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Discussion of Recent Decisions

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DISCUSSION OF RECENT DECISIONS

Constitutional Law—Personal Civil and Political Rights—Whether Compulsory Disclosure Under Oath of Political Beliefs and Affiliations is a Valid Prerequisite for the Acquisition of Public Benefits or the Securing of Public Employment—Two recent cases deal with the "cold war" problem of the validity of legislation requiring a person, under oath, to disclose his political beliefs and affiliations as a prerequisite to receipt of public benefits or to appointment to public employment. In one such case, that of Dworken v. Collopy,\(^1\) an inferior

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1 91 N. E. (2d) 564 (Ohio Com. Pleas, 1950).
Ohio tribunal declared that provision of the Ohio Unemployment Compensation Act to be valid which states that an individual who advocates, or who is a member of a party which advocates, overthrow of the government by force shall not be eligible for compensation. The statute in question, among other things, required the claimant for unemployment compensation benefits to attach to his claim a written affidavit amounting to a test oath of eligibility. The plaintiff, in his character as taxpayer, unsuccessfully advanced a claim of unconstitutionality predicated on an alleged infringement on the right of free speech as well as because the statute possessed ex post facto effects. In the other case, that of Garner v. Board of Public Works of the City of Los Angeles, a California intermediate appellate court upheld the constitutionality of a municipal ordinance which required a loyalty oath of its employees and also required the inclusion, within such oath, of a statement that the employee had not, within five years, advocated or taught the overthrow of the government by force. The plaintiffs there, some seventeen city employees who had been discharged for refusal to comply with the ordinance, sought a writ of mandate directing their reinstatement. The petition was denied by the trial court and that holding was affirmed when the appellate court could find no violation of the right of freedom of speech.

The major constitutional question with which the courts have been confronted in determining the validity of loyalty-oath legislation has been whether such compulsory disclosures of political beliefs and affiliations serve to violate constitutional rights to free speech. The conception that the right of free speech necessarily includes the right to be silent finds support in the decision of the United States Supreme Court in West Virginia State Board of Education v. Barnette in which it was held that a state statute requiring public school pupils to give a prescribed salute and to pledge allegiance to the American flag was an unconstitutional attempt to control national unity and political beliefs. The court there asserted that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein." Pointing out that "censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of the kind the State is empowered to prevent and punish," the court there reasoned that "it would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence."
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Subsequent thereto, however, in the case of *American Communications Association v. Dowds*, the court upheld the provision of the Labor Management Relations Act of 1947 which conditioned the right of a labor union to present cases to the National Labor Relations Board upon the filing of affidavits by its officers, as well as by the officers of the parent organization, that they were not members or supporters of the Communist Party. The court there apparently recognized that one is entitled to believe and to advocate what he chooses, including the right to be silent about those matters, unless there is a clear and present danger that a substantial public evil will result therefrom. Unlike the situation in the Barnette case, the court seemed to recognize the possibility of a clear and present danger arising from permitting Communists to hold office in a labor union, hence found justification for the denial of the benefit of a government service to a union if its officers refused to take a loyalty oath. The holding was not based on the assumption that all those who refused to take the oath were subversive but rather that the requirement for such an oath was, in effect, a reasonable means of insuring against an evil which Congress had a right to prevent, i.e. subversive control of the labor forces of the nation.

The decision of the California court in the Garner case, following and quoting from the Dowds case, clearly subordinates the right to be silent concerning one's political affiliations and teachings to the superior public interest in a "loyal" public service, just as the right in regard to one's political beliefs was there subordinated to the public interest in a "loyal" labor movement. While the court did not say it saw a clear and present

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7 339 U. S. 382, 70 S. Ct. 674, 94 L. Ed. 925 (1950).
8 29 U. S. C. A. § 159(h), sub. 9(h).
9 The court also relied on the decision of the California Appellate Court in Steiner v. Darby, 88 Cal. App. (2d) 481, 199 P. (2d) 429 (1948), which upheld a fact-finding program of the Board of Supervisors of Los Angeles County designed to require county civil service employees to swear allegiance to the federal and state constitutions as well as to compel answer, under oath, of advocacy of seditious concepts or membership in organizations formed to advocate the overthrow of government by force. No violation of a right to freedom of speech was there found to exist because it was said that the county employees had by accepting public employment, foregone privileges they might have had as private citizens. The oath there required was found to be a lawful safeguard against the dangers likely to arise from the hiring or retention of disloyal government employees.
10 The California court noted that the question whether the legislature could compel disclosure of mere beliefs or opinions in contrast to prior overt acts was not presented. The ordinance in question required an averment as to whether or not the public employee was then, or ever had been, a member of the Communist Party and advocated, or had advocated, within five years, the overthrow of the government by force. These provisions were interpreted as referring to overt acts rather than beliefs. The oath involved in the Dowds case specifically referred to a "belief" on the subject. It will be worth while to note whether future distinctions of this nature will be made.
danger of a substantive evil resulting from disloyal persons holding public posts, the fact that it regarded the oath requirement as a reasonable step in the loyalty program can have that meaning and only that meaning.\footnote{In the Ohio case of Dworken v. Cleveland Board of Education, 94 N. E. (2d) 18 (Ohio Com. Pleas, 1950), similar reasoning was utilized to uphold the validity of a non-Communist loyalty oath prescribed for public school teachers. After developing numerous reasons for declaring Communist teachers to be a threat to the nation and the state, the court said the regulations adopted represented "sincere and laudable efforts to protect our children from the susceptibility of such harm." See 94 N. E. (2d) 18 at 32.}

The decision in the Collopy case, on the other hand, represents a radical extension of the doctrine of the Dowds case, for the parties there required to declare their loyalty were not public employees nor even individuals holding strategic or influential positions in industry but were simply claimants for unemployment compensation benefits. Such being the case, it would appear that the Ohio court must have felt that all persons who advocate the overthrow of the government offer a clear and present danger to the community, regardless of their status. It would, seemingly, simplify the test of constitutionality to the point where no inquiry is necessary other than to determine whether a reasonable relation exists in conditioning the right to a public benefit on the taking of a loyalty oath. No other court has gone thus far to date.

