REPORT

OF THE

JOINT STATE GOVERNMENT COMMISSION

OF THE

GENERAL ASSEMBLY OF PENNSYLVANIA

Relating to the Following DECEDENTS' ESTATES LAWS:

Intestate Act of 1947

Wills Act of 1947

Estates Act of 1947

Principal and Income Act of 1947

Pursuant to Senate Resolution Number 46 of the General Assembly of 1945

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1947

JOINT STATE GOVERNMENT COMMISSION
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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."

1947-1949 Biennium

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FOREWORD

Pursuant to Senate Resolution Serial No. 46 of the regular session of the Legislature of 1945, the Joint State Government Commission of the General Assembly was directed to "study, revise and prepare for reenactment 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."

The Commission appointed a special committee on Decedents' Estates Laws on July 25, 1945, with the Hon. Thomas H. Lee serving as Chairman and the Hon. John M. Walker serving as Vice Chairman.

This committee in turn appointed an Advisory Committee composed of outstanding members of the Bar, both judges and practitioners, who were recognized experts in the field of Decedents' Estates Laws, with Robert Brigham, Esq., as its Chairman. The Commission appointed M. Paul Smith, Esq., Research Consultant and Philip A. Bregy, Esq., Associate Research Consultant.

On this Advisory Committee of thirty-two members, seven are orphans' court judges of counties having separate orphans' courts; two are judges from counties having no separate orphans' courts; two are leading executives of trust companies and the remaining twenty-one are practicing lawyers who are experienced in the law of decedents' estates and trusts.

Among the acts drafted by the Advisory Committee and approved by the Joint State Government Commission for submission at the 1947 session of the Legislature were an Intestate Act, a Wills Act, an Estates Act, and a Principal and Income Act.

In addition to recommending certain desirable changes in the substantive law, the Committee has simplified the structure of the acts. However, in all cases where it was desirable to preserve the authority of decisions under prior acts, the exact language of such prior acts has been retained.

There are submitted herewith the Intestate Act of 1947, the Wills Act of 1947, the Estates Act of 1947, and the Principal and Income Act of 1947, together with explanatory comments on each section. Such changes as have been recommended are fully explained in the comments.

IRA T. FISS, *Chairman,*
Joint State Government Commission.

Joint State Government Commission of the General Assembly.

1945-1947 Biennium

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HISTORY OF INTESTATE ACT OF 1947

HOUSE BILL NO. 297

Introduced by HONORABLE HOMER S. BROWN and HONORABLE THOMAS H. LEE

In the House

Referred to the Committee on Judiciary, February 11.
Reported as committed, March 4.
Passed first reading, March 5.
Passed second reading, March 11.
Passed third reading and final passage, March 17 (202-0).
House concurred in Senate Amendments,† April 9 (201-0).

In the Senate

Referred to the Committee on Judiciary General, March 17.
Reported as committed, March 26.
Passed first reading, March 26.
Passed second reading with amendments,† April 7.
Passed third reading and final passage, April 8 (48-0).

Approved by the Governor, April 24, 1947.
Act No. 37

† Amendments were made only to conform to original text.

INTESTATE ACT OF 1947

No. 37

AN ACT

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

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The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

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 hereinafter provided.

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.

Section 1 conforms with the prior language except where clarity dictates otherwise. The words "subject to payment" are 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" have been omitted as tending to possible restriction of the "debts and charges".

"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 the possibility that reference to property "sold" and "marriage settlement" might 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 denotes the transfer of ownership.

SECTION 2. *Share of Surviving Spouse.* The surviving spouse shall be entitled to the following share or shares:

COMMENT—Section 2 supplants sections 1, 2, and 17 of the 1917 act. It is believed that the share of the spouse is set forth clearly, briefly and logically, progressing from a share of one-third in clause (1) to the entire estate in clause (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 $5,000 allowance is increased to $10,000 because of the greatly decreased value of money.

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 each of them only a 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. The situation is now covered by section 8(b) of the Wills Act of 1947.

4. The procedural provisions applicable to the $10,000 allowance and to the spouse's claim of the entire estate have been placed separately in sections 10 and 11 to avoid confusion in defining the extent of the shares received by each beneficiary.

(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

COMMENT—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 is necessary to conform to the general method of presentation, the language here used is identical with that of section 1(b) of the Intestate Act of 1917. The word "decedent" has been substituted for "intestate" and "issue" for "descendants". These

designations are simple and accurate and have been used throughout the act. The 1917 act was not always consistent in this respect; compare 1(b) "descendants" with 2(a) "issue". "Decedent" is considered more accurate than "intestate" 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

COMMENT—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."

(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

COMMENT—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 has been increased from five to ten thousand dollars and the proviso has been 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, child of a brother or sister, grandparent, uncle or aunt.

COMMENT—The comparable provision of the 1917 act 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, in which 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.

SECTION 3. *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:

COMMENT—Section 3 is designed to take the place of sections 7, 8, 9, 10, 11, 12, and 19 of the act of 1917.

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

COMMENT—The manner in which persons taking in unequal degrees shall share in the estate is covered by section 4(1).

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

COMMENT—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."

Parents will receive their shares as tenants by the entireties under section 4(6).

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

COMMENT—This takes the place of section 9 of the 1917 act. Issue of deceased brothers and sisters are recognized without limitation. Thus, great grandnephews share in the estate prior to grandparents. This will seldom be applied.

(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.

COMMENT—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 (1922), as "vague and indefinite; it fails either to say or suggest what possible 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 attempted to answer these questions but it does not cover all situations.

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.

(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.

COMMENT—This replaces sections 10 and 11 of the 1917 act.

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

COMMENT—The rights of the Commonwealth as a participant in an intestate estate are accelerated at the expense of persons more remotely related than first cousins, but not prior to indefinite issue of deceased brothers and sisters. A decedent who does not provide by his will for relations more remote than first cousins cannot be supposed to have much concern for them, and it is desired to avoid tedious and expensive searches for distant relations not expressly favored by the testator.

"in default of all persons hereinbefore described" is suggested by the beginning of sections 10 and 24 of the 1917 act.

Section 24 of the 1917 act as amended sets forth procedural matters with respect to estates escheatable to the Commonwealth. These procedural matters are now in section 12.

SECTION 4. *Rules of Descent.* The provisions of this act shall be applied to both real and personal estate in accordance with the following rules:

COMMENT—The plan of combining the rules of descent in a separate section is new. The 1917 act includes rules of descent in separate sections and in some instances as parts of other sections. Section 4 now presents these rules in a convenient form.

(1) *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.

COMMENT—This appears as the first rule of descent 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 the same degree of consanguinity). Much of the cumbersome language of the places referred to is now avoided by the provisions of section 3 together with this clause (1) of section 4.

Definition of the words "by representation" is not needed because they are a term of art well known to lawyers and about which there can be no dispute except as to the top level at which the stirpital distribution starts. See 2 Blackstone 217. The definition given here covers that question.

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

COMMENT—This replaces the phrase "without distinction between those of the whole and those of the half blood" in section 9 of the 1917 act dealing with descent to next of kin in default of issue and parents.

(3) *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.

COMMENT—This clause 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."

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 because 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.

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

COMMENT—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."

(5) *Quantity of Estate.* Any person taking real or personal estate under this act shall take such interest as the decedent had therein.

COMMENT—This replaces 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."

(6) *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.

COMMENT—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." Cf. Act of 1705, 1 Sm. L. 31, Section 2, 68 PS 102.

The exception of property owned by entireties is necessary for clarity. When the whole title is received by husband and wife, as in the case of parents, they hold by the entireties: *Barati's Est.,* 89 Pitts. 84. The possibility that a question might arise when property goes to three grandparents is prevented by referring to "shares therein". The two who are husband and wife should take their undivided interest as tenants by the entireties.

(7) *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.

COMMENT—Since the Act of February 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. This clause (7) takes the place of the Act of 1791 which is repealed in section 16(1) insofar as it relates to inheritance.

(8) *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.

COMMENT—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 *Morgan* v. *Reel*, 213 Pa. 81, it was held that 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 is not squarely in point. Therefore it seemed advisable to make provision for cases of this kind, although they are rare. An illustration is:

A and B, brothers, marry C and D, sisters. A and C have a child X, and 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 through both his father and his mother. Y would be a first cousin through one line only, that of his father.

SECTION 5. *Spouse's Rights.*

(a) *Widow.* 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 a future estate owned by the husband as in an estate of which he dies seised, although the particular estate shall not terminate before the death of the husband.

(b) *Surviving Husband.* 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 a future estate owned by the wife as in an estate of which she dies seised, although the particular estate shall not terminate before the death of the wife.

COMMENT—Provisions concerning dower and curtesy are combined in one section. Subsection (a) follows section 3 of the 1917 act except that there has been added to the last sentence the words "as in an estate of which he dies seised" to conform with the corresponding sentence in subsection (b). Subsection (b) follows section 4 of the 1917 act. In both subsections the words "share in a future estate owned by" in the last sentence have been substituted for "share in an estate in remainder vested in interest in" so as to include reversions and contingent interests. See 42 Dick. L. R. 96.

SECTION 6. *Forfeiture.*

(a) *Husband's Share.* A 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 no title or interest under this act in her real or her personal estate.

COMMENT—This subsection, with slight changes in language, is section 5 of the 1917 act.

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

COMMENT—This subsection, with slight changes in language, is section 6 of the 1917 act.

(c) *Slayer's Share.* Any person who participates either as a principal or as an accessory before the fact in the wilful and unlawful killing of any person shall not in any way ac-

quire property or receive any benefits as the result of such killing, but such property or benefits shall be distributed as provided by law.

COMMENT—This subsection overlaps some of the provisions of the "Slayer" Act of 1941, P. L. 816. It is not intended to supplant the provisions of the Slayer Act, but is included here for completeness and to avoid any suggestion of partial repeal of the Slayer Act.

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

COMMENT—This subsection 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."

SECTION 7. *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, he shall be legitimated for purposes of descent by, from and through him as if he had been born during the wedlock of his parents.

COMMENT—Section 7 on illegitimates and section 8 on adopted persons have been rewritten to provide simpler lan-

guage than that contained in sections 14, 15, and 16 of the 1917 Act. So far as possible, the language of each section has been made to conform with the language of the other section so that court interpretation of either by analogy will apply to the other.

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.

SECTION 8. *Adopted Person.* 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—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 the Act of 1941, P. L. 424. It is only the natural parent who marries the adopting parent and not the other natural parent whose status remains unchanged after adoption. "Shall have married" covers any marriage whether before or after the adoption.

SECTION 9. *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.

COMMENT—This subsection closely follows section 22 of the 1917 act with some changes in style.

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

COMMENT—This subsection 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 10. *Spouse's Allowance—Procedure.*

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

COMMENT—No special procedure is required to give a right of selection in personal estate to the surviving spouse. That is merely a matter of distribution. However, in the case of real estate it becomes important to know the exact title of the spouse, and thus 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 by forcing a sale thereof, as in the case of a legacy, without resorting to the complicated requirements of the Partition Act.

The inclusion of "subject to the rights of creditors and to existing liens" is consistent with section 1. It also appears in section 2(c) of the 1917 act.

No reference is made to the widow's exemption as is done in section 2(a) of the 1917 act. This is consistent with the elimination of reference to it in section 2.

(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 of 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 the value of 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.

COMMENT—This subsection takes the place of subsections (b), (c), and (g) of section 2 of the 1917 act. The principal change is in the simplification of procedure where the real estate is located in another county.

(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: con-

ditioned, 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.

COMMENT—This subsection, with changes to conform with the other subsections, is based upon section 2(d) of the 1917 act. "without interest" is 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 this subsection conforms with section 23(a) of the Partition Act of 1917.

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

COMMENT—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 new 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 provisions of 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.

COMMENT—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.* A certified copy of every decree confirming an appraisement of real estate, and setting it apart to the surviving spouse, 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: Provided, That no decree conditioned upon payment of any surplus by the surviving spouse shall be recorded or registered unless there is offered for recording concurrently therewith written evidence of the payment of such surplus.

COMMENT—The portion of this subsection prior to the proviso is similar to section 2(h) of the 1917 act.

(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.

COMMENT—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 allowance shall be part of the general administration expenses of the estate.

COMMENT—The placing of these costs on the estate seems proper as they are general administration expenses 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 the charges for recording and registering upon the surviving spouse.

SECTION 11. *Procedure to Establish Title to Real Estate When Spouse Claims Entire Estate.* The surviving spouse or his successors in interest 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 successor in interest. 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 empowered 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. This 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 10(b). There is no reason why the petition should be filed in the county where the real estate is located. The problem of locating possible heirs is peculiarly for the court of administration.

It has been concluded that the delay in section 17(b) of the 1917 act should be continued before the decree is confirmed absolutely as against heirs who shall appear later. However, there is no reason for requiring, as the 1917 act does, that there be "final settlement of the administration accounts". A final settlement might be long delayed without fault of the surviving spouse.

SECTION 12. *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, three hundred eighty-eight) known as the Revised Price Act, as now or hereafter amended or recodified.

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 13. *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, who 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 subsection (a) limiting the application of the section to cases where the personal estate "shall have been distributed pursuant to adjudication or decree" has been considered necessary to cover the situation where it is difficult to liquidate the estate, thus causing the administration period to extend beyond seven years. It has been 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 proviso of the 1943 amendment is omitted as the six-month period has elapsed.

SECTION 14. *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 15. *Short Title.* This act shall be known and may be cited as the Intestate Act of 1947.

