THE LAW RELATING TO SUCCESSION

Report No 22

Queensland Law Reform Commission
February 1978

Q U E E N S L A N D

A REPORT OF THE LAW REFORM COMMISSION

ON THE LAW RELATING TO SUCCESSION

Q.L.R.C. 22

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To the Honourable W.D. Lickiss, M.L.A.,
Minister for Justice and Attorney-General,
BRISBANE.

Item number seven on the second programme of the Law Reform Commission approved by the Governor in Council on 15th February, 1973 is the examination of the law relating to administration of estates. Our report comprising a draft bill and accompanying commentary is forwarded herewith and contains the recommendations of the Commission on this subject.

The working paper which preceded this report was widely circulated and many comments, criticisms and suggestions were received from members of the profession, interested persons and institutions concerning matters which it contained. Where appropriate, the original draft bill has been amended or improved in the light of these comments. The enclosed draft bill would we feel, give this State the best legislation to date in this field.

In presenting the report, the Commission acknowledges its indebtedness to Mr. W.A. Lee, Dean of the Faculty of Law, University of Queensland

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whose knowledge and practical experience have been invaluable.

Signed: The Hon. D.G. Andrews
(Chairman)

Signed: Mr. B.H. McPherson, Q.C.
(Member)

Signed: Dr. J.M. Morris
(Member)

Signed: Mr. G.N. Williams
(Member)

Signed: Mr. J.J. Rowell
(Member)

Signed: Mr. J.R. Nosworthy
(Member)

Brisbane. 24th February, 1978

SUCCESSION LAW BILL

COMMENTARY

General Introduction

Although it would not be true to say that the Queensland Succession laws are the most archaic on the Statute Book, sensible reforms have been long overdue in many areas. The statutory content of the subject is spread over eleven full Acts of the Queensland Parliament, containing more than two hundred sections between them, with added provisions contained in certain other statutes. Of the eleven statutes mentioned, all of which we recommend should be repealed, three major ones, namely the Succession Act of 1867, the Probate Act of 1867 and the Intestacy Act of 1877 all contain a considerable volume of material which has nothing to do with the modern needs of our succession system. The fact that these statutes can be reduced to one statute of seventy-one sections itself demonstrates that much of what appears at present on the statute book is either a dead letter, or superfluous to needs, or even, sometimes, a positive hindrance to the sensible organisation of the winding-up of deceased estates.

The dead wood of the past is one thing which needs to be removed. But the greater defect of the Queensland Succession laws at the present date is its failure to keep up with the times as regards bringing the common, non-statutory law, of the subject up to date. Above all the Queensland Succession laws are still riddled with anomalous distinctions between realty and personalty, and it is true to say that, although the old rules about the descent of realty have been abolished since 1877, many of their by-products still rule us a hundred years later.

Perhaps the most archaic area of the Queensland Succession laws, and one where it is certainly true to say that Queensland law must be amongst the most archaic in the world, is that part of the law which concerns the payment of debts by executors, where the old common law rules have not been the subject of legislative attention for over a hundred years. A series of rules, which defy analysis and which only a reason tempered by long study of legal history could justify, govern the mode of distribution of assets amongst beneficiaries. A lawyer who attempted to satisfy the average client about the existence, let alone the justification, of some of the existing rules in this respect, would have an unenviable task. Indeed, how could one justify the present rule that if the testator devises realty on trust to pay the debts of his estate, nevertheless that realty will not be used for that purpose until all the residuary personalty has been exhausted for the payment of debts? Or how could one justify the rule that a devisee of land is protected, as against a pecuniary legatee, from the obligation to pay debts, whereas, if there happens to be a general direction contained in the will that debts are to be paid, the rule is reversed and the pecuniary legatee is protected as against the devisee?

Other major reforms have, however, been needed. Queensland had fallen behind other jurisdictions with respect to the recognition of formal validity of foreign wills; and the general tendency for the offices of personal representative and trustee to become more and more alike emphasised certain unnecessary distinctions which the law had made between them. Further, Queensland is the only State in Australia where a distinction is made between the devolution of realty and personalty on death. In Queensland, land devised still vests, immediately on the death, in the devisee, whereas it is generally

recognised elsewhere that it is desirable that all the estate of a deceased, both real and personal, should vest in personal representatives so that all the assets of the estate are gathered together in one place for the convenient payment of all the debts of the estate.

Apart from reforms to the common law which are needed simply to bring Queensland up to date in comparison with other English jurisdictions, there are many more particular rules of succession law which require a modern attention, and it has been the object of this report to offer certain much needed but novel reforms, which should place Queensland in the van-guard of legal reform in this area.

In particular, we draw attention to the provisions concerning the effect of divorce on a will (s.18); the construction of incomplete residuary dispositions (s.29); the power of the Court to rectify wills (s.31); lapse of benefit (s.32); new substitutional provisions in the event of lapse (s.33); the meaning of "heir" (s.39); the abolition of administrators' bonds and sureties (s.51); the destination of intermediate income on contingent and future legacies and devises (s.62); and the facilitation of the making of legacies and devises to unincorporated associations of persons (s.63). The extension of family maintenance to certain classes of persons wholly or substantially dependent on the deceased is recommended by s.41.

These may seem to present a bewildering series of reforms, but we have asked ourselves in every case whether the existing law is comprehensible or reasonable and in nearly every case we consider that it is neither. On the other hand we should say that in no case have we proposed reforms unless there has been a history of criticism of the existing law, or numerous cases in which the present law has proved to be unsatisfactory or there has been legislation or recommended reform of the law elsewhere. However, we have taken account of a number of valuable observations made upon the working paper leading to this report by members of the legal profession.

Two fundamental objectives have guided the writing of this report. One has been to confine the subject matter of the report and of the draft Bill to the substantive law of succession, and to avoid cluttering it up with matters which belong essentially to the realm of subordinate legislation. The conferring of very wide jurisdiction on the Court by s.6 is designed to save the repetition section by section of the many small jurisdictions which were conferred on the court by old piece-meal legislative action. The repeal of section 32 of the Probate Act of 1867, for instance, and its replacement by a much broader provision, will mean that motions for probate before the judge, in cases where the executor is out of the State, can be abolished and that business can be dealt with, if the Court so orders (by section 68) by the Registrar. Thus a reform which many solicitors and barristers have advocated as being in the interests of the cheap administration of estates can be achieved without making a special provision at all, but simply by repealing the limiting factor which exists in the present legislation.

The second objective has been to simplify the task of personal representatives and their legal advisers. Indeed we think it justifiable to claim that in practically every case where we have recommended a reform, the reform should make the lot of the personal representative an easier one. There is only one provision which may perhaps limit the power of the personal representative to some extent and that is the provision of section 49 that personal representatives must act jointly. This is the rule for trustees, but it should not seriously embarrass any personal representative because he can always

act under the authority of the other personal representatives or he can confer authority upon them. He is also protected by the provisions of the recommended section 44.

We have resisted changing the law where we feel that there is little or no statistical likelihood of a problem arising. Thus we do not propose to amend the so-called rule in Phipps v. Ackers (1842) 9Cl. & Fin.583, which was recently criticised in Re Mallinson Consolidated Trusts [1974] 2 All E.R.530, because to do so would be somewhat difficult, the rule is highly technical, seldom encountered and can easily be avoided. Likewise, although there is occasional criticism of the so-called rule in Lawes v. Bennett (1785) 1 Cox 167, which holds to be adeemed dispositions of property contracted (or the subject of an option) to be sold at the death of the testator, we have decided not to alter it because it is the accident of the death of the testator between contract (or option) and completion which brings about the apparently unjust consequence, rather than an inherent injustice in the rule itself, and to alter the rule would involve disregarding the effect of the testator's having entered into a specifically enforceable contract after making his will. In any case the rule is subject to contrary intention which is not all that difficult to find, as cases such as Estate of Stanley [1965] S.A.S.R.159 indicate.

There are certain matters which we consider not to be within our terms of reference. One is the recognition of foreign wills, as opposed to the recognition of formal validity of foreign wills which is covered in Part II Division 3. The other is the question of the Rules of Court. We have listed in Appendix 3 a number of matters which appear in the existing legislation but which we have endeavoured to keep out of the draft Bill because they are matters which are either covered by broader provisions, such as section 6, or because they are matters for inclusion in other legislation, probably subordinate, and in particular the Rules of Court. Although a reconsideration of the Rules of Court respecting deceased estates is no doubt desirable, we regard it as beyond our present terms of reference.

Three other appendices have been added to the report. The first provides a recommended amendment of the Real Property Acts, consequent upon the recommended new rule for the devolution of realty to personalty representatives, which is the object of section 45. Appendix 2 is concerned with the very important issue of the rights of succession of illegitimates. For the reasons mentioned in that Appendix further legislation may be required in that respect either in a more general Act or in this Act. We have added a fourth Appendix, setting out the recommended Arrangement of Sections.

PART I - PRELIMINARY

1. Short title and commencement. The title of the proposed Act is the Succession Act, a title adopted from the Queensland precedents, as the majority of Acts concerned with the law of inheritance have been called Succession Acts. Since the emphasis of the Act is on the substantive law of succession and matters of administration have not been emphasised, for the reasons mentioned in the general introduction, there seems to be no reason to call it an Administration and Probate Act, as some other jurisdictions call Acts concerned exclusively with those matters.

A short period should perhaps be allowed between the passage of the Act and its coming into effect to give testators and their legal advisers an opportunity to decide whether they wish to make any changes to their precedent forms or wills in the light of the provisions of the Act. A testator who has been divorced, for instance, might wish to make specific provision in favour of his divorced wife to counter the provision of the recommended section 18.

2. This is self-explanatory. The Act is divided into six parts and has two schedules. The substantive law of succession is included in the earlier parts of the Act and administrative and miscellaneous matters are placed in the later parts.

3. Repeals and Savings. This section, too, is standard, (Cf. s.3 of the Securities Industry Act 1975, No.78) and subsection (2) has been modified slightly, as against the precedents, to include specific references to certain types of event connected with the making of wills, such as appointments and revivals.

4. Application. The Act will apply in the case of deaths occurring, and, therefore, wills coming into effect after the commencement of the Act. So far as the formalities for making wills are concerned, since these have not been changed significantly, there is no need to apply the Act retrospectively and so far as deaths have already occurred the rights of persons under those deaths should not be interfered with. So far as some points of interpretation are concerned, existing wills may, if the death of the testator occurs after the commencement of the Act, have a different effect, but all the amendments which have been made have been with a view to meeting and not defeating the testator's intention, that is, as beneficial and not as limiting. Sections 29, 30(2) and 39 are cases in point. A notable exception to the provision occurs in section 6 where the widened jurisdiction of the Court is made retrospective so that if there are more convenient modes of practice which the Court wishes to adopt, it may do so as soon as the Act commences, and in relation to existing deceased estates.

5. Interpretation. It should be noted that although the general definitions are set out in this section special and differing definitions of the expression "residuary estate" are to be found in sections 34 and 55 for the reasons set out in the commentaries to those sections.

In this section note may be made that the definitions of the expressions "country", "internal law" and "place" appertain to Part II Division 3 concerning the formal validity of wills. The term "debts" is defined in order to save repeating a number of words every time the word is used; and "grant" is defined for the same reason. "pecuniary legacy" is defined from the precedent in the English Administration of Estates Act, 1925 and is needed for the purpose of Part V Division 2. The definition of "trustee" calls for some comment. The Trusts Act 1973 included in its definition of "trustee" certain persons who were not, strictly speaking, trustees, for the convenience of bringing settled land and the trust within the same administrative arrangements of the Trusts Act. Those persons have been included in the definition of "trustee" in this Act to ensure that the expression has the same meaning as that included in the Trusts Act in this particular respect.

6. Jurisdiction. The jurisdiction of the Court in succession matters has grown up in a piece-meal fashion. Apart from s.23 of the Supreme Court Act of 1867, which confers ecclesiastical jurisdiction on the Supreme Court, there are many sections in the Probate Act of 1867 which are concerned with what can only be described as small matters of jurisdiction, such as sections 22 - 27, concerning executors out of the jurisdiction, sections 30 - 32 concerning grants to interim and exceptional administrators, and sections 33 and 34, concerning interim receivers of real estate. We consider that most of these sections can properly be dropped from the legislation. This is not because it is desired to reduce the Court's jurisdiciton, but because it seems sufficient to express all the former jurisdictions exercised by the Court and deriving from a multiplicity of sources for historical reasons in one brief, all-embracing provision. Furthermore, we are satisfied that in a number of cases these provisions would, in a modern legislative scheme, be found in subordinate legislation and not in the statute itself. We believe that the best place for most of the provisions which we recommend should be repealed, if it is desired to state them directly, is in the Rules of the Supreme Court. Further, we express the hope that in the not too distant future the Australian States may be able to work out a uniform probate practice for use throughout Australia. We, therefore, recommend that matters which are basically of practice and not of substance should be left to the Rules of the Supreme Court so that, if uniform practice becomes possible, it can be introduced into Queensland without amending this legislation, or at least with a minimum of amendment to the legislation. A further attraction of this provision is that it eliminates some twelve or perhaps more sections from the existing legislation, some of which (e.g. sections 22 to 29 of the Probate Act), derive from as long ago as the English Administration of Estates Act, 1798.

Subsection (1). This subsection is in terms somewhat similar to s.5 of the New Zealand Administration Act, 1969. It is considerably shorter than the English provisions, to be found in s.20 of the Supreme Court of Judicature (Consolidation) Act 1925, or in sections 17 and 18 of the Supreme Court Act 1958 of Victoria, both of which refer to the jurisdiction of the Prerogative Court of Canterbury before 1852. The intention of this section is to give the Court plenary jurisdiction in respect of all matters in this area of the law. Jurisdiction is given in respect of "the estate" as well as "the administration of the estate" to embrace matters affecting estates which may not be strictly speaking administration matters, such as, for instance, questions of family maintenance, and the recognition of foreign decrees.

Subsection (2). In Re Bowes [1963] Q.W.N.35, Hart J. directed probate of a will to be granted although the deceased left no estate in Queensland. In that case the deceased left estate in Scotland. There are earlier cases, e.g. Re Selina Hill [1923] Q.W.N.40 and the cases there mentioned. Today there is an additional reason for stressing that the Court has jurisdiction even though there is no estate at all at the date of the death: this is where litigation is contemplated against an "estate" where the "estate" is merely a cover for litigation against the deceased's insurers, as in Kerr v. Palfrey [1970] V.R.825.

A person out of the jurisdiction can certainly be appointed as executor under the existing jurisdiction: See e.g. Re Kay [1927] V.L.R.66; Re Whitehead's Wills Trusts [1971] 1 W.L.R.833; [1971] 2 All E.R.1334; and according to Tristram and Coote's Probate Practice (24th edition, 1973, at p.344) a person out of the jurisdiction may by the Probate rules appoint an attorney to take the grant. In practice probate and letters of administration are frequently granted to persons in other Australian States, application being made to the judge. We take the view that where the personal representative is in Australia it should be possible for the grant to issue without going

before the judge, but that is a practice matter. The language of the subsection is not mandatory and so the Court may refuse to make a grant if no good reason for making it can be shown.

Subsection (3). This subsection enables the Court to continue its practice of making limited grants, such as grants ad colligenda bona, ad litem, durante minore, and so on. The jurisdiction is, in fact, enlarged by enabling the Court to attach any provisions to the grant it thinks fit.

Subsections (4) and (5). These subsections are self-explanatory.

PART II

Division 1 - The Making of Wills

7. What property may be disposed of by Will. This section is retained from existing legislation but has been abridged and set into paragraphs for easier reading. The abridgments accord with the deletions made from s.3 of the (English) Wills Act, 1837, on which s.36 of the Queensland Succession Act of 1867 was based, by the (English) Statute Law (Repeals) Act of 1969, Schedule, Part III. The getting into paragraphs follows the Australian Capital Territory precedent. The object of the section is to render statutory the ambulatory nature of a will and to emphasise the rule that a will may dispose of property acquired by the testator after the making of the will.

8. Legal capacity to make a will. Since, by virtue of the Age of Majority Act 1974, the status of adulthood is now conferred on persons of the age of eighteen, it is not, strictly speaking, necessary to repeat the specific provision included in the Succession Acts Amendment Act of 1968, s.10, enabling a person of the age of eighteen to make a will, but it has been repeated in the interests of clarity and comprehensiveness.

However, the special privilege given to married persons under the age of eighteen to make a will, given by the same section, is retained and expanded, to provide that if such a married person, having made a will under the age of eighteen, and having, whilst still under the age of eighteen, become unmarried, wishes to revoke the will, he may do so.

9. Will to be in writing and signed before two witnesses. The proposed draft for the formalities attending the execution of a will has been retained intact from the former law which is standard in many jurisdictions and it derives, verbatim, from the original (English) Wills Act of 1837, s.9.

We have given careful consideration to attractive arguments which have been raised with the object of reducing these formalities. In particular, the recent cases of In re Colling [1972] 1 W.L.R.1440; [1972] 3 All E.R. 729, where a will was refused admission to probate because one of the attesting witnesses left the presence of the testator when he was half way through writing his signature, and Re Beadle [1974] 1 All E.R. 493, where a will was refused admission to probate on the grounds that it had not been signed "at the foot or end thereof" have raised again the entire question of the utility of

the formal requirements. Nevertheless, we are satisfied that some formal requirements are necessary; and although sometimes the intention of testators is defeated, nevertheless, the existing law is in a fairly clear condition, having attracted a multitude of decisions. Furthermore, we are mindful of the Convention Providing a Uniform Law on the Form of an International Will, which was the product of the Washington Diplomatic Conference on Wills held in Washington from 16 to 26 October, 1973. Australia was represented at that Conference and the Convention which resulted from the Conference produced, in the Annex to the Convention, a Uniform Law on the Form of an International Will. That form includes all the formalities presently requisite in Queensland domestic law, with the addition of further formalities if the will is to have the considerable international recognition envisaged by the Convention. In these circumstances it is recommended that a reduction of the formalities attending the execution of a will might well be productive of confusion particularly if there is any international element. Furthermore, whilst a reduction in formalties may well be desirable, the need for uniformity of practice throughout Australia, in an area of law where unqualified persons sometimes feel competent to exercise themselves, is probably rather stronger than the need for change.

We have, however, been impressed by a different criticism of the working of the rules relating to the formalities prescribed for the execution of wills, and that is the criticism not of the formalities themselves, but of the rigid attitude of the courts respecting compliance with them. The existing criticisms have been collected together in a recent lengthy article in the Harvard Law Review (Vol. 88 (1975) pp. 489-531) written by Professor John Langbein of the University of Chicago Law School. Professor Langbein argues that the standard required by the probate court for compliance with the formalities prescribed is meticulous in the extreme, and that all that should be required is substantial compliance. Certainly when compared with the attitude of the courts of equity to formal requirements, the attitude of the court of probate is marked by a zeal which sometimes causes great injustice, as cases such as Re Colling and Re Beadle mentioned above, illustrate.

We have therefore decided to recommend that some relaxation in the court's standard should be permitted, and that provided substantial compliance is shown, and the court is satisfied that the instrument presented for probate represents the testatmentary intention of the maker of it, the court may admit it to probate. It will be for the court to work out what it understands by substantial compliance, but it is envisaged that the courts will be cautious in their approach to the latitude given, and that only in cases of accident and minor departures will it be possible to give effect to the obvious intention of the testator, as in cases where the court has hitherto wished to admit an instrument to probate but has felt unable to do so because of the shackles of its policy of meticulous compliance. We should add that Professor Langbein has seen and approves of the provision which we have added.

We have also added a provision respecting the admission of extrinsic evidence in cases where compliance with the formalities is in issue. This provision is considered to be declaratory and not reforming but the whole subject of the admissibility of extrinsic evidence, particularly of statements made by the testator, is not free of doubt, and this provision is intended to make the law clear at this point.

10. When signature to a will shall be deemed valid. It follows from the recommendation to retain the law respecting the formalities of execution of wills intact that section 40 of the Queensland Succession Act of 1867 must also be retained intact, since it performs the function of explaining the meaning of the expression "at

the foot or end thereof" which appears in the preceding section. However, the section has been put into paragraphs for easier reading, but without changing the meaning. The form has been adopted from the A.C.T. Ordinance.

11. Appointments by will to be executed like other wills. This section retains the existing law but the Australian Capital Territory drafting is preferred. The existing Queensland section, which follows the (English) Wills Act of 1836, is capable of the interpretation that where a power of appointment purports to be exercised by will and formalities for the execution of wills are not complied with, then the power is not effectively exercised even though the power was exercisable with lesser formalities which have been complied with. The Australian Capital Territory model appears to have borne this in mind and is adopted for that reason. It complements a similar provision respecting appointments made by instruments other than wills, appearing in s.202 of the Property Law Act, 1974.

12. Alterations to wills. This section repeats the existing Queensland legislation, although with one small amendment. The existing provision has worked reasonably well but has been found a little inflexible in practice because of its insistence that the execution of an alteration should appear with a certain physical proximity to the alteration or to a memorandum referring to the alteration. We have, therefore, added the words "or otherwise relating to" such alteration to give the provision greater flexibility.

We also propose removing this section from the place which it has hitherto occupied in conjunction with provisions respecting the revocation of wills as it is considered that it is concerned more with the question of due execution than with broader issues of revocation.

13. Publication of will unnecessary. The Australian Capital Territory provision has been adopted in preference to the existing Queensland provision which derives from the (English) Wills Act of 1837. The reason for this is that the existing provision is drafted by reference to the pre-1837 law which was that the testator should publish his will by making a declaration in the presence of witnesses that the instrument produced to them was his will. The Australian Capital Territory draft presents the 1837 reform in direct rather than indirect terms and is, therefore, preferred.

14. Competence of witnesses. The existing provision respecting the competency of witnesses, which appears in s.46 of the Succession Act of 1867 and which was taken from s.14 of the (English) Wills Act of 1837, is comprehensible only in the context of the law of evidence as it stood in England in 1837. At that time a person having an interest in the subject matter of litigation might be regarded as incompetent to give evidence. The consequence of this was that if a person to whom a benefit had been left by will witnessed, his evidence of execution was not receivable and the will might well be refused admission to probate for lack of evidence of execution. The object of s.46 of the Succession Act of 1867 was to abrogate that rule by enacting that a will attested by an incompetent witness should not on that account be invalid. As a corollary to the removal of the disability to attest was the imposition of a disability to benefit under the Instrument attested - see section 15 below.

But the incompetence of an interested party to be witness was, in any case, removed as part of the general law of evidence by s.4 of the Evidence and Discovery Acts, 1867 - 1967, and accordingly the context of the existing provision in the Succession Act has been removed. It is probable that there is no need whatever to make any provision in a Succession Act regarding the competency of witnesses, as the general law of evidence would appear to be sufficient; but the dropping of the existing provision without replacement might be misunderstood and accordingly a short general provision has been included which leaves the matter of the competency of a witness to the general law of evidence, applicable in civil proceedings. We feel it proper, however, to repeat the recognised rule that a blind person may not be a witness to the execution of a will.

Section 48, which enables creditor-witnesses, and section 49, which enables executor-witnesses to be admitted as witnesses to prove execution of wills under which they might benefit, may, for the same reason, be repealed and not replaced.

15. Gifts to attesting witnesses to be void. We consider that the existing policy of the law which prevents a witness of a will from taking a benefit under it should be continued. The presence of entirely independent witnesses at the signing of a will has clear advantages in terms of such questions as the presence of suspicious circumstances surrounding the execution of the will and the imposition of undue influence; and as far as possible the testator should be allowed to feel free at the moment he actually executes his will.

However, there are two respects in which the present law is unsatisfactory. In the first place it has been recognised in England that where there is a sufficiency of independent witnesses the fact that a beneficiary acts as a supernumerary witness should not bring about the failure of the benefit left to him. The (English) Wills Act 1968 adopts this view and it is recommended that it should be followed in Queensland. This will save the occasional litigation which arises (see e.g. Re Garthe [1935] Q.W.N. 15; In the Will of Elms [1964 - 1965] N.S.W.R.286 and In the Estate of Bravda [1968] 1 W.L.R.479, which led to the passage of the 1968 Act in England) where the intention with which a beneficiary signed his name on the will had to be established.

In the second place the rule that where a person who may be entitled to be remunerated for acting as executor, administrator, solicitor or conveyancer by virtue of a charging clause under a will then that person may not be remunerated under the provisions of the charging clause if he is witness to the will is a rule which is clearly out of date. It stems from the early English rule that a trustee might not receive a benefit under his trust and that remuneration was regarded as a benefit and not an entitlement. Since in Australia trustees and executors have always been regarded as being entitled to be remunerated there is no point in applying to them a rule which is appropriate to unearned benefit but not to earned remuneration. The section proposed will except from its operation provision for "proper" remuneration. The word "proper" has been used to ensure that if some extraordianary or disproportionate remuneration provision is included it may come under scrutiny. We wish, however, to state that in our view it is always preferable for a will to be witnessed by entirely disinterested persons.

There are two other minor respects in which the existing legislation is proposed to be altered. One is that the provision in the section which affirms that a beneficiary under a will has capacity to witness it is being omitted. That provision was, no doubt, necessary in 1837 when it amounted to a change of the previous law. But the proposed section 14 makes it clear that any

person generally competent may witness a will and that should suffice. Secondly, the drafting of the section has been adapted from the Australian Capital Territory Ordinance to emphasise that it is with beneficial provision that the section is concerned, not with provision upon trust. This follows the decision in Re Ray [1936] Ch.520.

16. Privileged Wills. The existing legislation with respect to soldiers' wills reflects the piece-meal and haphazard manner in which the law has developed. Secton 43 of the Queensland Succession Act of 1867 is itself comprehensible only by reference to the previous law, which had been established by the Statute of Frauds of 1677 and exempted soldiers from the requirements as to form imposed by that Statute with respect to the making of wills of personalty of above £30 in value. But section 43, coming as it did at the end of a series of sections (ss.39 - 42) relating to the formal requirements for the making of wills, left in doubt the question of whether a privileged soldier might make a will although under the age of twenty-one and the Wills (Soldiers, Sailors and Members of the Air Force) Act, 1940 was passed to make it clear that a soldier within the privilege might make a will informally although under the age of twenty-one. That Act also extended soldiers' privileges to testaments of realty (by s.4) and enabled a soldier to appoint a testamentary guardian (s.5).