In answer to the ex post facto argument, the Ohio court pointed out that: (1) the statute before it, unlike the California regulation involved in the Garner case, had no relation to past activities or allegiances but spoke only of the present; and (2) the statute was not penal in nature. It was "not intended," the court emphasized, "as a means to punish anyone for past conduct or affiliations."\footnote{91 N. E. (2d) 564 at 572. On that basis, the court distinguished the situation before it from the one involved in Cummings v. State of Missouri, 71 U. S. (4 Wall.) 277, 18 L. Ed. 356 (1867), which had declared a Missouri test oath statute to be invalid because directed against those who had seen service in the Confederate forces.} The decision may be highly significant in this respect, for it may serve to indicate what could prove to be an important and highly necessary limitation on legislation of this type.\footnote{In Dworken v. Cleveland Board of Education, 94 N. E. (2d) 18 (Ohio Com. Pleas, 1950), the same plaintiff as in the principal Ohio case unsuccessfully challenged a program calling for oaths from teachers, which oaths pertained only to present beliefs and called for no penalty. A different court there concerned approved the reasoning used in the instant case on the ex post facto aspect of the problem.} The California case, decided some three months later, might have produced a different result if the court had considered the Ohio decision for the ordinance there upheld clearly required an inquiry into past as well as present conduct and beliefs.

An analogous problem may arise when a state attempts to impose a
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nonsubversive pledge on an elected public official or a candidate for public office. A New Jersey statute, for example, required candidates for certain state offices to take an oath that they did not advocate the forceful overthrow of the government and were not members of any group dedicated to such a purpose. This provision was held invalid, in *Imbrie v. Marsh*, because in certain instances the language of the oath of office was set forth in the state constitution, while in the other instances at least the ground to be covered by the oath was so described. The New Jersey court indicated that the legislature had no power to require an oath different from or in addition to that prescribed by the constitution.

The existence of such constitutional provisions, however, did not prevent the Maryland court, in *Shub v. Simpson*, from upholding a state statute which required a candidate for state public office to file an affidavit with his nomination certificate that he was not a subversive person. The statute was said to be justified under the rationale that it did not provide an additional oath of office but was merely a proper exercise of the "inherent power to safeguard elections" by preventing the submission to the electorate of the names of those who would be ineligible to hold office.

One could only hazard a guess as to the probable validity of legislation requiring a loyalty oath as a condition to private employment, proposals for which have arisen during this "cold war" era. If the "clear and present" danger test is to be utilized by the courts in this regard, much of the reasoning used to justify the demand for oaths from public employees and labor leaders, persons whose positions clearly affect the public interest, will be inapplicable. In addition to a constitutional guarantee of free speech, the right to work for a living in a lawful occupation, well established under the Fifth and Fourteenth Amendments, should not

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16 The New Jersey decision should be of special interest in Illinois for the state constitution provides for the form of the oath of office to be taken by members of the General Assembly as well as that required of other civil officers: Ill. Const. 1870, Art. IV, § 5, and Art. V, § 25. The last mentioned section provides that "no other oath, declaration or test shall be required as a qualification."
17 — Md. —, 76 A. (2d) 332 (1950).
18 Flack Ann. Code Md., Art. 85A, § 15, added by Laws 1949, Ch. 86. The provision was held not to be applicable to candidates for federal offices, such as congressmen, on the ground the state had no right to add to the qualifications laid down in the federal constitution.
19 In a brief per curiam opinion filed in the case of Gerende v. Board of Supervisors of Elections of Baltimore City, — U. S. —, 71 S. Ct. 565, 95 L. Ed. (adv.) 495 (1951), the United States Supreme Court affirmed the decision of the Court of Appeals of Maryland, — Md. —, 78 A. (2d) 660 (1951). The effect of which was "to deny the appellant a place on the ballot for a Municipal election . . . on the ground that she had refused to file an affidavit" as was required by the same statute which had been referred to in the Shub case. The court agreed that the statutes, as construed in the Shub case, involved no federal constitutional question.
be overlooked. But valid or not, the effectiveness of legislation calling for test oaths is questionable. Why, for example, should it be supposed that a subversive individual would hesitate to perjure himself when his scruples have not prevented him from being subversive? Furthermore, the type of conduct concerning which disclosure under oath is most frequently sought is often itself of criminal character, which conduct should have been uncovered by proper and efficient police work. There is also more than a little of that which is un-American in the spirit which lies behind legislation of the kind here noted.

H. L. Blostein

Descent and Distribution—Persons Entitled and Their Respective Shares—Whether a Surviving Joint Tenant Who Has Slain the Co-tenant Obtains Clear Title to the Jointly Owned Property by Virtue of the Right of Survivorship—The Illinois Supreme Court, in the recent case of Welsh v. James, had occasion to pass for the first time on a unique problem concerning the rights of a surviving joint tenant, who had slain his co-tenant, in the jointly owned property. The defendant there concerned and his wife held title to four tracts of land and three bank accounts in joint tenancy. While so holding such property, he unlawfully killed his wife but, having then been declared insane, he was not tried for the offense. When defendant was subsequently restored to sanity, the heirs at law of the deceased wife sued to establish a constructive trust for their benefit, claiming that defendant held an undivided one-half interest in the several properties for them with a reversion in their favor as to the other one-half interest subject only to a life estate in favor of defendant. A motion to dismiss the complaint for failure to state a cause of action was sustained and, a freehold being involved, plaintiffs appealed directly to the Supreme Court. The decree dismissing the complaint was there affirmed.

20 Ill. Rev. Stat. 1949, Vol. 1, Ch. 38, § 558, for example, makes it a crime “for any person openly to advocate, by word of mouth or writing, the reformation or overthrow by violence or any other unlawful means, of the representative form of government now secured to the citizens of the United States and the several states by the Constitution of the United States and the constitutions of the several states.”

21 Professor Henry Steele Commager, writing in Harper’s Magazine for September, 1947, under the title “Who is Loyal to America?” states: “... loyalty is not conformity. It is not passive acquiescence in the status quo. It is not preference for everything American over everything foreign. It is not an ostrich-like ignorance of other countries and institutions. It is not the indulgence in ceremony—a flag salute, an oath of allegiance, a fervid verbal declaration. It is not a particular creed, a particular version of history, a particular body of economic practices, a particular philosophy... It is a realization that America was born of revolt, flourished on dissent, became great through experimentation... Every effort to confine Americanism to a single pattern, to constrain it to a single formula, is disloyal to everything that is valid in Americanism.”

1 408 Ill. 18, 95 N. E. (2d) 872 (1951).
In reaching that solution, the court examined the nature of the interest created in the property as well as the mode adopted for its creating and, finding that the interest had been created by grant, concluded that the defendant was seized of the whole estate, as had been the case with his wife until her death, from the moment the interest was first acquired. To hold that the defendant was no more than a constructive trustee would be to divest him of an interest in the property in violation of that provision of the state constitution which declares that "no conviction shall work corruption of blood or forfeiture of estate." In the light thereof, as well because of statutory penalties placed on unlawful homicide by the Criminal Code, the two constituting a declaration of public policy in the matter, the court felt compelled to affirm the decree.

