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HUSBAND AND WIFE AS "HEIR" UNDER TESTATE SUCCESSION

WILLIAM F. ZACHARIAS*

UPWARDS of three hundred year ago Lord Coke made the observation, which is nearly as true now as it was then, that "wills and the construction of them do more perplex a man, than any other learning, and to make a certain construction of them, this excedit juris prudentum artem." However, there was one problem in the construction of wills which did not bother the jurists of that age, but which has risen to vex the profession since then—the construction to be placed on the word "heir" in the light of the modern statutes of descent and distribution which usually provide a husband or wife with a vested interest in the property of the other deceased spouse.

The technical definition of heir, as it was approved in Lord Coke's time was: "He upon whom the law casts the estate immediately on the death of the ancestor," or to use the definition in Bouvier's Law Dictionary: "One born in lawful wedlock who succeeds by descent, and right of blood, to lands, tenements, and hereditaments, being an estate of inheritance." In that state of the law, of course, there was no room for argument on the proposition that neither the husband nor the wife could possibly be deemed the heir of the other.

But the early American legislatures were not satisfied with the common law rules of descent and distribution, and the accompanying estates of curtesy and dower, and soon passed statutes altering them. They have also, from time to time, enlarged the share given the spouse until today the surviving husband or wife of an intestate person takes as much as the entire personalty and one-half the realty in fee in the event of death without issue.

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2 Blackstone, II, Ch. 14, p. 201.
HUSBAND AND WIFE AS "HEIR" UNDER TESTATE SUCCESSION 265

The right of the legislature so to amend the laws relating to intestate property is now unquestioned, regardless of Glanville’s comment as to the necessity of divine intervention to produce an heir, and, of course, in such cases the spouse’s right to take as an heir is not denied. From the outset, therefore, all question of intestate succession is excluded, and we shall confine our discussion to those problems which arise in cases where the property owner dies testate.

As to testate succession, Jarman says:

Gifts to the heir, whether of the testator himself, or of another, are so frequently found in wills, and where these instruments are the production of persons unskilled in technical language, the term heir is so often used in a vague and inaccurate sense, that to ascertain and fix its signification in regard to real and personal estate respectively, whether alone or in conjunction with other phrases which most usually accompany it, is a point of no inconsiderable importance.

The problem in such cases usually arises when the deceased testator or testatrix, after providing a suitable estate for the surviving spouse, devises or bequeaths the balance of the estate to his or her "heirs." In such case the surviving spouse usually claims, and sometimes receives, a vested share in the remainder on the theory that

4 Blaine’s Glanville, p. 143.

5 Kochersperger v. Drake, 167 Ill. 122 (1897), holding, “The right to inherit and the right to devise being dependent on legislative acts, there is nothing in the constitution of this state, which prohibits a change of the law with reference to those subjects at the discretion of the law-making power.” State ex rel. Lockhart v. Mason, 21 Ind. 171 (1863), states, “It is undoubtedly competent for the Legislature to determine, upon the death of a person, upon whom the descent of his property shall be cast; that is to say, who shall be his legal heirs.” McKinney v. Stewart, 5 Kan. 384 (1870), to the effect that “The statute may make any person an heir. An heir at law is simply one who succeeds to the estate of a deceased person.” Menard v. Campbell, 180 Mich. 583, 147 N. W. 556 (1914); In re Shumway’s Estate, 194 Mich. 245, 160 N. W. 595 (1916). Rood on Wills, sec. 450 states: “... where the statutes make any part of the intestate lards descend to the surviving spouse, such spouse is thereby made heir.” See also Ill. Stat. Ch. 39, sec. 1, clause 3.


7 Underhill on Wills, II, 832, states “the fact that the testator has made a substantial testamentary provision for his widow in lieu of dower and then has devised all the residue to his ‘heirs’ may raise a strong presumption that he does not intend she shall take as one of his heirs.”
he or she is included within the term heirs as used in the will, because, so that argument runs, the heirs are to be determined by the intestate laws of the jurisdiction and any person receiving a vested share by the language of that statute is or should be included as a devisee. On the other hand, runs the counter-argument of the blood kin of the testator, the term heirs should be defined as it was at common law, or in the manner the testator intended it should be construed, and if so, then the spouse should be excluded from the residue and confined solely to the portion given him or her by the express language of the will.8

The question, then, becomes one of local law, and, as would be expected in such a case, there are several solutions to be found, differing not only as to the several states and the distinct methods of approach used by the several courts, but also differing between the nature of the property concerned and the size or degree of estate given the spouse by the intestate laws of the several states at different times in their legal history.

To avoid too much repetition, since the possible grounds for including or excluding the spouse from the definition of the term heirs are more or less limited, it is deemed appropriate to take the judicial decisions of Illinois, since, from the standpoint of historical development of the subject, this state affords a representative example, and the number of its pertinent decisions exceeds that of most others.9

The earliest case in Illinois was Rawson v. Rawson,10 decided in 1869, in which case an estate consisting solely of personalty was ordered distributed "to my heirs at law according to the statutes of the State of Illinois for

8 Shriver v. Shriver, 127 Md. 486, 96 A. 615 (1916), sets the keynote for this line of argument by stating: "When used to designate devisees of real estate, and when a different interpretation is not required by the context, the word 'heirs' is confined to its primary significance, and is applied exclusively to those who would inherit the land of the ancestor to whom reference is made for their identification."

9 The precise problem has never been considered by the courts of Arizona, Idaho, Louisiana, Montana, Nevada, New Mexico, North Dakota, Oklahoma, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, and Wyoming.

1052 Ill. 62.
such case made and provided." There being no issue, the widow claimed the entire estate, while the other heirs claimed that since the widow had not renounced she should only be given dower in the personalty. The court, awarding the entire personal estate to the widow, held:

.... as there is nothing in the will calling for a particular or special construction to be placed upon the term "heirs at law," as used in the will, it must be interpreted according to its strict, technical import; that heirs at law are such as are made so by the statute, and are the person or persons on whom the law casts the estate in case of intestacy; that the widow of the testator is within the contingencies specified in the statute, and is the heir at law to this estate ....

Three years later, in Richards v. Miller, the court passed on a will involving realty, by which the testatrix, after giving her husband $2000 and certain personal items, devised the remainder of her estate to "my heirs at law." In giving the husband a statutory share, the court said:

Where the will gave the residue of the estate to the heirs at law, uncontrolled by any other words, the property must descend according to the law of the place where it is situated, and where the will is to be carried into effect.