The Succession Act Amendment Act of 1968 added to the law of soldiers' wills by providing that a member of the Defence Forces of the Commonwealth might make a will although under the age of eighteen - the age of capacity to make a will having been reduced from twenty-one to eighteen by that Act. But although privilege as to age was so extended to members of the Defence Forces of the Commonwealth, privilege as to form was not; and so if there are members of the Defence Forces of the Commonwealth who do not come within the privileged class under the former general law, they may make a will although under the age of eighteen, but they must comply with the formalities prescribed for the non-privileged members of the community.

Quite apart from the lack of articulation which characterises the existing piece-meal legislation, is the whole question of to whom privilege as to form and age should be extended having regard to the very different character of modern warfare from the character of war in Roman times (whence the original privileges of soldiers were conceived) or even in the seventeenth century, the starting point of our own present law. Modern warfare does not begin and end on the battlefield; and does not even depend on the existence of an official state of war. Support services of various kinds are as essential to the conduct of military operations as the actual placing of troops in the field. Prisoners of war and interned Australian nationals, too, should recieve consideration. Unfortunately, we find the existing provisions in the different Australian States divergent to a point of bewilderment, and although we would like to adopt a provision from another State in the interests of uniformity in this particular area of the law, where the State connection as such should be minimised, we find that we cannot recommend the acceptance of any of the provisions which have been adopted by other States. The most recent precedents come from Western Australia and the Australian Capital Territory. Sections 16 - 19 of the Western Australian Wills Act of 1970 are commendable for their brevity and simplicity of language; but they do not make provision for prisoners of war or internees, as section 10 of the Capital Territory's Wills Ordinance of 1968 does. But on the other hand the Australian Capital Territory's provision seems to us, with due respect, to be overlong and to suffer from some contortions of language. We have, therefore, adopted the

Western Australian model in principle although it has been redrafted, and we have added a provision to included prisoners of war and internees. We see no reason, however, for extending the privilege to persons under the age of eighteen unless married. We offer the added reservation that we doubt the value of these special privileges, originally allowed when soldiers were illiterate and lacked access to legal advice. These conditions rarely obtain today.

Division 2 - The Revocation and revival of Wills

17. Revocation of will by marriage. Section 50 of the Succession Act of 1867, which provided that a will should be revoked by the marriage of the testator, except in certain cases of a will in exercise of a power of appointment, was modified by s.3 of the Law Reform (Wills) Act of 1962, which followed s.177 of the (English) Law of Property Act, 1925, to provide that a will expressed to be made in contemplation of marriage was not revoked by the solemnisation of the marriage contemplated. These provisions have been retained with slight modifications. In the first place it seems to be desirable to say not that the will must be "expressed to be made" in contemplation of a particular marriage, but that it should contain "an expression of contemplation" of a particular marriage. The existing wording has to some extent proved difficult to apply, as is evidenced by the numerous cases in which it has been argued, sometimes successfully and sometimes unsuccessfully, that expressions such as "my fiancee" or "my wife" are sufficient expressions of contemplation of a particular marriage. (See In the Estate of Langston decd. [1953] P.100; Re Chase decd. [1951] V.L.R.477; and Burton v. McGregor [1953] N.Z.L.R.487, where the word "fiancee" was in issue in this context; and Pilot v. Gainfort [1931] P.103; Re Keong decd. [1973] Q.W.N.21; and Will of Foss [1973] 1N.S.W. L.R.180 where "wife" was in issue - contra, such cases as Re Taylor [1949]V.L.R.201; Re Gray (1963) Sol.Jo.156; and Re Pluto (1969) 6 D.L.R.(3d) 541.) In fact the courts in England and Australia- and the Queensland case of Re Keong [1973] Q.W.N.21 is illustrative of this - have tended not to construe the words "expressed to be made in contemplation of marriage" strictly, and have beeen willing to accept any sufficient expression contained in the will that a particular marriage was contemplated by the testator. But a much stricter construction could be justified on the basis of the existing wording, and has been in the recent case of Re Coleman [1975] 2W.L.R.213. It seems to be desirable to allow latitude in this matter and to lessen the rigour of the existing phraseology, and accordingly, it is proposed that if there is some expression of contemplation of the particular marriage contained in the will, then the solemnisation of that marriage will not revoke the will. It is apprehended that, in effect, the change of wording does not change the law as it has been applied in Re Keong. Secondly, it seems desirable to state, as was held in Re Keong and in In the Will of Foss [1973] 1N.S.W.L.R.180, that extrinsic evidence is admissible to prove that a certain expression contained in a will is indeed an expression of contemplation of marriage, particularly in view of the fact that Megarry J. took the view in Re Coleman [1975] 2 W.L.R.213 that extrinsic evidence is not admissible in such case. Not only the surrounding circumstances but statements made by the testator, may well establish that a reference to a wife or a fiancee contained in a will is, in fact, made as an expression of contemplation of impending marriage to that person. The exception from the provisions of the section is the case where the will is justified on the grounds that the kind of power of appointment which is covered is a power of appointment

over property not belonging to the testator and in relation to which the revocation of its exercise by marriage could not benefit the testator's general estate. The exception has been removed to a subsection on its own because it is highly technical; and the Australian Capital Territory Ordinance has been used as a precedent in this respect.

18. Effect of divorce on will. It is, perhaps, surprising that, although marriage is accepted in most English jurisdictions as a suitable event - very often the only independent event - for the revocation of a will, there has been little discussion on what effect divorce should have on a will. We have had the advantage of seeing a Report of the New Zealand Property Law and Equity Reform Committee on the effect of divorce on testate succession presented to the New Zealand Minister of Justice in November, 1973; and we have seen the provisions of paragraph 2-508 of the American Uniform Probate Code. The proposals incorporated in this section adopt, in principle, the recommendations of the New Zealand Committee and the provisions of the American Code, which are similar.

The need to make some provision in the event of divorce in this context is clear from the common example of the testator who leaves his estate to his wife by name, and not merely by description, so that the provision is for her personally and not in her capacity as his wife. The subsequent termination of the marriage has no effect on the will and the divorced wife will take the benefit whatever the testator's intention might be presumed to be. One possible solution might be to provide that divorce revokes the entire will, as marriage does. But there may well be complex provisions in a will which have nothing to do with provision for the spouse of the testator and there could be no reason for supposing that a testator might intend to revoke his entire will in any event of divorce. Accordingly, and following both the New Zealand recommendations and the precedent of the American Uniform Probate Code, it seems reasonable to provide that benefits left to the spouse and any appointments to her to office contained in the will should, upon dissolution or annulment of the marriage, be regarded as revoked. In order to make the consequences of the revocation clear, so far as beneficial dispositions to the spouse are concerned, it is desirable to provide that the dispositions should have effect as if the spouse had predeceased the testator. This would ensure that if, for instance, a life interest were left to a wife, the effect of a divorce would be to accelerate the interests of the beneficiaries entitled upon the death of the spouse; and if the testator had included a substitutional provision in his will to take effect in the event of the prior death of his wife, that substitutional provision would still take effect, as this would presumably best accord with the testator's intention. Consideration has been given to extending the operation of the section in the case to judicial separation; but for the present it seems to be preferable to restrict it to the more permanent decrees of dissolution and nullity, since it is a novel reform in any English jurisdiction and may require reconsideration at some future time in the light of experience of its working. We are well aware that the only really adequate solution to the consequences of divorce is for the testator to revoke his will and make a new one; and that no reform is likely to meet the supposed intentions of a testator who has been divorced in every case.

19. No will to be revoked by presumption. This provision is retained from the existing law. The words "Subject to this Act"

are inserted at the beginning of the section in the light of the provisions of sections 17 and 18, both of which provide for revocations by reason of change of circumstances.

20. Revocation by instrument or destruction. It is not proposed to make any change in the law relating to the revocation of wills, which has stood in its present form since the (English) Wills Act of 1837 and has not attracted any serious adverse comment. The existing provisions have been set out in paragraphs for easier reading. It may, perhaps, be observed that the non-statutory doctrine of dependent relative revocation has enabled considerable flexibility to be introduced into the law relating to the revocation of wills, inasmuch as an apparent revocation may be given limited or no effect, if that appears to accord with the testator's intentions. Subsection (2) has been added to make it clear that privileged persons (as defined by s.16 of the Act) may revoke a will in as informal a manner as they make a will. This has already been established by case-law in In the Estate of Gossage [1921] P.194 and in In the Estate of Newland [1952] P.71.

21. Revival of revoked wills. The law relating to the revival of revoked wills is in a fairly clear state and no reform of it seems to be warranted. The Australian Capital Territory precedent has been used because the existing Queensland provision is somewhat archaic in its terminology, but subsection (2) has been redrafted. Subsection (3), which is taken from the Australian Capital Territory precedent, makes it clear that a revived will is deemed to have been made at the time of its revival. Accordingly, it will be construed from the date of the revival and not from the date of the original making. While this was almost certainly the law it is not entirely clear that a revival necessarily effects a republication of the will revived and Theobald on Wills (13th edition, 1971) para.210, does not make it clear that revival necessarily connotes republication. Subsection (3) should place this beyond doubt.

Division 3 - Formal validity of Wills Sections 22 - 25

At the ninth session of the Hague Conference on Private International Law a Convention was concluded on 5th October, 1961, on the conflict of laws relating to the form of testamentary dispositions. That convention was ratified by the United Kingdom and the Wills Act of 1963 was passed. Acts to the same effect were also passed in Victoria (Wills(Formal Validity) Act 1964), South Australia (Wills Act Amendment Act 1965 - 1966), Western Australia (Wills(Formal Validity) Act 1964) and Tasmania (Wills(Formal Validity) Act 1964). Perhaps Queensland has failed to follow suit becuase it was only in 1962 that it had passed s.4 of the Law Reform (Wills) Act which adopted the solution to these questions which had been adopted by the English Wills Act of 1861, otherwise known as Lord Kingsdown's Act. It is not our intention to spell out in detail the deficiencies of the former law. We are quite satisfied that it is desirable for Queenslnad to accept the conclusions of the Hague Convention and to follow the lead taken in the States mentioned. The main advantages of the

proposed legislation are that it abolishes with one minor reservation the archaic distinction which had been made formerly between movables and immovables; and it extends the range of validity for wills with a foreign element. The provisions are analysed in detail in Professor P.E. Nygh's book, Conflict of Laws in Australia (3rd edition, Butterworths, 1976) at p.480 et seq.

Division 4 - The construction and rectification of Wills

26. Change of domicile. The provision follows on from the provisions of Division 3 concerning the formal validity of wills. It repeats the provision of s.4(4) of the Law Reform (Wills) Act of 1962 which is being repealed for the reasons mentioned in the comment on Division 3. It also follows the precedents which adopted the model provisions approved by the Hague Convention.

27. Effect of subsequent conveyance on operation of will. This section is part of the general scheme of the (English) Wills Act of 1837 to ensure the maximum effectiveness of the will as a property disposing instrument for property coming into the testator's ownership after the date of the will but before his death. It ensures that a change in the title of property, such as the purchase of the freehold reversion of a lease belonging to the testator at the date of the will, does not affect the operation of the will as such. It seems likely that this section was intended to cover the case where there has been some reduction, rather than addition, to a testator's title, as the following section (section 28(a) below) seems more apt to cover additions to titles. The section cannot affect the operation of the doctrine of ademption; but it has been retained in England and all Australian States and is, therefore, retained intact.

28. General rules for the construction of wills. This section is taken with very slight modification from the Western Australian Wills Act of 1970, s.26, and is designed to replace, in more modern language, the provisions of sections 56 - 60 inclusive and sections 62 and 63 of the Queensland Succession Act of 1867. The main objects of those sections are well known, and we suppose that it is desirable to retain these provisions on the statute book although some of them are mainly concerned with reforming the law as it stood in England when the Wills Act of 1837 was passed. Nevertheless the provisions are found in the English Legislation and that of the Australian States and only Western Australia has taken a lead to bring the provisions up to date by compressing them into one section. We are satisfied that the compression does not effect any substantial reform and that it is easier to understand. It is, perhaps, worth observing that sections 62 and 63 of the Queensland Succession Act can be repealed merely by the inclusion in paragraph (e) of the proposed section of the words "or as executor or trustee". The object of the former sections was to ensure that where a testator devised land or bequeathed personalty to trustees upon trust, they would take the entire estate vested in the testator and not merely an estate sufficient to enable them to carry out the trusts reposed in them, which was the former rule. It has been suggested (by Jessel M.R. in Freme v. Clement (1881) 18 Ch.D.499 at p.514) that

section 63 was merely an alternative draft of section 62 and that both drafts happened to creep into the Wills Act by accident! By making it clear, as paragraph (e) of the proposed draft does, that no distinction is made between beneficial dispositions and dispositions to executors or trustees, the object of sections 62 and 63 are attained with a minimum retention of the former language.

Admissibility of extrinsic evidence in the construction of wills. We think we should mention that we have given very careful consideration to whether the rules relating to the admissibility of extrinsic evidence in the construction of wills, and in particular of the intention of the testator, should be relaxed. We have had before us the Nineteenth Report of the English Law Reform Commission and we note that of the members of the Commission, eight, including all the Justices of the High Court and Court of Appeal, took a conservative view with respect to extending the admissibility of evidence of the testator's intention, the other seven taking a reforming view. Indeed, we consider that the Report itself reflects the immense difficulties and complexities of the subject. As the Report itself says in paragraph 48:

> "It is thus a matter of great difficulty to state with absolute precision what the existing law really is."

We have particular consideration to a proposal that extrinsic evidence should be admissible to resolve problems of mistaken references to persons and property which might appear in a will, but in the end we have decided that the admission of additional modes of extrinsic evidence is likely to lead to the undesirable consequences to which we refer, in our comment on the proposed section 31 below, in relation to the question of granting the court power to rectify wills, namely that it might be taken as an invitation to litigate to disgruntled members of a family. We, therefore, recommend that the law be left as it is.

29. Construction of residuary dispositions. The avoidance of unintentional partial intestacies is a legitimate objective of a programme of revision of the succession laws and this section is a new one, having that objective.

Subsection (1). No professionally drafted will would include a residuary clause restricted to the realty of the testator without also including a clause bequeathing his residuary personalty, or vice versa. But home-made wills are sometimes found where the residuary provision refers only to the realty or only to the pesonalty of the testator, leaving a partial intestacy of the personalty of realty respectively. The rule of construction which brings about this state of affairs is that since the words "realty" (or "real estate") and "personalty" (or "personal estate") are technical expressions, the testator who uses them must be taken as intending them to have a technical effect. As Harman J. said in Re Cook [1948] 1 Ch.212 at p.216:

> "but this is a case where a layman has chosen to use a term of art. The words 'all my personal estate' are words so well-known to lawyers that it must take a very strong context to make them include real estate. Testators can make black mean white if they make the dictionary sufficiently clear, but the testatrix has not done so. It may well be that she thought 'personal estate' meant 'all my worldly goods'; I do not know. In the absence of something to show that the phrase ought not to be so construed, I must suppose that she used the term 'personal estate' in its ordinary meaning as a term

> of art. Consequently, I hold that the testatrix only succeeded in disposing of what the lawyers would call her 'personal estate' and she did not dispose of this house, No. 16, Kirton Park Terrace, which, therefore, devolves as on an intestacy."

We consider that it is time that this rule was changed. In the first place no distinction has been made, in the Queensland succession laws, between succession to realty and succession to personalty since 1877 when heirship was abolished by the Intestacy Act of that year. The technical meanings of the vocabulary of realty and personalty are, in this context, out of date. In the second place it is the object of many of the reforms to property law which this Law Reform Commission has recommended and implemented in the past, that the law relating to realty and personalty should be assimilated as far as is practicable. But in any case we really doubt whether any testator who uses the expression "realty" or "real estate" or "personalty" or "personal estate" on its own ever realises what the technical context of those expressions is; as if he did he would either not use those expressions at all or he would refer to both realty and personalty, as any professional draftsman would. The law as it stands insists that laymen mean what lawyers avoid. We, therefore, recommend that in the absence of a contrary intention, where a testator refers only to realty or only to personalty in a residuary clause, the prima facie construction should be that he is referring to all his estate, both real and personal. A contrary intention would, of course, be established if he left realty to one and personalty to another; or if he left realty or personalty to one and residue to another.

Subsection (2). It often happens that a testator leaves residue to a number of persons one or more of whom predecease him. Unless the gift can be construed as a class gift, the lapsed shares pass as on the intestacy of the deceased. This is an old rule but it is considered that it does not reflect what might most naturally be presumed to be the testator's intention. After all, if a testator leaves his estate to A, B and C in equal shares, one might reasonably expect that the testator would prefer A and B to take the entire residue if C's share happens to lapse, rather than that it should pass to his intestacy next of kin. The reason why the rule respecting lapsed shares of residue grew up seems to be connected with the construction of words of limitation in relation to devises of land, words which might only be construed, because of the nature of devises of land, with respect to the state of affairs at the death of the testator. It is within the experience of members of the Commission that the rule leads to hardship and that it is often regarded as unfair by laymen. The American Uniform Probate Code, s.2-606, makes a provision similar to the one which we now recommend, which is that a lapsed share of residue should pass, not as on the intestacy of the deceased, but to the other residuary beneficiaries. The residuary beneficiaries who take will take proportionately so that if they have been left unequal shares, they will take the lapsed share in those shares.

The provision is not limited to failure by lapse, so it will apply where the failure occurs for some other reason, for example, a breach of a rule of public policy, such as the rule against perpetuities. It is made subject to the Act to ensure that the substitutional provisions of section 33 are not cut back by this provision.

30. Construction of documents. "Die without issue"; mode of distribution amongst issue.

Subsection (1). Section 61 of the Succession Act of 1867, which adopts section 29 of the (English) Wills Act, 1837, relates to the way in which the construction of certain particular words, namely "die without issue", "die without leaving issue" and "have no issue" should be dealt with, changing the rules of construction which had grown up in relation to such expressions.

We recommend that the section be retained. However, it is not a provision about the general construction of wills; it is about a particular rule, and, therefore, it has been put in a different section from the preceding rules.

Subsection (2). The terms "issue" and "descendants" of a person mean prima facie issue and descendants of that person of all degrees of remoteness from that person. Prima facie, too, a legacy or devise to the issue or descendants of a person is construed as giving them a per capita benefit, because that is regarded as the "natural" meaning of the word. The development of that rule was probably inevitable because it would be hard to find an intention to distribute per stirpes from a complete absence of any wording in the will.

But it is to be doubted whether the rule performs any function except to violate the intention of a testator and cause hardship and dissent between members of a family, for it operates in a capricious and unpredictable fashion. One example will illustrate the point. If a benefit is left to the "issue" of A, and when it takes effect the issue of A consist of one child aged 30 who has four children and one child aged 20 who has no children each will take one-sixth of the benefit. Any further children born to the elder child would take nothing; and children born to the younger child would take nothing. A per stirpes distribution would give each child one-half.

The rule was attacked by Kindersley V.C. in Cancellor v. Cancellor (1862) 2 Dr. & Sm.194; 62 E.R.595, where a benefit was left to the "children and issue" of a certain person. The Vice Chancellor said at p.198:

> "Now it is certainly not very probable, a priori, that a testator should intend that parents and children and grandchildren should take together as tenants in common per capita; and the Court will not very willingly adopt such a construction."

A more recent and forceful criticism of the rule appears in the judgment of Adam J. in In the Will of Moore [1963] V.R.168 at p.172:

> "The considerations urged by Mr. Newton might well, I think, have led the courts to adopt, as a general rule of construction, that prima facie, gifts to issue were to be construed as stirpital, this being more probably in accord with the testator's intention. But now to adopt such a rule would fly in the face of authority. Misgivings about the settled rule of construction, based on the capriciousness of the consequences of its application, have at times been expressed by English judges (see, for example, Freeman v. Parsley [(1797) 3 Ves.Jun.421; 30 E.R. 1085] and Cancellor v. Cancellor (1862) 2 Dr. & Sm.194; 62 E.R.595) but notwithstanding, the rule has been consistently applied to cases within it. In passing

> I may observe that it appears that the rule of construction in Scot's law is the other way, and a gift to issue prima facie imports in Scotland a stirpital distribution (see Boyd's Trustee v. Shaw [1958] S.C.115)."

Because of the capriciousness of the rule, the courts have tended, and will be tempted, to find indications of contrary intention in wills brought before them in order to ensure a stirpital division and indeed the consequence of a rule which is in itself neither strong nor just is that litigation is invited to displace it and judges are tempted to co-operate, so inviting further litigation.

Further cogent criticism of the rule has been advanced at length in an article "Stare Decisis and Rules of Construction in Wills and Trusts" written by the distinguished American expert Professor Edward C. Halbach Jr., Former Dean of the Berkeley Law School of the University of California, in the Calfornia Law Review (1964) Vol.52 pp.921 - 955, at pages 926 - 932, in which it is observed that the State Legislature of New York amended the rule in 1921.

The fact is that the rule as it stands has attracted criticism in cases where it has been raised in issue and that it is desirable to change the already rather weak rule in favour of a more decisive and just rule, namely that legacies and devises to the issue or descendants of a person should be distributed to them in equal shares among the nearest surviving issue referred to and by representation among the more remote surviving issue. The expression "by representation" has its statutory origin in the Statute of Distributions of 1670 and its meaning is quite clear, although complex. It means in principle that surviving issue more remote than the nearest surviving issue represent their parent, if deceased, and take (between them if more than one) the share that their deceased parent would have taken had he survived. Thus if T dies leaving 8 issue namely two children A and B and 6 grandchildren, A1 and A2, children of A, B1 and B2, children of B, and C1 and C2, children of a deceased child C, then (1) A and B, being the nearest surviving issue, will take equal shares and the remoter issue will take by representation, i.e. between them, if more than one, the share which their deceased parent would have taken had he survived. A1, A2, B1 and B2 can therefore take nothing since they cannot represent their parents A and B who are still alive. But C1 and C2 represent their deceased parent C and take the share he would have taken had he survived. Accordingly A and B take one third of the estate each and C1 and C2 take the other third between them. The formula works however remote the nearest surviving issue are, and however remote the more remote representatives are. Thus if a deceased person leaves only grandchildren and great grandchildren, the grandchildren will take in equal shares and the great grandchildren by representation. It is considered that this is fairer than the traditional per stirpes rule which bases itself on the factual assumption, generally but not universally correct, that a deceased person never dies leaving grandchildren surviving him without also leaving children surviving him. This formula is repeated in sections 33 and 36.

There are added reasons, quite apart from the criticisms of the rule which exist, for changing this rule. One is that it is consistent with the per stirpes policy of this Act which emerges as part of the intestacy rules in Part III and as part of the rules against lapse in section 33. It is desirable that the prima facie rule of construction should coincide with the prima facie policy of the legislature. The other is that by having a settled, clear

rule, the use of per stirpes clauses, which are very much the preserve of technical draftsmen, will not be so crucial, and indeed it may often be possible to omit them altogether. On the other hand, it will be very easy, technically, to displace the per stirpes presumption, which we now recommend should be brought into the law, by the use of a very simple layman's expression such as "equally" or "in equal shares".

31. Power of court to rectify wills. The rectification of wills was one of the two topics upon which the English Law Reform Committee commented in its Nineteenth Report, presented to Parliament in May, 1973. We acknowledge the achievement the Report represents, and we have taken it fully into account in considering our recommendations.

The English Committee's recommendation concerning the rectification of wills is summarised at p.23 para.65 as follows:-

> " (1) The equitable doctrine of rectification should be applied to wills and be available wherever it can be clearly shown not only that the will does not contain the wording intended by the testator but also what the substance of that wording was (paragraphs 19 - 21, 25);
>
> (2) Although the standard of proof should be high there should be no rigid restrictions on the nature of the evidence admissible (or on its weight) on a claim for rectification of a will (paragraphs 26 - 31);
>
> (3) Claims for rectification should not be brought more than six months after the grant of representation without the leave of the Court (paragraph 32)."

Although we see much in favour of this recommendation we are hesitant to embark on what would be completely uncharted waters. In exercising the jurisdiction to rectify deeds the court often has the evidence of all parties to the deed before it; in rectifying a will it would never have the evidence of the testator himself. Further, there is a great deal to be said for the retention of the strict formal requirements for making of wills which have been accepted for over a hundred years in most English and many American jurisdictions and which are fairly well understood and often acted upon by laymen. If a generous invitation were to be extended to would-be rectifiers of wills, it might be interpreted as a serious inroad on what is recognised to be an effective and justifiable requirement for the protection of testators. It is in any case undesirable to offer much scope for litigation in an area where family passions regrettably all too often override reasonable expectations.

Furthermore, in Queensland the family maintenance system can ensure that justice is done at least as far as persons entitled to apply for maintenance are concerned, whatever appears in the will and whether it reflects the testator's intention or not. We are proposing to enlarge the class of possible applicants for family maintenance relief and we accordingly feel that there is less call for the more extreme measure of seeking to overthrow the will altogether, or to rectify it, where the immediate family of the deceased are protected anyway. Nevertheless, we are convinced that some step should be made in the direction of enabling the Court to perform at least a limited function in rectifying wills. The need for reform is well illustrated by the recent case of Re Morris [1971] P.62, where a testatrix

wished, by her codicil, to revoke clause 7(iv) of her will, in which she had made a certain provision which she wished to alter. But by a mistake the codicil revoked not clause 7(iv) but clause 7, and that had the unintended effect of revoking nineteen pecuniary legacies contained in the clause. The Court held, as the present rules allowed it to, that it had jurisdiction to strike out the 7 from the codicil - so restoring the original legacy altogether - but it had no jurisdiction to insert, after the 7, the numeral (iv), which was what the testatrix wanted. Another case is In the goods of Boehm [1891] P.247, where a testator intended to make one provision for his daughter Georgiana and a similar provision for his daughter Florence. But by a mistake in the drafting Georgiana's name was inserted in both clauses and Florence's name was omitted altogether. The Court held that it had jurisdiction to strike out Georgiana's name in one of the two clauses but it had no jurisdiction to insert Florence's name in that clause. The reason why the rule is that the Court may omit from a will material inserted accidentally or inadvertently - per incuriam - by the testator but may not insert into the will material accidentally or inadvertently omitted from the will by the testator is that since the requirement is that a will must be in writing and duly executed, material omitted from it cannot be in writing and duly executed and so cannot be inserted. Nevertheless, as the above cases illustrate, the rule produces an anomaly which can hardly be justified. It is, therefore, proposed to remove this anomaly by enabling the court to exercise the same jurisdiction with respect to the insertion of material accidentally or inadvertently omitted from a will as it has at present to omit material which has been accidentally or inadvertently inserted in a will. It is apprehended that a litigant seeking to utilise the jurisdiction which it is proposed to confer on the court by this provision would have to show not only that material had been accidentally or inadvertently omitted from the will, but also what that material was. It would be unlikely that the Court would entertain general evidence of the testator's supposed intention; and that, in practice, the kind of evidence which would be necessary to make good a claim would be of such matters as the form of the testator's instructions to his solicitors, failures to relay instructions accurately, and errors made by clerks or typists. It is further provided, as recommended by the English Law Reform Committee, that a limitation period be provided, so that the personal representatives can proceed on the basis that no claim for rectification can be made, without the consent of the court, more than six months after the grant of probate of the original will.

