# FORMAL JUSTICE IN SUCCESSION SYSTEMS

The starting point of this article was the discovery, shortly after reading Professor Chaim Perelman's essay *'Concerning Justice'*,[1] of a classic example of formal injustice in the Queensland intestacy rules. That led to a consideration of the function and utility of the distinction which Perelman makes between formal and concrete justice, and then to an examination of the content of a number of different succession systems, bearing the distinction in mind. This, in its turn, led to a re-appraisal of the utility and function of succession systems in modern society.

Perelman observes that from Plato and Aristotle, through St. Thomas and down to the jurists and moralists of our own day, one thread of agreement about the nature of justice is clear: equality of treatment. Thus the eyes of justice are ever directed towards the scales. But equality of treatment cannot refer to a generalised concept of equality over a large area of society. All men are not, in fact, equal, for their property, their talents and their skills have never been equally spread. The concept of justice as equality is consequently limited to equality by reference to categories and classifications which have as *their* referents social concepts, sanctions and shibboleths which may reflect the will of the community or perhaps the mere accidental processes of economic history, but which are unrelated to any legal concept of equality.

Nevertheless the legal concept of formal justice, however divorced it may appear to be from the social criteria which establish the justice of the concrete rule, has its own utility. It assures that the concrete rule shall be at least ascertainable and of a certain degree of abstraction, since it is to be applied in cases and to categories of persons of a certain degree of generality; and it requires that within such cases and in relation to such categories that rule shall be applied consistently and with impartiality. As Perelman says:[2]

> "We can, then, define formal or abstract justice as a principle of action in accordance with which beings of one and the same essential category must be treated in the same way".

Although this notion of equality divorced from the substance of the concrete rule illuminates one aspect of the rational content of the law, it reduces, logically, the social content of justice to vanishing point. As Professors Stone[3] and Lloyd[4] both point out, the principle of formal justice is maintained, even though a

1. Perelman: *The Idea of Justice and the Problem of Argument* (1963).
2. At p. 16.
3. *Human Law and Human Justice* (1965) at p. 243, n. 86; p. 326.
4. *The Idea of Law* (1964) pp. 119-121.

particular rule may be outrageous. Thus, if it be the rule of a society that all first-born females shall be put to death, then as long as all first-born females *are* put to death, the principle of formal justice is maintained. There is no injustice, since all such persons are dealt with on a basis of strict equality. There is the justice of logic, though not the justice of humanity.

In a sense, then, the concept of formal justice helps us to evaluate the justice of rules as rules, though it does not help us to evaluate the justice of rules as embodiments of the collective social will. Nevertheless, whilst it is clear that principles of rationality other than the principle of formal justice are required of a system of justice, and that these principles must emerge from the complex process of social evaluation within which the concrete rules are themselves nurtured and vindicated, there is a further utility in the idea of formal justice because it provides a focussing point for a comparative study of different sets of concrete rules relative to a particular subject which may bring to the surface perennial problems of that subject. In this article I have tried, by comparing some of the main features of several different succession systems, to discover the function of succession systems in modern communities and at the same time to gain some insight into the practical relevance of the idea of formal justice. It is in no sense an attempt, merely by comparing the variety of concrete rules which exist in different succession systems, to offer a solution to the question of what is the fairest or most just succession system—indeed what will be submitted is that no succession system can really ensure that all claims are met. It is, rather, an analysis of the way in which the concrete rules in different systems are formally related to each other.

## THE MAIN FEATURES OF SOME MODERN SUCCESSION SYSTEMS

In medieval times in England, the widow and children of a deceased person had certain rights to his property of which they could not be deprived by will. If the deceased left only a wife, then he had freedom of testation as to only one half of his estate: the widow took the other half. If he left a wife and children, he had freedom of testation as to one third of his estate, his wife and children taking the other two thirds.[5]

These restrictions on freedom of testation disappeared in Southern England early, but they remained in the North, in Wales and in London until the early eighteenth century. Nevertheless, the widow did remain entitled to certain dower rights, although these were emasculated by conveyancing devices. But from 1833 until the early part of the twentieth century, there was complete freedom of testation, during which time, as Mait-

5. Holdsworth: *History of English Law* Vol. III. p. 550 et seq.

land wrote: 'The law makes a will for an intestate which no sane testator would make for himself.'[6]

Thus throughout most of the nineteenth century, in common law jurisdictions, the widow could not know, as far as the concrete succession rules were concerned, whether there would be any financial provision for her or her family until after her husband's death. Whether it could be said that formal justice was done as between widows in such a case leads to a difficulty. Formal justice requires that a rule be applied indifferently to those of the same essential category: but where there is no general rule, there is in a sense no category. The rules of formal justice cannot establish the nature of any particular category. At this point it may be worth observing, but without attempting a precise formulation, that the notion of formal justice appears to be closely linked with the process of abstraction which goes into the making of rules. Thus, although there is categorisation of the widow in the intestacy rules, there is no categorisation of her in the succession system as a whole. In the common law succession system as a whole, the widow has no *indelible status*.

The inadequacy of the widow's position at common law was countered, in the wealthy classes at least, by the device of the family settlement, with its covenant to bring in after-acquired property. This was a voluntary response, but few large estates of the eighteenth and nineteenth centuries in England were left unprotected by some form of family settlement. It played much the same rôle, in protecting the family unit from the insecurity of the succession system, as the regime of community of goods did, and still does, in the ordering of the economics of the family in continental systems.

The common law partiality for freedom of testation gained ground throughout the eighteenth century. Thus when, in 1774, England first extended her legislative arm to the ceded French possession of Quebec, freedom of testation was superimposed upon the existing customs of the possession:

> "it shall and may be lawful to and for every person that is owner of any lands, goods or credits in the said province, and that has a right to alienate the said lands, goods or credits in his or her lifetime, by deed or sale, gift or otherwise, to devise or bequeath the same at his or her death by his or her last will and testament, any law, usage or custom heretofore or now prevailing in the province to the contrary notwithstanding . . . "[7]

6. *The Law of Real Property*: *Collected Papers*: Vol I. p. 162, 172.
7. S. 10 of the *British North America* (*Quebec*) *Act*, 1774. (Now embodied in Article 831 of the *Canadian Civil Code*—referred to in *Langlais v. Langley* [1952] 1 S.C.R. 28, 52.)

In England, the forces of change of the early nineteenth century were not as great as those which had transformed the continent. Certainly they were insufficient to bring about any major reforms of private property rights. Consequently the complete freedom of testation which had been won in the early Victorian era was well entrenched before its end. But in France, the upheaval of the revolution and the ardent spirit of its supporters, together with the inadequacy of its existing legal systems which were based on a social structure which had been completely demolished, provided the impetus and will for a zealous work of codification. The Code Napoleon revolutionised not only the law of France, but also the future form of the law of Europe and of many other countries as well.[8]

With regard to the French succession system, the Code unified the great multiplicity of different systems which had prevailed in the different parts of France from medieval times, suppressing primogeniture and the preference of males over females, reducing the freedom of testation which prevailed in the Midi, and devising a system noted, and even criticised, for its egalitarianism.

It is well worth while looking at the modern French law to see how it protects the widow and family of a deceased person, because the French law stems from a tradition different from that of the common law system, and includes an institution which has become widely spread in Europe and in some of the states of the United States of America—an institution which in one sense does not form part of the succession system at all, and yet which profoundly affects it by dimishing its importance—the institution of community of property.