SECTION 16. *Repealer.* This act is intended as an entire and complete system regulating the descent of the real and personal estates of persons dying wholly or partially intestate on or after the first day of January, one thousand nine hundred forty-eight. The following acts and parts of acts and all amendments of each 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, one thousand nine hundred forty-eight:

(1) The Act, approved the twenty-third day of February, one thousand seven hundred ninety-one (three Smith's Laws, four), entitled, "A supplement to the act, entitled 'An act to declare and regulate escheats'," in so far as it relates to inheritance.

(2) The Act, approved the seventh day of June, one thousand nine hundred seventeen (Pamphlet Laws, four hundred twenty-nine), entitled "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", absolutely.

(3) The Act, approved the twenty-fourth day of April, one thousand nine hundred thirty-one (Pamphlet Laws, forty-six), entitled "An act making the surviving spouse competent to testify in all cases where the right of such spouse to share in a deceased spouse's estate is disputed because of alleged desertion or nonsupport of the decedent, whether decedent died testate or intestate", in so far as it relates to inheritance.

(4) All other acts and parts of acts inconsistent herewith are hereby repealed.

SECTION 17. *Effective Date.* This act shall take effect on the first day of January, one thousand nine hundred forty-eight, and shall apply to the real and personal estates of all persons dying 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. See also section 16 hereof which preserves existing legislation until January 1, 1948.

HISTORY OF WILLS ACT OF 1947

HOUSE BILL No. 298

Introduced by HONORABLE JOHN H. MCKINNEY and HONORABLE CHARLES L. ROBERTSON

In the House

Referred to the Committee on Judiciary, February 11.
Reported as committed, March 4.
Passed first reading, March 5.
Passed second reading, March 11.
Passed third reading and final passage, March 17 (202-0).
House concurred in Senate Amendments,† April 9 (201-0).

In the Senate

Referred to the Committee on Judiciary General, March 17.
Reported as committed, March 26.
Passed first reading, March 26.
Passed second reading with amendments,† April 7.
Passed third reading and final passage, April 8 (48-0).

Approved by the Governor, April 24, 1947.
Act No. 38

† Amendments were made only to conform to original text.

WILLS ACT OF 1947

No. 38

AN ACT

Relating to the form, execution, revocation, operation, and interpretation of wills; to nuncupative wills; to the appointment of testamentary guardians; to elections to take under or against wills and the procedure in reference thereto.

TABLE OF CONTENTS.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

SECTION 1. *Who May Make a Will.*

(a) *Persons Twenty-one or Older.* Any person of sound mind twenty-one years of age or older may by will dispose of all his real and personal estate subject to payment of debts and charges.

COMMENT—Subsection (a) takes the place of sections 1 and 7 of the 1917 act, which read:

"Section 1. Every person of sound mind and of the age of twenty-one years or upwards, whether married or single, may dispose by will of his or her real estate, whether such estate is held in fee simple or for the life or lives of any other person or persons, and whether in severalty, joint tenancy or common, and also of his or her personal estate."

"Section 7. The emblements, or crops, growing on lands held by a widow in dower, or by any other tenant for life, may be disposed of by will as other personal estate. Rents and other periodical payments accruing to any tenant for life, or to any other person entitled under the laws of this Commonwealth regulating the descent and partition of real estate, may, so far as the same may have accrued on the day of death of such tenant for life or other person, be disposed of by will in like manner."

"His real and personal estate" is more inclusive than the language contained in sections 1 and 7 of the 1917 act. "subject to payment of debts and charges" conforms with a similar provision in section 1 of the Intestate Act of 1947.

(b) *Persons in Military Service and Mariners.* During any war in which the United States is engaged, a person of sound mind eighteen years of age or older and being in the Armed Forces of the United States in active service at home or abroad, or being a mariner on land or at sea, may by will dispose of all his real and personal estate subject to payment of debts and charges, and may thereafter revoke such will whether or not the United States is engaged in war and whether or not he is still in such service or is a mariner.

COMMENT—Subsection (b) takes the place of section 5 of the 1917 act which reads:

"Section 5. Notwithstanding this act, any mariner being at sea, or any soldier being in actual military service, may dispose of his movables, wages, and personal estate as he might have done before the making of this act."

Subsection (b) changes the law in the following respects:

1. It permits a person in the armed forces of the United States or a mariner, in time of war, to dispose of real as well as personal estate if he is eighteen years of age or older.

2. It invalidates wills made by all persons who have not attained eighteen years of age.

3. It makes all persons comply with the safeguards of the Wills Act.

4. It recognizes expressly the right to revoke such a will before attaining the age of 21, whether or not the status giving the privilege has been retained.

5. It permits mariners and soldiers between eighteen and twenty-one years of age to have their wills written at home without requiring them to be in "actual military service" or "at sea".

The term "active service" as distinguished from "reserve" service has a recognized meaning. It is not the equivalent of the words "actual military service" included in section 5 of the 1917 act.

SECTION 2. *Form and Execution of a Will.* Every will, except nuncupative wills but including wills of mariners and persons in the Armed Forces of the United States, shall be in writing and shall be signed by the testator at the end thereof, subject to the following rules and exceptions:

COMMENT—"Every will * * * shall be in writing and shall be signed by the testator at the end thereof" has been taken from section 2 of the 1917 act. The words "including wills of mariners and persons in the Armed Forces of the United States" are intended to take the place of section 5 of the 1917 act and change the policy of the law in respect to such wills. With the liberal provisions concerning the form and execution of written and oral wills contained in this act, with the liberal provisions for surviving spouses contained

in the Intestate Act of 1947, and with facilities for those in military service to write wills, it is inadvisable to permit a distinction for those in military service and mariners beyond the provisions of section 1(b) of this act.

(1) *Words Following Signature.* The presence of any writing after the signature to a will, whether written before or after its execution, shall not invalidate that which precedes the signature.

COMMENT—This is similar to the proviso in section 2 of the 1917 act. Between the Act of 1833, P. L. 249, which first required that wills be signed "at the end thereof" and the effective date of the Wills Act of 1917, any writing of a testamentary nature following the signature invalidated the whole will: *Wineland's Ap.,* 118 Pa. 37. This proved to be too harsh and hence the proviso in section 2 of the 1917 act which is hereby preserved. What is considered to precede or follow a signature will of necessity be a matter for judicial determination in each case, but the numerous decisions and articles on the subject will be helpful: See *Covington Est.,* 348 Pa. 1, 92 Pa. L. Rev., 217; *Coyne Will,* 349 Pa. 331, 93 Pa. L. Rev., 110.

(2) *Signature by Mark.* If the testator is unable to sign his name for any reason, a will to which he makes his mark and to which his name is subscribed in his presence before or after he makes his mark, shall be as valid as though he had signed his name thereto: Provided, He makes his mark in the presence of two witnesses who sign their names to the will in his presence.

COMMENT—This is taken in part from section 3 of the Wills Act of 1917. The requirement that two witnesses sign the will in the presence of the testator is new. It is believed that no mark should be recognized unless there are subscribing witnesses.

This clause is intended to eliminate arbitrary requirements without removing any of the essential safeguards. The testator's name may be subscribed "before or after he makes his mark" but it must still be subscribed in his presence. If it is subscribed out of his presence, the execution will be faulty: cf. *Orlady's Est.,* 336 Pa. 369. The mark must be made in the presence of the witnesses. A later acknowledgment to one or to both of them will not suffice.

(3) *Signature by Another.* If the testator is unable to sign his name or to make his mark for any reason, a will to which his name is subscribed in his presence and by his express direction shall be as valid as though he had signed his name thereto: Provided, He declares the instrument to be his will in the presence of two witnesses who sign their names to it in his presence.

COMMENT—This also is taken in part from section 3 of the Wills Act of 1917. Reasons for the precautions are slightly greater in this case than where execution is by mark. The requirements in addition to those where execution is by mark are: (1) Testator's name must be subscribed at his "express direction", and (2) Testator must declare the instrument to be his will in the presence of the witnesses. As a practical matter this clause seldom will be employed. Whether testator is able to sign his name or make his mark will depend largely upon his own decision. See *Rosato's Est.*, 322 Pa. 229, where the court at page 231 said: "As we view the act, the sufficiency of the reason for not signing his name is for the testator's determination; 'any' reason which moves him not to sign is sufficient provided there is compliance with the other requisites of the act."

No special provision was made for the extremity of the decedent's last illness as is contained in sections 2 and 3 of the 1917 act. If a testator is so ill that he can neither make his mark nor direct another to sign for him, he cannot be supposed to have testamentary capacity.

SECTION 3. *Nuncupative Wills.*

(a) *When Permissible.* A nuncupative will may be made only by a person in imminent peril of death, whether from illness or otherwise, shall be valid only if the testator died as a result of the peril, and must be declared to be his will by the testator before two disinterested witnesses, reduced to writing by or under the direction of both of the witnesses within ten days after such declaration, and submitted for probate within three months of the death of the testator.

(b) *Property Disposable.* A nuncupative will attempting to dispose of personal property of an aggregate value in excess of five hundred dollars, or of real estate in any amount, shall be wholly void.

(c) *Effect on Prior Will.* A nuncupative will shall neither revoke nor change an existing written will.

COMMENT—This is similar to section 6 of the Model Execution of Wills Act, 9 Unif. Laws Ann. 280. It is believed to be a substantial improvement over the 1917 act, section 4, which reads:

"Section 4. Personal estate may be bequeathed by a nuncupative will, under the following restrictions:

"(a) Such will shall in all cases be made during the last sickness of the testator, and in the house of his habitation or dwelling, or where he has resided for the space of ten days or more next before the making of such will, except where such person shall be surprised by sickness, being from his own house.

"(b) Where the sum of value bequeathed shall exceed one hundred dollars, it shall be proved that the testator, at the time of pronouncing the bequest, did bid the persons present, or some of them, to bear witness that such was his will, or to that effect; and, in all cases, the foregoing requisites shall be proved by two or more witnesses who were present at the making of such will.

"(c) No testimony shall be received to prove any nuncupative will after six months elapsed from the speaking of the alleged testamentary words, unless the said testimony, or the substance thereof, were committed to writing within six days after the making of said will."

In putting a limit on the amount which can be disposed of, it is believed that section 3 will serve a useful purpose. See *McClellan's Est.*, 325 Pa. 257, for a general discussion of the difficulties of establishing a nuncupative will under the 1917 act, section 4.

SECTION 4. *Witnesses.* No will shall be valid unless proved by the oaths or affirmations of two competent witnesses.

COMMENT—This is taken from section 2 of the 1917 act.

SECTION 5. *Revocation of a Will.* No will or codicil in writing, or any part thereof, can be revoked or altered otherwise than:

(1) *Will or Codicil.* By some other will or codicil in writing,

(2) *Other Writing.* By some other writing declaring the same, executed and proved in the manner required of wills, or

(3) *Act to the Document.* By being burnt, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revocation, by the testator himself or by another person in his presence and by his express direction. If such act is done by any person other than the testator, the direction of the testator must be proved by the oaths or affirmations of two competent witnesses.

COMMENT—This section takes the place of section 20 of the 1917 act which reads:

"Section 20. (a) No will in writing, concerning any real estate, shall be repealed, nor shall any devise or directions therein be altered, otherwise than by some other will or codicil in writing, or other writing declaring the same, executed and proved in the manner hereinbefore provided, or by burning, cancelling, obliterating, or destroying the same by the testator himself, or by someone in his presence and by his express direction.

"(b) No will in writing, concerning any personal estate, shall be repealed, nor shall any bequest or direction therein be altered, otherwise than as hereinbefore provided, in the case of real estate, except by a nuncupative will made under the circumstances set forth in section four of this act, and also committed to writing in the lifetime of the testator, and, after the writing thereof, read to or by him and allowed by him, and proved to be so done by two or more witnesses."

Two changes are made. No distinction is made between wills of realty and wills of personalty. Thus a written will of personalty cannot be revoked by a nuncupative will. This is confirmed also by section 3(c) of this act. In clause (3) the word "torn", a frequent method of destruction, has been added as declaratory of present law: cf. *Kapp's Est.*, 317 Pa. 253; *Ford's Est.*, 301 Pa. 183. The last sentence of clause (3) in requiring proof by two witnesses is also declaratory of present law: *Simrell's Est.*, 154 Pa. 604.

SECTION 6. *Revival of Revoked or Invalid Will.* If, after the making of any will, the testator shall execute a later will which expressly or by necessary implication revokes the earlier will, the revocation of the later will shall not revive the earlier will, unless the revocation is in writing and declares the intention of the testator to revive the earlier will, or unless, after such revocation, the earlier will shall be re-executed. Oral republication of itself shall be ineffective to revive a will.

COMMENT—This section was suggested by the problem of *Burtt Will,* 353 Pa. 217, and *Ford's Est.,* 301 Pa. 183. Under the decisions there has been a chance, depending on oral evidence, that a will which has been "revoked" and forgotten may be given new life by the revocation of a later will.

The language used was suggested by the wording of Nevada and New York statutes referred to at pages 239 and 240 of *Burtt Will.* However, the last sentence does not appear in either of these statutes. It was added to eliminate any doubt on the open question of oral republication. Cf. *Baum's Est.,* 269 Pa. 63; *Holmes' Est.,* 240 Pa. 537; *Broe* v. *Boyle,* 108 Pa. 76; *Shaeffer's Est.,* 240 Pa. 83; 8 Temple L. Q. 80.

SECTION 7. *Modification by Circumstances.* Wills shall be modified upon the occurrence of any of the following circumstances, among others:

COMMENT—The grouping of what were several separate sections of the 1917 act in one section is believed to be logical and convenient. A will may be affected vitally by the happening of any one of the circumstances listed in the clauses. In addition it may be changed by the election of the surviving spouse. All of the circumstances mentioned in this section must occur at or before testator's death. The importance of the surviving spouse's election warrants separate consideration, and therefore was excluded from this section.

