

# LORD BIRKENHEAD'S PROPOSALS FOR ALTERING THE LAW OF INTESTATE SUCCESSION IN ENGLAND

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In December last the Lord Chancellor took the unusual step of writing a series of articles in the *London Times* on the subject of Legal Reform. After stating that the general principle of the bill<sup>1</sup> which he introduced at the last session of Parliament was "to assimilate the law of real and personal estate," he adds, "Incidentally it has been necessary to make elaborate provision for the devolution of land upon intestacy so that as far as possible, the sexes may be placed upon an equality."<sup>2</sup> The words "incidentally," "necessary," and "elaborate" are significant. If the law of real property is to be assimilated to that of personal property, as the Lord Chancellor proposes, this will involve the consequence that, so far as intestacy is concerned, freeholds will have the attributes of leaseholds and other personal property. The elaborate rules for ascertaining the heir-at-law will vanish. Few will regret such a simplification of our law; but it would be a simplification and not an elaboration. To meet modern ideas it is desirable to take the further step of placing the sexes on an equality; this can be done without difficulty and, if done, would cause a further simplification. Such further alteration of the law is not, however, a 'necessary' consequence of the assimilation of the law of real and personal property. It has nothing to do with it. We may, therefore, conclude that the 'elaborate' provision for the devolution of land upon intestacy of which the Chancellor speaks is not a 'necessary' consequence either of having one law for all kinds of property, or of having one law for the two sexes. What then has led the Lord Chancellor and his advisers to propose the repeal of the existing statutes of distribution and the substitution of a more elaborate and quite different scheme? We may fairly ask: In what respects are these new rules for the distribution of property on an intestacy an improvement? How are they likely to work in actual practice? To answer these questions it is necessary to consider how the law stands at present and to find out what are its defects, both in actual practice and in scientific theory.

I have in a little book<sup>3</sup> tried to state the existing rules clearly and

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<sup>1</sup>I have given some account of the main provisions of this bill in (1920) 20 COL. L. REV. 652.

<sup>2</sup>*London Times* of December 15th, 1920.

<sup>3</sup>*Wills and Intestacy* (1914).

concisely. I found the task a difficult one. My experience compels me to admit that the present rules are not founded on simple or clear principles. In the following exposition of them I omit certain minor points for the sake of brevity.

Let us begin with the case where the intestate leaves a surviving husband or wife. The Statute 31 Edw. III st. 1, c. 11 (1357) enacts that "where a man dieth intestate the ordinaries shall depute the next "and most lawful friends of the dead person intestate to administer his "goods." This enactment was held to entitle the surviving husband to administration of the personal estate of his wife and thereby to become entitled to it beneficially, subject to the payment of her funeral expenses and debts. To prevent any doubt whether this right was affected by the Statute of Distribution it was provided by section 25 of the Statute of Frauds<sup>4</sup> that neither the Statute of Distribution nor anything therein contained

"shall be construed to extend to the estates of *feme covert*s that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estate and recover and enjoy the same as they might have done before the making of the said Act."

This is the reason why from the year 1357 till the present day a surviving husband had been entitled to all the personal property of which his wife died intestate. A good statement of the law will be found in Stirling, J.'s judgment in *In re Lambert's Estate*.<sup>5</sup>

Until the reign of Charles II the person who obtained administration under the Statute of Edward III became entitled to the surplus of the intestate's personal estate, after payment of funeral expenses and debts. The Statute of Distribution<sup>6</sup> put an end to this state of affairs by providing for the distribution of the surplus. Under section 5 of this Statute the widow of the intestate takes one-third of his personal property if he leaves issue, one-half if he does not. So the law remained until 1890. Now by the Intestate's Estates Act of that year, the widow of a man who dies totally intestate and without issue is entitled to £500 payable ratably out of his real and personal estate, and in addition takes half the surplus of the personalty (after providing for the £500) under the Statute of Charles II.

If then the sexes are to be put upon an equality, what is to be done? Either the wife might be put in the position of the husband, in which case she would take the whole estate, or the husband might be put in the position of the wife and take one-third if there were issue or £500 plus one-half of the remainder if there were no issue. The late Mr. Charles Sweet prepared a short bill to assimilate the devolution of real property on an intestacy to that of personalty and to amend the

<sup>4</sup> 29 Car. II, c. 3 (1676).

<sup>5</sup> (1888) 39 Ch. Div. 626.

<sup>6</sup> 22 & 23 Car. II, c. 10 (1670).

Statute of Distribution so as to put the surviving husband on the same footing as the surviving wife. This would be a great simplification of the law and I see no reason why it should not be adopted.

It is only as between husband and wife that the law is not equal. So far as issue and collaterals are concerned, there is no ground for making an alteration in the law, unless it is shown that the existing rules have in fact proved to be unsuitable. The cases of issue and of collaterals require separate consideration.

Section 5 of the Statute of Charles II enacts that after distributing one-third to the wife the residue shall be distributed "by equal portions to and amongst the children of such persons dying intestate and such persons as legally represent such children in case any of the said children be then dead," with a provision, which need not be considered here, for bringing advances made by the intestate into hotchpot. The odd expression, "such persons as legally represent such children," means the living issue of such children, so that we have a distribution *per stirpes* among the living issue. This strikes the plain man as the best and fairest scheme. The only alteration which I have ever heard suggested is that no one should take a vested interest who does not come of age or marry.