Relatively few cases exist presenting the problem involved in the instant case and, of these, the majority reach an opposite result. Two cases cited by the court, one involving a joint bank account and the other involving realty held by tenants by entirety, have achieved the same result. In all other cases, the wrongdoer has been divested of the jointly owned property either upon the constructive trust theory, expressly disapproved in the present case, or upon a tenancy-in-common theory. Under the first of these, and relying on a principle that no man should be permitted to profit by his own wrongdoing, a constructive trust has been invoked for the benefit of the heirs of the deceased co-tenant, but certain differences may be noted. In Sherman v. Weber, for example, a trust was declared in favor of the wife's heirs to the extent of a one-half interest for the remainder of her normal life expectancy on the proposition that, as the wife was older than the husband, he in all probability would have outlived her. Where the age differential has been reversed, however, the result has been to declare a trust in the full property subject to the use and enjoyment of a one-half interest for the remainder of the surviving joint tenant's life. Other cases apply the doctrine to its fullest extent and declare a trust as to the entire property. While the result reached in

5 The theory has been held inapplicable to a case where a wife killed her husband while she was afflicted with somnambulism on the ground that she was not a wrongdoer: In re Eckhardt's Estate, 184 Misc. 642, 54 N. Y. S. (2d) 484 (1945).
6 113 N. J. Eq. 451, 167 A. 517 (1933).
7 Bryant v. Bryant, 193 N. C. 372, 137 S. E. 188 (1927).
these cases might seem desirable on the basis of the purely moral considerations involved, it cannot be denied that these courts have overlooked not only the true nature of the interest created under a joint tenancy but also the nature of the constitutional prohibition against a forfeiture of estate.

The tenancy in common theory finds expression in very few cases. It is predicated on the proposition that the rules relating to joint tenancies contemplate a normal death so that the question of the survival of one of the joint tenants over the other should be subject only to the natural vicissitudes of life. Where one of the joint tenants disrupts this normal process his act, in effect, severs the joint tenancy relationship, leading to a tenancy in common between the slayer and the heirs of the victim. The cases which endorse this rule purport to go behind the fiction of joint tenancy in order to avoid the stigma of violating the constitutional prohibition against forfeiture of estate, but while they avoid the high degree of uncertainty prevalent in the constructive trust cases and prevent the wrongdoer from taking advantage of his criminal acts they disregard the true nature of the estate in joint tenancy and violate the clear constitutional prohibition against forfeiture. The action of the court in the instant case, therefore, even if it represents a minority view, reaches the only, at present, legally justifiable result.

This does not mean that Illinois courts are necessarily and irrevocably committed to the law expressed in the case for the ethical problem involved could be resolved by proper action on the part of the legislature. Pennsylvania has adopted a so-called "slayer statute" which might well serve as a model for other states. While it covers all aspects of the wrongdoer's connection with realty, it particularly deals with the joint tenancy situation by giving the decedent victim's estate an immediate one-half interest to be increased by the other half upon the death of the slayer, unless the slayer shall have obtained a severance of the property or a decree granting partition. Any joint tenancy created under such a statute would be governed by its terms so as to make the right of survivorship

11 Ibid., § 3441.1.
12 Ibid., § 3446, also covers the situation likely to develop where the joint tenancy arrangement exists between more than two persons. It also recognizes the possibility of a trust by agreement or arising from the contribution of a greater proportion of the price by one of the parties.
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depend upon a lack of wilful participation by the survivor in the cause of the deceased joint tenant's death, thereby obviating a violation of the constitutional provision against forfeiture. It would also serve to avoid any confusion inherent in an application of mortality tables for it establishes a conclusive presumption that the deceased victim would have outlived the slayer, regardless of the respective ages of the parties.

A secondary question appears to be raised by the opinion in the instant case, at least by way of inference, and that is one dealing with the right of a slayer to inherit, or to take by devise or bequest. One of the major cases cited by the court in support of its holding in the instant case was the earlier Illinois decision in Wall v. Pfanschmidt,\(^13\) handed down prior to the enactment of any statute on the general subject. It was there held that the constitutional prohibition against forfeiture of estate was a good defense to a suit designed to prevent a murderer from inheriting from his victim. Since that decision, certain statutory provisions have been enacted\(^14\) but no cases have, as yet, been decided thereunder. The approval given by the court to the holding in the Wall case might lead one to a belief that, upon such a suit being presented, the court could hold those sections of the statute to be unconstitutional.

Again, an examination of the decisions of other jurisdictions which have dealt with the problem, in the absence of statutory provision, discloses an apparent lack of uniformity. In those cases which have reached the same conclusion as that obtained in the Wall case\(^15\) primary consideration has been given to the constitutional prohibition involved and the unambiguous nature of the statutes relating to descent of property. In those cases which reach a contrary conclusion,\(^16\) the basic emphasis has been placed on the public policy argument that no man shall be allowed to profit

\(^{13}\) 265 Ill. 180, 106 N. E. 785 (1914).


\(^{15}\) Crumley v. Hall, 202 Ga. 588, 43 S. E. 646 (1917); Hill v. Noland, 149 S. W. 288 (Texas Civ. App., 1912); McAllister v. Fair, 72 Kan. 533, 84 P. 112 (1906); Eversole v. Eversole, 169 Ky. 793, 185 S. W. 487 (1916); Shellenberger v. Ransom, 41 Neb. 631, 59 N. W. 935 (1894); Owens v. Owens, 10 N. C. 240, 6 S. E. 794 (1898); Holloway v. McCormick, 41 Okla. 1, 136 P. 1111 (1913); DeGraffenreid v. Iowa Land & Trust Co., 20 Okla. 687, 95 P. 624 (1908); Deem v. Millikin, 6 Ohio Cir. R. 357 (1892); In re Carpenter's Estate, 170 Pa. St. 203, 32 A. 637 (1895); In re Johnson's Estate, 29 Pa. Super. 255 (1905).

from his own wrongdoing and on the theory that the constitutional prohibition is inapplicable as there is no deprivation of property but only the prevention of the acquisition of rights in property. Without attempting to analyze these theories but merely presenting them as being of historical importance, it is interesting to note that, at present, almost every jurisdiction has a statute designed to prevent a murderer from acquiring the property of the victim and the cases which have arisen thereunder have uniformly held these statutes to be constitutional,\(^7\) either by way of recognition of a change in public policy or because of a judicial belief that such statutes do not cause a forfeiture. The Illinois court could, and most likely would, side with that view.