The next case involved the proceeds of an insurance policy made payable to the "legal heirs or assigns" of the assured, and the dispute arose between the widow and children surviving. The court refused to follow the two preceding cases on the ground that no issue survived in those cases, pointed out that the share given the widow by the fourth clause of section 1, chapter 39, of the Revised Statutes of 1874, entitled "Descent," was in the nature of dower, and went on to say:

We know of no respectable authority, and venture there is none, holding that one entitled to dower or an interest in the nature of

11 52 Ill. 62, p. 69-70.
12 62 Ill. 417 (1872).
13 62 Ill. 417, 423.
dower, or any allowance of personal property only, because of the survivorship of the husband or wife, is held to be included within the legal definition of "heir." Nor is the distinction between the word "widow" and the word "heir" less marked in common parlance. No one, having children, speaks of his wife, in contemplation of her survivorship, as his "heir;" but it is believed it is universal that she is referred to as "widow," and the children as "heirs," and came to the conclusion that the widow was not entitled to any part of the proceeds since there was nothing to which her dower could attach.

Shortly thereafter the court affirmed a judgment against another insurance association, in a suit by the widow and children of the assured, merely stating:

It is provided by the certificate, that in the event of the prior death of the beneficiaries named, the benefit should be paid to the legal heirs or devisees of the holder of the certificate. A correct reading of this provision would be: in case of the prior death of any one of the class designated to take the benefit, the heirs of the holder would take the share of the deceased party. Here, the plaintiffs were the heirs of the holder, and they took the whole benefit, and the judgment in their favor was regular, and authorized by law. It failed to comment on the prior decision in the Gauch case.

In the same year (1884) the court decided the case of Kelley et al. v. Vigas et al., and while that case is not quite in point it contains some very interesting dicta so far as this problem is concerned, as the court was called upon to construe a will which concluded, "the remainder of my estate to be divided equal among my heirs at law." The court said, in part:

It will be seen the testator, by his will, disposed of the remainder of his estate to his "heirs at law," but made no devise of it to any one by name, other than designating them as a class. The

15 88 Ill. 251, 256.
16 Covenant Mutual Benefit Ass'n v. Hoffman, 110 Ill. 603, 607 (1884).
17 88 Ill. 251, supra, footnote 15.
18 112 Ill. 242.
word "heir," it is said, when uncontrolled by the context, designates the person appointed by law to succeed to the estate in question, as in case of intestacy, and so the authorities seem to hold. Who are heirs of a deceased person is determined and declared by statute, and the quantity each shall take, as heir, is also fixed. Observing these rules of construction, it would seem the residue of the estate of the testator should be divided in accordance with the provisions of the statute, as in cases of intestacy.

Thus, the court pointed out that the use of the term "heir" was to be construed as meaning that class of persons who would take by virtue of the Illinois statutes rather than those included in the common law definition of the word.

The insurance problem came up for further examination in 1888 in a case where the deceased insured left a widow but no issue, and the certificate was made payable to "the devisees or heirs at law" of the member. The court refused to depart from the theory that heirs were to be ascertained from a reference to the statute, and if the spouse was included therein, then that she was an heir even to the exclusion of all other kin.

Several years passed before the case of Smith v. Windsor was decided. This suit presented a state of facts wherein the testator, after giving his widow a life estate with power to sell and convey, and the right to dispose of the remainder by will as she saw fit for charitable purposes only, provided that at her death the remainder of the estate was "to descend to my heirs at law in the proportion designated and provided by the Statutes of the State of Illinois." Testator left no issue, and two weeks after his death, his wife died intestate. The statutory heirs of the wife, in a suit for partition of the lands, claimed that one-half of the realty had vested in them on the theory that the wife was included in the remainder over to "my heirs at law," while the collateral relatives

19 112 Ill. 242, 245.
20 Alexander v. Northwestern Masonic Aid Ass'n, 126 Ill. 558, 18 N. E. 556.
21 239 Ill. 567, 88 N. E. 482 (1909).
of the testator contended that the language was restricted to mean heirs of the blood of the testator. The Supreme Court in passing on this case did not object to the previous refusal of the earlier courts to follow the common law definition of the term used. In fact, they agreed specifically that a widow was, in a case like this, included as an heir within the strict legal sense of the term, but they decided against the wife’s heirs on the ground that they believed the testator had used the words in a colloquial and popular sense, and that they would have to apply his intention rather than the technical definition of the term. Since the cardinal rule of construction, especially in the case of wills, is the application of the intention of the parties where it does not violate positive rules of law, no objection can be made to the decision of the court in this case, except that the court did not seem to give consideration to the additional words referring to the local statute, which additional words have generally been held to display an intention to include statutory, rather than common law, heirs within the meaning of the term used.\textsuperscript{22}

Following this case came the decision in \textit{Black v. Jones},\textsuperscript{23} where the court had occasion to pass on a will which provided several absolute gifts to the widow of both realty and personalty, and placed the remainder of the estate in trust for the benefit of the widow for her life, with a remainder over on her death to “my heirs at law living at the time of my death.” Although the testator left no issue, it was held that the widow received no part of the trust realty, because, although recognizing the general rule in Illinois that the word “heirs,” in its legal sense, meant those whom the law appointed to take the intestate estate, the court found the intention of the testator was such as to exclude her, at the same time pointing out that the widow did not always take a vested interest in her husband’s realty, hence could not generally be understood to be an heir.

\textsuperscript{22} See footnote 63, post.
\textsuperscript{23} 264 Ill. 548, 106 N. E. 462 (1914).
In 1916 the court had an opportunity to establish the rule to be applied in cases like these, where the will contains a reference to the local statute, but failed to do so on the ground that it would follow the intention of the testator. The particular case before it, McGinnis v. Campbell,24 involved a will by which the remainder over, after life estate to the widow, was given to "my legal heirs at the time of my decease, to be distributed to them according to the laws of descent of the State of Illinois." The testator died without issue, and the statute at that time would have given the widow one-half in fee. After pointing out that while it was not contrary to law to give a life tenant an interest in the fee also, although such a situation was unusual, the court decided that the testamentary scheme was intended to give the widow a life estate only, and that the heirs referred to in the will were the testator's blood heirs, and having arrived at that conception of his intention, the court, of course, decided against the claim of the widow.

When deciding the case of Walker, Trustee v. Walker et al.,25 in 1918, the court gave an interest in personality to the husband of a deceased legatee, relying on the reference in the will to the Statute of Descent as displaying an intention on the part of the testator to use the term in some other than its common law meaning. In the light of the previous decisions of the court, the language with reference to the intention of the testator would seem gratuitous but for the decision in the Gauch case, which was relied on by the trustee to deprive the husband of the legatee of any share of the estate. The court distinguished the two cases on the ground of the additional language used in the will in the Walker case, and went on to state:

But where there is an express reference, as here, to the statute of distribution, and the husband would take under such statute of distribution, by the great weight of authority in this and

24 274 Ill. 82, 113 N. E. 102 (1916).
25 283 Ill. 11, 118 N. E. 1014 (1918).
other jurisdictions, and by sound reasoning, the husband must be held to be included in the term "heirs at law."\(^{26}\)

This case is the last word from the Supreme Court of Illinois on the subject of personalty, and clearly evidences an intention to differ from the ancient common law meaning of the word heir.

