PROPOSED
INTESTATE ACT OF 1947

REPORT

OF THE

COMMITTEE ON DECEDENTS' ESTATES LAWS

OF THE

JOINT STATE GOVERNMENT COMMISSION

JOINT STATE GOVERNMENT COMMISSION
CAPITOL BUILDING
HARRISBURG, PA.

MARCH 15, 1946

JOINT STATE GOVERNMENT COMMISSION OF THE GENERAL ASSEMBLY

(Created in 1937, P. L. 2460, as last amended 1943, P. L. 13)

"A continuing agency of the General Assembly to undertake studies and develop facts, information and data on all phases of government for the use of the General Assembly and departments and agencies of the State Government."

Chairman: IRA T. FISS, Speaker of the House.

Vice Chairman: M. HARVEY TAYLOR, President Pro Tempore of the Senate.

Secretary-Treasurer: FRANKLIN H. LICHTENWALTER, Majority Leader of the House.

Counsel: A. ALFRED WASSERMAN.

Resident Secretary: L. D. STAMBAUGH.

Senate Members	*House Members*
JOSEPH M. BARR	HIRAM G. ANDREWS
EDWARD J. COLEMAN	ADAM T. BOWER
JOHN H. DENT	REUBEN E. COHEN
CHARLES H. EALY	EDWIN C. EWING
JAMES A. GELTZ	IRA T. FISS
WELDON B. HEYBURN	ROBERT D. FLEMING
FREDERICK L. HOMSHER	THOMAS H. LEE
A. EVANS KEPHART	FRANKLIN H. LICHTENWALTER
JOHN G. SNOWDEN	THOMAS LYONS
O. J. TALLMAN	ALBERT S. READINGER
M. HARVEY TAYLOR	HERBERT P. SORG
J. FRED. THOMAS	HARRY E. TROUT
JOHN M. WALKER	LLOYD H. WOOD

COMMITTEE ON DECEDENTS' ESTATES LAWS

House Members	*Senate Members*
THOMAS H. LEE, *Chairman*	JOHN M. WALKER, *Vice Chairman*
HOMER S. BROWN	CHARLES H. EALY
REUBEN E. COHEN	WALLACE S. GOURLEY*
JACK J. MCDOWELL	BERNARD B. MCGINNIS
JOHN H. MCKINNEY	O. J. TALLMAN
ALBERT S. READINGER	
CHARLES L. ROBERTSON	

* Resigned.

ADVISORY COMMITTEE TO THE COMMITTEE ON DECEDENTS' ESTATES LAWS

ROBERT BRIGHAM, ESQ., *Chairman*
SHIPPEN LEWIS, ESQ., *Secretary*
M. PAUL SMITH, ESQ., *Research Consultant*

ROBERT W. ARCHBALD, JR., ESQ.
JOHN C. BELL, JR., ESQ.
PAUL BEDFORD, ESQ.
HON. W. WALTER BRAHAM
WILLIAM H. ECKERT, ESQ.
ROLAND FLEER, ESQ.
HON. ETHAN A. GEARHART
W. PITT GIFFORD, ESQ.
HON. ANDREW HOURIGAN
HON. DAVID G. HUNTER
A. J. WHITE HUTTON, ESQ.
MARK E. LEFEVER, ESQ.
WILLIAM W. LITKE, ESQ.
ALAN S. LOOSE, ESQ.
HON. FREDERICK A. MARX
J. PAUL MACELREE, ESQ.
RALPH D. MCKEE, ESQ.
RICHARD G. MILLER, ESQ.
RAYMOND M. REMICK, ESQ.
HON. KARL E. RICHARDS
WILLIAM M. ROBINSON, ESQ.
ARTHUR SCULLY, ESQ.
C. L. SHAVER, ESQ.
BOYD LEE SPAHR, ESQ.
THOMAS STOKES, ESQ.
HON. THOMAS P. TRIMBLE
PAUL C. WAGNER, ESQ.
HON. A. KIRK WRENSHALL
HON. J. COLVIN WRIGHT
ADOLPH L. ZEMAN, ESQ.

INTRODUCTION

Senate Resolution Serial No. 46 of the regular session of the Legislature of 1945 directed the Joint State Government Commission of the General Assembly to "study, revise and prepare for reënactment the Orphans' Court Partition Act, the Orphans' Court Act, the Revised Price Act, the Wills Act, the Register of Wills Act, the Intestate Act and the Fiduciaries Act, together with all of their supplements and amendments and all separate laws that should properly be incorporated therein, and to present them for the consideration of the General Assembly at its next session".

Pursuant to the said resolution, the Commission established a special "Committee on Decedents' Estates Laws" to carry out the mandate of the General Assembly. Hon. Thomas H. Lee, of Philadelphia, was designated as Chairman, and Hon. John M. Walker, Allegheny County, was designated as Vice Chairman.

The Committee recognized immediately the need for coöperation, advice and assistance of the Orphans' Court judges and the practitioners in the field of decedents' estates laws familiar with the problems involved in administering the laws. Therefore, an Advisory Committee consisting of judges and attorneys, distributed geographically throughout the Commonwealth of Pennsylvania, was appointed, and Robert Brigham, Esq., Philadelphia, was designated as Chairman; Shippen Lewis, Esq., of Philadelphia, as Secretary, and M. Paul Smith, Esq., Norristown Research Consultant. A list of the members of the Joint State Government Commission, the Committee on Decedents' Estates Laws and the Advisory Committee will be found at the beginning of this report. Both committees proceeded promptly with the study of the various decedents' estates laws.

After the Advisory Committee had completed its draft of a proposed new Intestate Act, it was submitted to the Committee on Decedents' Estates Laws of the Joint State Government Commission.

This report, therefore, contains the draft of the proposed "Intestate Act of 1947", and is distributed to the bench, the bar, and the public for their consideration.

While the proposed Act, in addition to including changes in general arrangement, also makes some substantial changes in the rules of succession, care has been exercised to retain the exact language of the 1917 Act where it is important to do so.

Some of the recommended changes are substantial, yet they are not as great as were those made in 1917 when the distinction

between succession in real and personal property was abolished and the rights of spouses were made equivalent. All proposals have been made with the realization that the burden of proof is upon those who propose a change. The following tests have been applied to every proposed change: (1) Is it fair? (2) Will it carry out the wishes of the average person? (3) Does it tend toward simplification? (4) Will it be workable in actual practice? (5) Will it decrease or increase litigation? (6) Will the value of established case law be lost?

Most of the substantial changes appear in sections one and two of the proposed Act. Section one defines the shares of participants in the estate. Subsection (a) thereof designates the share of the widow in four separate circumstances and subsection (b) the shares of all others, including the Commonwealth, in the balance, if any, of the estate. Principal changes are that the share of the surviving spouse is increased to $10,000 plus one-half of the estate when there are no issue, and that he or she inherits the entire estate before first cousins. The Commonwealth acquires the estate before heirs more distant than first cousins, but not before indefinite issue of brothers or sisters. Section two combines numerous rules of succession.

The Intestate Act of 1917 has been frequently criticized as being too complicated. The objective has been to simplify the structure of the Intestate Act, as well as particular sections thereof, whenever this could be done without impairing the authority of decisions under prior acts.

Each section of the proposed Act is followed by comments on the reasons for the proposed changes and is annotated with pertinent decisions.

It is the intention of this Committee and the Advisory Committee to give consideration to any additional suggestions and recommendations for further revisions of this draft of the "Intestate Act of 1947" before it is finally adopted and drafted for introduction during the regular legislative session of 1947.

