The *Succession Acts Amendment Act,* 1968 made substantial and welcome changes to the Queensland Succession laws in three respects. First, it entirely revised the law relating to intestacy, sweeping away the confusions of the earlier legislation which stemmed from the *Statute of Distributions.*[1] Secondly it lowered the age of capacity to make a will generally to 18, and gave married persons and members of the 'Defence Forces of the Commonwealth' capacity to make a will even before the age of 18 (s. 10). Thirdly, it re-wrote the *Testator's Family Maintenance Acts* 1914 *to* 1952, extending their provisions to cases of total intestacy, and enabling the courts to vary orders made under the Acts.

All in all, the Act is a forward-looking social document, and a well articulated product of the legislative draftsman. In this article is is proposed to examine and set in their context, the new intestacy rules.

A person is said to die intestate if he dies leaving no will, or if he dies leaving a will which makes no effective disposition of any part of his real or personal estate. This may occur if he makes a will solely for the purpose of appointing executors[2], or if the dispositive provisions of his will fail for some reason, such as the prior death of the beneficiaries, or uncertainty of operation. If a person dies leaving a will which disposes effectively of only a part of his real or personal estate, so that he dies intestate as regards the residue, he is said to die partially intestate. The part of a person's estate which is undisposed of by will is termed by the Act his residuary estate[3] and the statutory rules which oblige the intestate's personal representatives to distribute the residuary estate amongst the spouse and next of kin of the intestate are known as the intestacy rules.

From early times, rules have existed governing entitlement to property passing on intestacy, and these rules have always been based, naturally enough, on proximity of kinship. The claims of the spouse and issue of the intestate have always received special attention, whilst a more general rule has been applied to next of kin other than issue[4], expressed by the saying that nearer kin exclude more remote kin.

Most jurisdictions which inherited the common law of England also inherited the English intestacy rules which were set out in the Statute of Distributions of 1670[5] and amended in 1685[6]. In Queensland the *Statute of Distributions* was incorporated into the *Succession Act* of 1867; the amendment of 1685 was incorporated later[7]; and local amendments were made in 1895[8], 1906[9], 1919[10]

1. Some of the anomalies of the earlier legislation were examined in an article *'Formal Justice in Succession Systems'* (Lee) (1966) 5 U.Q.L.J. 141 at p. 161 et seq.
2. *Brownrigg* v. *Pike* (1882) 7 P.D. 61. *Re Pring* [1910] Q.W.N. 15. Such an instrument must be admitted to probate: see Mortimer on *Probate law and Practice* (2nd ed.) at p. 205.
3. *Succession Act,* s.29. References to the *Succession Act* are to the *Succession Act* of 1867 as amended by later Acts including the *Succession Acts Amendment Act* of 1968.
4. A spouse is technically not kin at all: *Garrick* v. *Camden* (*Lord*) (1807) 14 Ves. 372; 33 E.R. 564; *Re Richardson* [1956] St.R. Qd. 485.
5. 22 & 23 Car. 2c. 10.
6. 1 Jas. 2 c. 17, s.7.
7. Having apparently been overlooked in 1867: *The Succession Act Declaratory Act of 1884* (48 V. No. 11).
8. *The Succession Act Amendment Act of 1895* (59 V. No. 10).
9. *The Succession Act of 1906* (6 E. 7, No. 24).
10. *The Succession Act of 1906 Declaratory Act of 1919* (10 G. 5, No. 6).

and 1943[11], all of which were concerned with improving the rights of the widow or mother of the intestate[12].

The intestacy rules as set out in these enactments were repealed by the *Succession Acts Amendment Act* of 1968 and replaced by an entirely new code.[13] The new rules affect the distribution of estates of persons dying intestate after 15th April 1968.[14] The estates of persons dying intestate before 16th April 1968 will continue to be distributed in accordance with the old intestacy rules.

The new rules will be examined first as they affect the rights of issue of the intestate, then as they affect the spouse, and lastly as they affect remoter kin.

(1) The rights of issue

Issue of an intestate are entitled, subject only to the rights of any surviving spouse, to take the entire estate. The rights of any surviving spouse can be stated quite simply, but the rights of the surviving issue are rather more complex.