A suit for partition, entitled *Henkins et al. v. Henkins et al.,*\(^{27}\) decided in 1919, resulted in the widow of the life tenant, a daughter-in-law of the testator, receiving a share in the fee simple title to lands, from her deceased husband, not because of any reference to the Statute of Descent as occurred in the previous cases mentioned, but because her husband (the life tenant) had been given an interest in the remainder through failure on the part of the testator to set the time of determining the class of heirs as of the date of the life tenant's death. Having found that the life tenant was not to be excluded from the class, since he lived after the testator, the passage of the estate in lands to the widow came about through intestate law rather than under the devise in the will.

The decision in *Peacock v. McCluskey*\(^{28}\) is not quite pertinent to this problem, but in determining whether or not the rule in Shelley's case was applicable to the devise in question, the court held that the facts did not warrant construing the language of the devise to exclude the husband of the testatrix from the remainder over after a life estate which had been given to "my son . . . and at his death to be distributed among his heirs according to the laws of this state" by saying, "Having determined that testatrix used the word 'heirs' in its technical sense, then by the use of the term she brings the devise within the rule in Shelley's case . . . ;"\(^{29}\) hence the husband might be one of the heirs, and the life tenant was held to have received a fee simple estate.

An interesting situation developed in the case of *Belle-

\(^{26}\) 283 Ill. 11, 27.
\(^{27}\) 287 Ill. 62, 122 N. E. 88 (1919).
\(^{28}\) 296 Ill. 87, 129 N. E. 561 (1921).
\(^{29}\) 296 Ill. 87, 91.
ville Savings Bank v. Aneshaensel,\(^\text{30}\) heard in 1921, wherein both realty and personalty were involved. Here the testator had a life insurance policy payable to his wife as beneficiary, and also gave her certain personalty for life with a remainder over to "the heirs of my said wife." The wife predeceased the testator, and upon his death a dispute arose between the heirs of the wife and the heirs of the testator as to which class should receive the property mentioned. It was held that as to the life insurance, she having died intestate, her husband was her sole heir, and of course his relatives were entitled to the proceeds thereof; but as to the personalty given by the will, even though the husband was within the language used, the evident testamentary scheme was to exclude the husband from the class, and so it was awarded to the relatives of the wife. The will also devised certain realty to the wife, but this devise was held to have lapsed by her death before the testator, hence would pass to the husband's heirs. While the decision contains language with regard to the meaning of the term "heirs," the case turns upon the intention of the testator and throws but little light on the attitude of the court toward this problem.

In Potter v. Potter,\(^\text{31}\) decided in 1922, the testator had given his wife a life estate in certain lands, and provided for a remainder over "to be equally divided between our living children or to their living heirs." This language was held sufficient to include the wife of one child and the husband of another, both of whom had died in the lifetime of the testator without issue, on the ground that the word "heirs" was a technical word with a fixed legal meaning, and, unless controlled by or inconsistent with the context, must be interpreted according to its strict technical meaning as importing those persons designated by law to succeed to the estate in case of intestacy. On rehearing the court passed on the question of the claimed

\(^{30}\) 298 Ill. 292, 131 N. E. 682 (1921).

\(^{31}\) 306 Ill. 37, 137 N. E. 425 (1922).
intention of the testator to mean issue of his blood, by saying:

Had the testator intended to narrow the meaning of the word "heirs" and to use it in the sense of children or descendants, the proper and the only legal way to have accomplished that purpose would have been to use the ordinary legal words that are commonly employed for that purpose, such as "bodily heirs" or "heirs of their bodies," or words of similar import.\(^2\)

Justice Cartwright dissented from the decision, but solely on the grounds of the intention of the testator, and not on the legal definition of the terms used in the will.

That the widow is not an heir when the statutory estate awarded to her is less than a fee-simple, was decided in the case of *Emery v. Emery*,\(^3\) where the testatrix placed her realty in trust with directions to convey the property to her children on January 1, 1925, if they were then living, or to "their heirs" if dead. One son died before the date named, leaving a widow and issue, and prior to the 1923 amendment of the Descent Act. The court applied the technical definition to the term "heirs," and awarded the estate to those named in the statute of descent, but pointed out that prior to the 1923 amendment the widow only received dower where issue survived, hence she could not take under the will in question.

Among the Appellate Court decisions in Illinois on this problem we find the case of *Lawwill v. Lawwill*,\(^4\) involving the proceeds of a mutual benefit certificate made payable to the heirs of the member. The court held that the term was to be defined in the light of the prevailing statute, and since the member left no issue and the subject matter was personalty, the widow was awarded the entire proceeds.

Also in point is the case of *Harris v. Rhodes*.\(^5\) Here the second husband of the testator's widow was given a

\(^2\) 306 Ill. 37, 45.
\(^3\) 325 Ill. 212, 156 N. E. 364 (1927).
\(^4\) 29 Ill. App. 643 (1888).
\(^5\) 130 Ill. App. 233 (1906).
share in personalty arising under the doctrine of equitable conversion from a direction in the will to the executor to sell the realty on the death of the widow and to distribute the proceeds to certain named persons and the remainder "among the heirs at law of my said wife." The court again applied the statutory definition of the term, but pointed out that the husband was not entitled to the entire balance because the will directed an equal distribution among the heirs of the wife, and this language indicated an intention on the part of the testator to substitute a different plan of distribution from that provided in the statute.

Summarizing briefly, therefore, we find that in Illinois, in the absence of a contrary intention which is to be drawn from the will itself, the surviving spouse will be included in the term "heir," whether used simpliciter or in conjunction with a reference to the Statute of Descent and Distribution, and whether realty or personalty is involved, if, in fact, the statute would give the spouse an absolute estate, and that the common law definition of the term as meaning blood relatives of the deceased ancestor is no longer recognized.