The Committee acknowledges the excellent work performed by the Advisory Committee and M. Paul Smith, the Research Consultant, in the preparation of the proposed draft of the Intestate Act. The members of the Committee of the Commission attended the meetings of the Advisory Committee, joined in the discussions, and heard at first hand the careful and thorough consideration given to every section of the proposed Act. It expresses its sincere appreciation for the time contributed, as

well as the interest displayed and the industry with which the Advisory Committee pursued this study.

THOMAS H. LEE, *Chairman*
JOHN M. WALKER, *Vice Chairman*

Committee on Decedents' Estates Laws

HOMER S. BROWN
REUBEN E. COHEN
CHARLES H. EALY
THOMAS H. LEE
JACK J. MCDOWELL
BERNARD B. MCGINNIS
JOHN H. MCKINNEY
ALBERT S. READINGER
CHARLES L. ROBERTSON
O. J. TALLMAN

A. ALFRED WASSERMAN, *Counsel*

TABLE OF CONTENTS

AN ACT

Relating to the descent of the real and personal estate of persons dying intestate and the procedure in reference thereto.

COMMENT:

The title to the proposed Act differs from the Act of 1917, which reads:

"AN ACT

"Relating to the descent and distribution of the real and personal property of persons dying intestate; and to provide for the recording and registering of the decrees of the orphans' court in connection therewith, and the fees therefor."

A general reference to procedure was considered preferable to a reference to two or three minor matters of procedure.

Section 1. *Intestate Descent.* The real and personal estate of a decedent, whether male or female, subject to payment of debts and charges, and not disposed of by will or otherwise, shall descend as follows:

COMMENT:

The introductory paragraph of the 1917 Act reads:

"Be it enacted, etc., That the real and personal estate of a decedent, whether male or female, remaining after payment of all just debts and legal charges, which shall not have been sold, or disposed of by will, or otherwise limited by marriage settlement, shall be divided and enjoyed as follows; namely,—"

The 1917 introductory clause was copied from Section 1 of the Act of April 8, 1833, P. L. 315.

Changes of statutory language in use since 1833 are submitted with considerable hesitancy. The suggested paragraph has been written to conform with the prior language except where clarity dictates otherwise. The words "*subject to payment*" have been substituted for "remaining after payment" to eliminate any implication that only title to the net balance passes. It is the whole title which passes "subject to payment of debts and charges." The words "just" and "legal" were omitted as tending to possible restriction of the "debts" and "charges". In the final analysis, it is the net estate after administration whether the debts paid were "just" or the charges made were "legal".

"*And not disposed of by will or otherwise*" has been substituted for "which shall not have been sold, or disposed of by will, or otherwise limited by marriage settlement", because of possibility that reference to property "sold" and "marriage settlement" might tend to indicate that other inter vivos dispositions, such as inter vivos trusts, were excluded.

"*Shall descend*" instead of "shall be divided and enjoyed" is used because it includes words denoting the transfer of ownership not necessarily included in the earlier language.

(a) *Share of Surviving Spouse.* The surviving spouse shall be entitled to the following share or shares:

(1) *More Than One Child.* One-third if the decedent is survived by more than one child, or by one or more children and the issue of a deceased child or children, or by the issue of more than one deceased child; or

(2) *One Child.* One-half if the decedent is survived by one child only, or by no child, but by the issue of one deceased child; or

(3) *No Issue.* The first ten thousand dollars in value and one-half of the balance of the estate, if the decedent is survived by no issue; or

(4) *No Issue or Other Designated Person.* All of the estate if the decedent is survived by no issue, parent, brother, sister, or child of a brother or sister, and by no grandparent, uncle or aunt entitled to take.

GENERAL COMMENTS:

Section 1(a) is intended to supplant sections 1, 2 and 17 of the Intestate Act of 1917. As now drafted it is believed that the share of the spouse is set forth clearly, briefly and logically, progressing from a share of one-third in paragraph (1) to the entire estate in paragraph (4). The present arrangement has the added virtue of setting forth in one place the share of the surviving spouse. The principal changes are:

1. The five thousand dollar allowance is increased to ten thousand dollars because it is believed that $10,000 has a purchasing value somewhat akin to, if not less than, $5,000 in 1909, when the $5,000 allowance first made its appearance in Pennsylvania law (Act of April 1, 1909, P. L. 87), and because of present public opinion which is inclined to favor the surviving spouse. While it is arguable that $10,000 is not a sufficient increase, it seems that this is a sufficiently large step in the proper direction at this time. If experience indicates otherwise, the next step can be taken easily.

2. The surviving spouse is given the entire estate in the absence of near relatives. This seems more equitable and reduces administration difficulties by avoiding the necessity of searching for remote relatives, and in many cases giving them a very small interest.

3. The proviso in section 2(a) of the 1917 Act to the effect that the allowance does not apply upon an election to take against the will has been omitted because it is not properly in this Act. *Langerwisch's Est.*, 267 Pa. 319 (1920) raised the question of the validity of the proviso. While it was determined that the proviso was effective, this was due largely to the title of the amendatory Act of July 11, 1917, P. L. 755. It is believed that the proper way to cover the situation is to make appropriate provision for it in the Wills Act.

4. The procedural provisions applicable to the $10,000 allowance and to the spouse's claim of the entire estate have been placed in separate sec-

tions (8 and 9) to avoid confusion in defining the extent of the shares received by each beneficiary.

SPECIFIC COMMENTS:

"(a) *Share of Surviving Spouse. The surviving spouse shall be entitled to the following share or shares:*"

There is no comparable provision in the 1917 Act. As hereinbefore noted, provisions for the surviving spouse are now found in sections 1, 2, and 17. Section 1(a) provides for a one-half share, section 1(b) for a one-third share, section 2 for $5,000 plus one-half, and section 17 for the whole estate. Each section and clause stands on its own. The present re-arrangement is believed to be clearer and more orderly.

"*Shall be entitled to*" is used instead of "shall receive" because they are the words used throughout the 1917 Act, and there seems to be no reason to change.

"(1) *More Than One Child. One-third if the decedent is survived by more than one child, or by one or more children and the issue of a deceased child or children, or by the issue of more than one deceased child; or*"

The comparable provision of the 1917 Act is:

> "Section 1(b). Where such intestate shall leave a spouse surviving and more than one child, or one child and the descendants of a deceased child or children, or the descendants of more than one deceased child, the surviving spouse shall be entitled to one-third part of the real and personal estate."

It will be noted that except in so far as it was necessary to conform to the general method of presentation, the language here used is identical with that contained in Section 1(b) of the Intestate Act of 1917. The word "*decedent*" has been substituted for "intestate" and "*issue*" for "descendants". These designations are believed simple and accurate and have been used throughout the proposed Act. The 1917 Act was not always consistent in this respect. Compare 1(b) "descendants" with 2(a) "issue". "*Decedent*" is considered more accurate, because the Act applies to all property not disposed of and is not confined to cases where there was no will.

"(2) *One Child. One-half if the decedent is survived by one child only, or by no child, but by the issue of one deceased child; or*"

The comparable provision of the 1917 Act is:

> "Section 1(a). Where such intestate shall leave a spouse surviving and one child only, or shall leave a spouse surviving and no children, but shall leave descendants of one deceased child, the spouse shall be entitled to one-half part of the real and personal estate."

The comment made for the paragraph immediately preceding is equally applicable here.

The Pennsylvania Bar Association Committee on the Law of Decedents' Estates recommended that the share of children, at least when they are minors, in smaller estates should be awarded to the surviving parent. It is believed that an attempt to remedy the situation by making a distinction between the sharing in smaller or in larger estates by provisions therefor

in the Intestate Act would lead to numerous complications with questionable results.

