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THE INTESTATE LAW OF PENNSYLVANIA*

A. J. WHITE HUTTON*

CHAPTER I

INTRODUCTION

The Law of intestacy presents a subject interesting, from an historical standpoint, in the development of economic and social theories generally accepted today but questioned in some quarters. To trace the evolution of the phases from ancient times would take us too far afield and to discuss the theories would be beyond the scope of the present treatise. Our purpose is to set forth the present law of Pennsylvania as found in the statutes and reflected in the decisions of the courts, together with sufficient background to show the development from provincial times and the changes in policy as disclosed by the acts of assembly.

Those who may be interested in a study of the theories, economic and social, referred to as above will find some good leads in the opening pages of Mechem and Atkinson's Cases on the Law of Administration. Others, who may desire to follow an antiquarian research, will be amply repaid by reading the essays of able historians as reproduced in Vol. III, Select-Essays in Anglo-American Legal History, page 723 and following; Little, Brown and Company, Boston. For local reading giving the history of our intestate law from provincial times to a date in our Commonwealth just prior to the adoption of the Constitution of 1874, the most available source is Scott's Commentaries upon the Intestate System of Pennsylvania and the Power and

*This article consists of four chapters of a text on this subject to be published in the near future.

*A.B., Gettysburg College, 1897; A.M., Gettysburg College, 1899; LL.B., Harvard University, 1902; Professor of Law, Dickinson School of Law, 1902—-; Member of Pennsylvania House of Representatives, 1931-1935,
Jurisdiction of the Orphans' Court. published in 1871. It is well also for the reader to keep in mind that Pennsylvania has had in its history four constitutions, viz: 1776, 1790, 1838 and 1874. This fundamental law has affected somewhat the Register's Office, the Orphans' Court and the substantive and adjective law of intestacy. The statutory history covers a period of two hundred and seventy years. In this space of time there have been two important codifications of intestate law, viz: that by the Commission of 1830 and the other by the Commission of 1915. At other times important revisions, as well as amendments and supplements, have been made to the various statutory enactments. In order to make readily accessible for study and comparison the various acts, the same have been collected from the Duke of Yorke's Laws to the Act of 1917 and its amendments. They will be found in the Appendix to the present volume. Reference will also be found in this collection to the publication by the Commonwealth known as the Statutes at Large, a monumental work but too little appreciated, the publication of which, unfortunately, has never been completed. This review of sources would not be complete without reference to the invaluable compilation of the statute law known as Purdon's Annotated Statutes and generally cited as PS. The publication of Pennsylvania Standard Practice, now under way, will also be a valuable contribution as an aid to the lawyer in putting into practice the principles of the intestate law which are the subject of exposition in the present volume. The notes of the Commission of 1915 as embodied in the Report of the Commission to Codify and Revise the Law of Decedents' Estates made to the General Assembly of 1917 will also be quoted from time to time for the purpose of explaining the general and specific views of the Commission in its draft of the Intestate Act. These notes likewise contain some excellent historical data, as well as pertinent citations to the decisions of the courts. The early Pennsylvania reports contain a variety of cases not only rich in land law applying to intestacy and the problems of curtesy and dower but also in the field of administration of the personal assets of a deceased owner. Blackstone as Vinerian Professor of Law at Oxford, in his opening address, observed that it was the duty of every scholar to acquaint himself with the laws of the country and it may be added specifically that in a commercial country like the United States, the citizens of the several states, laymen as well as lawyers, should have an acquaintance with the principles of law applicable to the devolution of property upon the death of the owner. Such a knowledge if considered an ornament to the laymen, is nevertheless an essential to the equipment of the lawyer.
CHAPTER II

HEREIN OF EARLY HISTORY, CHARTERS, STATUTES AND COMMISSIONS

EARLY HISTORY

The early settlements of Pennsylvania were made on the banks of the Delaware by the Swedes and other European adventurers about 1623. These Swedish settlements were reduced to Dutch control in 1655 and the Dutch were in turn conquered by the English in 1664. The New Netherlands and the Colonies on the Delaware were granted on 12th of March, 1664, to James, Duke of York, by the Royal Charter of Charles II.

William Penn, English Admiral and "great captain commander," under James, Duke of York, loaned Charles II the sum of 16,000 pounds. Upon the death of Admiral Penn in 1670, this claim on the Crown came into the possession of William Penn, his son. Penn asked the Crown, at a council held on the 24th of June, 1680, for "a tract of land in America, North of Maryland, bounded on the East by the Delaware, on the West limited as Maryland, northward as far as plantable;" this latter limit Penn explained to be "three degrees northwards."

Penn was made the absolute proprietor, but the sovereignty was reserved to the crown and Penn was to hold the province, "as of our castle of Windsor, in our county of Berks, in free and common socage, by fealty only for all services, and not in capite or knight service: Yielding and paying therefor to us, our heirs and successors, two beaver skins, to be delivered to us at our said castle on the first day of January in every year; and also the fifth part of all gold and silver ore which shall from time to time happen to be found within the limits aforesaid, clear of all charges."

The learned reader may compare the matter just quoted with the opinion of Woodward J., in Wallace v. Harmstad, 44 Pa. 492, holding Pennsylvania land titles to be allodial which opinion Mitchell on Real Estate and Conveyancing pronounces as "full of historical errors."

Penn was given power to make laws with the advice and approbation of the freemen, of appointing officers and the granting of pardons. The laws were to be consistent with the laws of England and were to be transmitted to the privy council for approval or disapproval within five years from the date of their passage. If the laws were not disapproved within six months after they were transmitted and delivered, they were to be in full force.
Certain conditions or concessions were agreed upon by Penn and the "adventurers and purchasers in the same province" on July 11th, 1681. The concessions provided for the allotment of the land to purchasers and provided for the opening of roads and dealing with the Indians.

