LEGISLATION

ADMINISTRATION OF ESTATES ACT, 1954

"If by any accident," wrote Joshua Williams in 1848, "a man should die without making his will, it would seem to be the province of an equitable legislature to make such a disposition of his property as would, in ordinary circumstances, most nearly correspond with his intention."[1] This was the policy adopted some seventy-five years later by the framers of the English legislation of 1925,[2] which fundamentally altered the ancient rules.[3] In pursuance of it, a search was made into a large number of modern wills taken at random from the files of Somerset House,[4] presumably representing the intentions of well-advised testators. On correlation of the information thus obtained, it was found that certain rough general lines were followed and these lines, made more exact and with their form remodelled, were written into the Act. The result, however, was not found to be finally satisfactory in relation to the interests of the surviving spouse and in 1950 a committee was appointed to consider this matter, among others, under the chairmanship of Lord Morton.[5] It reported in 1951[6] and its recommendations were passed into law in 1952.[7]

The Act which is the subject of this note[8] represents the New South Wales solution of a generally similar problem. In one respect, it is true, the situation in New South Wales was less in need of reform than England, for this State had abandoned the parentelic system of intestate succession to real property in 1862,[9] and had generally assimilated the succession to real property to that to personal property. But, as in England, the rules relating to succession to personal property were themselves antiquated, depending as they did on the seventeenth-century Statutes of Distribution[10] modified only by certain very cautious amendments affecting a surviving spouse.[11]

The new Act, like the English Act, effects fundamental changes, and the policies which our Act carries out are to some degree similar to those of the

[1] Cited J. Williams, *Principles of the Law of Personal Property* (18 ed. 1926) 601.
[2] 15 Geo. 5 c. 23.
[3] For a short summary of the development of English legislative policy see J. Stone, *The Province and Function of Law* (1946) 567-569 and authorities there referred to.
[4] *Id.* at 569.
[5] See G. Boughen Graham, "The Intestates' Estates Act, 1952" (1952) 16 *Conveyancer and Property Lawyer* (N.S.) 402.
[6] *Cmd.* 8310.
[7] The Intestates' Estates Act, 1952 (15 & 16 Geo. 6 and 1 Eliz. 2, c. 64).
[8] Act No. 40, 1954. The Act applies to the estates of persons dying intestate or partially intestate on or after 1st January, 1955. It is summarised by A. K. Beveridge, "New Administration of Estates Legislation in New South Wales" (1955) 28 *A.L.J.* 495.
[9] Real Estate of Intestates Distribution Act (26 Vict. No. 20).
[10] 22 & 23 Car. 2 c. 10; 1 Jac. 2 c. 17, s. 7.
[11] Probate Act, 1890 (54 Vict. No. 25) as amended by 56 Vict. No. 30, repealed and re-enacted by the Wills, Probate and Administration Act, 1898 (Act No. 13, 1898), ss. 50-53,

English Act. It seeks to improve substantially the position of the surviving spouse and it follows to some degree the order of succession of blood relatives laid down in the English legislation. It also introduces a principle, espoused long ago by John Stuart Mill,[12] that the Crown should take the estate in preference to very remote blood relatives. In other respects the Act differs in its policies from the English legislation.

Generally it may be said that the New South Wales Act attaches greater weight to the interest in simplicity of the law and its expeditious administration than does its English counterpart. The blood relatives who are given rights under our Act form a much narrower class than under the English legislation. Under our Act, the most remote relatives who can gain rights in any circumstances are relatives in the third degree. First cousins are excluded, the interest which they would formerly have taken going to the surviving spouse, if there is one, otherwise to the Crown.[13] Under the English legislation, first cousins and the issue of first cousins take in preference to the Crown, though if there is a surviving spouse he or she will take the interest which would formerly have been taken by anyone more remote than a brother or sister of the full blood.[14] The exclusion of the first cousin was justified by the Minister in his speech explaining the New South Wales Bill on the ground that it is in tracing relatives as remote as first cousins that difficulties usually begin, and that these difficulties are likely to be particularly acute in the case of New Australians.[15] A further example of the preference of the New South Wales legislation for simplicity is to be found in the provision made with respect to shares taken by infants.[16] Under the English Act the share only vests absolutely when the infant reaches the age of twenty-one or marries,[17] while under the New South Wales Act the share vests immediately on the intestate's death.[18] The result is that under the New South Wales Act the determination of vested interests is effected at an earlier point of time, but with the result that whereas under the English Act the share of an infant who dies during infancy must go to a blood relative of the original intestate, in New South Wales the share would devolve as on the intestacy of the infant and is likely to go to that parent of the infant who has no blood relationship with the original intestate at all.