Illinois was by no means the first state to repudiate the common law definition of heir or next of kin. The honor in that regard belongs to the North Carolina Supreme Court which court in 1826 in a lengthy and well written opinion by Justice Henderson gave full consideration to the basis for the use of the term "heir." He said:

He on whom the law casts an inheritance on the death of the ancestor is designated by the technical word heir . . . . Does the widow who succeeds to the estate of her deceased husband under the act of 1801 come to the estate by purchase or descent? For she must come in by the one or the other of these two ways; there is no other. It is very clear that she does not come in by purchase; that is, by her own act she is perfectly passive; it is thrown upon her by law, as much as it is thrown upon the uncle, there being no issue, brothers or sisters, or their issue . . . . If she does not come in by the purchase, it follows that she comes
in by descent. She is, therefore, in such case, the heir of the husband. Yet she is not of his blood.\footnote{Croom v. Herring, 11 N. C. 393, 394-397 (1826).}

Pertinent comment from some of the decisions of other states on this subject will serve to illustrate their attitude in seeking to minimize the effect of the ancient views regarding heirship. Thus California states:

The "heirs" of a person are those whom the law appoints to succeed to his estate in case he dies without disposing of it by will. In this state the heirs . . . are determined by the provisions of section 1386, Civ. Code, and the use of the term "heirs" in an instrument of conveyance to designate the persons in whom the estate granted is to vest will, in the absence of any qualifying terms, be construed to mean the heirs as thus ascertained.\footnote{Hochstein v. Berghauser, 123 Cal. 681, 56 P. 547, 549 (1899).}

In Colorado, where a contingent remainder had been given by will to the heirs of the life tenant, it was held that when the life tenant died leaving a widow surviving the contingency had been met, and the widow took the devise.\footnote{Binkley v. Switzer, 75 Colo. 1, 223 P. 757 (1924).} From Connecticut comes the following language:

The original and underlying reason for presuming that the word "heirs" referred to those who would inherit real estate was that that was the historical significance of the word, and it was more probable than otherwise that the testator understood it to have that meaning. Under the feudal conceptions of the early English law, the descent of real estate was of primary importance, while the descent of personal property was of little consequence. Not only as a word of art, but in common parlance, the word "heirs" thus signified those who inherited real estate. While the rule came to us from this source, the reason for it has never existed to any extent in this country. In the absence here of the historical feudal background, the sanction for the technical definition of the word seems to be largely lacking. On the contrary, our conception of property has never given predominant importance to real estate. The popular conception of inheritance in this country included personal as well as real property, the
historical distinction between the two has disappeared, and today personal property is of equal importance with real estate as the subject of inheritance. Indeed, we cannot reasonably assume that a testator today in the use of the word "heirs" intends to suggest only one who inherits real estate but rather one who inherits property generally. As matter of fact, there are probably few testators who ever heard of the historical meaning of the word. It has acquired a broader meaning, and is defined in dictionaries as those who inherit property generally. Its original or historical meaning is given secondary place only, and may fairly be said not to exist at all in the popular mind. Since the intent of the testator is always the controlling purpose of the construction of wills, this modern conception of the word in the popular mind cannot rightly be ignored. Usage makes language, and, the historical significance of this word being largely lost, the intent of those who make wills will obviously be found by giving it the popular and generally understood meaning. To adhere to the historical meaning under such circumstances would more often than otherwise defeat the real intent of the testator.

Extracted from a recent decision in a Kentucky case\(^{40}\) is this language:

\[\ldots\] but when she [testatrix] added the language, "in accordance with the law laid down by the statutes of the state of Kentucky" she, in effect, gave a definition to, and indicated the sense in which she intended to employ, the words "heirs at law," and which was, that by the use of such words she intended to include all those who would take the property under the "statutes of the state of Kentucky."\(^{41}\)

While in 1873 Massachusetts had held in the case of \textit{Haraden v. Larrabee} that a mere reference to the Statute of Distributions was not sufficient to include a widow of the testator,\(^{42}\) the same court in 1887 was asserting:

If, in determining who are heirs, we depart from our statutes, and go back to the common law \ldots we might be required to rec-


\(^{41}\)2 S. W. (2d) 1057, 1059.

\(^{42}\)113 Mass. 430 (1873).
Ognize rules of descent for estates in fee-simple which have not been in force in the territory of this commonwealth since the passage of chapter 14 of the Province Laws, 1692-3.

And, acting under a statute passed in 1880, the court gave a husband an estate in lands devised to certain persons for life with remainder to “their respective heirs” by pointing out:

Although, in the case at bar, the heirs of Susan do not take from her by inheritance, but take as persons designated by the will; yet we know of no way of determining the persons intended by the will except by ascertaining the persons who by law would have inherited the estate from her if she had died seized of it and intestate.

In 1909, Massachusetts again had the same situation before it as it had in the Haraden case, but this time the court held for the widow, because “whether the phrase under all circumstances necessarily is equivalent to legal heirs or whether it may sometimes have the meaning of heirs by the blood, or possibly some other significance,” from the will under consideration it was evident that the testator intended to have his estate distributed according to the statutes of descent.

Nebraska pointed out that since 1907, when the estates of dower and curtesy were abolished in that jurisdiction, the husband and wife were considered heirs of each other, stating: “Unless excluded by unambiguous words or by clear implication from the language used in a will, the description therein of ‘heirs’ includes a surviving spouse as well as a surviving child or surviving children.”

North Carolina, following the early decision mentioned before, has frequently held, at least in so far as personality was concerned, that the use of the term “heirs,” even simpliciter, would send the court to the local statute of distributions as its guide, not only to ascertain who shall

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44 143 Mass. 389, 393, 9 N. E. 747, 750.
46 In re Hanson’s Estate, 118 Neb. 208, 224 N. W. 2, 5 (1929).
succeed, but how they shall succeed and in what proportions. Even in Pennsylvania, where the state of the law is such that the use of the word "heirs" simpliciter would probably result in barring a spouse from the estate, the court recognizes the probable altered intention of the testator when additional language is present, for we find this language in a decision rendered in 1915:

... the only reasonable meaning to be given to its words is that she intended to save every legacy ... to those who would take ... under the intestate laws of the state. The words "next of kin" are to regarded as superfluous, or as having been used ... in their popular sense, meaning those who are entitled to the personal estate of a decedent under the statute of distribution.

In 1931, in a case where personality was involved, the court did not need the reference to the statute to include a widow, but instead pointed out that unless a contrary intent is indicated by the will a widow will be considered an heir of her husband, because, it was said, "where the word 'heirs' is used in a bequest of personality it means heirs as ascertained by the statutes of distribution."

In accord with this view is the decision from South Carolina handed down in 1916, where it was said that when the word "heirs" is used in a will and it does not appear from the context who were intended to be included, then it becomes necessary to resort to the statute of distributions for the purpose of ascertaining those who are included within that term; and the court awarded a share in the testator's realty to his widow, she being within the definition of the term thus applied.