Penn published the "Frame of Government" or Constitution on 20th of April, 1682. This constitution was confirmed by "the laws agreed upon in England" which were signed 5th of May, 1682.

Says Scott, supra, page 2:

"Unlike the charters of some of the other colonies, the royal charter of Charles II, to William Penn, bearing date the 4th of March, 1681, provided for the establishment of courts, &c. By the 5th section power and authority were given to Penn and his heirs, their deputies and lieutenants, 'to establish any judges and justices, magistrates and other officers whatsoever, for what cause soever (for the probate of wills, and for the granting of administrations, within the precincts of the province);' and also to make and constitute fit and wholesome ordinances from time to time, so as the said ordinances be consonant to reason, and not repugnant nor contrary, but, so far as conveniently may be, agreeable with the laws of the kingdom; but, until altered by said Penn and the freemen of the provinces, 'the laws for regulating and governing of property within the said province, as well for the descent and enjoyment of lands, as likewise for the enjoyment and succession of goods and chattels, shall be and continue the same as for the time being by the general course of the law in our kingdom of England'."

As to the "Frame of Government" it provided for a Governor, Council, and General Assembly; the appointment of judges, justices, masters of the rolls, sheriffs, and coroners; and committed civil administration generally to four committees. It was further provided, that all lands and goods should be liable for the payment of debts, with certain exceptions; that all wills in writing, attested by two witnesses, should be of the same force as to lands as other conveyances, being legally proved within forty days, either within or without the said province; and that there should be a register for births, marriages, burials, and letters of administration, distinct from the registry of deeds and conveyances in the enrollment office.

Penn arrived in the province on October 27th, 1682, the affairs having been administered temporarily by William Markham, his cousin. The first assembly met at Chester on December 4th, 1682.

In order to protect his interest in the province of Pennsylvania, on August 24th, 1682, Penn obtained a grant from James, Duke of York and Albany, of the town of New Castle, and a district of twelve miles around it.
On the same day he obtained a grant from the Duke of York of the counties of Kent and Sussex which together with New Castle or Delaware were known as "the three lower counties." On the 31st of August, 1682, he obtained the deed from the Duke of York for the province of Pennsylvania in practically the same terms as the Royal Charter. Penn was now the sole proprietor of what has since become the States of Delaware and Pennsylvania and he became also one of the owners of East and West Jersey. The two provinces were united under one governor in 1699.

In 1692, Penn was deprived of control of the government of the province by William and Mary who succeeded James II on the throne of England. Benjamin Fletcher, governor of New York, was appointed governor. Fletcher appointed William Markham lieutenant-governor. In 1694, Penn being restored to control, Markham was commissioned deputy-governor.

"Markham's Frame of Government," was published with the consent of the proprietor who had been in England since 1684. Penn returned in 1699 and a "Charter of Privileges" was granted by him and approved and agreed to by the Assembly on 28th of October, 1701. Recorded in Patent Book A, Vol. II, page 125.


STATUTES

Pennsylvania is known as a common law state and, therefore, is in contrast with other jurisdictions in the United States, particularly in the West, where there are so called code states which do not follow the course of the common law. Expounding on this topic, Scott, supra, at page 2 declares:

"The colonists, who, under the leadership of William Penn, settled the territory and founded the Commonwealth of Pennsylvania, were exclusively natives and residents of England, and, naturally, brought with them that system of polity and those laws to which they had been accustomed, and which best promised to flourish under the modifications imposed by change of locality and the slow growth of civilization in a barbarous soil. To this origin is to be attributed the existence of the English common law in this and the other colonies; and the origin of our Orphans' Court is to be found in the same locality. For, though we look in vain for a similar system throughout England at large, yet London, where many of the colonists originated, presents us, in one peculiar to her limits, a system of which ours may be regarded as a more complete amplification."

In the preamble to the Act of January 12, 1706 it is solemnly stated that
the late King Charles the Second, by his royal charter to William Penn, proprietary and governor of this province did declare, that the laws for regulating and governing of property within this province, for descent and enjoyment of lands, as likewise for the enjoyment and succession of goods and chattels, should be and continue the same as they should be for the time being by the general course of the law in England, until the said laws should be altered by the said William Penn, his heirs or assigns, and by the freemen of the said province, their delegates or deputies, or the greater part of them.

As late as 1932 our Supreme Court is found adhering to common law principles in Bridgeford vs. Groh, 306 Pa. 566 (1932), 160 A. 451, where in interpreting the Intestate Law, Schaffer, J., stated:

"In Merrick v. DuPont, 285 Pa. 368, 132 A. 181, we re-announced a principle operative throughout the whole course of our existence as a commonwealth in which the foundations of jurisprudence are in the common law, that a statute should be so interpreted that it will accord, as nearly as may be, with the theretofore existing course of the common law."

Nevertheless, it must be remembered that as regards the law of intestacy the same is based almost solely upon statutory enactments. As to the jurisdiction of the Register's Office and the Orphans' Court in the administration of the law of decedents' estates, it is a trite principle that such jurisdiction is founded solely on statutes.

COMMISSION OF 1830

In 1830 those who had made a study of such matters came to the conclusion that the mass of statutory law accumulated over a period of one hundred fifty years had become not only unwieldy but uncertain. This mass comprised ordinances found originally in the Duke of Yorke's Laws, enactments of provincial assemblies and those of a period following the American Revolution, many inconsistent with each other. This situation was true generally and particularly in the laws pertaining to the estates of the dead.