While marriage of the parents of children born illegitimate and death of legatees or devisees are changes in circumstances, they also concern rules of construction and are included thereunder in section 14 so that they can appear with other rules with which they are closely associated and which are properly included in that section alone.

(1) *Death Within Thirty Days—Religious and Charitable Gifts.* Any bequest or devise for religious or charitable purposes included in a will or codicil executed within thirty days of the death of the testator shall be invalid unless all who would benefit by its invalidity agree that it shall be valid. The thirty-day period shall be so computed as to include the day on which the will or codicil is written and to exclude the day of death. Unless the testator directs otherwise, if such a will or codicil shall revoke or supersede a prior will or codicil executed at least thirty days before the testator's death, and not theretofore revoked or superseded and the original of which can be produced in legible condition, and if each instrument shall contain an identical gift for substantially the same religious or charitable purpose, the gift in the later will or codicil shall be valid; or if each instrument shall give for substantially the same religious or charitable purpose a cash legacy or a share of the residuary estate or a share of the same asset, payable immediately or subject to identical prior estates and conditions, the later gift shall be valid to the extent to which it shall not exceed the prior gift.

COMMENT—The first two sentences take the place of the 1917 act, section 6, as amended, which reads:

> "Section 6. No estate, real or personal, shall be bequeathed or devised to any body politic, or to any person in trust for religious or charitable uses, except the same be done by will at least thirty days before the decease of the testator, which period shall be so computed as to exclude the first and to include the last day thereof; and all dispositions of property contrary hereto shall be void and go to the residuary legatee or devisee, heirs or next of kin, according to law."

"and go to the residuary legatee or devisee, heirs or next of kin according to law" in the 1917 act has been omitted as unnecessary, especially since this act expressly provides the manner in which void devises and legacies shall be distributed.

"for religious or charitable purposes" has been substituted for "to any body politic, or to any person in trust for religious or charitable uses" for simplicity.

"The thirty-day period shall be so computed as to include the day on which the will or codicil is written and to exclude the day of death" is necessary because under the Statutory Construction Act "Whenever the last day of any such period shall fall on Sunday, or on any day made a legal holiday by the laws of this Commonwealth or of the United States, such day shall be omitted from the computation". In some instances the Statutory Construction Act allows thirty-one days.

The addition of the words "unless all who would benefit by its invalidity agree that it shall be valid" will preserve the testator's wish with the least mechanical difficulties where all parties are agreed.

The last sentence of the new clause covers the case in which a testator has been charitably inclined and then changes his will in some respect within thirty days of death. Cf. *Hartman's Est.*, 320 Pa. 321.

Of course, a testator may still provide expressly in his new will that it shall not revoke charitable gifts in his former will if he dies within thirty days.

(2) *Divorce.* If the testator is divorced from the bonds of matrimony after making a will, all provisions in the will in favor of his spouse so divorced shall be thereby revoked.

COMMENT—This is taken from section 53 of the Model Probate Code. There is no similar provision in the 1917 act. A will in favor of a named spouse remained good in Pennsylvania without regard to a subsequent divorce: *Jones's Est.*, 211 Pa. 364. It is not a complete answer to say that the will can be changed or revoked. The testator may delay the change too long or may forget to make it or may be incompetent to make it. The real question is whether most persons so circumstanced (as in the case of later marriage or birth) would wish their wills changed or would wish them to remain the same, and there is no doubt that most would wish them changed.

(3) *Marriage.* If the testator marries after making a will, the surviving spouse shall receive the share of the estate to which he would have been entitled had the testator died intestate, unless the will shall give him a greater share.

COMMENT—Clauses (3) and (4) as proposed take the place of section 21 of the 1917 act, as amended, which reads:

> "Section 21. When any person, male or female, shall make a last will and testament, and afterward shall marry, or shall have a child or children, either by birth or by adoption, not provided for in such will, and shall die leaving a surviving spouse and such child or children, or either a surviving spouse or such child or children, although such child or children be born after the death of their father, every such person, so far as shall regard the surviving spouse or child or children born or adopted after the making of the will, shall be deemed and construed to die intestate; and such surviving spouse, child, or children shall be entitled to such purparts, shares, and dividends of the estate, real and personal, of the deceased, as if such person had actually died without any will."

The division of the substance of the 1917 act, section 21, into two clauses is a step toward clarity. This is especially necessary with the substantive changes made.

The Model Probate Code makes no provision for the after-married spouse because it is considered that his right to take against the will is a full protection. Pennsylvania places the after-married spouse in the more gracious position of receiving a full intestate share, including the spouse's allowance (*Shestack's Est.*, 267 Pa. 115), without requiring that there be an election to take against the will.

"unless the will shall give him a greater share" is declaratory of existing law. See *Lintner's Est.*, 297 Pa. 428 where a will written prior to marriage gave the surviving spouse the entire estate which he was permitted to retain. In most instances it will be obvious which is the greater share, and such a share of personal property will be awarded in the adjudication or in the decree of distribution.

(4) *Birth or Adoption.* If the testator fails to provide in his will for his child born or adopted after making his will, unless it appears from the will that the failure was intentional, such child shall receive out of the testator's property not passing to a surviving spouse, such share as he would have received if the testator had died unmarried and intestate owning only that portion of his estate not passing to a surviving spouse.

COMMENT—This clause is believed to be a distinct improvement over section 21 of the 1917 act. It avoids the necessity for nominal gifts to after-born or after-adopted children or the re-execution of a will after the birth of a child. The revised form gives ample protection to the child and will avoid frequent occasions for the disruption of well laid plans.

(5) *Slaying.* Any person who participates either as a principal or as an accessory before the fact in the wilful and unlawful killing of any person shall not in any way acquire property or receive any benefits as the result of the wilful and unlawful killing but such property or benefits shall be distributed as provided by law.

COMMENT—This clause overlaps some of the provisions of the Slayer Act of 1941, P. L. 816. It is not intended to supplant the provisions of the Slayer Act, but is included here for completeness and to avoid any suggestion of partial repeal of the Slayer Act of 1941. A similar provision is included in section 6(c) of the Intestate Act of 1947.

SECTION 8. *Change by Election of Surviving Spouse.*

(a) *Right of Election.* When a married person dies testate as to any part of his estate, the surviving spouse while living shall have a right of election under the limitations and conditions hereinafter stated.

(b) *Share of Estate.* The surviving spouse, upon an election to take against the will, shall be entitled to one-third of the real and personal estate of the testator if the testator 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, and in all other circumstances the surviving spouse shall be entitled to one-half of the real and personal estate of the testator.

COMMENT—The exact share of the surviving spouse upon election to take against the will has been set forth in brief language in this section. This is necessary in order to make it clear that a spouse taking against the will does not receive the $10,000 allowance. The definition of the share of the spouse is in accordance with the language of section 2 of the Intestate Act of 1947.

Consideration was given to the inclusion of the proviso of section 23(a) of the 1917 act, which reads:

> "Provided, That nothing herein contained shall affect the right or power of a married woman by virtue of any authority or appointment contained in any deed or will, to bequeath or devise any property held in trust for her sole and separate use."

It was concluded that this should be omitted, especially in view of the provisions of subsection (c) of this section 8.

(c) *Power of Appointment.* The surviving spouse, upon an election to take against the will, shall not be entitled to any share in property passing under a power of appointment given by someone other than the testator and exercised by the will of the testator whether or not such power has been exercised in favor of the surviving spouse and whether or not the appointed and the individual estates have been blended.

COMMENT—The only statutory precedent for this subsection is the proviso of section 23(a) of the 1917 act set forth in the comment to section 8(b). It is declaratory of existing case law to the extent that it refuses the surviving spouse the right to share in property passing under a power not exercised in favor of the surviving spouse whether or not the appointed and individual estates of the testator are blended: *Kates's Est.*, 282 Pa. 417. However, in refusing to permit the surviving spouse who elects to take against the will to share in property appointed to him, a change is made in the law as enunciated in *Huddy's Est.*, 236 Pa. 276, where the surviving husband who elected to take against his wife's will was nevertheless permitted to share in an estate appointed by the will to him.

SECTION 9. *Forfeiture of Right of Election.*

(a) *By Husband.* A 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 no right of election.

(b) *By Wife.* A wife, who for one year or upwards previous to the death of her husband shall have wilfully and maliciously deserted him, shall have no right of election.

(c) *Slayer.* Any surviving spouse who participates either as a principal or as an accessory before the fact in the wilful and unlawful killing of the testator shall have no right of election.

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

COMMENT—This section is the same in substance as section 6 of the Intestate Act of 1947. It is necessary in the Wills Act as the share of the surviving spouse is no longer measured by rights under the Intestate Act.

SECTION 10. *How Election Made.* The surviving spouse electing to take under or against the will shall manifest the election in writing signed by him and acknowledged before an officer authorized by law to take acknowledgments of deeds. The election or a copy thereof shall be mailed or delivered to the personal representative of the testator or his attorney. The election shall be filed in the office of the clerk of the orphans' court of the county where the will was probated, and a record shall be made of such filing by the clerk. When the estate includes real estate the election or a duplicate original or a certified copy thereof shall be recorded in the office of the recorder of deeds of each county in which any of the real estate of the testator lies, and shall be indexed by the recorder in the grantors' index under the name of the testator, and in the grantees' index under the name of the surviving spouse. The costs of filing and recording the election shall be paid out of the estate as a part of the administration expenses.

COMMENT—Section 10 should be compared with the first sentences of section 23(b) and section 23(e) of the 1917 act. Section 10 provides simply and clearly what shall be done to perfect the election. Later sections define the time limits and the effect of failure to comply with the procedure herein directed.

SECTION 11. *Time for Making Election.* As between the surviving spouse and other legatees and devisees, the spouse's election shall be in time if within one year after the probate of the will the surviving spouse shall (1) mail or deliver the election or a copy thereof to the personal representative of the testator or his attorney or (2) file it in the office of the clerk of the orphans' court and mail or deliver a copy to the personal representative or his attorney or (3) record such election or a duplicate original or certified copy thereof in the office of the recorder of deeds of any county in which real estate of the testator lies and mail or deliver a copy to the personal representative or his attorney. The orphans' court, on application of the surviving spouse made within one year after the probate of the will, may extend the time for making the election for such period and upon such terms and conditions as the court shall deem proper under the circumstances. A certified copy of the decree of the court extending the time for making the election may be recorded and indexed in the office of the recorder of deeds in any county in which any of the real estate of the testator lies in the manner provided in section 10 hereof.

COMMENT—The proviso of section 23(b) of the 1917 act has not been preserved. It is considered unnecessary because of the privilege of applying to the court for extension of time to file the election. This avoids the uncertainties of when there is a "final adjudication of the contest."

The provisions of section 23(f) of the 1917 act, added by amendment of 1939, P. L. 705, have been preserved, but the time of making application to the court has been extended from seven months to one year from the date of probate. This gives the surviving spouse a better opportunity to know what his share will be and whether there will be a will contest. Compelling action to be taken within one year is not considered unduly harsh. If a will contest is initiated within the year, application may be made to extend the time. If the contest is initiated after the year, the surviving spouse will have his share under the election if the will is sustained. If the will is not sustained, he will have an additional period of one year from the probate of a

former will or, in case of intestacy, will have an intestate share which may be more than the share which would be acquired by an adverse election.

The provisions of section 23(d) of the 1917 act for enforcing an earlier election after six months have been omitted in their entirety. The circumstances in which such provisions would be of assistance to persons interested in the estate are considered so unlikely to occur that their retention does not seem justified.

Under the procedure now provided, a time limit is retained for making the election without requiring that all formalities be completed within the one year period. If these simple requirements have been met, the spouse is protected against legatees and devisees. His rights against third persons are covered in the following sections.

SECTION 12. *Failure to Make an Election.*

(a) *Effect.* Except as provided in section 7(3) hereof, failure to make an election in the manner and within the time limits set forth in section 11 hereof shall be deemed an election to take under the will or an acquiescence in the provisions thereof. No payment or distribution from the estate, except the exemption allowed by law to the widow, shall be required to be made to the surviving spouse within one year after the probate of the will unless his election to take under or acquiesce in the will shall have been made and filed as provided in section 10 hereof.

COMMENT—Comparable provisions of the 1917 act are found in section 23(b) of that act, which reads, "Neglect or refusal or failure to deliver such writings within said period shall be deemed an election to take under the will," and section 23(c) which reads:

> "No payment from the estate of such decedent, except the exemption allowed by law to the widow, shall be required to be made to any surviving spouse unless his or her election shall have been first duly executed, acknowledged and delivered as provided in clause (b) of this section."

(b) *Personal Right.* The right of election shall be personal to the surviving spouse and shall not be exercised after his death.

COMMENT—This subsection is declaratory of existing case law, and will prove helpful to persons examining the act. This subsection will not interfere with the right of the common pleas court to direct the election which shall be made by the guardian of an incompetent surviving spouse.

SECTION 13. *Grantee or Lienholder.* An election shall be void as against a bona fide grantee of or holder of a lien on real estate in any county unless (1) the election or a duplicate original or certified copy thereof is recorded in such county within one year after the probate of the will or if thereafter then before the recording or entering of the instrument or lien under which such grantee or lienholder claims, or (2) a certified copy of the decree of the court extending the time for making the election has been recorded in such county within one year after the probate of the will or if thereafter then before the recording or entering of such instrument or lien and the election or a duplicate original or certified copy thereof has been recorded in such county within the time set by the court or if thereafter then before the recording or entering of such instrument or lien.

