedent to prevent it by his will, the wife is entitled to claim a minimum percentage of his estate. This statutory minimum is known as the forced share.

Illinois case law proclaims that the state is very solicitous of the widow's position. The public policy of the state was clearly expressed in an early Illinois decision:

We do not go too far when we say that it has become a sort of common law in this State, that support shall be "in all cases," one-third of the husband's real estate for life, and one-third of the personal estate forever, which shall remain after the payment of debts, unless the husband shall by his last will and testament make some devise or bequest to her, which she is willing to accept.³⁶

Indeed, a later court recognized a conscious desire on the part of Illinois lawmakers "to provide for the support of the wife, not only during the lifetime of the husband, but also after his death."³⁷

Sections 11 and 16 of the Probate Act would seem to substantiate the state's concern for the plight of the widow.³⁸ Section 11 provides the surviving spouse with one-third of all the estate, depending on the existence of children, should the husband die intestate. Section 16 permits the wife to elect against the will of her husband, and claim one-half or one-third of his estate.

There has been general dissatisfaction with the statutory share concept, however,³⁹ and the typical arguments marshalled against it are

33. *The Report of the Commission to Investigate Defects in the Laws of Estates*, New York Legislative Document No. 69, at 86 (1930).

34. Also, in the eight community property states, the surviving spouse is entitled to half of the property which he or she once owned together with the deceased spouse. The intricacies of community property law are beyond the scope of this article. See generally, Wren, *The Widow's Election in Community Property States*, 7 ARIZ. L. REV. 1 (1965).

35. See, for each state, 3 VERNIER, *AMERICAN FAMILY LAWS* §§ 189, 216 (1935); 2 PRENTICE HALL *WILLS, ESTATES & TRUSTS SERVICE* § 2735 (1969).

36. *In re Taylor's Will*, 55 Ill. 252, 259 (1870).

37. *Blankenship v. Hall*, 233 Ill. 116, 129, 84 N.E. 192, 196 (1908).

38. ILL. REV. STAT. §§ 11, 16 (1969).

39. See generally, MACDONALD; Cahn, *Restraints on Disinheritance*, 85 U. PENN. L. REV. 139 (1936); Haskell, *The Power of Disinheritance: Proposal for Reform*, 52 GEO. L.J. 499 (1964); Rea, *Election to Take the Statutory Share*, 29 ROCKY MT.

good in Illinois. Sections 11 and 16 of the Illinois Probate Act apply only to the property owned by the decedent at the time of death.⁴⁰ The protection offered by the Illinois statute is often an illusion, since it does not prevent evasive depletion of the estate by inter-vivos transfer. The utility of sections 11 and 16 is slight since they can be easily circumvented by a number of devices readily available to the husband. Should he dispose of his entire estate during life, the widow's interest is successfully defeated. One-third or one-half of nothing is nothing. The ineffectiveness of such a statutory share provision has prompted one writer to declare that "only the poor and the stupid need conform."⁴¹ In reality, sections 11 and 16 pay only so much lip service to the stated policy of Illinois. The repeal of dower thus removes the only indefeasible protection for the spouse provided by the Probate Act.

There is a clear inconsistency between the little security the state provides to the spouse whose marriage terminates because of death and the important measures it provides for the spouse whose marriage ends on account of divorce. Illinois recognizes the husband's obligation to support his wife while he lives,⁴² and in the event of divorce, it is recognized that the wife has a right to an equitable share in her husband's property.⁴³ The share may be in the form of alimony or property settlement⁴⁴ and is a matter of great significance in the negotiations surrounding the dissolution of a marriage. Either because of conscious design or legislative inertia, the lawmakers of this state have not provided similar means to insure support of the wife upon the death of her husband.

As of January 1, the widow has only her statutory share, homestead exemption⁴⁵ and surviving spouse's award⁴⁶ to support her in the years following her husband's death. Even with the surviving spouse award increased to \$5,000, the sum of the award and homestead exemption will be inadequate to sustain her. She should be entitled to a portion of the net estate which cannot be defeated by the husband. In Illinois,

L. REV. 506 (1957); Simes, *Protecting the Surviving Spouse by Restraints on the Dead Hand*, 26 U. CINN. L. REV. 1 (1957).

40. ILL. REV. STAT. §§ 11, 16 (1969).

41. Cahn, *Restraints on Disinheritance*, 85 U. PENN. L. REV. 139 (1936).

42. Banck v. Banck, 322 Ill. App. 369, 54 N.E.2d 577 (1944); Stewart v. Stewart, 1 Ill. App. 2d 283, 117 N.E.2d 579 (1954).