"(3) *No Issue. The first ten thousand dollars in value and one-half of the balance of the estate, if the decedent is survived by no issue; or*"

The comparable provision of the 1917 Act is:

> "Section 2(a). Where such intestate shall leave a spouse surviving and other kindred, but no issue, the surviving spouse shall be entitled to the real or personal estate, or both, to the aggregate value of five thousand dollars, in addition, in the case of a widow, to the widow's exemption as allowed by law; and, if such estate shall exceed in value the sum of five thousand dollars, the surviving spouse shall be entitled to the sum of five thousand dollars absolutely, to be chosen by him or her from real or personal estate, or both, and in addition thereto shall be entitled to one-half part of the remaining real and personal estate: Provided, That the provisions of this clause as to said five thousand dollars in value shall apply only to cases of actual intestacy of husband or wife, entire or partial, and not to cases where the surviving spouse shall elect to take against the will of the deceased spouse."

The amount was increased from five to ten thousand dollars and the proviso was omitted for the reasons heretofore given.

"(4) *No Issue or Other Designated Person. All of the estate if the decedent is survived by no issue, parent, brother, sister, or child of a brother or sister, and by no grandparent, uncle or aunt entitled to take.*"

The similar provision in the Intestate Act of 1917 is:

> "Section 17(a). In default of known heirs or kindred, competent as aforesaid, the real estate of such intestate shall be vested in the surviving spouse of such intestate, if any, and the surviving spouse shall be entitled to the whole of the personal estate."

"*Child of a brother or sister*" instead of "nephew or niece" is used to eliminate any claim that a grandnephew or grandniece is included. See *Root's Est.*, 187 Pa. 118, where the court at page 121 says, "A nephew, according to all the lexicographers, is the son of one's brother or sister; sometimes the word includes grandnephew".

It is to be noted that, when a spouse and a first cousin whose parent is deceased survive the decedent, whether or not the first cousin shares in the estate may depend on whether the decedent left an uncle or aunt or grandparent surviving. However, this result is considered more desirable than to require a spouse to share the estate with a first cousin when first cousins are the nearest surviving relative.

(b) *Shares of Others Than Surviving Spouse.* The share of the estate, if any, to which the surviving spouse is not entitled, and the entire estate if there is no surviving spouse, shall descend in the following order:

(1) *Issue.* To the issue of the decedent.

(2) *Parents.* If no issue survives the decedent, then to the parents or parent of the decedent.

(3) *Brothers, Sisters, or Their Issue.* If no parent survives the decedent, then to the issue of each of the decedent's parents.

(4) *Grandparents.* If no issue of either of the decedent's parents but at least one grandparent survives the decedent, then half to the paternal grandparents or grandparent, or if both are dead, to the children of each of them and the children of the deceased children of each of them, and half to the maternal grandparents or grandparent, or if both are dead, to the children of each of them and the children of the deceased children of each of them. If both of the paternal grandparents or both of the maternal grandparents are dead leaving no child or grandchild to survive the decedent, the half which would have passed to them or to their children and grandchildren shall be added to the half passing to the grandparents or grandparent on the other side.

(5) *Uncles, Aunts and Their Children.* If no grandparent survives the decedent, then to the uncles and aunts and the children of deceased uncles and aunts of the decedent.

(6) *Commonwealth.* In default of all persons hereinbefore described, then to the Commonwealth of Pennsylvania.

GENERAL COMMENTS:

While several important changes have been recommended in the plan of distribution, the fundamental set-up remains substantially the same. In addition to changes altering the share of the surviving spouse, there are only three changes:

(1) Issue of deceased brothers and sisters are recognized without limitation. Thus, great grandnephews share in the estate prior to grandparents. This seems largely a theoretical difference.

(2) Grandparents receive their shares in pairs, maternal and paternal, with limited right of representation where both grandparents on one side are deceased and a grandparent on the other side survives.

(3) The Commonwealth receives the entire estate prior to relatives more distant than first cousins—but not prior to indefinite issue of a brother or sister.

Subsection (b) of Section 1 is designed to take the place of sections 7, 8, 9, 10, 11, 12, and 19 of the Act of 1917. It will be observed that subsection (b) as recommended is much less complicated than are these numerous sections.

SPECIFIC COMMENTS:

"(b) *Shares of Others Than Surviving Spouse. The share of the estate, if any, to which the surviving spouse is not entitled, and the entire estate if there is no surviving spouse, shall descend in the following order:*"

The plan of subsection (b), including this introductory statement, has been taken largely from the Model Probate Code, but the latter portion of the introduction is taken from the introductory statement of Section 7 of the 1917 Act. The introductory statement in Section 7 reads:

> "Section 7. The real and personal estate of such intestate not hereinbefore given to the surviving spouse, if any there be, shall descend to and be distributed among his or her issue according to the following rules and order of succession; namely,—"

"(1) *Issue. To the issue of the decedent.*"

Chief virtue of the recommended provision is its brevity as compared with Section 7 of the 1917 Act. It is believed that nothing is lost in clarity of expression. The only thing which is not covered is the manner in which persons taking in unequal degrees shall share in the estate. However, that problem which is common to other provisions of subsection (b) is covered by Section 2(a) as hereinafter proposed.

"(2) *Parents. If no issue survives the decedent, then to the parents or parent of the decedent.*"

This takes the place of Section 8 of the 1917 Act, which reads:

> "Section 8. In default of issue, as aforesaid, the real and personal estate of such intestate not hereinbefore given to the surviving spouse, if any there be, shall go to and be vested in the father and mother of such intestate; or, if either the father or mother be dead at the time of the death of the intestate, the parent surviving shall take such real and personal estate."

Here again the recommended language is brief and clear. The parents would receive their shares as tenants by the entireties both under the provisions of Section 2(f) hereinafter proposed, and by judicial interpretation: *Barati's Est.*, 89 Pitts. 84.

"(3) *Brothers, Sisters, or Their Issue. If no parent survives the decedent then to the issue of each of the decedent's parents.*"

This takes the place of Section 9 of the 1917 Act. The suggested provision is brief, and when read together with Section 2(a) is clear. The value of retaining the exact language of Section 9 of the 1917 Act appears to be overweighed by the simplicity of the language suggested.

"(4) *Grandparents. If no issue of either of the decedent's parents but at least one grandparent survives the decedent, then half to the paternal grandparents or grandparent, or if both are dead, to the children of each of them and the children of the deceased children of each of them, and half to the maternal grandparents or grandparent, or if both are dead, to the children of each of them and the children of the deceased childen of each of them. If both of the paternal grandparents or both of the maternal grandparents are dead leaving no child or grandchild to survive the decedent, the half which would have passed to them or to their children and grandchildren shall be added to the half passing to the grandparents or grandparent on the other side.*"

This takes the place of Sections 10 and 12 of the 1917 Act. Section 10 has been criticized by the Supreme Court in *Miles's Est.*, 272 Pa. 329, 332 (1922) as "vague and indefinite; it fails either to say or suggest what pos-

sible groups of the persons indicated are to inherit, how these groups are to be ascertained, and whether those composing them take, as individuals, per stirpes or per capita." Section 12 of the 1917 Act attempts to answer these questions but it is applicable only if there shall be living "one or more than one grandparent."

"(5) *Uncles, Aunts and Their Children. If no grandparent survives the decedent, then to the uncles and aunts and the children of deceased uncles and aunts of the decedent.*"

The recommended paragraph replaces Sections 10 and 11 of the 1917 Act.

"(6) *Commonwealth. In default of all persons hereinbefore described, then to the Commonwealth of Pennsylvania.*"

Rights of the Commonwealth as a participant in an intestate estate are accelerated at the expense of persons more remotely related than first cousins.

The words "*in default of all persons hereinbefore described*" is suggested by the beginning of sections 10 and 24 of the 1917 Act.