## PROTECTION FOR THE FAMILY IN MODERN FRENCH LAW

In French law the widow is accorded certain rights, a certain status, even before she becomes a widow. Her economic status at the time of her husband's death is regulated from the time when she is first married. To the French mind, it is upon marriage that the future property rights of the spouse should become fixed, and not upon the death of one of the spouses. Thus the spouse's rights under the succession system as such are of limited concern.

In French law the rights of the spouses *inter se* are governed by the matrimonial regime, which may be defined as the body of concrete rules which is applied to the economic interests of the spouses. If marriage moulds a society—the family—the matrimonial regime is the economic cast in which that society is moulded.

8. Messrs. Arminjon, Nolde & Wolfe have shown in their *Traité de Droit Comparé* (Paris 1950) the influence of the Code Napoleon on the codes of many states, including Italy, the Low Countries, Quebec, Portugal, Spain, Chile, Columbia, Brazil, etc.

The matrimonial regime is not uniform for all French households. Each household has the right to build its own economic nest as it chooses. If the parties to the marriage enter into a marriage contract, they may choose from a variety of models of regimes which are to be found in the Civil Code.[9] This is the principle of liberty of matrimonial conventions. Such marriage contract is entered into in solemn form requiring the offices of a notary. It has no effect until the marriage actually takes place, but once married, the parties cannot modify it. This is the principle of immutability of matrimonial conventions.[10] The reason for this is that the marriage contract is intended to protect the family as a whole. In England this was achieved only be means of the growth of the trust which, once completely constituted, could not be revoked, and by the particular doctrine of the marriage consideration—that children of the marriage were within the marriage consideration, and could enforce the promises of the marriage settlement, though they had not even been born when it was entered into.[11] It was equity, and the unique institution of the trust, which was alone capable in England of meeting the need for a viable and yet durable ordering of the family's economic needs. Another characteristic of the French marriage contract is that it is in some measure regarded as a matter of public moment, its existence being noted on a public register.

Nevertheless the parties to a marriage in France are not under any obligation to enter into a marriage contract, and most marriages are entered into without one: but where there is no marriage contract the Code imposes its own matrimonial regime —the community of movables and acquisitions (communauté de meubles et d'acquêts)—called legal community.[12]

Legal community affects movables acquired before marriage and movables and immovables acquired after marriage. These all fall into the community. Only immovables acquired before marriage remain as separate property of the spouses. There is an exception in the case of gifts of movables after marriage, where the donor stipulates that the donee is to retain the gift as separate property; and certain items of a personal nature, such as clothes, family heirlooms, and damages for personal injuries, are separate. It is interesting to note that the *income* derivable from separate property (such as immovables acquired before marriage) belongs to the community. The onus of proving that a particular asset is separate, and not community property, rests on the person seeking to claim that. There is, in other words, a

9. Article 1387.
10. Article 1395.
11. *Pullan v. Koe* [1913] 1 Ch. 9.
12. See the judgment of Halsbury L.C. in *De Nicols v. Curlier* [1900] A.C. 21 at p. 24 et seq.

presumption that property of a married person belongs to the community.

The original rigour of the system led to a certain difficulty where the wife was in receipt of her own earnings; and now the wife's earnings (though not those of the husband) are formed into a separate fund within the community, called biens réservés (reserved assets) of which the wife may freely dispose.

The mixing of the various funds which constitute legal community, obviously leads to administrative problems. If, for instance, a spouse decides to sell his or her separate property, then since the income of that property may belong to the community, the proceeds of the sale of it may be required to be attached in some way to the community. It may be that the husband (who administers all community property as head of the family) will re-employ the proceeds of sale in the purchase of other property (this is known as remploi). In that event, the wife has certain rights in relation to the new property which resemble in some respects tracing rights in equity systems of common law jurisdictions. Since the assets of the community derive from three sources—viz. the husband's ante-nuptial assets, the wife's ante-nuptial assets, and the assets accruing to the community after marriage—it followed, for the Frenchman, that these assets should be separately earmarked to meet the different kinds of debts which might be owed by the parties to the marriage, and which had been incurred before the marriage, or after it. Where one of the funds has discharged obligations strictly belonging to another fund, then there is a right of recompense.

The administration of the legal community is committed to the husband as head of the family, and he is given full powers both of administration and disposition, except that he may not give away assets of the community without his wife's consent. The difficulty of distinguishing between the three kinds of community assets and the separate assets of husband or wife significantly restricts both husband and wife in their dealings even with their own separate assets, without the knowledge and consent of the other spouse, since purchasers generally require some assurance, of whatever class assets are said to be, of the consent of the other spouse.

It can be seen, from this brief sketch of the legal community, that the family property which it envelopes is thoroughly protected during the marriage of the partners.

*The effect of death on the legal community*

It remains to discuss how the wife is protected when the community is dissolved by the death of her husband. The real point of community is that, upon the death of the spouse, no account is taken of the origin of the community assets. Thus

when the husband dies, all that has to be decided is what property is separate and what property is of the community. Of the community property, one half belongs to the wife and the other half belongs to the estate of the husband. The wife may renounce her interest if she wishes.[13]

Since the community property system gives good protection to the widow from destitution, the economic importance to her of the intestacy rules is less acute. Nevertheless, as in most systems of intestacy, the widow enters into competition, in the law of France, with the other immediate relatives of the deceased. The widow takes the entire estate of her husband where he leaves neither children (including illegitimate children and the issue of children) parents or remoter ancestors, brothers or sisters, (including half brothers and half sisters) or their representatives. If the intestate leaves remoter ancestors, e.g. grandparents, then the estate is split between the maternal and paternal ancestral lines, the split being known as la fente. If either of those ancestral lines fails, the widow takes the share which that line would have taken. If, however, the intestate dies leaving ancestors descendants or near collaterals, the widow takes nothing absolutely, but instead she receives a life interest or usufruct over the estate or some part of it. Thus where there are children or remoter issue of the marriage, the widow takes an usufruct over one quarter of the succession; where there are children of a previous marriage, the spouse takes a child's share (not exceeding one quarter) in usufruct. She takes an usufruct in one-half of the succession where her rights compete only with those of illegitimate children, brothers, sisters or their descendants, parents or grandparents of both ancestral lines. Thus considerable provision is made for the widow by the intestacy laws, in addition to the provision which is made for her through the community property system.

However, where it comes to the making of a will, whilst the husband cannot dispose of his share of the community property freely—his freely disposable property is a fraction of his estate and depends on the number and degree of relationship of those relatives who survive him—nevertheless the restrictions on freely disposable property are relaxed to a certain extent in the case of dispositions made by will in favour of the wife.

To return to the starting point, it will be seen that under the French succession system, the widow has no more status than she has under the English succession system. She has a status as far as the intestacy rules are concerned, but the restrictions on testation which do exist are not in her favour. But in the ordering of family rights generally, the wife is accorded

13. Art. 1453.

an important status, indeed a status which she can herself regulate with some measure of freedom at the time of her marriage.

The failure of French law to accord status to the widow in its succession system generally is eclipsed by the important status which is accorded to her by the institution of legal community. It is submitted that it is because the succession system plays a relatively unimportant role in the ordering of the family property that no reformation of the succession system has been undertaken.

In the common law countries, however, the failure to accord the widow status in the succession system, and the fact that the ordering of family property was developed only in a certain section of the community, and was class-based, led to sufficient pressures for reform for alternatives to be sought and found. There were three main solutions: the imposing of a specific restraint upon freedom of testation, by means of the reserved portion or forced heirship; the utilisation of the concept of election; and the introduction of a system of arbitration.