Hence we find the General Assembly of the Commonwealth adopting a set of Resolutions "relative to a revised code of Pennsylvania" approved March 23rd, 1830, P. L. 408. This action is significant as the only completed effort on the part of the General Assembly to codify the entire statutory law of the Commonwealth. Resolve II stated in part as follows:

"That it shall be the duty of the revisers to carefully collect and reduce into one act, the different acts and parts of acts which from similarity of subject ought to be so arranged and consolidated; to divest the said acts of all redundant phrases and useless verbiage; to distribute and arrange the
several acts systematically, under proper titles, divisions and sections; to omit in the revision all such acts or parts of acts as shall have been repealed or supplied by subsequent acts, or which may have expired by their own limitation; to suggest to the legislature such contradictions, omissions or imperfections, as may appear in the statutes, to be revised, and the mode in which the same may be reconciled, supplied or amended; to designate such acts or parts of acts which ought to be repealed, and recommend the passage of such new acts or parts of acts as such repeal may render necessary; and generally it shall be the duty of the revisers to execute the duties hereby confided to them, in such a manner as to render plain and perfect.”

By the terms of Resolve 6 it was stipulated, “That the revisers be and they are hereby directed to revise the several statutes relative to the settlement of accounts before registers, and proceedings in the Orphans’ Court, as soon as conveniently may be, and report the same for the determination of the General Assembly at their next session.”

The Revisers, as appointed by the Governor, were William Rawle, Thomas I. Wharton, and Joel Jones, three lawyers distinguished for ability and scholarly attainments.

They later reported the following bills which were enacted into law:


An Act relating to last Wills and Testaments, April 8, 1833, P. L. 1832-33, 249.

An Act relating to the Descent and Distribution of the Estates of Intestates, April 8, 1833, P. L. 1832-33, 315.

An Act relating to Executors and Administrators, February 24, 1834, P. L. 1833-34, 73.

Other acts were passed subsequently, pursuant to recommendations of the Commissioners, but the above constitute the base of the law concerning the estates of the dead in Pennsylvania, until the passage of the recent acts pertaining to the same subject by the Legislature of 1917.

The Act of April 8, 1833, P. L. 315, together with subsequent amendments and supplements continued as the law of Pennsylvania until the year 1917.

COMMISSION OF 1915

Section 1 of the Act of April 23, 1915, P. L. 177, provided as follows:

“That the Governor is duly authorized to appoint a Commission of
three persons, learned in the law, and one of whom shall be an orphans' court judge in commission, to codify and revise the law of decedents' estates, whether testate or intestate, and to report the same to the next General Assembly, and to recommend such changes in the existing laws as may to such Commission seem desirable."

The Commissioners were the late Judge John Marshall Gest, a most able Orphans' Court Judge of Philadelphia, George E. Alter, sometime Attorney-General of the Commonwealth and Thomas J. Baldrige, now a Judge of the Superior Court of Pennsylvania. The following codes were proposed and later enacted by the General Assembly of 1917 and became known as

Intestate Act
Wills Act
Fiduciaries Act
Partition Act
Revised Price Act
Register of Wills Act
Orphans' Court Act.

The Intestate Act became the Act of June 7, 1917, P. L. 429.

In submitting these codes to the General Assembly the Commission observed, inter alia:

"In an endeavor to fulfill the difficult and responsible task thus imposed upon us, we have in many ways been guided by the example of the Commission of 1830, and particularly in this: We have avoided making any change in the phraseology of the existing statutes unless some definite and substantive change in the purpose of the law itself was intended, even where some other words or expressions might seem better adapted to express that purpose. Our obvious reason has been that the phraseology of the older statutes, much of which the Commission of 1830 copied from prior statutes as early as those of 1705, 1794, and 1797, has acquired through long use and judicial decision a settled and determinate meaning, which should not be disturbed through any desire to attain mere elegance of diction; and, indeed, this course was expressly enjoined upon the Commission of 1830 by the Resolution of the General Assembly, which provided that in the revision of the statutes ‘no such change shall be made in this phraseology by which this true intent and meaning shall in any wise be injured, altered or affected, except in those instances in which it shall be expressly intended and proposed to amend or change the existing provisions of such statutes.’ This principle has however been adhered to with greater stricture in revising those statutes which relate
to substantive law than in case of those which merely regulate procedure; and, throughout, some verbal changes have been made for the sake of purity and clearness, when no alteration of the meaning is involved."

Referring particularly to the Intestate Act the Commissioners state:

"In this revised Act, the Commissioners have followed the phraseology of the existing statutes in accordance with their resolution to make as a general rule, only such verbal changes as might be necessary when a substantive change of the law is intended.

"It is well at this point to note two important changes which affect the entire Act. The first is that the same scheme of inheritance is provided for both real and personal estate, thus ignoring the distinction that exists at present by which the interests of the surviving spouse or of parents are in some cases restricted to a life interest in the realty while their interests in the personal estate are absolute . . . .

"The second important change which the Commission recommends is that the reciprocal rights of husband and wife in each others intestate estate should be the same."


In addition to the above citations reference is also made to the note appended to the Act of April 19, 1794, 3 Smith's Laws page 153. This note extending from pages 153-176 is a most valuable contribution historically of the statutes and decisions pertaining to intestacy up to the time.