The 1917 Act as amended (Section 24) sets forth procedural matters with respect to estates escheatable to the Commonwealth. These procedural matters are covered in section 11 of this proposed Act.

Section 2. *Rules of Descent.* The provisions of this act shall be applied to both real and personal estate in accordance with the following rules:

(a) *Taking in Different Degrees.* The shares descending under this act to the issue of the decedent, to the issue of his parents or grandparents or to his uncles or aunts or to their children, shall descend to them as follows: The part of the estate descending to any such persons shall be divided into as many equal shares as there shall be persons in the nearest degree of consanguinity to the decedent living and taking shares therein and persons in that degree who have died before the decedent and have left issue to survive him who take shares therein. One equal share shall descend to each such living person in the nearest degree and one equal share shall descend by representation to the issue of each such deceased person, except that no issue of a child of an uncle or aunt of the decedent shall be entitled to any share of the estate.

(b) *Whole and Half Blood.* Persons taking under this act shall take without distinction between those of the whole and those of the half blood.

(c) *After-Born Persons—Time of Determining Relationships.* Persons begotten before the decedent's death but born thereafter, shall take as if they had been born in his lifetime.

(d) *Source of Ownership.* Real estate shall descend under this act without regard to the ancestor or other relation from whom it has come.

(e) *Quantity of Estate.* The real estate of the decedent shall be vested in the person or persons taking it under this act, for such estate as the decedent had therein, and such person or persons shall take the personal estate absolutely.

(f) *Tenancy in Estate.* When real or personal estate or shares therein shall descend to two or more persons, they shall take it as tenants in common, except that if it shall descend to a husband and wife they shall take it as tenants by the entireties.

(g) *Alienage.* Real and personal estate shall descend without regard to whether the decedent or any person otherwise entitled to take under this act, is, or has been, an alien.

(h) *Person Related to Decedent Through Two Lines.* A person related to the decedent through two lines of relationship shall take one share only which shall be the larger share.

GENERAL COMMENTS:

The plan of combining rules of succession in a separate section is new. The 1917 Act includes rules of succession in separate sections and in some instances as a part of other sections. Section 2, as recommended, seems to be a more orderly method of presenting these rules.

SPECIFIC COMMENTS:

"(a) *Taking in Different Degrees. The shares descending under this act to the issue of the decedent, to the issue of his parents or grandparents or to his uncles, aunts or their children, shall descend to them as follows: The part of the estate descending to any such persons shall be divided into as many equal shares as there shall be persons in the nearest degree of consanguinity to the decedent living and taking shares therein and persons in that degree who have died before the decedent and have left issue to survive him who take shares therein. One equal share shall descend to each such living person in the nearest degree and one equal share shall descend by representation to the issue of each such deceased person, except that no issue of a child of an uncle or aunt of the decedent shall be entitled to any share of the estate.*"

It seems advisable that this appear as the first rule of succession to eliminate any question concerning the manner in which the shares shall be divided. The 1917 Act refers to "representation" and to rules of representation in numerous places, including 7(d)3 (descendants of intestate); 9(d) (descendants of brothers and sisters); 11 (general rule of limitation of representation); 12(d) (issue of grandparents); and 19 (persons in same degree of consanguinity). Much of the cumbersome language of the places to which reference is made is avoided by the provisions of Section 1(b), as proposed, together with this paragraph.

Definition of the words *"by representation"* is not needed because it is unquestionably a word of art well known to lawyers and about which there is no dispute except as to the top level at which the stirpital distribution starts. See 2 Blackstone 217. The definition suggested here covers that situation.

"(b) *Whole and Half Blood. Persons taking under this act shall take without distinction between those of the whole and those of the half blood.*"

The only reference to half blood in the 1917 Act is in the introductory clause of Section 9 which reads:

> "Section 9. In default of issue, father and mother, the real and personal estate of such intestate not hereinbefore given to the surviving spouse, if any there be, shall descend to and be distributed among the collateral heirs and kindred of such intestate, without distinction between those of the whole and those of the half blood, according to the following rules and order of succession; namely,—"

"(c) *After-Born Persons—Time of Determining Relationships. Persons begotten before the decedent's death but born thereafter, shall take as if they had been born in his lifetime.*"

This section takes the place of Section 20 of the 1917 Act which reads:

> "Section 20. Descendants and relatives of an intestate, begotten before the death of the intestate and born thereafter, shall in all cases inherit and take in like manner as if they had been born in the lifetime of such intestate."

The language as proposed is considered adequate. No general provision is made to the effect that heirs and next of kin with this exception are determined as of the date of decedent's death. It is well established that real estate descends directly to heirs at the moment of death *(Wolfe v. Lewisburg Trust & Safe Deposit Co.*, 305 Pa. 583), and that the equitable rights of the next of kin in personalty are similarly vested at the moment of death. See *Brothers Est.*, 156 Pa. Super. 292.

"(d) *Source of Ownership. Real estate shall pass under this act without regard to the ancestor or other relation from whom it has come.*"

The comparable provision in the 1917 Act is Section 13 which reads:

> "Section 13. In all cases where, under the provisions of this act, the real estate shall descend to, and the personal estate shall be distributed among, the next of kin of an intestate, the real as well as the personal estate shall pass to and be enjoyed by such next of kin, without regard to the ancestor or other relation from whom such estate may have come,—it being the true intent and meaning of this act that the rule excluding from the inheritance of real estate persons not of the blood of the ancestor or other relation from whom such real estate descended, or by whom it was given or devised to the intestate, be abrogated; and that the heir at common law shall not take, in any case, to the exclusion of other heirs and kindred standing in the same degree of consanguinity with him to the intestate."

"(e) *Quantity of Estate. The real estate of the decedent shall be vested in the person or persons taking it under this act, for such estate as*

the decedent had therein, and such person or persons shall take the personal estate absolutely."

This is almost identical with Section 18 of the 1917 Act, which reads:

> "Section 18. The real estate of such intestate shall be vested in the person or persons entitled thereto, under the provisions of this act, for such estate as the intestate had therein, and such person or persons shall be entitled to the personal estate absolutely."

"(f) *Tenancy in Estate. When real or personal estate or shares therein shall descend to two or more persons, they shall take it as tenants in common, except that if it shall descend to a husband and wife they shall take it as tenants by the entireties.*"

This takes the place of Section 19 of the 1917 Act which reads:

> "Section 19. Wherever real or personal estate shall descend to or be distributed among several persons, whether lineal or collateral heirs or kindred standing in the same degree of consanguinity to the intestate, if there shall be only one of such degree, he shall take the whole of such estate; and, if there shall be more than one, they shall take in equal shares, and, if real estate, shall hold the same as tenants in common."

The exception of property owned by entireties is necessary for clarity. When the whole title is received by a husband and wife, as in the case of parents, they hold by the entirety: *Barati's Est.*, 89 Pitts. 84. The possibility that a question might arise when title goes to three grandparents is prevented by referring to *"real or personal estate or shares therein"*. The two who are husband and wife should take their undivided interest as tenants by the entirety. Cf. *Mauser v. Mauser*, 326 Pa. 257; *Blease v. Anderson*, 241 Pa. 198; *Johnson v. Hart*, 6 W. & S. 319.