The rules for collaterals are contained in sections 6 and 7 of the Statute of Charles II and section 17 of the Statute 1 Jac. II, c. 17.<sup>7</sup> We find that, subject to certain exceptions, the estate is to be distributed among the next of kin according to the degrees of the Civil Law. These degrees are calculated by taking the number of generations from one party up to the common ancestor and then down again to the other party.<sup>8</sup> Thus first cousins are in the fourth degree, uncle and nephew in the third, brother and sister in the second, mother and son in the first. This *gradual* scheme is, I think, felt by most persons to be less satisfactory than a *parentelic* one, under which issue to any distance represent their deceased ancestor. The Statute of Distribution allows such a right of representation in favour of children of a deceased brother or sister, but no farther. The Statute of James II provides that the mother shall share equally with the brothers and sisters of the intestate, although she is in the first degree, and they are in the second. It must be admitted that the provisions of the Statutes of Distribution as to collaterals and ascendants are anomalous and not based upon a satisfactory principle. It has been suggested also that kindred of the whole blood should be preferred to kindred of the half blood. On the other hand these provisions are now so well known and understood that in the law of wills and settle-

<sup>7</sup> (1685). The two Statutes together are commonly referred to in the law of wills and settlements as the Statutes of Distribution. See *In re Morgan* (1919, Ch.) 121 L. T. 573.

<sup>8</sup> See the judgment of Sir J. Strange, M. R., in *Lloyd v. Tench* (1751, Ch.) 2 Ves. Sr. 213.

ments, it is not uncommon to make an ultimate trust by reference to them. This shows that they are not felt to be unsatisfactory.

We are now in a position to consider the Lord Chancellor's proposals. Briefly they seem to be based on three principles: (a) the adoption of a *parentelic* scheme; (b) the creation of a settlement under which a surviving husband or wife takes only a life interest; (c) the provision that no person who dies under age and unmarried shall take a vested interest. The provisions of the bill are very "elaborate" and were frequently amended in the House of Lords; so that the following account of them is, of necessity, very imperfect.

In the first place a surviving husband or wife takes one half of the estate and then, if there are issue, a life interest in one-half of what remains, but if there are none, in the whole of what remains. Subject to this, the administrator is to hold the estate upon certain trusts, called the statutory trusts for issue, the effect of which is that the issue of the intestate take *per stirpes* through all degrees, except that no one who dies under age and unmarried takes. There are powers of maintenance.

If there is no issue, then the parent or parents of the intestate, if living, take the estate subject to the rights of the surviving husband or wife. If the intestate leaves no issue or parent, then, subject as before to the rights of a surviving husband or wife, the distribution is as follows:

*First:* brothers and sisters of the whole blood and their issue *per stirpes*.

*Secondly:* brothers and sisters of the half blood and their issue *per stirpes*.

*Thirdly:* grandparents.

*Fourthly:* uncles and aunts of the whole blood and their issue *per stirpes*;

and so on until we come to

*Eighthly:* great uncles and great aunts of the half blood and their issue *per stirpes*.

No one takes unless he or she attains 21 or marries.

These provisions for ancestors and collaterals certainly seem better than those of the Statutes of Distribution. They resemble to some extent the simple provisions of the German Civil Code,<sup>9</sup> where the issue of the intestate are the heirs of the first degree, parents and their issue heirs of the second degree, grandparents and their issue heirs of the third degree and so on. The real objection to the proposals is the provision for creating a settlement where there is a surviving spouse. Settlements involve trouble, the keeping of accurate accounts, and usually legal expenses. The bill provides that the administrator is to hold the estate upon trust for sale, but may with the leave of the court (if he or she is the tenant for life, which will commonly be the case)

<sup>9</sup> Art. 924 ff.

permit the tenant for life to have the use and enjoyment of the furniture and other articles.

Consider a common case. A man dies leaving a widow, but no children. His estate consists of household furniture and effects and some stocks and shares. The widow takes out administration. She is entitled to £500 and a life interest in the rest of the property. She ought to apportion all the dividends as at her husband's death, but she is not likely to know the law or to know how to calculate the apportionments. She may not use the kettle or the teapot without an application to the court, which will cost her at least £30. In course of time she will sell some of the stocks and make some investments. When she dies, it will be found that she has not kept proper trust accounts, and has intermixed some of the trust property with her own and has used the furniture without the leave of the court. The collateral relations will then take chancery proceedings for accounts and for the administration of the estates of the intestate and the widow. The taking of the accounts will be difficult and costly. In the end there will be a heavy bill of costs to be paid, whatever the result or length of the litigation.

Now in England an administrator has to find sureties. Who will be a surety when there is every likelihood of chancery proceedings after the widow's death, and a considerable claim against the sureties? The Court of Chancery always refused to pay out money to a sole trustee or to appoint the tenant for life as a trustee. This, except in rare cases, is undoubtedly a wise course. To create settlements of which the sole trustee will, more often than not, be a widow with little knowledge of business or the keeping of trust accounts, must, I believe, lead to much litigation and unhappiness. Personally I have never met any human being in favour of this type of statutory settlement. The Institute of Conveyancers appointed a special committee to consider the bill. That committee's report is not less forcible because it is couched in restrained language. They state:

"(a) It is not generally desirable to settle either small estates or chattels.

"(b) The burden of an administrator will be greatly increased and probably the expense of obtaining the necessary sureties. At present the administrator after paying the funeral testamentary expenses and debts, has merely to divide the residue of the estate. Under the new scheme he will be a Trustee with a trust to administer which may possibly last over a period of many years.

"(c) It is not desirable, and quite contrary to the principles adopted by the Court to entrust to a Trustee who is also a beneficiary and will in many cases take a life interest, a trust with wide powers of management."

This criticism has not been replied to. An alteration in the law is not necessarily a legal reform. In the *Times* the Lord Chancellor stated that his "elaborate" scheme was necessary. I venture to submit that it is unnecessary and undesirable.