CHAPTER III

HEREIN OF INTESTACY, LEGISLATIVE POWER AND THE ACT OF 1917

INTESTACY

The second book of Blackstone's Commentaries—so much valued by the old school lawyers of Pennsylvania—concerns property rights in real estate and personal chattels. The discussion embodies about one-fourth of Blackstone's complete work and probably represents a fair proportion of the general
law devoted to such rights, including the consideration not only of gifts and transfers inter vivos but also the devolution of property at the death of the owner.

Duncan J., of our Supreme Court, once quaintly observed that as surely as a person dies, just as surely does his estate come into the Orphans' Court. More names have been immortalized in the records of the venerable tribunal than on tablets of bronze or of marble. In fact, in our practice, estates of the dead have become, as it were "a sort of posthumous entity." The condition precedent to admission to this valhalla of the law is that the deceased person shall have left property to be distributed according to the rules of law. The law applied is that of testacy or intestacy. Henry Wharton, inveighing against the use of the word "decedent," 6 W. N. C. 545 (1879), thus puts it:

"When a man dies, to use the plain phrase, he has either disposed of his goods by will, or he has not. He is either testate or intestate. He is in either case a dead man and there is an end of him, and if we call him so, and discard the useless word decedent, we know that, as respects all we have left to deal with, his property, his creditors, and his heirs, he must be one of two things—a dead man with a will or a dead man without one, not a sort of posthumous entity."

From the earliest times in Pennsylvania, the law has provided for testamentary disposition and as has already been quoted Penn's Frame of Government stipulated that all wills in writing, attested by two witnesses, should be of the same force as to lands as other conveyances. On the other hand, one of the first recorded ordinances of "The Duke of Yorke's Lawes" set forth with considerable exactitude the rules of procedure and of distribution of the estate of the person who "dyed intestate." In the provincial enactments persons deceased are habitually designated as "testators and intestators." The Act of 1693, passed during the governorship of Benjamin Fletcher in the reign of William and Mary, is entitled "The Law about Testates' and Intestates' Estates."

Therefore it may be stated that the laws of Pennsylvania from the earliest times have reflected the liberality of view of the Founder in making real estate freely alienable inter vivos and devisable by will—testamentary power including personalty as well—and likewise providing in cases of intestacy precise rules of distribution of both personal and real property in accordance with the general principles of the common law. It is noteworthy to mention, however, that the rule of primogeniture was never recognized but in place thereof the early laws provided for the eldest son "a double portion."

In McNulty's Estate, 29 Dist. 709 (1920) it was observed that intestacy
may result not merely from the decedent's failure to make any will or to dis-
pose by will of all his estate, but also from his failure to make legal and
effectual disposition either of his entire estate or part of it.

In Roberts v. Washington Trust Company, 313 Pa. 584 (1934), 170 A.
291, plaintiffs brought ejectment for the recovery of certain lands alleged to
have been the property of the ancestor. Plaintiffs claimed as heirs under the
Intestate Law. The court ruled that the burden was upon them to show that
the ancestor died intestate. One of the reforms of the Intestate Act of 1917
is the abolition of the common law distinction between personal property and
real estate in the matter of the distributive shares. As to the former law and
the general background thereof the following quotation from Scott, supra,
page 206-7 is informative:

"Anciently when a man died in England without making disposition of his
testable goods, the king, as parens patrias, used to seize the goods to the in-
tent that they should be preserved and disposed of for the burial of the de-
ceased, the payment of his debts, and to advance his wife and children, if he
had any, and if not, then of his blood. This royal prerogative, granted some-
times to lords of manors, was invested finally in the prelates of the Church,
for it was said none could be found more fit to have such care and charge of
the goods of the deceased than the ordinary, who all his life had the care and
charge of his soul. By statute of Westminster 21, 3 Edw. 1 C. 19, it was en-
acted that the ordinary should be bound to pay the debts of the intestate, as
far as his goods extended, in the same manner that executors were bound in
case the deceased left a will; and in Snelling's Case, 5 Rep. 82, it was resolved
that if the ordinary took the goods in possession he was chargeable with the
debts of the intestate at common law, and that the above statute was only in
affirmance of the common law. The residuum, after payment of debts, re-
mained still in the hands of the ordinary, to be applied to whatever purpose
his conscience should approve. The flagrant abuses of this power led to the
statute of 31 Edw. 3 C. 11, which required the ordinary to depute the next
and most lawful friends of the dead person intestate, to administer his goods.
This is the origin of administrators as they stand in England to this day. It
was not until the statute of 22 and 23 Car. 2 C. 10, that the surplusage of in-
testates' estates (except of femes covert which were left as at common law)
was required to be distributed among the next of kin, according to fixed rules.
Thus it is seen that the right of creditors to be paid out of a decedent's goods
was recognized, both at common law and by statute, long before the right of
succession was secured to his children and kindred.
In Pennsylvania, a variety of laws were made prior to 1700 to regulate intestates' estates, and to fix the course of descent and distribution. A summary of these laws may be seen in the note to 3 Smith's Laws, 153, but they all kept in view the paramount right of creditors, and made distribution among kindred of only the residuum, whether of real estate or personal goods, that should remain after creditors were paid. And to this day in Pennsylvania, as the succeeding pages testify, the right of creditors maintains its precedence over that of heirs and legatees, and holds its place fixedly in our legislation. In the revised act of 1833, relating to the descent and distribution of the estates of intestates, it is expressly said that "the real and personal estate of a decedent, remaining after payment of all just debts and legal charges, shall be divided and enjoyed in the manner now to be set forth."