(*a*) *Where a spouse survives*

If the deceased is survived by one child or the issue of one child only, the surviving spouse takes one half of the estate and the surviving issue take the other half.[15] If the deceased is survived by more than one child, or by one child and the issue of another child or children, or by the issue of more than one child, the spouse takes one third of the estate and the surviving issue take the other two thirds.[16]

(*b*) *Where no spouse survives*

Where no spouse survives, the issue take the entire residuary estate of the intestate.[17]

The manner in which surviving issue take

Where issue survive, they do not necessarily all take, nor do those who do necessarily take in equal shares. Their entitlement, and the manner in which they take, is set out in s. 31:

> "31. *Manner of distribution to issue.* (1) Where an intestate is survived by issue who are entitled to the whole or a part of the residuary estate of the intestate—
>
> (a) if only one person being a child or remoter issue of the intestate survives the intestate—that person is entitled to the whole, or that part, of the residuary estate, as the case may be; or
>
> (b) in any other case—the whole or that part of the residuary estate shall be divided into a number of parts ascertained in accordance with sub-section (2) of this section and—
>
> (i) each child (if any) of the intestate who survived the intestate is entitled to one of those parts; and

11. *The Succession Acts and Another Act Amendment Act of 1943* (7 G. 6, No. 28).
12. Until the late nineteenth century a widow could never take more than one half of the intestate's estate if there were any next of kin surviving, however remote; and the intestate's mother was entitled to no more than a sister's share.
13. Section 8 of the Act re-writes ss. 29 to 35 (inclusive) of the 1867 Act as amended.
14. The 1968 Act received the Royal Assent on the 16th April 1968. By s. 2 it applies in respect of the estate of a deceased person dying "on or after the passing of this Act", i.e. from the expiration of 15th April 1968 (*Acts Interpretation Acts*, 1954 to 1962, s. 15(2).).
15. *Succession Act*, Schedule, Part I, Item 2.
16. *Ibid.*
17. *Succession Act*, Schedule, Part II, Item 1.

(ii) the issue of each child (if any) of the intestate who died before the intestate leaving issue who survived the intestate are entitled to one of those parts through all degrees, according to their stocks, and, if there shall be more than one issue, in equal shares.

(2) The number of parts for the purposes of paragraph (b) of subsection (1) of this section is a number equal to the sum of—

(a) a number equal to the number of children (if any) of the intestate who survived the intestate; and

(b) a number equal to the number of children (if any) of the intestate who died before the intestate leaving a child or remoter issue who survived the intestate."

It is clear that in the vast majority of cases, the scheme provided by subsections (1)(b) and (2) will govern the matter, as the provision of subsection (1)(a) is applicable where one *person* only survives the intestate. Thus, if an intestate leaves a child and issue of that child, or two grandchildren, both issue of a deceased only child, subsection (1)(a) does not apply.

Subsections (1)(b) and (2) provide for the division of the estate into a number of parts, and for surviving issue to take shares in those parts. Section 31(2) provides that the number of parts into which the estate is to be divided is the sum of:—

(a) the number of children who survived the intestate; and
(b) the number of children who predeceased the intestate but left issue who survived the intestate.

Thus, if an intestate dies leaving three children surviving him, and grandchildren, the issue of two deceased children, the estate is divided into five parts. Children who predecease the intestate leaving no issue do not count for this purpose at all, or, indeed for any purpose.

As to the manner in which the parts into which the estate is divided are shared, there is no difficulty as far as surviving children are concerned: each surviving child takes one part[18]; but issue surviving the intestate of each child who predeceases the intestate are entitled to "one of those parts through all degrees, according to their stocks, and, if there shall be more than one issue, in equal shares". The interpretation of these words requires some explanation, as the expression "through all degrees, according to their stocks" belongs to the traditional vocabulary of the subject. It is submitted that, in accordance with the traditional meaning of the expression, issue who take share *per stirpes* since "according to their stocks" is simply the English for *per stirpes*. This means that:—

(1) The principle of representation will be applied through all degrees of issue[19].
(2) Children will never take concurrently with their parents; i.e. issue nearer to the intestate always exclude issue more remote[20].