It should be noted, however, that the holding on any particular set of facts falling within this general field cannot easily be determined in advance. Where statutory regulation exists some unusual results have been obtained because of varying statutory language. For example, a slayer convicted of manslaughter was allowed to inherit in one jurisdiction because the statute there required a conviction for murder in order to be operative.\(^8\) It has been said that a widow who has slain her husband is entitled to her widow’s distributive share as the same is more nearly in the nature of a right of contract rather than one of inheritance.\(^9\) An heir who had committed suicide after murdering the ancestor has been declared to be a source of inheritance for lack of a conviction for murder,\(^10\) while an out-of-state conviction has been said to be insufficient in another case.\(^11\) It was held, in *Ward v. Ward*,\(^22\) under a statute that required proof that the murderer had killed for the purpose of inheriting from the victim, that a conviction for murder without proof of the requisite purpose behind the act was not enough to disinherit. Of course, a subsequent

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\(^9\) In re Kuhn’s Estate, 125 Iowa 449, 101 N. W. 151 (1904).


\(^22\) 174 Va. 331, 6 S. E. (2d) 664 (1940).
declaration of insanity, which would operate to prevent a trial of the killer, would preserve the right of inheritance where conviction for the crime is an essential prerequisite to bring the statute into the case.\textsuperscript{23}

It would seem obvious, then, that the real problem is not so much whether a constitutional statute could be drafted but rather whether adequate language can be devised to meet the peculiar sets of facts likely to arise. The Pennsylvania statute mentioned above possesses merit in that no conviction is required, but it does insist that the killing be wilful and unlawful. If the insane slayer, for example, is to be penalized by being deprived of his rights as a joint tenant or as an heir, the proposed model would have to be suitably altered.

A. L. Wyman, Jr.

\textbf{Descent and Distribution—Rights and Liabilities of Heirs and Distributaries—Whether or Not, Where Intestacy has been Found to Exist, a bona fide Purchaser of Property from an Heir is Protected Against Claims by Devisee Named in a Subsequently Probated Will—}

The Supreme Court of Illinois had occasion to decide a relatively rare question when it considered the direct appeal taken in the case of \textit{Eckland v. Jankowski}.\textsuperscript{1} The action was for partition of land. One Hegstad who was shown to be the last owner of the record title to the realty in question died supposedly intestate in January, 1945. Soon after his death, application for administration of his estate was made to and granted by the probate court of Cook County. The court found that he died intestate and declared his heirship. After the administration proceedings had been concluded and the administrator had been discharged, the premises were conveyed by the heirs-at-law to the defendants’ predecessors in title. Approximately six months after the defendants had acquired title to the disputed property a will of the decedent was discovered and admitted to probate. Under the provisions of that will the plaintiff was devised a one-half interest in the realty. It was his contention that when the will was admitted to probate his title was perfected as of the date of the testator’s death under the doctrine of relation back\textsuperscript{2} and was not divested by the conveyance of the heirs-at-law. The defendants, however, contended that since they were innocent purchasers for value from the lawful heirs of the decedent owner, in reliance upon the public records which gave them no actual or constructive notice of the existence of a will or that anyone


\textsuperscript{1}407 Ill. 263, 95 N. E. (2d) 342 (1950). Another aspect of the case is discussed in 39 Ill. Bar J. 412.

\textsuperscript{2}Ill. Rev. Stat. 1949, Vol. 1, Ch. 3, § 205 recognizes this doctrine.
other than those persons designated by the statute of descent had any interest in the premises, the statutory effect of the admission of the will to probate was not applicable so as to divest them of their title. The circuit court, after a hearing on the merits, dismissed the complaint for want of equity. The Supreme Court squarely deciding the issue for the first time in Illinois affirmed the decree of the lower court on the ground that the purchasers had the right to rely on the devolution of title shown by the record.

The courts have considered this problem in relation to two fact situations: (1) those where the purchase was from a putative heir of a supposed intestate which purchase was followed by the probate of a will; and (2) those wherein the purchase was from an heir of a supposed intestate after the ancestor’s estate had been administered followed by the subsequent discovery and probate of a will.

As to the first fact situation, there is no apparent reason why the vendee who has purchased from a person allegedly entitled as heir should be protected in his title and prejudice the rights of innocent third parties when his reliance upon the representations of his vendor was misplaced. However, the reported cases have been divided on the question of protecting the purchaser’s title in such a situation. Those jurisdictions which have refused protection to the purchaser have in the main done so on the basis of the doctrine that probate of the will relates back to the death of the testator and avoids all dispositions and conveyances by the heirs contrary to the provisions of the will in the absence of any statutory limitation as to the time when a will may be probated. The doctrine that real property descends to the heirs-at-law of the deceased, unless a devise thereof is affirmatively shown, coupled with an extended lapse of time prior to the conveyance by the heirs, was made the foundation for protecting the purchaser in other jurisdictions. In none of these cases was there any evidence that the estate of the decedent had gone through administration.

3 See Cassem v. Prindle, 258 Ill. 11, 101 N. E. 241 (1913), for a case in which the bona fide remote grantee was not a party to the action but whose title was held valid in spite of the fact that his vendor’s title was taken with knowledge of the decedent’s will and in fraud of the rights of the devisees.


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The importance of a prior administration is made apparent by the case of Simpson v. Cornish. Following an express adjudication of intestacy and a final decree of distribution specifically allotting realty, the heirs in that case conveyed to good faith purchasers. The court said, in protecting the vendees from the effect of a subsequent probate of decedent’s will, “We believe it is the law that a bona fide purchaser who relies upon official acts of a court having jurisdiction of the subject-matter will be protected in his title and in his purchase, for if it were not so, the courts, representing the judicial system, would be instrumental in committing a fraud, to the great detriment of one who relies upon its order or decree. . . . the distinction [between a purchaser from a devisee after probate of a will and a purchase made from an heir after an adjudication of intestacy] is not based upon a difference in principle. While, in case of testacy, reliance is placed by the purchaser on the order or decree of probate admitting the will, in the case of intestacy reliance is placed, as in the instant case, upon the adjudication of intestacy. In either case, the purchaser is protected, because he relied upon a judicial determination of a court of competent jurisdiction.”

Protection is given to the title of the vendee acquired subsequent to intestacy administration proceedings because of the fear that the opposite conclusion would result in clouds on title derived from an heir, impairment of marketability and sale value, and, in effect, would create restraints on alienation. These fears were voiced by the Wisconsin court concerned with the Simpson case for it said: “To hold that a bona fide purchaser . . . cannot rely upon an adjudication of intestacy or upon a final decree, would have a tendency . . . to suspend the power of alienation . . . If the rule contended for . . . be adopted by the court . . . then the title to all property passing under the intestate laws of this state may be involved under a cloud which will effectually restrict its alienation and which will vitally effect the value of the real estate.” This argument bears considerable weight, for the free transfer of inherited realty might well be impeded if a possible revocation of probate were to hang, like the sword of Damocles, over the purchaser’s title.