**LEGISLATIVE POWER**

In Gilbert's Estate, 227 Pa. 648 (1910), 76 A. 428, the Act of April 1, 1909, P. L. 87 regulating the descent and distribution of the estates of intestates was held constitutional and not violative of secs. 3, 6 or 7 of Art. 3 of the Pennsylvania Constitution. Said Elkin J.:

"The descent and distribution of estates is primarily a legislative question. The legislature has the power to say in what manner, and to whom, and in what proportions, estates shall descend and this power having been properly exercised in the act of 1909 we can see no reason why its provisions should not be enforced in accordance with the legislative direction."

In Bigelow on Wills (1898) at p. 11 the author says:

"Thus disposition by testacy and disposition by intestacy stand upon the same footing and are expressions of the same purpose, to wit, the prevention of a vacancy and the failure of what is the very foundation of society and order, the social instinct. They do not express any theory of State or individual ownership of property forever. It still the question is raised, from what source emanates the authority which confers ownership upon devisee, legatee, or distributee, the answer is, the social instinct. The power of disposition is conferred upon the owner or upon the State; it does not emanate from either. Nor does it emanate from the social instinct as fictitious owner of the property; the power is the expression of the social instinct as a social and political necessity. Ownership is not a necessary condition to conferring ownership. To maintain the social order, power or authority, without being synonymous with robbery or injustice, may act and confer ownership. So it does act, it is conceived in the matter of postmortem disposal of property."
In Strode v. Com., 52 Pa. 181 (1866) the following language of the Lower Court was approved:

"The death of the owner of property would necessarily terminate his control over it, and it would pass to the first who might obtain possession. The right of the owner to transfer it to another after death, or of kindred to succeed, is the result of municipal regulation, and must, consequently, be enjoyed subject to such conditions as the state sees fit to impose."

In accord with the sentiments above expressed further authorities will be found in Hutton on Wills, page 14 and following. See also, Briegel vs. Briegel, 307 Pa. 93 (1931). 160 A. 581.

Without going into the question as to the ultimate ownership of the state in the property of its citizens it can be deduced as a settled principle of law that all rights of inheritance, as well as rights to dispose of property by testamentary direction are extended to the property owner by the state as a privilege and may be withdrawn in part or in whole without violating any constitutional principle. For example, if the state can impose a death transfer tax of two per cent, it may increase it to one hundred per cent. It is conceivable that a distinction might be made between direct and collateral inheritances by placing a much heavier tax upon the latter than the former. It will be recalled that at present the direct inheritance tax in Pennsylvania is two per cent, whereas the collateral tax is ten per cent.

The original theory of inheritance tax legislation was that of avowedly taxing property and this is apparent in Pennsylvania prior to the Death Transfer Tax Act of 1919. Cope's Estate, 191 Pa. 1. However, the modern view following the Act of 1919 and federal legislation on the same subject is that the tax is upon the right of succession as distinguished from the property itself.


ACT OF JUNE 7, 1917, P. L. 429

The Intestate Act of 1833 in original form embraced twenty-one sections. Its provisions remained intact as the law of the state until changed by the Act of April 1, 1909, P. L. 87.

The Act of 1917, which supplants the former law, has twenty-eight sections and avowedly covers the subject of Intestacy in a thoroughly comprehensive way. The constitutionality of the act of 1917 has been sustained in several cases, notably where attacks were made upon the title as violating Art. 3, Section 3 of the Constitution of Pennsylvania.

Bridgeford vs. Groh, 305 Pa. 554 (1932), 158 A. 260.
Gilbert's Estate, 227 Pa. 648 (1910), 76 A. 428, holding constitutional the Act of 1909, referred to supra.

For a case comparing the Intestate Act of 1833 and the Intestate Act of 1917 in certain particulars as to representation among collaterals see Miles’s Estate, 272 Pa. 329 (1922), 116 A. 300.

In the latter case Moschzisker, C. J. observed:
“The Act of June 7, 1917, P. L. 429 designates the persons who are entitled to the real and personal estate of an intestate after the payment of all just debts and legal charges. The first eight sections of the statute determine the distributive shares of the spouse, issue, father and mother; and, in absence of these, the ninth section provides for a division among certain collateral heirs and kindred.”

In the following chapters there will be discussed in detail the various sections of the Act of 1917, comparing the same, where possible, with the provisions of the Act of 1833.

CHAPTER IV

SHARES OF THE SPOUSES

PROLOGUE

To thoroughly understand the provisions of the Act of June 7, 1917, P. L. 429 and where necessary, to construe and to interpret its language, in some places involved and sometimes obscure, the reader must resort to the Act of 1833 and amendments for comparison and study. Moreover, to have readily available the entire series of prior intestate enactments is most helpful. Accordingly, these earlier laws have been placed in the Appendix, infra. Of course, where the language has been passed upon by the courts, the decisions are ruling. In discussing the several sections the above suggested course is followed. Concerning the particular subject matter of this chapter, it may be stated that it is of prime importance, perhaps of the greatest importance, as compared with other sections hereinafter discussed, to the lawyer as a conveyancer of real estate and a draftsman of wills. Indeed, some of the conclusions disclosed by the decisions of the courts are startling. The possibilities, for example, of the $5,000 allowance as applied to various situations, are such as to make conveyancing a dangerous art and the drafting of a will
a happy expedient. The present chapter is devoted to a consideration of the
shares of the respective spouses.

ACT OF JUNE 7, 1917, P. L. 429

Section 1 (a) provides:
"That the real and personal estate of a decedent, whether male or female,
remaining after payment of all just debts and legal charges, which shall not
have been sold, or disposed of by will, or otherwise limited by marriage settle-
ment, shall be divided and enjoyed as follows: namely,—

(a) Where such intestate shall leave a spouse surviving and one child
only, or shall leave a spouse surviving and no children but shall leave descend-
ants of one deceased child, the spouse shall be entitled to one-half part of the
real and personal estate."