32. Lapse of benefit where beneficiary does not survive testator by thirty days. Section 95 (formerly s.88A) of the Succession Act 1867 - 1968 was taken from s.184 of the English Law of Property Act 1925 and in effect, provided that where two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall be presumed to have occurred in order of seniority, and therefore the younger is deemed to have survived the elder. That provision proved inadequate where the persons were a husband and wife who died intestate because unless there were children of the marriage the family of the younger to die in such circumstances took the elder spouse's estate, and not the elder spouse's family. Accordingly, in England, The Intestates' Estates Act 1952, s.1(4), was passed which provided that in that case neither was deemed to have survived the other. That provision has never been adopted in Queensland.

There are certain disadvantages to the provision as it stands. In the first place it is comparatively rare to find two persons dying in circumstances rendering it uncertain which of them survived. Even in the case of car crashes it is often possible to say that one victim survived another, if only by a short space of time. The provision is, therefore, suited to such catastrophes as aeroplane crashes; but it is clear that a more general provision is needed, because what is needed is not a presumption to save difficulties of proof, which are the terms within which the existing legislation envisages its own operation, but a substitutional provision attempting to give effect to the supposed wishes of the testator in the event of the early death of a beneficiary. Furthermore, the added burden of succession duties which have sometimes been involved where two successions take place in quick succession had led many testators, in professionally drawn wills at least, to provide that, unless a beneficiary survives the testator by a period of thirty days, a substitutional provision shall have effect. The American Uniform Probate Code has adopted this approach, by providing that a beneficiary's interest lapses if he fails to survive the testator by 120 hours. In Australian precedents (see e.g. The Australian Encyclopedia of Forms and Precedents [Butterworths] Vol.16, p.364, Precedent 16, clause 2, and Mr. Justice Hutley's Australian Will Precedents [Butterworths, 1970] at p.82) the preferred period is thirty days and we recommend accordingly. In the case of issue of the testator a lapse brought about by the operation of this section will be saved by the operation of the next section. In other cases, lapse will occur in the ordinary way and the subject matter of the lapsed disposition will pass with the residuary disposition, if any, in accordance with s.28(b).

Finally, it is emphasised that the justification for extending the period for the operation of the lapse doctrine by thirty days is the same as the justification of the lapse doctrine itself, namely the supposed intention of the testator that he desires the beneficiaries and not his estate, to take the benefit.

(2) It seems prudent to make it clear that a general requirement or condition that a beneficiary survive the testator should not constitute a contrary intention of the will for the purposes of this section. A testator might say that a benefit is to go to "such of" the members of a class "as survive me"; and it might be argued that "survive" should be construed strictly and so as indicating an intention contrary to the section. Since such survivorship requirements are common in precedent forms and their use may produce results which this section is designed to avoid, this provision seems to be desirable. If a testator wishes to avoid the provisions of this section he will have to state explicitly that the beneficiary is to take if he survives him for any length of time.

33. Statutory substitutional provisions in event of lapse. The statutory substitutional provisions which appear in section 65 of the Queensland Succession Act of 1867 follow s.33 of the (English) Wills Act of 1837 and have been the subject of criticism on a number of counts. The criticisms have been collected by Professor H.A.J. Ford of the Melbourne University Law School in an article "Lapse of Devises and Bequests" in (1962) 78 L.Q.R. 88 - 106. One criticism of the existing rule is that it provides that where there is a provision by will for a child or other issue of the testator and that child or other issue predeceases the testator leaving issue who survive the testator, the child or issue who predeceased the testator is deemed to have survived him. The consequence is that the legacy left goes not to the issue upon whose survival after the death of the testator the operation of the section is essential, but to those persons, whoever they may

be, to whom the child or issue who predeceased the testator may have left the property by his will. In other words, although the survival of issue of the deceased legatee is the condition precedent for the operation of the section, the surviving issue may not take any benefit at all in certain circumstances. The section has also been criticised because it deals with gifts to individuals and not to class gifts, and in any case the wording of the section has caused other problems of interpretation as illustrated by such cases as Re Hensler (1881) 19 Ch.D.612 and Re Basioli [1953] Ch.367. We accept that the present provision does not perform the function which it was originally intended to perform and that it needs redrafting; and we have studied the alternative provisions offered by s.31 of the Victorian Wills Act of 1958, originally introduced by the Wills Act Amendment Act of 1947, and section 27 of the Western Australian Wills Act of 1970. Both those Acts are designed to ensure that the issue of the issue to whom the testator left the legacy take the benefit of the legacy left, and they also extend the operation of the older provision to class gifts. Similar legislation has been passed in New Zealand by section 16 of the Wills Amendment Act of 1955. We consider that where a testator makes provision for issue, then, in the absence of a contrary intention, a statutory per stirpes clause should be implied, and this is the object of the section which we propose. We have also extended the operation to the case of class gifts. This provision is, therefore, in consonance with the per stirpes provisions of the proposed intestacy rules. In subsection (2) we have provided that a general requirement that such issue survive the testator is not a contrary intention for the purposes of the section. This parallels the similar provision in s.32(2) and is included for the same reasons. In addition we provide that a general requirement or condition that such issue attain a specified age is not a contrary intention for the purpose of this section. This is in response to the decision in Re Wolson [1939] 1 Ch.780, [1939] 3 All E.R.852 that if issue predecease the testator not having attained a requisite age, their issue cannot benefit under this provision. It is the object of s.31(2) of the Victorian Wills Act of 1958 to reverse that decision and we adopt the same policy, so that if issue of a testator fail to reach a specified age, but leave issue, those issue can take the benefit of this section.

We should add a reference to the fact that the New Zealand and Western Australian legislation both specifically exclude from the operation of this section dispositions to beneficiaries as joint tenants, although the Victorian legislation does not. We propose to follow the Victorian precedent. Where one joint tenant beneficiary predeceases the testator then the surviving joint tenant beneficiaries will take by survivorship, any issue of the deceased beneficiary taking nothing. This is already the law as indicated by Re Butler [1918] 1 Ir.R.394, and the New Zealand and Western Australian legislation is in consonance with that case. However that legislation might have undesirable consequences where a disposition is made to joint tenants all whom predecease the testator. In that event it seems reasonable to distribute the property amongst the surviving issue of the deceased beneficiaries and to provide that the section does not apply to dispositions to joint tenants might prevent that from happening. Subsection (1) seems to be broad enough to cover the case and therefore a specific provision seems unnecessary.

Finally, we have repealed and do not intend to replace section 64 of the Succession Act of 1867 which saved from lapse certain devises for an estate tail or in quasi entail, as such estates have now been converted into estates in fee simple by section 22 of the Property Law Act, 1974.

PART III - DISTRIBUTION ON INTESTACY

Sections 34 - 39

In view of the fact that the present rules for the distribution of intestate estates date only from 1968 we have decided not to undertake a thorough review of the suitability of those rules generally. We, nevertheless, observe that in times of severe inflation intestacy rules should be reviewed from time to time, particularly where, as is provided in this Part, a specific sum of money (namely $20,000) is set aside for the spouse in the case where no issue survive the intestate. In view of the considerable inflation which has occurred since 1968, we recommend that the widow's specific fund be increased by $10,000 to $30,000.

We also, recommend two minor changes in the present rules. We have already recommended, in relation to section 32, that a beneficiary under a will should not benefit if he fails to survive the testator for a period of thirty days, and we recommend a similar provision in relation to intestacy beneficiaries and for the same reasons. Section 35(2) embodies this recommendation.

The other small change which we recommend is in relation to the operation of the per stirpes rule which governs entitlement of issue of an intestate under the present section 31. The application of that section results in a strict per stirpes distribution amongst the issue of an intestate and we have had our attention drawn to a modification of that rule as embodied in the American Uniform Probate Code, Section 2-103(1) and which has also been recommended as desirable by the Report of the Ontario Law Reform Commission's Report on Family Law (Part IV, Family Property Law) of 1974 at pages 167 - 168. The recommendation is best illustrated by an example. Where an intestate is survived only by six grandchildren, they will be entitled to share the entire estate; but they will not necessarily take equal shares. If five of the grandchildren are children of one of the intestate's children and the other is the only child of another child of the intestate's each of the five will take a one-tenth share only, but the sixth will take a one-half share. This is because a strict application of the per stirpes rule (which is the present Queensland provision) allows grandchildren in such a case to take between them only the share which their parent would have taken if he had survived the intestate. We are not satisfied that such an unequal distribution is warranted where all the persons entitled to share in the intestate's estate are of the same degree: in that case we consider that they should all take equal shares. We, therefore, recommend that the nearest surviving issue of the intestate shall take in equal shares and the more remote by representation. The language of the closing words of s.3 of the Statute of Distributions of 1670 has been used as a model in the drafting.

We have modified section 36 accordingly and also refer to sections 30(2) and 33 where a similar provision has been included in the cases there mentioned.

We have omitted the provision which was contained in s.34(2) of the Succession Act which says that 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 to take that part. The provision might be construed as meaning that where the spouse or issue of an intestate happen to be his executor they cannot take benefit under a partial intestacy. The historical reasons for this provision have been referred to in Vol.7 No.1 of the University of Queensland Law Journal (1968) at pp.74 - 84. It appears to have been originally intended as a provision to ensure that an executor could not take as against the intestacy beneficiaries of the testator. It is quite clear that

the only persons who may take on intestacy in Queensland are those persons designated by this Part of the Act and, therefore, there is no need to retain what is, in effect, an archaic amendment to an even more archaic rule.

The former section 33 of the Act has been removed as it does not necessarily relate to the intestacy provisions at all. It is now embraced by section 6.

39. The construction of documents: references to the Statutes of Distribution; meaning of "heir". We adopt the provision of section 50(1) of the English Administration of Estates Act 1925 that references to Statutes of Distribution in instruments inter vivos or wills coming into effect after the commencement of this Act should be construed by reference to the intestacy provisions set out in Part III of the Act. That is, presumably, what the makers of such instruments and testators mean when they make these references, unless, of course, a contrary intention appears.

We have added in our proposed provision references to the meaning of the word "heir". Heirship having been abolished in Queensland since 1877 we consider that it is virtually inconceivable that any person would use the word "heir" to mean heir-at-law in accordance with the exceedingly complex rules of the common law, and that no ordinary person would really be likely to draw a distinction between the next of kin of a person entitled on his intestacy and his heir-at-law under the old rules. It is, as we have mentioned, the policy of the Law Reform Commission to abolish, as far as practicable, the distinctions between realty and personalty and we recommend abolishing the distinction which exists between the meaning of "heir" and next of kin, except where context retains the distinction. The repeal of the words

> "and in the case of an interest in any property expressed to be given to an heir or heirs or any particular heir or class of heirs, the same person shall take as would in the case of freehold land have answered that description under the general law in force before the commencement of this Act"

at the end of section 28 of the Property Law Act 1974 is consequential as those words, deriving as they do from the conservative English legislation of 1925, when heirship was still a factor in English property law, retain the construction which we think, in the context of more up-to-date succession legislation, should be abolished.

PART IV - FAMILY PROVISION

Sections 40 - 44

Whilst we were considering reforms to the law of family provision we received the Second Report on Family Property, dealing with Family Provision on Death, of the English Law Commission (Law Com. No.61 of 1974) and a Working Paper on Testator's Family Maintenance and Guardianship of Infants Act, 1926, circulated for comment and criticism by the New South Wales Law Reform Commission and dated October, 1974.

We do not recommend any reforms to the administrative arrangements of the present law respecting family provision applications. The machinery seems to be working well enough and the general format of the legislation is well known to practitioners.

In one respect, however, we consider that a significant reform is desirable and we find that a similar reform has been recommended by the English Report and by the New South Wales Working Paper. This is the extension of the legislation to enable certain classes of dependents to make application for relief. At the present time the only persons who are able to claim relief are the children, including illegitimate, legitimised step and adopted, of the deceased and the wife of the deceased, including a divorced wife who has not remarried and who is receiving or entitled to receive maintenance from the deceased. But it is clear that hardship does occur because certain other classes of persons are excluded from that list. Both the English and New South Wales recommendations are that the list should be extended to include persons dependent on the deceased. The English Report limits relief to persons wholly or substantially dependent on the deceased (see Clause 1(3) of the draft Bill on page 84 of the English Report). The New South Wales recommendation is that any person who has, during the life of the deceased, been wholly or partly dependent on him and a member of the household of which the deceased person was a member may claim, if he can show that immediately before the death of the deceased it was reasonable to expect that the deceased person would have made provision for him.

It is to be observed that any person, whether or not related to the deceased, may claim provided he comes within these broad limits. Thus companions, family retainers and partners, male and female, in meretricious relationships may all make claims.

We are hesitant to make so broad a recommendation. We do not consider that it is necessarily the role of the State to insist that every testator's will should be a model of propriety respecting everybody having some sort of claim upon him. No doubt, in many cases, a relationship of dependence during the lifetime of a person does attract some moral responsibility to make provision for the dependant by the will of the deceased. But it does not necessarily follow that in all cases every dependant should be allowed to embark on litigation against the estate of the deceased where almost invariably costs will be awarded against the estate and the administration of the estate will be protracted by litigation which is often discordant in character. We recommend that it is more desirable to spell out classes of person who may become applicants, rather than to offer so vague a qualification as dependence, perhaps coupled with membership of the same household as the deceased at some time. So vague a qualification is likely to attract tentative and exploratory, even litigious applications. We, therefore, recommend that three classes of dependants only should be enabled to claim, and that in all cases the claimant should be wholly or substantially dependent on the deceased at the time of his death. The three classes to whom we recommend that this legislation should be extended are: persons under the age of eighteen; the parents of the deceased; and the parent of an illegitimate child of the deceased. As to persons under the age of eighteen we wish to ensure that provision can be made for foster children of a deceased person. It happens regrettably too often that children are left as orphans, perhaps by reason of a motor vehicle accident. A relative or friend may take the children in and care for them as his own. Unless that relative makes specific provision for them by his will, they may be left destitute upon his death. It seems reasonable to assume that at least in the case of persons under the age of eighteen such a foster parent would not wish that to happen. In the case of parents, since most people assume that they will outlive their parents, they generally make no provision for them by their will. But the parents of a child may become increasingly dependent on that child as they become older, due to failing health and the erosion of

savings by inflation. It may be argued that it is the State which should care for the aged, but we believe that most children would wish to provide for needy parents if they could foresee that they would die before them. Turning to the parent of an illegitimate child of the deceased's, since the illegitimate child itself is enabled to claim it seems reasonable, too, to enable that child's parent to claim.

The recommendation which we make that certain classes of dependants only should be allowed to bring claims raises the issue of where the line should be drawn and we accept that responsible opinions may differ on this point.

Thus, it is to be observed that the de facto spouse is omitted from the list of those to whom we recommend that this legislation should now be extended, and this omission may require some explanation. We do not take the view that there is never any moral obligation upon a deceased person to provide for a de facto spouse: there may well be in given cases. Indeed we do enable the parent of an illegitimate surviving child under the age of 18 to make a claim and that parent may well be a de facto spouse of the deceased. We also considered whether provision should be made for a de facto spouse where the relationship had been in subsistence for a reasonable period of time and we accept that there is force in favour of making provision in that case. But we are not convinced that there is so great a need to protect the de facto spouse that the law should enable the de facto spouse in every case to bring an action against the estate of the deceased partner. Further than that, it is difficult to justify the inclusion of the de facto spouse in the list of applicants without also including in the list other relatives and companions who look after a deceased person and who are dependent on him. We reject the proposition that a meretricious relationship should of itself establish elegibility to share in the estate of a deceased person. So that if we were to accede to the inclusion of the de facto spouse we should feel bound to include other dependants as well, and that would result in the establishment of a vague class of possible applicants with the unfortunate consequence of multiplicity of claims which we wish to avoid. In any case we take the view that these issues are not as such strictly issues for a Law Reform Commission because they involve considerations of current sociological trends and questions of public and political decision rather than legal correction or improvement. While we have therefore drawn a line within the general boundaries of the existing legal method we stress that the provision which we offer is one on which those engaged in making political decisions may wish to take a different view.

It may well prove to be the case, in the light of experience, and changes in general community attitudes, that the list should be enlarged to include all persons wholly or substantially dependent on the deceased. But at the present time we believe that a balance should be struck so as to ensure some degree of freedom to testators and at the same time to place a reasonable limit on litigation and the threat of litigation to overthrow the declared intentions of testators

A further alteration which we recommend should be made in the law is that we consider that a husband divorced from a wife should be in the same position as a wife divorced from a husband, so far as the making of claims is concerned. It seems to be out of accord with modern concepts to make a distinction between husbands and wives which enshrines a view that it is always the male who provides and never the female. We have, therefore, substituted the word "spouse" for the word "wife" in the definition clause in section 40.

We think the Court should be able to hear and determine an application although no grant has been made, as it used to do

before Re Jenner [1960] Qd.R.349 was decided, and we have drawn s.41(8) accordingly.

We have added two further subsections, one procedural, and the other to retain the law as it was considered to be before a recent decision of the High Court of Australia.

Subsection (9) has been drafted to give an illegitimate child locus standi in the making of an application before but subject to his succeeding in an application under the provisions of the Status of Children Act. Otherwise he has no locus standi and time might run against him. It is in everybody's interest that, if there is an illegitimate with a potential maintenance claim, he should be able to come to court and be seen as a possible claimant.

Subsection (13) is intended to negative the High Court of Australia's decision in Easterbrook v. Young. (1977) 13 A.L.R.351.

In that case the court held that even although the administration of an estate was completed, as long as the personal representatives still had assets in their hands, even as trustees for beneficiaries by virtue of trusts contained in the will, a maintenance order might still be made against those assets. The previous law had always been accepted as that expounded for Queensland by Hart J. in Re Lowe [1964] Q.W.N.37, who quoted Adams J. in Re Kidd [1930] N.Z.L.R.595 at 597 as follows:

> "These authorities establish the proposition that when executors who are also trustees have got in the estate and performed the duties of their office, they henceforth hold the property remaining vested in them as trustees for the beneficiaries under the Will. It has then ceased to be part of the estate of the testator".

That case was followed in Re Donkin [1966] Qd.R.96, now overruled by Easterbrook v. Young.

There are three reasons why we desire to retain this rule. First a trust will be set up under a will to provide for a widow or for persons under a disability. It is unjust that those funds should be subject to a claim whilst benefits paid out to others without a trust cannot be subject to a claim. Secondly the new rule can be circumvented by the simple device of the executor-trustees' appointing new trustees and transferring the funds to them. It is only against funds in the personal representatives' hands that claims can be made. In effect the new rule may simply force personal representatives to transfer assets to new trustees, instead of themselves continuing as trustees. Thirdly the ruling contravenes the policy of the legislation that applications should be commenced within a time limit set by subsection (8). We consider it to be undesirable that claims should be allowed to be left unlodged for periods of time as long as 47 years (Re Pratt [1964] N.S.W.R.105.) The High Court's decision almost encourages applicants to defer the making of applications during the lifetime of a life tenant.

Turning to other recommendations contained in the English Law Commission's Report, we adopt the view that if the deceased has made a donatio mortis causa before his death the subject of that gift should be regarded as part of his estate for the purposes of this Part, so that the gift may be recovered, if the asset is needed to make proper provision for a given applicant or applicants. The present law is that property given away by the deceased in his lifetime, even if the gift is made with the object of defeating the policy of the legislation, cannot come within the jurisdiction of this Part. (See Re Richardson [1920] S.A.L.R.24 at p.40; Parish v. Parish [1923 N.Z.G.L.R.712.) Although we will not be recommending that the law should be altered, we do think that the

case of a donatio mortis causa should be treated differently from an ordinary gift. A donatio mortis causa is made by a person in a particular frame of mind. The conditional nature of the gift encourages generosity because the gift is returnable if the donor recovers from the danger he believes himself to be in. The gift is also one made as a rule a comparatively short time before the death of the deceased, and, therefore, is probably not too difficult to trace; and there is already the rule that such a gift is assets for the payments of the deceased's debts if the other assets are insufficient (Re Korvine's Trusts [1921] 1 Ch. 323). It should, therefore, be reasonably practicable to bring such gifts into the purview of a maintenance order. We have, therefore, added a further subsection, (11), to the new section 41 (formerly section 91). This is adapted from clause 8(2) of the draft Bill annexed to the English Law Commission's Report.

There are other recommendations of the English Law Commission's Report which, however, we have decided not to recommend for adoption in Queensland. We have, however, considered them and believe we should comment upon them. One major recommendation which we have decided not to adopt is the recommendation that the widow or widower of a deceased person should be entitled to receive a different kind of provision from that to which other applicants are entitled. The English recommendation is that a surviving spouse should receive not "such financial provision as it would be reasonable in all the circumstances of the case for the applicant to receive for his maintenance" - which is the provision envisaged in the ordinary case (see clause 1(2)9b) of the draft Bill) - but "such financial provision as it would be reasonable in all the circumstances of the case for a husband or wife to receive, whether or not that provision is required for his maintenance". The reason for recommending a different kind of provision for the surviving spouse is stated by the Law Commission in para.27 (at page 8):

> "In view of our conclusion that, as a general principle, the surviving partner should have a claim on the family assets at least equivalent to that of a divorced spouse, we consider that for the surviving spouse the standard set by family provision legislation should no longer be confined to maintenance, but should be more generally expressed."

With respect we take a slightly different view. In the first place we doubt whether a widow in the normal case would necessarily expect to receive as much, under this legislation, as a divorced spouse. The normal case is that a widow does not survive her spouse for as long as a divorced woman might. A widow belongs to a different sort of age group with different needs and requirements. We feel that there is no real comparison to be made. In any case, our legislation already provides that the Court shall make such provision "as the Court thinks fit", and so there is ample jurisdiction for the Court to take fully into account the youth of the widow and every kind of circumstance: and the criterion for relief namely that adequate provision has not been made for the "proper maintenance and support" of the applicant has been construed broadly.

The other recommendations of the English Law Commission which we have considered but have decided not to adopt relate to the problem, if it is such, of transactions entered into inter vivos by the deceased in an attempt to defeat the policy of this legislation. Six sections are included in the draft Bill annexed to the Report, to enable the Court to reach the following classes of property, if needed, in order to implement the policy of the legislation: property, the subject of a nomination under which the property will pass to the nominated person on the death of the deceased (Clause 8); property held on a joint tenancy which passed to the deceased's survivor and not his estate (Clause 9);

property given away be the deceased less than six years before his death with the intention of defeating an application under this legislation (Clause 10); and property included in a contract to leave property by will where full valuable considerations were not furnished by the promisee and where the contract was made by the deceased with the intention of defeating an application under the legislation (Clause 11). Clauses 12 and 13 of the draft Bill concern themselves with the supplementary provisions.

Although we see no particular vice in these provisions, we doubt whether these cases arise often enough to warrant the inclusion of complex provisions in our legislation in an attempt to counter them. A person may be generous in his lifetime but provision intended to defeat the policy of the legislation would need to be very generous and would necessarily deprive the donor - a person already, by definition, estranged from his family - of his own wealth. It is possible for such a donation or contract to be called in question on the grounds of incapacity if motivated by so irrational a resentment and antipathy of the donor towards his family that a balanced judgment is absent - see Cragg v. McIntyre (1975) Supreme Court of New South Wales, No.717 of 1970; and there is also the doctrine of undue influence to call such donations in question. Lastly, we feel that there must be an end to transactions, particularly where the title to property is involved, and we are loath to provide a new form of litigation the basis for the success of which must depend on establishing, after the death of a person, a highly improper motivation for his conduct.

PART V - ADMINISTRATION

Division 1

45. Devolution of property on death. The present law with respect to the devolution of the title of the property of a deceased person is in a state of some confusion. It seems to be the object of section 30 of the Public Curator Act of 1915 to vest the property of an intestate in the Public Curator. But that section uses the language of beneficial succession when what appears to be intended is representative succession; and in any case, the section does not expressly include property of a testator who has died without an executor.

Of graver consequence is the law in Queensland that realty devised vests in the devisee. There are some advantages to that rule in the case of simple estates, since it enables the Registrar of Titles to enter transmission of the title of a devisee without production of probate of the will. We propose to enable that practice to be continued. But the practical objections to the legal rule are overwhelming in cases other than the simplest. For instance, there is no doubt that land devised must be available for the payment of the debts of the deceased, even if it is not assets in the technical common law sense. Accordingly, if the personalty is insufficient for the payment of the debts, a creditor may pursue the realty. Furthermore, because of the peculiar rules which exist respecting the order in which debts are to be paid from assets, it can happen that a devisee is obliged to pay debts before a legatee - for example, if a general direction to pay debts appears in a will then devisees of land are obliged to pay those debts before general legatees - see Calcino v. Fletcher [1969] Qd.R.8. In such event the devisee's interest is subject to the liability to pay debts before the general legacy fund is utilised.

In fact, the Court may make an order under s.83 of the Real Property Acts vesting the devised estate in a trustee to enable debts chargeable against it to be paid - Re Kwong [1954] Q.W.N. 18. It is clearly undesirable from the point of view of creditors and even from the point of view of devisees that the former should find themselves having to pursue devisees rather than personal representatives, and that the latter should not know whether their devise, even after transmission of the title to them, is freed of future liability to other beneficiaries of the estate.