7 196 Wis. 125 at 151-2, 218 N. W. 193 at 203. The action was one brought by devisees after probate to remove a cloud from title.

8 Simpson v. Cornish, 196 Wis. 125, 218 N. E. 193 (1928).

9 196 Wis. 125 at 154, 218 N. W. 193 at 204.
It cannot be denied that the result reached may work hardship on the isolated devisee normally entitled to the property, but this is lessened by the fact that he may pursue the purchase price into the vendor's hands.\(^\text{10}\) Also, the normal administration proceedings take long enough to give him a fair opportunity to make a search into the fact situation before the administration of the estate is closed.

In many jurisdictions this problem can be solved by resort to statutes. A few of these enactments have direct application while others bear only indirectly on the issue. In some states there are express statutes granting specific protection to the purchaser from an heir subsequent to the death of his ancestor.\(^\text{11}\) These have application either with or without prior intestacy administration proceedings. In substance, these statutes provide that the title of a bona fide purchaser of realty from the heirs of a person who died seized thereof is not affected by a devise of the property made by the latter unless, within a certain period of time after his death, the will devising the property is admitted to probate or duly established by the judgment of a court of competent jurisdiction. Then if the will is not probated within the statutory period, the rights of the devisees, under the subsequently probated will, are limited to the proceeds of the sale in the hands of the adverse heirs. There is an implication which arises from the mere fact of the existence of these express statutory protective devices and that is that there has been a legislative attempt to grant advantages to and balance the equities between the unhappy devisees and bona fide purchasers who find themselves in the unfortunate situation discussed herein.\(^\text{12}\)

\(^\text{10}\) In re Walker's Estate, 160 Cal. 547, 117 P. 510, 36 L. R. A. (N. S.) 89 (1911); Thompson v. Sampson, 64 Cal. 330, 30 P. 980 (1883), McKinstry, Sharpstein, and McKee, JJ., dissented.

\(^\text{11}\) See, for example, McKinney's Cons. Laws N. Y., Decedent Estate Law, § 46: "The title of a purchaser in good faith and for a valuable consideration, from the heir of a person who died seized of real property, shall not be affected by a devise of the property made by the latter, unless within two years after the testator's death, the will devising the same is either admitted to probate and recorded as a will of real property in the office of the surrogate having jurisdiction, or established by the final judgment of a court of competent jurisdiction, in an action brought for that purpose." The statute, like most statutes of limitation, contains certain saving clauses favoring minors, non-residents and the like. It was derived from original § 2628, Code of Civil Procedure, which had a four year limitation. Cases illustrating the application of this section are: Gilkinson v. Miller, 74 F. 131 (1896); Fox v. Fee, 167 N. Y. 44, 60 N. E. 281 (1901) affirming 33 App. Div. 627, 53 N. Y. S. 1103 (1898) in turn affirming 24 App. Div. 314, 49 N. Y. S. 292 (1897); Cole v. Gourlay, 79 N. Y. 527 (1880); Cipperly v. Link, 135 Misc. 134, 237 N. Y. S. 106 (1929) (bar limited to title acquired from heir); Werner v. Wheeler, 142 App. Div. 365, 127 N. Y. S. 158 (1911).

\(^\text{12}\) Cases illustrating the application of similar statutes found in other jurisdictions may be observed in Biggs v. McCarthy, 86 Ind. 352, 44 Am. Rep. 320 (1882); Markley v. Kramer, 66 Kan. 664, 72 P. 221 (1903); Barnhardt v. Morrison, 178 N. C. 563, 101 S. E. 218 (1919); Cooley v. Lee, 170 N. C. 18, 86 S. E. 720 (1915) (question of retrospective application); Crickenberger v. Jasper, 105 W. Va. 638, 144 S. E. 576 (1928). See also 57 Am. Jur., Wills, § 786; 26 C. J. S., Descent and Distribution, § 78.
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Among the enactments which indirectly protect the purchaser are those which have either placed an absolute limitation on the time within which a will may be probated or that the probate of a will is of no effect unless filed for probate within a given period. Therefore, if the will is not probated within the time allotted the purchaser would automatically become protected.13

Recordation statutes have also played their part in sustaining or denying the claim of the devisee. For instance, where there has been an intentional and fraudulent or negligent omission to record the prior probate of a foreign will in the county in which the land is located, or an improper recordation of a valid domestic or foreign will prior to a conveyance by the heirs either with or without intestacy administration proceedings,14 the grantee has been protected.

In the light of these judicial determinations from other jurisdictions, the legal basis for the decision rendered upon the facts and circumstances in the principal case appears to be the most reasonable and logical conclusion that could be reached. It establishes stability of title to realty, creates a guide post for the attorney, and sounds a warning to testators that if the persons whom they desire to be the beneficiaries of their generosity are to receive the property intended instead of litigation such testators should overcome their inherent dislike to notify the world that they have made a will and should provide for a safe-keeping deposit thereof in a location known to all within their immediate circle. When the innocent vendee has examined the public records and purchased in reliance on the devolution of title as shown therein, the Illinois court, in the absence of express legislation, has given the unqualified answer to the unspoken question of "what more can he do?" by answering "nothing, no more is needed.'"

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13 Goodman v. Russ, 14 Conn. 210 (1841); Ryan v. Texas & Pacific R. Co., 64 Tex. 239 (1885); Ochoa v. Miller, 59 Tex. 460 (1883). Local statutes contain innumerable differences, hence should be individually examined. Kentucky has construed its ten year statute of limitation for relief not otherwise limited as applicable on the right to offer a will for probate; Foster v. Jordan, 130 Ky. 445, 113 S. W. 490 (1908); Reid's Admin'r v. Benge, 112 Ky. 810, 66 S. W. 997, 57 L. R. A. 253, 99 Am. St. Rep. 334 (1902) (in an action brought by devisees to probate an after-discovered will against purchaser from an heir without prior intestacy administration) following Allan v. Froman, 96 Ky. 313, 28 S. W. 497 (1894) (on right to probate a foreign will).