## PROTECTION FOR THE FAMILY IN OTHER LEGAL SYSTEMS

### *Direct restraints upon freedom of testation*

One of the most logical ways of ensuring that provision is made for members of the family upon the death of the father of the family is simply to restrict his power of testation by reserving a share of the estate for distribution to dependants. In early English medieval law, as we have seen, the widow had a reserved share of a third or a half of her husband's personal estate. Later, when she lost these rights, her rights of dower remained for a time, giving her some portion of the estate of her husband.

This principle of the reserved portion, which is sometimes referred to as forced heirship, derived from Roman Law, and was caught up and utilised in a number of succession systems.

The most recent example of a legislature utilising this type of provision in its succession code is that of Scotland. *The Succession (Scotland) Act,* 1964, which is one of the most important reforms of Scottish private law of recent years, makes generous provision for the widow of a deceased intestate. She is entitled to receive the ownership or tenancy of any one house owned or tenanted by the deceased spouse to a maximum value of £15,000 and its furnishings and plenishings to a maximum of £5,000. In addition, she takes the first £5,000 personalty if there are no children, or £2,500 if there are. It is further provided that any will made by the deceased spouse can only take effect as to one-third of the estate if the deceased left a wife and children or as to one-half if he left only a widow but no children, or only

children but no widow. The widow is therefore assured of the intestacy rights or of at least one-third of the estate.

In many American jurisdictions the same general principle is invoked to support the retention of dower rights for widows and the making of what are known as homestead rights for widows and infant children.

Although dower has long been abolished in England, Australia and New Zealand,[14] it is still retained in one form or another in many states of the United States.[15] As a general rule the dower right ensures for the widow a life interest in a certain portion of the realty left by her deceased husband; but in a number of states dower has been supplemented or replaced by what are termed homestead rights which generally give her, in addition to the right to occupy the homestead during her widowhood, protection against the execution of process by creditors against the homestead. Thus in Florida, for example, the widow has, in addition to rights of dower, the right to live in the homestead for her life, with a protection from any forced sale by creditors, whatever the value of the homestead.

In some states[16] the widow has dower and homestead rights; in some states[17] she has dower but no homestead rights; and in some states[18] there are homestead rights, but dower rights have been abolished.

A leading American commentator[19] has described the bewildering variety of states' succession systems in the United States as follows:—

> 'The most pronounced reaction . . . after having examined the Statutes . . . is a feeling of disgust for the slipshod methods of the lawmakers. Many statutes are practically incomprehensible without a knowledge of the local practice and of the legislative and case history in the particular jurisdictions. The statutes are full of ancient matter which, coupled with piecemeal innovations, form an inconsistent, ambiguous hodge-podge. In no field is there more evidence of

14. In England dower was not finally abolished until 1925, although it had ceased to be of importance since the early nineteenth century. In Australia it was abolished in the various states as follows—*The Dower Abolition Act* (Vic.) 1880; *The Deceased Persons Estates Act* (Tasmania) 1874; *The Intestacy Act* (Queensland) 1877; *The Dower Abolition Act* (N.S.W.) 1906; and the *Administration of Probate Act* (South Australia) 1891 (and later enactments).
15. There are dower provisions of various kinds in Alabama, Alaska, Arkansas, Delaware, D. Columbia, Florida, Georgia, Hawaii, Illinois, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Montana, New Hampshire, New Jersey, Ohio, Oregon, Rhode Island, S. Carolina, Tennessee, Utah, Vermont, Virginia, W. Virgina and Wisconsin.
16. e.g. N. Hampshire, Kentucky, Montana.
17. e.g. New Jersey.
18. e.g. Minnesota.
19. Vernier, *American Family Laws* (1935) Vol. 3 pp. 346-7.

haphazard, fragmentary legislation; and in most jurisdictions, no field is more deserving of a complete renovation."

*Election*

Out of the American hodge-podge there did emerge one type of provision, which is in one sense a form of reserved portion, and which is to be found in practically every American state except those states which have adopted a community property regime after the continental model. This is the provision whereby the widow is entitled to elect between whatever may be left to her by her husband's will, and other rights. It is common for her to be allowed to elect between the provision made for her by will, and her dower rights (or statutory dower-like rights)[20] but that is little more than an administrative change, as it gives the widow no additional rights. But in many states the widow is entitled to renounce the will entirely in which event she takes a share in the estate as a whole. This means that she is accorded an indelible status.

In fact election provisions of this kind are so widespread that they may fairly be described as the most common feature of the succession systems of the different states of the United States. It is not a feature of the community property states,[21] but it figures in every other state except North and South Dakota. Thus in Colorado,[22] notwithstanding any provisions of any will of the deceased, the widow may, within six months of the admission of the will to probate, exercise an election to take possession of one-half of the estate. The period for making the election may be extended to a year by the court. Thus the provisions made by the intestacy laws for the protection of the widow are entrenched in her favour. In the vast majority of states, the widow is not able to elect between the will and the intestacy provisions as such, but between the will and other provisions, smaller in value than the intestacy provisions. Presumably the principle of to each according to his merits is thought to be more appropriate where the husband leaves his estate away from his wife, than the principle of to each according to his needs![23]

It is important to note that these are very broad patterns of the states' succession systems, that details vary considerably

20. In Montana, for instance, a devise or bequest to a widow bars her dower rights (which are for a life interest in 1/3 of all lands whereof her husband was seized for an estate of inheritance at any time during the marriage, unless relinquished in due form). The widow is entitled to elect between these rights and the provisions made for her by the will. She may similarly elect in New Jersey, Rhode Island, S. Carolina, Utah and Vermont.
21. Viz Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas and Washington.
22. And in some other states e.g. Nebraska and Oklahoma.
23. Such provisions occur in Delaware, Illinois, Indiana, Kentucky, Maine, Massachusetts, Michigan, New York, North Carolina (in 1960) Ohio, Oregon, Virgin Islands, W. Virginia.

from state to state, and that other types of provision for widows have been devised. It is common for instance, for the widow and children to be given an allowance for living expenses during the time during which the estate of the deceased is being administered. This is a temporary provision, often at the court's discretion, and it is the nearest that any state has come to the solution of the problem by arbitration. In Maine these provisions have been interpreted as extending to the provision of permanent maintenance for the widow.[24]

In the states which have inherited or adopted a community property system, although the details vary from state to state, the basic concept is very similar to that of the French Code. Louisiana is probably the most typically representative state of the community property system. In the community property states there is no need to make provision for the widow by any of the means mentioned as in use in other states, and so the device of election has not been used.

Looking at the broad picture, as far as the states of the United States are concerned, the solution to the problem of the widow's status has been two-fold, namely the retention of the dower system and provision of homestead rights, and the according to the widow of a right to elect to take a fixed portion of the estate in lieu of whatever other benefits may, or may not, have been accorded to her by the will of the deceased. Both these are, in effect, variations of the Roman Law idea of the reserved portion or forced heirship.

There are three grave defects to the American solutions. One is that they proceed on a rather rigid, mathematical basis. The deserving and undeserving, old and young, rich and poor, are all treated alike. Another defect is that, except in the community property states and to the extent to which dower and homestead rights are entrenched, the solutions to the problem of the destitute widow are conceived within the succession system. Thus the widow's rights (and the children's as well) are related to the estate left by the deceased. There is nothing to prevent the husband from rendering his wife and children destitute by means of an inter vivos transaction. Moreover, the benefits of election are usually only available in favour of the widow, but not of the children, although minors are often accorded homestead rights during minority. Thus there is no general approach to the disinheritance of the children of a deceased person. The advantage of the American solutions is that the dependant does know where

24. In North Dakota, for instance, in addition to homestead rights, $2500 (protected from creditors) must be set aside for the immediate support of the widow and children; and if this is insufficient, the court may order a reasonable allowance to be made out of the estate during the settlement of it, in accordance with the family's standard of living.

he or she will stand in relation to the estate of the deceased person.