Another contrast between the English and the New South Wales legislation lies in the extent of the preparatory research. In England, as we have seen, preparation involved researches in Somerset House and, before the latest amendment, the taking of evidence and a report by Lord Morton's committee. In the New South Wales Parliament no information was given to the House as to the investigations made before the Bill was brought before the House. The Attorney-General explained that it was really the Bill of his colleague the Minister of Justice and in answer to a question as to why a particular provision was included his reply was that some case must have come before the notice of the Minister of Justice to indicate the need for it.[19]

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further amended by Act No. 30, 1938, s. 6 (e).

[12] 1 J. S. Mill, *Political Economy* (2 ed.) 272-273.

[13] See *infra.*

[14] 15 Geo. 5 c. 23, ss. 46 (1) (v) and 15 & 16 Geo. 6 and 1 Eliz. 2, c. 64, s. 1.

[15] 10 New South Wales Parliamentary Debates (3rd series, 1954) 1714.

[16] *E.g.*, infant issue of the intestate or infant issue of brothers and sisters of the intestate.

[17] 15 Geo. 5 c. 23, ss. 46, 47.

[18] Act No. 40, 1954, s. 2 (1) (a) inserting new section 61A in the Wills, Probate and Administration Act, 1898-1954 (Act No. 13, 1898—Act No. 40, 1954) which in turn inserts new sections 49, 50, and 51 in the Wills, Probate and Administration Act, 1898-1954 in relation to the estates of persons dying intestate or partially intestate after 1st January, 1955. References to sections bearing these numbers hereinafter are to these newly inserted sections and are not, except where otherwise indicated, to the sections which remain in the Act as governing distribution of estates of intestates dying before 1st January, 1955.

[19] 10 New South Wales Parliamentary Debates (3rd series, 1954) 1715. The Attorney General himself was misinformed as to one feature of the Bill. He stated to the House that the Bill did not follow English law in that in England the next of kin are pursued much further than they would be under the New South Wales Act before the estate reverted to the surviving spouse (at 1713). This is not so. In England, as noticed above, the next of

All in all, however, the English law reform machinery appears on the surface as more impressive than its New South Wales counterpart in the imagination and industry displayed in attending to the various interests involved.

The new rules of distribution of an intestate estate in New South Wales are as follows:

(1) *The Surviving Spouse.*

Where there is issue living at the death of the intestate the spouse is to receive (a) a one-third share in the case where such issue comprises or includes two or more children of the intestate; (b) in any other case, a one-half share of the intestate estate.[20]

It will be seen that the legislature desired to improve the position of the spouse in the case where only one child survives. Formerly the spouse in such circumstances received only a one-third share, the child taking two-thirds,[21] now the spouse takes one half. It will be noticed that the subsection is framed so as to give the spouse a one-half share not only in this simple case but also apparently in the case where the intestate leaves one surviving child and also grandchildren or more remote descendants being issue of a deceased child or children. For it is only where the issue living at the death comprise or include two *children* that the one-third share rule comes into operation. The result would seem to be that in the case of one surviving child and surviving children of a deceased child the spouse would receive one half, the child one quarter, and the children of the deceased child would share the remaining quarter. This result does not indeed give effect exactly to the words of s. 49 as inserted in the Wills, Probate and Administration Act by the new Act, which provides that children of a deceased child are to take the share their parent would have taken if alive. In this case the share of the deceased child had he lived would have been one-third. But s. 49 is made subject to the section defining the widow's rights (s. 50) and it is submitted that s. 50 as outlined above is quite clear.

