SOUTH AUSTRALIA

TWENTY-EIGHTH REPORT

of the

LAW REFORM COMMITTEE

of

SOUTH AUSTRALIA

to

THE ATTORNEY-GENERAL

RELATING TO THE REFORM OF THE LAW ON INTESTACY AND WILLS

1974

The Law Reform Committee of South Australia was established by Proclamation which appeared in the *South Australian Government Gazette* of 19th September, 1968. The present members are:—

THE HONOURABLE MR. JUSTICE ZELLING, C.B.E., *Chairman.*
B. R. COX, Q.C., S.-G.
R. G. MATHESON, Q.C.
*J. F. KEELER.
K. T. GRIFFIN.

The Secretary of the Committee is Miss J. L. Hill, c/o Supreme Court, Victoria Square, Adelaide 5000.

*NOTE:—Mr. J. F. Keeler was absent overseas when this Report was discussed.

TWENTY-EIGHTH REPORT OF THE LAW REFORM COMMITTEE OF SOUTH AUSTRALIA RELATING TO THE REFORM OF THE LAW ON INTESTACY AND WILLS

To:

The Honourable L. J. King, Q.C., M.P.,
Attorney-General for South Australia.

Sir,

We have the honour to report at your request on what reforms may be thought to be necessary in relation to the law governing the estates of persons who die wholly or partially intestate.

There is little doubt that English law along with the law of most of Northern Europe originally recognised a division of the goods of a deceased on his death into three parts:—the widow's part, the bairns' part and the deid's part. One third went to the widow, one third was divided amongst the children and the other third represented what the deceased could dispose of and in general he was expected to dispose of it, after payment of his just debts funeral and other expenses, in pious uses. The history of this older scheme is well set out in *Holdsworth History of English Law Volume III, pages* 550-554. As Holdsworth points out, the custom lingered on in the Province of York, in Wales and in the City of London until finally abolished by a Statute of 1856: 19 & 20 Vict. c.94. It still survives, or certainly did until recent years, in Scotland.

By the latter half of the thirteenth century wills of realty became legally impossible unless they were allowed by some special custom because the land descended to the heir. Wills of personalty on the other hand, as Holdsworth points out, were not only legal but usual, because to die intestate was probably also to die unshriven.

The Ecclesiastical Courts gradually acquired jurisdiction over the distribution of an intestate's goods and this was formally recognised in chapter 27 of Magna Carta which enacted that the distribution of an intestate's goods should be made *per visum ecclesiae.*

The difficulty was that the ecclesiastical view of a proper distribution of goods and that of the common law varied, particularly in relation to a married woman. The rule of the common law was, to quote Blackstone, that husband and wife were one person in law and that one person was the husband. On the other hand the ecclesiastical lawyers were influenced by the story of the daughters of Zelophehad in the book of Numbers (Num. 27: 1-11) and saw no reason why both sexes should not participate in the division of the estate whether married or unmarried.

During the thirteenth century the administrator of the goods of the deceased was the Ordinary of the diocese but as he was not recognised by the common law, he could neither sue nor be sued and therefore he had no real power in that litigious age to get in the estate of an intestate deceased. He was permitted to be sued in 1285 for debts owed by the intestate during his lifetime by the Statute 13 Edw. I St. 1 c.19 and it was obvious as Holdsworth points out, that the real remedy was to appoint an administrator who was not the Ordinary of the diocese but who was a person recognised by law as a man or woman to whom the administration of the estate should be committed and that that person should have the same powers of getting in the estate as an executor. This was ultimately accomplished by a Statute of 1357: 31 Edw. III St. 1 c.11 which originated the office of administrator as we now know it and which appears, as amended by the Statute 21 Henry VIII c.5, to be still the foundation of this jurisdiction in South Australia today.