A system which rigidly restricts freedom of testation may be said to do formal justice to those in whose favour the restrictions are imposed. Those persons, at least, are accorded a status under the succession system of the state. So, where the widow is empowered to elect between whatever provision is made for her by her husband's will and her intestacy or other prescribed entitlement, that gives her a status in the succession system as a whole. What is interesting to note is that the solution of the problem of the destitute wife and children has been undertaken within and as part of the succession system, and has been dealt with in a piecemeal fashion. It is submitted that most of the inadequacies of the different solutions which have been utilised in different states would not have resulted had the problems been regarded as problems of the ordering of family property generally, rather than as problems of what is to be done upon the death of a member of the family.

*Arbitration—The Commonwealth and British contributions.*

It was left to New Zealand to devise a bold, imaginative and new approach to the inadequacies of the common law succession systems. *The Family Protection Act* of 1900 and some other enactments were consolidated in 1908 and that consolidation formed the basis for similar enactments which were brought down in no fewer than sixteen other common law jurisdictions including all the states of Australia[25] and seven Canadian provinces.[26] In England, the *Inheritance (Family Provisions) Act* 1938 was passed after a bitter and long struggle; and it was supplemented by the *Intestates Estates Act* of 1952.

The basic proposition of the legislation is that members of the family of a deceased person, including the widow and, of course, the children, may ask the court to make provision for their proper maintenance where the deceased failed to make such provision. That the legislation as whole is of considerable jurisprudential interest can be gathered from a brief review of some of the problems which have come to be dealt with under it. It is proposed to mention four areas of enquiry which have been developed more particularly in Australia and New Zealand:

(1) Over what property has the court jurisdiction?

(2) Who is entitled (a) legally and (b) morally, to invoke the aid of the Acts?

25. Victoria (1906); Tasmania (1912); Queensland (1914); N.S.W. (1916); S. Australia (1918); W. Australia (1920); and the Capital and Northern Territories (1929).
26. Alberta (1927); British Columbia (1948); Manitoba (1954); Ontario (1950); Saskatchewan (1953); Nova Scotia (1956) and New Brunswick.

(3) By what moral criteria is the court bound in making an award?

(4) By what economic criteria is the court bound in making an award?

As to the property over which the court has jurisdiction, there are two main types of problems. One relates to the limitations of territorial jurisdiction as such. It is generally accepted that the court has jurisdiction over movables wherever situate, if the deceased died domiciled within the jurisdiction;[27] and it has jurisdiction over immovables situate within the jurisdiction wherever the deceased died domiciled.[28]

Nevertheless, although the court may find that it does not have jurisdiction over particular assets for some territorial reason, this does not prevent it from taking the value of such assets into account considering the availability of the claim and the amount of the award.[29] In any case, it has been held in Australia[29] that there is no requirement that the *applicant* be domiciled within the jurisdiction, so that the applicant can bring his action before any court having jurisdiction. There would appear to be no reason in principle why he should not bring the same application before tribunals in more than one state.

The other point as to assets jurisdiction is concerned with the nature of the assets left. In some jurisdictions assets which descend in accordance with the intestacy rules—because the deceased died partly or wholly intestate—are outside the jurisdiction. This was the case in New South Wales, New Zealand[30] and England until statutory reforms were introduced.[31] In Queensland, partial or total intestacies caused by failure of the provisions of a valid will, have been held to be within the purview of the Acts.[32] While asset jurisdiction has been gradually extended to include assets passing on intestacy—the argument against such extension being that the intestacy rules must be presumed to do concrete justice between members of the deceased's family—it is still possible for a person to settle property inter vivos and so defeat the legislation entirely.[33]

The question of who may legally apply for relief under this legislation is distinguished from the question of who, of those so

27. *Re Paulin* [1950] V.L.R. 462; *Re Perkins* [1958] S.R. (N.S.W.) 1. The principle is that enunciated in *Re Berchtold* [1923] 1 Ch. 192; and see *Re Williams* [1945] V.L.R. 213.
28. *Re Butchart* [1932] N.Z.L.R. 125.
29. *Re Donnelly* (1929) 28 S.R. (N.S.W.) 34.
30. *Yuill v. Tripe* [1925] N.Z.L.R. 65.
31. In New South Wales in 1938, in New Zealand in 1939, and in England in 1952.
32. *Re Mayes* [1957] Q.W.N. 23. Contra in Victoria, where *Yuill v. Tripe* was followed in *Re Hood* [1942] V.L.R. 144.
33. *Re Thompson* [1933] N.Z.L.R. s.59.

entitled, can show a proper *moral* ground for his or her application. In jurisdictions which have adopted a somewhat cheeseparing attitude to the legislation—such as England—the class of persons entitled to apply for relief is restricted to the spouse and children suffering from some disability such as infancy or physical infirmity. But in states which take a wider view of the legislation, illegitimate children, stepchildren, divorced wives, de facto wives and even parents of the deceased[34] may apply.

As to the moral claim of those formally entitled, the original New Zealand legislation, which has been copied verbatim in many Australian states, required the applicant to show that the testator had not made by his will 'adequate provision for the *proper* maintenance and support'[35] of the applicant. It was the requirement for *proper* support which added the moral dimension. In the famous words of Edwards, J. in *Re Allardice*:[36]

> "It is the duty of the Court, so far as is possible, to place itself in all respects in the position of the testator, and to consider whether or not, having regard to all existing facts and surroundings circumstances, the testator has been guilty of a manifest breach of that moral duty which a just, but not a loving, husband or father owes towards his wife or towards his children, as the case may be."[37]

From these beginnings has developed the idea that whereas the widow and infant children have a prima facie moral claim upon the deceased, adult children should establish a special moral claim.[38] But the claims of morality do not end there. Not only is a moral claim the basis of elegibility for relief: it can also affect the quantum of relief which may be awarded, since the legislation provides that the court may refuse to make an order in favour of any person "whose character or conduct is such as, in the opinion of the court, disentitles him or her to the benefit of an order".[39]

At this point in the proceedings, if not earlier, evidence of the character of the applicant can be heard by the court, and that evidence may affect the quantum of the award. As Sholl, J. said in *Re Paulin*:—[40]

> "There may be cases where the Court, though the moral claim is not fully rebutted, is yet satisfied by direct evidence,

34. In New Zealand.
35. These words are used in the New Zealand, N.S.W., S. Australian, Queensland, Western Australian, Northern Territory, and Victorian statutes. Similar wording is used in the Tasmania, Capital Territory, and English statutes.
36. (1910) 29 N.Z.L.R. 959.
37. Ibid., at 972.
38. See e.g. *Re Sinnot* [1948] V.L.R. 279.
39. *Re Thompson* [1933] N.Z.L.R. s.59.
40. [1950] V.L.R. 462.

or by inference from applicant's answers to testator's allegations, or both of enough matters to reduce the provision which should have been made if the applicant's character and conduct had been unassailed or the moral claim unabated."[41]

The court is bound by certain economic criteria not only in the matter of whether it allows an application to be heard, but also in the matter of what award it should make. An interesting question which arises relative to the former is whether, if at the date of the testator's death the provision made by him for the applicant can be described as adequate for his proper maintenance and support, the fact that, subsequently to the death, assets of the estate unexpectedly rise in value gives the applicant a new locus to seek relief. The answer to this question appears to be in the negative.[42] As regards the amount of the award, the size of the estate must be taken into account (as it must be in determining whether the applicant is elegible for relief at all) but it is not the court's place to go farther than to repair the testator's moral failure to make adequate provision for the proper maintenance and support of the applicant. In some jurisdictions which have adopted this legislation e.g. Ontario and England, the amount of the award which the court may make is limited by reference to the intestacy entitlement. Despite the undesirable restrictions on the jurisidiction of the courts in the case of some States, the flexibility of the system, and its anchorage to the rock of a concept of family morality makes unquestionably the most important and the most realistic contribution to the jurisprudence of succession since Roman times.