18. Section 31 (1)(b)(i).
19. "This, as it appears to me to be, is the essential meaning of the words *"per stirpes"*. Why are you to stop at any one place, when the testator directs that the descendants are to take *per stirpes,* and say after that that they are to take *per capita*". (Per Romilly M. R. in *Gibson* v. *Fisher* (1867) L.R. 5 Eq. 51 at p. 58).
20. "The effect of the direction . . . is, that they take *per stirpes* not *per capita,* so that children do not take concurrently with their parents" (Per James L. J. in *Ralph* v. *Carrick* (1879) 11 Ch.D. 873 at p. 884).

(3) It follows that the words at the end of sub-paragraph (ii) "in equal shares" refer to "according to their stocks" and not to "the issue of each child"; that is, they mean simply that each stirps shall have an equal share with every other stirps.[21]

Accordingly, if, for instance, the intestate dies leaving one grandchild and four great grandchildren, two of the great grandchildren being children of the surviving grandchild, and the other two being children of a grandchild of the intestate's who predeceased him, the grandchild will take one half, and the two great grandchildren, children of the deceased grandchild, will take the other half between them: i.e. the surviving grandchild takes his half to the exclusion of his own children.[22]

Thus it is submitted that s. 31 merely re-writes, in more explicit terms, the provision of the Statute of Distributions that the residuary estate be distributed:

> "by equal portions to and amongst the children of such persons dying intestate and such persons as legally represent such children in case any of the said children be then dead"

as those words have been interpreted in subsequent case law[23].

Advancement

To correct any possibility of injustice as between children of an intestate, the Statute of Distributions provided[24] that any child of an intestate to whom an advancement had been made during the lifetime of the intestate should bring that advancement into account upon the distribution of the children's shares in the intestacy. An advancement consists of any gift of a substantial amount, made for the purpose of setting a child up in business or upon marriage[25]. This provision has been repealed and has not been replaced. Accordingly it would seem that if a parent now makes an advancement to one of his children in his lifetime, it is up to him to make compensating provision for his other children, either by gift *inter vivos* or by will.

The dropping of the requirement to bring advancements into account is understandable. When the *Statute of Distributions* was passed, the marriage settlement played a significant role in the distribution of family wealth, and advancements to children by way of marriage portions were the rule rather than the exception. It was necessary, therefore, to make some allowance in respect of that almost universal practice, to provide for the unadvanced child whose parent might die intestate before he married. However, the legal and economic circumstances in which the family settlement flourished have long since been

21. "How can I give the fund "*per stirpes and not per capita*", and at the same time give it "*in equal shares*". I am of opinion that the correct construction is, that there are two roots, that the fund must be divided into two parts, and then that one of them must be divided equally amongst the descendants of one daughter, and the other moiety amongst those of the other daughter, living at the death of the testator. If one left eleven and the other five descendants, it would have to be divided into two equal shares, and one such share would then be divided in elevenths and the other in fifths" (Per Romilly M. R. in *Robinson* v. *Shepherd* (1863) 32 Beav. 665; 55 E.R. 261, 262. He was overruled by Westbury L. C. at 4 De G. J. & S. 129; 46 E.R. 865; but only on the point of the generation of next of kin at which the stirpital division was to be made.)
22. See per Lord Simonds in *Sidey* v. *Perpetual Trustees Estate and Agency Co. of New Zealand* [1944] A.C. 194 at p. 201.
23. E.g. *Re Natt* (1888) 37 Ch.D. 517; and see Halsbury's Laws of England (2nd Edition) Vol. 10 paragraphs 868 et seq.
24. By s. 5, written into the Queensland Act of 1867, s. 29.
25. *Taylor* v. *Taylor* (1875) L.R. 20 Eq. 155; *In re R.* [1952] Q.W.N: 33.

displaced, and today advancements to children are not only much less common, but are made in response to pressures of business, income tax, gift duty and succession duty considerations.

Furthermore, since the 1968 legislation allows a family maintenance claim to be made by (*inter alia*) any child who can show that "as a result of the intestacy adequate provision is not made for" his "proper maintenance and support,"[26] it is submitted that if an intestate died having made substantial advancements to some children during his lifetime, that circumstance would be a relevant factor to be taken into account in establishing failure to make adequate provision for any unadvanced child, and that an unadvanced child would accordingly be able to resort to the arbitration procedure provided by the Act.[26]

(2) The rights of the spouse, where no issue survive

The rights of the spouse where issue survive have been set out.