However as Holdsworth also points out, an administrator was not assimilated in all respects to an executor. As Holdsworth says at page 569:—

> "But the older ideas which regarded the administrator as simply the delegate of the ordinary have left their traces in the law. The ordinary could appoint either one or several administrators; and, in the latter case, the office survived to the other or others on the death of one. But when the last surviving administrator died the office did not go to his executor. A new appointment must be made. Seeing that the administrator was the delegate of the ordinary, the ordinary had powers of revoking the letters of administration and of making a new appointment, which he did not possess in the case of the executor. The property of the deceased vested in the administrator from the time of the grant of the letters of administration; but it was recognised that his title would be considered to relate back to the death for the purpose of enabling him to sue in respect of matters happening between the date of the death and the grant of administration. Another result, which must be attributed partly to the idea that the administrator is simply the delegate of the ordinary, and partly to the jealousy which existed between the common law and the ecclesiastical courts, was the rule that if a will appointing an executor was in existence, a grant of administration was void *ab initio*, and, consequently, that all transfers of property and other acts done thereunder were void."

That view, as Holdsworth pointed out, was not ultimately overcome until 1914 in *Hewson v Shelley* 1914 2 *Ch.* 13.

Throughout the Middle Ages because of the conflict between the courts of common law and the ecclesiastical courts, the position of an administrator remained unsatisfactory because of writs of prohibition issued out of the courts of common law. The Ordinary, having once given the administration to an administrator or administrators, was powerless to do anything further about it and ultimately after the matter had been argued both in the common law courts and in the ecclesiastical courts in the case of *Hughes* v. *Hughes, Carter's Reports* 125, King Charles II intervened. He required the Lord Keeper to have the matter settled by the Judges and the Privy Council so that his subjects might not be put "to the expense and trouble of trying jurisdictions instead of getting their just rights". The result of this was the Statute of Distribution 1670, 22 & 23 Car. II c.10 which is still in force in South Australia. It is based on the 118th Novel of the Institutes of Justinian, and with amendments provides for the distribution of intestate estates today. The few amendments may be shortly enumerated as follows:— By the Statute of Frauds 29 Car. II c.4 it is provided by section 25 that husbands have an absolute right to a grant of letters of administration of the estate of their wives. By the Statute 1 Jac. II c.17 s.7 it is provided that if a person dies intestate without wife or children leaving a mother brother and sisters or the representatives of deceased brothers or sisters the brothers and sisters and representatives share equally with the mother. Hott C.J. said in *Blackborough* v. *Davis* 1 *P. Wms, at page* 49—

> "The Statute of 1 James II 'allowed the proceedings of the spiritual court to be right as the law then stood but thought it unreasonable that the mother (who might marry again) should carry all away; and therefore the Parliament let in the intestate's brothers and sisters equally with the mother'."

The next amendment was not by statute but by a decision of the House of Lords in 1690 that collaterals of the half blood rank equally with collaterals of the whole blood of the same degree which was decided in the case of *Watt* v. *Crook, Shower P.C.* 108. The law

was further amended by Statute by 14 Geo. II c.20 s.9 to provide that in the case of estates *pur autre vie* in which there was no devise over, the balance did not belong beneficially to the administrator but was assets to be applied in the same way as other assets for the benefit of those who took either under a will, or in the case of an intestacy, under the Statutes of Distribution. The last statutory amendment before 1836 is contained in the Statute 11 Geo. IV and 1 Will. IV c.40 which provides (amongst other things) that in cases of partial intestacy the executor is not entitled to the residue if there is any person entitled to the testator's estate under the Statutes of Distribution. All these Statutes to which we have referred are in force in South Australia today.

These Imperial Statutes have been further amended by Sections 53, 54, 55 and 55a of the Administration and Probate Act, 1919-1960. These section shortly deal with the distribution of the estate of a married woman, the succession of a widow or widower, the succession of an illegitimate child and the next of kin of such illegitimate child and provide for a mother to succeed equally with a father if only a father and mother is left surviving and no widow, widower or issue.