To return again to the original starting point, it may be observed that the recourse to arbitration as a solution to the problem of the disinherited widow and children is virtually an admission of the inadequacy of any body of concrete rules to meet the needs of the community. Without a body of concrete rules, the application of the principle of formal justice is, of course, greatly reduced. So reduced, indeed, is the formal and logical content of this solution that it seems not quite to belong to a succession system at all, although it is set in the context of a succession system. Its broad objective seems to be the regulation of the economic effects to the family viewed as a unit, consequent upon the death of a member of the family, rather than to act as a gloss upon an excessively formal system of intestate succession and an excessively informal liberty of testation.

If a comparison of the four basic approaches to the problem of the economic consequences within the family of the death of a

41. Ibid., at 473.
42. See e.g. *Welsh v. Mulcock* [1924] N.Z.L.R. 673 at 687 and *Re Brown* [1952] St.R.Qd. 47.

member of it, namely the community of property system, the common law system, the system of the reserved portion or forced heirship, and the system of arbitration leads to any conclusion, it is towards the conclusion that in modern society succession systems are in themselves inadequate and that in the most forward-looking jurisdictions they are giving place to a concept of family protection as part of a family law system.

## A FORMAL INJUSTICE IN THE QUEENSLAND INTESTACY PROVISIONS

The Queensland succession system is in the same general pattern as the common law succession systems of the other Australian States. On the one hand, complete freedom of testation is accorded to all, subject only to the possibility of a recourse to arbitration by a disappointed relative under the *Testator's Family Maintenance Act* of 1914, which is a close copy of the New Zealand legislation; and as far as intestacy is concerned, the law applied is that of the *Statute of Distributions* of 1670, as amended by small items of legislation since.

### *The Queensland Legislation*

There has never been any attempt by Queensland to find its own solution to any of the important problems of the ordering of family property which the succession system creates.

The real difficulty with the Queensland Succession legislation is that it is full of mistakes. When the original *Succession Act* of 1867 was being prepared—it was no more than a consolidation of the then existing English legislation on the subject—one important Act, the Statute 1 Jac.2.c.17 of 1685 which gave a better share to the brothers and sisters of an intestate than they had enjoyed before, was simply overlooked. When this omission was noticed, the *Succession Act Declaratory Act* of 1885 was passed to put the omission right but, whether by accident or by misunderstanding, the provisions of the 1685 Act were altered before they reached the Queensland statute book. After the *Succession Act Amendment Act of* 1895 gave the widow of an intestate dying with neither child nor widowed mother the first $1000[43] of the estate, it was felt in 1906 (the *Succession Act* of that year) that widowers also should receive the first $1000 in the same circumstances, but the drafting of that Act left room for doubt which had to be cleared by the *Succession Act of* 1906 *Declaratory Act* of 1919. In 1943, it was desired to make another change in order to improve the position of (inter alia) the parents of a deceased intestate, but it will be submitted that that legislation was both conceived and drafted without due consideration of either the substance or, and this is as important, the form of the law as it

43. This was increased to $2000 in 1943.

then was: indeed it fell into the same error of drafting which Lord Hardwicke had criticised in an earlier statute. What is interesting is that because of the failure to pay due regard to the content and form of the law as it existed in 1943, the legislators put on to the statute book an enactment (*The Succession Acts and Another Act Amendment Act* of 1943) which leads in two particular respects to glaring examples of formal injustice.

The failure to maintain the principle of formal justice appears in relation to the rights *inter se* of the nearest next of kin of an intestate, where an intestate dies leaving no children. There are two serious anomalies:—

(1) If an intestate leaves (no child but) a widow, a father and a mother, then his widow takes one-half of the estate and his parents take the other half in equal shares; but if an intestate dies leaving neither widow nor child but a father and a mother, the father takes the entire estate to the exclusion of the mother.

(2) If an intestate leaves (no child but) a widow, a widowed mother and any brothers and sisters or their representatives, then his widow takes one-half of the estate, and the widowed mother and the brothers and sisters or their representatives take the other half of the estate in equal shares; but if an intestate dies leaving neither widow nor child but a widowed mother and brothers and sisters or their representatives, then the widowed mother takes the entire estate to the exclusion of brothers sisters or their representatives.

In other words the shares available for the nearest next of kin of an intestate differ according to whether or not the intestate left a widow. It would seem that this is a breach of the principle of formal justice that, *other things being equal,* persons in the same essential category should be treated equally. It is submitted that as between the parents of an intestate, and as between the widowed mother and brothers and sisters of an intestate, if they are to be treated equally when the intestate leaves a widow, they should be treated equally when the intestate leaves no widow.

It is submitted that this is a not unimportant matter, since the rights of such near relatives to a deceased person are a matter of importance to the community as a whole, and since it is in any event undesirable that there should be provisions which are clearly anomalous and inexplicable, and for which there is no social explanation which could be found to justify them on general grounds. That there is no social justification for the anomalies can be demonstrated by an examination of the history of how the anomalies arose, an examination which throws much incidental light on the history of the Queensland intestacy laws, and which

may also throw some light on the utility of the concept of formal justice.

Sections 29, 30 and 31 of the Queensland *Succession Act* of 1867 were taken for the most part from the *Statute of Distributions* of 1670. In fact the very wording is adopted practically *in toto*. The wording was originally not very satisfactory, but two hundred years of judicial legislation had brought matters to a reasonable clarity. The sections regulate the rights of the widow and of other next of kin where there are no children. Where the intestate leaves no child but a widow the Act provides (s. 30) for "one moiety of the said estate to be allotted to the wife of the intestate the residue of the said estate to be distributed equally to every of the next of kindred of the intestate who are in equal degree and those who legally represent them." Where the intestate leaves neither widow nor children, however, the Act provides (s. 31) that the estate shall be distributed 'to the next of kindred in equal degree of or unto the intestate and their legal representatives as aforesaid and in no other manner whatsoever'.

From this point we shall trace the rights of the mother of the intestate and those of the brothers and sisters (or their representatives) of the intestate.