43. ILL. REV. STAT. ch. 40 § 19 (1969).

44. *Id.*

45. House Bill 538, approved July 23, 1971, increases the Homestead Exemption to \$10,000.

46. ILL. REV. STAT. ch. 3 § 178 (1969). The minimum Surviving Spouse Award is \$5,000 with an additional sum not less than \$1,000 for each child. House Bill Number 1275, which increased the minimum award to \$5,000, was signed by the Governor in 1971, and is effective July 1, 1972.

the burden of insuring the widow a portion of her husband's estate has been on the judiciary, and the widow has consistently failed in attempts to reach property which had been transferred by her husband during life. Transfers to defeat her statutory share have been generally effective. As the court has struggled with each particular device, it has used various rationales to arrive at the typical result.

JUDICIAL DECISIONS SUSTAINING INTER-VIVOS TRANSFERS⁴⁷

A. *Gifts*⁴⁸

In Illinois, a gift inter-vivos will successfully defeat the rights of the widow in the object of the gift. The gift must be *real*, however.⁴⁹ In other words, it must be a valid gift under personal property law. The fact that the express purpose of the gift is to defeat the statutory marital rights of the surviving spouse is immaterial. The decision in *Haskell v. Art Institute of Chicago* articulates the position of the Illinois courts:

The law is well settled that a husband may dispose absolutely of his property during his lifetime even though he intended to deprive his wife of her right to take one-half of such property where she renounces the provisions of the will. If the gift or disposition of the property, however, is but a scheme of the husband to deprive the wife of her property rights at the same time retaining the benefits of the property himself during his lifetime, the transaction may be set aside. If the title to the paintings passed from the husband to the Art Institute, then, regardless of what his intentions were there was no fraud practiced on the wife.⁵⁰

The *Haskell* court made no attempt to reconcile its holding with the state's alleged concern for the surviving spouse.⁵¹

It is only under unusual circumstances that a real gift inter-vivos will be set aside in favor of the widow's statutory share. When the gift inter-vivos is made in contemplation of impending death with the intent to defeat the wife's marital rights, and the gift comprises the bulk of the husband's estate, the transfer will be vulnerable to attack by the

47. Annotations: 49 A.L.R.2d 521 (1956); 157 A.L.R. 1164 (1944); 112 A.L.R. 649 (1938); 64 A.L.R. 466 (1930).

48. Epstein, *Inter-vivos Transfers: Gifts, Joint Ownerships, and Contemplation of Death*, 1949 U. ILL. L. FORUM 18 (1949).

49. See, *Haskell v. Art Institute of Chicago*, 304 Ill. App. 393, 26 N.E.2d 736 (1940). Here the husband, who owned a valuable art collection, entered into a written contract by which he purported to transfer and deliver forty paintings to the Art Institute. The Institute's Board of Trustees accepted the gift but agreed to leave the pictures in the possession of the husband for a period of a year. He died during the one year period never having relinquished possession.

50. *Id.* at 398, 26 N.E.2d at 739.

51. See text beginning p. 99 *supra*.

wife.⁵² In the absence of these circumstances, the gift inter-vivos will successfully defeat her interest.

A gift *causa mortis* is a revocable gift of personalty made in apprehension of imminent death.⁵³ Title passes immediately to the donee of a gift *causa mortis*, although the transfer is subject to revocation. Because the nature of the gift is so nearly testamentary, it is treated by the court much like the gift inter-vivos which is made in contemplation of death. Dicta in three Illinois cases indicates that conformity to property law alone will not sustain a gift *causa mortis* against the claim of a surviving spouse.⁵⁴ Reality of the gift is not enough; it appears a gift *causa mortis* will be *per se* vulnerable to the widow's claim.⁵⁵

B. *Revocable Living Trusts*⁵⁶

Although Illinois has determined that an irrevocable inter-vivos trust is good against any claim of the widow,⁵⁷ the device is not particularly attractive to the husband who seeks to disinherit his wife by transfer during his life, since he must relinquish too many of the incidents of ownership in the trust property. The revocable living trust, however, is an ideal way for the husband to accomplish his desire, since the settlor retains so many powers over the trust *res*.

Illinois is particularly liberal in sustaining the validity of revocable inter-vivos trusts.⁵⁸ In *Farkas v. Williams*,⁵⁹ the settlor directed that certain shares of stock be issued in his name as trustee for the beneficiary. He reserved the right to receive all dividends during his lifetime, to vote the stock, to change the beneficiary and to revoke the trust. The Illinois Supreme Court held that the retention of these powers did not make the trust invalid and found that it was a good revocable living trust.