Where no issue survive the intestate, the entitlement of the spouse depends on what next of kin of the intestate also survive.

Where the intestate is survived by a parent, a brother or sister or children of a brother or sister the spouse is entitled to:

(a) $20,000 or the whole of the residuary estate, whichever is the less; and
(b) if the value of the residuary estate exceeds $20,000, one half of the balance of the residuary estate[27].

The abovementioned next of kin who survive are entitled, in case (b) to share the remaining half of the balance of the residuary estate[28], in the order mentioned below.

Where no parent, brother or sister or children of a brother or sister survives the intestate, the spouse takes the whole of the residuary estate[29].

It is worth noting that a spouse does not have to share any part of the estate with a grandparent, uncle, aunt or cousin of the intestate.

Provision by will for the spouse

In the case of a partial intestacy, if the intestate has by will made provision for the spouse, the benefit of such provision is deducted from the spouse's $20,000, allowed under the rule just mentioned. If the intestate has by will provided more than $20,000 for the spouse, then the spouse is entitled to that provision in substitution for the $20,000, and thereafter to the one half share in the balance of the residuary estate[30]. In other words, a provision made by the will in excess of $20,000 is not deductible from the spouse's entitlement to the half share of the balance of the residuary estate.

This provision also applies if the benefit taken by the spouse is by virtue of the exercise of a *general* power of appointment by the will[31].

This provision represents a change in the law. Previously a spouse was never obliged to bring into account, in determining his or her entitlement on intestacy, any provision made in a will[32].

26. *Succession Act*, s. 90(1).
27. Schedule, Part I, Item 3, para. 1.
28. *Ibid.*
29. Schedule, Part I, Item 1.
30. Section 34.
31. *Ibid.*
32. *Re Kruschel* (1929) S.A.S.R. 252; *Re Madder* [1945] V.L.R. 250.

(3) The rights of the next of kin where no spouse survives

Under the Statute of Distributions entitlement upon intestacy depended on kinship: remoteness of kinship did not constitute a bar to entitlement. Thus the personal representatives of an intestate were obliged, in the absence of near next of kin, to seek out remoter next of kin *ad infinitum* until the nearest surviving next of kin could be traced. This has now been recognised as impracticable, particularly in the administration of Australian estates, where, in the absence of near kin, remoter next of kin often have to be sought in the country of origin of an immigrant from Europe. Accordingly, the new Act limits next of kin who are entitled by s. 30, which provides (*inter alia*):

"For the purposes of this Act—

(a) the brothers and sisters of the intestate;
(b) the grandparents of the intestate;
(c) the brothers and sisters of a parent of the intestate;
(d) the children of any brothers or sisters of an intestate who predeceased the intestate; and
(e) the children of any brothers or sisters of a parent of the intestate who predeceased the intestate.

are the next of kin of the intestate".

Next of kin beyond the scope of this definition cannot share in an intestate's residuary estate.

It is to be noted that this is not a definition section: it merely limits the next of kin who are entitled upon intestacy. This is why parents, who are, of course, next of kin, are omitted from the provision, since specific, separate provision is made for them in the Schedule to the Act.

Order of Entitlement of Next-of-kin

(*i*) *Parents*

If the intestate is survived by either or both of his parents, the parents take, if more than one in equal shares, the entire residuary estate, to the exclusion of all other kin.[33] If a spouse survives, this entitlement is subject to the spouse's, mentioned above.

(*ii*) *Brothers and Sisters and Children of Deceased Brothers and Sisters*

If no parent survives the intestate, the brothers and sisters of the intestate and the surviving children of any brothers and sisters who predeceased the intestate are entitled to share the entire residuary estate, to the exclusion of all other kin.[34] If a spouse survives, this entitlement is subject to the spouse's, mentioned above. Brothers and sisters share in the same manner as if they had been children of the intestate, i.e. they take *per capita*; but surviving children of a brother or sister who has predeceased the intestate take in the same manner as if they had been children of a child of the intestate i.e. they take *per stirpes*.[35] The entitlement of issue of brothers and sisters of the intestate ends there, however, as it is provided[36] that the residuary estate of the intestate shall not be divided amongst issue of a brother or sister of an intestate remoter than children of any such brother or sister.