The computation of proximity of kinship was borrowed from the Roman civil law, which differed from the canon law, the *Statute of Distributions* having been drafted by a Civilian.[44] According to the Civil Law degree of kinship was ascertained by counting the steps up to a common ancestor and then the steps down to the surviving next of kin. So that a grandparent is nearer in degree (there are two steps only) than an uncle or nephew (three steps in each case). To this principle was added the principle of representation, viz. that the issue of deceased next of kin were in some cases admitted to the rights of those whom they represented. This principle was limited by s. 31 of the *Succession Act,* following the *Statute of Distributions,* which provides that "there be no representations admitted among collaterals after brothers' and sisters' children". As far as the parents of a person were concerned, however, the father was accorded priority over the mother. Thus where an intestate died leaving neither widow nor children (or their representatives), his parents were his nearest next of kin: there being a father, he would accordingly take all; there being no father, the mother would take all.[45]

However, the mother's position was regarded as too good, and it was altered so as to place her in the same position as

44. Sir Walter Walker (See *Rex v. Kaines* (1700) 1 Ld. Raym. 571; 91 E.R. 1281; *Mentney v. Petty* (1722) Prec. Ch. 593; 24 E.R. 266.)
45. *Keilway v. Keilway* (1726) 2 P.Wms. 344; 24 E.R. 748; Gilb. Rep. 190; 25 E.R. 133.

brothers and sisters of the intestate by the Statute 1 Jac.2.c.17 of 1685, s. 7 of which included the following:

> 'Provided also . . . that if after the death of a father any of his children shall die intestate without wife or child in the lifetime of the mother, every brother and sister and the representatives of them shall have an equal share with her anything in the (Statute of Distributions) to the contrary notwithstanding'.

In *Stanley v. Stanley*[46] Lord Hardwicke described this proviso as 'very incorrectly penned' and therefore to be construed 'according to the intent and meaning of the legislature'. That case followed *Keilway v. Keilway* and decided, to use the words of the Lord Chancellor:—

"Upon the Statute of Distributions, the descending line excluded all collaterals, and afterwards went to the next of kin; so that the father or mother would take all. As suppose a rich citizen died intestate, his share would all go to the mother; therefore the subsequent statute intended that she should have a provision only equal with a brother and sister of the intestate".

Lord Hardwicke's comment on the drafting of the provision appears to relate to the use of the expression "shall die intestate *without wife or child* in the lifetime of the mother." On a strict interpretation, it would follow that the provision would have no effect at all if an intestate died leaving either a wife or a child surviving him. Such a construction would clearly be absurd because a widowed mother could never take anything at all if her intestate child left children surviving him—so that the words 'or child' are in one sense superfluous, because they do not change the existing position. The words 'without wife' are also problematical because if the intestate died leaving a wife but no children this would mean on a strict construction that the proviso would not apply, so that the intestate's widowed mother would take the entire share to the exclusion of brothers and sisters. Conversely, if the intestate died leaving no wife, the proviso would apply and the intestate's mother would take only a share with his brothers and sisters. In other words, the position would be the converse of the position which today obtains in Queensland. Fortunately, however, the wording was never strictly construed, and these results were avoided. It was early settled too that the words could not be taken as meaning 'without wife *and* children' (instead of 'without wife *or* children') which would again mean that the intestate's mother would take to the exclusion of the brothers and sisters where the intestate left a widow, but she would share with the brothers and sisters if the intestate died leaving no widow. In fact, that very construction (viz. that 'or'

46 (1739) 1 Atk. 455, 457; 26 E.R. 289, 290.

should be read as 'and') was pleaded for in *Keilway's Case,* but rejected by Lord Chancellor King.[47] Accordingly, it is submitted that the words are in effect meaningless and that had the Statute omitted them altogether, it would have made no difference. This is how the statute was in fact interpreted.[48] What happened was that these words were regarded as simply indicating that the draftsman had in mind, and was drawing attention to, those occasions of intestacy where the intestate's mother became entitled to any share—one of those occasions, undeniably, being where the intestate died leaving neither wife nor child.

As has already been mentioned, when the Queensland legislature came to consolidate the succession system for the State in 1867, the provisions of the 1685 Act were accidentally omitted, and this omission was made good by the *Succession Act Declaratory Act* of 1884, which was introduced because somebody noticed the omission, and not because of any decided case.[49] Nevertheless although the Queensland Act was described as a declaratory act, and despite Lord Hardwicke's comments as to the inadequacy of the drafting, and the particular examination of the drafting which occurred in *Keilway's Case,* the Queensland Legislature *altered* the original wording and provided that:—

> 'If after the death of a father any of his children shall die, or shall have died intestate, without wife *and children,* in the lifetime of the mother, every brother and sister, and the representatives of them, shall have, and shall be deemed to have had an equal share with her in the surplusage of the estate of such intestate'.

Thus, for the words of the original Statute 'without wife *or child,* which have been examined in detail, the Queensland Declaratory Act substituted the words 'without wife *and children*'—a *construction* which Lord Chancellor King had rejected in 1726 in *Keilway's Case.*

The question arises whether the alteration was intended to produce a different *result*—whether it was intended to change the law as it had been interpreted since *Keilway's Case.* A long examination of this would be fruitless because it has already been submitted that these words had no operative function in any event, and whatever attempt is made to give them both a different and an operative meaning leads to conflict with the general intent of the rest of the provision and with the particular intent of the proviso added to it which reads:—

> 'Provided always that nothing herein contained shall of itself invalidate or disturb the distribution of the estate

47. 2 P.Wms. 344; 24 E.R. 748.
48. E.g. See *Halsbury's Laws of England* (3rd Ed.) Vol. 16 para. 806.
49. Queensland Parliamentary Debates Vol. XLII, pp. 28-30.

of any intestate person heretofore made on the assumption that the mother was entitled to the whole of the surplusage thereof'.

It would appear from these words that after the date of the legislation, the mother is not intended to take the whole of the surplusage of an estate in any circumstances where there is a brother or sister. One is, of course, bound to look at the whole of the provision to ascertain its meaning, and the tenor of the proviso seems to establish with reasonable certainty the meaning of a curious alteration to what was always a badly drafted provision.

Proceeding on the assumption that the law of Queensland was brought into line with English Law by the 1884 Act, the position was, until 1943, that wherever the widowed mother of an intestate was entitled to share in the estate, her entitlement was the same as the entitlement of any brothers and sisters of the intestate (or their representatives)—viz. to share equally with them.

It was in 1943 that the widowed mother of an intestate next received the attention of the legislature. Sections 4, 5 and 6 of the *Succession Acts and Another Act Amendment Act* of 1943 inserted into the 1867 Act:—

(1) A proviso to s. 29, so as to give the widow of an intestate a half share of the estate where the intestate left only one child—formerly she was entitled to receive only a third share, any child or children taking the other two thirds;

(2) S. 31A of the Act which will be examined in detail later; and

(3) S. 31B of the Act, which in effect entitles certain illegitimate children of an intestate to apply to the court for relief under the *Testator's Family Maintenance Acts*—normally no application can be made on an intestacy, unless it is an intestacy or partial intestacy arising because of the failure of a disposition in a will.[50]

S. 31A—*A formal injustice affecting mothers and brothers and sisters of an intestate*

Section 31A of the Queensland *Succession Acts,* presents us with a classic example of a formal injustice affecting the close relatives of a deceased person. It is, in a sense, a lesson in how not to achieve the objects one is presumably seeking. S. 31A reads as follows:—

"The real and personal estate of every person who shall hereafter die intestate in the circumstances hereinafter specified shall be distributed in the manner following, that is to say—

50. *Re Mayes* [1957] Q.W.N. 23.

(a) Where the intestate dies leaving a father and also a mother, but no widow, or, as the case may be, no widower, and no lineal descendant, the whole surplusage of such estate shall be distributed in the manner and form following, that is to say, one-half part of the said surplusage to the father of the intestate, and one-half part of the said surplusage to the mother of the intestate;

(b) Where the intestate dies leaving a mother but no father, and no widow, or, as the case may be, no widower, and no lineal descendant, the whole surplusage of such estate shall be so distributed that the whole surplusage of such estate shall go to the mother of the intestate, absolutely and exclusively;

(c) Where the intestate dies leaving a father but no mother, and no widow, or, as the case may be, no widower, and no lineal descendant, the whole surplusage of such estate shall be so distributed that the whole surplusage of such estate shall go to the father of the intestate, absolutely and exclusively;

(d) Where the intestate dies leaving a widow, or, as the case may be, a widower, but no father and no mother and no children and no next-of-kin, the whole surplusage of such estate shall be so distributed that the whole thereof shall go to the widow, or, as the case may be, the widower, absolutely and exclusively."