Illinois has followed the New York courts in determining whether or not the living trust is good against the surviving spouse. In the cele-

52. *Blankenship v. Hall*, 233 Ill. 116, 84 N.E. 192 (1908).

53. See MACDONALD at 194.

54. *West v. Miller*, 78 F.2d 479 (7th Cir. 1935), cert. denied, 296 U.S. 633 (1935); *Smith v. Northern Trust Co.*, 322 Ill. App. 168, 54 N.E.2d 75 (1944); *Delta & Pine Land Co. v. Benton*, 171 Ill. App. 635 (1912).

55. *Id.*

56. See MACDONALD for an exhaustive survey of the status of the revocable living trust in the fifty states. See also, Hayes, *Illinois Dower and the "Illusory" Trust*, 2 DEPAUL L. REV. 1 (1952), for a study of this device in Illinois.

57. *West v. Miller*, 78 F.2d 479 (7th Cir. 1935), cert. denied 296 U.S. 633 (1935).

58. E.g., *Farkas v. Williams*, 5 Ill. 2d 417, 125 N.E.2d 600 (1955); *Bear v. Milikin Trust Co.*, 336 Ill. 366, 168 N.E. 349 (1929); *Kelly v. Parker*, 181 Ill. 49, 54 N.E. 615 (1899).

59. 5 Ill. 2d 417, 125 N.E.2d 600 (1955).

brated case of *Newman v. Dore*,⁶⁰ a New York decision, the husband created an inter-vivos trust of all his property three days before his death. He retained the right to revoke, an income for life, and control over the powers granted to the trustee. The widow was given no beneficial interest in the property. The court assumed, without deciding, that the trust was a valid trust under New York law.⁶¹ In determining whether the trust would be good against the surviving spouse, the New York Court of Appeals enunciated the following test:

[We must ask] whether the husband has in good faith divested himself of ownership of his property or has made an illusory transfer.⁶²

The trust here was found to be illusory with respect to the widow. The conveyance was said to be "intended only as a mask for the effective retention by the settlor of the property which in form he had conveyed."⁶³

Illinois has adopted New York's "illusory" test in the case of *Smith v. Northern Trust Co.*,⁶⁴ which specifically cites *Newman v. Dore*. During his life, Smith transferred into trust all his assets with the exception of his pension. The three powers retained by the settlor in *Newman v. Dore* were also retained by Smith: the trust was revocable, the settlor retained a life estate, and the trustees were subject to his control. After Smith's death, there was nothing with which to pay Mrs. Smith the widow's award or statutory share. Although the trust probably would have qualified as valid under Illinois trust law,⁶⁵ the trust was said to be illusory as to the widow and a fraud on her marital rights.⁶⁶ The court found that the transfer to the trustee, "although absolute in form, was merely colorable and illusory."⁶⁷ As a result, the trust property was subject to her claim for widow's award and statutory share.

The decision in *Smith v. Northern Trust* appears on its face to be a great step toward subjecting inter-vivos transfers to the wife's elective share. Actually, the Illinois courts have limited the *Smith* holding to the precise combination of circumstances found in the case, and have

60. 275 N.Y. 371, 9 N.E.2d 966 (1937).

61. *Id.*

62. *Id.* at 379, 9 N.E.2d at 969.

63. *Id.*

64. 322 Ill. App. 168, 54 N.E.2d 75 (1944).

65. See cases cited note 58, *supra*.

66. *Smith v. Northern Trust Co.*, 322 Ill. App. 168, 54 N.E.2d 75 (1944); *Dennis v. Dennis*, 271 N.E.2d 55 (Ill. App. 1971); *Burnet v. First National Bank*, 12 Ill. App. 2d 514, 140 N.E.2d 362 (1957).

67. *Id.*

not sought to extend it. In *Burnet v. First National Bank*,⁶⁸ the settlor retained the power to revoke, a life estate in the income, and the right to control the trustees; after the settlor's death the wife was to receive a life estate in the net income. By subsequent amendment, however, the spouse was to be paid \$100 a month while the settlor lived. In addition, the trust was altered to give the trustee the right to make any sale or investment. The court commented that this situation was factually distinguishable from *Smith*.⁶⁹ In addition, the charges of undue influence and misrepresentation that the court felt were present in *Smith*, were absent. Determining that the evidence negated any intent by the donor to defraud the widow's rights, the court did not allow her to reach the trust property.⁷⁰

Illinois does not extend the doctrine of illusory transfer to a revocable living trust which is later made irrevocable by amendment. In *Dennis v. Dennis*,⁷¹ the wife was not left penniless, having been given property of the value of \$27,000 under a will. In addition, considerable other property was passed by will which could be reached by her by election under section 16 of the Probate Act.⁷² The doctrine of *Smith v. Northern Trust* was not extended to this irrevocable trust. These two recent cases are illustrative of the reluctance of the Illinois courts to extend the protection of *Smith*.