"(g) *Alienage. Real and personal estate shall descend without regard to whether the decedent or any person otherwise entitled to take under this act, is, or has been, an alien.*"

Since the Act of Feb. 23, 1791, 68 PS 22, et seq., Pennsylvania has recognized the right of aliens to dispose of and receive Pennsylvania property by will or descent, and no distinction is made between nationals of enemy, or of friendly countries except as they may reside in enemy-occupied territory: *Gregg's Est.*, 266 Pa. 189, cert. den. 252 U.S. 588. Decisions subsequent to the Act of 1791 refusing an alien the right to acquire Pennsylvania property by descent from an alien ancestor *(Rubeck v. Gardner*, 7 W. 455) or to receive a curtesy interest *(Reese v. Waters*, 4 W. & S. 145) are distinguishable or overruled: cf. *Cooke v. Doron*, 215 Pa. 393; *Bradley v. Comber*, 19 D. R. 130 *Ondis v. Banta*, 7 Luz. 390. It seems advisable to include such provision in the Intestate Act and to repeal the earlier Act in so far as it applies to intestate descent.

"(h) *Person Related to Decedent Through Two Lines. A person related to the decedent through two lines of relationship shall take one share only which shall be the larger share.*"

This is based on Section 28 of the Model Probate Code. There is no similar provision in Pennsylvania law. There are no Pennsylvania cases directly in point. In the case of *Morgan v. Reel*, 213 Pa. 81, it was held a grandchild adopted by a grandparent could inherit as a child only, but the case turned on an interpretation of the Adoption Act and therefore not

squarely in point. Therefore it seems advisable to make provision for cases of this kind. Situations where the question might arise include:

1. A and B, brothers, marry C and D, sisters. A and C have a child X, a third brother has a child Y. Suppose a child of B and D dies leaving only first cousins as next of kin. X would be a first cousin both through his father and mother. Y would be a first cousin through one line only, that of his father.

2. A husband and B his wife have children C and D. Upon the death of A, B marries A's father F, and they have two children X and Y who are half brothers of C and D and also their uncles, being half brothers of A. Upon the death of Y his closest kin are C, D, and X who share equally as half brothers. C and D do not take the share of their father A by representation.

Section 3. *Dower and Curtesy.* (a) *Share in Lieu of Dower.* The shares of the estate to which the widow is entitled shall be in lieu and full satisfaction of her dower at common law, so far as relates to real estate of which the husband dies seised; and her share in real estate aliened by the husband in his lifetime, without her joining in the conveyance, shall be the same as her share in real estate of which the husband dies seised. The widow shall receive the same share in an estate in remainder vested in interest in the husband during his lifetime, as in an estate of which he dies seised, although the particular estate shall not terminate before the death of the husband.

(b) *Share in Lieu of Curtesy.* The shares of the estate to which the surviving husband is entitled shall be in lieu and full satisfaction of his curtesy at common law. The surviving husband shall receive the same share in an estate in remainder, vested in interest in the wife during her lifetime, as in an estate of which she dies seised, although the particular estate shall not terminate before the death of the wife.

COMMENT:

The combination of dower and curtesy in one section seems advisable. Subsection (a) closely follows Section 3 of the 1917 Act except that there has been added to the last sentence thereof the words *"as in an estate of which he dies seised"* to conform with the corresponding sentence in subsection (b).

Subsection (b) closely follows Section 4 of the 1917 Act.

Section 4. *Forfeiture of Spouse's Share.* (a) *Husband's Share.* No husband who, for one year or upwards previous to the death of his wife, shall have wilfully neglected or refused to provide for her, or who for that period or upwards shall have wilfully and maliciously deserted her, shall have any title or interest under this act in her real or personal estate.

(b) *Wife's Share.* No wife who, for one year or upwards previous to the death of her husband, shall have wilfully and maliciously deserted him, shall have any title or interest under this act in his real or personal estate.

(c) *Surviving Spouse as Witness.* The surviving husband or wife shall be a competent witness as to all matters pertinent to the issue of desertion or non-support under this section.

COMMENT:

Subsection (a), as recommended, with a slight change in the style of the language is Section 5 of the 1917 Act; Subsection (b) is Section 6; and Subsection (c) is taken from the Act of April 24, 1931, P. L. 46.

The Pennsylvania Bar Association Committee's report of June 1942 included the following:

> "(a) *Denial of Right to a Delinquent Spouse.* The right of a spouse to take against a will is subject to the provisions of Sections 5 and 6 of the Intestate Act. (There is also a proviso in favor of married women which permits them, without any power of election in the husband, to dispose of property held in trust for their sole and separate use. 20 PS 261). These sections deny the right to a husband who refuses to support the wife or maliciously deserts, and to a wife who maliciously deserts, for one year or upwards previous to the death of the spouse. Separation by consent does not bar the right, although the Supreme Court has held otherwise where the separation has been followed by adultery. (Lodge's Est., 287 Pa. 184 (1926); Bowman's Est., 301 Pa. 337 (1930)). Perhaps the Supreme Court will some day construe the statute to deny the right of a wife whom the husband had left because of her adultery or vice versa. Yet, it would seem more advantageous that if this be desirable the statute should so provide and also that the provision be correlated to existing divorce laws.
>
> "*Recommendation No. 7.* The right of election to take against the will should be denied to any spouse who at the time of death is separated from the decedent if the decedent at that time had adequate grounds for divorce."

The recommendation of the Bar Association Committee would probably extend also to shares in the intestate estate.

Serious consideration was given to the Committee's recommendation, but it was concluded that while the procedure recommended is logically sound, the net result would be that the Orphans' Court would be trying divorce cases.

Sections 5 and 6 of the 1917 Act have a wealth of judicial decisions interpreting them, and these decisions will apply with equal force to Section 4 as recommended. The large majority of cases where the surviving spouse should not share are taken care of by subsections (a) and (b) of this section. It does not seem advisable to enlarge the opportunity to bring family differences into court after the death of one of the spouses.

The only other kind of forfeiture of an intestate share is forfeiture for "wilful and unlawful" killing as provided in the "Slayer" Act of 1941, P. L. 816. It seems inadvisible to attempt to incorporate the provisions of that Act in so far as they relate to intestate estates in this Act.

Subsection (c) is taken from Section 1 of the Act of April 24, 1931, P. L. 46, which reads:

> "Section 1. Be it enacted, &c., That in any proceeding where the matter in issue shall be the right of a surviving husband or wife to share in the estate of the deceased spouse, which right is disputed because of the allegation that such surviving spouse had forfeited such right by reason of desertion or non-support of the deceased spouse for one whole year prior to the death of the deceased spouse, the surviving husband or wife shall be a competent witness as to all matters pertinent to such issue, whether the same occurred before or after the death of the deceased spouse, and whether the deceased spouse died testate or intestate."

The abbreviation of the language seems justified as it is so closely related to subsections (a) and (b) immediately preceding.

Section 5. *Illegitimates.* (a) *Child of Mother.* For purposes of descent by, from and through an illegitimate, he shall be considered the child of his mother but not of his father.

(b) *Marriage of Parents.* When the parents of a person born illegitimate shall have married each other, such person shall be legitimated for purposes of descent by, from and through him as if he had been born during the wedlock of his parents.

Section 6. *Adopted Persons.* For purposes of descent by, from and through an adopted person he shall be considered the issue of his adopting parent or parents and not the issue of his natural parents: Provided, that if a natural parent shall have married the adopting parent, the adopted person for purposes of descent by, from and through him shall also be considered the issue of such natural parent.

COMMENT:

Sections 5 and 6 have been rewritten to provide simpler language than that contained in Sections 14, 15 and 16 of the 1917 Act. In so far as was possible, the language of each section has been made to conform with the language of the other section so that court interpretation of either would by analogy apply to the other.

SPECIFIC COMMENTS:

Section 5. This section takes the place of sections 14 and 15 of the 1917 Act. The use of "born illegitimate" in subsection (b) is suggested by similar words in *Restatement, Conflict of Laws,* Section 139 and Restatement, Property, Section 286, and is in accordance with the thought that the child is considered as never having been illegitimate.