This section would appear to have been inserted in the Act without any regard whatever to what went before, that is without regard to the existing state of the law or to the existing form of the law. It is proposed to consider three questions in relation to the section:—

(1) What, on a strict construction, does it mean?

(2) How should the section have been drafted?

(3) Is there an arguable case for construing the section in not too strict way, if a more desirable result can be achieved by a not too strict construction?

(1) *The strict construction of* S. 31A

On a strict construction of s. 31A there is discernible a serious failure of the principle of formal justice in our succession system. The difficulty stems from the use in paragraphs (a), (b) and (c) of the section of the words:—

'Where the intestate dies leaving . . . no widow . . . and no lineal descendant' . . .

These words are framed as a condition precedent for the operation of the paragraphs so that, in paragraph (a), if the intestate dies leaving a widow, then the paragraph cannot apply,

and its provision that the intestate's father and mother shall share any surplusage will not take effect. In other words, where an intestate dies leaving a widow (no 'lineal descendant') a mother and a father, the widow will take her share ($2000 plus half the residue) and the father will take the residue to the entire exclusion of the intestate's mother in accordance with the law as it stood before 1943. Again, in paragraph (b), if the intestate dies leaving a widow (but no 'lineal descendant') then any surplusage will go not to the mother, but equally between the mother and any brothers and sisters, in accordance with the law as it stood before 1943. Again, in paragraph (c), if an intestate dies leaving a widow (no mother or 'lineal descendant') then any surplusage will go to the father. As this paragraph effects no change in the law, it merely indicates that the draftsman of the paragraph did not realise that he was inserting a completely unnecessary provision.

On the other hand, if the intestate leaves neither widow nor 'lineal descendant', the three paragraphs operate, the mother and father sharing the surplusage equally under (a), the mother taking all the surplusage to the exclusion of brothers and sisters under (b) and the father taking all the surplusage (as he always did) under (c).

It is submitted that this is a clear example of a formal injustice because there would seem to be no reason whatever for providing for *surplusage* to be distributed on one basis where the intestate leaves a widow, but on another basis where the intestate leaves no widow.

There is another point of difficulty which arises in relation to these words, and that is the meaning of the expression 'lineal descendant'. In earlier sections of the Acts (e.g. s. 29) the expression used is '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'. It is submitted that although these words were presumably deliberately discarded by the draftsman of s. 31A, nevertheless the expression 'lineal descendant' in s. 31A has the same meaning as the earlier wording, i.e. that it simply means children, grandchildren and great grandchildren etc. The only other possibility is that the expression may include illegitimate children—a possibility which one is entitled to canvass because the same legislation does make some provision for illegitimate children to share in the estate of an intestate parent, and because the Attorney General, during the debate on the second reading of the Bill[51] said:

51. The debate on the second reading took place on September 15th 1943, and is reported in the Queensland Parliamentary Debates, Vol. CLXXXI.

> 'If a man dies intestate, the widow will have prior right on the estate, but if he left no widow or lineal issue, that is, any children *either legitimate or illegitimate,* the mother will take the whole of the estate. If only a father is left and no mother, the father takes the whole estate'.[52]

It is submitted, however, that to interpret 'lineal descendants' as possibly including illegitimates would be too great a break from the traditional policy of the law to exclude illegitimates unless no other construction can be intended. In any case, if the expression were to be construed as including illegitimates, it would lead to an absurd result because it would in effect mean that no administrator of an intestate estate could know whether s. 31A was applicable or not, since there might be an illegitimate child of the intestate of whose existence he was unaware. Certainly there is nothing in the legislation which positively leads one to think that 'lineal descendant' might include illegitimates. On the whole, then, it would seem that no problem should arise here despite the Attorney General's remarks.

(2) *How should the section have been drafted?*

It will be submitted that the legislature was fully aware that s. 31A would lead to the anomalous results which have been mentioned in this article. But it is more interesting to consider what the legislature ought to have intended. It is submitted that, had the mind of the legislature been fully advertent, it would have made three simple provisions:—

(1) It would have repealed those provisions of the 1685 Act which were 'declared' by the Queensland Act of 1885. That would have restored the mother of an intestate to the priority which she enjoyed over brothers and sisters before 1685.

(2) It would have placed parents of an intestate on an equal footing vis-à-vis each other, thus depriving the father of his priority over the mother.

(3) It would have abolished the right of escheat to the Crown wherever an intestate was survived by a spouse. I have no criticism of paragraph (d) of s. 31A, but it it submitted that it would have been easier to understand if it had referred to the Crown's right of escheat, since the abolition of the right of escheat is the real objective of the section.

If the Queensland legislature had approached the problem in this way, there would have been no possibility of the distribution of surplusage following two sets of rules differing according to whether or not the intestate left a widow.

52. p. 393.

(3) *Can the section be interpreted non restrictively?*

It might be thought that, since the drafting error made in s. 31A (a), (b) and (c) is in effect the same error as was made in the 1685 legislation, and since the error of 1685 was not allowed to affect its interpretation and was adopted in 1885, the errors in the 1943 legislation should be broadly construed so as not to lead to the anomalies to which on a strict construction they do lead. Could not the words which have been examined be regarded as merely giving a general indication that what is in mind is the question of rights to surplusage, rather than as establishing a series of rigid conditions precedent for the operation of the paragraphs? If this could be done, it would ensure that a mother of an intestate would always share with a father, and would always take in preference to brothers and sisters.

However, it is submitted that a departure from a strict construction of the section could not be justified for two reasons.

The first is that standards of legislative drafting and interpretation have become much more precise since 1685—the 1885 legislation does not pretend to be a redraft—and it would today be difficult to press upon a court a construction which involves a disregard of the basic, if misconceived, structure of the section. The second reason is that when the Bill which led to the Act was being debated in the Queensland legislature, it was made quite clear that the results which have been described as anomalous were intended. Indeed, although the Attorney General's outline of the effect of the proposed legislation is sometimes rather too condensed for accuracy, there is set out in the report of the debate a Schedule of what was then accepted to be the law, and what amendments it was intended to make. That Schedule is set out as an Appendix to this article. Paragraphs 6 and 16 of the Schedule make it clear that the mother shares with brothers and sisters where there is a widow (para. 6); and that she takes all where there is no widow (para. 16). It is interesting to note that one very important and common possible state of affairs was omitted from the Schedule, namely where the intestate dies leaving a widow, a father and mother. Para. 5 covers the case of an intestate leaving a widow and a father, and para. 6 the case of an intestate leaving a widow and mother, and para. 13 covers the case of an intestate leaving a father and mother but no widow. Since the casus omissus is important, this is further indication that the legislature was not advertent to the ultimate implications of the amendments.

It would seem, therefore, that we are left with an anomalous defect in our intestacy provisions, and for the theoretician, a practical example of a formal injustice.

## CONCLUDING OBSERVATIONS

I have tried, by keeping the idea of formal justice as a point of reference, to show two things, one about the succession systems of a number of states, and one about the utility of the distinction which is made between formal and concrete justice.