It would be possible to quote from many other decisions along the same line, but for outstanding examples of the extent to which some states may go in substituting a statutory definition for the common law meaning of "heir" or "next of kin" reference is made to the legal

47 Freeman v. Knight, 37 N. C. 72 (1841).
48 In re Garrett's Estate, 249 Pa. 249, 94 A. 927, 928 (1915).
49 In re Simpson's Estate, 304 Pa. 396, 156 A. 91, 93 (1931).
history of Connecticut and Michigan. Both of these states started out by excluding the spouse, but as the descent and distribution statutes were changed from time to time, both have come to hold that the words mentioned include the spouse whether used simpliciter or with a reference to the statute, and regardless of whether the subject matter be realty or personality.

On the other hand a number of states have flatly refused to adopt any other definition than that which prevailed at common law, at least in so far as wills are concerned, even in the face of their own liberal statutes giving the spouse a vested absolute share in the deceased spouse's intestate estate. Among these states are Iowa, which holds to the view that there is a marked difference in common parlance between "widow" and "heir." Maine has several cases all holding that regardless what statutory estate the spouse may receive in the other's estate, the spouse does not take as an heir. New Hampshire says that ordinarily, in the absence of evidence showing a different intention, the word will be understood as used in its legal sense, but qualified this by saying that in the interpretation of a will very little competent evidence may be sufficient to show that the testator used the words in a broader sense than their legal meaning. New York holds that the presence of additional language is not sufficient to enlarge the class of legatees to include the spouse and that in the absence of anything showing a different intention the words will be limited to mean relatives in blood, as they have not, by legal usage or general custom, come to mean anything else. Virginia, in 1903, preferred to follow the English Chancery Court decisions and those of Massachusetts, but has not since had occasion to review the question in the light of

51 Phillips v. Carpenter, 79 Iowa 600, 44 N. W. 898 (1890).
52 Morse v. Ballou, 112 Me. 124, 90 A. 1091 (1914); McCarthy v. Walsh, 123 Me. 157, 122 A. 406 (1923).
54 Luce v. Dunham, 69 N. Y. 36 (1877).
HUSBAND AND WIFE AS "HEIR" UNDER TESTATE SUCCESSION

the changes made in the decisions of the latter court. The sole case from Texas is in accord with these decisions, but carries the proviso that regardless of the technical meaning of the words legal heirs, if the intention of the testator can be ascertained from the will itself, then such meaning they must bear.

We thus find that, depending on the nature of the property involved, or the presence or absence of a reference in the will to the local laws of descent, or the appearance in the will of a definite testamentary intention, the courts may answer the question of the spouse's right to take as an heir in different ways.

Statistically considered, when realty is involved and the term "heir" is used simpliciter, in a total of sixty-five cases, the attitude of the courts is generally to hold in favor of the blood kin and against the spouse on any of the following grounds:

1. That the word still bears its common law meaning.
2. That the will contains an evident intention to exclude the spouse.

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56 Allison v. Allison's Executors, 101 Va. 537, 44 S. E. 904 (1903).
57 Peet v. Commerce etc. R. R. Co., 70 Tex. 522, 8 S. W. 203, 205 (1888).
58 Perry v. Bulkley, 82 Conn. 108, 17 A. 1014 (1909); Mason v. Baily, 6 Del. Ch. 129, 14 A. 309 (1888); Haney v. Moore, 140 Ga. 691, 29 S. E. 772 (1913); Prather v. Prather, 58 Ind. 141 (1877); McMenomy v. McMenomy, 22 Iowa 148 (1867); Journell v. Leichton, 49 Iowa 601 (1878); Blackman v. Wadsworth, 69 Iowa 80, 21 N. W. 190 (1884); Murphy v. Murphy, 190 Iowa 874, 179 N. W. 530 (1920); Trout v. Kendall, 125 Me. 85, 130 A. 878 (1925); Shriver v. Shriver, 127 Md. 486, 96 A. 615 (1916); Fabens v. Fabens, 141 Mass. 395, 5 N. E. 650 (1886); Gardner v. Skinner, 195 Mass. 164, 80 N. E. 825 (1907); Edwards v. Stults, 97 N. J. Eq. 44, 128 A. 609 (1925); Bayley v. Lawrence, 118 N. Y. S. 286 (1909); Dodge's Appeal, 106 Pa. St. 216, 51 Am. Rep. 519 (1884); In re Lesieur's Estate, 205 Pa. 119, 54 A. 579 (1903); In re Raleigh's Estate, 206 Pa. 451, 55 A. 1119 (1903).
3. That the statutory estate of the spouse is less than an interest in fee simple.  

4. That the prior estate on which the rights of the spouse depended had failed.

Of these sixty-five cases, however, a total of twenty-four have included the spouse within the meaning of the term, because the courts, in the absence on any controlling intention, have defined the term "heir" as including any person who would take of the fee simple under the local statute of descent.

When realty is involved and the term "heir" is not used simpliciter, but the will makes reference to the local statute, the decisions are not uniformly in favor of the surviving spouse, as would be expected, although the attitude of the courts is generally to include the spouse within the definition. The decisions against the spouse usually result because:

60 Wilson v. Fridenburg, 19 Fla. 461 (1882); Miller v. Finegan, 26 Fla. 29, 7 So. 140 (1890); Emery v. Emery, 325 Ill. 212, 156 N. E. 364 (1927); Rose v. Rambo, 120 Miss. 305, 82 So. 149 (1919); Wells' Guardian v. Moore, 16 Mo. 478 (1852); Wilkins v. Ordway, 59 N. H. 37, 47 Am. Rep. 215 (1879); Drake v. Pell, 3 Edw. Chan. (N. Y.) 266 (1839).

61 Hartnett v. Langan, 282 Mo. 471, 222 S. W. 403 (1920).

62 Hochstein v. Berghauser, 123 Cal. 681, 56 P. 547 (1899); Wittenbrook v. Wheeldon, 128 Cal. 150, 60 P. 664 (1900); Dickey v. Walron, 200 Cal. 335, 253 P. 706 (1927); Daniels and Fisher Realty Co. v. Kenyon, 261 F. 407 (Colo.) (1919); Binkley v. Switzer, 75 Colo. 1, 223 P. 757 (1924); Richards v. Miller, 62 Ill. 417 (1872); Kelley v. Vigas, 112 Ill. 242 (1884); Belleville Savings Bank v. Aneshaensel, 298 Ill. 292, 131 N. E. 682 (1921); Potter v. Potter, 306 Ill. 37, 137 N. E. 425 (1922); Dusz v. Chappel, 41 Ind. App. 651, 84 N. E. 775 (1908); Dodge v. Beeler, 12 Kan. 525 (1874); Couch v. Wright, 20 Kan. 103 (1878); Allen v. Poth, 210 Ky. 343, 275 S. W. 804 (1925); Lavery v. Egan, 143 Mass. 389, 9 N. E. 747 (1887); Proctor v. Clark, 154 Mass. 45, 27 N. E. 673 (1891); Holmes v. Holmes, 194 Mass. 552, 80 N. E. 614 (1907); In re Hanson's Estate, 118 Neb. 208, 224 N. W. 2 (1929); Weston v. Weston, 38 Ohio St. 473 (1882); Durfee v. MacNeil, 58 Ohio St. 238, 50 N. E. 721 (1898); Connertin v. Coucannon, 122 Or. 387, 259 P. 290 (1927); In re Potter's Estate, 13 Phila. (Pa.) 318 (1860); Seabrook v. Seabrook, 31 S. C. Eq. (10 Rich). 495 (1859); Turner v. Guest, 117 S. C. 14, 108 S. E. 177 (1921).