EXECUTORS AND ADMINISTRATORS—ALLOWANCES TO SURVIVING WIFE, HUSBAND, OR CHILD—WHETHER OR NOT A WIDOW IS ENTITLED TO A FULL AWARD WHEN SHE DIES PRIOR TO THE EXPIRATION OF THE STATUTORY SUPPORT PERIOD AND BEFORE THE AWARD HAS BEEN GRANTED—Among recent decisions dealing with the administration of decedents' estates, the opinion rendered by the Court of Appeals of Ohio in Croke's Estate v. Clancy is of importance. The case offered the court its first opportunity to consider the extent of a widow's entitlement, under the local widow's allowance statute, when she died three months after her husband and before any allowance had been set aside for her benefit by the appraisers. The allowance, when subsequently made, was objected to by the widow's executrix since it was apparently limited to that period during which the widow had survived her husband. The executrix claimed that the amount so set aside was, and would have been, insufficient to support her decedent for the entire statutory period. She therefore moved for an increase to an amount equivalent to that payable for a full year. The Probate Court so held, but the Court of Appeals, looking to the purpose of the statute, reversed and reinstated the sum originally granted. In arriving at that conclusion, the court pointed out that the statute was not intended to provide a gratuity or a distributive share in the husband's estate, but that its sole province was to extend the husband's duty of support for one year beyond the date of his death. By adopting this position, the court refused to be persuaded by the argument that support for the entire year indefeasibly vested in the surviving widow on the death of the husband.

Statutes directing some form of allowance to the widow to alleviate the economic distress likely to prevail upon the death of the husband and during the period of administration are purely American in origin. Such


2 Page's Ohio Gen. Code Ann. 1946, § 10509-74, provides: "The appraisers shall set off and allow to the widow . . . sufficient provisions or other property to support [her] for twelve months from the decedent's death . . . The probate judge shall have authority to fix the year's allowance if the appraisers fail to do so, or if for any other reason there is no appraisal."

3 The action was brought pursuant to Page's Ohio Gen. Code 1946, § 10509-77, which permits the widow or other interested person to petition for a review of the allowance and authorizes the probate judge to take discretionary action in the matter.

4 The court, by way of dictum, indicated that if the appraisers had set aside an allowance for a full year the same result would have been reached upon proper motion by the husband's personal representative to reduce the allowance.

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statutes undoubtedly owe their existence to a benevolent and humane legislative spirit as well as to a recognition by the State of its duty to protect the family in time of need. But the legislation now to be found in all of the American states would appear to have well defined local characteristics for each state seems to have preferred to treat the problem in its own fashion. According to one writer, this provincial attitude has given rise to a hodge-podge of legislation which is often ambiguous and difficult to apply. One of the more apparent difficulties concerns that which faced the court in the instant case for the contingency of the widow's death before the receipt of the award does not appear to have been contemplated nor covered by express language in any of these statutes.

It might be emphasized, at the outset, that the prior cases which have dealt with the particular problem defy any comprehensive classification because of the facility with which the several statutes may be distinguished. Notwithstanding this circumstance, certain standards of construction seem to have been formulated which might serve to give some aid to the interpretation to be given to any particular statute whenever the problem here presented should arise.

When heretofore confronted with the question, the fundamental inquiry of the courts has been to determine whether or not the allowance could be said to have vested at or prior to the time of the widow’s death. On this basis, some courts have concluded that the entire allowance is defeated where the statute requires a judicial determination of the amount to be received by the widow and judicial action has not been taken during the widow’s lifetime. That result appears dictated whenever there are discretionary features to the statute which render it impossible to confer definite property rights on the widow until determination has been made. It has also been held that the allowance cannot be declared vested where the statute requires the widow to perform some affirmative act as a

6 Ibid.
7 Vernier, American Family Laws (Stanford University Press, Stanford, California, 1935), Vol. 3, § 228. The author has compiled the various statutes on the subject at the place cited.
8 This thought is expressed in an annotation, to be found in 144 A. L. R. 270, to the case of Re Sampson, 142 Neb. 556, 7 N. W. (2d) 60 (1942).
9 Zunkel v. Colson, 109 Iowa 695, 81 N. W. 175 (1899); Drew v. Gordon, 95 Mass. (13 Allen) 120 (1866); Adams v. Adams, 51 Mass. (10 Metc.) 170 (1845); Tarbox v. Fisher, 50 Me. 236 (1836); Easton v. Fessenden, 65 R. I. 259, 14 A. (2d) 508 (1940); State ex rel. Case v. Superior Court, 23 Wash. (2d) 250, 160 P. (2d) 606 (1945). See also 24 C. J. Executors and Administrators, § 824, p. 258, and 34 C. J. S., Executors and Administrators, § 348, p. 55. In Ex Parte Dunn, 63 N. C. 137 (1868), a judicial confirmation of the proposed set off by the appraisers was said to be a necessary pre-requisite to vesting.
prerequisite to obtaining the allowance.¹⁰ In that category fall those statutes which require the widow to select the property which is to constitute the allowance¹¹ or to make application for it.¹² The rationale for this view rests on the proposition that the act so required is one personal to the widow and must be made choate by her while still living, otherwise the right to the allowance will be deemed to be waived.¹³

Conversely, a number of decisions have concluded that, as the statute in question vested the allowance in the widow immediately on the death of her husband, the claim to the award was capable of surviving, in its entirety, to the widow's personal representative upon the widow's death.¹⁴ The vesting feature of such statutes has been said to be demonstrated by the presence of a granting clause which "entitles"¹⁵ or "allows"¹⁶ the widow to have a fixed amount of property upon her husband's death. Other instances of vestiture occur where the allowance

¹⁰ Henderson, Adm'r v. Tucker, 70 Ala. 381 (1881); Barnes v. Cooper, 204 Ark. 118, 161 S. W. (2d) 8 (1942); Zunkel v. Colson, 109 Iowa 695, 81 N. W. 175 (1895); In re Bayer's Estate, 95 Neb. 488, 145 N. W. 1030 (1914); Carey v. Monroe, 54 N. J. Eq. 632, 35 A. 456 (1896); Kimball v. Deming, 27 N. C. (5 Ired.) 194 (1844); Cox v. Brown, 27 N. C. (5 Ired.) 418 (1845); In re Hemphill's Estate, 157 Wis. 331, 147 N. W. 1089 (1914).

¹¹ Henderson, Adm'r v. Tucker, 70 Ala. 381 (1881); Carey v. Monroe, 54 N. J. Eq. 632, 35 A. 456 (1896); In re Hemphill's Estate, 157 Wis. 331, 147 N. W. 1089 (1914).