C. Totten Trusts

A savings account trust, or Totten Trust, is made by the deposit by one person of his own money in trust for another.⁷³ The beneficiary is paid upon the death of the depositor. It is a tentative trust since it is revocable at will.⁷⁴ The settlor of a Totten Trust has a life interest, can control the trust by withdrawing funds at will, and retains the power to revoke. These are the three elements in *Newman v. Dore*⁷⁵ that made the inter-vivos transfer illusory with respect to the surviving spouse. To be consistent with its holding in the *Newman* case, the New York court should have allowed a surviving spouse to reach the proceeds of a Totten Trust. Yet in *In Re Halpern's Estate*,⁷⁶ the New

68. 12 Ill. App. 2d 514, 140 N.E.2d 362 (1957).

69. *Id.*

70. *Id.*

71. 271 N.E.2d 55 (Ill. App. 1971).

72. *Id.*

73. *In re Totten*, 179 N.Y. 112, 71 N.E. 748 (1904).

74. *Id.*

75. 275 N.Y. 371, 9 N.E.2d 966 (1937).

76. 303 N.Y. 33, 100 N.E.2d 120 (1951).

York Court of Appeals upheld the effectiveness of the Totten Trust against the claims of the widow.

Although the court did not specifically reverse its decision in *Newman*, it held that it had no power to divide up a valid trust, and call it illusory for one purpose and real for another. A trust is illusory only if it is totally invalid.⁷⁷ Thus, the wife can be successfully disinherited if the trust is effective as a trust,⁷⁸ and the *Halpern* court held that the Totten Trust operated as such an effective inter-vivos transfer.

The decision in *Halpern* thus appears to weaken considerably the *Newman* holding. There have been attempts to distinguish *Halpern* on the grounds that the court meant to deal specifically with the popular Totten Trust device.⁷⁹ Another possible approach is that *Halpern* varies procedurally from *Newman*, since the spouse in *Halpern* failed timely to renounce the will.⁸⁰ Regardless of its effect on *Newman*, *In Re Halpern's Estate* limits the effectiveness of the "illusory" test as a protection to the surviving spouse.

Illinois has recognized the validity of the savings account trust.⁸¹ Given the increasing importance of this type of trust in the estate of the average person,⁸² it is doubtful that Illinois will extend its holding in *Smith v. Northern Trust* to the Totten Trust. As a policy matter, allowing the spouse to reach the Totten Trust would upset the testamentary intentions of numerous persons. In addition, the Illinois decision, *Smith*, is expressly based on the New York holding of *Newman*. To the extent that the *Newman* test has been abandoned with respect to Totten Trusts, consistency demands that Illinois not employ the *Smith* decision as a basis for allowing the surviving spouse any interest in Totten Trusts.

D. Joint Tenancy in Realty

Real property which the husband holds in joint tenancy with one other than his wife is another attractive way to evade the widow's share. This method of inter-vivos disposition of wealth resembles the revocable living trust, since the husband retains virtually full, unimpaired incidents of ownership. Illinois courts have held that valid joint tenancy

77. *Id.* In *Newman*, however, the court assumed the trust was valid but termed it illusory as to the surviving spouse.

78. *Id.*

79. Simes, *Protecting the Surviving Spouse by Restraints on the Dead Hand*, 26 U. CINN. L. REV. 1 (1957).

80. See Hayes, *supra* note 56, at 24.

81. *In re Estate of Petralia*, 32 Ill. 2d 134, 204 N.E.2d 1 (1965), *aff'g* 48 Ill. App. 2d 122, 198 N.E.2d 200 (1965).