It seems fairly clear that modern societies are not really able to order the economics of the family unit on a basis of formal rules which have as their sole point of reference the death of an important member of the unit. A review of the succession systems of the United States, for instance, which are for the most part rigidly formal in their approach, leaves one with a sense of inadequacy and indeed chaos. The arbitration systems of the Commonwealth countries succeed in negotiating the problem of family economics by a means which is conspicuous for the absence of formal content in its substantive provisions. The community property systems are indeed systems of substantive formality, but the point of reference for the control of the family economics is not exclusively the death of a member of the family—most of the ordering of family property is done when the family first becomes a unit—namely upon marriage. It would seem then that succession systems which exemplify considerable formality in their substantive provisions are unlikely to meet the needs of the modern concept of the family. The future movement of the law would appear to be towards the ordering of the family property in in such a way as to minimise the effect of the death of a member of the family by an elastic system of family protection, and it is submitted that even earlier control over the family property is the desirable goal. This is not to suggest that the community property system of France is necessarily the answer. In modern society, marriage seems to play a role very different from that which it played when the nexus of community property was added to it. It may well be that a future solution is to be found by attending to the limitations of the arbitration system, in particular the limitation which enables testators to avoid the policy of the arbitration legislation by the simple device of the *inter vivos* settlement. Moreover, should marriage be the sole occasion for the reorganising of family property rights? Should anything change, as a matter of law, simply upon marriage? May it not be time to consider the case for the reorganisation of property rights upon the birth of children, rather than merely upon the celebration of matrimony?

To turn to the distinction which has been made between formal and concrete justice, it was observed that the principle of formal justice tells us about the justice of rules as rules rather than about the justice of particular rules as the embodiment of the collective will. What emerges from the particular study of

a singular example of a formal injustice which happens to have found its way into the law of Queensland seems to be that formal injustice may well result from the misunderstanding of an existing concrete rule in the mind of an amending legislature. In other words, an error of understanding or an error of formulation is one of the ways in which formal injustice is created. In fact it would be difficult to think of an example of a formal injustice which does not stem either from a failure to understand the content of a particular rule, with a consequent misapplication of the rule, or a failure in the logical structure of a particular rule. It might even be said that the principle of formal justice is the same as the principle of strict logical form within a given body of rules—certainly there is logical failure in the Queensland intestacy rules.

It is, of course, a truism to say that when a statute is badly drawn injustice results. Generally that injustice is a formal injustice, because the statute omits what it should have included, or, just as often, includes what it should have omitted. The concept of formal justice, abstract though it may seem in some expositions, can provide a test of the logical propriety of a particular provision. It can, too, help in considering the propriety of the level of abstraction which the draftsman of a particular provision has adopted. If s. 31A of the Queensland *Succession Acts* had been drafted on the level of abstraction of its parent statute, the *Statute of Distributions* of 1670, and not on the lower and defective level of the Statute of 1685, neither the widowed mothers of deceased intestates, nor the brothers and sisters of deceased intestates, would have cause to complain of unequal treatment.

WILLIAM A. LEE*

## APPENDIX

*Table of Distribution on Intestacy showing the effect of The Succession Acts and Another Act Amendment Act of* 1943 *as presented to the Queensland Legislature on* 15*th September,* 1943.[53]

| "A person dies intestate leaving as kin— | Estate Divided thus— Present Law. | Proposed Law. |
|---|---|---|
| "1. Widow or Widower and children | Widow or widower, one-third; children, two-thirds equally divided among them | No change |
| "2. Widow or widower and one child | Widow or widower, one-third; child, two-thirds | Widow or widower, one-half; child, one-half |
| "3. Widow or widower and child or children and grand-child or grand-children (being child or children of deceased child or children) | Widow or widower, one-third; child or children and grand-child or grand-children, two-thirds divided among them, as to children per capita, as to grand-children per stirpes | No change |

53. Queensland Parliamentary Debates Vol. CLXXXI pp. 394-5.

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| "4. Widow or widower and no children, but grand-child or grand-children (being a child or children of an only child) | Widow or widower, one-third; grand-child or grand-children, two-thirds divided equally among them | Widow or widower, one-half; grand-child or grand-children, one-half divided equally among them |
| "5. Widow or widower and father, but no child or grand-child | Widow or widower, £500 as first charge and one-half of residue; father, one-half residue | Widow or widower, £1,000 as first charge and one-half residue; father, one-half residue |
| "6. Widow or widower and widowed mother, but no child or grand-child | Widow or widower, one-half; next-of-kin, one-half equally divided among them | No change |
| "7. Widow or widower and no child, grand-child, mother, or father | Widow or widower, £500 as first charge and one-half residue; next-of-kin, one-half residue | Widow or widower, £1,000 as first charge and one-half residue; next-of-kin one-half residue equally divided among them |
| "8. Widow or widower, but no child, grand-child, mother, father, or next-of kin | Widow or widower, £500 as first charge and one-half residue; the Crown, one-half residue | Widow, the whole |
| "9. Widow or Widower, mother, brothers and sisters, but no child, grand-child or father | Widow or Widower, one-half; mother, brothers and sisters, one-half equally divided among them | No change |
| "10. Widow or widower, mother, brothers, sisters, nephews and nieces (being children of deceased brothers or sisters) but no child, grand-child or father | Widow or widower, one-half; mother, brothers, sisters, nephews and nieces, one-half divided equally among them; mother, brothers and sisters per capita; nephews and nieces per stirpes | No change |
| "11. Widow or widower, mother, nephews and nieces (being children of deceased brothers and sisters), but no child, grand-child, father, brother, or sister | Widow or widower, one-half; mother, nephews and nieces, one-half divided between them, nephews and nieces taking per stirpes | No change |
| "12. Widow, or widower and mother, but no child, grand-child, father, brother, sister, nephew or niece | Widow or widower, one-half; mother, one-half | No change |
| "13. Father and mother, but no widow or widower, child, or grand-child | Father, the whole | Father, one-half; mother, one-half |
| "14. Father, but no widow or widower, child, grand-child, or mother | Father, the whole | No change |
| "15. Mother, brothers and sisters, but no widow or widower, child, grand-child or father | The whole equally divided between them | Mother, the whole |
| "16. Mother, brothers and sisters, nephews and nieces (being children of deceased brothers or sisters), but no widow or widower, child, grand-child or father | The whole divided among them, mother, brothers and sisters per capita, nephews and nieces per stirpes | Mother, the whole |
| "17. Mother, but no widow or widower, child, grand-child, father, brother, sister, nephew or niece (being child or children of deceased brother or sister) | Mother, the whole | No change |
| "18. Child or children, but no widow or widower | The whole equally divided between them | No change |
| "19. Child or children and grand-child or grand-children, but no widow or widower | The whole equally divided between them. Children per capita grand-children per stirpes | No change |
| "20. Grand-children, but no widow or widower, child or children | The whole between them per stirpes | No change |

Note A.—The right of representation does not go beyond brothers' and sisters' children—that is to say, the right of taking a deceased parent's share.

Note B.—Children of the half-blood take equally with children of the whole blood.

Note C.—If a child be advanced during the lifetime of the intestate, he must bring the amount of the advancement into hotchpot.

Note D.—If the death of a wife occurred before 1906, the above distribution may not apply, and the matter should be referred to the Public Curator or local deputy.

Note E.—Attention is drawn to the Adoption of Children Act of 1935, which gives rights of inheritance to adopted children in certain cases.

Note F.—The above table applies only to the succession of lawful relations of the intestate."