Another serious objection to the vesting of land immediately in devisees arises as a result of the policy of the Trusts Act 1973 to convert as far as possible all forms of property held for successive interests into trust property. The objective of the Trusts Act is to ensure that all trust property as defined by that Act becomes vested in trustees having the powers of trustees given by that Act. Where land is devised to beneficiaries in succession, without the appointment of trustees, however, the vesting rule constitutes an obstacle to that policy. As a consequence section 6 of the Trusts Act makes provisions which, inter alia, give certain powers to the persons beneficially entitled to the possession of the land or to the rents and profits therefrom - s.6(b). There being no trustees, such beneficiaries are defined as statutory trustees by s.5, but their powers of sale of the property are strictly limited by s.31(3). As part of the scheme to simplify the bringing of such property within the general policy of the Trusts Act we, therefore, propose that where a testator creates a trust of land by his will, the land will devolve, as will all land, to the personal representatives. This will substantially reduce the number of cases where section 6 of the Trusts Act will operate.

A further argument for having land devised devolve in the first instance to the personal representatives rather than to the devisee is that we know of no other jurisdiction where this is not the law. It has been virtually universally adopted elsewhere, and the retention of the present rule is an anachronism wholly inconsistent with the theory of representative succession which ensures the speedy administration of the whole estate and the payment of debts thereout.

Turning to the provisions of the section in greater detail we propose that the entire property of a deceased person (not being property of which he is trustee) to which he was entitled for an interest not ceasing on his death shall vest upon his death in his executors if there are executors able and willing to act. If there are not, the property will devolve to the Public Curator. The exception of property of which the deceased was trustee from the section follows from section 16 of the Trusts Act 1973, as it is considered desirable that property beneficially owned should be kept entirely separate from property held by the deceased person as trustee. We considered whether we should recommend that all property of the deceased - whether owned beneficially or as trustee - should vest in the Public Curator, but we rejected it because it would have involved departing from a law instituted by Cap. XVIII of Magna Carta (1215) and maintained without inconvenience ever since, as well as a departure from the existing policy favouring the private administration of deceased estates.

Subsection (1) makes it clear that the property devolves to the Public Curator only in cases where there is no executor, and this is intended to make good the deficiency of s.30 of the Public Curator Act.

Subsection (2) ensures that as soon as a grant of letters of administration (whether under intestacy or with the will annexed) is made, a devolution of title to the persons to whom the grant is made takes place; subsection (3) covers the case where a grant is revoked, and subsection (4) repeats the provision of section 14 of the Intestacy Act of 1877 under which the title relates back to the date of the death. Although there may be some theoretical objections to a relation-back provision we consider that it accords most closely with the practicalities of estate administration. Subsection (5) ensures that the devolution rules of this section apply to executors by representation. If a sole executor dies having administered an estate only partially, the exception of trust property from the provisions of the section might have the effect that partially unadministered estates would vest in the Public Curator under the provisions of section 16 of the Trusts Act 1973 as trust estates. But that would destroy the utility of the mechanism of executorship by representation which we propose to retain.

46. Cesser of right of executor to prove. This section repeats in one section sections 17 and 18 of the Probate Act of 1867. The wording used is that of the English legislation, which has been adopted in New South Wales, Victoria, Western Australia and New Zealand.

47. Executor of executor represents original testator. We propose to continue the law relating to executorship by representation which dates from the statute 25 Edward III St.V, c.5 of 1351. We have adopted the English wording. We are satisfied that the rule is a convenient one as it enables a partially administered estate to be administered to conclusion without the necessity of a grant of letters of administration de bonis non. However, we consider that the rule that an executor by representation cannot renounce that executorship without also renouncing the executorship of his own testator is harsh. A person may undertake the executorship of a friend without realising that it also entails undertaking the executorship of a total stranger of whom the deceased friend was executor. It may well be convenient if he does undertake both executorships but we are satisfied that he should not be forced to undertake all or none. We have, therefore, added a provision which makes it clear that an executor by representation may renounce that executorship without renouncing the executorship of his own testator.

48. Provisions as to the number of personal representatives. The limitation of the number of persons to whom a grant of probate or letters of administration may be made follows s.160 of the English Judicature Act. The policy has been foreshadowed by the Trusts Act of 1973, which provides that there shall be no more than four trustees in the case of a private trust. It seems desirable to restrict the number of personal representatives to whom a grant may be made at any one time. Personal representatives must act together and the larger the number the greater the possibility of disagreement or failure of communication.

On the other hand we should mention that we have decided not to adopt the English precedent which requires at least two persons or a trustee corporation to be appointed, where there is a minority or life interest arising under the will or intestacy. The existing practice is most commonly illustrated by the case of a surviving spouse with infant children and is that the surviving spouse may be appointed sole administrator or administratrix. We see no reason to insist that this practice be changed. Two persons are not insisted on in the case of executors and we see no reason for insisting on two in the case of administrators.

There is a further reason why we have decided not to follow the English legislation in this respect, and that is that we see it as, to some extent, misconceived. The existence of a minority or life interest cannot be established until the estate has been duly administered, that is, all the assets have been collected and the debts paid. At that point the personal representative becomes, or will soon become, a trustee, when the policy of the Trusts Act 1973 will tend to bear upon him to ensure the appointment of an additional trustee - see sections 12(2)(c) and 14(1). If it is a case of a surviving spouse and infant children, it may well be desirable to let matters stand as they are, and not to insist on the appointment of an additional trustee. A similar remark applies to the provision, found in s.160(2) of the English Judicature Act, enabling the Court to appoint an additional personal representative where there is a minority or life interest. Since any person interested may seek an administration order against a defaulting administrator, there is no special need to appoint an additional administrator during the administration period merely because a minority or life interest may or will arise upon the termination of the administration.

49. Powers of personal representatives. We recommend the assimilation, as far as may be, of the powers of executors and administrators. Traditionally executors have been placed in a better position than administrators, the argument being that since the testator himself selects his own executors their authority should be unlimited, whereas since it is the Court which appoints administrators their authority should be more limited. In particular, when heirship was abolished in Queensland by the Intestacy Act 1877, administrators to whom intestate realty thereafter devolved were denied the power of sale of such realty by s.24, a section repealed but replaced in effect by the Intestacy Act Amendment Act 1974. That Act was passed in order to clear up doubts which arose as to whether s.24 of the 1877 Act had been impliedly repealed by the Trusts Act 1973. Where realty devolves upon the executor of a deceased, rather than upon an administrator, he is regarded, however, as trustee of the land and has all the powers of sale of trustees (Re Matthews [1972] Q.W.N.8). Otherwise, land devised to a devisee vests, under the present law, in the devisee and he has, of course, full powers of sale. We doubt whether any purpose is served by these distinctions or, indeed, by many of the distinctions made between executors and administrators. Both have the same duties to perform and usually an administrator is appointed because he is beneficially interested in the due administration of the estate. We have no reason to believe that in these days administrators are to be trusted less than executors. We, therefore, recommend that, as far as may be, their positions should be assimilated.

In framing the provisions of this section we have included the provisions of section 35 of the Probate Act of 1867 and sections 8 and 15 of the English Administration of Estates Act 1925, which have been adopted in other jurisdictions, although the language has been broadened to comply with the general policy of assimilation which we recommend.

Subsection (1). This subsection makes it clear that personal representatives have from the date of the death all the powers hitherto exercisable by executors in relation to personalty as well as all the powers conferred on personal representatives by virtue of the Trusts Act, which includes personal representatives in its definition of trustees in section 5. Administrators cannot be entirely assimilated to the position of executors, however, for certain reasons. One is that the administrator's authority derives from the grant of letters of administration and not from the will of testator. Accordingly, an administrator cannot exercise any powers before the grant. Secondly, an administrator will never be

in the position of an executor by representation, special provision having been made in that regard by section 47, because of the convenience of that mechanism. The powers given to personal representatives are made subject to any provisions contained in the grant made to them. This is to enable special kinds of grants to issue such as the grant ad colligenda bona or ad litem, where the grantee is not intended to perform all the functions of a personal representative.

Subsection (2). We consider that upon the making of the grant the powers of personal representatives should be exercised only by persons who have a grant and that whilst the grantees are exercising the powers vested in them no other person should have concurrent powers. In particular we are thinking of an executor to whom power has been reserved, but who has not taken out a grant of probate. We recommend protection of persons who act informally in section 54.

Subsection (3). Because we propose that a person shall not normally take a benefit under the will (s.32) or intestacy (s.35(2)) unless he survives the deceased for a period of thirty days, it is necessary to provide for the needs of the immediate family of the deceased during that period. This subsection enables the personal representatives to make provision for the reasonable maintenance of the spouse and issue of the deceased from the death, including the provision of hospital and medical expenses.

Any sums so expended will be deducted from the beneficiary's share in due course, but, if the beneficiary does not survive for the period of thirty days, they will be treated as an adminstration expense.

Subsection (4). In consonance with the provision of section 45(4) that the title of administrators relates back to the death it seems proper to ensure that personal representatives' powers, too, should relate back to the death. Personal representatives are referred to collectively, so as to include executors and administrators, because this Act gives personal representatives wider powers than those conferred on executors by law.

Subsection (5). The powers of administrators are joint, but some although not all powers of executors are several. Third parties are rightly reluctant to deal with only one executor where probate is granted to more than one executor. In our view it is undesirable that one executor should be able to exercise powers as such, and we consider that in any case the position of personal representatives in this respect should be assimilated to that of trustees, and that they should act jointly. The limitation of the number of personal representatives to four, which is provided by section 48, further assimilates the law relating to personal representatives with that of trustees. This will not mean that, in practice, every act will have to be performed by every representative, since the representatives can easily authorise one of their number to act as their agent.

50. Rights and liabilities of administrators. In common with legislation in other jurisdictions this section assimilates the rights and liabilities of administrators with those of executors.

51. Abolition of administration bond and sureties. We have had before us the English Law Commission's Report (Law Com.No.31) of 1970 on the subject Administration Bonds Personal Representatives' Rights of Retainer and Preference and Related Matters. Cogent reasons are advanced in that report for the abolition of administration bonds. The report points out that the administrator's bond seems

to serve three functions. In the first place it repeats the duties of an administrator, in somewhat vague terms. This merely draws these duties to the attention of the administrator. We are proposing to do that by the Succession Act itself, in section 52. The second function performed by the bond is that it adds to the equitable liability of the administrator a legal liability in respect of any defaults of administration causing loss. This added liability is of little or no use, as a sufficient remedy is provided in the equitable remedy. Indeed, it would be a disadvantage if the impression were gained, or a law retained, that there were two avenues of redress, one equitable and the other furnished by a common law deed, as that may give the impression that there are two differing, competing modes of relief, with one, perhaps offering advantages that the other lacks. The third function of the bond is its only useful one. It acts as a vehicle for litigating against the sureties whose support is required upon the bond. If an administrator defaults, causing loss to the estate, and decamps or is bankrupt, the only recourse a beneficiary who has suffered loss may have is against the sureties. Very often, of course, an insurance company acts as surety and charges a premium. The rate of premium seems to vary but 0.3% of the sum assured is sometimes found as a figure where the estate is simple, e.g. the administrator is sole beneficiary; but 0.7% of the sum assured is sometimes found as a figure where the estate is more complicated, e.g. where there is a minority under the intestacy. The sum assured has to be for twice the declared value of the estate, for reasons which are sunk in the mists of history. Details of premiums actually charged are not available but we understand from one solicitor that he had been charged a premium of $62 on a bond of $8504, that is an estate the declared value of which was under of $4300. The declared value is before debts have been deducted. Added to that, stamp duty of $1 is payable on the bond, and although that is not excessive an adhesive stamp is not permitted and so attendance at the Stamps Office is requisite to obtain the impressed stamp, so adding to costs. The Court will reduce the amount of the bond if application is made to it on behalf of adult beneficiaries of full capacity, so that often in practice the bond is only for the amount of the estate which has to be held in trust for an infant beneficiary. That application entails the drawing of an Originating Summons, a Draft Order and attendance to settle and take out the order. Costs of the order of $30 at least are entailed and it is not unreasonable to say that such a fee as that would be very modest indeed for the work done. Nevertheless, it represents a saving on the premium which the insurance company would otherwise charge on the surety policy for the entire value of the estate. All in all the expense to the community generally, to support this system, is very considerable. It is borne by every intestate estate, and is borne most heavily where there are infant beneficiaries. We have asked ourselves whether the cost to the community is justified in the terms of the protection it affords. In the first place, as we have pointed out, the surety procedure only affords protection where the defaulting administrator is bankrupt or cannot be found. If he can be found and is solvent, there is either no point in pursuing the sureties, or the sureties themselves will have an action against the administrator. Again, if the administrator has made the mistake of paying the wrong beneficiaries the beneficiaries who should have been paid have a right of action against those wrongly paid beneficiaries, although subject to the defence of change of position under section 109(3) of the Trusts Act 1973. The English Law Commission Report to which we have referred remarks that it is "indeed, extremely rare for any action to be taken on the bond. Very occasionally, however, it does provide a remedy against the surety in cases where no other means of recovery are available". The Report then quotes one solitary case which had been drawn to its attention where an estate had been distributed to beneficiaries

on the basis that the deceased was legitimate when, in fact, it later turned out that he was illegitimate. As the administrator and persons to whom the estate had been distributed could not practicably be sued for recovery, the sureties were bound. But even this example cannot carry much weight where the position of illegitimates has been assimilated to that of legitimates, which is the present trend in the law. An enquiry of the State Government Insurance Office as to the number of occasions on which they had been obliged to pay out a surety bond elicited a response that that company had never, in fact, been obliged to meet any claim. We have never heard of any private insurance company having to meet any claim and the Registrar of the Supreme Court cannot recollect a bond ever having been assigned by the court which is the first step taken where a bond is to be enforced. Turning to the legal literature on bonds, an examination of every case cited in Williams & Mortimer on Executors, Administrators and Probate (Stevens, London, 1970) reveals that most of the litigation in the area is not about sureties who are held liable but about the ways in which sureties may protect themselves against liability. The only recently reported case in which sureties have been held liable is a case - Harvell v. Foster [1954] 2 Q.B.367 - which Professor Mellows in the Law of Succession (Butterworths, London, 3rd edition, 1973 at p.328) says gives a decision "which makes it difficult to give a coherent statement of the law". In Harvell v. Foster a testator's daughter was his sole executrix and beneficiary, but she was under age. She was, however, married and her husband took out letters of administration with the will annexed. He later defaulted against his own wife in the sum of about £700 and it was held that the sureties of his bond were liable. Considerable argument in that case revolved around the proposition that once an administrator had terminated his duties as administrator then his liability under his bond is at an end, even though he still holds the balance of the estate in his hands as trustee. This was, no doubt, the law before Harvell v. Foster, but in that case Lord Evershed said (at p.383):

> "We are unable to accept the view ... that because a personal representative who has cleared the estate becomes a trustee of the net residue for the persons beneficially interested, the clearing of the estate necessarily and automatically discharges him from his obligations as personal representative and, in particular, from the obligation of any bond he may have entered into for the due administration of the estate. We would add that, in our view, the duty of an administrator, as such, must at least extend to paying the funeral and testamentary expenses and debts and legacies (if any) and where, as here, immediate distribution is impossible owing to the infancy of the person beneficially entitled, retaining the net residue in trust for the infant."

We consider that this passage may introduce an undesirable uncertainty into the law. A personal representative retains his office for life and even although all the estate has been administered and distributed there is always the possibility that further property may accrue to the estate at a later date, when the personal representative will be liable in respect of it as personal representative. But a personal representative may, if he so decides, appoint new trustees of property which he holds as trustee, his duties of administration in relation to that property having been completed, and the liability of the bond or sureties could not extend to that property, so that if the new trustees defaulted there would be no protection. It seems unfair that the

sureties should be made liable if the administrator continues as trustee, when they would not be liable if he had appointed new trustees.

Turning to the product of the English Law Commission's Report we are disappointed to find that, after advancing cogent arguments for the abolition of the administration bond altogether, the reforms actually implemented were far from sweeping. Indeed, the requirement for an administration bond has been retained in a number of cases, set out in Rule 38 of the Non-Contentious Probate Rules of 1954 as amended. The following persons must still furnish a bond if they wish to be appointed administrators of a deceased estate: creditors of the estate; persons having an interest if future property accrues to the estate; persons entitled to the entire estate on the death intestate of the person entitled to the grant; the attorney of a person entitled to a grant; where the grant is to the use of an infant or person under a disability; and persons resident outside the jurisdiction. With respect, we doubt whether the protection of the bond and sureties is really needed in these cases.

Finally, we consider that there are two overwhelming arguments for the abolition of the administration bond and sureties altogether from this branch of the law. One is that such bonds and sureties are never required of executors or trustees as such and we do not see that administrators are the less to be trusted: as far as we are aware, administrators virtually never default to the extent that recourse to the sureties is needed. Secondly, we are satisfied that the very considerable cost to the community, estate by estate, of the retention of this system simply does not justify the protection which it may extraordinarily provide for persons who have been defrauded.

52. The duties of personal representatives. It seems desirable to set out the duties of the personal representatives and a recent precedent has been furnished by the English Administration of Estates Act 1971, which we recommend should be repeated in paragraphs (a), (b) and (c) of subsection (1). We have added paragraph (d) to restore to the law the provision of the Statute of Distributions of 1670 that the personal representative is not under a duty to distribute the estate less than a year after the death of the deceased. That provision had been repealed by the Succession Act Amendment Act of 1968 because it had appeared, as s.32 of the Succession Act of 1867, with other provisions which are not now needed. But the wording has been couched in positive terms, namely that the personal representative must distribute the estate as soon as may be, subject to the administration. Paragraph (e) also states in positive terms that interest is payable upon legacies unpaid twelve months after the death of the deceased. The rate has been revised upwards from 4% to 5%, to meet the changed circumstances of modern interest rates.

The proviso ensures that the different drafting approach adopted does not affect rules dependent upon the principle of the executor's year such as apportionments under the rule in Howe v. Dartmouth.

Subsecton (2) derives from the former section 6 of the Probate Act of 1867. It is probably unnecessary, apart from the provision for the payment of interest which may be desirable and which should be stated expressly.

53. Effect of revocation of grant. Subsections (1) and (2) of this provision update sections 39 and 40 of the Probate Act of 1867. They follow substantially the wording of section 27 of the

English Administration of Estates Act. Subsection (3) follows the wording of section 37 of the English Act and renders statutory the law declared in Hewson v. Shelley [1914] 2 Ch.13. There seems to be no reason why these provisions, all of which are concerned with the effect of revocation of a grant, should be placed in different sections. Subsection (4) is procedural and is based on s.17 of the English Administration of Estates Act of 1925 and s.23 of the Victorian Act. It has been widened to enable the Court to deal with any pending case, whereas the English and Victorian provisions deal only with revocations of temporary grants.

Subsections (4) and (5) make a substantial change in favour of the personal representative whose grant has been revoked. Hitherto if a grant was revoked under which a personal representative had paid out legacies or made intestacy distributions he would be personally liable to those to whom the payments should have been made under a later grant and he could not recover anything from the person paid under the revoked grant. That rule is considered to be unjust and we recommend that if the personal representative has acted in good faith and without negligence he should not be liable for such payments. We further recommend that the personal representative under a subsequent grant may recover any legacy or distributive share paid under the revoked grant, if it is not payable under the subsequent grant. But we wish to extend to the distributee the defence of change of position already given, by s.109 of the Trusts Act 1973, in the case of mistaken payments made out of a trust fund, so as to give him some protection particularly if there is delay in the bringing of proceedings for recovery.

54. Protection of persons acting informally. Since 1601 (43 Eliz. c.8) provision has been made to protect persons who act informally, but properly, in the administration of a deceased estate. In these days, when some time may elapse between the death and the grant of probate or letters of administration, protection for those who act in the meantime is essential, whether the person to be protected is an executor, intending administrator, or even an executor de son tort. Provided such person does what a duly constituted personal representative should properly do the estate will not be harmed. It is to be noted that this provision only protects those into whose hands a part of the deceased's estate actually comes. A person who incurs expense in relation to a deceased estate is not given by this section any right of recourse as such. The provision follows the Victorian precedent which originates in s.28 of the English Administration of Estates Act of 1925. That provision is a descendant of the Elizabethan provision. The Victorian provision is preferred because it does not retain a right of preference or retainer in the informal executor, as the English provision does. We recommend the abolition of rights of preference and retainer by section 58.

Subsection (2) has a rather different objective. At present if an executor intermeddles he will normally not thereafter be allowed to renounce probate. This may, in some cases, be rather harsh, particularly where a person who happens to be nominated executor performs acts of administration in the emergency following a death without any intention of taking up his executorship. We recommend that it should be made clear that an executor may renounce despite his intermeddling.

It should, perhaps, be added that it is not proposed to add to this section the provisions of section 29 of the English Administration of Estates Act, followed in section 33(2) of the Victorian Administration and Probate Act 1958. This provision simply enables any liability of a person which arises under this section to pass to his own estate. That will be the case in Queensland law by virtue of the proposed s.66 of this Act.

Division 2 - Administration of Assets

The law governin g the administration of assets, that is, the rules which prescribe out of whose benefits, left by the will, the debts of the deceased are to be paid, is in a state of unwarranted confusion. There are historical reasons why the rules are as they are, but those reasons are no longer relevant. The principal policy factor which the present rules inherit is the desire of former times that realty devised should not be available for the payment of the debts of the deceased. As the medieval reasons for that rule faded so attempts were made, with increasing success, to bring realty into the creditors' net. The eventual crystallising of the rules, which did not finally take place in Australia until 1912 in Ramsay v. Lowther (1912) 16 C.L.R.1, left us with many anomalies. The order in which benefits left by the will of a testator are to be used for the payment of debts is set out in Calcino v. Fletcher [1969] Qd.R.8, and is set out on pages 22 and 23 of that report as follows:

> " The old order of application of assets can be varied by the testator but in order to do so it is necessary for the testator to say so very clearly.
>
> The first class of assets available is determined by the common law rule that personalty was originally the only fund available for the payment of debts, funeral and testamentary expenses. Thus, the first class of property is personalty not specifically bequeathed, the executor retaining a fund sufficient to meet any pecuniary legacies.
>
> Class 2 consists of realty specifically appropriated for or devised in trust for (and not merely charged with) the payment of debts.
>
> Class 3 is realty that descended to the heir.
>
> Class 4 includes realty devised, whether specifically or by way of residue and charged with the payment of debts and also personalty specifically bequeathed and charged with the payment of debts: see Woodman, supra (at p.46 and 47) and see also the same author's article on the subject in Vol.6 The University of Queensland Law Journal at p.86. See also Ramsay v. Lowther (1912) 16 C.L.R.1. The position is that where there is a general direction to pay debts, specifically bequeathed personalty is charged with the payment of the debts to the extent of bringing such personalty into the fourth class but does not have the effect of making it primarily liable for the payment of the debts (Ramsay v. Lowther, supra). Assets falling within class 4 are liable to contribute rateably towards debts funeral and testamentary expenses. For this purpose the value is the value of the assets less encumbrances on the assets, but without regard to any legacies charged thereon.
>
> Class 5 is the fund, if any, retained to meet general pecuniary legacies.
>
> Class 6 comprised legacies and realty devised specifically or by way of residue and not being at the same time charged with the payment of debts although it must be borne in mind that a mere general direction to pay debts has the effect of moving these assets from this class and placing them in class 4. (Ramsay v. Lowther, supra, at p.24.)

> Class 7 includes realty and personalty which did not belong to the deceased but over which he had a general power of appointment which power was actually exercised by the will."

A more detailed examination of the Queensland rules and of the anomalies which they produce, is contained in a pamphlet published by the Queensland University Press in 1973 called "The Administration of Solvent Deceased Estates in Queensland" by Mr. W.A. Lee, and we have had the advantage of having the work of Professor R.A. Woodman, of the University of Sydney, published in his book "The Administration of Assets" (Law Book Co. 1964) and in an article in (1968) 6 University of Queensland Law Journal, both of which are referred to in the above judgment.

Extensive reforms were introduced in this area of the law by England in the Administration of Estates Act of 1925, and that legislation was adopted in New South Wales, and, with some amendments by Victoria. The English model has proved far from satisfactory in a number of respects and has been productive of much litigation. We recommend the adoption of provisions which remove the existing anomalies in particular the distinction between realty and personalty and which utilise the most successful elements from the present Queensland rules, and the English and Victorian precedents. One of our aims has been to try to eliminate the possibility of certain kinds of family litigation arising from the operation of these rules and to give personal representatives clear guidance in cases where there may otherwise be doubt. We, therefore, recommend as follows:

55. Interpretation. The definition of "residuary estate" performs a special function in this Part. It preserves the existing law that no distinction is made, as far as the payment of debts is concerned, between property comprised in a residuary gift and property not disposed of by the will at all. That is the present law in Queensland, although it relates only to personalty. Then, by referring to property generally, it brings realty the subject of a residuary provision in the will and realty undisposed of by will within the same definition as personalty. Both objectives of this definition are recommended as desirable. In England, New South Wales and Victoria the common law was changed and an attempt was made to make property undisposed of by will primarily liable for the payment of the deceased's debts. Although there is no doubt some attraction in that, it appears to have given rise to difficulty because it is also the policy of the legislation to enable the testator to vary the order of payment of debts, and so, if the testator includes directions for the payment of debts out of a certain part of his estate, the question arises whether that direction should override that part of the legislative scheme. Since there seems to be a presumption that a testator does not intend to die intestate, it is often difficult to work out whether a direction to pay debts was really intended to alter the statutory order at that point. See e.g. Re Lamb [1929] 1 Ch.722 and Re Kempthorne [1930] 1 Ch.268. The difficulties have led one commentator, Associate Professor Woodman of the Sydney Law School, to remark in an article in the University of Queensland Law School, Journal, "Payment of Debts and Legacies: Proposals for Reform" (1968, Vol.6 U.Q.L.J. at p.105), as follows:

> "It is thus submitted that there is every justification for the proposal that assets which are not disposed of by the will should be, at all times, the primary fund for the payment of debts, but subject to the retention thereout, as under the present legislation, of funds sufficient to satisfy any general legacies."