¹² Barnes v. Cooper, 204 Ark. 118, 161 S. W. (2d) 8 (1942); Zunkel v. Colson, 109 Iowa 695, 81 N. W. 175 (1895); In re Bayer's Estate, 95 Neb. 488, 145 N. W. 1030 (1914); Kimball v. Deming, 27 N. C. (5 Ired.) 194 (1844); Cox v. Brown, 27 N. C. (5 Ired.) 418 (1845); In re Bayer's Estate, 95 Neb. 488, 145 N. W. 1030 (1914); In re Hemphill's Estate, 157 Wis. 331, 147 N. W. 1089 (1914).

¹³ See In re Bayer's Estate, 95 Neb. 488, 145 N. W. 1030 (1914); Kearn's Appeal, 120 Pa. 523, 14 A. 435 (1888). Another segment of this rationale is exemplified in Re Sampson, 142 Neb. 556, 7 N. W. (2d) 60, 144 At L R. 264 (1942). It was there held that the action to compel an award was personal to the widow, hence was not capable of surviving according to the common law, and there was no statutory sanction for its enforcement after the widow's death.

¹⁴ In re Hearn's Estate, 22 Del. Ch. 447, 195 A. 367 (1937); Brown v. Joiner, 77 Ga. 232, 3 S. E. 157 (1885); York v. York, 38 Ill. 522 (1885); Bratney v. Curry, 33 Ind. 399 (1870); Mallory v. Mallory, 92 Ky. 316, 17 S. W. 757 (1891); Pyles v. Bowle, 123 Md. 13, 90 A. 772 (1914); In re Poupore's Estate, 132 Minn. 409, 157 N. W. 648 (1916); Sammons v. Higbie, 103 Minn. 448, 115 N. W. 265 (1908); Hastings v. Myer, 21 Mo. 519 (1855); Monahan v. Monahan's Estate, 232 Mo. App. 91, 95 S. W. (2d) 153 (1936); Crawford v. Nasso, 173 N. Y. 163, 65 N. E. 962 (1899); In re Warner's Estate, 53 App. Div. 585, 65 N. Y. S. 1022 (1900); In re Ackler's Estate, 168 Misc. 623, 6 N. Y. S. (2d) 128 (1938); In re Hulse, 41 Misc. 307, 84 N. Y. S. 220 (1903); In re Estate of Phillips, 27 Ohio N. P. (N. S.) 142 (1928); In re James' Estate, 38 S. D. 107, 160 N. W. 525 (1916); Estate of Johnson, 41 Vt. 467 (1868). Where the widow, not having received her allowance, does not die until after the expiration of the statutory support period, there seems to be no question but what the award is a vested one: In re Rice's Estate, 146 Iowa 48, 124 N. W. 792 (1910); Bane v. Wick, 14 Ohio St. 631 (1863).


¹⁶ York v. York, 38 Ill. 522 (1885); Sammons v. Higbie, 103 Minn. 448, 115 N. W. 265 (1908); In re James' Estate, 38 S. D. 107, 160 N. W. 525 (1916).
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may be said to "belong" to the widow,\(^\text{17}\) or where the property which comprises the award is to be excluded from the assets of the husband's estate.\(^\text{18}\)

In the cases reviewed to this point, the allowance was either granted or denied in its entirety regardless of the length of time within which the widow survived her husband. The principal case must be regarded as novel in that it took a middle ground by directing a proration of the allowance measured according to the length of time the widow survived in relation to the one-year statutory support period.\(^\text{19}\) The divergence between this result and that reached by other courts, in cases where a similar discretionary sum has been involved, seems to rest upon the fact that the support feature of the Ohio statute was emphasized, making it unnecessary for the court to enter upon an investigation of the vesting question. In the cases which turn on the point of whether the award was vested or not, it may be noted there has been an inclination to treat the allowance as a gratuity rather than a provision for support.\(^\text{20}\) An added reason for proration of the allowance in the instant case might be said to exist in the fact that the Ohio statute fixed a statutory period for support which made it possible accurately to measure the sum to which the widow would be entitled for those months during which she did survive. No such possibility of measurement appears under other statutes where the amount of the allowance is made to depend upon a judicial determination.

What the particular outcome of the instant problem would be in Illinois, if it should arise, is not clear, since the prevailing statute\(^\text{21}\) does not indicate the course to be followed and no Illinois case to date has provided any construction thereof. The statute presently provides that the widow is to be allowed, as her own property,\(^\text{22}\) certain chattels\(^\text{23}\) and, in addition, a sum of money which the appraisers shall deem to be reasonable\(^\text{24}\) to support her for the nine-month period following her husband's


\(^{18}\) In re Ackler's Estate, 168 Misc. 623, 6 N. Y. S. (2d) 128 (1938); In re Estate of Phillips, 27 Ohio N. P. (N. S.) 142 (1928). The statute concerned in the case of In Estate of Johnson, 41 Vt. 467 (1868), provided that the widow should "have" the award.

\(^{19}\) But see In re Rice's Estate, 146 Iowa 48, 124 N. W. 792 (1910).

\(^{20}\) An exception to this view may be seen in Adams v. Adams, 51 Mass. (10 Metc.) 170 (1845), where the court gave credence to the "support" theory but denied recovery because the award had not "vested."


\(^{22}\) This thought has been expressed in various forms. The phrase "sole and separate" was used in Laws 1845, p. 38, § 1. It was amended to read "sole and exclusive" by Laws 1847, p. 168, § 1. The latter phrase was retained until the present term "own" appeared in Laws 1899, p. 4, § 178.

\(^{23}\) These chattels consist of the family pictures and the wearing apparel, jewels and ornaments of the widow.

\(^{24}\) The reasonableness of the sum is to be determined by a consideration of the
death, but which sum of money shall not be less than $1,000. It may be seen that this statute contains, in combination, many factors which have been deemed to be singularly controlling in prior cases considered elsewhere. The Illinois statute, therefore, being much more complex, may be productive of a mixed result.