82. MACDONALD at 206.

in real estate will defeat the rights of the surviving spouse. In *Hoeffner v. Hoeffner*,⁸³ the widow attempted to reach realty which her husband held in joint tenancy with his daughter by a previous marriage. The court determined that a valid joint tenancy had been created under Illinois law. By operation of law, the daughter became absolute owner upon the death of her father,⁸⁴ and the widow could have no claim to the real property:

The property in litigation was owned by joint tenants, and it is elemental that a joint tenancy estate is not an estate of inheritance, the joint owner first dying has no interest which he can devise, and the title to the property held in joint tenancy passes to his survivor, as here, independently of the claims of the wife.⁸⁵

E. *Joint Bank Accounts*

The joint bank account is as popular as the Totten Trust as a testamentary substitute, and, like the Totten Trust, is invulnerable to attack by the widow.⁸⁶ To create a joint bank account, the Illinois Statutes require that the specific words of survivorship be used.⁸⁷ These words are part of the contract between the bank and the two co-tenants. Although a gift law justification may be used,⁸⁸ it is because of this *contract* of survivorship that Illinois refuses to permit invasion of the account by the surviving spouse.⁸⁹ Such was the holding in the case of *Holmes v. Mims*.⁹⁰ Here, the survivorship contract entered into by the husband and a third party was found to be valid and enforceable, and therefore beyond the scope of any claim by the widow.

The wife's chance of any claim to the joint bank account is non-existent unless she can prove that no joint tenancy in fact existed. In *Hamilton v. First State Bank of Willow Hill*, the widow reached the account because the validity of the joint tenancy could not be sustained on either a contract or gift rationale.⁹¹

F. *United States Savings Bonds and Life Insurance*

United States Treasury Regulations provide that Savings Bonds may be issued to a sole owner, to two persons as co-owners, or in the name of

83. 389 Ill. 253, 59 N.E.2d 684 (1945).

84. *Id.*

85. *Id.* at 263, 59 N.E.2d at 689.

86. MACDONALD at 214.

87. ILL. REV. STAT. ch. 76 § 2 (1969).

88. Milewski v. Milewski, 351 Ill. App. 158, 114 N.E.2d 419 (1953).

89. Holmes v. Mims, 1 Ill. 2d 274, 115 N.E.2d 790 (1953).

90. *Id.*

91. Hamilton v. First State Bank, 254 Ill. App. 55 (1929).

one person, payable on his death to another designated beneficiary.⁹² Issuance of the bond in co-owner or beneficiary form can serve as an effective will substitute, which will put the bonds beyond the reach of the widow.⁹³

In *Levites v. Levites*,⁹⁴ the husband purchased a number of Series E United States Savings Bonds payable to himself and various children, grandchildren, and great-grandchildren in co-owner form. The widow sought to reach the bonds after the death of her husband, but the court determined that upon issuance of the bonds in co-owner form the co-owners acquired a present interest.⁹⁵ On the basis of Federal Treasury Regulations, the interest of the co-owners ripened into absolute ownership upon the death of Levites, and his widow had no claim to the bonds.⁹⁶ The husband's intent to defraud his widow was irrelevant,⁹⁷ since title passed under the terms of the survivorship agreement with the United States Government. No Illinois case deals directly with an United States bond issued in the name of beneficiary payable on death, but it is fair to assume that such a bond would receive similar treatment by the Illinois courts.

Life insurance, payable to one other than the widow, is another potential means of evasion. By Illinois case decision, life insurance is not considered an asset of the decedent's estate unless the p.o.d. beneficiary is the decedent himself, his executors, or administrators.⁹⁸ It would appear that life insurance, payable to a third party, is *per se* unreachable by the widow.

In only a few instances has the spouse ever attempted to reach the proceeds of life insurance, since it appears to be immune from her attack.⁹⁹ In a leading New York case,¹⁰⁰ the court refused to include the proceeds as a part of the husband's estate so that the widow could claim her distributive share.

92. 31 CODE FED. REG. § 315.60 (1971).

93. See, *Free v. Bland*, 369 U.S. 663 (1962) which held that the Supremacy Clause embraced the Treasury Regulations governing survivorship of bonds registered in co-ownership form. State property law which conflicted with the right of survivorship was superseded by federal law.

94. 27 Ill. App. 2d 274, 169 N.E.2d 574 (1960).

95. *Id.*

96. *Id.*

97. *Id.*

98. *Gurnett v. Mutual Life Ins. Co. of N.Y.*, 356 Ill. 612, 191 N.E. 250 (1934), *aff'd* 268 Ill. App. 518 (1932); *Illinois Bankers' Life Ass'n v. Collins et al.*, 341 Ill. 548, 173 N.E. 465 (1930).

99. *MACDONALD* at 238.

100. *Mitchell v. Mitchell*, 290 N.Y. 779, 50 N.E.2d 106 (1943).