The draftsman notes that this introductory paragraph is copied from
Section 1 of the Act of April 8, 1833, P. L. 315, which was amended by the
Act of April 1, 1909, P. L. 87. Clause (a) is clause 1 of the same section
amended so as to make the rights of husband and wife the same and to elim-
inate the distinction between real and personal property in this regard, and to
give the surviving spouse one-half of the estate under the circumstances
described.

Let us consider to what situations the introductory paragraph is or is not
applicable.

DECEDEANTS

All persons, male or female, whether sui juris or not, dying intestate domic-
icled in the Commonwealth, are within the meaning of the Act. Moreover,
all persons, above described, not so domiciled dying intestate seised of real estate
located in the Commonwealth, are likewise within its terms. The latter con-
clusion is reached by application of the general principle of lex loci rei sitae.

Adam's Estate, 45 C. C. 263 (1916).
Paul's Estate, 46 C. C. 33 (1917).

On the other hand Section 25 of the Act stipulates that nothing in this
act contained, relative to a distribution of personal estate among kindred,
shall be construed to extend to the personal estate of an intestate whose dom-
icile, at the time of death, was out of this commonwealth.

Further discussion of the matters of location of property and the applica-
tion of the Act is deferred until later when Section 25 is given specific consid-
eration. However, it may be noted at this time, that under the taxing power
the tangible personal property of the deceased owner is affected by lex loci
rei sitae.

First National Bank of Boston vs. State of Maine, 284 U. S. 312 (1932),
76 L. ed. 313.

City Bank Farmers Trust Company vs. Schnader, 55 Sup. Ct. Rept. 29
(1934). 79 L. ed. 68.

See also Section 1, Act of June 20, 1919, P. L. 521, amended by Act of
June 22, 1931, P. L. 690 and 72 PS Section 2301 and valuable note giving
latest death transfer tax cases.

ESTATES

The real and personal estate "of a decedent" is the property affected. In
reality a decedent can have no property and in fact the use of the word "de-
cedent" is a provincialism, so characterized by Henry Wharton, 6 W. N. C.
545 (1879), wherein that forceful thinker observed:

"When we are met with the peculiar word decedent, which, for some un-
known reason, has become adopted in Pennsylvania, though to be found no-
where else, we have indeed made it so far our own that in defiance of etym-
ology, we generally call it decedent. The Romans, from their hatred of the
idea of death, had a reluctance to use its name, and resorted to by-speech, as
decedere, to depart. But to convert this timid metaphor into a noun, to make
that noun a pillar of jurisprudence, and then deface its pronunciation, was
only possible in a period when small Latin and less law were current. Were
it a good and useful word, however bastard its origin, philology might be shut
out; but the word is not good or useful, since it is a source of confusion of
ideas, and has become the basis of a kind of logic as really illegitimate as it-
self. When a man dies, to use the plain phrase, he has either disposed of his
goods by will, or he has not. He is either testate or intestate. He is in either
case a dead man, and there is an end of him, and if we call him so, and dis-
card the useless word decedent, we know that, as respects all we have left to
deal with, his property, his creditors, and his heirs, he must be one of the two
things—a dead man with a will or a dead man without one, not a sort of
posthumous entity."

Nevertheless, the use of the word "decedent" has become so inveterate
in Pennsylvania and as it appears in the present and other statutes the
grammatical rule of common usage making good usage must prevail. What
is undoubtedly meant by the language is a reference to the real and personal
estate owned by the intestate immediately preceding his decease. From this
total of assets there must be paid "all just debts" of the intestate and "legal
charges" in the administration of the estate. The emphasis laid upon the prior payment of debts is a most characteristic feature of all the Pennsylvania intestate laws, already pointed out in the quotation from Scott, supra, page 8, and which may be verified by reference to the early laws in the Appendix, infra. In the midst of the language now under consideration appear, by interpolation three exceptional situations, which will now be discussed.

NOT SOLD

The language is "which shall not have been sold," referring to the real and personal estate remaining to be divided "after the payment of all just debts and legal charges." However, the question arises as to what property is meant which has been sold, by the intestate at some time or by the personal representative to pay "all just debts and legal charges"? Or possibly does it embrace both situations? Simpson J., has opined that the phrase "is broad enough to include all land aliened by a decedent whether before or after the passage of the statute."

This statement was made in Merrick v. DuPont, 285 Pa. 368 (1926), 132 A. 181 wherein the facts were that Merrick conveyed real estate in 1902 without the joinder of his wife. Merrick died in 1924, intestate and without issue, leaving the above wife as his widow and certain collateral relatives to survive him. The widow claimed under the Intestate Act of June 7, 1917, P. L. 429, that she was entitled to a $5,000 absolute interest in the property as conveyed and also to a fee simple estate in an undivided one-half of the balance. She filed a bill in equity for partition and the court entered a decree sustaining her claim, from which decree the defendants, DuPont and his lessee, appealed to the Supreme Court. The Intestate Act, it will be observed, was passed between the date of the husband's conveyance and his death. It was held that prior to the Intestate Act of June 7, 1917, P. L. 429, a widow had only a common law dower interest in lands aliened by her husband in his life time, without her joining in the conveyance.