Some assistance may be provided by the holding in the early Illinois case of York's Administrator v. York's Administrator, interpreting a former statute, wherein it was decided that the specific articles which went to make up the award vested absolutely in the widow immediately upon her husband's death, notwithstanding the fact that she died ten days later and prior to a set-off by the appraisers. The statute then in effect provided that the widow was entitled to have certain specific articles and also other property of an unascertainable nature as and for her sole exclusive property. In arriving at this decision the court said, "The language of the act is emphatic, and declares in the most express terms, that the specific articles . . . shall be the sole and exclusive property of the widow forever." This case, and others previously noted, should stand as good authority for the proposition that the fixed items designated in the present award statute, to-wit: the chattels and the minimum $1,000 allowance, should be deemed to vest in the widow on the death of her spouse for "own," as presently used, does not differ in legal effect from the phrase "sole and exclusive" heretofore used. The case is not, however, completely satisfactory for present purposes because there is no clear indication therein concerning a disposition toward the discretionary features included in the award. The question of choice

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25 38 Ill. 522 (1865).
26 Even then the award was provisional in nature, for the widow had an option to take the estimated worth of the articles in cash or in other property.
28 The pioneer character of the times may have been reflected in the fact that this property was said to consist of the necessary beds, furniture, stove and stove pipe, yearly provisions, livestock feed for six months, and fuel for three months. Not only was the property unascertainable before set off but an element of time was interposed.
29 38 Ill. 522 at 525.
30 Comparable cases from other jurisdictions are listed in note 14, ante.
31 There is dicta to that effect in McCord v. McKinley, 92 Ill. 11 (1879) ; Allen v. Hempstead, 164 Ill. App. 91 (1910) ; Fick v. Armstrong, 136 Ill. App. 28 (1907) ; Ross v. Smith, 47 Ill. App. 197 (1892) ; In re Estate of Scoville, 20 Ill. App. 426 (1886). See also Horner, Probate Practice (Callaghan & Co., Chicago, 1925), 3d Ed., § 83; Simons, Probate Practice (Callaghan & Co., Chicago, 1907), § 495.
33 A criticism of this deficiency, expressed by Levi North, author of North's Probate Practice, appears in a note appended to the report of the decision in York v.
among the three possible results, heretofore illustrated, that could be achieved with regard to that part of the monetary award which exceeds the minimum amount, still, therefore, remains undetermined.

Notice has already been taken of the fact that there is support for the general proposition that an unascertained portion of an award cannot be said to vest until a determination with regard thereto has been made.\(^3\) The possibility is not remote that Illinois might adopt this attitude and deny all chance of recovery as to this part of the award for the theory followed in other jurisdictions could apply, with equal vigor, to the Illinois statute.\(^4\) One important consideration may mitigate against such a result and that is the fact that the statute has received extremely liberal treatment at the hands of earlier Illinois courts.\(^5\) If that same liberality prevails, it is unlikely that such a harsh course would be followed, especially since the other two possible approaches lead to less severe consequences.

One such approach concerns itself with the unique result of proration attained by the Ohio court in the instant case. A similar result is possible in Illinois for there is comparable language in the two statutes as well as machinery in the form of a fixed support period through which an accurate proration could be achieved.\(^6\) The analogy tends to lose some of its persuasiveness when it is recognized that the Ohio statute lacks a granting clause as explicit as that to be found in the Illinois act,\(^7\) but application of the analogy would put emphasis on the idea of support, York, 38 Ill. 522, as the same appears in the Denslow reprint, made in 1877, of that volume of the Illinois Reports. See also Boyer v. Boyer, 21 Ill. App. 534 (1886), where it was held that the appraisers were not permitted to estimate the worth of certain of these discretionary articles.

\(^3\) See cases cited in note 9, ante.

\(^4\) Proponents of this view should not overlook the case of Estate of Johnson, 41 Vt. 467 (1868). The statute there concerned provided that the widow should have so much of the personal estate of her husband as the probate court might assign to her according to circumstances and degree, but in no case was the share to be less than one-third of the estate after debts. The court, in a case where the widow had died one month after her husband without receiving any part of such contemplated allowance, held that her personal representative was entitled to at least a one-third share since that sum had vested in her on the death of her husband.

\(^5\) In particular, see Gillett v. Gillett, 207 Ill. 136, 69 N. E. 942 (1904), affirming 100 Ill. App. 126 (1903); Strawn v. Strawn, 53 Ill. 263 (1870); Moss v. Moss, 208 Ill. App. 589 (1917).

\(^6\) Compare Ill. Rev. Stat. 1949, Vol. 1, Ch. 3, § 330, which provides for "... such sum of money as the appraisers deem reasonable for the proper support of the surviving spouse ... for nine months after the death of the decedent," with Page's Ohio Gen. Code Ann. 1946, § 10509-74, which directs that the appraisers "shall set off and allow to the widow ... sufficient provisions or other property to support [her] for twelve months from the decedent's death ..."

\(^7\) Ill. Rev. Stat. 1949, Vol. 1, Ch. 3, § 330, provides that the widow shall be allowed, "as her own property," that property which constituted the award. In contrast, the Ohio provision is contained in an entirely different section, to-wit: Page's Ohio Gen.
a necessary element to the Ohio decision, whereas a contrary view would give to the Illinois statute a sense of gratuity over-riding the phrase which reveals a purpose to provide for the "proper support" of the widow. Certainly, her need for "support" would be contemporaneous only with her lifetime and no longer.

The other possible construction of the Illinois act would automatically vest the entire allowance, minimum and discretionary, in the widow upon the death of her husband regardless of when she died. Such a construction would give the utmost liberality to the statute and would emphasize the idea that the granting clause is definitive as to the entire award. Stated differently, the word "own" as employed in the statute, would apply to all segments of the award, the unascertained as well as the ascertained. This view finds support in the Georgia case of Brown, Administrator v. Joiner, Administrator. It reached the conclusion that the statute under consideration vested the unascertained portion of the allowance in the widow immediately on the death of her husband inasmuch as it imposed an absolute duty on the appraisers to set off this reasonable sum for her yearly support, even though the widow might, as in fact she did, die within the twelve month period without having received the allowance. It was pointed out that the appraisers were precluded from taking into consideration the time of the widow's death, for the statute made it their sole duty to determine the reasonableness of the sum intended for her support for one year. The Illinois statute is susceptible of much the same construction. Although the appraisers have other duties to perform, their service in relation to the widow's award is limited to a determination of the reasonableness of the amount to be granted and no more.

The foregoing discussion may have served to highlight the problem and furnish possible alternatives for its solution even if it has not attempted the impossible by way of providing a forecast of the precise action which an Illinois court will take when forced to achieve a decision. As certain recent revisions of the statute call for clarifying amendment, it can only be suggested that the legislature should consider the whole situation and all of its possibilities, when it next considers the subject.

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Code Ann. 1946, § 10509-54, as amended, which excludes certain assets from the husband's estate for the benefit of the widow. Even if this section and Section 10509-74 were construed in pari materia, they would still lack the comprehensibility of the Illinois granting clause.

39 77 Ga. 282, 3 S. E. 167 (1887).

40 An amendment adopted in 1949 was intended to put both spouses on an equal plane: Laws 1949, p. 1, § 1. It has, however, produced a need for clarification because certain parts of the statute still refer only to widows and might be said to be inapplicable to widowers.