Section 6. This section is intended to retain the rule of *Cave's Est.,* 326 Pa. 358, and *Reamer's Est.,* 331 Pa. 117, and also the proviso of 1941, P. L. 424. The language of the proviso has been altered to make it clear that it is only the natural parent who marries the adopting parent and not

the other natural parent who is included. The word "retain" has been replaced by *"shall also be considered"* to take care of the situation where marriage takes place after the adoption.

Section 7. *Advancements.* (a) *In General.* If any person, other than the surviving spouse taking real or personal estate from the decedent, shall have received any estate by settlement or advancement of the decedent, in either real or personal estate, the value of such settlement or advancement shall be charged against the share of the person who shall have received it, so that the total share received by him, including the value of such settlement or advancement, shall not exceed the share received by each of the other persons who take equally from the decedent.

(b) *Valuation.* The settlement or advancement shall be considered as of its value when the advancee came into possession or enjoyment of it or at the death of the decedent, whichever occurred first.

COMMENTS:

Subsection (a) closely follows Section 22 of the 1917 Act. Verbal changes have been made to conform with the style of the other sections of the proposed act.

Subsection (b) is new. It is in accordance with Section 29 of the Model Probate Code and with *Gore Est.*, 7 Beav. L. J. 143 (1945). There is no known appellate court case to the same effect as *Gore Estate.*

Section 8. *Spouse's Allowance—Procedure.* (a) *Right of Selection.* Subject to the rights of creditors and to existing liens, the surviving spouse, his heirs, devisees or legal representatives shall have the right to claim all or part of his ten thousand dollar allowance out of real estate of the decedent.

(b) *From Real Estate.* If the allowance is to be set apart in whole or in part out of real estate, the appraisement of the real estate shall be made by two appraisers who shall be appointed by the orphans' court. The orphans' court of the county where letters testamentary or of administration have been granted, or should no letters have been granted then the county within which was the family or principal residence of the decedent, shall have jurisdiction concerning the allowance, whether the real estate is situate in that county or in any other county of the Commonwealth. If the decedent was a non-resident of the Commonwealth then the appraisers shall be appointed by the orphans' court of any county wherein any real estate of the decedent shall lie, and that court shall thereupon have jurisdiction concerning the allowance with respect to all of the real estate of the decedent within the Commonwealth. When real estate is located outside

of the county of original jurisdiction, the orphans' court of the county of original jurisdiction may, in its discretion, direct that an application for the appointment of appraisers shall be made to the orphans' court of the county in which the real estate is located to fix the value of such real estate. The appraisers so appointed shall fix a value for the real estate as of the date the claim is presented in court and shall receive such compensation as shall be allowed by the court appointing them. Exceptions to appraisements wherever made shall be filed with the court of original jurisdiction which may in its discretion refer the exceptions to the orphans' court of the county in which the real estate is located. Upon compliance with such requirements of notice as the court shall prescribe, the court of original jurisdiction may confirm such appraisement and set apart such real estate to the surviving spouse.

(c) *Real Estate Valued at More Than the Amount Claimed.* Whenever the real estate of the decedent cannot be divided so as to set apart the amount claimed in value without prejudice to or spoiling the whole or any parcel of it, and the appraisers shall value such real estate or parcel thereof at any sum exceeding the amount claimed, it shall be lawful for the orphans' court of original jurisdiction to confirm the appraisement, and to set apart such real estate or parcel thereof for the use of the surviving spouse: conditioned, however, that the surviving spouse shall pay the amount of the valuation in excess of the amount claimed without interest within six months from the date of confirmation of the appraisement. If the surviving spouse shall refuse to take the real estate or parcel thereof at the appraisement, or shall fail to make payment as provided above, the court, on application of any person interested, shall direct the executor, or administrator, or a trustee appointed by the court, to sell the same, and the procedure in such case shall be the same as is provided by law in cases of sales of real estate for the payment of debts of a decedent.

(d) *Payment of Surplus.* The real estate, if taken by the surviving spouse as aforesaid, shall vest in him, upon the payment by him of the surplus over and above so much of the allowance as shall be claimed out of the real estate, to the parties entitled thereto, or to the personal representatives of the decedent as the court in its discretion shall direct. When the real estate is sold so much of the allowance as shall be claimed out of such real estate shall be paid out of the purchase money to the surviving spouse, and the balance after payment of costs and ex-

penses shall be distributed to the parties entitled thereto, or to the personal representatives of the decedent as the court in its discretion shall direct.

(e) *Income.* When the spouse's allowance does not exhaust the entire real and personal estate the income therefrom shall be equitably prorated between the surviving spouse and the others taking the estate.

(f) *Recording and Registering Decrees.* When a decree shall be made confirming an appraisement of real estate, and setting it apart to the surviving spouse, a certified copy of the decree shall be recorded in the deed book in the office of the recorder of deeds of each county where the real estate shall lie, shall be indexed by the recorder in the grantor's index under the name of the decedent, and in the grantee's index under the name of the surviving spouse, and shall be registered in the survey bureau or with the proper authorities empowered to keep a register of real estate in the county.

(g) *Other Remedies.* The surviving spouse may also collect the allowance out of real and personal estate, together with income thereon in the manner provided by law for the collection of legacies.

(h) *Costs and Expenses.* All costs, appraisers' fees, and expenses of recording and registering incurred in claiming the allowance shall be part of the general administration expenses of the estate.

GENERAL COMMENT:

This section changes the 1917 Act by restricting the right of selection of the allowance to real estate alone. When the allowance or a part thereof is requested from personal estate, this becomes a mere matter of distribution—the same as any share of the estate. It is believed no special procedure should be provided to give a right of selection in personal estate to the surviving spouse. However, in the case of real estate it becomes important to know the exact title of the spouse, thus the procedure is provided for establishing the spouse's rights in real estate. The spouse's right can be enforced by choosing particular real estate or forcing a sale thereof, as in the case of a legacy, without resorting to the complicated requirements of the Partition Act.

Also considered was whether there should be included here, or as a separate section of the Act (and in that case applying to all intestate shares), a provision that a will offered for probate would be invalid as against a bona fide conveyance or mortgage of real estate. It was concluded that this might involve the constitutional difficulty of having two subjects in one act. It was believed that any remedial procedure of this nature should be in the Register of Wills Act, possibly by shortening the period in the Register of Wills Act Section 16(b).

"(a) *Right of Selection. Subject to the rights of creditors and to existing liens, the surviving spouse, his heirs, devisees or legal representatives shall have the right to claim all or part of his ten thousand dollar allowance out of real estate of the decedent.*"

"*Subject to the rights of creditors and to existing liens.*" Inclusion of these words is consistent with the introductory clause of Section 1. It also appears in Section 2(c) of the 1917 Act.

No reference is made to widow's exemption as is done in the 1917 Act, Section 2(a). This is consistent with the elimination of reference to it in Section 1(a) hereof.