COMMENT—The purpose of this new section is to protect bona fide grantees, mortgagees, and judgment creditors when the election is recorded in the county where the real estate is located after the one year period has expired. The spouse who has failed to record his election is allowed to take ahead of devisees, if he has complied with the minimum requirements of section 10, but must perfect the election in each county where real estate lies if he wishes to be protected against bona fide grantees, mortgagees or judgment creditors of the devisee.

SECTION 14. *Rules of Interpretation.* In the absence of a contrary intent appearing therein, wills shall be construed as to real and personal estate in accordance with the following rules:

COMMENT—This section includes rules for the interpretation of wills, some of which are new and some of which are separate sections of the 1917 act.

(1) *Wills Construed As If Executed Immediately Before Death.* Every will shall be construed, with reference to the testator's real and personal estate, to speak and take effect as if it had been executed immediately before the death of the testator.

COMMENT—Clause (1) is identical with section 9 of the 1917 act.

(2) *After-Acquired Property.* The real and personal estate acquired by a testator after making his will shall pass by a general devise or bequest.

COMMENT—Clause (2) is similar to section 10 of the 1917 act, but has been made applicable to personal estate as well as to real estate.

(3) *Devises of Real Estate.* All devises of real estate shall pass the whole estate of the testator in the premises devised, although there be no words of inheritance or of perpetuity.

COMMENT—This is section 12 of the 1917 act with some changes in style. Section 12 of the 1917 act reads:

"Section 12. All devises of real estate shall pass the whole estate of the testator in the premises devised, although there be no words of inheritance or of perpetuity, unless it appear by a devise over, or by words of limitation or otherwise in the will, that the testator intended to devise a less estate."

(4) *Meaning of "Heirs" and "Next of Kin", etc.—Time of Ascertaining Class.* A devise or bequest of real or personal estate, whether directly or in trust, to the testator's or another designated person's "heirs", or "next of kin", or "relatives", or "family" or to "the persons thereunto entitled under the intestate laws", or to persons described by words of similar import, shall mean those persons, including the spouse, who would take under the intestate laws if the testator or other designated person were to die intestate at the time when such class is to be ascertained, a resident of the

Commonwealth, and owning the estate so devised or bequeathed: Provided, However, That the share of a spouse, other than the spouse of the testator, shall not include the ten thousand dollar allowance under the intestate laws. The time when such class is to be ascertained shall be the time when the devise or bequest is to take effect in enjoyment.

COMMENT—This clause is new. It is an extension of the Act of 1923, P. L. 914, 21 PS Section 11, to include gifts in remainder to heirs of a person other than the testator. In all such cases it is desirable to have the class determined as of the time the remainder falls in, unless the testator directs otherwise.

It has also been suggested by the recommendation of the Pennsylvania Bar Association Committee on the Law of Decedents' Estates, submitted in June 1942, which was as follows:

> "The present law is by no means clear as to what is normally meant by a testator's use of the word 'heirs'. The Superior Court a few years ago had the occasion to point out that as to personalty 'heirs' does not mean 'children' or 'issue', (The Statutory Construction Act, Section 101(56) defines 'issue' as meaning lineal descendants but no definition of 'heirs' is given), but rather means the persons entitled to take in case of intestacy (*Bowen's Est.,* 139 Pa. Super. 523 (1939)). The inference to be drawn as to the rule with regard to a disposition of realty is not too clear, (See 'Effect of the Intestate Act of Pennsylvania Upon Husband and Wife as Heirs of Each Other' (1935) 9 Temp. L. Q. 214). Yet there is no real reason why any difference should exist today.
>
> "Recommendation No. 15. Unless indicated otherwise, the word 'heirs', whether applied to realty or personalty should mean those persons including spouses who would take in case of an intestacy."

"Provided, however, that the share of a spouse, other than the spouse of the testator, shall not include the ten thousand dollar allowance under the intestate laws" has been suggested by the recommendation of the Pennsylvania Bar Association Committee on the Law of Decedents' Estates, submitted in June 1941, which read:

> "The allowance of $5,000 to the spouse if there is no issue is stated to be applicable 'only to cases of actual

intestacy of husband or wife.' (Act of June 17, 1917, P. L. 429, Sec. 2, 20 PS Section 11). Yet, it has been held, and it seems properly held, that the allowance is applicable where a spouse directs that the remaining spouse shall take so much 'as she could claim under the intestate laws'. (Morris Est., 298 Pa. 25 (1929); Carrell's Est., 264 Pa. 140 (1919). But cf.: Erk's Est., 311 Pa. 185 (1933) where the will gave such portion 'which is required by Pennsylvania Law, but no more.') It is doubtful, however, whether this should apply where there is a similar devise or bequest to a person other than the surviving spouse. For example, if a testator leaves property to A for life and then to the heirs, next of kin or persons entitled to take from A under the intestate laws, it is doubtful whether the testator intended the spouse of A to get the $5,000 allowance. The problem is apt to become of much greater importance because of the repeal of the Rule in Shelley's case. (Act of July 15, 1935, P. L. 1013, 20 PS 229.)

"Recommendation No. 3. The provisions for the $5,000 allowance should not apply to a gift by will or deed to a class described as those entitled under the intestate laws or to a person whose share is described as the part he is entitled to under the intestate laws, except where the beneficiary is the spouse of the donor."

(5) *Meaning of "Die Without Issue" and Similar Phrases.* In any devise or bequest of real or personal estate, the words "die without issue", "die without leaving issue", "have no issue", or other words importing either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in his lifetime or at his death, and not an indefinite failure of his issue.

COMMENT—This is based on section 14 of the 1917 act. See Restatement, Property, sections 266 *et seq.*, for illustrations of the necessity for continuing the statutory rule.

(6) *Adopted Children.* In construing a will making a devise or bequest to a person or persons described by relationship to the testator or to another, any person adopted before the death of the testator shall be considered the child of his adopting parent or parents and not the child of his natural

parents: Provided, That if a natural parent shall have married the adopting parent before the testator's death, the adopted person shall also be considered the child of such natural parent.

COMMENT—This takes the place of section 16 of the Wills Act of 1917. It makes several important changes: (1) It makes no distinction as did the 1917 act between adopted children of the testator, and adopted children of others. (2) It permits children of others adopted after the date of the will and before the testator's death to be included. In requiring adoptions to be made before the testator's death, it avoids the possibility of adoptions for the sole purpose of preventing a gift over in default of issue. (3) It prevents adopted children from receiving gifts as natural children, except through a natural parent who is the spouse of an adopting parent. The purpose of the clause is to conform with the theory of adoption as expounded in *Cave's Est.*, 326 Pa. 358, and as embodied in the Intestate Act of 1947. The child is considered the child of the adopting family and not of the natural parents.

(7) *Illegitimates.* In construing a will making a devise or bequest to a person or persons described by relationship to the testator or to another, an illegitimate person shall be considered the child of his mother and not of his father; Provided, That when the parents of a person born illegitimate shall have married each other, he shall thereafter be considered legitimate.

COMMENT—This provision is new. It is intended to give the illegitimate (whose parents do not marry each other) full rights as a child of his mother, but not of his father, as in the Intestate Act of 1947, section 7. Heretofore an illegitimate's status under any general description such as "issue" or "children" has been questionable. Cf. *Seitzinger's Est.*, 170 Pa. 500. The proviso is believed to be declaratory of existing law (cf. *Thorn Est.*, 353 Pa. 603) except that cohabitation is not required. The Act of 1857, P. L. 507, 48 PS 167 which requires cohabitation plus marriage was repealed by the Intestate Act of 1917 only insofar as it relates to inheritance. As heretofore, legitimation of a child by marriage of the parents after the testator's death may alter rights which have not vested. Cf. *Thorn Estate.*

(8) *Lapsed and Void Devises and Legacies—Substitution of Issue.* A devise or bequest to a child or other issue of the testator or to his brother or sister or to a child of his brother or sister whether designated by name or as one of a class shall not lapse if the beneficiary shall fail to survive the testator and shall leave issue surviving the testator but shall pass to such surviving issue who shall take per stirpes the share which their deceased ancestor would have taken had he survived the testator; provided, that such a devise or bequest to a brother or sister or to the child of a brother or sister shall lapse to the extent to which it will pass to the testator's spouse or issue as a part of the residuary estate or under the intestate laws.

COMMENT—This clause takes the place of sections 15(a) and (b) of the 1917 act.

In addition to simplifying the language, clause (8) states expressly that the issue shall receive their shares "per stirpes". The proviso, unlike the condition of section 15(b) of the 1917 act, includes the spouse as well as the issue among those who will defeat the rights of issue of deceased brothers, sisters, nephews or nieces, if they would benefit as residuary beneficiaries or by intestacy, on the lapse of the gift.

Under 15(b) of the 1917 act the words "shall not leave any lineal descendants who would receive the benefit of any lapsed or void devise or legacy" presented the question of whether the lapsed share would go wholly to the issue of the testator or partially to others sharing in the residue. The new provision is intended to make it clear that the gift to the named collaterals will fail only to the extent that the spouse and issue will benefit by the lapse. For example, $250 of a $500 bequest to a predeceased nephew will be paid to the nephew's issue and $250 to the surviving widow if the residuary estate is given one-half to the widow and one-half to a charity.

Gifts to named individuals within the favored group, who were dead when the will was written, subject to the rights of testator's spouse or issue will remain available for their issue (*Spencer's Est.*, 37 Pa. Super. 67), but when the gift is to a class, issue will not take the ancestor's share unless the ancestor was living when the will was written or was born

thereafter prior to the testator's death: See *Harrison's Est.*, 202 Pa. 331, 334. Substituted beneficiaries will still receive their shares subject to any indebtedness owing by their ancestor to the testator: *Callery's Est.*, 333 Pa. 258; and where a power of appointment is exercised it will be the relationship between the donee, not the donor, of the power and the appointee which controls whether there will be a substitution or lapse: *Rowland's Est.*, 17 D. & C. 477.

(9) *Lapsed and Void Devises and Legacies—Shares not in Residue.* A devise or bequest not being part of the residuary estate which shall fail or be void because the beneficiary fails to survive the testator or because it is contrary to law or otherwise incapable of taking effect or which has been revoked by the testator or is undisposed of or is released or disclaimed by the beneficiary, if it shall not pass to the issue of the beneficiary under the provisions of clause (8) hereof, and if the disposition thereof shall not be otherwise expressly provided for by law, shall be included in the residuary devise or bequest, if any, contained in the will.

COMMENT—This takes the place of the first sentence of section 15(c) of the 1917 act. The wording has been changed for clarity, and additions have been made. "or is undisposed of" has been added to avoid the disposition of such shares to the heirs and next of kin and to make them the same as lapsed shares: cf. *Rickenbach Est.*, 348 Pa. 121. "or is released or disclaimed by the beneficiary" has been added through an abundance of caution to make it clear that such shares are included. The words "released or disclaimed" rather than "renounced" are used because they are the words employed in section 3 of the Estates Act of 1947. "and if the disposition thereof shall not be otherwise expressly provided by law" is included to avoid possible conflict with provisions for disposition of void accumulations and provisions in conflict with the rule against perpetuities, the disposition of which is provided for expressly in the Estates Act of 1947.

(10) *Lapsed and Void Devises and Legacies—Shares in Residue.* When a devise or bequest as described in clause (9) hereof shall be included in a residuary clause of the will and shall not be available to the issue of the devisee or legatee under the provisions of clause (8) hereof, and if the

disposition shall not be otherwise expressly provided for by law, it shall pass to the other residuary devisees or legatees, if any there be, in proportion to their respective shares or interests in the residue.

COMMENT—This replaces the second sentence of section 15(c) of the 1917 act, which reads:

> "In any case where such devise or bequest which shall fail or be void, or shall be revoked as aforesaid, shall be contained in the residuary clause of such will, it shall pass to and be divided among the other residuary devisees or legatees, if any there be, in proportion to their respective interests in such residue."

The addition of the words "and shall not be available to the issue of the devisee or legatee under the provisions of clause (8) hereof" gives statutory recognition to the conclusion of *Desh's Est.,* 321 Pa. 286, which held that other residuary shares are not increased so long as issue of the favored relative survive the testator. This clause is not a cure-all. Questions will remain as to what is a residuary clause: cf. *Armstrong Est.,* 347 Pa. 23; *Carson's Est.,* 130 Pa. Super. 133; *Wenner's Est.,* 17 D. & C. 784.

(11) *Lapsed and Void Devises and Legacies—Adopted Persons and Illegitimates.* For the purposes of the foregoing clauses of this section, the words "child" or "issue" shall include persons claiming by or through adoption and an illegitimate person shall be considered the child of his mother and not of his father; Provided, That when the parents of a person born illegitimate shall have married each other, he shall thereafter be considered legitimate.

COMMENT—This is intended to give adopted children the same right of substitution as natural children, thus avoiding the effect of *Russell's Est.,* 284 Pa. 164, where an adopted child of a niece was not permitted to receive the niece's share, and *Corr's Est.,* 34 D. & C. 255, where an adopted child given the residuary estate was not such a lineal descendant as would defeat the substitution of issue for a deceased brother and sister. So also this clause gives full rights of substitution to illegitimates and their issue in the mother's family if there is no marriage, and in both families if the parents marry: Cf. Act of 1901, P. L. 639, 11 PS 1; *Patterson's Est.,* 282 Pa. 396; *Wettach* v. *Horn,* 201 Pa. 201.

(12) *Real Estate Subject to a Mortgage.* The devisee of real estate which is subject to a mortgage shall take subject thereto, and shall not be entitled to exoneration out of the other estate of the testator, real or personal; and this whether the mortgage was created by the testator or by a previous owner or owners, and notwithstanding any general direction by the testator that his debts be paid.