STATUTORY ATTEMPTS TO DEAL WITH FRAUD
ON THE WIDOW'S SHARE

The previous discussion of case law illustrates that no satisfactory criteria have been developed to determine whether an inter-vivos transfer should be set aside in favor of the spouse's statutory share.¹⁰¹ The Illinois courts are greatly limited in their decisions because they must work within the framework of the statutory share, which applies only to property owned at death. This share is essentially a product of the nineteenth century, an age in which there was less inter-vivos property transmission.¹⁰² Today the emphasis is on inter-vivos dispositive devices,¹⁰³ yet the judiciary receives no statutory direction in applying the provisions of section 11 and section 16 of the Probate Act to nonprobate assets.

In recent years, numerous statutory schemes have been developed to insure the surviving spouse a share in nonprobate assets. The Illinois legislature would have ample guidance were it to attempt to modernize the state's provisions for the widow.

A. Statutes which Extend the Forced Share to Inter-Vivos Transfers

A number of plans have been devised which have specifically extended the statutory share to particular categories of inter-vivos transfer. These statutes have the advantage of objectivity, and provide estate planners with a firm basis on which to advise their clients.

1. The Pennsylvania Statute

Pennsylvania was one of the first states to expand the scope of the forced share by statute.¹⁰⁴ By election, the surviving spouse may treat as testamentary any property conveyed by the decedent to the extent the decedent retained a power of appointment, revocation, or consumption over the principal.¹⁰⁵ While the law is undoubtedly a step in the right direction,¹⁰⁶ there is an inherent problem due to the wording of the statute. Terms such as "conveyance of assets" and "power of con-

101. See generally, MACDONALD, ch. 22; Cahn, *Restraints on Disinheritance*, 85 U. PA. L. REV. 139 (1936); Haskell, *The Power of Disinheritance: Proposal for Reform*, 52 GEO. L.J. 499 (1964); Spies, *Property Rights of the Surviving Spouse*, 46 VA. L. REV. 157 (1960).

102. MACDONALD at 271.

103. *Id.*

104. 20 PA. STAT. ANN. § 301.11 (1950) (Estate Act of 1947) as amended 1956, P.L. (1955) No. 374, § 4.

105. *Id.*

106. MACDONALD at 143.

sumption" are subject to various interpretations, and the Pennsylvania Act fails to define them. It is not surprising, then, that there is uncertainty as to the statute's coverage.¹⁰⁷

2. The New York Statute

In 1954, New York adopted a comprehensive statute which embraced the Pennsylvania approach, but extended it to cover specific inter-vivos transactions.¹⁰⁸ It provides a list of those nonprobate assets which can be included in the net estate against which the spouse may claim. The New York statute treats as testamentary dispositions all gifts *causa mortis*, money on deposit by the decedent in trust for another, money deposited in the decedent's name payable on death to another, joint tenancy property, and transfers by the decedent over which he has a power to revoke or invade.¹⁰⁹ Any of these testamentary substitutes received by the *wife* are to be credited against her elective share.¹¹⁰ Thus, the statute attempts to take into consideration the financial status of the wife herself. New York expressly excludes life insurance, pension plans, and United States Savings Bonds from the coverage of its law. While the devices by which a husband can disinherit his wife are restricted, they are not eliminated entirely. A man intent on pauperizing his widow could convert the bulk of his assets into the exempted areas of insurance, pensions, and United States Savings Bonds.¹¹¹

3. The Uniform Probate Code

The drafters of the Uniform Probate Code¹¹² were undoubtedly influenced by the New York experience. The spouse is given a right to claim one-third of an augmented estate. The augmented estate is the estate at death *reduced* by funeral expenses, cost of administration, all claims of creditors, homestead allowances, family allowances and ex-

107. Clark, *The Recapture of Testamentary Substitutes to Preserve the Spouse's Elective Share: An Appraisal of Recent Statutory Reforms*, 2 CONN. L. REV. 513 (1970) [hereinafter cited as CLARK].

108. N.Y. ESTATES, POWERS & TRUST LAWS § 5-1.1 (McKinney 1967).

109. *Id.* The adoption of this statute renders the furor over *Newman v. Dore* and *In re Halpern* moot in New York. The law includes revocable living trusts and savings bank trusts in the net estate against which the spouse may claim.