"(b) *From Real Estate. If the allowance is to be set apart in whole or in part out of real estate, the appraisement of the real estate shall be made by two appraisers who shall be appointed by the orphans' court. The orphans' court of the county where letters testamentary or of administration have been granted, or should no letters have been granted then the county within which was the family or principal residence of the decedent, shall have jurisdiction concerning the allowance, whether the real estate is situate in that county or in any other county of the Commonwealth. If the decedent was a non-resident of the Commonwealth then the appraisers shall be appointed by the orphans' court of any county wherein any real estate of the decedent shall lie, and that court shall thereupon have jurisdiction concerning the allowance with respect to all of the real estate of the decedent within the Commonwealth. When real estate is located outside of the county of original jurisdiction, the orphans' court of the county of original jurisdiction may, in its discretion, direct that an application for appointment of appraisers shall be made to the orphans' court of the county in which the real estate is located to fix the value of such real estate. The appraisers so appointed shall fix a value for the real estate as of the date the claim is presented in court and shall receive such compensation as shall be allowed by the court appointing them. Exceptions to appraisements wherever made shall be filed with the court of original jurisdiction which may, in its discretion, refer the exceptions to the orphans' court of the county in which the real estate is located. Upon compliance with such requirements of notice as the court shall prescribe, the court of original jurisdiction may confirm such appraisement and set apart such real estate to the surviving spouse.*"

This subsection makes several important changes in the procedure necessary under the 1917 Act. All jurisdiction is retained by the court of the county where letters were or could be granted—and if the decedent was a non-resident, then in a county where any of the real estate is located. This simplifies the procedure outlined in Section 2(g) of the 1917 Act and is in accordance with the recommendation of the Bar Association Committee's report of June 1941. See Bar Ass'n Quarterly, June 1941, p. 310. Also in accordance with the Bar Association Committee's recommendation (p. 322) it is made definite that the valuation is determined as of the date the claim is presented in court. It is to be noted that when the petition for appraisement is directed to another court, the other court fixes the valuation only and jurisdiction is retained by the original county.

"*Upon compliance with such requirements of notice as the court shall prescribe, the court of original jurisdiction may confirm such appraisement and set apart such real estate to the surviving spouse.*" This language has been used in place of Intestate Act of 1917, Section 2(c) which reads:

"(c) Upon due proof of compliance with such requirements as to notice, by advertisement or otherwise, as may be prescribed by the orphans' court by general rule or otherwise, such court may confirm such appraisement, and set apart such personal or real estate, or both, to the surviving spouse, subject to claims of creditors of the decedent and to the lien of debts of the decedent."

It is believed that this change of language together with the Supreme Court Rules and local rules of court will make it possible to dispense with excessive advertising costs in numerous instances.

The Pennsylvania Supreme Court Orphans' Court rules provide:

Section 12, Rule 2(b)

"(b) The manner of appraising the property, of filing and confirming the appraisal, and of advertising or giving notice thereof shall be prescribed by local rules."

"(c) *Real Estate valued at More Than the Amount Claimed. When the real estate of the decedent cannot be divided so as to set apart the amount claimed in value without prejudice to or spoiling the whole or any parcel of it, and the appraisers shall value such real estate or parcel thereof at any sum exceeding the amount claimed, it shall be lawful for the orphans' court of original jurisdiction to confirm the appraisement, and to set apart such real estate or parcel thereof for the use of the surviving spouse: conditioned, however, that the surviving spouse shall pay the amount of the valuation in excess of the amount claimed without interest within six months from the date of confirmation of the appraisement. If the surviving spouse shall refuse to take the real estate or parcel thereof at the appraisement, or shall fail to make payment as provided above, the court, on application of any person interested, shall direct the executor or administrator, or a trustee appointed by the court, to sell the same, and the procedure in such case shall be the same as is provided by law in cases of sales of real estate for the payment of debts of a decedent.*"

This subsection, with changes to conform with the other subsections, is based upon Section 2(d) of the 1917 Act. "*without interest*" was added to eliminate any doubt. "*or a trustee appointed by the court*" covers the situation where there is no executor or administrator. In this respect it conforms with Section 23(a) of the Partition Act of 1917.

"(d) *Payment of Surplus. The real estate, if taken by the surviving spouse as aforesaid, shall vest in him, upon the payment by him of the surplus over and above so much of the allowance as shall be claimed out of the real estate, to the parties entitled thereto, or to the personal representatives of the decedent as the court in its discretion shall direct. When the real estate valued at more than the amount claimed is sold, so much of the allowance as shall be claimed out of such real estate shall be paid out of the purchase money to the surviving spouse, and the balance after payment of costs and expenses shall be distributed to the parties entitled thereto, or to the personal representatives of the decedent as the court in its discretion shall direct.*"

The first sentence is similar to the first sentence of Section 2(e) of the 1917 Act which reads:

"(e) The real estate, if taken by the surviving spouse as aforesaid, shall vest in him or her and his or her heirs or assigns, upon his

or her paying the surplus over and above the sum of five thousand dollars, or such part thereof as may be claimed out of the real estate, to the parties entitled thereto."

The change in language is to conform with the style of the proposed Act, and the addition of the words *"or to the personal representatives of the decedent as the court in its discretion shall direct"* is to suggest the advisability or necessity of making distribution through the personal representative for payment of debts or administration expenses.

The second sentence is similar to the second sentence of section 2(e) of the 1917 Act. The words *"or to the personal representatives of the decedent as the court in its discretion shall direct,"* have been added to conform with the first sentence.

"(e) *Income. When the spouse's allowance does not exhaust the entire real and personal estate, the income therefrom shall be equitably prorated between the surviving spouse and the others taking the estate.*"

This section takes the place of Section 2(f) of the 1917 Act which reads:

"(f) In all cases where the appraisement of property, real or personal, or both, is confirmed, and the property set apart to the surviving spouse under the provisions of this section, said surviving spouse shall be entitled to receive, for his or her own use, the net rents, income, interest, and dividends thereof from the date of the death of such intestate. Where the property set apart shall consist of real estate appraised at a sum in excess of five thousand dollars, or such part thereof as may be claimed out of the real estate, and the surviving spouse shall fail to pay the excess over the amount so claimed as provided in clause (d) of this section, and the property shall thereupon be sold, there shall be deducted from the sum to be paid to said surviving spouse out of the proceeds of such sale a proportionate part of the rents and income of such real estate received by such surviving spouse."

Any attempt to define more definitely what is to be received can only result in confusion. Each estate will be a separate problem and the equitable method will appear clearly in most instances.

"(f) *Recording and Registering Decrees. When a decree shall be made confirming an appraisement of real estate, and setting it apart for the surviving spouse, a certified copy of the decree shall be recorded in the deed book in the office of the recorder of deeds of each county where the real estate shall lie, shall be indexed by the recorder in the grantor's index under the name of the decedent, and in the grantee's index under the name of the surviving spouse, and shall be registered in the survey bureau or with the proper authorities empowered to keep a register of real estate in the county.*"

This is similar to Section 2(h) of the 1917 Act except that the following is also included at the end of 2(h) in the 1917 Act:

"And the charges for recording and registering shall be the same as are provided by law for similar services, and shall be paid by said surviving spouse."

It is considered unnecessary to provide what the charges for recording and registering shall be.

"(g) *Other Remedies. The surviving spouse may also collect the allowance out of real and personal estate, together with income thereon, in the manner provided by law for the collection of legacies.*"

This is a new subsection intended to make the spouse's allowance a lien upon real estate even though not claimed in kind, and also to make it clear that all usual remedies are available to the spouse in the collection of the allowance out of personal property.

"(h) *Costs and Expenses. All costs, appraisers' fees, and expenses of recording and registering incurred in claiming the spouse's allowance shall be part of the general administration expenses of the estate.*"

The placing of costs on the estate seems proper as it is a general administration expense and the burden should be borne by all interested parties and not by the surviving spouse alone. Section 2(h) of the 1917 Act places charges for recording and registering upon the surviving spouse.