However, Section 3 of the Intestate Act of 1917, for the first time, gives to a widow the same share in lands aliened by her husband in his life time, without her joining in the conveyance, as in those in which he died seised. Simpson J., having interpreted the words "which shall not have been sold" as referring to a sale by the husband was compelled to reconcile the language of Section 3. This is accomplished by treating the Act as prospective only. The learned Justice then explains:

"Thus considered, section 1 will give the widow the interest specified in section 2 (a) in lands 'which shall not have been sold' by decedent before the
passage of the act; and by section 3 'her share in lands aliened by the husband in his life time (after the passage of the act) . . . . shall be the same as her share in lands of which the husband died seized.' This is the only reasonable reconciling interpretation to be given to the two sections, and it has the additional merits of according with the rule as to prospective statutory operation, of avoiding a possible injustice to purchasers of land before the act was passed, and of so construing the statute that it will agree, as nearly as may be, with the theretofore existing course of the common law: Kates's Estate, 282 Pa. 417."

Thus construed the result reached by the decision is sound and in accordance with justice but it is submitted that the same result could have been attained by considering the phrase "which shall not have been sold" as applying only to operations of the personal representative of the decedent. Either interpretation confronts the reader with the conviction that the phrase is redundant. It was present in the Act of 1833 and in view of the opening sentence of the paragraph it seems that the reference is only to what takes place subsequent to the death of the deceased owner. Under the Act of 1833 it was recognized that the language had no application to an alienation by the husband of real estate without the joinder of his wife. Her claim to common law dower was supported by a different line of reasoning.


DISPOSED BY WILL

The second exceptional situation is in the language "or disposed of by will" and is so obvious as to need very little explanation. If the real and personal estate has been disposed of by the will of the deceased owner there is nothing upon which an Intestate Law can operate. However wherein the will does not operate the provisions of the Intestate Act will apply. In other words, one may die partially testate and partially intestate. An odd construction of the words under consideration was contended for in Keen's Estate, 297 Pa. 22 (1929), 146 A. 531, wherein it was shown that the decedent at all times after attaining her majority had been incompetent to make a will because of impaired mentality and the contention was that the Act of 1917 did not apply. This point was thus disposed of by Simpson, J.:

"He first contends that the Intestate Act of June 7, (1917) P. L. 429 (Pa. St. 1920, sec. 8342 et seq.), does not apply to the estate of one who never was competent to make a will, and hence distribution should have been made under the Statute De Prerogativa Regis, 17 Edw. II, c. 9, enacted in 1324, though we
held in Wright's Appeal, 8 Pa. 57, that Chapter-10 was not in force in this commonwealth, it and Chapter 9 being in pari materia, and neither reported to be effective here. 3 Bin. 610. Those interested will find some of the other answers to this contention in the opinion of Judge Gest in the court below. Keen's Estate, 11 Pa. Dist. & C. Rep. 499. All we need say on this appeal is that section 27 of the Intestate Act (P. L. 442) states that the statute shall apply to the estates, real and personal of all persons dying intestate on or after December 31, 1917, as the present intestate did; and, as usual, we decide that 'shall' means shall and 'all' means all.

OTHERWISE LIMITED

The third exceptional situation to be discussed is embodied in the language of the introductory paragraph of Section 1 (a), supra, wherein the words appear "or otherwise limited by marriage settlement." Where an estate is limited by the terms of a marriage settlement or some trust provision such estate may or may not constitute a part of the real and personal estate of a decedent which the section in question provides shall be divided in a certain way. The question is determined by the scope of the limitations and the construction which may be placed upon the same by the court.

In Page's Estate, 75 Pa. 87 (1874) there was the following situation as described by Agnew, C. J.:

"Mrs. Page, the intestate, being domiciled in Philadelphia, the register of her domicile had jurisdiction over her estate. This would include the estate which came to her under the will of her father, William Wurts, of New Jersey, unless taken out of the course of administration by the limitations of his will. As the donor of the estate, he had power to limit it to others on her death, and thus to cause it to be disposed of as his own estate, and in that event it might be drawn into administration in New Jersey. But the property bequeathed to her was not to go over under the terms of the will, and the court in New Jersey decreed payment to the ancillary administrator of Mrs. Page, who has brought the fund into this state, to be administered under the principal letters issued here. The jurisdiction of the Orphans' Court cannot be doubted."

It was held in this case that under the facts and the construction placed upon the will of the father, the daughter's share at her death became a part of her estate and was distributable as such under the laws of Pennsylvania.

On the other hand in Huddy's Estate, 236 Pa. 276 (1912), 84 A. 909 a testatrix by will gave $15,000 in trust to a granddaughter for life with power of appointment by will. The granddaughter married and subsequently died.
In her will, after some small pecuniary and specific legacies, she bequeathed one-half of her residuary estate to her husband for life or until his remarriage, the other half to her sisters and brother, and the remainder after her husband's life estate to her sisters; she did not direct the payment of her debts, nor did she expressly exercise or refer to the power given her by the will of her grandmother. The husband elected to take against her will. Upon distribution of the $15,000 fund in the hands of the trustees the court directed that the whole fund should be paid over to the executors of the deceased granddaughter. Held, that inasmuch as there was no appointment of the fund for the payment of debts and no such blending of it with the donee's assets as made it impracticable to pay directly to her appointee, the fund was distributable to the residuary legatees named in the will of the granddaughter, these being the ones entitled to take under the will of the creator of the trust as designated by the donee of the power.

In such a case the fact that the husband elects to take against the will of his wife, the donee of the power, in no wise affects the distribution of property thereby directly or incidentally disposed of in the exercise of a power of appointment, for such property is not and never was the "real and personal estate" of the wife, and the husband is not therefore entitled to share the trust fund with the other residuary legatees named in his wife's will.