110. *Id.*

111. CLARK at 531.

112. UNIFORM PROBATE CODE, PRENTICE-HALL, WILLS, ESTATES, TRUSTS, REPORT BULLETIN 6 § 2-202 (August 27, 1969). In 1962, a committee of the Real Property, Probate and Trust section of the ABA combined with the National Conference on Uniform State Laws to produce the Uniform Probate Code. It was approved by the American Bar Association in August of 1969.

emptions *plus* the value of: any incomplete gifts, revocable trusts, any gifts made within two years of decedent's death to the extent that the aggregate transfers made to any one donee in either of the years exceed \$3,000, and any property the decedent has transferred without adequate consideration to another and to himself as joint tenants.¹¹³ The proceeds of life and accident insurance and of an annuity or pension are not included as a part of the augmented estate only if the beneficiary is one other than the surviving spouse.¹¹⁴ Under the Uniform Probate Code, the husband could still conceivably disinherit his wife by transferring his assets into any of these exempted categories.¹¹⁵

The Uniform Probate Code requires that the widow's *share* of the augmented estate be reduced by any testamentary substitutes received by the surviving spouse. She must account for practically everything she received from her husband during his life: the classification of the testamentary substitutes received by the spouse is broader than that used to determine the augmented estate. The Code provides that her *share* of the augmented estate be reduced by the amount of any inter-vivos trust, life insurance proceeds of which she is the beneficiary, gifts, joint tenancies and the commuted value of any pensions and retirement plans.¹¹⁶ The inclusion of life insurance and pensions here is not unreasonable. It would be expected that the wife would very frequently benefit from life insurance and pension plans and therefore, she is required to account for them. On the other hand, the Uniform Probate Code specifically *excludes* from the *augmented estate* annuity, pension and life insurance plans with non-spouse beneficiaries. The drafters probably considered them an unlikely device by which to disinherit the wife.

Like the New York statute, the Code seeks to prevent the spouse from disturbing testamentary provisions or inter-vivos transfers where she has been adequately provided for.¹¹⁷ Furthermore, the Code gives additional scope and flexibility to the inquiry into the wife's financial position.¹¹⁸

B. *Plans Which Provide a Flexible Restraint on Inter-Vivos Transfers*

The preceding statutes all attempt to protect the widow by enlarging

113. *Id.*

114. *Id.*

115. CLARK at 538.

116. UNIFORM PROBATE CODE § 2-202.

117. Ideally, the competing right of the husband to transfer his property will be superseded only if necessary for the support of the wife. In 1936, Professor Edmund Cahn proposed that certain inter-vivos transfers be deemed voidable. They would be set aside only if the probate estate proved insufficient. Cahn, *Restraints on Disinheritance*, 85 U. PENN. L. REV. 139 (1936).

118. CLARK at 539.

the scope of the probate estate to which her statutory share can be applied.¹¹⁹ A different approach is to be found in those schemes which do not attempt to update the traditional statutory share.

1. The Wisconsin Statute

A recent Wisconsin law¹²⁰ rejects the idea of including nonprobate assets as subject to the elective share. Instead, it reaches only those deliberate plans which deplete the probate estate in an attempt to defeat election by the surviving spouse. Wisconsin's statute does not subject any nonprobate assets to her elective share as a general rule. The widow can reach such assets only if she can prove in a proceeding in equity that a transfer was made for the "primary purpose" of defeating her marital rights.¹²¹ Although such a law is flexible and infringes only minimally on the husband's property rights, it is hardly an improvement on the "illusory" transfer test. The meaning of "primary purpose" in the statute is ambiguous, and consequently, the statute provides no assurance of what will be considered testamentary by the courts.¹²² In addition, even if it is possible to define "primary purpose" by means of a workable standard, proving the essential elements of such a standard would be a difficult task.

2. Support Statutes

Effective restraints on disinheritance necessitate interference with the power of testation and the power to make inter-vivos transfers. The New York statute and Uniform Probate Code go a long way in taking into consideration the financial status of the spouse, but they fail to deal with wealth the wife may have acquired from sources other than transfer by her husband. Under the augmented estate concept, a financially independent woman can unnecessarily upset numerous inter-vivos transfers.

Great Britain has attempted to deal with this very problem by limiting the surviving spouse's share to what is actually *needed*. Much of the

119. See also, Simes, *Protecting the Surviving Spouse by Restraints on the Dead Hand*, 26 U. CINN. L. REV. 1 (1957) for a suggestion that the surviving spouse reach those transfers considered testamentary under Federal estate tax law.

120. W.S.A. 861.17 (1969). In the comments following this provision, the drafters of the Wisconsin statute specifically reject, "at least for the time being," the approach taken by Pennsylvania and New York. The test of primary purpose, they feel, has the advantage of familiarity.