Section 9. *Procedure to Establish Title to Real Estate When Spouse Claims Entire Estate.* The surviving spouse, his heirs, devisees, or legal representatives claiming the entire estate under this act may, after the expiration of one year from the death of the decedent, present a petition to establish title to real estate in the orphans' court of the county where letters testamentary or of administration have been granted, or should no letters have been granted then of the county within which was the family or principal residence of the decedent, setting forth that the decedent died leaving no known heirs, other than the surviving spouse, entitled to take under the provisions of this act and seised of real estate which by virtue of this act has vested in the surviving spouse. If the decedent was a non-resident of the Commonwealth, the petition may be presented in the orphans' court of any county wherein any real estate of the decedent shall lie and such court shall thereupon have jurisdiction of proceedings under this section with respect to all of the real estate of the decedent within the Commonwealth. The court, being satisfied concerning the facts set forth in the petition, aided if necessary by the report of a master, may enter its decree nisi adjudging that the title to such real estate is in the surviving spouse, or his heirs or devisees. Notice of the decree nisi shall be published for such length of time and in such manner as the court shall direct. If within six months from the last publication of such notice exceptions shall be filed with the court alleging the existence of other heirs entitled to interests in the real estate, the court after hearing thereon and upon evidence satisfactory to it, aided if necessary by the report of a master, shall vacate the decree nisi, or confirm it absolutely. If no exceptions are filed, the decree shall be confirmed absolutely. A certified copy of the decree shall be recorded in the deed book in the office of the recorder of deeds of

each county where real estate of the decedent shall lie, shall be indexed by the recorder in the grantor's index under the name of the decedent and in the grantee's index under the name of the surviving spouse, and shall be registered in the survey bureau or with the proper authorities employed to keep a register of real estate in the county.

COMMENT:

This section takes the place of Section 17(b) of the 1917 Act. Here again no provision is made for the fixing of title to personal property. That is taken care of automatically by the adjudication or distribution decree.

The procedure in so far as the court of jurisdiction is concerned is similar to that in Section 8(b). There is no reason why the petition should be filed in the county where real estate is located. The problem of locating possible heirs is peculiarly for the court of administration.

It was concluded that the one year delay in Section 17(b) of the 1917 Act should be continued, because the decree is confirmed absolutely, in the absence of fraud, as against heirs who shall appear later. There did not seem, however, to be any reason for requiring that there be "final settlement of the administration accounts" as is provided in Section 17(b). These might be long delayed without fault of the surviving spouse.

Section 10. *Property Distributable to the Commonwealth.* All of the real and personal estate of the decedent, to which the Commonwealth shall be entitled under this Act, shall be sold by the executor or administrator after notice to the Attorney General. The proceeds of sale shall be accounted for by the executor or administrator to the court having jurisdiction of the estate and the net amount remaining for distribution shall be paid by him through the Department of Revenue into the State Treasury as in the case of unclaimed funds in the hands of fiduciaries. Sales of real estate under this section shall be made in the manner and form prescribed for sales of real estate by the act approved the seventh day of June, one thousand nine hundred seventeen (Pamphlet Laws 388) known as the Revised Price Act.

COMMENT:

This is Section 24 of the 1917 Act with amendments suggested by Ralph B. Umsted, Esq., Deputy Attorney General in charge of escheats.

Section 11. *Limitations of Claims.* (a) *Shares Not Claimed Within Seven Years.* Any person entitled under this Act to a share of the estate of the decedent must make legal claim to his share of the personal estate within seven years of the death of the decedent or be debarred from claiming such share thereof as shall have been distributed pursuant to adjudication or decree: Provided, that if any such person shall be a minor at the death

of the decedent, the seven-year period shall commence to run upon his attaining majority.

(b) *Pleading Limitation.* The bar of this section may be pleaded by any person interested in the estate including the Commonwealth, but it may not be pleaded by a personal representative of the decedent to enable him to retain any part of the decedent's estate to which he is not legally entitled.

COMMENT:

This is similar to Section 21 of the 1917 Act as amended by the Act of June 4, 1943, P. L. 872, which reads:

> "Section 21. All relatives and persons concerned in the estate of any intestate, which shall not lay legal claim to their respective shares of the personal estate within seven years of the decease of the intestate, shall be debarred from the same forever: Provided, That if any such relative or person shall, at the time of the decease of the intestate, be within the age of twenty-one years, he or she shall be entitled to receive and recover the same if he or she shall lay legal claim thereto within seven years after coming to full age.
>
> "The bar of this section may be pleaded by any relative or person concerned, whose right in the estate will be defeated or diminished by the allowance of such claim and by the Commonwealth in furtherance of its right of escheat, but it may not be pleaded by the personal representatives of an intestate in answer to a petition for distribution in order to enable them to retain an estate or portion of an estate to which they are not legally entitled. The provisions of this amendment shall be retroactive: Provided, however, that any relatives or persons concerned whose claims would be sooner barred by this amendment may lay legal claim to their respective shares of the personal estate within six months after the passage of this amendment; and further, that this amendment shall not have the effect of removing the bar of this section as to any legal claim which may have been barred prior to the passage of this amendment."

The change in clause (a) limiting the application of the section to cases where the personal estate "*shall have been distributed pursuant to adjudication or decree*" was considered necessary to take care of the situation where it is difficult to liquidate assets of the estate, thus causing the administration period to extend beyond seven years. It was thought inadvisable, where the estate has not been distributed pursuant to order of court, to bar next of kin who in reliance upon the administrator or the court have not made "legal claim". The words "*adjudication or decree*" are used to cover the situation in counties where there is or is not a separate Orphans' Court. See Pa. O. C. Rules, Sec. 6, Rules 9, 10, and 11. The proviso in the 1943 amendment is omitted as the six-month period has elapsed.

Consideration was given to whether there could be a general provision providing that the share of all heirs not appearing could be barred upon failure to appear within two years. However, any general limitation less than 21 years must be confined to personal property because a satisfactory reason cannot be given "why an heir should have twenty-one years allowed to him before he is barred of his right, as against a stranger who takes

adversary possession, and yet should be cut off, as against a co-heir, if he makes no claim within seven years.": *Blackmore v. Gregg*, 2 W. & S. 182, 187. See also *Vogest's Est.*, 31 D. & C. 169.

Section 12. *Personal Estate of Non-Resident.* Nothing contained in this act with respect to a distribution of personal estate shall extend to the estate of a decedent whose domicile at his death is out of the Commonwealth.

COMMENT:

This is based on Section 25 of the 1917 Act, which in turn was Section 20 of the Act of 1833.

Section 13. *Short Title.* This act shall be known and may be cited as the Intestate Act of 1947.

COMMENT:

This is the same as Section 26 of the Act of 1917.

Section 14. *Effective Date.* This act shall take effect on the first day of January, nineteen hundred and forty-eight, and shall apply to the real and personal estates of all persons dying intestate on or after that day. The existing laws shall remain in full force and effect for the real and personal estates of all persons dying before that day.

COMMENT:

This is almost identical with the language of Section 27 of the 1917 Act which reads:

> "Section 27. This act shall take effect on the thirty-first day of December, nineteen hundred and seventeen, and shall apply to the estates, real and personal, of all persons dying intestate on or after said day. As to the estates, real and personal, of all persons dying before that day, the existing laws shall remain in full force and effect."

See also Section 15 hereof which preserves existing legislation until January 1, 1948.

It was thought that there would be less confusion if the exact calendar years mark the break between the acts. Possibly the December 31st rather than January 1st was used in the 1917 Acts to conform with their titles, but that seems unnecessary.

Section 15. *Repealer.* This act is intended as an entire and complete system regulating the descent of the real and personal estates of persons dying intestate on or after the first day of January, nineteen hundred and forty-eight. The following acts and parts of acts are hereby repealed as respectively indicated,

but so far only as relates to the real and personal estates of persons dying intestate on or after the first day of January, nineteen hundred and forty-eight.

(Here will follow a list of the acts to be repealed or partially repealed. These will include:

1. The 1917 Act and its amendments.
2. Partial repeal of the Act of February 23, 1791, 3 Sm. L. 4—Aliens.
3. Partial repeal of the Act of 1931, P. L. 46—Spouse as a witness.
4. Repeal of Act of 1919, P. L. 886, 20 PS 43—which is no longer required.)