Note: In the Mersereau case, supra, the devise was to "the persons entitled thereto under and by the laws of the State of New York;" the court held that the Tillman case, 95 N. Y. 17, was not controlling because the intention of the testator was not to give the property to "heirs," which would have excluded the spouse, but to the "persons" referred to in the state statute.
HUSBAND AND WIFE AS "HEIR" UNDER TESTATE SUCCESSION 283

1. An intention is expressed in the will to exclude the spouse.64

2. The court distinguishes or disregards the additional language.65

3. The spouse is said to take by reason of his or her status and not as an "heir."66

4. The prior estate on which the spouse relies was held to have failed.67

The decisions affecting personal property are also in conflict, but they are more evenly balanced. In the first place, when the term "heir" is used in a bequest of this species of property it is legally incorrect. Justice Henderson pointed out in the case of Croom v. Herring:

It could not originally be used to designate him on whom the law cast the goods or chattel property, for it cast them on no one; no person was appointed by law to succeed to the deceased ancestor; on his death they became bona vacantia, and were seized by the king on that account, and by him, as grand almoner, applied to pious uses (now considered superstitious) for the good of the soul of their former owner.68

64 In re Wilson's Estate, 184 Cal. 63, 193 P. 581 (1920); Tyler v. Theilig, 124 Ga. 204, 52 S. E. 606 (1905); Smith v. Winsor, 239 Ill. 567, 88 N. E. 482 (1909); McGinnis v. Campbell, 274 Ill. 82, 113 N. E. 102 (1916).

65 Carter v. Carter, 10 Hawaii 687 (1897) where the court said that "the additional language relates merely to division and would be implied in the will anyway." Knickerbocker v. Seymour, 46 Barb. 198 (N. Y. 1863); Lewis v. Arnold, 42 R. I. 94, 105 Atl. 568 (1919), holding that the reference to the statute was merely to show that persons were to take per stirpes and not per capita; Allison v. Allison, 101 Va. 537, 44 S. E. 904 (1903).

66 McCarthy v. Walsh, 123 Me. 157, 122 A. 406 (1923), where court stated, "The statute does not change the status of the widow with reference to her deceased husband's estate. It enlarges her interest by giving her an estate in fee instead of an estate for life. She still takes not as heir, but as widow;" Richardson v. Martin, 55 N. H. 45 (1874); Dodge's Appeal, 106 Pa. St. 216, 51 Am. Rep. 519 (1884), which points out, "while she acquires an interest or estate in the land, and not a mere lien thereon, that interest is of a special and peculiar nature, essentially different from the estate of inheritance which the law casts upon the heir." These cases overlook the fact that as soon as the widow has acquired her statutory estate it becomes inheritable property insofar as her own heirs are concerned, to whom she becomes the ancestor.


68 11 N. C. 393, 394 (1896).
Statutes, of course, became necessary to regulate the passage of personalty upon the death of the owner, and at common law, this species of property devolved upon the next of kin, subject, however, to the rights of the husband. The courts have solved the problem arising from this legal error, however, either by finding that the word "heir" is used in connection with a blended gift of realty and personalty, customarily so found in a residuary clause, hence properly used to describe the one who would take the realty at common law, and hence the personalty also, or they have translated the term "heir" to mean "next of kin" or "statutory distributees."

The decisions regarding personalty, therefore, depend on which of these methods was used by the court to make the will, otherwise incorrect, effective, and are aligned as follows. When the term is used simpliciter, the spouse has been held to be excluded because:

1. The literal common law meaning of the term "heir" has been applied regardless of the species of property involved.

2. The word has been translated to mean "next of kin," which is given a common law definition of blood relatives.

69 Fabens v. Fabens, 141 Mass. 395, 5 N. E. 650 (1886), the court stating, "There is nothing in the will which shows any intention that the real estate should go in one direction and the personal in another. The provision is a single one...." In Allison v. Allison, 101 Va. 537, 44 S. E. 904, 913 (1903), appears the language: "... as the residuary clause of the will blends real and personal estate and gives it to the heirs at law of the testator, the persons answering that description should enjoy the whole...."


71 For an example of the use of the term "distributees" see Eby's Appeal, 84 Pa. 241 (1877), but notice the criticism in Henry v. Henry, 31 N. C. 278, especially pp. 285-6, regarding the use of the word "distributees" which was then apparently an innovation.

72 Ruggles v. Randall, 70 Conn. 44, 38 A. 885 (1897); Miller v. Metcalf, 77 Conn. 176, 58 A. 743 (1904); Harrell v. Osborne, 12 Ky. Law Rep. 686; Lord v. Bourne, 63 Me. 368 (1873); Herrick v. Low, 103 Me. 353, 69 A. 314 (1907); Houghton v. Hughes, 108 Me. 233, 79 A. 909 (1911); Morse v. Ballou, 112 Me. 124, 90 A. 1091 (1914).

73 Townsend v. Radcliffe, 44 Ill. 446 (1867); McMurphy v. Boyles, 49 Ill. 110 (1868); Richardson v. Martin, 55 N. H. 45 (1874); Tillman v. Davis, 95 N. Y. 17, 47 Am. Rep. 1 (1884); Snider v. Snider, 42 N. Y. S. 613 (1896).
3. The court has found the will to contain an intention to exclude the spouse.\textsuperscript{74}

4. In construing a local statute, the court impressed on it a common law meaning and continually applied that meaning because of the failure of the legislature to amend the statute after it had once been construed.\textsuperscript{75}

On the other hand, the spouse has been included in an equal number of cases, even though the term was used simpliciter, and in these cases the courts have placed their decisions on the grounds that:

1. The word would be defined as "next of kin" according to the statutes or as "statutory distributees."\textsuperscript{76}

2. The word would be left untranslated and the statutory definition applied anyway.\textsuperscript{77}

3. The will indicated an intention to include the spouse.\textsuperscript{78}

As would be expected, when the term "heir" is used in conjunction with additional words, the majority of the decisions involving personalty is heavily in favor of including the spouse, and in only one instance has the court found it necessary to search for the intention of the testa-

\textsuperscript{74} Trexler v. Miller, 41 N. C. 248 (1849); Henderson v. Henderson, 46 N. C. 221 (1853); In re Wunder's Estate, 270 Pa. 281, 113 A. 378 (1921).