Where in such a case there are sufficient funds in the estate of the donee to pay her pecuniary legacies in full there is no necessity for applying the Act of 1879 so as to throw them upon the trust fund, and the law will not assume that the donee of the power intended so to exercise it.

In Kates's Estate, 282 Pa. 417 (1925), 128 A. 97 a testator had an estate of his own, and also a general power of appointment over a portion of the estate left by his father. His widow and two children survived him; the widow elected to take against his will, and claimed to receive one-third of both estates; the auditor decided she was only entitled to one-third of such property as the testator personally owned; the orphans' court held otherwise and this appeal followed.

The testator's will provided: "I make this will to dispose of as well my own property as the property over which I have a power of appointment under the will of my father, Horace N. Kates, deceased, or of any other person." He then directed payment of his debts and funeral expenses and divided the balance of the blended estates between his wife and certain other specified legatees.

It was held that where a donor gives to his donee a life estate, with a general power of appointment in remainder, the property must be distributed
as specified in the paper by which the power is exercised, and not otherwise; to permit any other disposition of it would be an invasion of the donor's private dominion over his own property.

If the donee dies in the life time of the donor, a gift over to the donee's appointee or his heirs, will be effective upon the death of the donor.


Furthermore, where one having a general power of appointment directs that the appointed estate be blended with his own for the purpose of distribution to the creditors and distributees named in his will, the court having jurisdiction over the donor's estate should award it to the executor of the donee's will, in order that distribution, from the blended estates, may be made properly to such creditors and distributees.

**SPOUSE AND ONE CHILD**

The remaining portion of paragraph (a) of Sec. 1 of the Act of 1917 constitutes a radical departure from the Act of 1833, (1) the shares of both spouses are equalized in the real and personal property of the deceased spouse, (2) life estates in realty are eliminated, (3) the fractional portion is raised to one-half where there is a child or descendant of a deceased child surviving with the spouse.

As already set forth, where either husband or wife shall die leaving a spouse surviving and one child only or shall leave a spouse surviving and no children but descendants of one deceased child in that event the spouse surviving shall be entitled to one-half part of the real and personal estate remaining after the deductions already mentioned.

In contrast Section 1 of the Intestate Act of 1833, P. L. 315 provided:

"Article 1. Where such intestate shall leave a widow and issue, the widow shall be entitled to one-third part of the personal estate absolutely."

The draftsman thus explains:

"Section 1 of the Act of 1833 was derived from Sections 3 and 4 of the Act of April 19, 1794, 3 Sm. L. 143. The earlier acts provided, in substance, as follows: Act of 1683 (10th Law): "That the estate of an intestate shall go to his wife, his child, or children." Act of 1684 (172nd Law): "One-third of the personal estate shall go to the wife; and one-third of the lands and tenements during her natural life; * * * and in case the intestate leaves no child, then half the personal estate to the widow, and the moiety of the real estate during her natural life." Act of 1693: "One-third to the wife, the residue among his children * * * ; and if there be no children nor legal representatives of them, one moiety shall be allotted to the wife. * * *"
Provided, That where testators', or intestates' personal estates are sufficient to pay all debts," and so forth, "then the real estate to be distributed in manner following. * * * one-third of all intestates' lands to the wife for life." Act of 1705 (3 Sm. L. 156 n.) : "One-third part of the said surplusage to the wife of the intestate. * * * And in case there be no children, nor any legal representatives of them, then one moiety of the said estate to be allotted to the wife of the intestate."

Section 8 of the Act of 1705 provided: "That the surplusage or remaining part of the intestate's lands, tenements and hereditaments * * * shall be divided between the intestate's widow and children, or the survivors of them, who shall equally inherit and make partition, as tenants in common may or can do. But if the intestate leaves a widow and no child, then such widow or relict shall inherit one moiety or half part of the said lands and tenements."

Section 10 of the Act of 1705 provided: "That nothing in this act contained shall give any widow a right or claim to any part of such lands or tenements, for her dower or thirds, as shall yield yearly rents, or profits, whereof her husband died seised, for any longer time than the term of her natural life; which dower she shall hold as tenants in dower do in England."

Section 2 of the Act of March 23, 1764 (3 Sm. L. 159 n.) provided: "That the shares and purparts of intestates' real estates which by the act for settling intestates' estates aforesaid are given to widows, shall be construed and understood to be estates for their natural lives respectively and not otherwise."

Section 5 of the Act of April 4, 1797 (3 Sm. L. 296) provided: "That where any woman shall hereafter die intestate" leaving a husband, "he shall take the whole personal estate, and the real estate shall descend and go in the same manner as is directed in the case of men dying intestate, saving to the husband his right as tenant, by the curtesy."

In this section, the Commissioners have introduced a change which they consider a much needed improvement. The Act of 1833 provides for two cases: first, where there is no issue, and second, where there is issue. This clause provides for the case where there is issue one child, or the descendants of one child only; in which case the surviving spouse will take not one-third, but one-half of the estate. It seems unjust where a man dies leaving a widow and one child, often a minor, that the single child should receive twice as much as its mother, and many cases of hardship have been observed in practice. In Rowan's Estate, 132 Pa. 299, an adopted child was thus held entitled to two-thirds of the estate as against the widow.
In this section and throughout the act the Commissioners have used the words, "surviving spouse," in place of "widow or surviving husband," and the like, believing that "the use of one word is preferable when there can be no mistake as to the meaning, and where the interests of widow and husband are made the same, as it is now suggested they should be."

For an additional case on the subject of adoption, see McQuiston's Estate, 238 Pa. 313 (1913), 86 A. 207.