The position as to distribution of an intestate estate in South Australia today may be summarised as follows:—

a. The widow or husband, if there is issue, takes one-third and the issue take the remainder equally between them *per stirpes*. Descendants represent a deceased ancestor.

b. If there is no issue, then (as from the 7th day of December, 1956)—

   (1) A husband takes the first $10 000·00 and 8 per cent interest thereon until payment and one-half of the balance, and the rest is distributed as if the wife had died unmarried.

   (2) A wife takes the first $10 000·00 and 8 per cent interest thereon until payment and one-half of the balance, and the rest is distributed as if the husband had died unmarried.

c. If there is no husband or wife surviving then—

   (1) If there is issue, the issue take the whole *per stirpes*.

   (2) If there is no issue, the father and mother take equally, and if only the father survives he takes the whole estate. However the mother does not take if she is the sole surviving parent unless there are no brothers and sisters of the deceased.

   (3) If there is no father and no issue, the estate is divided among the next of kin according to their degree of relationship.

d. In ascertaining the degree of relationship of next of kin, the steps up to the common ancestor and down to the relation are counted; e.g. a grandfather is in the second degree of relationship while an uncle is the third degree.

e. Illogically, brothers and sisters are counted as of the first degree, when the brother or sister is in competition with any other claimant next of kin.

f. The half blood share equally with the whole blood.

g. Females share equally with males.

h. Children of deceased brothers and sisters represent their parents so long as one brother or sister is alive.

i. An illegitimate child can inherit from his mother and the mother of an illegitimate child and her lawful relatives can inherit from him.

We think that a number of these rules ought to be the subject of reform and we have not been deterred from this task by the consideration that the first known reformer in this field was the Emperor Nero (see the S.C. Neronianum).

Taking the above points a. to i. in order:—first the position where the deceased is survived both by his spouse and by issue. The present position in this State is that the spouse gets one third of the estate and the balance goes to the issue *per stirpes*. In Queensland and New South Wales the spouse gets one half of the estate if there is only one child but one third if there is more than one child. All the other States, the Australian Capital Territory, England and New Zealand, give the spouse a legacy as well as her aliquot interest. We recommend that the New South Wales and Queensland position obtain in South Australia and that if there is only one child the widow gets half and if there are more than one child she gets one third as at present. Many people deliberately make no will as between widow and children so that they cannot be badgered by various members of the family seeking special treatment for themselves.

The real problem with giving a legacy to a widow, a problem which we shall have to return to later, is that the amount is the same whether the wife is the first wife or a second wife, whether she has been married for one year, five years or thirty years, whether any of the husband's assets came from the use of money provided by the wife or the wife's relatives or by her co-operation in a business, whether the relationship between the husband and wife was good or ill, whether she remarries speedily, and many other permutations and combinations of facts. Now that the Inheritance (Family Provision) Act No. 32 of 1972 provides that an order for maintenance can be made against the estate of a person who died intestate, we think that cases of hardship are better dealt with under that Act than by providing a large statutory legacy, which will be unfair in some cases to the children and in other cases unfair to the widow. If a statutory legacy is to be given, which is a matter of policy for the Government we recommend that it should be $5 000 in estates of a net value of $50 000 or under and $10 000 in estates of a net value exceeding $50 000.

The second case is where the deceased leaves issue but no wife. In that case everywhere the issue get the whole estate *per stirpes* but in some States and in England only issue who attain a specified age, which should now in South Australia be eighteen years, take. We think this is sensible, provided that the provisions of the Trustee Act enabling an administrator to apply the income or part of the capital of a putative share of a child who does not reach eighteen for that child's maintenance education advancement or benefit applies equally under this Act.