We agree that at a certain point it is desirable that the statutory order should override provisions contained in the will, but we recommend that this should be so in a slightly different way from that recommended by Professor Woodman. This is because in the first place, it is a primary objective of section 29 to avoid partial intestacies of residue anyway, for the reasons set out in the commentary on that section. So that ordinarily there will be no competition between intestacy beneficiaries and residuary beneficiaries, because the two classes will rarely exist side by side unless there is an intention contrary to section 29 appearing by the will, which is unlikely. Therefore, there is no particular need to choose between intestacy beneficiaries and beneficiaries under residuary provisions. Furthermore, the present rule is that where there are intestacy beneficiaries as well as residuary beneficiaries they share the payment of the debts ratably according to their respective interests. That was always the common law and where it has been changed, very considerable problems of interpretation of the legislation have emerged. In any case, we do not consider that an intestacy beneficiary should necessarily have to pay debts, as against a residuary beneficiary who will be more remote from the testator, in terms of relationship, than the intestacy beneficiary. As between strangers taking under a residuary clause and intestacy next of kin we do not consider that either class should be preferred to the other.

56. Property of deceased assets for the payment of debts. This section provides that the property of a deceased person which passes to his personal representatives are assets for the payment of his debts. It is found in not dissimilar terms in other legislation. It changes the law inasmuch as it includes realty as assets. Under the existing law realty devised vests immediately in the devisee, and is not, strictly speaking, assets in the narrow, common law sense of that term. It appears to be subject, in the hands of the devisee, to a trust in favour of creditors who cannot be paid out of the personalty coming into the hands of personal representatives - see e.g. Re Kwong [1954] Q.W.N.18. This is hardly suitable and it is clearly desirable, now that there can be no question of protecting realty from creditors as against personalty, that all the property of the deceased should be, in the hands of the personal representatives, equally available to creditors whatever the ultimate rights of beneficiaries inter se are to be. Subsection (2) of the section preserves the rights of mortagees and other encumbrancees.

57. Payment of debts in the case of insolvent estates. Even more anomalous than the rules respecting the payment of debts out of benefits where the estate is solvent are the rules regarding the payment of debts in the case of insolvent estates not being administered under the Commonwealth Bankruptcy Act. Although that is a comparatively rare event, we recommend that, in any case, the State rules should be the same as the Commonwealth rules, as in practice a personal representative cannot afford to follow the State rules in any case where a creditor may have power to insist that the estate be administered under the Commonwealth Act. The rules of distribution under the State system, which derive from the common law, are set out in a University of Queensland Law Faculty Paper, Vol.1, No.3, entitled "Payment of Debts by Executor in Queensland" by Professor E.I. Sykes (1955).

58. Retainer preference and the payment of debts by personal representatives. The English Law Commission's Report on "Administration Bonds, Personal Representatives' Rights of Retainer and Preference and Related Matters" (Cmnd. 4497, Law Com. No.31) has already been referred to in the commentary on the proposed section 51. As a result of that report, so far as

personal representatives' rights of preference and retainer were concerned, s.10 of the Administration of Estates Act 1971 was placed on the statute book in England. We recommend the adoption of that section in Queensland. The old rules of retainer and preference are, as the Law Commission's Report pointed out, clearly anomalous and stem from former distinctions made by the law relative to the ability of a personal representative - creditor to sue himself in a common law court and so convert his debt into a judgment debt.

Nevertheless, the English Law Commission thought fit to allow creditors mentioned in subsection (2) of the section to retain up to a point powers of preference and retainer. It may happen that a personal representative pays small debts, owing to traders who have supplied the deceased with goods and services for instance, without being aware of the pending insolvency of the estate. If such payments are made in good faith it seems desirable that the personal representative should not thereafter be charged by other creditors who have not been paid in full. We recommend the adoption of the English provision in this respect.

59. Payment of debts in case of solvent estates. In this section we set out the order in which we recommend that the assets of the deceased's estate should be made available for the payment of the debts payable out of the estate. We see no reason to put the classes of that order in a Schedule to the Act and we have retained the traditional vocabulary describing the assets as comprising classes.

Class 1 - Property left on trust and property charged to pay debts.

Two changes in the law are envisaged by the placing of these assets in class 1. In the first place, what were two classes of realty, are now merged as one class of property in which no distinction is made between realty and personalty. It is part of the general policy of this legislation to assimilate, as far as possible, the law of realty and personalty; and we do not consider it desirable to continue to make a distinction between property left on trust to pay debts and property charged with the payment of debts. According to Professor Woodman in (1968) 6 U.Q.L.J. at p.107, the New South Wales case of Permanent Trustee Company of N.S.W. Ltd. v. Temple (1957) 57 S.R.(N.S.W.) 301 "illustrates that there is no real purpose in separating the two classes". But in any case we doubt whether any testator would really wish to make a distinction between a trust to pay debts and a charge to pay debts, or would intend, even if he did, that the former should be applicable for the payment of debts before the latter. In some cases difficulty has been encountered in deciding whether a particular expression gave rise to a trust or a charge (e.g. Jacquet v. Jacquet (1859) 27 Beav.332) and by merging the two classes unnecessary litigation may be avoided.

The other change is that this class has been placed before the second class, so following the Victorian rather than the English and New South Wales precedents. The change made by the Victorian statute, which we recommend should be followed in Queensland, was originally proposed by Sir Leo Cussen and, according to Professor Woodman (Administration of Assets assets at p.166) "bears the stamp of a far-sighted and logical approach to one of the problems associated with the administration of assets, and can be considered as a major improvement upon the English and New South Wales legislation".

In support of our recommendation we take the view that where a testator specifically charges property or leaves it upon trust to pay debts he means what he says and that that property should be used for the payment of debts before the residuary estate.

Whilst it is arguable that there is no need to include property of this description in the classes at all, since it is provided (in section 62) that the will may vary the order and this simply confirms that provision, we, nevertheless, recommend that it be retained as a class both as a statutory expression of the view we take and to provide personal representatives with clear guidance as to the order in which such property should be used. Otherwise the executor would have himself to consider whether a direction or trust to pay debts out of property placed that property in a class of its own and where that class was in relation to the other classes.

Class 2 - Property comprising the residuary estate of the deceased.

As mentioned in the commentary on the definition of the expression "residuary estate" we do not propose separating property the subject of a residuary disposition in the will from property undisposed of by will. This decision adheres to the present Queensland law. The separation of property undisposed of by will from property contained in a residuary gift has caused considerable difficulties in those jurisdictions where it has been done. It drives a wedge between next of kin and residuary legatees, by placing them in competition as far as payment of debts is concerned. It generates problems of knowing whether a direction to pay debts out of residue constitutes a variation of the statutory order and special provisions have to be made respecting the payment of pecuniary legacies out of these funds. All these problems are avoided by retaining the existing law and we so recommend. In any case the proposed s.29 virtually obviates competition arising between residuary legatees and next of kin, so that it is not worth making special provision for that case.

Class 3 - Property specifically devised or bequeathed.

We have omitted from the list of classes the fund retained for the payment of pecuniary legacies. This is because section 60 makes separate provision for the payment of pecuniary legacies and, in any event, since the classes which formerly separated the residuary estate from the fund set aside thereout for the payment of pecuniary legacies have all been eliminated there is no point in having the pecuniary legacies fund in a separate class next to the class from which such fund is derived. Class 3 follows the exisiting class 6. It should also be observed that we take the view that the fund reserved for the payment of pecuniary legacies should be used before property specifically devised or bequeathed. We admit that the distinction is hard to justify, although it has been made historically. It is clearly arguable that if a testator leaves $10,000 to A and "Blackacre" to B, there is no particular reason to suppose that he intends the former fund to pay the debts and the latter to be protected. On the other hand, pecuniary legacies have a character of liquidity which specific legacies lack and if specific legacies and devises were to be made to share the payment of debts with the fund reserved for the payment of pecuniary legacies, properties the subject of specific legacies and devises would have to be sold more often to bring about the proportionate abatement required. We doubt whether a testator would really wish this, particularly where the subject matter of a specific legacy has some sentimental value. Accordingly, we propose to retain the existing order in this respect.

Class 4 - Donationes mortis causa.

These gifts were always available for the payment of debts once all other assets had been exhausted (Re Korvine's Trusts [1921] 1 Ch.343). This provision renders that rule statutory.

Subsection (2). Ratability. This subsection renders statutory the principle of ratability, class by class of property within each class, real and personal. It also places beyond doubt the application of the principle to all property, real and personal. A change in the law is effected by the proviso. At present, where property bequeathed is charged with the payment of a legacy the legatee on whose legacy the legacy is charged has to meet the entire burden of the legacy but no allowance is made for that in determining the contribution which he must make towards the payment of debts. Thus a property worth $10,000, charged with a legacy of $5,000, is valued for the purposes of determining its obligation to pay debts within its class at $10,000. If more than 50% is needed from that class to pay debts, the legatee will get nothing, and indeed the legacy charged on the asset will have to be utilised. Professor Woodman (Administration of Assets, at p.125) remarks:

> "This is unrealistic and no law should operate so adversely to the interests of persons who are specifically entitled to certain assets under a will."

We recommend that the fund and the legacy should be charged ratably.

We have added a provision, taken from the English precedent but slightly widened to make it clear that a contrary or other intention varying the order of application is not indicated by a general direction for the payment of debts out of the estate or residue. Such directions occur in many precedent books and they should be regarded as being merely administrative. In the past disproportionate significance has been attached to general directions to pay debts, for historical reasons now irrelevant, so much so that in the present order of application of assets the presence of a mere general direction to pay debts suffices to remove assets in class 6 to class 4. In any case, it is important to ensure that a general direction to pay debts out of residue cannot be used as an argument to drive a wedge of litigation between residuary beneficiaries taking under the will and the next of kin entitled on a partial intestacy, although, as a result of the change in the law proposed by section 29, this will not happen often in practice.

Powers of appointment. Property the subject of a general power of appointment is specially privileged in the present order for the application of assets being placed as Class 7. But that rule does not apply where the power is exercised by implication under the provisions of s.59 of the old Act (repeated as s.28(d) in this Act) - see Re Hartley [1900] 1 Ch.152. We propose that if property the subject of a general power of appointment is appointed by the residuary clause, it should be available for the payment of debts with other property the subject of the same clause; and that if a general power is exercised by specific gift then the fund should be available for the payment of debts with other property the subject of a specific gift. In this way we reduce the number of classes and the possibility of litigation even further.

60. Payment of pecuniary legacies. A further problem created by the English statutory order for the application of assets concerned the order of payment of pecuniary legacies, as distinguished from the order of payment of debts. Since assets undisposed of by the will were separated in the English legislation from assets comprised in a residuary disposition, the rule that former should first be used for the payment of legacies seemed to follow from the rule that it should first be used to pay debts. But the legislation did not make this clear. Professor Woodman has set out the difficulties which this change in the law engendered in Chapter VII of his book on the Administration

of Assets. We propose that, subject to the will, pecuniary legacies shall be paid out of assets comprised in Class 2.

61. Payment of debts on property mortgaged or charged. This adopts the existing English and Australian precedents and is an improvement on the existing Queensland law which goes no further than the Equity Act of 1867, s.78. The present legislation is limited to realty.

Subsection (1) makes only slight amendments to the form of the precedents, to give it wider scope; and the theory underlying the provision is that where a testator has charged property with the payment of a debt all he really owns is the property minus the value of the charge, and that when he disposes of that property by will he disposes of it together with the burden of the charge which he has placed on it. The testator may oust the operation of the subsection by will if he pleases and cast the burden of paying a debt charged on a property on another property or on the residuary estate, if he is so minded.

Subsection (2) performs the same function as the similar wording appearing in s.59(3) and is included for the reasons set out in the commentary to that subsection.

PART VI - MISCELLANEOUS

62. Intermediate income on contingent and future bequests and devises of property. Where a will provides that a specific or residuary devise or bequest of income-bearing property is not to be paid until some future time and there is no provision in the will regarding the destination of the income before the bequest or devise is transferred, the law makes a number of distinctions with respect to what is to be done with the intermediate income. In the case of devises of realty, the income goes to any residuary devisee, or if there is none, to the intestacy beneficiaries. In the case of bequests, the intermediate income of residuary contingent bequests is accumulated and added to the capital of the bequest; but if the residuary bequest is future and not contingent, or if the bequest is specific, the income goes to the residuary legatee or to the intestacy beneficiaries. Sometimes future bequests are referred to as deferred bequests. The English Law of Property Act 1925, s.175, tried to assimilate the divergencies which existed between the rules with respect to devises and bequests and more generally, but it has been pointed out by Mr. P.V. Baker, Q.C., in the Law Quarterly Review, that the provision is deficient in certain respects. He observes in (1963) 79. L.Q. R. at p.184 that the English statute does not legislate for the following classes of bequests and devises:

(1) contingent residuary bequests, whether direct or through the intermediacy of a trust;

(2) future residuary bequests, whether direct or through the intermediacy of a trust;

(3) contingent or future specific bequests under a trust; and

(4) future residuary devises given directly and not under a trust.

Mr. Baker comments:

> " One cannot admire drafting which leans heavily on a correct appreciation of the old law in so detailed and uncertain a field as this, but the courts have had to do the best they can. The results have not been impressive."

We consider that there are a number of desirable objectives to be attained in this area. First, the rules respecting devises of land and bequests of personalty should be the same. It has always been the policy of recent property law legislation to assimilate, as far as may be, the rules of realty and personalty. Secondly, it seems reasonable that where the future or contingent gift is residuary then intermediate income should go with the gift, because otherwise, unless it is given elsewhere, it will pass as on intestacy, and that is not likely to accord with the testator's intention. Thirdly, we think it desirable that the same rule should apply to contingent and future gifts. A gift "to A at 30" is contingent, but a gift "to A on the death of B" is future. No doubt there is a distinction to be drawn, and it is important in certain contexts; but we doubt whether a testator would really mean the intermediate income on a contingent gift to go a different way from the intermediate income on a future gift. At present the rule stated for intermediate income on future gifts is summarised by Roxburgh J. in Re Gillett's Will Trusts [1950] Ch.102 at p.110 as follows:

> "... it would be impossible (in the absence of a special context) to construe a gift timed to take effect on the happening of an event which must happen sooner or later as a gift of anything before that time, because such a construction is excluded by necessary implication, and accordingly, a deferred or future gift could not carry intermediate income unless there were a rule of law that intermediate income not otherwise disposed of passed with the principal money as accessory thereto."

The consequence of this reasoning is that such intermediate income goes to the residuary beneficiary, or, if the gift is itself residuary, to the intestacy beneficiaries. There are two objections to this rule, however. One is that, as Mr. Baker has also pointed out, the English statute has provided to the contrary in the case of specific gifts and in the case of residuary devises given under a trust - but not in the case of residuary devises given directly, an omission which he regards as "difficult to explain". Secondly, although it may well be that a testator who desires a gift to be given at a future time no doubt does not wish the recipient to receive anything before that time, that does not necessarily mean that he does not wish that he should receive accumulated intermediate income at that time, although not before. In any case, it is to be doubted whether a testator really thinks about the destination of intermediate income unless he gives it elsewhere. Further, it seems odd that the intermediate income should carry on a contingent gift, which has less likelihood of taking effect, than on a future gift which is sure to take effect. One would have thought that the intention to provide a benefit is greater where the gift is intended to take effect in any event than in the case where it is to take effect only upon a contingency.

In the circumstances, then, we consider that the same rule should be applicable to intermediate income of future gifts as to contingent gifts, unless, of course, the income is given elsewhere in the meantime.

The only remaining question which arises is whether specific gifts should be treated in the same way as residuary gifts. There is the added argument, in the case of residuary gifts, that undisposed income will pass to the intestacy beneficiaries. In the case of specific gifts, the intermediate income would pass to the residuary beneficiary (see s.28(b)). On balance, we doubt whether a testator would be likely to intend this; and the English legislation provides that the intermediate income is carried. (Roxburgh J.'s remarks, quoted above, were in the context of a future residuary bequest but in Queensland they would apply to all devises and to all specific and residuary future bequests.) We recommend that we adopt the English provision in this respect.

In conclusion, we recommend that the intermediate income on all contingent, future and deferred devises and bequests, whether residuary or specific, should pass with the property unless it is given elsewhere by the will. This provision will save the extraordinary and chancy distinctions which have hitherto beset this topic.

63. Legacies and devises to unincorporated associations of persons. A lay testator, minded to include in his will a legacy or devise for an unincorporated association of persons, has a phenomenal series of legal obstacles to overcome. If he leaves the benefit to the members of the association for the time being the legacy will take effect. But, if he leaves it to the present and future members of the association, it will fail. If he leaves it to augment the general funds of the association the legacy will take effect; but, if he leaves it for the purposes of the association, then, unless the purposes are charitable, it will fail. None of the problems arises if the association of persons happens to be incorporated. Perhaps, even less explicable, in layman's terms, is the fact that one may easily make a gift in one's lifetime to an unincorporated association of persons, but, if one attempts the same thing by one's will inordinate technicalities almost block the way. Further, how is anyone to understand why it is that a legacy to "the Communist Party of Australia ... for its sole use and benefit" should fail: (Bacon v. Pianta (1976) 114 C.L.R. 634 - the same fate would, of course, await the same legacy to any political party) as would a legacy to "the New Life Centre" [Re Haks [1973] Qd.R.455], or to "the Brisbane Revival Centre" (Re Hargreaves [1973] Qd.R.448), whereas a legacy "for the general purposes of the Loyal Orange Institution of Victoria" (Re Goodson [1971] V.R.801,) or a Masonic Lodge (Re Turkington [1937] 4 All E. R.501), or the Old Bradfordians Club (Re Drummond [1914] 2 Ch.90) should succeed?

Although the principles on which distinctions have been made in these cases are, in themselves, soundly based, inasmuch as trusts for non-charitable purposes must sometimes fail and gifts offensive to the rule against perpetual non-charitable trusts must fail, the fact is that few, if any, testators ever intend to offend these principles and if they do so they do so inadvertently. The cost of their inadvertence is that their intention is defeated, whereas it might easily have been achieved if they had happened to use a more acceptable form of words. The principles on which these distinctions are made have been illustrated in such recent cases as Re Inman [1965]V.R.238, Bacon v. Pianta (1966) 114 C.L.R.634 and Re Goodson [1971] V.R.801.

Where a testator succeeds in his objective, the personal representatives may face a further problem because, if the legacy is to the members for the time being of the unincorporated assocation, strictly speaking, the personal representative may not be able to secure a valid discharge for the legacy unless he transfers it to the intended recipients, namely each and every individual member. The testator may have had the foresight to

provide that the receipt of an officer of the association shall be a valid discharge and such a provision is recommended by legal advisers. But, unless the testator does that, the personal representatives may be placed in a difficulty. In any case, even the theoretical basis on which such legacies are regarded as valid, namely that they are legacies not to the association but to its members as private individuals, is out of accordance with the true intention of a testator. His intention is to benefit the association and it is a legal fiction, invented to give effect to his intention, that he intends to benefit the members individually. But, in any case, we doubt the wisdom of a series of rules which, although they may not be harmful in themselves in the context in which they have developed, frustrate perfectly legitimate testamentary wishes for there seems to be no reason why a legacy should not be left to a political party, an association of former school fellows, a golf or other sporting club, or, indeed, any of the voluntary associations of persons which play an enormous part in the social and private welfare life of the country. Gifts to such associations are encouraged. We therefore recommend that the two major technical pitfalls which beset the unwary testator should be removed from his path and that the administration of legacies and devises for unincorporated associations of persons should be rendered more practicable for personal representatives.

Subsection (1) converts legacies for or on trust for the aims, objects or purposes of an unincorporated association of persons and legacies for or on trust for the present and future members of an unincorporated association of persons into legacies for the augmentation of the general funds of the association. In effect, this validates legacies which would otherwise fail and gives effect, we believe, to the testator's true intention. It follows the reasoning in Re Goodson [1971] V.R. 801.

Subsection (2) makes clear that these legacies are to go to the association and that they shall be applied by it in accordance with the provisions of its constitution from time to time with respect to the application of its general funds. Unless a testator specifies a particular purpose for his legacy, it would be reasonable to construe a legacy to an unincorporated association of persons in this way. The general funds of an association are within the control of the association and the varying needs of the association can best be met through the medium of its general funds. Any objection on the grounds of perpetuity is also avoided.

Subsection (3) is designed to enable personal representatives to obtain a discharge from an unincorporated association of persons. Pecuniary legacies or sums of money may be paid to the Treasurer for the time being; but where a testator leaves a particular asset, such as a trophy or equipment or property in specie, it seems reasonable to facilitate transfer of such property by way of an authorised recipient.

Subsection (4). It is occasionally objected that if the members of an unincorporated association of persons cannot be listed, then the testator cannot intend the legacy to be to the members of the association, and so it fails. Since, by subsection(2) we recommend that in any event legacies to members should be paid to the association, it would be undesirable if this objection could be raised in what will be a different context, and for the purpose of rendering invalid a legacy which it is the object of this provision to save from failure because of a technical rule which operates capriciously.

64. Certain powers and trusts not invalid as delegation of will-making power. It is a reasonable proposition that a testator should be able, by his will, to creat trusts and powers similar to those which he may create inter vivos; and it is productive of doubt if provisions which are perfectly well accepted when included in an inter vivos gift should be subject to difficulty when included in a will. We have already made a similar observation with respect to legacies and devises to unincorporated association of persons. In England this appears to be the law but in Australia some weight has been attached to the proposition that certain kinds of powers of appointment which may be created by deed may not be created by will, since their creation by will is contrary to a rule that a testator may not delegate to another his will-making power. The rule against delegation which has grown up is given weight in only three cases - Tatham v. Huxtable (1950) 81 C.L.R.638, Lutheran Church of Australia, South Australia District Incorporated v. Farmers Co-operative Executors and Trustees Ltd. (1970) 121 C.L.R.628 and In the Will and Estate of Nevil Shute Norway Case No. 63/4731 (1963) of the Victoria Supreme Court (unreported). We refer to the detailed observations concerning these cases and the arbitrary results to which they lead in an article of Dr. Ian Hardingham's in Vol.9 of the Melbourne University Law Review (September, 1974 at pp.650 - 668) entitled The Rule against Delegation of Will-Making Power in which Dr. Hardingham advances the argument, which we accept, as follows:

> "... if there is a rule which prevents a testator delegating to others his powers of testamentary disposition, it has no operation independent of the normal certainty requirements which apply in relation to dispositions inter vivos; a man may do by will exactly what he may do by dispositions inter vivos; the rule, if it exists, is 'simply a rule that no settlor and no testator may by means of either trust or power delegate to others the selection of beneficiaries from a limited but uncertain class.'."

The quotation is taken from a learned article "The Enigma of General Powers of Appointment" written in (1955-6) 7 Res Judicata by Enid (now Professor) Campbell.

We do not wish to repeat the detailed analysis of the cases mentioned against which Dr. Hardingham argues with great force. But, in the Lutheran Church case a testatrix provided that "my trustees have discretionary power to transfer my mortgages and property [etc.) to the Lutheran Mission ... for building Homes for Aged Blind Pensioners after all expenses paid ...". The provision failed, although it would, of course, have been entirely valid in an inter vivos gift, or if the testator had used the word "shall" instead of "have discretionary power to". The High Court was evenly divided as to the validity of this provision, Barwick C.J. and Windeyer J., holding it valid and McTiernan and Menzies J.J. holding it invalid. As the judge below had held it invalid, it remained so. In Norway's case the testator said in his will: 'And it is my wish that my trustees should, from time to time, from my estate make such further provision for my wife either in the form of payments to her or payments for her own benefit as they may consider reasonable after balancing the interests of all parties, and I put the matter in this form because it is impossible for me to estimate the value of my estate.' This was held to be void as a delegation of the testator's power to make a will, although it would have been perfectly valid if contained in a settlement inter vivos.

We cannot regard these provisions as offensive to the rule that only the testator may make his own will; and with respect to those who have accepted the extension of the anti-delegation

doctrine, we are satisfied that it will cause more problems than it solves and that it is indeed a dangerous doctrine to perpetuate, for, in these days, the flexibility of the discretionary trust in which trustees are invested with very wide powers regarding the distribution of the funds committed to their management, is a vital factor in the ordering of private estates so as to mitigate taxation. To allow such trusts to be created inter vivos quite freely but then to prevent their creation by will on the grounds that such a degree of discretion, vested in a personal representative, amounts to an undue delegation by the testator of his power of making a will, is arbitrary. It is bound to lead to litigation since it may be in the interests of certain members of the family or of the revenue authorities to challenge dispositions made by will which are perfectly accepted when made inter vivos since such challenges in the case of large estates, that is, those estates most in need of protection by means of discretionary trusts, would be tempting to beneficiaries and revenue authorities alike. We, therefore, have no hesitation in recommending that the objection of delegation, in this particular respect at least, should be removed, so far as it exists, from the law.

65. Presumption of survivorship. As indicated in the commentary on section 32, the English and Queensland legislatures saw fit to furnish a general presumption that, where two or more persons die in circumstances rendering it uncertain which of them survived the other, their deaths occur in order of seniority, so that the younger is deemed to survive the elder.

The provision which we have recommended for adoption in sections 32 and 35 is much broader because it requires a beneficiary to survive thirty days, normally, before he may benefit under the will or intestacy of the deceased. That provision will, for most purposes, oust the need for a presumption of survivorship. However, there will be at least three cases where the present legislation will still be needed. One is where there is doubt as to when the second death occurred, and to dovetail this provision into the policy of sections 32 and 35 we have added the words "for a period of one day". One is where the testator indicates in his will an intention contrary to the provision of section 32. And the third is in the case of survivorship as between joint tenants. It is possible, too, that there may be other cases where the order of deaths of two persons is needed to be known in other contexts of title to property; and if it is this statutory presumption may continue to serve its purpose.

66. Survival of actions. Section 15D of the Common Law Practice Act 1867 to 1972 provides generally for the survival of actions on the death of a person. The main object of that legislation was to provide for the survival of actions in tort against the estate of a deceased person, the former rule having been that actio personalis moritur cum persona, a rule which proved intolerable in the era of the motor accident. The section was borrowed from England and the provision has proved inadequate in certain respects. Section 15D was amended by section 7 of the Law Reform (Limiatation of Actions) Act of 1956 and by section 3 of the Common Law Practice Amendment Act of 1972. In addition, a defect not attended to by either of those amendments has been the subject of an English Law Commission Report (Law Com. No. 19 of 1969) entitled "Proceedings Against Estates" and the consequence of that Report was the passage of the Proceedings Against Estates Act of 1970. We recommend that it is desirable to follow the English lead and since this would mean a third amendment to the original section and since we consider that the provision may properly be included in a Succession Act, we recommend the repeal of all the legislation as part of the Common Law Practice Act and its re-enactment as a revised and up-to-date provision in this Act.