121. *Id.*

122. See generally, Laufer, *Flexible Restraints on Testamentary Freedom*, 69 HARV. L. REV. 277 (1955).

attractiveness of the British Family Maintenance legislation¹²³ is that it is sensitive to the individual requirements of the widow. The British statute authorizes the courts to award maintenance payments out of the decedent's estate to those who qualify as dependents; the surviving spouse is one such dependent. Payments are not based on any fixed fractional part of the estate as is the American custom. Rather, the amount is to be determined by the court.¹²⁴ In making the award, the court is to consider the interests of the persons who otherwise would be entitled to the property concerned, the financial position of the applicant, the testator's reasons for his dispositions, and any other circumstances that the court deems relevant.¹²⁵ Naturally, the British support statute places a great burden on the court, and it increases the likelihood of litigation.¹²⁶ On the other hand, the actual instances in which the husband attempts to disinherit his wife are probably infrequent,¹²⁷ so the actual burden is not as great as it first appears. In 1971, the state of Oregon adopted a statute nearly identical to the British Maintenance legislation.¹²⁸ Such a law is not without defects. Both the British and Oregon provisions are as vulnerable to inter-vivos transfers as is the widow's share under the typical American statute,¹²⁹ since the source of maintenance payments is only the *probate* estate. In his monumental work, *Fraud on the Widow's Share*,¹³⁰ W.D. MacDonald suggests a Model Decedent's Family Maintenance Act which seeks to buttress the basic British notion of reasonable support with anti-evasion provisions.¹³¹

123. 1 & 2 GEO. 6, ch. 45 (1938).

124. *Id.*

125. *Id.*

126. MACDONALD at 292.

127. In the "Chicago" study of the Probate Court of Cook County, based on a sample of 99 estates of testators who died in 1953 and 73 estates of testators who died in 1957, it was found that 100% of the testators who left a spouse and children deviated from the intestate distribution scheme. 100% of the decedents left all their property to the surviving spouse. Durham, *The Method, Process, and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241, 252 (1962). A sample of 84 Illinois attorneys who participated in a total of 1,513 probate proceedings revealed that where there was a surviving spouse, there was need for protection from disinheritance in less than 2% of the cases. Plager, *The Spouse's Share: A Solution In Search of a Problem*, 33 U. CHI. L. REV. 681, 712 (1966). The statistics offered by Durham and Plager are certainly not conclusive since both authors base their findings on samples which represent only a fraction of the total number of estates probated in Illinois each year.

128. O.R.S. 114.015 (1971). Unlike the British statute, the Oregon law gives the surviving spouse priority over creditors. The court is limited to taking one-half of the estate for support if it appears the estate will be insolvent.

129. MACDONALD at 294.

130. *Id.* at 299-327.

131. Certain defined inter-vivos transfers may be reached by the surviving spouse or child in the event the estate of the decedent is inadequate for their maintenance. The transferee may be liable to contribute only if the transfer was unreasonably large at the time it was made under the circumstances then obtaining, and only in an amount in excess of what would have constituted a reasonable transfer. The trans-

CONCLUSION

Illinois' oft proclaimed concern for the surviving spouse¹³² is at odds with the actual protection the state provides for her. The passing of dower calls attention to the glaring inconsistency between public policy and objective reality. Because of the ease with which the husband may deplete his estate, sections 11 and 16 of the Probate Act are virtually ineffectual. Illinois case law has consistently sustained inter-vivos transfers which accomplish this depletion; some statutory change would appear to be called for.

Although a flexible support statute holds considerable appeal, its very flexibility is its drawback. The estate planner would be unable to advise his client with certainty that the latter's transfers would be upheld after his death. Conversely, Section 2-202 of the Uniform Probate Code is painfully precise and is based on the more traditional notion of the one-third elective share. Under the Uniform Probate Code, the certainty of estate planning would be enhanced. The Uniform Probate Code has been recently adopted by the neighboring state of Michigan and should certainly be given careful attention by the Illinois legislature.

Inherent in the state's abolition of dower is the importance attached to the free transferability of property. Under present Illinois law, the rights of the surviving spouse are clearly subordinate. Certainly, the dower right is not today's solution to the problem of the surviving spouse. Yet in Illinois it at least served as an indefeasible protection to some people under some circumstances. The legislature has summarily repealed this protection without providing an indefeasible estate to meet contemporary needs. Only by some change in the present statutory share will the legislature fulfill what is purported to be its goal:

. . . to provide for the support of the wife, not only during the lifetime of the husband, but also after his death.¹³³

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feree shall not be required to contribute if the transfer was made more than three years prior to the transferor's death provided the decedent retained no beneficial interest in the transferred property.

132. *Blankenship v. Hall*, 233 Ill. 116, 84 N.E. 192 (1908). In *re Taylor's Will*, 55 Ill. 252 (1870).

133. *Blankenship v. Hall*, 233 Ill. 116, 84 N.E. 192 (1908).