Where the intestate deceased leaves a spouse but no children, at present the spouse gets the first $10 000 together with eight per cent interest per annum from the date of death to the distribution and one-half of the residue and the balance goes to the next of kin. These figures have been substantially outdated by the fall in the value of money in the recent past. The highest figure for the statutory legacy that we have met is in the Australian Capital Territory where the

figure is $50 000. We think that the $10 000 should be trebled to provide a realistic figure in terms of today's currency but otherwise we feel that the Inheritance (Family Provision) Act should govern the situation. However in Western Australia, New South Wales, Queensland, the Australian Capital Territory, England and New Zealand, if there is no parent, brother, sister or issue of a brother or sister claiming in competition with the spouse then the spouse gets the whole and we think this is fair.

In the Australian Capital Territory and in England the surviving spouse may elect to acquire the matrimonial home at valuation in satisfaction or part satisfaction of his or her interest. This would seem to us to be a beneficial provision and indeed we would go further. We think that the family house and the furniture and furnishings ordinarily used in that house at the time of the death of the deceased should be available to the surviving spouse for acquisition in satisfaction or part satisfaction of his or her interest at the value they bear at the date of acquisition.

If the intestate leaves a parent or parents but no spouse or issue then, generally speaking, the parents or the surviving parent get the whole estate. However in this State and in Western Australia if only the mother is left, then under the Statute 1 Jac. II c.17 the mother shares with the brothers and sisters. We consider that it should be enacted that the Statute 1 Jac. II c.17 s.7 should cease to have application in South Australia and that the mother should take the whole estate to the exclusion of brothers and sisters. We should however tell you that in the German farming community in South Australia, there is a strong feeling that women should not inherit farm properties to the exclusion of brothers or other male relatives and this is so whether the deceased leaves a widow and daughters, a widow or a mother and we draw your attention to this very strong view which has been expressed on numerous occasions to some members of this Committee who are or were in general practice, so that you may consider it as a matter of Government policy before this and other suggested amendments are made. We still think the amendments ought to be made notwithstanding this view, but we feel it our duty to acquaint you with these facts.

If the intestate leaves brothers and sisters and/or children of deceased brothers and sisters but no widow issue or parent then the brothers and sisters and the representatives of deceased brothers and sisters take the whole estate *per stirpes*. New South Wales has reversed by Statute the decision of the House of Lords in *Watt* v. *Crook* to which we have already referred so that the half blood do not share equally with the whole blood. We do not recommend this amendment to our law. There are many families in which the half blood and the whole blood live together perfectly happily and it has been the experience of at least one member of this Committee that when distinctions between the whole and the half blood have been made by will, they have been productive of great unhappiness. If this particular recommended form of distribution does not produce justice in any particular case, it would be better to amend the Inheritance (Family Provision) Act to include in the categories of those who are entitled to claim, brothers and sisters but only in this particular class of case. We note that there are other categories within Section 6 of the Inheritance (Family Provision) Act who are likewise restricted to claims only in certain specific circumstances.

If there are only remoter issue then they take under the Statutes of Distribution. That is also the position in Western Australia and Victoria. The policy of the law has varied in various countries and at various times in this respect. For example, the ancient Brehon law in Ireland restricted it to a six generation group (see volume 1 of the *Gill History of Ireland* at page 50), but it seems to us that the claims of relatives of any degree should take priority over the Crown's claims by escheat or *bona vacantia*. All of the amendments which have been proposed to limit the degree of inheritance for this purpose seem to us to be purely arbitrary "cut-off" points which do not have any compelling logic to support them and that the amendments made by the other States to recognise the rights of descendants of deceased brothers and sisters to claim should be followed here.