Turning to the recent English change in the law, it concerned the former rule, which is still part of Queensland law, that an action in tort against a deceased estate must be brought within six months of the grant of probate or letters of administration, other than actions in tort for personal injuries where a three-year period is provided under the ruling in Minchin v. Public Curator of Queensland [1964] Qd.R.545. The six months rule appeared to cause hardship in certain respects because the plaintiff might not become aware of the death of the defendant, particularly if he lived elsewhere and his death was unconnected with the tort which he had committed. And then the case of Airey v. Airey [1958] 1 W.L.R.729; [1958] 2 Q.B.300 showed that for technical reasons, as long as action was brought within six months of the grant of probate or letters of administration it might be brought at any time, even although the tort had been committed many years before, and, indeed, that there is no period of limitation for such torts apart from the period provided by the six months rule.

There are further reasons for abolishing the six months rule. It is the trend for Limitation Acts to seek uniformity of limitation periods, if not as respects the kinds of action which are in question at least as respects the identity of the defendants. The Queensland Limitation of Actions Act 1974 amply illustrates this trend by abolishing many of the abbreviated periods of limitation which had been enacted to protect local government and other statutory authorities. There seems to be no reason suddenly to abridge a period of limitation merely because the defendant dies. Again, there seems to be no reason to provide for a six months rule only in the case of certain actions in tort but not in others. If, for the convenient administration of estates, it is desirable to set litigation to rest, a general rule should be provided. But no-one has ever suggested that creditors' limitation periods should be abridged for that reason. Furthermore, by limiting the six months rule to tort actions an invitation is extended to torture out of fact-situations which usually give rise to tort actions causes of action which are non-tort, simply to circumvent the rule. In any case, something has to be done about the anomalies uncovered by Airey v. Airey.

However, we have been mindful of one problem which does arise and that is the problem of the bringing of actions against beneficiaries to whom estates have been distributed by personal representatives. The personal representative may distribute the estate paying attention to claims of which he has knowledge, and if he has duly advertised and does not know of a claim, he is protected. Creditors may pursue beneficiaries to whom distributions have been made but it is not entirely clear whether tort plaintiffs may. Indeed, the English Law Commission Report says at p.14:

> "... it seems that in proceedings of this kind for an unliquidated sum of damages the plaintiff ought to sue the beneficiaries directly in order to establish liability, rather than sue the personal representative to establish the claim.
>
> The legal position is uncertain but there are dicta in the early case of Clegg v. Rowland [(1866) L.R.3 Eq.368 at p.373] where the executor was held not to be a proper party to an action for unliquidated damages because he had no interest in resisting it."

Added to this uncertainty is the uncertainty of the present wording of the section about survival of actions. Section 15D speaks of survival of actions against or for the benefit of the estate of the deceased person and since that was written a restrictive view of the meaning of the word "estate" has developed,

at least in relation to family maintenance applications, where it has been held repeatedly that the provision which may be made out of the estate of the deceased means the estate in the hands of the personal representatives, and that assets distributed to beneficiaries in due course are not part of the estate. This proposition has been maintained in Re Lowe [1964] Q.W.N.37; Re Donkin [1966] Qd.R.96; and Re McPhail [1971] V.R.534. But, although that limitation is made against family maintenance applicants, we doubt whether it was ever intended that the use of the word "estate" in the Common Law Practice Act was intended to furnish an added limitation period against claimants against estates. In any case, if such a construction is possible, as it now is, we consider it to be undesirable in this context since it is an oblique way of importing a special and, to some extent, capricious limitation period into this branch of the law. The English Law Commission unfortunately made no recommendations regarding this confused and confusing state of affairs and we, therefore, recommend that it be stated clearly that the surviving cause of action may be brought against beneficiaries as well as against personal representatives. However, we consider that beneficiaries should only be liable to the extent of the distributions made to them, that they should be able to plead equitable defences (particularly laches) and that they should be afforded the defence of change of position which we have already included in s.109(3) of the Trusts Act, 1973 in the case of persons who have received wrongful distributions of trust property and have changed their positions detrimentally to themselves in reliance on the propriety of the distribution. The protections which these provisions afford to beneficiaries should constitute an added incentive to claimants against estates to come into the open and pursue their claims against the personal representatives promptly.

It seems appropriate, too, to set out the position where a beneficiary is pursued by a claimant against the estate. He should be able to seek contribution against other beneficiaries ranking equally with himself for the payment of debts, and indemnity from beneficiaries ranking below him for the payment of debts. He should also be able to bring co-beneficiaries into court so that the matter can be dealt with at one time. We have set these provisions out in s.66(7)(b). It is considered that they express the normal principles of application of the doctrines of contribution and indemnity.

67. Commission. It is desirable to confer jurisdiction on the Court to allow the payment of remuneration or commission to the personal representative, and to enable the court to attach conditions to the payment. The present jurisdiction is conferred by s.6 of the Probate Act, 1867.

68. The Registrar. Sections 11 and 12 of the Probate Act of 1867 invest certain powers in the Registrar and although it is not considered desirable to spell out the functions of the Registrar in particular legislation of this kind, as his duties should properly be spelled out in more general legislation, it seems desirable to mention that he may continue to exercise the powers he exercised before the passing of this Act, although subject to it. Apart from that the powers conferred on him by the Court or by the Rules of Court should enable him to perform all his necessary functions in relation to this Act.

69. Practice. It is unlikely that there will be any very important changes of practice resulting from the passing of this Act. Probates will issue for realty as well as personalty, because of the new provision that realty will devolve in the same manner

as personalty and the practice associated with administration bonds will cease altogether. But otherwise every day matters of practice in ordinary matters will remain very much as they are. It is, perhaps, unnecessary to mention practice in this substantive Act but the existing Act does and so does the Victorian Act. Changes to practice will be possible by way of amendments to Rules of Court and by way of the power given to the Court by s.68 to invest powers and authorities in the Registrar. But, otherwise, where there is no practice, the practice of the past has been to consult the practice of the English probate jurisdiction, now exercised within the Family Division of the High Court.

70. Rules of Court. It is envisaged that the Rules of Court are the proper place for regulating the practice and procedure of the Court in this area of the law. A large number of rules already exist in the Rules and there are numerous forms included in the Rules. We recommend that the Rules in respect of these matters should be reconsidered and brought up-to-date in due course. This section is taken from the existing Act, as included in the Succession Acts Amendment Act of 1968.

We have also added, in subsection (2)(a)(b) and (c) provisions recently introduced into English law by the Proceedings against Estates Act 1970, s.2. These speak for themselves. Subsection (2)(d) is new and is to be related to section 71.

71. Service. It may be impossible for a person desirous of effecting service of any proceedings against a deceased estate, or of any notice or other document, for instance notice of renewal of a lease, to effect service within a time prescribed by reason of the fact that he may not be able to ascertain whether the deceased died testate or intestate, and if he died testate, whether or not he appointed an executor and whether any executor appointed is willing to undertake the duties of the office. He may therefore be uncertain as to upon whom service should be effected just when the time for service is about to expire. It seems desirable in such case that he should be enabled to seek the directions of the Court and that the Court should be able to give directions as to the mode of service and, if it thinks fit, to allow an extension of the time within which service should be effected. The procedure should not be used as a means of escaping any prescribed time limit and therefore the application for directions should be made within the time limit prescribed for the service; but the Court may then extend the time for service. The procedure should not be used where Rules of the Court exist; and so this provision is intended to operate until Rules are made and for cases not covered by the Rules when they are made.

The First Schedule. The first Schedule sets out the repeals. Eleven Acts are repealed and other provisions as indicated are.

The Second Schedule. This Schedule simply repeats the Schedule to the Succession Acts Amendment Act of 1968, since no changes to the substantive intestacy rules are proposed, except for the increase of the spouse's stipulated sum from $20,000 to $30,000.

Appendix 1. Transmissions of land subject to the Real Property Acts.

The provision of section 45 that land devised shall vest in the personal representatives in the first instance and not directly in the devisee draws attention to the provisions of s.32 of the Real Property Act of 1877 which governs transmissions to devisees in most cases. In particular, we refer to the practice of the Titles Office in allowing transmission to take place although no grant of probate is produced. That practice was connected with the law that land devised vested in the devisee, but was justified in any case by the wording of the secton. We may say that we regard the practice whereby the Titles Office enters transmissions in simple cases without requiring probate of the will as a practice which is beneficial to the community, since it means that many small estates can be administered without the expensive process of obtaining a formal grant of probate. It may appear to be somewhat anomalous that the Titles Office acts as a kind of probate court in this connection, but we consider that the co-operative role which the Registrar and Master of Titles have performed is in the public interest and we are anxious that the change in the law provided by section 45 should not affect that practice in general although it will bear upon it to some extent.

In future, since realty devised will vest in the personal representatives as trustees, subject to the administration, for the devisees, the personal representatives will be able to have transmission entered in their own names, and there is nothing in the present section 32 to prevent the Registrar of Titles from acting as he has done in the past without necessarily requiring production of the actual probate, since there is nothing in section 32 which says that probate must be produced. Neither is there anything which prevents a devisee from applying for transmission even though the land is not vested in him by operation of law. So that it is arguable, at least, that section 32 may continue to be used as before to justify informal transmissions either to personal representatives or direct to the devisee.

However, we consider that the Registrar of Titles should be able to rely on a rather less questionable interpretation than this and we, therefore, recommend that sections 32 and 32A be updated to take into account the changes brought about by section 45 and to make it clear that the present practice of informal transmissions may continue. We have, therefore, combined the present section 32 with the most recent legal re-thinking in this area which is provided by sections 93 and 95 of the New South Wales Real Property Acts, which were introduced in 1970. The reasons for those changes and the advantages of them are fully set out in standard text-books such as Baalman's The Torrens System in New South Wales (2nd edition 1974) at pages 336 to 342. We have added subsection (4) to make it clear that the Registrar may dispense with production of the grant of probate or letters of administration. The decision must, however, rest with him and it is not to be expected that he will exercise his discretion lightly in the case of intestacies, although we hope that he will continue to exercise his discretion in the case of wills as in the past but with the added formality of consents as provided by subsection (2). That added formality must be included to provide the personal representative with an opportunity to consider whether the realty sought to be transmitted is needed for the purposes of administration or not. We have also retained the provision of the existing section 32 that the applicant shall produce and surrender any existing grant unless production or surrender is dispensed with.

We should add that we think that there is, perhaps, one minor disadvantage to the present practice of informal transmissions and that is that there are in Queensland two repositories for the wills of deceased persons, namely the Court, in the case where the

will has been proved, and the Titles Office, in the case where the will has not been admitted to probate but has been a vehicle for an informal transmission. The effect of that is that a person who wishes to trace an original will may not know where to go and the Court may have to redirect him to the Titles Office. This is an administrative matter and not for the legislature, but we express the hope that at some future time it may be possible to house all original wills of deceased persons in the same repository.

Appendix 1. Recommended new section to replace sections 32 and 32A and amendment to section 33 of the Real Property Act of 1877.

"32(1). Upon the death of a registered proprietor of any estate or interest in land the personal representative of such deceased proprietor may make application in writing to the Registrar to be registered as proprietor as such personal representative of all or part of the estate or interest of that deceased proprietor and shall deposit with him the Grant of Probate or Grant of Administration or other authority of the Supreme Court of Queensland in the estate of such deceased proprietor or an office copy thereof and such application shall state the estate in such land claimed by him and the nature of every estate or interest held by other persons at law or in equity in such land within the applicant's knowledge.

(2) Notwithstanding the provisions of subsection (1) of this section and of any other Act:-

(a) Where a Grant of Probate or a Grant of Administration or other authority of the Supreme Court of Queensland has not been obtained in relation to the estate in Queensland of a deceased proprietor, on application made to him in writing by such one or more of the persons as the Master of Titles may determine would have been entitled upon a Grant of Probate or Grant of Administration or other authority of the Supreme Court of Queensland to be entered up as the personal representative of the deceased proprietor the Registrar may if satisfied that no administration of his estate has been granted in Queensland within six months after his death cause transmission to be entered up in the Register Book in favour of such applicant or applicants as personal representative or personal representatives of the deceased proprietor in respect of the estate or interest of the deceased proprietor and thereupon such person or persons shall have all the rights powers and liabilities in respect of the land as if probate or administration had been granted to him or them, provided however that no such application shall be permitted under the provisions of this subsection in the case of the death intestate of a registered propietor whose gross estate in Queensland exceeds $15,000 at the date of his death.

(b) With the written consent of the person who has obtained probate or a grant of administration with the will or other authority of the Supreme Court of Queensland in the estate of a deceased proprietor or of the person or persons who is or are entitled to make an application under the provisions of paragraph (a) of this subsection a person claiming to be beneficially entitled to the land by virtue of a devise to that person contained in the will of a deceased proprietor may make application to the Registrar to be entered as devisee of such land or estate therein and the Registrar may if satisfied that such entitlement has been proved to his satisfaction and that of the Master of Titles cause transmission to be entered up in the Register Book in favour of such applicant as devisee of such estate or interest.

(3) An application under this section shall be supported by such evidence and verified by such oath or statutory declaration of the applicant and other person or persons as the Registrar may require and the applicant shall surrender the existing Grant or Certificate or other instrument of title of the land

in respect to which he claims to be registered prior to his being entered in the Register Book as hereinbefore mentioned unless the production of such Grant, Certificate or other instrument of title be duly dispensed with.

(4) Where pursuant to an application under paragraph (b) of subsection (2) of this section a person is registered as proprietor with the consent of another person the person who has given consent shall be deemed to have become immediately before registration of the applicant as proprietor himself registered as proprietor of the land specified in the application and to have transferred the land to the applicant.

(5) A personal representative registered as proprietor pursuant to this section shall hold the estate or interest in respect of which he is registered in trust for the persons for whom and the purposes for which that estate or interest is applicable by law but for the purposes of any dealing therewith he shall be deemed to be the absolute proprietor thereof.

(6) Notwithstanding anything to the contrary contained in this section in any case where the Court in exercise of its powers authorities and jurisdiction shall grant probate or administration in respect of the estate of any such deceased proprietor subsequent to the entry in the Register Book of such transmission of his estate and interest in the land concerned in favour of a personal representative all things done by and all payments bona fide made by and to the person or persons in whose favour such transmission has been entered up, up to the date of such grant which if made by and to a person to whom a grant of probate or administration had been made would have been lawfully done and made shall be and be deemed to have been lawfully done and on the grant of such probate or administration the person or person in whose favour such transmission as personal representative has been entered shall take all necessary steps and perform all necessary acts to hand over to and account to the grantee for any property in his or their hands at the date of such grant and to render an account of all property passing through his or their hands from the entry up of transmission to the date of such grant."

Appendix 2. Provision for illegitimates.

We have reported separately on the law of succession and other allied considerations in relation to illegitimate persons : Q.L.R.C.20 (1975). Legislation on this subject has been enacted in New Zealand and each of the other Australian States.

We have omitted from this report the question of the rights of succession which should be accorded to illegitimate children. If general legislation respecting the status of children is to be adopted in Queensland, there will be no need, in all probability, for any specific provision to be made in this legislation respecting illegitimates. But if no general legislation is passed it will be necessary to consider and include provisions for illegitimates in this legislation.

Appendix 3. Matters omitted from the Act.

The Probate Act of 1867 contains a number of detailed provisions which are concerned with the jurisdiction of the court and the organisation of business. In section 6 of the Act we have attempted to confer on the Court the broadest possible jurisdiction in all areas of the law of succession and the administration of deceased estates. We, therefore, decided to minimise the repetition of provisions which we consider to be merely specific and to be covered by the more general conferral of jurisdiction, and we have also resisted the temptation to include in the statute matters which are not of law but of court practice and procedure and the organisation of the business of the Court. We observe that in some States lengthy provisions are included in the statutes which are not questions of law at all. In our view such matters should be left to the organisation of business within the administrative structure of the Supreme Court, or, if specific written provision is desirable for any reason, to the Rules of the Supreme Court. It has, therefore, been our policy to omit from the Act provisions of those kinds which we find have been omitted in England or Victoria, where the precedent legislation is a good deal more brief than the New South Wales or Australian Capital Territory precedents. So as to draw attention to the matters which we have indeed considered for inclusion in the Act but decided, for the above reasons to omit, we list them as follows. References are to the Probate Act of 1867.

(1) Power to examine witnesses and order production of testamentary instruments (ss.3 and 5) is now covered in general terms by s.6, but is not a matter of succession law.

(2) Mode of taking evidence in contentious matters, (s.7) is inappropriate for inclusion in a succession Act.

(3) Chamber Practice (s.9) should be a matter for the internal organisation of the court and not the subject of specific legislation in a succession Act.

(4) Registrar's powers to issue subpoenas etc. (ss.11 and 12) will be covered by the general powers conferred on Registrars by s.68.

(5) The production of calendars (s.13) is also, clearly, a matter of internal business.

(6) Official copies of wills (s.14) will still be obtainable on the basis that it is the practice of the Court which will continue as hitherto under s.69. That section did not make it obligatory on the Court to provide these copies, and there is nothing in the Act which prevents the Court from doing it in the future. Section 6 gives them such jurisdiction as may be convenient in the administration of estates and this practice clearly is.

(7) Taxation of costs (s.15) should be a matter for the general law, not for an act concerned with rights of inheritance.

(8) Oaths (s.16). The Registrar will continue to have power to administer oaths under s.68.

(9) Renunciation or neglect of executors (ss.17 and 18) is now covered by s.46.

(10) Probate in solemn form (ss.19 - 21) is clearly a matter of practice and, if needed, should be in Rules of Court.

(11) Executors out of the jurisdiction (ss.22 - 27) can be controlled by the Court under the general jurisdiction conferred on it by s.6. In any case, these matters should be for the rules. To retain these sections would be to go back to the original English Statute of 1795.

(12) Infant executors (ss.28 and 29) are matters for Rules or for practice now that executors are given virtually no beneficial rights as such.

(13) Interim and exceptional administration (ss.30 - 32) and Interim Receivers (s.33) are likewise matters of convenient practice for which provisions should be made, if anywhere, in the Rules.

(14) Securities (ss.36 - 38) are abolished by s.51.

Appendix 4. Arrangement of sections.

PART I - Preliminary

Section

PART II - Wills

Division 1 - The Making of Wills

Division 2 - The Revocation and Revival of Wills

Division 3 - Formal Validity of Wills

An Act to consolidate and amend the law of succession and the administration of estates.

BE IT ENACTED by the Queen's Most Excellent Majesty, by and with the advice and consent of the Legislative Assembly of Queensland in Parliament assembled, and by the authority of the same, as follows:-

PART I - PRELIMINARY

1. Short title and commencement. (1) This Act may be cited as the Succession Act, 197

(2) This Act shall come into operation on

2. Division of Act. This Act is divided into Parts, Divisions and Schedules as follows:-

PART I - PRELIMINARY, ss.1-6;

PART II - WILLS, ss.7 - 33;

Division 1 - The making of Wills, ss.7 - 16;

Division 2 - The Revocation and Revival of Wills, ss.17 - 21;

Division 3 - Formal Validity of Wills, ss.22 - 25;

Division 4 - The Construction and rectification of Wills, ss.26 - 33;

PART III - DISTRIBUTION ON INTESTACY, ss.34 - 39;

PART IV - FAMILY PROVISION, ss.40 - 44;

PART V - ADMINISTRATION, ss.45 - 61;

Division 1 - Devolution of Property, Probate and Administration, ss.45 - 54;

Division 2 - Administration of Assets, ss.55 - 61;

PART VI - MISCELLANEOUS, ss.62 - 71;

FIRST SCHEDULE - ACTS CEASING TO APPLY OR REPEALED;

SECOND SCHEDULE - DISTRIBUTION OF RESIDUARY ESTATE UPON INTESTACY

Abbreviations.

In Parts II, III and IV the abbreviations used in references to other Acts in notes in sections appearing at the beginning of the sections have the following meanings: Qld. Succession Acts 1867 - 1968 (Queensland); Eng. Wills Act, 1837 (England); Vic. Wills Act 1958 (Victoria); A.C.T. Wills Ordinance 1968 (A.C.T.); and in Part V have the following meanings:

Qld. Probate Act 1867 (Queensland); Eng. Administration of Estates Act, 1925 (England), N.S.W. Wills Probate and Administration Act 1898 (New South Wales); Vic. Administration and Probate Act 1958 (Victoria); W.A. Administration Act 1903 (Western Australia); N.Z. Administration Act 1969 (New Zealand).

3. Repeals and Savings. [Qld. Trusts Act, 1973, s.3.]
(1) The Acts specified in the First Schedule are repealed to the extent mentioned in that Schedule.

(2) Without limiting the operation of the Acts Interpretation Act 1954 - 1971 to or in relation to the repeals effected by subsection (1), unless the contrary intention appears in this Act -

(a) all persons things and circumstances appointed or created by or under any of the repealed provisions or existing or continuing under such a provision immediately before the commencement of this Act shall under and subject to this section continue to have the same status operation and effect as they respectively would have had if those provisions had not been repealed; and

(b) in particular and without affecting the generality of the foregoing paragraph, such repeal shall not disturb the continuity of operation or effect of any order, rule, regulation, scale of fees, instrument, document, disposition, execution, attestation, appointment, revival, duty, obligation, proceeding, matter or thing done effected given issued entered into accrued incurred existing pending or acquired by or under any of those provisions before the commencement of this Act; and

(c) nothing in this Act shall affect the construction of the will of any person who died before the commencement of this Act.

4. Application. [Cf. Trusts Act, 1973 s.4; England: Administration of Estates Act. 1925, s.54.] (1) Save as otherwise expressly provided this Act applies in the case of deaths occurring after the commencement of this Act.

(2) This Act binds the Crown not only in right of the State of Queensland but also, so far as the legislative power of Parliament permits, the Crown in all its other capacities.

5. Interpretation. [Cf. Property Law Act, 1974, s.4; England: Administration of Estates Act, 1925, s.55.] (1) In this Act unless a contrary intention appears -

"adopted child" means, in relation to any person, a child that is adopted by such person or by such person and his spouse jointly, in accordance with the law and of the State, Territory or country where the adoption takes place as in force at the date of the adoption;

"Country" means any place or group of places having its own law of nationality, including the Commonwealth and its Territories;

"Court" means the Supreme Court or a Judge thereof;

"debts" includes funeral, testamentary and administration expenses, debts and other liabilities payable out of the estate of the deceased;

"disposition" includes any gift, devise, bequest or appointment of or affecting property contained in a will; and

"dispose of" has a corresponding meaning;

"grant" means grant of probate of the will or letters of administration of the estate of the deceased: and includes the grant of Order to Administer or the filing of an Election to Administer such estate;

"internal law" in relation to any country or place means the law that would apply in a case where no question of the law in force in any other country arose;

"income" includes rents and profits;

"intestate" means a person who dies and either does not leave a will or leaves a will but does not dispose effectively by his will of the whole or part of his property; and

"intestacy" has a corresponding meaning;

"pecuniary legacy" includes an annuity, a general legacy, a demonstrative legacy, so far as it is not discharged out of the designated property, and any other general direction by the testator for the payment of money including all duties relating to the estate or property of a deceased person free from which any devise, bequest or payment is made to take effect;

"personal representative" means the executor, original or by representation, or administrator of a deceased person and if there is no such person, the Public Curator;

"place" means any territory including a State or Territory;

"property" includes real and personal property or any estate or interest therein and any thing in action and any other right;

"Public Curator" means the Public Curator of Queensland constituted by the Public Curator Act 1915 - 1973;

"residuary estate" in Part III of this Act has the meaning given to it by s.34 and in Part V, Division 2, the meaning given to it by s.55;

"trustee" includes -

(a) any person who immediately before the first day of July, 1973, was a trustee of the settlement or in any way a trustee under the Settled Land Act of 1886 and who, if that Act had not been repealed, would be such a trustee;

and

(b) a statutory trustee within the meaning of the Trusts Act 1973;

"will" includes codicil.

(2) A reference in this Act to a child or issue of any person includes a child or issue en ventre sa mere at the death, provided such child or issue is born alive and remains alive for a period of thirty days.

(3) A reference in this Act to the estate of a deceased person includes property over which the deceased exercises a general power of appointment by his will.

6. Jurisdiction. [Cf. Qld. Probate Act of 1867, ss.3 - 6; Eng. Supreme Court of Judicature (Consolidation) Act 1925, s.20; Vic. Supreme Court Act 1958, ss.17, 18; N.Z. Administration Act, 1969, s.5.] (1) Subject to this Act, the Court has jurisdiction in every respect as may be convenient to grant and revoke probate of the will or letters of administration of the estate of any deceased person, to hear and determine all testamentary matters and to hear and determine all matters relating to the estate and the administration of the estate of any deceased person to make all such declarations and to make and enforce all such orders as may be necessary or convenient in every such respect.

(2) The Court may in its discretion grant probate of the will or letters of administration of the estate of a deceased person notwithstanding that he left no estate in Queensland or elsewhere or that the person to whom the grant is made is not resident or domiciled in Queensland.

(3) A grant may be made to such person and subject to such provisions, including conditions or limitations, as the Court may think fit.

(4) Without restricting the generality of the foregoing provisions of this section the Court has jurisdiction to make, for the more convenient administration of any property comprised in the estate of a deceased person, any order which it has jurisdiction to make in relation to the administration of trust property under the provisions of the Trusts Act 1973.

(5) This section applies whether the death has occurred before or after the commencement of this Act.

PART II - WILLS

Division 1 - The Making of Wills

7. What property may be disposed of by will. [Qld. s.36; Eng. s.3; Vic. s.5; A.C.T. s.7.] (1) A person may, by his will, devise, bequeath or dispose of any property to which he is entitled at the time of his death, not being property of which he is trustee, whether he became entitled to the property before or after the execution of the will.

(2) Without limiting the generality of the last preceding subsection, a person may, by his will, dispose of -

(a) Property that, if not disposed of by his will, would devolve on the executor of his will or the administrator of his estate;

(b) a contingent, executory or future interest in property, whether he becomes entitled to the interest by virtue of the instrument by virtue of which the interest was created or by virtue of a disposition of the interest by deed or will and whether he has or has not been ascertained

as the person or one of the persons in whom the interest may become vested; and

(c) a right of entry for condition broken and any other right of entry.