33. Schedule, Part II, Item 2.
34. Section 32(1)(a).
35. Section 32(2)(a).
36. Section 32(2) proviso.

The provision now made for nephews and nieces represents a change in the law. Under the Statute of Distributions nephews and nieces took a brother's or sister's share *per stirpes* only if at least one brother or sister survived;[37] otherwise they took *per capita* with uncles and aunts, after grandparents.[38] The new provisions make it clear[39] that nephews and nieces are entitled to a *per stirpes* share whether or not a brother or sister survives the intestate; and that they are so entitled in priority to grandparents. Thus nephews and nieces will never in future take *per capita* equally with uncles and aunts.

(*iii*) *Grandparents*

If the intestate is survived by neither parent, nor brother or sister, his grandparents take, if more than one in equal shares, the entire residuary estate, to the exclusion of all other kin[40]. Grandparents are not entitled to any share of the estate where there is a surviving spouse.

(*iv*) *Uncles and Aunts and Children of Deceased Uncles and Aunts*

If the intestate is survived by neither parent, brother or sister or nephew or niece, nor grandparents then the uncles and aunts of the intestate and the surviving children of any uncles and aunts who predeceased the intestate are entitled to share the entire residuary estate.[41] Uncles and aunts share in the same manner as if they had been children of the intestate, i.e. they take *per capita*; but surviving children of an uncle or aunt who has predeceased the intestate take in the same manner as if they had been children of a child of the intestate, i.e. they take *per stirpes*[42]. The entitlement of issue of uncles and aunts of an intestate ends there, however, as it is provided[43] that the residuary estate of an intestate shall not be divided amongst issue of an uncle or aunt of an intestate remoter than children of such uncle or aunt.

This provision, too, represents a change in the law. Under the old law, uncles and aunts took equally with nephews and nieces (except where nephews and nieces took *per stirpes* as representing a deceased brother or sister) and cousins could never take a deceased uncle's or aunt's share by representation as the principle of representation amongst collaterals was limited by the Statute of Distributions to the children of brothers and sisters.

It should be noted that uncles, aunts and cousins will never be entitled to a share of the estate where there is a surviving spouse.

37. See per Wickens V. C. in *In re Ross's Trusts* (1871) 13 Eq. 286 at p. 293.
38. *Lloyd* v. *Tench* (1750-1) 2 Ves. Sen. 214; 28 E.R. 138.
39. Section 32(1) specifies what next of kin are entitled to the residuary estate, and paragraph (a) refers to brother and sisters of the intestate equivalently with the children of a brother of the intestate who died before the intestate, being children who survived the intestate. There is no provision or suggestion that the entitlement of children of brothers or sisters is conditional upon the survival of at least one brother or sister. Further s. 32(a)(a) assimilates the manner of entitlement of brothers and sisters and nephews and nieces to the manner of entitlement of children and grandchildren of the intestate as set out in s. 31; and there is no suggestion in s. 31 of any limitation of the *per stirpes* rule. Lastly, since no other provision whatever is made for nephews and nieces in the legislation, then unless s. 32(1)(a) entitles nephews and nieces to take *per stirpes* in any event (i.e. whether or not a brother or sister survives the intestate), nephews and nieces would not be entitled at all unless a brother or sister survived, a result which is offensive to the reason and counter to the spirit of s. 30, which includes "the children of any brothers or sisters of an intestate who predecease the intestate" in the definition of next of kin of the intestate.
40. Section 32(1)(b).
41. Section 32(1)(c).
42. Section 32(2)(b).
43. *Ibid.* proviso.

The Entitlement of The Crown—Bona Vacantia

Subject to what is said hereafter under the heading of "Illegitimacy", unless the intestate is survived by at least one of the following viz. issue, a spouse, a parent, a brother or sister, a nephew or niece, a grandparent, or an uncle or aunt or a child of an uncle or aunt, his entire residuary estate will pass to the Crown as *bona vacantia.*[44]

Some Further Comments on Kinship

Next of Kin of the Half Blood

Section 29(2) provides that in ascertaining relationship it is immaterial whether the relationship is of the whole blood or of the half blood. This is declaratory of the existing law.[45] In England kin of the half blood are entitled only in the absence of kin of the whole blood.[46]

In-laws

In-laws are not kin and cannot take. A step parent is therefore not kin, nor is a mother-in-law[47]. A step-child, however, may bring proceedings under the family maintenance provisions of the Act[48].
Kin *en ventre sa mere* at the date of death of the intestate, take, if born alive, equally with other kin of the same degree[49].