COMMENT—This is section 18 of the 1917 act. It was new in that act. Prior thereto the devisee was entitled to call upon the personal estate for exoneration when the mortgage was made by the testator.

(13) *Lien of Pecuniary Legacies.* Pecuniary legacies of one hundred dollars or less shall not be a charge on any of the testator's real estate. All pecuniary legacies in excess of the principal sum of one hundred dollars shall be charged upon, and payable out of, any real estate not specifically devised, where the personal estate is or becomes insufficient for their payment.

COMMENT—This is similar to section 17 of the 1917 act. Prior to the 1917 act, real estate was not available for payment of pecuniary legacies unless they were expressly charged upon it. The 1917 act made all legacies a lien. Clause (13) makes a distinction between the larger and the smaller legacies. This seems justified as a reasonable classification. We thus avoid the necessity of recording releases of small legacies to perfect title to real estate. This has been a frequent source of annoyance, particularly in the case of very small legacies. The words "principal sum" are used to avoid any possible question when income has accumulated. It is to be noted that a legacy of $100 would not be a charge on real estate, but that a legacy of $100.01 would be. As a practical matter the smaller legacies are usually paid first.

(14) *Power of Appointment.* A general devise of the real estate of the testator, or of the real estate of the testator in any place, or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend, as the case may be, which he shall have power to appoint in any manner he shall think

proper, and shall operate as an execution of such power. In like manner, a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend, as the case may be, which he shall have power to appoint in any manner he shall think proper, and shall operate as an execution of such power. In like manner, a general pecuniary legacy, when the assets of the individual estate of the testator are not sufficient for its payment, shall, to the extent necessary to make possible the payment of the legacy, be construed to include any estate which the testator shall have power to appoint in any manner he shall think proper, and shall to such extent operate as an execution of such power.

COMMENT—This is based upon section 11 of the 1917 act which was derived from section 3 of the Act of 1879, P. L. 88. The last sentence is new and is intended to clarify the situation where the will, as in *South's Est.*, 248 Pa. 165, does not include a residuary clause. See *Wilson's Est.*, 57 D. & C. 612.

SECTION 15. *Devise in Fee Tail Abolished.* Whenever by any devise an estate in fee tail would be created according to the common law of the Commonwealth, it shall pass an estate in fee simple, and as such shall be inheritable and freely alienable.

COMMENT—This is based on section 13 of the 1917 act.

SECTION 16. *Rule in Shelley's Case.* The Rule in Shelley's Case and its corollaries shall not be applied, and a devise or bequest directly or in trust which shall express an intent to create an estate for life with remainder to the life tenant's heirs or the heirs of his body or his issue or his next of kin or persons described by words of similar import, shall not operate to give such life tenant an estate in fee in real estate or an absolute estate in personalty.

COMMENT—This is based on the Act of 1935, P. L. 1013, 20 PS 229, which reads:

"Grants or devises in trust, or otherwise, becoming effective hereafter, which shall express an intent to create an estate for life with remainder to the heirs of the life tenant, shall not operate to give such life tenant an estate in fee."

"The Rule in Shelley's Case and its corollaries shall not be applied" has been included because it is feared that the subsequent language might not of itself cover all of the ramifications of the rule. The importance of covering all possibilities is emphasized by the history of such legislation in other states. The statutes have been strictly construed because they are in derogation of the common law. See Simes, *Future Interests,* Section 136, *et seq.* See *Federal Land Bank* v. *Walker,* 345 Pa. 185, for Pennsylvania cases showing some of the ramifications of the rule. "or bequest" has been included to make certain that if the common law rule applies to personal property it is terminated as to it. See *Appeal of Cockins* v. *Harper,* 111 Pa. 26; *Hurd's Est.,* 305 Pa. 394.

SECTION 17. *Alienage.* Real and personal estate shall pass without regard to whether the testator or any devisee or legatee is or has been an alien.

COMMENT—This is based upon section 4(7) of the Intestate Act of 1947.

SECTION 18. *Testamentary Guardian.*

(a) *Guardian of the Person.* A person competent to make a will, being the sole surviving parent or adopting parent of any unmarried minor child, may appoint a testamentary guardian of the person of such child during his minority, or for any shorter period: Provided, That no father who, for one year or upwards previous to his death, shall have wilfully neglected or refused to provide for his child, and no mother who, for a like period, shall have deserted her child or wilfully failed to perform her parental duties, shall have the right to appoint a testamentary guardian of the person of such child.

(b) *Guardian of the Estate.* Any person may by will appoint a testamentary guardian of the real or personal estate which he shall devise, bequeath, or appoint to a minor.

COMMENT—This new section 18 takes the place of section 8 of the 1917 act as amended by the Act of 1925, P. L. 689. Section 18 differs from the 1917 act in the following respects:

(1) Authority in the surviving parent to appoint a general guardian of the estate has been omitted. This has proved to be a source of confusion especially where a guardian of the estate has been appointed by the orphans' court.

(2) The right to appoint a testamentary guardian is given to all testators but is restricted to the property passing by their wills to the minors. This is frequently attempted by grandparents, and there is no objection to it so long as it is confined to property passing under the testator's will. This is consistent with the Act of 1945, P. L. 253, 20 PS 1178, which reads:

"Any person, who hereafter makes a deed or gift *inter vivos* or exercises a right under an insurance or annuity policy to designate the beneficiary to receive the proceeds of such policy, may in such deed or in the instrument creating such gift or designating such beneficiary, appoint a guardian of the estate or interest of each beneficiary named therein who shall be a minor or otherwise incompetent. Payment by an insurance company to the guardian of such beneficiary so appointed shall discharge the insurance company to the extent of such payment to the same effect as payment to an otherwise duly appointed and qualified guardian."

SECTION 19. *Personal Estate of Non-Resident.* Nothing contained in this Act shall be construed to apply to the disposition of personal estate by a testator whose domicile at the time of his death is out of the Commonwealth.

COMMENT—This is section 24 of the 1917 act which in turn was derived from section 17 of the Act of 1833.

SECTION 20. *Short Title.* This act shall be known and may be cited as the Wills Act of 1947.

SECTION 21. *Repealer.* The following acts and parts of acts of assembly and all amendments of each are hereby

repealed as respectively indicated, but so far only as relates to the estates, real and personal, of any person or persons dying on or after the first day of January, one thousand nine hundred forty-eight:

(1) The act, approved the twenty-third day of February, one thousand seven hundred ninety-one, (three Smith's Laws, four), entitled "A supplement to the Act, entitled 'An act to declare and regulate escheats' ", in so far as its relates to dispositions of real or personal estate by wills.

(2) The act, approved the seventh day of June, one thousand nine hundred seventeen, (pamphlet laws, four hundred three), entitled "An act relating to the form, execution, revocation, and interpretation of wills; to nuncupative wills; to the appointment of testamentary guardians; to spendthrift trusts; to forfeiture of devise or legacy in case of murder of testator; to elections to take under or against wills, and to the recording and registering of such elections and of decrees relative thereto, and to the fees therefor", absolutely.

(3) The Act, approved the twenty-fourth day of April, one thousand nine hundred thirty-one, (pamphlet laws, forty-six), entitled "An act making the surviving spouse competent to testify in all cases where the right of such spouse to share in a deceased spouse's estate is disputed because of alleged desertion or nonsupport of the decedent, whether decedent died testate or intestate", in so far as it relates to dispositions of real or personal estate by wills.

(4) All other acts and parts of acts inconsistent herewith are hereby repealed.

SECTION 22. *Effective Date.* This act shall take effect on the first day of January, one thousand nine hundred forty-eight, and shall apply only to the wills of all persons dying on or after that day. As to the wills of persons dying before that day, the existing laws shall remain in full force and effect.

COMMENT—This is similar to section 26 of the 1917 act.

HISTORY OF ESTATES ACT OF 1947

HOUSE BILL NO. 296

Introduced by HONORABLE THOMAS H. LEE and HONORABLE ALBERT S. READINGER

In the House

Referred to the Committee on Judiciary, February 11.
Reported as committed, March 4.
Passed first reading, March 5.
Passed second reading, March 11.
Passed third reading and final passage, March 17 (202-0).
House concurred in Senate Amendments,† April 9 (201-0).

In the Senate

Referred to the Committee on Judiciary General, March 17.
Reported as committed, March 26.
Passed first reading, March 26.
Passed second reading with amendments,† April 7.
Passed third reading and final passage, April 8 (48-0).

Approved by the Governor, April 24, 1947.

Act No. 39

† Amendments were made only to conform to original text.

ESTATES ACT OF 1947

No. 39

AN ACT

Relating to the incidents of legal and equitable interests in real and personal property, including the validity thereof, the powers, rights, and duties of persons with respect thereto, and the disposition of interests which fail, and containing provisions concerning termination of trusts, releases and disclaimers of powers and interests, perpetuities, accumulations, charitable estates, rights of a surviving spouse in property as to which the decedent has retained certain powers, spendthrift trusts, limited estates in property, rules of interpretation, estates pur auter vie, estates in fee tail, and the Rule in Shelley's Case.

TABLE OF CONTENTS.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

SECTION 1. *Definitions.* The following words and phrases, when used in this act, unless the context clearly indicates otherwise, shall have the meanings ascribed to them in this section:

(1) "Charity" or "charitable purposes" includes but is not limited to the relief of poverty, the advancement of education, the advancement of religion, the promotion of health, governmental or municipal purposes, and other purposes the accomplishment of which is beneficial to the community.

COMMENT—The definition of "charitable purposes" is the definition given in Restatement, Trusts, section 368, with the addition of the words "but is not limited to".

(2) "Conveyance" means an act by which it is intended to create an interest in real or personal property whether the act is intended to have *inter vivos* or testamentary operation.

COMMENT—This is similar to the definition of "conveyance" in section 1 of the Uniform Property Act, which reads:

"The term 'conveyance' means an act by which it is intended to create one or more property interests, irrespective of whether the act is effective to create such interests, and irrespective of whether the act is intended to have *inter vivos* or testamentary operation."

Restatement, Property, section 11, also defines "conveyance" in the same manner as the Uniform Property Act, except that it omits the last clause "and irrespective of whether the act is intended to have *inter vivos* or testamentary operation."

(3) "Trust" means any testamentary trust or trust inter vivos.

SECTION 2. *Termination of Trusts.*

(a) *Failure of Original Purpose.* The court having jurisdiction of a trust, regardless of any spendthrift or similar

provision therein, in its discretion may terminate such trust in whole or in part, or make an allowance from principal to a conveyor, his spouse, issue, parents, or any of them, who is an income beneficiary, provided the court after hearing is satisfied that the original purpose of the conveyor cannot be carried out or is impractical of fulfillment and that the termination, partial termination, or allowance more nearly approximates the intention of the conveyor, and notice is given to all parties in interest or to their duly appointed fiduciaries. But, distributions of principal under this section, whether by termination, partial termination, or allowance, shall not exceed an aggregate value of twenty-five thousand dollars from all trusts created by the same conveyor.

COMMENT—Termination of trusts, which have failed in their purpose and which have become oppressive or otherwise undesirable, has been impossible in numerous instances due to inability to secure the consent of persons unborn, unascertained, or not *sui juris*. The purpose of this section is to give relief in such cases, but only as to trusts created after the effective date of the act. The relief to be given is in the nature of *cy pres*, thus preventing a complete frustration of the conveyor's intention.

The only other legislation on the subject of termination is section 4 of the Act of 1855, P. L. 415, 20 PS 2982, and the Act of 1931, P. L. 29, 20 PS 3251. Section 4 of the Act of 1855, P. L. 415, which was repealed, insofar as it relates to testamentary trusts, by the Fiduciaries Act of 1917 reads:

> "Whenever, by the agreement of competent parties, the further execution of any trust has become useless, it shall be lawful for such court to decree a reconveyance, as provided by the act to which this is a supplement, in case of a trust executed or expired."

The Act of 1931, P. L. 29, provides for termination of trusts by agreement between charitable remaindermen and owners of prior interests. That act apparently was passed for the sole purpose of making possible the termination of the trust involved in *Biddle's Ap.*, 99 Pa. 525, *Derbyshire's Est.*, 239 Pa. 389, 16 D. & C. 200, 306 Pa. 278. The 1931 act has no application unless the remainder is vested in a

charity: *Yeager Est.*, 354 Pa. 463. Provisions for charitable trusts, accumulations, and general rules of law permitting termination of trusts upon consent of all interested parties, avoid the possibility of a problem such as that of *Derbyshire's Estate.* The 1931 act, being an amendment to section 9 of the Act of 1853, P. L. 503, is repealed in section 20(1) of this act.

A provision for the termination of trusts without the consent of all parties in interest is inspired by similar legislation in several other states including California, Texas, Oklahoma, North Carolina and New York. The allowance from principal for maintenance of the income beneficiary has its analogy in the allowance from income of a spendthrift trust, as authorized in section 12 of this act.

"regardless of any spendthrift or similar provision therein" is included to eliminate any doubt about the effect of such a provision on the right of termination. Cf. *Rehr* v. *Fidelity-Phila. Trust Co.*, 310 Pa. 301; *Bowers' Trust Est.*, 346 Pa. 85; *Rehr* v. *Fidelity-Phila. Trust Co.*, 37 D. & C. 324.

(b) *Distribution of Terminated Trust.* Whenever the court shall decree termination or partial termination of a trust under the provisions of this section, it shall thereupon order such distribution of the principal and undistributed income as it deems proper and as nearly as possible in conformity with the conveyor's intention.