We turn now to the more difficult question of partial intestacy. Our rules in South Australia have applied both to total and partial intestacy. We think this should continue to be the case except in relation to a spouse. In Queensland, Tasmania, the Australian Capital Territory, England and New Zealand the spouse's interest under the will is deducted from the statutory legacy. In New South Wales she does not get the statutory legacy but she gets one-half of the estate if there is a partial intestacy. We do not find either of these solutions to be completely satisfying because it depends in every case how much of the estate is covered by the will; in other words the spouse may get very little under the will or she may get a very great deal. In the first case the New South Wales solution would be unjust to the wife and under the second the wife may do very great deal better than her merits entitle her to. We think it may be wise to provide that the spouse has an option either to deduct the interest under her will from the statutory legacy (if one is to be prescribed) or to claim in relation to that part of the estate which is intestate under the Inheritance (Family Provision) Act and that in the latter case her rights are to be at large and are not to be restricted to the figure which she might have expected to get if she had taken the other option. We say this because there are numerous cases, although not of recent date, where courts have tended to take the position that what is allowable on intestacy, to a certain extent at least, is a measuring stick of what the spouse ought to get for testator's family maintenance and we think that she should not be placed in that position.

Turning next to individual problems as to the distribution of estates in intestacy, the first problem is that of the present law of hotchpot. The law on this subject is set out in *Williams & Mortimer on Executors Administrators and Probate* at page 883 and following pages. Leaving aside for the moment the vexed question of what is an "advancement", the general law as to hotchpot is stated at page 883 as follows:—

> "The intent of the statute was to make the provisions for all the children of the intestate equal, as far as could be estimated. Accordingly, section 5 (of the Act of 1670) provided that no child of the intestate, except his heir-at-law, who should have any estate in land by the settlement of the intestate, or who should be advanced by the intestate in his lifetime by pecuniary portion, equal to the distributive shares of the other children, should participate with them in the surplus; but if the estate so given to such child by way of advancement was not equivalent to their shares, then that such part of the surplus as would make it so should be allotted to him or her.
>
> This provision applied only to the distribution of the estates of intestate fathers.

The statute took nothing away that had been given to any of the children. A child was not bound to bring advances into account unless he elected to claim his distributive share.

Section 5 applied only to the case of total intestacy. Where there was a partial intestacy a child did not have to bring advances into hotchpot.

If a child, who received an advancement from his father, died in his father's lifetime, leaving children, such children were not admitted to their father's distributive share, unless they brought in his advancement; since, as his representatives, they could have no better claim than he would have had, if living.

Advances were chargeable with interest at 4 per cent, from the testator's death.

A child advanced in part brought in his advancement only among the other children; for no benefit was to accrue from it to the widow."

The law has been changed to a substantial extent in England by Section 49 of the Administration of Estates Act, 1925, 15 Geo. V c.23 as amended by the Second Schedule of the Intestate Estates Act, 1952, 15 and 16 Geo. VI and I Eliz. II c.64.

The rule of the civil law was that "*collatio bonorum* was an obligation on the successors to an inheritance to return to the common inheritance, before sharing in the distribution, gifts which they received during the lifetime of the person in whose estate they claimed a share by succession". The general provision as to collation (*anglice* hotchpot) in relation to all successors was as we have just said the rule of the civil law so that Section 5 of the Act of 1670 must be taken to have expressly reduced the persons who had to bring advancements into hotchpot.

The cases as to what is and what is not an advancement for the purpose of Section 5 of the Act of 1670 are numerous and some of them irreconcilable. On the other hand the underlying proposition that there should be equality as between beneficiaries is a good one but it should not only apply to children. In the opinion of a majority of the Committee Section 5 of the Act of 1670 should be repealed in its application to this State, and the whole law of hotchpot along with it and in lieu thereof it should be enacted that any person other than a spouse taking under an intestacy (including a partial intestacy) who has received a gift from the deceased within five years prior to death shall bring in the value of that gift at the time it was made or the amount of the gift if it was in money and the gift shall be taken to be in satisfaction or part satisfaction of that person's share under the intestacy. The Chief Justice in his comments has raised the question of wedding and other similar gifts in relation to the operation of this suggested reform and in order to deal with this point we recommend that gifts of this nature not exceeding in the aggregate the sum of $2 000 be exempt from hotchpot. We do not propose any alteration to the present law that if the husband covenants either that he will leave or that his executor shall pay to his widow a sum of money or part of his personal estate and he dies intestate, then the widow has to bring in the value of the payment under the covenant in part satisfaction of her share under the intestacy, for it is well established that she cannot claim both: see *Williams & Mortimer* (op. cit.) page 881 and cases there cited.