8. Legal capacity to make a will. [Cf. Qld. s.37; Eng. s.7; Vic. s.6; A.C.T. s.8.] (1) A person who has attained the age of eighteen may make a valid will and may also validly revoke a will with or without making a new will.

(2) A married person may make a valid will and may also validly revoke a will with or without making a new will irrespective of age.

(3) A person who has made a will while under the age of eighteen and married may, if he is subsequently unmarried and under the age of eighteen, revoke such will by any manner of revocation provided in this Act other than by the making of a later will.

9. Will to be in writing and signed before two witnesses. [Cf. Qld. s.39; Eng. s.9; Vic. s.7; A.C.T. s.9.] No will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned and required (that is to say) it shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time and such witnesses shall attest and shall subscribe the will in the presence of the testator but no form of attestation shall be necessary provided that:

(a) the Court may admit to probate a testamentary instrument executed in substantial compliance with the formalities prescribed by this section if the Court is satisfied that the instrument expresses the testamentary intention of the testator; and

(b) the Court may admit extrinsic evidence including evidence of statements made at any time by the testator as to the manner of execution of a testamentary instrument.

10. When signature to a will shall be deemed valid. [Cf. Qld. s.40; Eng. Wills Act Amendment Act, 1852, s.1; Vic. s.8; A.C.T. s.10] (1) A will, so far only as regards the position of the signature of the testator on the will, is not invalid if the signature is so placed at, after, following, under, beside or opposite to the end of the will that it is apparent on the face of the will that the testator intended to give effect by that signature to the writing signed as his will.

(2) Without limiting the generality of the last preceding subsection, the validity of a will is not affected by reason of the fact -

(a) that the signature of the testator does not follow, or is not immediately after, the foot or end of the will;

(b) that a blank space intervenes between the concluding word of the will and the signature;

(c) that the signature -

(i) is placed among the words of the testimonium clause or of the clause of attestation;

(ii) follows, or is after or under, the clause of attestation, whether or not a blank space intervenes between the concluding word of that clause and the signature; or

(iii) follows, or is after, under or beside, the names, or one of the names, of the subscribing witnesses;

(d) that the signature is on a side, page or other portion of the paper or papers containing the will on which no clause, paragraph or disposing part of the will is written above the signature; or

(e) that there appears to be sufficient space for the signature on or at the bottom of the preceding side, page or other portion of the paper on which the will is written.

(3) The signature of the testator on a will does not operate to give effect to a disposition or direction that is underneath or follows that signature, or that is inserted in the will after that signature is made.

(4) In this section, references to the signature of the testator shall, in relation to a will signed by a person by the direction of the testator, be read as references to the signature of that person.

11. Appointments by will to be executed like other wills. [Qld. s.42; Eng. s.10; Vic. s.9; A.C.T. s.11.] (1) Where a testator purports to make an appointment by his will in exercise of a power of appointment by will, the appointment is not valid unless the will is executed in accordance with this Part.

(2) Where power is conferred on a person to make an appointment by a will that is executed in some particular manner or with some particular solemnity, the person may exercise the power by a will that is executed in accordance with this Part but is not executed in that manner or with that solemnity.

12. Alterations to executed as a will. [Cf. Qld. s.53; Eng. s.21; Vic. s.19; A.C.T. s.12.] No obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near or otherwise relating to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

13. Publication of will unnecessary. [Qld. s.45; Eng. s.13; Vic. s.11; A.C.T. s.13.] The validity of a will that has been executed in accordance with the provisions of this Part is not affected by reason that a person who subscribed the will as a witness was unaware that the document was a will.

14. Competence of witnesses. [Cf. Qld. s.46; Eng. s.14; Vic. s.12; A.C.T. s.14; Uniform Probate Code s.2-505.] Any person competent to be a witness in civil proceedings in Court, other than a blind person, may act as a witness to a will.

15. Gifts to attesting witnesses to be void. [Cf. Qld. s.47; Eng. s.15; Vic. s.16; A.C.T. s.15.] (1) Where any disposition of property (other than a charge or direction for the payment of any debt or for the payment of proper remuneration to any person, whether executor, administrator, solicitor or conveyancer for acting in or about the administration of the estate of the testator) is, by will, given to, or made in favour of, a person who attested the signing of the will, or the spouse of such person, to be held by that person beneficially, the disposition is null and void to the extent that it entitles that person, the spouse of that person or another person claiming under that person or that spouse to take property under it.

(2) The attestation of a will by a person to whom or to whose spouse there is given any disposition as aforesaid shall be disregarded if the will is duly executed without his attestation and without that of any other such person, whether or not the attestation was made upon the execution of a will before the passing of this Act.

16. Privileged wills. [Cf. Qld. s.43: Eng. s.11; Vic. s.10; W.A. ss. 17-19; A.C.T. s.10.[A will made by a person having the legal capacity to make a will being -

(a) any person, whether as a member or not, serving with the armed forces of the Commonwealth or its allies while in actual military, naval or air service in connection with operations that are or have been taking place, or are believed to be imminent in relation to a war declared or undeclared or other armed conflict in which members of such armed forces are, or have been or are likely to be engaged;

(b) any mariner or seaman being at sea; or

(c) any person who is a prisoner of war or internee in an enemy or neutral country -

need not be executed in the manner prescribed by section 9 of this Act but may be made without any formality by any form of words, whether written or spoken, if it is clear that that person thereby intended to dispose of his property after his death.

Division 2 - The Revocation and Revival of Wills

17. Revocation of will by marriage. [Cf. Eng. s.18, Qld. s.50; Law Reform (Wills) Act of 1962, s.3; Vic. s.16; A.C.T. s.20.] (1) Subject to subsection (2) of this section, where a person marries after making a will, the will is revoked by the marriage unless it contains an expression of contemplation of that marriage: and extrinsic evidence, including evidence of statements made by the testator, is admissible to establish that an expression contained in the will is an expression of

contemplation of that marriage.

(2) Where a testator marries after he has made a will by which he has exercised a power of appointing property by will, the marriage does not revoke the will in so far as it constitutes an exercise of that power if the property so appointed would not, in default of the testator exercising that power, pass to an executor under any other will of the testator or to an administrator of any estate of the testator.

18. Effect of divorce on will. [Cf. American Uniform Probate Code, para.2 - 508.] (1) The dissolution or annulment of the marriage of a testator revokes:

(a) any beneficial disposition of property made by will by the testator in favour of his spouse;

and

(b) any appointment made by will by the testator of his spouse as executrix, trustee, advisory trustee or guardian.

(2) So far as any beneficial disposition of property which is revoked by the operation of subsection (1) of this section is concerned the will shall take effect as if the spouse had pre-deceased the testator.

19. No will to be revoked by presumption. [Cf. Eng. s.10; Qld. s.51; Vic. s.17.] Subject to this Act no will shall be revoked by any presumption of an intention on the ground of an alteration of circumstance.

20. Revocation by instrument or destruction. [Cf. Qld. s.52; Eng. s.20; Vic. s.18; A.C.T. s.21.] (1) No will or codicil or any part thereof shall be revoked otherwise than:

(a) as aforesaid; or

(b) by another will or codicil executed in manner hereinbefore required; or if not so executed, admitted to probate under section 9 of this Act; or

(c) by some writing declaring an intention to revoke the same and executed in the manner in which a will is hereinbefore required to be executed; or

(d) by the burning, tearing or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

(2) Notwithstanding the provisions of subsection (1) of this section a person included in a class of person specified in section 16 of this Act may revoke a will in the same manner as he may make a will under the provisions of that section.

21. Revival of revoked wills. [Cf. Qld. s.54; Eng. s.22; Vic. s.20; A.C.T. s.22] (1) A will or a part of a will that has been revoked is not revived unless:-

(a) the testator re-executes it in the manner in which a valid will is required to be executed by this Part: or

(b) the testator executes, in the manner in which a valid will is required to be executed by this Part, a valid codicil showing an intention to revive the will.

(2) Where a will that has been partly revoked and afterwards wholly revoked is revived the revival operates, unless a contrary intention appears, to revive only so much of the will as was last revoked.

(3) A will that is revoked and subsequently revived shall, for the purpose of this Act, be deemed to have been made at the time when it is revived.

Division 3 - Formal Validity of Wills

[Cf. Eng. Wills Act, 1963; Vic. Wills (Formal Validity) Act, 1964; W.A. Wills Act, 1970, Part VII.]

22. Operation of this Division. The provisions of this Division take effect notwithstanding any other provisions of this Act.

23. General rule as to formal validity. A will shall be treated as properly executed if its execution conformed to the internal law in force in the place where it was executed, or in the place where, at the time of its execution or of the testator's death, he was domiciled or had his habitual residence, or in a country of which, at either of those times, he was a national.

24. Additional rules. Without prejudice to the provisions of section 23 of this Act the following wills shall be treated as properly executed:-

(a) a will executed on board a vessel or aircraft of any description, if the execution of the will conformed to the internal law in force in the place with which, having regard to its registration if any, and other relevant circumstances, the vessel or aircraft may be taken to have been most closely connected;

(b) a will so far as it disposes of immovable property if its execution conformed to the internal law in force in the place where the property was situated;

(c) a will so far as it revokes a will which under this Division would be treated as properly executed or revokes a provision which under this Division would be treated as comprised in a properly executed will, if the execution of the later will conformed to any law by reference to which the revoked will or provision would be so treated;

(d) a will so far as it exercises a power of appointment if the execution of the will conformed to the law governing the essential validity of the power.

25. Ascertainment of system of internal law. (1) Where, under this Division, the internal law in force in any country or place is to be applied in the case of a will, but there are in the country or place two or more systems of internal law relating to the formal validity of wills, the system to be applied shall be ascertained as follows:-

(a) if there is in force throughout the country or place a rule indicating which of those systems can properly be applied in the case in question, that rule shall be followed; or

(b) if there is no such rule, the system shall be that with which the testator was most closely connected at the relevant time and for this purpose the relevant time is the time of the testator's death where the matter is to be determined by reference to circumstances prevailing at his death and at the time of execution of the will in any other case.

(2) In determining for the purpose of this Division whether or not the execution of a will conformed to a particular law, regard shall be had to the formal requirements of that law at the time of the execution of the will, but this does not prevent account being taken of an alteration of law affecting wills executed at that time, if the alteration enables the will to be treated as properly executed.

(3) Where a law in force outside this State falls, whether in pursuance of this Division or not, to be applied in relation to a will, any requirement of that law whereby special formalities are to be observed by testators answering a particular description or witnesses to the execution of a will are to possess certain qualifications, shall be treated, notwithstanding any rule of that law to the contrary, as a formal requirement only.

Division 4 - The Construction and Rectification of Wills

26. Change of domicile. [Cf. Eng. Wills Act, 1963, s.4; Vic. Wills Act, 1958, s.20D; W.A. Wills Act 1970, s.23.] The construction of a will shall not be altered by reason of any change in the testator's domicile after the execution of the will.

27. Effect of subsequent conveyance on operation of will. [Qld. s.55; Eng. s.23; Vic. s.21; W.A. s.25; A.C.T. s.23.] No conveyance or other act made or done subsequently to the execution of a will of or relating to any property therein comprised except an act by which such will shall be revoked as aforesaid shall prevent the operation of the will with respect to such estate or interest in such property as the testator shall have power to dispose of by will at the time of his death.

28. General rules for the construction of wills. [Cf. Qld. ss. 56 - 60, 62, 63; Eng. ss. 24-28, 30, 31; Vic. ss.22 - 26, 28, 29; W.A. s.26; A.C.T. ss.24 - 26, 29, 30.] Unless a contrary intention appears by the Will -

(a) the will is to be construed, with reference to the property comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator;

(b) property that is the subject of a disposition that is void or fails wholly or in part to take effect is to be included so far as the disposition is void or fails to take effect in any residuary disposition contained in the will;

(c) a general disposition of land or of the land in a particular area includes leasehold land whether or not the testator owns freehold land;

(d) a general disposition of all the testator's property or of all his property of a particular kind includes property or that kind of property over which he had a general power of appointment exercisable by will and operates as an execution of the power;

(e) a disposition of property without words of limitation whether to a person beneficially or as executor or trustee is to be construed as passing the whole estate or interest of the testator therein.

29. Construction of residuary dispositions. [Cf. American Uniform Probate Code s.2-606]. Unless a contrary intention appears by the will -

(1) a residuary disposition referring only to the real estate of the testator or only to the personal estate of the testator shall be construed to include all the residuary estate of the testator both real and personal; and

(2) subject to this Act where a residuary disposition fails as to any part thereof for any reason that part shall pass to that part of the residuary disposition which does not fail and if there is more than one part which does not fail to all those parts proportionately.

30. Construction of documents: "Die without issue"; mode of distribution amongst issue. [Qld. s.61; cf. s.33.] (1) Any disposition or appointment of property using the words "die without issue" or "died without leaving issue" or "having no issue" or any words which may import either a want or failure of issue of any person in his lifetime or at the time of his death or an indefinite failure of his issue shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person and not an indefinite failure of his issue.

(2) Unless a contrary intention appears by the will a beneficial disposition of property to the issue of a person shall be distributed in equal shares among the nearest issue of that person and by representation among the remoter issue of that person.

31. Power of Court to rectify wills. (1) As from the commencement of this Act the Court shall have the same jurisdiction to insert in the probate copy of a will material which was

incidentally or inadvertently omitted from the will when it was made as it has hitherto exercised to omit from the probate copy of a will material which was accidentally or inadvertently inserted in the will when it was made.

(2) Unless the Court otherwise directs no application shall be heard by the Court to have inserted in or omitted from the probate copy of a will material which was accidentally or inadvertently omitted from or inserted in the will when it was made unless proceedings for such application are instituted before or within six months after the date of the grant in Queensland.

32. Lapse of benefit where beneficiary does not survive testator by thirty days. [Cf. Qld. s.95; Eng. Law of Property Act, 1925, s.184; American Uniform Probate Code, s.2 - 601.] (1) Unless a contrary intention appears by the will where any beneficial disposition of property is made to a person who does not survive the testator for a period of thirty days the disposition shall be treated as if that person had died before the testator.

(2) A general requirement or condition that a beneficiary survive the testator is not a contrary intention for the purpose of this section.

33. Statutory substitutional provisions in the event of lapse. [cf. Qld. s.65; Eng. s.33; Vic. s.31; W.A. s.27; A.C.T. s.31.] (1) Unless a contrary intention appears by the will where any beneficial disposition of property is made to any issue of the testator (whether as an individual or as a member of a class) for an estate or interest not determinable at or before the death of that issue and that issue is dead at the time of the execution of the will or does not survive the testator for a period of thirty days, the nearest issue of that issue who survive the testator for a period of thirty days shall take in the place of that issue in equal shares and the more remote issue of that issue who survive the testator for a period of thirty days shall take by representation.

(2) A general requirement or condition that such issue survive the testator or attain a specified age is not a contrary intention for the purpose of this section.

PART III - DISTRIBUTION ON INTESTACY

34. Interpretation. [Qld. s.29.] (1) In this Part, unless a contrary intention appears "residuary estate" in relation to an intestate means -

(a) in the case of an intestate who leaves a will - the property of the intestate that is not effectively disposed of by the will; or

(b) in any other case - the property of the intestate,

which is available for distribution after payment thereout of all such debts as are properly payable thereout.

(2) For the purposes of this Part, in ascertaining relationship it is immaterial whether the relationship is of the whole blood or of the half blood.

(3) The provisions of this Part shall be subject to the provisions of an order made under and in accordance with the provisions of Part IV of this Act and shall be applied accordingly.

35. Distribution of residuary estate on intestacy. [Qld. s.30.] (1) Subject to the provisions of subsection (2) the person or persons entitled to take an interest in the residuary estate of an intestate, and the interest in that estate which that person is or those persons are entitled to take shall be ascertained by reference to the Second Schedule of this Act according to the facts and circumstances existing in relation to the intestate.

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 predecease the intestate; and

(e) the children of any brothers or sisters of a parent of an intestate who predecease the intestate;

are the next of kin of the intestate.

(2) Where a person entitled to take any part of the residuary estate of an intestate under this Part does not survive the intestate for a period of thirty days that part of the residuary estate shall be treated as if that person had died before the intestate.

36. Manner of distribution to issue. [Qld. s.31.] Where an intestate is survived by issue who are entitled to the whole or a part of the residuary estate of the intestate the nearest issue of the intestate shall take that whole or part in equal shares and the more remote issue of the intestate shall take that whole or part by representation.

37. Manner of distribution to next of kin. [Qld. s.32.] (1) Where, by virtue of this Act, the next of kin of an intestate are entitled to the residuary estate of the intestate, the persons entitled to that residuary estate shall be ascertained in accordance with the following paragraphs:-

(a) the brothers and sisters of the intestate who survived the intestate, and the children of a brother or sister of the intestate who died before the intestate, being children who survived the intestate, are entitled to the residuary estate of the intestate;

(b) if the intestate is not survived by any persons entitled to the residuary estate under the last preceding paragraph but is survived by one or more of his grandparents, the grandparent is entitled to the residuary estate of the intestate, or the grandparents are entitled to the residuary estate in equal shares, as the case requires; and

(c) if the intestate is not survived by any persons entitled to the residuary estate under the last two preceding paragraphs, the uncles and aunts of the intestate who survived the intestate and the children of an uncle or aunt who died before the intestate, being children who survived the intestate, are entitled to the residuary estate

of the intestate.

(2) The residuary estate of an intestate shall be divided amongst:-

(a) the brothers and sisters of the intestate, and the children of those brothers or sisters who died before the intestate, in the same manner as the residuary estate would have been divided amongst those persons, if the brothers and sisters had been children of the intestate and the children of a brother or sister who dies before the intestate had been children of a child of the intestate who died before the intestate;

(b) the uncles and aunts of the intestate and the children of those uncles or aunts who died before the intestate, in the same manner as the residuary estate would have been divided amongst those persons if the uncles and aunts had been children of the intestate and the children of an uncle or aunt who died before the intestate had been children of a child of the intestate who died before the intestate:

Provided that the said residuary estate of the intestate shall not be divided amongst the issue of a brother or sister or of an uncle or aunt who died before the intestate more remote than the children of any such brother or sister, uncle or aunt.

38. Partial intestacies. [Qld. s.34.] (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 an intestate on trust for the persons entitled to it.

(2) Where the spouse of an intestate acquires a beneficial interest under the will of the intestate in the property of the intestate, item 3 of Part I of the Second Schedule to this Act applies as if -

(a) in a case where the value of the beneficial interest so acquired by the spouse under the will does not exceed thirty thousand dollars - the references to the sum of thirty thousand dollars were read as references to that sum less the value of that beneficial interest; or

(b) in any other case - the references to the sum of thirty thousand dollars or the whole of the residuary estate, whichever is the less, were omitted.

For the purposes of this subsection, a beneficial interest in real or personal property acquired by virtue of the exercise, by will, of a general power of appointment, shall be taken to be an interest acquired under that will.

39. Construction of documents: references to Statutes of Distribution; meaning of "heir". [Cf. Eng. Administration of Estates, 1925, s.50.] (1) References to any Statutes of Distribution in an instrument inter vivos made or in a will coming into operation after the commencement of this Act shall be construed as references to this Part; and references in such an instrument or will to an heir or heir at law or next of kin

of a person shall be construed, unless the context otherwise requires, as referring to the persons who would take beneficially on the intestacy of that person under the provisions of this Part.

(2) Section 28 of the Property Law Act 1974 is amended by omitting the words ", and in the case of an interest in any property expressed to be given to an heir or heirs or any particular heir or class of heirs, the same person shall take as would in the case of freehold land have answered that description under the general law in force before the commencement of this Act".

PART IV - FAMILY PROVISION

40. Meaning of terms. [Qld. s.89.] In this Part unless a contrary intention appears -

"Child" means, in relation to a deceased person, any child, stepchild or adopted child of that person;

"Dependant" means, in relation to a deceased person, any person who was being wholly or substantially maintained or supported (otherwise than for full valuable consideration) by that person at the time of that person's death, being a parent of that person or the parent of a surviving child under the age of eighteen of that person, or a person under the age of eighteen;

"Spouse" means, in relation to a deceased person, the husband or wife of that person and includes a husband or wife who has been divorced whether before, on or after the passing of this Act by or from that person and who has not remarried before the death of that person, if he is receiving or entitled to receive maintenance from that person at the time of that person's death;

"Stepchild" means, in relation to a deceased person, a child of that person's spouse who is not a child of the deceased person.

41. Estate of deceased person liable for maintenance. [Qld. s.90.] (1) If any person (hereinafter called "the deceased person") dies whether testate or intestate and in terms of the will or as a result of the intestacy adequate provision is not made from the estate for the proper maintenance and support of the deceased person's spouse, child or dependant, the Court may, in its discretion, on application by or on behalf of the said spouse, child or dependant, order that such provision as the Court thinks fit shall be made out of the estate of the deceased person for such spouse, child or dependant:

Provided that:

the Court shall not make an order in respect of a dependant unless it is satisfied, having regard to the extent to which the dependant was being maintained or supported by the deceased person before his death, the need of the dependant for the continuance of that maintenance or support and the circumstances of the case, that it is proper that some provision should be made for the dependant.

(2) The Court may -

(a) attach such conditions to the order as it thinks fit; or

(b) if it thinks fit, by the order direct that the provision shall consist of a lump sum or a periodical or other payment; or

(c) refuse to make an order in favour of any person whose character or conduct is such as, in the opinion of the Court, disentitles him or her to the benefit of an order, or whose circumstances are such as make such refusal reasonable.

(3) The incidence of the payment or payments ordered shall, unless the Court otherwise directs, fall rateably upon the whole estate of the deceased person or upon so much thereof as is or may be made directly or indirectly subject to the jurisdiction of the Court.

(4) The Court may, by such order or any subsequent order, exonerate any part of the estate of the deceased person from the incidence of the order, after hearing such of the parties as may be affected by such exoneration as it thinks necessary, and may for that purpose direct the personal representative to represent, or appoint any person to represent, any such party.

(5) The Court may at any time fix a periodic payment or lump sum to be paid by any beneficiary in the estate, to represent, or in commutation of, such proportion of the sum ordered to be paid as falls upon the portion of the estate in which he is interested, and exonerate such portion from further liability, and direct in what manner such periodic payment shall be secured, and to whom such lump sum shall be paid, and in what manner it shall be invested for the benefit of the person to whom the commuted payment was payable.

(6) Where an application has been filed on behalf of any person it may be treated by the Court as, and, so far as regards the question of limitation, shall be deemed to be, an application on behalf of all persons who might apply.

(7) The personal representative or The Public Curator of Queensland or the Director of Children's Services, or any person acting as the next friend of any infant or any mentally ill person, may apply on behalf of any person being an infant, or being mentally ill in any case where such person might apply, or may apply to the Court for advice or directions as to whether he ought so to apply; and, in the latter case, the Court may treat such application as an application on behalf of such person for the purpose of avoiding the effect of limitation.

(8) Unless the Court otherwise directs, no application shall be heard by the Court at the instance of a party claiming the benefit of this Part unless the proceedings for such application be instituted within twelve months of the death of the deceased, but the Court may at its discretion hear and determine an application under this Part although a grant has not been made.

(9) A person who, if a declaration of paternity were made upon his application under the provisions of the Status of Children Act 197 , would be entitled to make an application under this Part may make an application under this Part but such application shall not be proceeded with until he has obtained a declaration of paternity under that Act; and the Court may give such directions and act as it thinks fit to facilitate the making and determination of all necessary applications on behalf of that person under that Act and this Part.

(10) Upon any order being made, the portion of the estate comprised therein or affected thereby shall be held subject to the provisions of the order.

(11) No mortgage, charge or assignment of any kind whatsoever of or over such provision, made before the order is made, shall be of any force, validity or effect; and no such mortgage, charge or assignment made after the order is made shall be of any force, validity or effect unless made with the permission of the Court.

(12) Where any sum of money or other property is received by any person as a donatio mortis causa made by the deceased person that sum of money or that other property shall be treated for the purposes of this Part as part of the estate of the deceased; but this subsection shall not render any person liable for having paid that sum or transferred that other property in order to give effect to that donatio mortis causa.

(13) An order under this Part may not be made with respect to any assets of which the personal representative has properly assumed, upon the completion of his duties as personal representative with respect to those assets, trusteeship of trusts arising under the will or intestacy of the deceased.

42. Court may vary order. [Qld. s.91.] (1) Where (whether before or after the passing of this Act) the Court has ordered a periodical payment or has ordered any part of the estate or a lump sum to be invested for the benefit of any person, it may from time to time on the application of any person inquire whether any party deriving benefit under the order is still living or has become possessed of or entitled to provisions for his proper maintenance or support and into the adequacy of the provisions, or whether the provisions made by the order for any such party remain adequate, and may increase or reduce the provisions so made or discharge, vary or suspend the order, or make such other order as is just in the circumstances:

Provided that the Court shall not increase the provisions so made unless the income of the estate or, as the case may be, the capital or income of the part of the estate or lump sum invested for the benefit of the person concerned in pursuance of the original order is considered by the Court to be sufficient for the purposes of such increase and all other lawful payments (if any) therefrom.

(2) Without derogating from the provisions of subsection (1) of this section, where the Court has increased the provisions so made for the benefit of any person and at any subsequent date the income of the estate or, as the case may be, the capital or income of the part of the estate or lump sum invested for the benefit of the person concerned is considered by the Court to be insufficient for the purposes of such provisions and all other lawful payments (if any) therefrom, the Court may reduce or suspend any increase or discharge, vary or suspend the original order, or make such other order as is just in the circumstances.

43. (1) Manner of computing duty on estate. [Qld. s.92.] Where an order is made by the Court under this Part, all duties payable in consequence of the death of the deceased person shall be computed in the following manner:-

(a) where the deceased person leaves a will, as if the provisions of such order had been part of the will;

(b) where the deceased person did not leave a will,

as if the provisions of such order had been part of the law governing the distribution of the estates of persons dying intestate.

(2) Refund of duty paid in excess. Any duty paid in excess of the amount required to be paid under this section shall, on application and without further appropriation than this Part, be refunded to the person entitled to receive the same.