COMMENT—This subsection is required to eliminate the possible claim that the trust, upon failure of its original purpose, reverts to the settlor or to the settlor's or testator's estate. While courts apparently have ignored this possibility, it nevertheless exists. See Restatement, Trusts, section 411 *et seq.*; *Overbeck* v. *McHale,* 354 Pa. 177; *Conrad's Est.,* 341 Pa. 451.

(c) *Other Powers.* Nothing in this section shall limit any power of the court to terminate or reform a trust under existing law.

COMMENT—This subsection is added in an abundance of caution to make it clear that this section does not purport to be a codification of all circumstances under which a trust can be terminated.

SECTION 3. *Release or Disclaimer of Powers or Interests.*

(a) *Powers and Interests Releasable.* Any power of appointment, or power of consumption, whether general or special, other than a power in trust which is imperative, and any interest in, to, or over real or personal property held or owned outright, or in trust, or in any other manner which is reserved or given to any person by deed, will or otherwise, and irrespective of any limitation of such power or interest by virtue of any restriction in the nature of a so-called spendthrift trust provision, or similar provision, may be released or disclaimed, either with or without consideration, by written instrument signed by the person possessing the power or the interest and delivered as hereinafter provided, but nothing in this section shall authorize an income beneficiary of a spendthrift trust to release or disclaim his right to such income.

COMMENT—Subsections (a), (b), and (c) are similar to sections 1, 2, and 3 of the Act of 1943, P. L. 797, as amended by the Act of 1945, P. L. 1337, 68 PS 581, *et seq.*

An effort has been made to preserve the tax advantages which led to the amendments of 1945 and at the same time to eliminate certain collateral questions which have been raised by those amendments.

The Act of 1943 was prompted by a change in the Federal tax laws by the Revenue Act of 1942. A complete or partial release or disclaimer of a power of appointment or other property right is now often desirable. The purpose of the Act of 1943 was to establish an orderly method by which the releases, partial releases and disclaimers could be evidenced.

The 1945 amendment went much further than the original act. The amendments were intended to make it possible for life beneficiaries to disclaim interests in favor of charitable remaindermen before the due date for filing the Federal estate tax return, and in this manner secure full deductions for the charitable gifts in such tax returns. See section 812(d) of the Internal Revenue Code as amended by the Revenue Act of 1942. As now amended it is possible for the life beneficiary to relinquish his right to consume principal or to receive principal in the discretion of the trustee, and thus secure deduction for the charitable gift. See *Schoonmaker Est.*, 6 T. C. 404.

The subsection preserves the right to relinquish rights in principal which otherwise might make the principal taxable or prevent the deduction of a gift to a charitable remainderman. It does not continue the right to release or disclaim the income of a spendthrift trust. In thus avoiding the possibility of defeating the conveyor's plans, it also avoids difficult questions concerning acceleration of remainders: Cf. *Disston's Est.*, 257 Pa. 537; *Gunning's Est.*, 234 Pa. 144.

(b) *Form of Release or Disclaimer.* A power or interest which is releasable or disclaimable may be released or disclaimed either absolutely or conditionally, and may also be released or disclaimed with respect to the whole or any part of the property subject to such power or interest, and may also be released or disclaimed in such manner as to reduce or limit the persons or objects or classes of persons or objects in whose favor such power or interest would otherwise be exercisable. No release or disclaimer of a power or of an interest shall be deemed to make imperative a power or interest which was not imperative prior to such release or disclaimer unless the instrument of release or disclaimer expressly so provides.

COMMENT—The words "except that no power or interest, subject to a spendthrift trust provision or similar provision may be released or disclaimed except in favor of a remainderman" which are in the 1943 and 1945 Acts, are here omitted as unnecessary. A release or disclaimer as distinguished from an assignment can only benefit remaindermen or persons taking in default of appointment. The omitted words raise difficult questions if there is no remainderman and the conveyor or his estate has a reversion. The reference to "imperative" powers in the last sentence is necessary because if the donee of a general power releases his power to appoint to anyone except members of a special class, it might be argued that an interest vests in the members of such class who will take even in default of appointment. See *Jones* v. *Mackie,* 49 D. & C. 459, 488.

(c) *Delivery of Release or Disclaimer.* Such release or disclaimer may be delivered to any one of the following:

(1) Any person specified for such purpose in the instrument creating the power or interest;

(2) Any trustee of the property to which the power or interest relates;

(3) The clerk of the court having jurisdiction of the trust for filing in said court;

(4) The recorder of deeds for recording in the county in which the person possessing the power or interest resides, or in which the deed, will, or other instrument creating the power or interest is recorded or filed.

COMMENT—Clauses (1) and (2) are in accordance with the 1943 and 1945 acts. Clause (3) is considered a proper addition as the most natural place where the release or disclaimer should be filed. There has been omitted as inadvisable and unnecessary the following clause appearing in the 1943 and 1945 acts:

"(c) Any person other than the person possessing the power or interest who could be adversely affected by an exercise of the power or interest".

Clause (4) takes the place of clause (d) in the 1943 and 1945 acts.

(d) *Grantee or Lienholder.* A release or disclaimer shall be void as against a bona fide grantee of or holder of a lien on real estate in any county unless the release or disclaimer or a duplicate original or certified copy thereof is recorded in the county where the real estate lies before the recording or entering of the instrument or lien under which such grantee or lienholder claims.

COMMENT—Some protection should be given to persons who give value for an interest in the estate and have taken a reasonable precaution before such value is given. The style of the subsection is based on the language of section 13 of the Wills Act of 1947.

(e) *Application of Section.* This section shall apply to releases and disclaimers heretofore and hereafter delivered, but shall not invalidate any release or disclaimer delivered pursuant to the law in effect prior to the effective date of this act.

COMMENT—The first part of this subsection is identical with section 4 of the 1943 act. The addition makes it clear that the changes made in subsection (c) will not invalidate what was previously effective.

SECTION 4. *Rule Against Perpetuities.*

(a) *General.* No interest shall be void as a perpetuity except as herein provided.

(b) *Void Interest—Exceptions.* Upon the expiration of the period allowed by the common law rule against perpetuities as measured by actual rather than possible events, any interest not then vested and any interest in members of a class the membership of which is then subject to increase shall be void.

COMMENT—This subsection is intended to disturb the common law rule as little as possible, but to make actualities at the end of the period, rather than possibilities as of the creation of the interest, govern, and to provide a more equitable disposition of void gifts.

By regarding actualities at the end of the period, the unrealistic results based on purely theoretical possibilities are avoided. The possibility test seems peculiarly inappropriate in most Pennsylvania cases because by the time the courts do decide upon the validity of the remainders, possibilities have become actualities. This results because (1) the modern tendency is to uphold valid life estates even though the ultimate remainder seems obviously void, and (2) the court refuses to decide on the validity of future estates until the termination of the valid life estates. See *Quigley's Est.*, 329 Pa. 281, on both points.

Gifts to a class, the membership of which is still subject to increase at the expiration of the period, are treated in the same manner as contingent interests although there may have been a technical vesting in some of the members. This is in accord with the common law which invalidates the entire class gift if the class will not be closed within the period. See Simes, Future Interests, Sections 498 and 499. It also seems the most sensible solution in such cases. It will be noted that most class gifts do not vest at all until the class is determined so that this provision is necessary only for those cases where a technical vesting occurs as each member of the class is born.

This subsection shall not apply to:

(1) *Interests Exempt at Common law.* Interests which would not have been subject to the common law rule against perpetuities;

COMMENT—This will save charitable gifts and other interests, such as easements, which are not subject to the rule against perpetuities.

(2) *Cemetery Trusts.* Interests which are directed to be used for the maintenance, care, or adornment of any cemetery, churchyard, or other place for the burial of the dead, or any portion thereof, or any grave therein or any improvement on or about the same, and which are subject to no condition precedent at the end of the period described in subsection (b);

COMMENT—This takes the place of the Act of 1891, P. L. 119, 9 PS 4, which reads:

"No disposition of property hereafter made for the maintenance or care of any cemetery, churchyard or other place for the burial of the dead, or of any portion thereof, or grave therein, or monuments or other erections on or about the same, shall fail by reason of such disposition having been made in perpetuity, but said disposition shall be held to be made for a charitable use."

The only substantial change in wording is that the words "said disposition shall be held to be made for a charitable use" have been omitted as unnecessary and as tending toward confusion. See *Deaner's Est.,* 98 Pa. Super. 360, where a bequest for cemetery care was made within thirty days of death; *Wise* v. *Rupp,* 269 Pa. 505, where accumulation was directed; and *Devereux's Est.,* 48 D. & C. 491, where an award of excess income *cy pres* was requested.

(3) *Pension or Profit-Sharing Plans.* Interests created by a bona fide trust *inter vivos* primarily for the benefit of business employees, their families or appointees, under a stock bonus, pension, disability or death benefit, profit-sharing or other employee benefit plan;

COMMENT—This is suggested by a similar statutory provision in New York, and is included to eliminate any possible doubt. See 44 Mich. L. R. 833, 837, for references to similar legislation recently enacted in other states.

(4) *Administrative Powers.* Powers which contribute to the effective management of trust assets, including powers to sell, mortgage, or lease trust assets, powers relating to investment of trust assets, powers to determine what is principal and what is income, and powers to name successor trustees;

COMMENT—This clause is included to clarify and change the common law rule as to such interests which either might be or definitely are subject to the present rule against perpetuities.

(c) *Time for Beginning Period.* The period allowed by the common law rule against perpetuities under subsection (b) of this section shall be measured from the expiration of any time during which one person while living has the unrestricted power to transfer to himself the entire legal and beneficial interest in the property.

COMMENT—The period would begin as of the death of a donee of a power who could appoint by deed or by will (*Mifflin's Ap.*, 121 Pa. 205), but not where the power is to appoint by will alone: *Lawrence's Est.*, 136 Pa. 354. For revocable trusts the period would begin as of the settlor's death. For an unfunded life insurance trust the period would be measured from the insured's death unless the trust was irrevocable and the policies were also irrevocably assigned to the trustee: See Leach, 51 Harv. L. R. 638, 662.

SECTION 5. *Rule Against Perpetuities—Disposition When Invalidity Occurs.*

COMMENT—Another significant change in present law does not involve the rule against perpetuities itself, but rather the question of what should be done with interests which are held to be void under the rule. Under the law in effect until the effective date of this act such void gifts (a) fall into the residue, or (b) pass to other residuary beneficiaries under section 15(c) of the Wills Act of 1917, or (c) pass to the settlor's heirs or next of kin as of the date of his death. While these results seem appropriate in cases of lapsed gifts, they are not appropriate when applied to gifts void as perpetuities.

One objection to the law as it has been heretofore is a purely practical one. In most cases where prior gifts were upheld and only the remote remainders were invalidated, those who took the void gifts were deceased when the remainders came into enjoyment and the perpetuity questions were decided. It therefore became necessary to trace each reversion through one or more estates with consequent administration and tax difficulties.

A more serious objection to the former law arose in all cases where the invalid limitation was in favor of the settlor's descendants or of other primary objects of his bounty and the gift was either not in the residuary clause of the will or comprised only part of the residuary gift. In such a case the void remainder might be wholly or partially diverted from the family, or to another branch of the family which had already received its full share of the estate, without leaving any share to the issue of the income beneficiary. Perfect justice cannot be done in all cases, but an award of the void interests to the income beneficiaries at the expiration of the period will bring about equitable distribution in accordance with the settlor's most probable intent in all except the most unusual cases. Void remainders are usually to the issue of a life tenant, so that the void gift will usually go to the parent of the disappointed remainderman. In the rare cases where this will not be the result, the award to the last valid life tenant may be arbitrary, but no more so than dispositions which have taken place under the former law.

(a) *Valid Interests Following Void Interests.* A valid interest following a void interest in income shall be accelerated to the termination date of the last preceding valid interest.

COMMENT—This is in accord with general principles of law which favor acceleration in the absence of some definite reason to the contrary.

(b) *Void Interests on Condition Subsequent or Special Limitation.* A void interest following a valid interest on condition subsequent or special limitation shall vest in the owner of such valid interest.

COMMENT—Special provision for estates on condition subsequent or special limitation is necessary in order not to

change the very sensible results reached by the common law in cases of remote conditions subsequent followed by void gifts over. In such cases the first taker is awarded the estate freed of the condition: Cf. *Bilyeu's Est.*, 346 Pa. 134. It will be seldom indeed that the owner of the estate on a remote condition subsequent or on a special limitation is not also the income beneficiary at the expiration of the period so that he will be covered in any event by the general provisions of subsection (c) *infra*. However, the unusual situation where this might not be the case is provided for.

(c) *Other Void Interests.* Any other void interest shall vest in the person or persons entitled to the income at the expiration of the period described in Section 4(b).

COMMENT—See comment to section 4(a).

SECTION 6. *Income Accumulations—When Valid.* No direction or authorization to accumulate income shall be valid except:

COMMENT—Comparable wording in the Act of 1853, P. L. 503, 20 PS 3251, reads:

"No person or persons shall, after the passing of this act, by any deed, will, or otherwise, settle or dispose of any real or personal property, so and in such manner that the rents, issues, interest or profits thereof, shall be wholly or partially accumulated for any longer term than * * *"

(1) *Judicious Management.* For the purpose of creating a temporary reserve of a reasonable amount for administration of the trust, or periodic distributions in specified amounts, or the needs of a beneficiary;

COMMENT—This is declaratory of case law: *Howell's Est.*, 180 Pa. 515; *Spring's Est.*, 216 Pa. 529.