By the Statutes 9 Henry III c.1 s.7 and 25 Edw. I c.7 which are in force in South Australia, a widow is entitled to live in "the chief mansion house of her husband for forty days after his death". This right is known as the widow's quarentine. The rules on the subject are set out in *Sanger on Wills and Intestacies 2nd Edition* page 142. The reason for it was that her dower ought to be assigned to her within the forty days. Rights to dower mostly have disappeared.

They have disappeared altogether in intestate estates because of the South Australian Act 29, of 1867 which abolished them entirely in intestacy. Whether they have gone altogether in a testate estate is a difficult matter which need not be considered here. As the right to dower has totally gone in intestacy and we propose elsewhere that a widow should have the right to acquire the dwelling house and furniture as part of her share, we think that it should be enacted that the Statutes referred to above so far as they relate to quarentine should cease to have effect in South Australia.

The present rule is that a person *en ventre sa mère* is considered as living for the purpose of the distribution rules. Thus for example a posthumous brother of the half blood shares equally with the brother of the whole blood: see *Burnet* v. *Mann* 1 *Ves. Sen.* 156. It is possible that a court construing the new Act as a code on intestacy might think that an omission to restate this rule was intentional. For this but for no other reason it may be wise to restate the rule in the Statute which we think ought to be enacted.

We turn now from the present law as to intestacy to a different subject, namely that there are a number of situations in which at present letters of administration have to be taken out where we feel that legislation should be enacted to cure deficiencies in the present law. A grant of administration requires one or two sureties to the bond unless a Judge otherwise orders and such orders are rare. Quite frequently it is difficult if not impossible to obtain personal sureties, in which case an insurance company has to act as surety, an annual premium of quite substantial amount is charged and as the administration of even a fairly simple intestate estate quite frequently runs for more than one year the extra cost of administration as against probate, irrespective of the fact that extra documents have to be drawn and prepared, is out of proportion and ought to be avoided wherever possible.

We suggest that the following amendments to the law would reduce quite substantially the numbers of cases in which either letters of administration or letters of administration with the will annexed have to be obtained. They are as follows:—

1. At present the requirement of the Wills Act (with certain minor exceptions) is that the signature of the testator must be placed at the foot or end of the will. There are a number of cases in which a testator does not do so, either because he misunderstands the instructions on a printed form or because he thinks that writing in his name at the beginning is a signature, as indeed it quite often is, or for any one or another of a number of reasons based on ignorance or inadvertence. Nevertheless he has intended to die testate and not intestate and it is not to the law's credit that he ends up as an intestate person where everything points to the fact that he intended to die testate. A similar case is where for some reason or another the witnesses do not sign in each other's presence as required by section 8 (*b*) of the Wills Act. The Australian and English cases are not identical on this point: see *Re Hancock deceased* 1971 *V.R.* 620, *in re Robertson deceased* (1972) 2 *S.A.S.R.* 481 and *Re Colling* (*deceased*) 1972 3 *All E.R.* 729. Certainly the South Australian practice as known to us is the same as the English one and does not follow that set out in the judgment of Mr. Justice McInerney in the Victorian case. However situations such as happened in *Re Colling* are not uncommon. It would seem to us that in all cases where there is a technical failure to comply with the Wills Act, there should be a power given to the Court

or a Judge to declare that the will in question is a good and valid testamentary document if he is satisfied that the document does in fact represent the last will and testament of the testator and that he then had the requisite testamentary capacity. Such a validating provision would stop a number of technical arguments as to the formal validity of wills.