Where there is no issue of the intestate surviving at all the new Act distinguishes between total and partial intestacy. In the case of total intestacy where the net value of the property of the intestate does not exceed three thousand pounds, the spouse is to be entitled to the whole of the amount. In the case of total intestacy where the net value of the property exceeds three thousand pounds the spouse is to receive three thousand pounds together with interest thereon at the rate of four per cent from the date of death till payment and one half the residue of the estate after the payment of such sum of three thousand pounds and interest. In the case of partial intestacy and no issue surviving the spouse's share consists of half the estate.[22]

The only difference between the old legislation and the new in respect of the above matters is the substitution of the figure of three thousand pounds for one thousand pounds[23] wherever occurring. The provision is less ample than that for the spouse in the English Act, which assures to the spouse the first twenty thousand pounds in the estate, whether the intestacy be total or partial.[24]

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kin are pursued only as far as brothers or sisters of the full blood before the estate reverts to the surviving spouse. In New South Wales the relatives are pursued as far as the uncle or aunt before a similar reversion takes place. On the other hand, in England, if there is no surviving spouse, the next of kin are pursued as far as the issue of first cousins before the estate reverts to the *Crown*. Under the New South Wales Act the next of kin are pursued only as far as the uncles and aunts before the estate reverts to the Crown. The Attorney General's statement would therefore have been correct if he had substituted the word "Crown" for the word "spouse". It should be added in fairness, however, that, as in the English legislation, there is provision in the New South Wales Act for the Crown to provide for dependants or persons for whom the intestate might have been expected to provide.

[20] Wills, Probate and Administration Act, 1898-1954, s. 50.
[21] Wills, Probate and Administration Act, 1898, s. 50.
[22] Wills, Probate and Administration Act, 1898-1954, s. 50.
[23] Wills, Probate and Administration Act, 1898, s. 50, as amended by Act. No. 30, 1938, s. 6.
[24] 15 & 16 Geo. 6 and 1 Eliz. 2, c. 64, s. 1.

In case of default of next of kin who are given rights under the New South Wales Act, the whole of the remainder of the estate reverts to the surviving spouse, as explained hereafter.

(2) *The Issue.*

The share of the estate which will devolve on the children or other issue is the residue of the estate after the share of the surviving spouse is taken therefrom. Where there is no surviving spouse the issue take the whole of the estate.[25] The manner of division among the issue is in either case determined by the "statutory trust for the issue" defined by the Act as follows:

> In trust, in equal shares if more than one, for all or any of the children or child of the intestate, living at the death of the intestate, and for all or any of the issue living at the death of the intestate of any child of the intestate who predeceases the intestate, such issue to take through all degrees, according to their stocks, in equal shares if more than one, the share which their parent would have taken if living at the death of the intestate, and so that no issue shall take whose parent is living at the death of the intestate and so capable of taking.[26]

This section corresponds with the former rules, under which children's issue took *per stirpes* even if all the children were dead.[27] The new Act does, however, contain a hotchpot provision which requires the children to bring advances and settlements into hotchpot in the case of a total intestacy of either parent.[28] Under the old law hotchpot applied only in the case of an intestate father.[29] There is also new provision for illegitimate children of an intestate mother and their issue, who, in default of legitimate issue, take any interest they would have taken if born legitimate. The same section gives the mother of an illegitimate child the rights on the intestacy of the child which she would have had if the child had been born legitimate and she had been the only surviving parent.[30]

(3) *The Parents.*

The surviving father or mother takes, or if both survive they take in equal shares, the whole of the estate in the absence of issue or surviving spouse. If there are issue parents take nothing, if there is a surviving spouse they take the residue after the share of the surviving spouse.[31] The giving to the mother of rights equal with the father represents an alteration in the law. Formerly the father took before the mother, who was given rights equal only with those of the brothers and sisters.[32]

(4) *Brothers and Sisters.*

The Act provides in relation to the case where there are neither parents nor issue, and subject to the share of any surviving spouse, that the estate shall vest:

> First, in statutory trust for the brothers and sisters of the whole blood of the intestate; but if there is no member of this class, then
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> Secondly, in statutory trust for the brothers and sisters of the half blood of the intestate.[33]

The distinction drawn between the full blood and the half blood is an innovation. Formerly the half blood had equal rights with the full blood.[34]

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[25] Wills, Probate and Administration Act, 1898-1954, s. 49 (1) (a) (i) (a).
[26] *Id.*, s. 49 (2) (a) (i).
[27] *In re Natt* (1888) 37 Ch. D. 517.
[28] Wills, Probate and Administration Act, 1898-1954, s. 49 (2) (a) (ii).
[29] *Holt* v. *Frederick* (1726) 2 P. Wms. 356.
[30] Wills, Probate and Administration Act, 1898-1954, s. 51.
[31] *Id.*, s. 49 (1) (a) (i) (b) and (c).
[32] 1 Jac. 2 c. 17, s. 7, *Blackborough* v. *Davis* (1701) 1 P. Wms. 41.
[33] Wills, Probate and Administration Act, 1898-1954, s. 49 (1) (a) (i) (d).
[34] *Re Green* (1911) 2 Ch. 275.

(5) *Nephews and Nieces.*

Nephews and nieces are not explicitly mentioned in the new Act and their position is dealt with very indirectly. In the trusts for various classes of relatives appearing in the new Act certain ones only are described as statutory trusts though all might equally well merit that description as being laid down by legislation. The trusts *described* as statutory are, firstly, the trust for issue,[35] and secondly, the trusts for the two classes of brothers and sisters, quoted above.[36] The statutory trust for issue is set out *in extenso* in the Act, and appears above.[37] The statutory trusts in respect of brothers and sisters are not set out in the Act, but are dealt with by a provision which states that where there is a statutory trust for any class of relatives other than issue, then there shall be a trust corresponding to the trust for issue, apart from the hotchpot provision, as if such trust was repeated with the substitution of references to the particular class of relative in question for references to children in the statutory trust for issue.[38] Thus nephews and nieces and more remote issue of brothers and sisters take through all degrees *per stirpes.*

These provisions generally represent an improvement in the position of nephews and nieces. Under the older law, nephews and nieces were only allowed to represent their deceased parent if one of the brothers or sisters,[39] or the mother of the intestate,[40] was alive. More remote issue of a brother or sister of the intestate did not represent their ancestor at all.[41] In circumstances other than those above outlined, nephews and nieces and their issue, took, if at all, in their own rights. Hence, according to the ordinary rules for tracing degrees of kinship, nephews and nieces would be excluded by grandparents and would share equally with uncles and aunts. Under the new Act, though the mother of the intestate is given a preferred position she did not previously possess, in all other respects issue of brothers and sisters are given an improved position by the broadening of the scope of the representation rule.

(6) *Grandparents.*

These are the next class to take in default of living members of the classes of relatives so far considered.[42] As the claims of issue of brothers and sisters have been strengthened the claims of the grandparents have been correspondingly weakened.

(7) *Uncles and Aunts.*

Uncles and aunts being brothers and sisters of the full blood of parents of the intestate take in default of living members of the classes of relatives so far considered. In default of such uncles and aunts, brothers and sisters of the half blood of a parent of the intestate take the estate.[43]

These are not 'statutory' trusts within the meaning of the new New South Wales Act so that first cousins and their issue are excluded from benefiting as of right in any circumstances.