\textsuperscript{75} Overdieck's Will, 50 Iowa 244 (1878).


\textsuperscript{77} Harris v. Rhodes, 130 Ill. App. 233 (1906); Brooks v. Parks, 189 Mich. 490, 155 N. W. 573 (1915).

\textsuperscript{78} Fidelity and Columbia Trust Co. v. Vogt, 250 S. W. 486 (Ky. 1923); In re Scott's Will, 204 N. Y. S. 478 (1924).
There are six decisions against the spouse, but these depend on the testamentary intention, or the particular emphasis that New York has placed on the term "next of kin" when used with other language, giving this term its original common-law meaning.

The proceeds of life insurance policies, although a species of personalty, have been distinguished by the courts from the general rules, and while most courts will award the proceeds to the spouse either by applying the statutory definition or an intention of the assured as drawn from provisions in the charter of the insurance association or other facts, it is possible to find early cases where the spouse was excluded. These cases, however, turn on the fact that at the time of the decision the spouse was given only a dower interest in the personalty, or that, in line with other decisions of the same state, the spouse had been held outside of the term "heir" for some

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79 In re Newman's Estate, 68 Cal. App. 420, 229 P. 898 (1924); Rawson v. Rawson, 52 Ill. 62 (1869); Walker v. Walker, 283 Ill. 11, 118 N. E. 1014 (1918); Clay v. Clay, 63 Ky. 295 (1865); Lee v. Belknap, 163 Ky. 418, 173 S. W. 1129 (1915); Vandyke v. Vandyke, 223 Ky. 49, 2 S. W. (2d) 1057 (1928); Hascall v. Cox, 49 Mich. 435, 13 N. W. 807 (1882); In re Fretheim's Estate, 156 Minn. 366, 194 N. W. 766 (1923); Knickerbocker v. Seymour, 46 Barb. 198 (N. Y. 1863); In re Slosson's Est., 149 N. Y. S. 797 (1914); Croom v. Herring, 11 N. C. 393 (1826); Brown v. Brown, 37 N. C. 309 (1842); In re Garrett's Estate, 249 Pa. 249, 94 A. 927 (1915). In the case of Lawrence v. Crane, 158 Mass. 392, 33 N. E. 605 (1893), the court looked to the additional words as an indication of the testator's intention, which was probably necessary at that time, because the Massachusetts courts had not yet repudiated the common law definition of the term "heir."

80 Haraden v. Larrabee, 113 Mass. 430 (1873); Commercial Trust Co. v. Gould, 168 A. 822 (N. J. Eq. 1933).


82 Mullen v. Reed, 64 Conn. 240, 29 A. 478 (1894); Covenant Mutual Benefit Ass'n v. Hoffman, 110 Ill. 603 (1884); Alexander v. Northwestern Masonic Aid Ass'n, 126 Ill. 558, 18 N. E. 556 (1888); Lawwill v. Lawwill, 29 Ill. App. 643 (1888); Thompson v. N. W. Mutual Life Ins. Co., 161 Iowa 446, 143 N. W. 518 (1913); Lyons v. Yerex, 100 Mich. 214, 58 N. W. 1112 (1894).


other reason. To correct such decisions, Iowa enacted a special statute which expressly included the spouse in the proceeds of life insurance, even though the policy be made payable to the "heirs" of the assured, which statute has had the effect of overruling one of the cases against the spouse.

From a consideration of the decisions and the attitude of the courts on this subject we achieve the result that for the purposes of the practitioner, the rules evolved by the courts may be succinctly stated as follows:

Generally speaking the word "heir" or "heir at law," when used in a will in its common law technical sense does not include the spouse, but when the term "heir," so used, is qualified by its connection with other sufficient words, it will usually be given a non-technical meaning so as to include the wife or husband as heir. Thus, where the term "heirs" is used, not simpliciter, but in connection with other words, or where there is an express reference to the statute of distributions or descent, and the surviving spouse is capable of taking thereunder, he or she will take by virtue of the term "heirs" or like words. When the surviving spouse is made a statutory heir, he or she will generally take, but not where the spouse takes an interest as by way of dower, or some marital right.

But even the presence of such rules may not be helpful in any particular case since the courts are primarily concerned with applying the intention of the testator, and they will follow that intention, if clearly shown, without regard to technical definitions of terms used in the will. Such statements as that presented above are only helpful in ascertaining the intention of the testator when the will is silent as to his true purpose. It is suggested

85 Phillips v. Carpenter, 79 Iowa 600, 44 N. W. 898 (1890).


87 This statement is based on Thompson, Construction and Interpretation of Wills (1928), sec. 170, pp. 298 et. seq., as modified by the writer. A portion of the language in the text cited is taken from Higginbothom v. Higginbothom, 177 Ky. 271, 197 S. W. 627 (1917).
that the expenditure of a few extra words in drafting wills may have the effect of preventing litigation of the type herein commented upon. For example, a bequest or devise “to my heirs at law (or next of kin) as if I had died intestate and unmarried” clearly illustrates an intention to exclude the spouse of the testator. If the testator desires to include his spouse, the clause might well read, “to my heirs at law (or next of kin) according to the statutes of this state, including among such heirs my wife A if she should survive me.”

Note, however, that unless the will directs distribution to be made among the next of kin “equally” or in some other way which will indicate an intention to effect a distribution described by a statute in existence at the time the will is drafted, the testator’s intent may be defeated, for distribution will be made according to the plan laid down by the statute at the time of the testator’s death, which may be varied between the time of drafting the will and the time of its operation.

In keeping with the spirit of change in the law, the writer favors the uniform adoption by the courts of the statutory definition for “heir” which will include the spouse, rather than the maintenance of those distinctions which may have been appropriate generations ago when feudal policies prevailed but which do not now meet with uniform approval in a democratic civilization. The trend of modern decisions, at least, is in that direction.