2. The next matter is one which is perhaps of greater importance in Australia than in a more closely settled country such as England and that is the requirement of two witnesses to a will. A person dying of thirst in the desert or a person in the icefields of Australian Antarctica may well scratch out what is without doubt his last will and testament but there is no hope at all of his having or obtaining witnesses to that will and yet there is no doubt that what is recorded is in fact his last will. This position becomes of greater importance today as people cease to live in families and elderly people in particular are left to fend for themselves in the cities. They too may have no way of summoning somebody to attest their last will. There should be, in our opinion, a general provision that if the document produced without doubt represents the last will of the deceased and the Court is satisfied that for some good and sufficient reason it was impossible or impracticable to obtain witnesses to that will then the Court should have power to declare that the will is valid in those circumstances.

3. Another reason for the necessity for a grant of letters of administration and in this case with the will annexed is the very common failing of testators to fill up the line in a printed will form requiring the appointment of an executor. The rest of the will is done correctly but there is no executor appointed. Another and less common case is where an executor is appointed but he becomes of unsound mind. If there is either only one beneficiary under the will as so often happens where it is simply a will in favour of the surviving spouse or there are universal devisees and legatees of full age and *sui juris* named in the will then they should be entitled to obtain a grant as executors and not as administrators. No purpose is served by compelling a grant of administration because the administration can only be for their own benefit and for the benefit of nobody else. In the second of these latter cases we are only proposing in any event the solution which already exists under the canon law because a residuary legatee is by the canon law considered as an executor: see *Browne's Ecclesiastical Laws of Ireland* page 297. If there is more than one beneficiary or no universal devisee and legatee therein named then we think that Public Trustee should be entitled, on the application of any beneficiary, to administer the estate as executor and not as an administrator, and that the same position should apply where the executor is of unsound mind. In practically every case now Public Trustee will take over the administration of the affairs of a person of unsound mind under the Mental Health Act and we feel that he ought to be able to obtain a grant as executor and not as administrator.

4. The last question on which we should like to see an alteration in the law is that as the law now stands, it is probable that the next of kin do not take a vested interest upon the death of an intestate but only an inchoate right pending administration and assent: see *Williams & Mortimer* (op.cit.)

page 871. The result of this is seen in two cases in 1965. In the first of the two cases a person who had an interest in a house or would have had an interest in a house if an administrator had been appointed and the estate administered was held to have none: see *Eastbourne Mutual Building Society* v. *Hastings Corporation* 1965 1 *W.L.R.* 861. In the second the widow of an intestate sought to defend an action for possession of the matrimonial home on the ground that the provisions of schedule two to the English Intestate Estates Act, 1952 applied (which required the matrimonial home to be appropriated to her interest in the estate of her deceased husband) and was refused leave because those provisions did not give her any equitable interest or any other interest so as to defend an action for possession: see *Lall* v. *Lall* 1965 1 *W.L.R.* 1249. The second of these is especially important, as we have already proposed that a similar right be given to a widow under our proposed amended Statute of Distribution and we certainly do not wish to see such a right defeated as it was in *Lall* v. *Lall*. In our opinion the law ought to be altered to provide that next of kin do take a vested interest upon the death of an intestate, which vested interest is liable to be divested upon the production of a valid will.

We should say that we have been assisted in our consideration in this matter by a perusal of reports of the Law Reform Commission of Western Australia, of the Ontario Law Reform Commission and of the English Law Reform Commission dealing with some of the problems to which we have adverted.

We express our appreciation to the Honourable the Chief Justice Dr. J. J. Bray and Mr. N. W. Lowrie who acted as commentators on the draft of this report.

We have the honour to be

HOWARD ZELLING

B. R. COX

R. G. MATHESON

K. T. GRIFFIN

The Law Reform Committee of South Australia

Dated 27th September, 1974.

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