44. Protection of personal representative. [Qld. s.93.] (1) No action shall lie against the personal representative by reason of his having distributed any part of the estate and no application or order under this Part shall disturb the distribution, if it was properly made by the personal representative for the purpose of providing for the maintenance or support of the wife, husband or any child of the deceased person totally or partially dependent on the deceased person immediately before the death of the deceased person whether or not the personal representative had notice at the time of the distribution of any application or intended application under this part in respect of the estate.

(2) No person who may have made or may be entitled to make an application under this Part shall be entitled to bring an action against the personal representative by reason of his having distributed any part of the estate if the distribution was properly made by the personal representative after the person (being of full legal capacity) has notified the personal representative in writing that the person either -

(a) consents to the distribution; or

(b) does not intend to make any application that would affect the proposed distribution.

(3) No action shall lie against the personal representative by reason of his having distributed any part of the estate if the distribution was properly made by the personal representative after the expiration of twelve months from the death of the deceased and without notice of any application or intended application under subsection (1) of section 41 of this Act or under section 42 of this Act in respect of the estate.

(4) For the purposes of this section notice to a personal representative of intention to make any application under this Part shall be in writing signed by the applicant or his solicitor and shall lapse and be incapable of being renewed, and the personal representative may act as if he had not received the notice, unless, before the expiration of three months after the day on which he first receives notice of intention to make the application, the personal representative receives notice in writing that the application has been made to the Court or is served with a copy of the application:

Provided that nothing in this subsection shall prevent the subsequent making of an application within any other period allowed pursuant to this Part.

PART V - ADMINISTRATION

Division 1 - Devolution of Property Probate and Administration

45. Devolution of property on death. [Qld. Intestacy Act, 1877, s.14; Public Curator Act 1915 - 1973, s.30; Eng. s.1. N.S.W. s.44;

Vic. ss.13, 19; W.A. s.8; N.Z. s.24.] (1) The property to which a deceased person was entitled for an interest not ceasing on his death (other than property of which he was trustee) shall on his death and notwithstanding any testamentary disposition devolve to and vest in his executor and if more than one as joint tenants, or, if there is no executor or no executor able and willing to act, the Public Curator.

(2) Upon the Court granting probate of the will or letters of administration to the estate of any deceased person the property vested in his executor or in the Public Curator under the provisions of the preceding subsection shall devolve to and vest in the person to whom the grant is made and if more than one as joint tenants.

(3) Where at any time a grant is recalled or revoked or otherwise determines the property of the deceased vested at that time in the person to whom the grant was made shall be divested from him and shall devolve to and vest in the person to whom a subsequent grant is made; and during any interval of time between the recall revocation or other determination of a grant and the making of a subsequent grant the property of the deceased shall devolve to and vest in the Public Curator.

(4) The title of any administrator appointed under this Act to any property which devolves to and vests in him shall relate back to and be deemed to have arisen upon the death of the deceased as if there had been no interval of time between the death and the appointment: provided that all acts lawfully done by to or in regard to the Public Curator before the appointment of an administrator shall be as valid and effectual as if they had been done by to or in regard to the administrator.

(5) For the purposes of this section and notwithstanding the provisions of section 16 of the Trusts Act 1973 an executor includes an executor by representation under the provisions of section 47 of this Act.

46. Cesser of right of executor to prove. [Qld. ss.17, 18; Eng. s.5; N.S.W. s.69; Vic. s.16(1); W.A. s.32; N.Z. s.11; Cf. Trusts Act, 1973, s.18.] Where a person appointed executor by a will -

(i) survives the testator but dies without having taken out probate of the will; or

(ii) renounces probate; or

(iii) after being duly cited or summoned fails to apply for probate,

his rights in respect of the executorship shall wholly cease, and the representation of the testator and the administration of his estate shall devolve and be committed in like manner as if that person had not been appointed executor.

47. Executor of executor represents original testator. [Eng. s.7; Vic. s.17; N.Z. s.13.] (1) Subject to this section an executor of a sole or last surviving executor of a testator is the executor by representation of that testator.

This provision shall not apply to an executor who does not prove the will of his testator, and, in the case of an executor who on his death leaves surviving him some other executor of his testator who afterwards proves the will of that testator, it shall cease to apply on such probate being granted.

(2) So long as the chain of such representation is unbroken, the last executor in the chain is the executor of every preceding testator.

(3) The chain of such representation is broken by -

(a) an intestacy; or

(b) the failure of a testator to appoint an executor; or

(c) the failure to obtain probate of the will in Queensland; or

(d) the renunciation by the executor of the executorship by representation;

but it is not broken by a temporary grant of administration if probate is subsequently granted.

(4) Every person in the chain of representation to a testator -

(a) has the same rights in respect of the estate of that testator as the original executor would have had if living; and

(b) is, to the extent to which the estate of the testator has come into his hands, answerable as if he were an original executor.

(5) An executor may renounce his executorship by representation before intermeddling therein without renouncing the executorship of his own testator.

48. Provisions to the number of personal representatives. [Cf. Eng. Judicature Act, 1925, s.160; Trusts Act 1963, s.11.] (1) A grant shall not be made to more than four persons at any one time and where a testator appoints more than four persons as executors the order of their entitlement to a grant shall be the order in which they are named.

(2) This section shall apply to grants made after the commencement of this Act whether the testator or intestate died before or after such commencement.

49. Powers of personal representatives. [Cf. Eng. s.1(3); N.S.W. s.48; N.Z. s.23.] (1) Subject to this Act a personal representative represents the real and personal estate of the deceased and has in relation to all such estate from the death of the deceased all the powers hitherto exercisable by an executor in relation to personal estate and all the powers conferred on personal representatives by the Trusts Act 1973.

(2) Upon the making of a grant and subject thereto the powers of personal representatives may be exercised from time to time only by those personal representatives who have the grant; and no other person shall have power to bring actions or otherwise act as personal representative without the consent of the Court.

(3) The personal representatives may, during and after the period of thirty days after the death of a deceased person, make reasonable provision out of the estate for the maintenance (including hospital and medical expenses) of any spouse or issue of the deceased who would, if he survived the deceased for a period of thirty days, be entitled to a share in the estate, and any sum so expended shall be deducted from that share; but if any spouse or issue of the deceased for whom any provision has been so made does not survive the deceased for a period of

thirty days any sum expended shall be treated as an administration expense.

(4) Subject to the grant the powers of those personal representatives who have a grant shall relate back to and be deemed to have arisen upon the death of the deceased as if there had been no interval of time between the death and the grant.

(5) The powers of personal representatives shall be exercised by them jointly.

(6) The Court may confer on a personal representative such further powers in the administration of the estate as may be convenient.

50. Rights and liabilities of administrators. [Eng. s.21; Vic. s.27; W.A. s.41.] Subject to any provision contained in the grant every person to whom administration of the estate of a deceased person is granted shall have the same rights and liabilities and be accountable in like manner as if he were the executor of the deceased.

51. Abolition of administration bond and sureties. As from the commencement of this Act neither an administration bond nor sureties in support of an administration bond shall be required of any administrator.

52. The duties of personal representatives. [Qld. s.6; Eng. Administration of Estates Act 1971, s.9; Vic. s.28.] (1) The personal representative of a deceased person shall be under a duty to -

(a) collect and get in the real and personal estate of the deceased and administer it according to law;

(b) when required to do so by the Court, exhibit on oath in the Court a full inventory of the estate and when so required render an account of the administration of the estate to the Court;

(c) when required to do so by the Court, deliver up the grant of probate or letters of administration to the Court;

(d) distribute the estate of the deceased, subject to the administration thereof, as soon as may be;

(e) pay interest upon any general legacy from the first anniversary of the death of the testator until payment of the legacy at the rate of five per cent per annum or at such other rate as the Court may either generally or in a specific case determine;

Provided that nothing in this section abrogates any rule or practice deriving from the principle of the executor's year.

(2) If the personal representative neglects to perform his duties as aforesaid the court may, upon the application of any person aggrieved by such neglect, make such order as it thinks fit including an order for damages and an order requiring the personal representative to pay interest for such sums of money

as shall have been in his hands and the costs of the application.

53. Effect of revocation of grant. [Qld. ss.39, 40; Eng. ss.17, 27, 37; Vic. ss.23,31, 42.] (1) Every person making or permitting to be made any payment or disposition in good faith under a grant shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of the grant.

(2) All payments and dispositions made in good faith to the personal representative named in the grant before the making or the revocation thereof shall be a valid discharge to the person making the same; and a personal representative who has acted under a grant which is subsequently revoked may retain and reimburse himself in respect of payments and dispositions made by him which the person to whom a grant is afterwards made might properly have made.

(3) Without prejudice to any order of the Court made before the commencement of this Act all dispositions of any interest in property made to a purchaser in good faith by a person to whom a grant has been made are valid notwithstanding any subsequent revocation thereof.

(4) A personal representative who in good faith and without negligence has sought and obtained a grant is not liable for any legacy paid or asset distributed in good faith and without negligence in reliance on the grant notwithstanding any subsequent revocation thereof.

(5) The personal representative under any grant made subsequent to a grant which has been revoked may recover any legacy paid or asset distributed (or the value thereof) in reliance on the revoked grant from the person to whom the legacy or asset was paid or distributed, being a legacy or asset which is not payable or distributable to that person under the subsequent grant, but if that person has received the payment or distribution in good faith and has so altered his position in reliance on the propriety of the payment or distribution that, in the opinion of the Court, it would be inequitable to order the repayment of the legacy or the return of the asset or its value, the Court may make such order as it considers to be just in all the circumstances.

(6) If, while any legal proceeding is pending in any Court by or against a personal representative to whom a grant has been made the grant is revoked that Court may order that the proceeding be continued by or against the new personal representative in like manner as if the same had been originally commenced by or against him, but subject to such conditions and variations, if any, as the Court directs.

(7) For the purposes of this section revocation includes any partial revocation by way of a variation of the grant or otherwise.

54. Protection of persons acting informally. [Eng. s.28; Vic. s.33(1).] (1) Where any person, not being a person having a grant, obtains, receives or holds the estate or any part of the estate of a deceased person otherwise than for full and valuable consideration or effects the release of any debt or liability due to the estate of the deceased, he shall be charged as executor in his own wrong to the extent of the estate received or coming into his hands, or the debt or liability released, after deducting any payments made by him which might properly be made by a personal representative having a grant.

(2) An executor who has intermeddled in the administration of the

estate before applying for a grant of probate may renounce his executorship notwithstanding his intermeddling.

(3) A personal representative may ratify and adopt any act done on behalf of the estate by another if the act was one which the personal representative might properly have done himself.

Division 2 - Administration of Assets

55. Interpretation. In this Division unless a contrary intention appears "residuary estate" means -

(a) property of the deceased that is not effectively disposed of by his will; and

(b) property of the deceased not specifically devised or bequeathed but included (either by a specific or general description) in a residuary disposition.

56. Property of deceased assets for the payment of debts. [Eng. s.32; Vic. s.37.] (1) The property of a deceased person which on his death devolves to and vests in his executor or the Public Curator is assets for the payment of his debts and any disposition by will inconsistent with this enactment is void as against creditors, and the Court shall, if necessary, administer the property for the purposes of the payment of the debts.

(2) This section shall take effect without prejudice to the rights of mortgagees or other encumbrancees.

57. Payment of debts in the case of insolvent estates. [Eng. s.34; Vic. s.39; Cf. Commonwealth Bankruptcy Act 1966 - 1973, s.109 (i)(e).] Where the estate of a deceased person is insolvent -

(a) the funeral, testamentary and administration expenses have priority; and

(b) subject as aforesaid and to this Act, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors and as to debts and liabilities provable and as to the valuation of annuities and future and contingent liabilities, respectively, and as to the priorities of debts and liabilities as may be in force for the time being under the law of bankruptcy with respect to the administration of estates of deceased persons in bankruptcy.

58. Retainer, preference and the payment of debts by personal representatives. [Eng. Administration of Estates Act 1971, s.10.] (1) The right of retainer of a personal representative and his right to prefer creditors are hereby abolished.

(2) Nevertheless a personal representative -

(a) other than one mentioned in paragraph (b) below, who, in good faith and at a time when he has no reason to believe that the deceased's estate is insolvent, pays the debt of any person (including himself) who is a creditor of the estate; or

(b) to whom letters of administration had been granted solely by reason of his being a creditor and who, in good faith and at such a time pays the debt of another person who is a creditor of the estate;

shall not, if it subsequently appears that the estate is insolvent, be liable to account to a creditor of the same degree as the paid creditor for the sum so paid.

59. Payment of debts in the case of solvent estates. [Eng. s.34(3), 35(2); N.S.W. s.46C; Vic. s.39, 40(2).] (1) Where the estate of a deceased person is solvent the estate shall, subject to this Act, be applicable towards the discharge of the debts payable thereout in the following order, namely;

Class 1 - Property specifically appropriated devised or bequeathed (either by a specific or general description) for the payment of debts; and property charged with, or devised or bequeathed (either by a specific or general description) subject to a charge for the payment of debts;

Class 2 - Property comprising the residuary estate of the deceased including property in respect of which any residuary disposition operates as the execution of a general power of appointment;

Class 3 - Property specifically devised or bequeathed including property specifically appointed under a general power of appointment and any legacy charged on property so devised bequeathed or appointed;

Class 4 - Donationes mortis causa.

(2) Property within each class as aforesaid shall be applied in the discharge of the debts and where applicable the payment of pecuniary legacies ratably according to value; and where a legacy is charged on a specific property the legacy and the property shall be applied ratably.

(3) The order in which the estate is applicable towards the discharge of debts and the incidence of ratability as between different properties within each class may be varied by a contrary or other intention signified by the will, but a contrary or other intention is not signified by a general direction charge or trust for the payment of debts or of all the debts of the testator out of his estate or out of his residuary estate or by a gift of any such estate after or subject to the payment of debts.

60. Payment of pecuniary legacies. Subject to a contrary or other intention signified by the will -

(a) pecuniary legacies shall be paid out of the property comprised in Class 2 of s.59 after the discharge of the debts or such part thereof as are payable thereout; and

(b) to the extent to which that property is insufficient the pecuniary legacies shall abate proportionately.

61. Payments of debts on property mortgaged or charged. [Eng. s.35; Vic. s.40.] (1) Where a person dies possessed of, or entitled to, or under a general power of appointment by will

disposes of, an interest in property, which at the time of his death is charged with the payment of any debt, whether by way of mortgage, charge or otherwise, legal or equitable (including a lien for unpaid purchase money), and the deceased has not by will signified a contrary or other intention, the interest so charged shall, as between the different persons claiming through the deceased, be primarily liable for the payment of the debt; and every part of the said interest, according to its value, shall bear a proportionate part of the charge of the whole thereof.

(2) A contrary or other intention is not signified by a general direction charge or trust for the payment of debts or of all the debts of the testator out of his estate or out of his residuary estate or by a gift of any such estate after or subject to the payment of debts.

PART VI - MISCELLANEOUS

62. Intermediate income on contingent and future bequests and devises. A contingent, future or deferred bequest or devise of property whether specific or residuary carries the intermediate income of such property except so far as such income or any part thereof is otherwise disposed of by the will.

63. Legacies and devises to unincorporated associations of persons. (1) A legacy or devise to an unincorporated association of persons or to or upon trust for the aims, objects or purposes of an unincorporated association of persons or to or upon trust for the present and future members of an unincorporated association of persons shall have effect as a legacy or devise in augmentation of the general funds of the association.

(2) Money or property representing a legacy or devise in augmentation of the general funds of an unincorporated association of persons whether expressed by the will or having effect by virtue of subsection (1) of this section shall be paid or transferred to or sold or otherwise disposed of on behalf of the association and the money property or proceeds of sale thereof shall be applied by the association in accordance with the provisions of its constitution from time to time with respect to the application of its general funds.

(3) Subject to the will -

(a) the receipt of the Treasurer or like officer for the time being of an unincorporated association of persons is an absolute discharge to the personal representative for the payment of any pecuniary legacy or other moneys to the association;

(b) the transfer of property representing a legacy or devise to a person or persons designated in writing by any two persons holding the offices of President Chairman Treasurer or Secretary (or like offices if those offices are not so named) of an unincorporated association of persons is an absolute discharge to the personal representatives for the payment or transfer of money or property representing such legacy or devise; and

(c) a transfer of devised property which is land under the provisions of the Real Property Acts shall be effected by means of a Nomination of Trustees under and pursuant to the provisions of the Real Property Acts upon trust for the association and in respect of other land a

transfer thereof shall be effected in accordance with the requirements of the Registrar of Dealings or Registering Officer pursuant to the relevant legislation relating to the registration of such transfer; and a declaration made by those persons claiming to be the officers of the unincorporated association duly authorised to designate the transferee or transferees in relation to such property shall be sufficient evidence of such designation to the Registrar of Titles, Registrar of Dealings or Registering Officer as the case may be.

(4) It shall not be an objection to the validity of a legacy or devise to an unincorporated association of persons that a list of all the members of the association at the death of the testator cannot be compiled.

64. Certain powers and trusts not invalid as delegation of will-making power. A power to appoint or a trust to distribute property, created by will, is not void as a delegation of the testator's power to make a will if the same power or trust would be valid if created by an instrument made inter vivos.

65. Presumption of survivorship. [Qld. Succession Act of 1867, s.95.] Subject to this Act where two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the court) for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder for a period of one day.

66. Survival of actions. [Cf. Common Law Practice Act 1867 - 1972) s.15D; Eng. Proceedings Against Estates Act, 1960] (1) Subject to the provisions of this section, on the death of any person after the 15th October, 1940, all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate.

(2) Sub-section (1) does not apply to causes of action for defamation or seduction or for inducing one spouse to leave or remain apart from the other or to claims for damages on the ground of the commission of adultery.

(3) Where a cause of action survives pursuant to subsection (1) for the benefit of the estate of a deceased person, the damages recoverable in any action brought -

(a) shall not include damages for pain and suffering, for any bodily or mental harm or for curtailment of expectation of life;

(b) shall not include exemplary damages;

(c) in the case of a breach of promise to marry, shall be limited to damages in respect of such damages as flows from the breach of promise to marry;

(d) where the death has been caused by the act or omission which gives rise to the cause of action shall be calculated without reference to -

(i) loss or gain to the estate consequent upon the death save that a sum in respect of

funeral expenses may be included;

(ii) future probable earnings of the deceased had he survived.

(4) Where damage has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there shall be deemed, for the purposes of this section, to have been subsisting against him before his death such cause of action in respect of that act or omission as would have subsisted if he had died after the damage was suffered.

(5) The rights conferred by this section for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by the provisions of the Common Law Practice Act 1867 - 1972 and so much of this section as relates to causes of action against the estates of deceased persons shall apply in relation to causes of action under those Acts as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1) of this section.

(6) Nothing in this section enables any proceedings to be taken which had ceased to be maintainable before the commencement of this Act.

(7)(a) An action which survives pursuant to subsection (1) of this section against the estate of a deceased person may be brought against any beneficiary to whom any part of the estate has been distributed as well as against the personal representatives.

(b) Where an action is brought against a beneficiary to whom a part of the estate has been distributed that beneficiary is entitled to contribution from any beneficiary to whom a distribution has been made being a beneficiary ranking in equal degree with himself for the payment of the debts of the deceased and to an indemnity from any beneficiary to whom a distribution has been made being a beneficiary ranking in lower degree than himself for the payment of the debts of the deceased, and he may join any such beneficiary as a party to the action brought against him.

(c) Where an action is brought against a beneficiary (including a beneficiary who has been joined as aforesaid) whether in respect of an action which has survived against the estate or for contribution or indemnity, the beneficiary may plead equitable defences and if he has received the disposition made to him in good faith and has so altered his position in reliance of the propriety of the disposition that, in the opinion of the Court, it would be inequitable to enforce the action, the Court may make such order as it thinks fit.

(d) In no case may a judgment against a beneficiary exceed the amount of the distribution made to him.

67. Commission. [Qld. Probate Act, 1867, s.6.] The Court may authorise the payment of such remuneration or commission to the personal representative for his services as personal representative as it thinks fit, and may attach such conditions to the payment thereof as it thinks fit.

68. The Registrar. [Cf. Qld. Probate Act of 1867, ss.11, 12.] Subject to this Act the Registrar of the Supreme Court shall be invested with and shall and may exercise with reference to proceedings in the Court under this Act all such powers and authorities as may be conferred on him from time to time by the Court and by the Rules of Court and otherwise all such powers and authorities as he exercised before the passing of this Act.

69. Practice. [Qld. Probate Act of 1867, s.8; Vic. s.67.] The practice of the Court shall, except where otherwise provided in or under this or any other Act or by Rules of Court for the time being in force, be regulated so far as the circumstances of the case will admit by the practice of the Court before the passing of this Act.

70. Rules of Court. [Qld. Succession Acts 1867 - 1968, s.94; Eng. The Proceedings Against Estates Act 1970, s.2.] (1) All such Rules of Court as may be necessary or convenient for regulating the practice and procedure of the Court for the purpose of giving full effect to the provisions of this Act may be made and the provisions of The Supreme Court Act of 1921 and the Supreme Court Acts Amendment (Rules Ratification) Act of 1928 shall apply and extend in respect of such Rules of Court.

(2) Without affecting the generality of the foregoing subsection Rules of Court may make provision -

(a) for enabling proceedings to be commenced against the estate of a deceased (whether by the appointment of a person to represent the estate or otherwise) where no grant has been made;

(b) for enabling proceedings purported to be commenced against any person who has died to be treated as having been commenced against his estate;

(c) for enabling any proceedings commenced or treated as commenced against the estate of a deceased person to be maintained (whether by substitution of parties, amendment or otherwise) against a person appointed to represent the estate or, if a grant is made, against the personal representatives; and

(d) for the mode of service and for extension of time within which service may be made in any case where any person desires to effect within a prescribed time service of any proceedings against or of any notice or other document required or permitted to be served in respect of the estate of a deceased person and that person is uncertain as to upon whom service should be effected.

71. Service. In any case where any person desires to effect within a prescribed time service of any proceedings against or of any notice or other document required or permitted to be served upon the estate of a deceased person and that person is uncertain as to upon whom service should be effected the Court may, if application for directions is made to it within the time prescribed for service, direct the mode of service in that case and, if it thinks fit, allow an extension of the time within which service may be effected.

FIRST SCHEDULE

Acts ceasing to apply or repealed

[Section 3]

Year & Number	Short Title (if any) or subject-matter	Extent of cesser of application
1867 31 Vic. No.9	Probate Act of 1867	The whole
1867 31 Vic. No.17	Common Law Practice Act of 1867 as amended	Sections 8, 11 & 15D
1867 31 Vic. No.18	Equity Act of 1867	Section 78
1867 31 Vic. No.23	Supreme Court Act of 1867	Section 23
1867 31 Vic. No.24	Succession Act of 1867 as amended	The whole
1871 34 Vic. No.27	The Specialty and Simple Contract Debts Equalisation Act, 1871	The whole
1877 41 Vic. No.24	Intestacy Act of 1877	The whole
1915 6 Geo. 5 No.14	The Public Curator Act of 1915	Section 30
1940 4 Geo. 6 No.4	The Wills (Soldiers, Sailors and Members of the Air Force) Act of 1940	The whole
1940 4 Geo. 6 No.6	The Common Law Practice Amendment Act 1940	The whole
1942 6 Geo. 6 No.20	The Succession Acts Amendment Act of 1942	The whole
1943 7 Geo. 6 No.28	The Succession Acts and Another Act Amendment Act of 1943	The whole
1956 5 Eliz. 2 No. 19	The Law Reform (Limitation of Actions) Act of 1956	Section 7
1962 11 Eliz. 2 No. 19	The Law Reform (Wills) Act of 1962	The whole
No. 8 of 1968	The Succession Acts Amendment Act of 1968	The whole
No. 34 of 1972	The Common Law Practice Amendment Act 1972	Section 3
No. 6 of 1974	The Intestacy Act Amendment Act 1974	The whole
No. 76 of 1974	The Property Law Act 1974	Section 28 to the extent provided in s.39 of this Act

SECOND SCHEDULE

Distribution of Residuary Estate Upon Intestacy

Part I - Manner of distribution where intestate is survived by a spouse

[Sections 34 - 39]

Item	Circumstances	Manner in which the residuary estate of the intestate is to be distributed
1	Where the intestate is not survived by - (a) issue; or (b) a parent, a brother or sister or a child or children of a brother or sister	The spouse is entitled to the whole of the residuary estate.
2	Where the intestate is survived by issue	1. The spouse is entitled to one-half of the residuary estate if there is only one child or to one-third of the residuary estate if there is more than one child. 2. The issue of the intestate are entitled to the balance of the residuary estate.
3	Where the intestate is not survived by issue but is survived by a parent, a brother or sister or a child or children of a brother or sister	1. The spouse is entitled - (a) to the sum of thirty thousand dollars from the residuary estate or to the whole of the residuary estate, which ever is the less; and (b) if the value of the residuary estate exceeds thirty thousand dollars, to one-half of the balance of the residuary estate. 2. If the intestate is survived by one or both of his parents (whether or not the intestate is also survived by a brother or sister or a child or children of a brother or sister), the surviving parent is entitled or the surviving parents are entitled in equal shares, as the case may be, to the remaining one-half of the balance of the residuary estate. 3. If the intestate is not survived by a parent, the brothers and sisters of the intestate, who survive the intestate, and a child or

Item	Circumstances	Manner in which the residuary estate of the intestate is to be distributed
3 cont.		children who survive the intestate of a brother or siste of the intestate who died befor the intestate, are entitled to the remaining one-half of the balance of the residuary estate in such shares as he or they would have been entitled to the residuary estate of the intesta if the intestate had not been survived by his spouse.

Part II - Manner of distribution where intestate is not survived by a spouse

Item	Circumstances	Manner in which the residuary estate of the intestate is to be distributed
1	Where the intestate is survived by issue	The issue are entitled to the whole of the residuary estate.
2	Where the intestate is not survived by issue but is survived by a parent or both parents	The parent is entitled to the whole of the residuary estate or, if both parents survive the intestate, the parents are entitled to the whole of the residuary estate in equal shares.
3	Where the intestate is not survived by issue or by a parent but is survived by next of kin	The next of kin are entitled to the residuary estate in accordance with s.37 of this Act.
4	Where the intestate is not survived by issue, by a parent or by next of kin	The residuary estate shall be deemed to be bona vacantia and the Crown is entitled to it.