(2) *Lifetime of the Settlor.* For a period expressly measured by the lifetime of the settlor;

(3) *Minority.* During the minority of any beneficiary who if living at the age of twenty-one will be entitled to such accumulations and earnings thereon or to the entire income from such accumulations and earnings thereon; and a direction or authorization to accumulate income until a person reaches a designated age over twenty-one and there-

after to pay to such person, if living, such accumulations and earnings thereon or the entire income from such accumulations and earnings thereon, shall be valid during minority and shall take effect as though twenty-one had been the designated age;

COMMENT—Clauses (2) and (3) are suggested by the following portion of the 1853 Act:

No income shall be accumulated "for any longer term than the life or lives of any such grantor or grantors, settler or settlers, or testator, and the term of twenty-one years from the death of any such grantor, settler, or testator, that is to say, only after such decease during the minority or respective minorities with allowance for the period of gestation of any person or persons, who, under the uses or trusts of the deed, will, or other assurance directing such accumulation, would, for the time being, if of full age, be entitled unto the rents, issues, interests, and profits so directed to accumulate * * *"

Clause (3), in permitting accumulation during any minority, is more liberal than heretofore. See *McBride's Est.*, 152 Pa. 192, where it was held that accumulations during the minority of afterborn children would be invalid if for more than 21 years after the testator's death. Permission to capitalize income accumulations is also a change. Cases interpreting the 1853 Act refused to permit the capitalization of income accumulated during a minority: *Farnum's Est.*, 191 Pa. 75; *Washington's Est.*, 75 Pa. 102. In such cases the proper disposition of the accumulated income was not clear: *Wright's Est.*, 227 Pa. 69; *In re Trustee's Account*, 87 Pitts L. J. 79.

The validation of accumulations during minority, when the accumulation is directed to be continued beyond the minority and then paid to the former minor, is consistent with former law: *Stocking's Est.*, 304 Pa. 476; Gray, Rule Against Perpetuities (4th Ed.), sections 700, 718. However, clause (3) as proposed changes the law by permitting the designated person to receive accumulated income on reaching twenty-one when the gift of income is contingent upon survival to a designated age (cf. *Lowe's Est.*, 326 Pa. 375) and in permitting income accumulated until the age of twenty-one to be capitalized. If the minor dies before he is twenty-one, accumulations to the date of his death, being valid, will be distributed as directed by the conveyor.

(4) *Incompetency.* For the exclusive benefit of a person who, in the opinion of the trustee, is incompetent to receive or judiciously use the income;

COMMENT—This is new and will validate what frequently occurs in actual practice when persons interested do not wish to secure the appointment of a guardian in the common pleas court.

(5) *Charity.* For any charitable purpose or purposes;

COMMENT—Clause (5) is suggested by the following portion of the 1853 Act as amended:

"Provided, that any donation, bequest, or devise, for any literary, scientific, charitable, or religious purpose, shall not come within the prohibition of this section, which shall take effect and be in force, as well in respect to wills heretofore made by persons yet living and of competent mind, as in respect to wills hereafter to be made."

(6) *Pension or Profit-Sharing Plans.* In a bona fide trust inter vivos primarily for the benefit of business employees, their families or appointees, under a stock bonus, pension, disability or death benefit, profit-sharing, or other employee benefit plan;

COMMENT—This is based on a New York statute, Personal Property Law, sec. 16.

(7) *Insurance Premiums.* In a trust consisting of, or including, a policy or policies of insurance, a direction or authorization that the dividends on such policies may be applied in whole or in part for the payment of premiums on such policy or policies;

COMMENT—This is based on a New York Statute, Personal Property Law, sec. 16. The New York statute, unlike clause (7), authorizes the accumulation of income of a funded insurance trust for the payment of premiums.

(8) *Apportionment Between Principal and Income.* The following directions or authorizations shall be valid:

a. To apply to principal in whole or in part extraordinary dividends, regardless of the form in which they are paid, and rights to subscribe to stock;

b. To amortize from income premiums paid for investments which are callable or have a fixed maturity;

c. To amortize from income the waste represented by the return from a wasting asset or dividends from a wasting asset corporation;

d. To pay carrying charges on unproductive or under-productive property from income;

e. To apply to principal in whole or in part the proceeds of the conversion of unproductive or under-productive property.

COMMENT—Clause (8) is added to make it certain that directions of this nature can not be considered directions for invalid accumulations. This is particularly necessary in view of the language of section 2 of the Principal and Income Act of 1947, which merely refers to existing law. The inclusion of this paragraph made possible the repeal of the Act of 1939, P. L. 201, which only partially covered the subject and read:

"In wills, deeds of trust, or other instruments creating trusts, becoming effective hereafter, provisions directing that extraordinary dividends declared upon corporate stock held in trust, whether payable in cash, stock, rights to subscribe to stock of the issuing or another corporation, or otherwise, or directing that profits realized from such stock, either upon its sale or upon the sale or dissolution of the issuing corporation, or otherwise, shall be treated, in whole or in part, either as principal or income, shall be valid and enforceable."

SECTION 7. *Disposition of Valid Income Accumulations.*

(a) *During Lifetime of Settlor.* Except as may be otherwise directed or authorized in the conveyance, accumulations during a period measured by the lifetime of the settlor shall be added to and form a part of the principal from which they originated.

COMMENT—The only portion of the Act of 1853 dealing with the distribution of accumulated income reads:

"* * * and in every case where any accumulation shall be directed otherwise than as aforesaid, such direction

shall be null and void insofar as it shall exceed the limits of this act, and the rents, issues, interests and profits, so directed, to be accumulated contrary to the provisions of this act, shall go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed."

Capitalization of income during the lifetime of the settlor is not against public policy. But existing decisions do not conclusively show that such capitalization of income is valid. For a general discussion, see Kain, Limitations Upon Accumulations of Income in Pennsylvania for Noncharitable Purposes, 38 Dick. L. R. 29, 54; Foulke, Rule Against Perpetuities, section 648.

(b) *During Minority.* Except as may be otherwise directed or authorized in the conveyance, accumulations during the minority of a beneficiary shall be added to any principal from which the beneficiary is to receive the income. Notwithstanding any direction or authorization to accumulate income during the minority of a beneficiary, it shall be lawful for the court, where other means for his maintenance and education shall be insufficient, to make an adequate allowance from income for such purpose.

COMMENT—The second sentence of this subsection is based on the following portion of the 1853 act:

"And provided, That notwithstanding any direction to accumulate rents, issues, interests, and profits, for the benefit of any minor or minors, it shall be lawful for the proper court as aforesaid, on the application of the guardian, where there shall be no other means for maintenance or education, to decree an adequate allowance for such purpose, but in such manner as to make an equal distribution among those having equal rights or expectations, whether at the time being minors or of lawful age."

(c) *During Incompetency.* Notwithstanding any direction or authorization to accumulate income for the benefit of an incompetent person, it shall be lawful for the court, where other means for such incompetent's maintenance shall be insufficient, to make an adequate allowance from income for such purpose.

(d) *Upon Competency or Death.* Accumulations during the incompetency of a person shall be distributed to him when he shall become competent, or to his personal representative at his death.

COMMENT—There are no comparable provisions in the 1853 act. Subsection (c) together with section 6(4) make it safe for the trustee to apply income funds for the benefit of incompetents and thus avoid the appointment of a guardian by the court of common pleas in many instances.

Subsection (d) will make it certain that the funds cannot be withheld for the benefit of someone other than the incompetent or his estate.

SECTION 8. *Disposition of Invalid Income Accumulations.*

(a) *Unlawful Authorization.* Any income authorized but not directed to be accumulated unlawfully shall be distributed as if no such accumulation had been authorized.

COMMENT—When there is merely an authorization to accumulate unlawfully, it is clear that the authorization can be disregarded without disrupting the conveyor's plans.

(b) *Unlawful Direction.* Any income directed to be accumulated unlawfully shall be distributed in the absence of a valid alternative direction in the following order of preference:

(1) To the person or persons, if any, who are entitled to the immediate enjoyment of the income from which such accumulations were directed;

COMMENT—Since 1853, Pennsylvania has provided that void accumulations of income "shall go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed."

The present rule in Pennsylvania was announced in *White's Est.*, 8 Dist. 33, 35, by Judge Penrose, and adopted by the Supreme Court in *Maris's Est.*, 301 Pa. 20, as follows:

"* * * the striking down of the illegal accumulation leaves the will as if it had been silent on the subject, and future gifts are not accelerated; if the accumulation relates to a vested interest *taking effect in possession,* the

released income goes at once to the beneficiary—if to an interest *not* vested *in possession,* the income goes to the residuary legatee or devisee, unless the residuary estate itself be the subject of the provision, in which case the income goes under the intestate laws to the next of kin or heirs."

Subsection (b)(1) retains as a first preference the part of the rule in *White's Estate* which gives void accumulations to the person or persons who have a vested estate in immediate possession. The best illustration of such an estate is that in *Maris's Estate, supra,* where a primary gift of all the income to B was subsequently modified by a void direction that stock dividends be considered as principal. In striking down the void accumulation the primary gift of all the income was construed as a vested estate in immediate possession and became absolute in B, as if the accumulation had never been directed.

(2) To the person or persons, if any, who would be entitled to the accumulations if the time fixed by the conveyance for the payment of the accumulations were accelerated to the time of the accrual of the income;

COMMENT—The part of the rule in *White's Est.,* 8 Dist. 33, denying the acceleration of future gifts is modified because where the conveyor has indicated who in the future should take the accumulation, his presumed intent is to give to the same person a present gift of the released income. Subsection (b)(2) as a second preference accelerates future gifts whether vested or contingent. Illustrations of acceleration are as follows:

1. A vested gift of the accumulations to B payable to him after a term of years, or after a prior life estate—accelerated by immediate payment to B.

2. A contingent gift of the accumulations to B payable to him if living after a term of years or after a prior life estate, and if not then living, payable to C. This is accelerated by immediate payment to B if living when the income accrues. C is eliminated because the conveyor's presumed intent was primarily to benefit B, and only secondarily to benefit C.

3. Gifts of the accumulations to a class, whether vested or contingent, are similarly accelerated, and the members are determined at the time of the accrual of the income.

(3) To the person, or proportionately to the persons, if any, who, when the income accrues, are entitled to other income from the same trust;

COMMENT—If there are other income beneficiaries, it seems probable that the conveyor would intend them to receive the income before it would go under the subsequent clauses. "the same trust" may in some cases require judicial construction.

(4) To the person or persons, if any, entitled under the residuary clause of the conveyance;

(5) To the person or persons entitled to property undisposed of by the conveyance.

COMMENT—This means to the next of kin of the conveyor in many instances.

SECTION 9. *Combination of Charitable Trusts.* Whenever two or more trusts heretofore have been or hereafter shall be created for substantially the same charitable purposes, and the court having jurisdiction over any such trust, upon the application of any party in interest, shall find that they can be more effectively administered if they are combined, the court in its discretion, after such notice as the court shall direct, may combine them in the manner and to the extent that the court shall approve, but not so as to violate any express provision to the contrary in any conveyance creating any of the trusts so combined.

COMMENT—This section is based on the Act of 1933, P. L. 271, 10 PS 16. In most circumstances where a trust fails it can be awarded *cy pres* under section 10. However, there are numerous instances where charitable trusts of small amounts should not be applied *cy pres* but where they can be more effectively administered if combined—particularly for purposes of investment. It was thought preferable to make this section apply to all cases where a combination of charitable trusts would provide for more effective administration than to confine its application, as in the 1933 act, to cases where "the income from the trust estates set apart for the purposes of the trusts is insufficient or inadequate."

SECTION 10. *Administration of Charitable Estates.* Except as otherwise provided by the conveyor, if the charitable purpose for which an interest shall be conveyed shall be or become indefinite or impossible or impractical of fulfilment, or if it shall not have been carried out for want of a trustee or because of the failure of a trustee to designate such purpose, the court may, on application of the trustee or of any interested person or of the Attorney General of the Commonwealth, after proof of notice to the Attorney General of the Commonwealth when he is not the petitioner, order an administration or distribution of the estate for a charitable purpose in a manner as nearly as possible to fulfil the intention of the conveyor, whether his charitable intent be general or specific.

COMMENT—This section is intended to supplant the five conflicting and inconsistent statutes on the *cy pres* principle, namely: (1) Act of 1855, P. L. 328, 10 PS 13; (2) Act of 1876, P. L. 211, 10 PS 15; (3) Act of 1885, P. L. 259, 20 PS 196; (4) Act of 1889, P. L. 173, 10 PS 14, and (5) Act of 1895, P. L. 114, 10 PS 13.

Section 10 is in accordance with the strong tendency of the courts to apply *cy pres* whenever possible and to limit very narrowly the right of next of kin to get the property back. To reach this result the section goes the whole way and lip service to a "general charitable intention" will no longer be required.

Except where the conveyor makes an alternative gift, the only question which will be before the court will be whether the original gift has failed and if so to what other charity the fund shall be awarded. The conveyor's heirs, next of kin and residuary beneficiaries will no longer be in a position to bargain with expectant charities.

SECTION 11. *Powers of Appointment—Rights of Surviving Spouse.* A conveyance of assets by a person who retains a power of appointment by will, or a power of revocation or consumption over the principal thereof, shall, at the election of his surviving spouse, be treated as a testamentary disposition so far as the surviving spouse is concerned to the extent to which the power has been reserved, but the right of the

surviving spouse shall be subject to the rights of any income beneficiary whose interest in income becomes vested in enjoyment prior to the death of the conveyor.