ADDENDA

Since the foregoing article was written the Appellate Court for the Second District of Illinois has given fur-

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88 The use of the last clause in the devise is recommended to prevent the distribution of any of the testator’s property to the heirs of the wife if she should predecease the testator and he then die without changing his will.
90 Potter’s Est., 13 Phila. 318 (Pa. 1889) contains the statement that “Chief Justice Tilghman has defined heirs as the persons who are representatives of the decedent by the law of the country.” Reference to the local statute, therefore, determines who shall take and in what proportion, and all named therein should be included within the term “heirs.”
ther consideration to the problem and has produced an anomalous decision in the case of Hall v. Ray, Executor,\textsuperscript{91} which requires comment.

In that case the testatrix, Mary Wetzel, gave her estate to an executor with directions to convert the estate into personalty and, after a life-estate therein to her husband, directed the division of the corpus among her sister, brothers, and the child of a deceased brother equally, and further provided that in case of the death of either before testatrix or life tenant died then the portion given such legatee “shall be equally divided among his or her lawful heirs.”

A brother of the testatrix died testate in 1928 after her death, but before that of the life tenant, leaving a widow and no issue surviving him, and in his will he gave his widow his entire estate. The widow filed a claim against the estate of the life tenant, he having been appointed executor under the will in question, demanding a one-fifth interest in the corpus of the estate of Mary Wetzel, as the sole heir, devisee and legatee of her deceased husband. This claim was denied in the county and circuit courts of Warren county, and came before the appellate court, which decided at the June, 1934, term that the claimant was not entitled to take under the will of Mary Wetzel as “heir” of her deceased husband.

The opinion, relying on three cases,\textsuperscript{92} states that the Statute of Descent making the surviving widow an heir of her deceased husband applies only in case two things concur: (1) that the husband die without child or children or descendants, and (2) that he die intestate; and, while recognizing that the legatee in question left no issue, the court found that the claimant’s husband had died testate and held the statutory requirements were not satisfied, hence she could not be an heir.

Further examination of the cases cited indicates that they do not justify their application in the instant case.

\textsuperscript{91} 275 Ill. App. 344.
\textsuperscript{92} Gauch v. St. Louis Mutual Life Ins. Co., 88 Ill. 251; Alexander v. Northwestern Masonic Aid Ass’n, 126 Ill. 558; Rolofson v. Rolofson, 246 Ill. App. 305.
In the Gauch case\(^93\) and the Rolofson case\(^94\) the deceased persons left children or descendants, which is not the situation in the instant case, and it was then rightly held on the statutes existent at the time\(^95\) that the widow's share was that of dower or its equivalent. The third case cited, that of *Alexander v. Northwestern Masonic Aid Ass'n*\(^96\) wherein the insured died intestate leaving a widow and collateral heirs surviving, decided that the term "devises or heirs at law" in an insurance policy included the widow and awarded her the proceeds thereof, on the ground that "it is the actual capacity of inheritance at the time of the death of the owner of the property, and not the fact that a particular person might have inherited from him under a state of facts which did not exist, that determines who is heir,"\(^97\) and held that reference to the Statute of Descent was all that was necessary to determine that capacity.\(^98\) If anything was decided in this case, it more nearly supported the contention of the appellant in the case under consideration than the decision of the appellate court, particularly since in each instance personalty was involved, and the facts are parallel, with the exception that in the Alexander case the insured died intestate while in the instant case the husband died testate.

The Appellate Court appears to have overlooked the case of *Potter v. Potter*,\(^99\) decided by the Supreme Court of Illinois in 1922, which in turn parallels the instant case in many respects, although the estate appears to have consisted of realty.\(^100\) The language in the Potter will was treated as being substantial in effect, and the widow of a son and the husband of a deceased daughter were

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\(^93\) 88 Ill. 251 (1878). See footnote 14.

\(^94\) 246 Ill. App. 305 (1927).

\(^95\) See Black v. Jones, footnote 23.

\(^96\) 126 Ill. 558, 18 N. E. 556.

\(^97\) 126 Ill. 558, 565.

\(^98\) Affirming same case in 27 Ill. App. 29.

\(^99\) 306 Ill. 37, 137 N. E. 425.

\(^100\) The facts and the reasons controlling the decision in the Potter case appear *supra*, footnote 31.
held to be entitled to take the shares which the respective spouses would have taken had they lived. Of equal weight are the earlier Supreme Court decisions in the Rawson case and the Richards case heretofore commented upon.101

The remaining point to the decision under consideration rests upon the effect of the fact that the child through whom the appellant claimed had died testate, which, so the appellate court insisted, operated to remove her from the class of heirs named in the will, although, inferentially, they would have allowed her to recover had he died intestate. Had the appellant been obliged to rely on the will of her husband to claim the share in question, it is conceded that she could not have succeeded unless her husband had himself received a vested estate in the fund during his lifetime on which his will could operate to transfer the share to appellant.102 In the instant case, however, the appellant is not, unless limited by the language of her claim, insisting that she participate in the estate in question because of her husband’s will, but rather that she takes in lieu of him by way of substitution under the will of Mary Wetzel,103 and the only way the heirs of her husband can be determined, as the Supreme Court of Illinois has stated in numerous instances,104 is by reference to the Descent Act which alone, in Illinois, determines heirship.105 Undue weight, it would seem, has been accorded to the language of the act in question pertaining to intestacy, particularly in view of such cases as Rawson v. Rawson,106 Richards v. Mil-

102 As to whether the gift over after the life-estate in the instant case was vested or contingent, see Henkins v. Henkins, 287 Ill. 62, 122 N. E. 88, supra, footnote 27.
103 See Potter v. Potter, 306 Ill. 37, 137 N. E. 425.
105 See Kochersperger v. Drake, 167 Ill. 122, for the right of the legislature to change the Statute of Descent and to make new classes of heirs.
106 52 Ill. 62.
where, even though the decedent died testate, the Supreme Court of Illinois went direct to the Statute of Descent to determine heirship.

It is suggested, therefore, in view of the fact that the precedents relied on do not support the decision, and the court has apparently misinterpreted the effect of the Statute of Descent, that the decision in the Hall case is erroneous and not at all in accord with the decisions of the Supreme Court of Illinois on this subject.

107 62 Ill. 417.
108 112 Ill. 242.
109 325 Ill. 212, 156 N. E. 364. Husband of person claiming to inherit died testate, but since his will did not operate as an execution of a power of appointment, and the statute then only gave his widow dower, she was denied the right to take as an heir of the original testator, though court said (p. 324), "The word 'heirs,' when uncontrolled by the context, designates the persons appointed by law to succeed to the estate in cases of intestacy, and where a devise is made to a class of persons not named, as heirs at law of the testator, so that the statute must be invoked to ascertain the persons who take, its provisions as to the quantity each shall take must also be observed."