Illegitimacy

(*a*) *The rights of illegitimate children*

An illegitimate child is defined by the Act[50] as a child born out of lawful wedlock, and who is not otherwise legitimised or legitimated or adopted in accordance with the law of the State, Territory or country where the adoption takes place as in force at the date of the adoption.

If the intestate leaves:

(a) no lawful issue; and
(b) a residuary estate not exceeding $2,000[51]

an illegitimate child of his is deemed to be his lawful child. The Public Curator is in this case exclusively entitled[52] to seek Letters of Administration to his estate, and is empowered:[53]

> "upon being satisfied that the evidence submitted to him on behalf of an illegitimate child is reasonably sufficient to establish that such child is the offspring of the deceased person"

to distribute the entire estate to the illegitimate. If there is more than one illegitimate, the Public Curator may distribute to them in equal shares.

These provisions do not apply where the estate of the intestate exceeds

44. *Ibid.*
45. In *Watts* v. *Crooke* (1690) Show. 108; 1 E.R. 74 it was established that next of kin of the half blood were equally entitled with next of kin of the whole blood, and the argument that next of kin of the half blood should take only half the entitlement of next of kin of the whole blood was rejected.
46. *Administration of Estates Act*, 1925, s. 46(v).
47. *Rutland* (*Duke*) v. *Rutland* (*Duchess*) (1723) 2 P. Wms. 210, 216; 24 E.R. 703, 705.
48. Section 89 defines "child" for this purpose as including step-child.
49. *Ball* v. *Smith* (1698) 2 Free. 230; 22 E.R. 1178.
50. Section 35(1).
51. Section 35(2).
52. Section 35(4)(i).
53. By section 35(2)(b).

$2,000. In such case the illegitimate must depend on his right to claim under the family maintenance provisions of the Act[54].

(*b*) *The rights of the mother of an illegitimate child*

Where an illegitimate child dies intestate[55] leaving neither spouse nor issue (legitimate or illegitimate) but leaving a mother, the mother is deemed to be the lawful mother of the illegitimate as if it were legitimate. The Public Curator is again exclusively entitled to seek Letters of Administration to the estate, and is empowered, if satisfied that the intestate is the offspring of the mother, to distribute the entire estate to her. There is no limit to the value of the estate which may be so distributed.

No provision appears to be made for the mother if her illegitimate child dies leaving an illegitimate child. The illegitimate's child takes the entire estate if it does not exceed $2,000, and is entitled to make a claim under the testator's family maintenance provisions of the Act if the estate exceeds $2,000; but an illegitimate's mother cannot claim under either of those provisions.

Non-legitimated Children

Where a child of the intestate was born out of lawful wedlock but the parents subsequently intermarry, that child is entitled on the death of the intestate as a legitimate child. This is notwithstanding the fact that, by the law of the State, Territory or country where the father of the child was domiciled at the date of the marriage to the mother of the child, such child did not become legitimated by virtue of that marriage[56].

Legitimated Children

A fortiori from the inclusion of non legitimated children in the intestacy provisions, legitimated children are entitled as legitimate children.

Adopted Children and Adoptive Parents

Upon the making of an adoption order by the Queensland Court:

(a) the adopted child becomes a child of the adopter or adopters, and the adopter or adopters become the parent or parents of the child, as if the child had been born to the adopter or adopters in lawful wedlock; and

(b) the adopted child ceases to be a child of any person who was a parent (whether natural or adoptive) of the child before the making of the adoption order, and any such person ceases to be a parent of the child[57].

Accordingly such adopted child and adoptive parents are entitled upon the intestacy of an adoptive parent or adopted child respectively, as if the child were the natural legitimate child and the parent the natural parent[58].