(8) *The Surviving Spouse.*

In default of any living member of the classes of blood relatives listed above the surviving spouse takes the relatives' share as well as the spouse's share already taken according to the rules discussed earlier.[44]

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[35] Wills, Probate and Administration Act, 1898-1954, s. 49 (1) (a) (i) (a).
[36] *Supra* n. 33.
[37] *Supra* n. 26.
[38] Wills, Probate and Administration Act, 1898-1954, s. 49 (2) (b).
[39] *Loyd* v. *Tench* (1750) 2 Ves. Sen. 214.
[40] *Stanley* v. *Stanley* (1739) 1 Atk. 455, 457.
[41] 22 & 23 Car. 2 c. 10, s. 7.
[42] Wills, Probate and Administration Act, 1898-1954, s. 49 (1) (a) (i) (d).
[43] *Ibid.*
[44] *Ibid.*

(9) *The Crown.*

In default of the above listed relatives or a surviving spouse the Crown takes the property as *bona vacantia.* The Crown may, out of property devolving upon it provide, in accordance with existing practice, for dependants whether kindred or not of the intestate, and other persons for whom the intestate might reasonably have been expected to make provision.[45]

It has already been mentioned that under the New South Wales Act the Crown takes to the exclusion of first cousins and their issue, whereas in England these classes of relatives are preferred to the Crown. The mitigating effect of the Crown's power, under the legislation, to make provision for relatives and others has also been mentioned. It may not be inappropriate to add in conclusion a reference to the implications in the sphere of Private International Law of the description of the Crown's rights as arising because the property is *bona vacantia.* On the authorities a right to take as *bona vacantia* is strictly territorial, so that other common law states will not enforce the rights of the New South Wales Crown in respect of property within the jurisdiction of that other state. If on the other hand the Crown claimed as successor on intestacy other common law states would recognise the Crown's rights in respect of all New South Wales domiciliaries. And the difference between a Crown taking as successor and one taking property as *bona vacantia* seems to be one largely of words.[46] The result may be that thanks to the choice of language in the Act property may devolve on a government outside New South Wales which has no powers to dispose of it in the equitable manner envisaged by the New South Wales proviso. It may be suggested that closer consideration could profitably be given by draftsmen to the private international law aspects of proposed legislation.[47]

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THE AUSTRALIAN "OBSCENE PUBLICATIONS" LEGISLATION OF 1953-55

EDITORIAL NOTE: This Note is intended merely to summarise the main points of the recent Australian Acts. The policy aspects seem too important and controversial for discussion in a Legislation Note, and we hope to have a leading article on this and certain other aspects from Mr. Iliffe in a later issue.

Up to the changes of 1953-55 the legislation in the States dealing with obscene publications was mostly of the "Vagrancy" or "Police Offences" pattern.[1] Nearly all the Acts had their roots in the Imperial Statutes[2] or English decisions of the 19th century and were more concerned to create extra offences such as "being in possession apparently for the purposes of sale" and more efficient machinery for the suppression of what the Courts might find "obscene", than to deal with the problem as fully as possible. Again, both in the Acts and decisions, the word "obscenity" was used primarily in the physical sense.

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[45] Wills, Probate and Administration Act, 1898-1954, s. 49 (1) (b).

[46] See generally *Re Maldonado* (1953) 2 All E.R. 1579.

[47] The above note does not seek to deal with the provisions of the Administration of Estates Act, 1954 inserting new sections in the Testators' Family Maintenance and Guardianship of Infants Act, 1916-1954, the Public Trustee Act, 1913-1954 and the Conveyancing Act, 1919-1954.

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[1] Apart from provisions in the Criminal Codes the earlier legislation in the States, not all of which has been repealed, or even amended by the new legislation, is as follows:— Obscene and Indecent Publications Act, 1901 (N.S.W.); Police Offences Act 1928 (Vic.) Part V (particularly as amended by Police Offences (Obscene Publications) Act 1938 (Vic.); Vagrants, Gaming and Other Offences Act, 1931 to 1949 (Q'land) ss. 12-17; Police Act, 1936-52 (S. Aust.) ss. 86, 108; Police Offences Act 1935 (Tas.) Div. IV. So far Western Australia has made no alteration or addition to the Indecent Publications Act, 1902 (W. Aust.) nor to the Police Act, 1892-1952 (W. Aust.) s. 66.

[2] E.g. Vagrancy Acts of 1824 and 1838 (5 Geo. 4, c. 83; 1 and 2 Vic., c. 38) and Obscene Publications Act, 1857 (Eng.) (20 and 21 Vic., c. 83).