The provisions of the 1964 Act with respect to succession are more radical than the provisions of the earlier Adoption Acts which they replace. Under

54. Section 89 defines child for the purpose of these provisions as including an illegitimate child; and the same standard of proof of relationship is required as for the Public Curator—s. 90, proviso.
55. Section 35(3) says 'without leaving a will'. If strictly interpreted, this would mean that if an illegitimate died leaving a will which failed to dispose of any or any part of his real or personal property, the provisions would not apply. It is submitted that 'without leaving a will' should be interpreted as having the meaning given to 'intestate' in s. 29(1) of the Act.
56. This is provided for in the definition of 'child' set out in s. 29(1).
57. *The Adoption of Children Act*, 1964, s. 28.
58. This is plain from the references to devolution of property upon intestacy inserted into ss. 5 and 29 of the *Adoption of Children Act*, 1964 by ss. 3 and 4 respectively of the *Adoption of Children Acts Amendment Act*, 1967.

s. 8(2) of the *Adoption of Children Acts,* 1935 to 1952 which are now repealed, an adopted child was given no right of succession upon the intestacy of a *relative* of its adoptive parent; and conversely, under s. 8(2)(b) although an adopted child could not take anything upon the intestacy of its natural parent, it was not deprived of any right of succession upon the intestacy of a relative of its natural parent.

There is no comparable provision in the 1964 Act and accordingly it would seem that, as far as rights upon intestacy are concerned, the adopted child and its adoptive parents are regarded in every respect as a natural child and natural parents, and the child's former family links are completely severed in every respect.

Executors

Under the heading "Partial Intestacies" s. 34 of the 1968 Act provides

"(1) The executor of the will of an intestate shall hold, subject to his rights and powers for the purposes of administration, the residuary estate of the intestate on trust for the persons entitled to it.

(2) An executor of the will of an intestate is not entitled to take beneficially any part of the residuary estate of the intestate unless it appears by the will that he is intended so to take that part."

At first glance it might be thought that subsection (2) has the effect of preventing a person entitled upon intestacy and appointed as executor (e.g. the spouse of the intestate) from acting as such unless he is prepared to forfeit his intestacy entitlement; but it is submitted that that construction is unsound because of the historical context of the provision.

Historically, an executor was entitled at law to the whole of the personalty of his testator which was undisposed of by his will. The courts of equity took a slightly different view, however, holding that the executor took personalty undisposed of unless it appeared to be the testator's intention to exclude him from benefit, in which case the executor held personalty undisposed of upon trust for those entitled as upon intestacy under the Statute of Distributions.

In 1830 however, the Executors Act[59] was passed in England which provided that the appointed executor or executors "shall be deemed by Courts of Equity to be trustees for the person or persons (if any) who would be entitled to the estate under the Statute of Distributions, in respect of any residue not expressly disposed of, unless it shall appear by the Will or any codicil thereto, that the person or persons so appointed executor or executors was or were intended to take such residue beneficially".

The object of the Act, accordingly, was to shift the burden of proof in the equity courts more heavily in favour of the next of kin.

These provisions of the English Executors Act of 1830 were re-enacted in the Administration of Estates Act of 1925, in s. 49(b). The provisions of the English Act of 1830 were omitted from the early Queensland legislation, and the language of the 1968 provisions is closely similar to that of the English 1925 provisions. Accordingly it is submitted that a person who is a spouse or next of kin of an intestate is not precluded from his entitlement upon the intestacy merely by reason of the fact that he acts as executor of the intestate, for the following reasons:

59. 1 Wm. IV c. 40.

(1) The language of the Queensland statute resembles so closely that of the English statutes that the Queensland statute must be construed within the historical context of the similar legislation; and

(2) the object of the legislation is to protect the entitlement of the spouse or next of kin against stranger executors, and not to defeat that entitlement; and

(3) In *Re Skeats*[60] the widow executrix of an intestate claimed that she was entitled to the whole of her husband's estate, as before 1830, the Executor Act 1830 having been repealed in England by the Administration of Estates Act 1925. The court held that she was entitled only to her statutory share, her obligation being to distribute the estate as provided by the statute. In other words, section 34(2) should be construed as referring to a claim made by an executor as such: it does not limit in any way the claim of a spouse or kin of an intestate who happens to be executor.

W. A. LEE*

60. [1936] Ch. 683; [1936] 2 All E.R. 298.

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