COMMENT—This section preserves for the surviving spouse the right to share in the decedent's assets where the decedent has retained important rights of ownership at death. Rights of the surviving spouse in such circumstances have been recognized in other states: cf. *Newman* v. *Dore,* 275 N. Y. 371, annot. 12 Temple L. Q. 129, 36 Mich. L. R. 496. However, Pennsylvania has given little opportunity to the surviving spouse to share when legal title has passed from the decedent prior to death: cf. *Beirne* v. *Continental-Equitable T. & T. Co.,* 307 Pa. 570; *Windolph* v. *Girard Trust Co.,* 245 Pa. 349; *Rynier Est.,* 347 Pa. 471; *contra Diedel's Est.,* 32 D. & C. 685. Indeed, the situation in Pennsylvania has been such that it was stated correctly that "It is only the stupid husband, who, against his wishes, would be forced to allow his wife to share in his personalty.": Comment (1939) 5 Univ. of Pitts. L. Rev., 78, p. 87.

Section 11, in respect to powers of appointment completes the plan suggested by section 8(c) of the Wills Act of 1947. The surviving spouse will have the right to reach assets of a trust *created by the decedent* where power of appointment is retained by the decedent, but not where the trust was created by another.

"power of appointment" and not "general power of appointment" is employed so that this section can not be avoided by creating special powers giving the right to appoint to a class including everyone but the spouse or some other designated individuals.

"but the right of the surviving spouse shall be subject to the rights of any income beneficiary whose interest in income becomes vested in enjoyment prior to the death of the conveyor" is included for two reasons: (1) It might prove harsh to withdraw income from persons who have been receiving it. (2) It seemed proper to permit the surviving spouse to share in property of which the decedent had the beneficial enjoyment at his death, but not to permit a sharing in property over which the decedent retained control but which he did not enjoy beneficially.

SECTION 12. *Spendthrift Trusts.* Income of a trust subject to spendthrift or similar provisions shall nevertheless be

liable for the support of anyone whom the income beneficiary shall be under a legal duty to support.

COMMENT—This section is based on section 19 of the Wills Act of 1917. Other acts applicable to spendthrift trusts are the Act of 1921, P. L. 434, 48 PS 136, and section 733 of the Penal Code, 18 PS 4733.

The Pennsylvania Bar Association Committee on the Law of Decedents' Estates and Trusts in its report made in June 1942, made the following comments on spendthrift trusts:

"It is not proposed at this point to treat the general subject of spendthrift trusts even though they are often created by wills. Here will merely be discussed the inadequacy of the existing provision in Section 19 which subjects such trusts created by will to liability for the support and maintenance of the 'wife and minor children' (cf. 48 PS 136, which confers rights to proceed with levy or attachment on any estates up to 50 percent of the amount thereof for support of 'the wife or children'. In Stewart's Est., 334 Pa. 356 (1939) it is said that the two acts provide concurrent remedies). Why should not the provision protect any member of the family whom the beneficiary of the trust is under a legal duty to support? Should there be any difference whether the support is necessary for a minor child as contrasted to a disabled child who is of age or a parent who is an invalid? The Supreme Court in Moorehead's Est., (289 Pa. 542, 552 (1927)) has said:

" 'In every civilized country is recognized the obligation, sacred as well as lawful, of a husband to protect and provide for his family. * * * This case goes beyond the concern of the immediate parties to it. It affects the status of the family as being the foundation of society and civilization, and hence in a very certain sense is of wide public concern'.

"In that case, however, the issue was only as to the right of the wife against the spendthrift trust in favor of her husband.

"Recommendation No. 6. Spendthrift trusts hereafter becoming effective should be subjected to liability for the support of all persons whom the beneficiary is under a legal duty to support."

The recommendation of the Bar Association Committee was followed.

SECTION 13. *Limited Estates in Personalty and in the Proceeds of the Conversion of Real Estate.* A person having a present interest in personal property, or in the proceeds of the conversion of real estate, which is not in trust, and which is subject to a future interest, shall be deemed to be a trustee of such property, and not a debtor to the remainderman, with the ordinary powers and duties of a trustee, except that he shall not be required to change the form of the investment to an investment authorized for Pennsylvania fiduciaries, nor shall he be entitled to compensation as trustee. Such person, unless given a power of consumption or excused from entering security by the terms of the conveyance, shall be required to enter such security for the protection of persons entitled to the future interests as the court in its discretion shall direct. If a person having a present interest shall not enter security as directed, the court shall appoint a trustee who shall enter such security as the court shall direct, and who shall exercise all the ordinary powers and duties of a trustee, except that he shall not be required to change the form of the investment to an investment authorized for Pennsylvania fiduciaries.

COMMENT—This section replaces section 23 of the Fiduciaries Act of 1917. "Proceeds of the conversion of real estate", instead of proceeds of the "sale" of real estate, was employed so that it includes the proceeds of real estate no matter how acquired, whether from the proceeds of insurance (cf. Uniform Principal and Income Act Section 3(2), 20 PS 3473), from natural resources allocated to principal (Uniform Principal and Income Act, Section 9, 20 PS 3479), from forfeited down money (*Knapp's Est.*, 24 C. C. 119) or from the proceeds of property taken on eminent domain: *Conner's Est.*, 239 Pa. 449.

Section 13 will continue to apply when the proceeds of the conversion are reinvested in real estate.

The words "a person having a present interest * * * which is not in trust, and which is subject to a future interest" are considered an all-inclusive definition of the relationship and as making it clear that it does not include trust relationships as such. "and not a debtor to the remainderman" was added to emphasize the fact that the rule of law heretofore found in Fiduciaries Act, section 23, will

no longer apply. "except that he shall not be required to change the form of the investment to an investment authorized for Pennsylvania fiduciaries" was included to make it clear that the life beneficiary may retain the original property so long as he considers it advisable. New investments will be required to be in legal investments, as the life beneficiary is subject to "the ordinary powers and duties of a trustee".

Consistent with *Powell's Est.,* 340 Pa. 404, 411, and *Zehender's Est.,* 8 Dist. 439, there is no provision for requiring security where the life tenant is given a power of consumption or is excused therefrom. Where these features are lacking the court in its discretion can require security.

SECTION 14. *Rules of Interpretation.* In the absence of a contrary intent appearing therein, conveyances shall be construed, as to real and personal estate, in accordance with the following rules:

COMMENT—This introductory paragraph and the contents of section 14 are similar to the introductory paragraph and some of the contents of section 14 of the Wills Act of 1947.

(1) *Meaning of "Heirs" and "Next of Kin", etc.—Time of Ascertaining Class.* A conveyance of real or personal property, whether directly or in trust, to the conveyor's or another designated person's "heirs", or "next of kin", or "relatives" or "family", or to "the persons thereunto entitled under the intestate laws", or to persons described by words of similar import, shall mean those persons, including the spouse, who would take under the intestate laws if such conveyor or other designated person were to die intestate at the time when such class is to be ascertained, a resident of the Commonwealth, and owning the property so conveyed: Provided, That the share of a spouse other than the spouse of the conveyor, shall not include the ten thousand dollar allowance under the intestate laws. The time when such class is to be ascertained shall be when the conveyance to the class is to take effect in enjoyment.

COMMENT—This clause is based on section 14(4) of the Wills Act of 1947, which in turn is based in part upon the

Act of 1923, P. L. 914, 21 PS 11, extended to include gifts in remainder to heirs of a person other than the conveyor. It is also based on recommendations of the Pennsylvania Bar Association Committee on the Law of Decedents' Estates submitted in June 1941 and June 1942.

(2) *Meaning of "Die Without Issue" and Similar Phrases.* In any conveyance of real or personal estate, the words "die without issue", "die without leaving issue", "have no issue", or other words importing either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in his lifetime or at his death, and not an indefinite failure of his issue.

COMMENT—This is almost identical with section 14 of the Wills Act of 1917, the Act of 1897, P. L. 213, 21 PS 9, and section 14(5) of the Wills Act of 1947.

(3) *Adopted Children.* In construing a conveyance to a person or persons described by relationship to the conveyor or to another, any person adopted before the effective date of the conveyance shall be considered the child of his adopting parent or parents and not the child of his natural parents: Provided, That if a natural parent shall have married the adopting parent before the effective date of the conveyance, the adopted person shall also be considered the child of such natural parent.

COMMENT—This is based on section 14(6) of the Wills Act of 1947. The comments thereto are applicable here.

(4) *Illegitimates.* In construing a conveyance to a person or persons described by relationship to the conveyor or to another, an illegitimate person shall be considered the child of his mother and not of his father: Provided, That when the parents of a person born illegitimate shall have married each other, he shall thereafter be considered legitimate.

COMMENT—This is based on section 14(7) of the Wills Act of 1947. The comments thereto are applicable here.

SECTION 15. *Estates Pur Auter Vie.* An interest conveyed to a person for the life of another, whether or not such conveyance is to him and his heirs, shall, on his death before expiration of the interest, be considered as personal property forming a part of his estate and shall be subject to distribution in like manner as a lease for a term of years.

COMMENT—Section 1 of the Wills Act of 1917, unlike the Wills Act of 1947, includes specific reference to estates *pur auter vie.* There is no special mention of estates *pur auter vie* in the Intestate Act of 1917, or in the Intestate Act of 1947. Section 11(g) of the Fiduciaries Act of 1917 provides that estates *pur auter vie,* unless such estates have been limited to the decedent and his heirs, shall be included in the inventory.

At common law, the estate *pur auter vie* was not an estate of inheritance; the interest of the tenant terminated upon his death, even though he died before the *cestui que vie.* Section 15 changes the property interest of a tenant *pur auter vie* by enlarging it to an estate of inheritance. This provision is more logically in this act than in the Wills Act or the Intestate Act. The phrase "shall be subject to distribution in like manner as a lease for a term of years" is taken from the Fiduciaries Act. Its inclusion is desirable to avoid various questions that might arise in regard to procedure.

SECTION 16. *Estates in Fee Tail Abolished.* Whenever by any conveyance an estate in fee tail would be created according to the common law of the Commonwealth, it shall pass an estate in fee simple, and as such shall be inheritable and freely alienable.

COMMENT—This is based on section 15 of the Wills Act of 1947, which in turn was based on section 13 of the Wills Act of 1917, and upon the Act of April 27, 1855, P. L. 368, 68 PS 124, which reads:

> "Whenever hereafter by any gift, conveyance or devise, an estate in fee tail would be created according to the existing laws of this state, it shall be taken and construed to be an estate in fee simple, and as such shall be inheritable and freely alienable."

SECTION 17. *Rule in Shelley's Case.* The Rule in Shelley's Case and its corollaries shall not be applied, and a conveyance directly or in trust which shall express an intent to create an estate for life with remainder to the life tenant's heirs or the heirs of his body or his issue or his next of kin or persons described by words of similar import, shall not operate to give such life tenant an estate in fee in real estate or an absolute estate in personalty.

COMMENT—This is based on section 16 of the Wills Act of 1947. The comments made thereto are applicable here.

SECTION 18. *Severability.* If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of this Act and the application of such provision to other persons or circumstances shall not be affected thereby, and to this end the provisions of this act are declared to be severable.

COMMENT—This severability clause is based upon section 2(c) of the Model Probate Code, and also upon the severability clause used in practically all recent Federal legislation. See, for example, the severability clause in section 3803 of the Internal Revenue Code.

It is a much more complete severability clause than is found in Art. IV, Sec. 55 of the Statutory Construction Act of May 28, 1937, P. L. 1019.

SECTION 19. *Short Title.* This act shall be known and may be cited as the Estates Act of 1947.

SECTION 20. *Repealer.* The following acts and parts of acts and all amendments of each are hereby repealed as respectively indicated, but so far only as relates to conveyances effective on or after the first day of January, one thousand nine hundred forty-eight:

(1) Section 9 of the act, approved the eighteenth day of April, one thousand eight hundred fifty-three (pamphlet laws five hundred three), entitled "An act relating to the sale and conveyance of real estate", absolutely.

(2) Section 10 of the act, approved the twenty-sixth day of April, one thousand eight hundred fifty-five, (pamphlet laws, three hundred twenty-eight), entitled "An act relating to corporations and to estates held for corporate religious and charitable uses", absolutely.

(3) The act, approved the twenty-sixth day of May, one thousand eight hundred seventy-six, (pamphlet laws, two hundred eleven), entitled "An act relating to trusts created for benevolent purposes", absolutely.

(4) The act, approved the seventh day of July, one thousand eight hundred eighty-five (pamphlet laws, two hundred fifty-nine) entitled "An act relating to the disposition of property of decedents on failure of testamentary devises", absolutely.

(5) The act, approved the ninth day of May, one thousand eight hundred eighty-nine (pamphlet laws, one hundred seventy-three), entitled "An act relating to estates held for religious and charitable uses", absolutely.

(6) The act, approved the twenty-sixth day of May, one thousand eight hundred ninety-one (pamphlet laws one hundred nineteen), entitled "An act legalizing dispositions in perpetuity for the care of burial places", absolutely.

(7) The act, approved the ninth day of July, one thousand eight hundred ninety-seven (pamphlet laws, two hundred thirteen) entitled "An act declaring the construction of words in a deed, will or other instrument importing a failure of issue", absolutely.

(8) Section 23 of the act, approved the seventh day of June, one thousand nine hundred seventeen (pamphlet laws, four hundred forty-seven), as amended entitled "An act relating to the administration and distribution of the estates of decedents and of minors, and of trust estates; including the appointment, bonds, rights, powers, duties, liabilities, accounts, discharge and removal of executors, administrators, guardians, and trustees, herein designated as fiduciaries; the administration and distribution of the estates of presumed

decedents; widow's and children's exemptions; debts of decedents, rents of real estate as assets for payment thereof, the lien thereof, sales and mortgages of real estate for the payment thereof, judgments and executions therefor, and the discharge of real estate from the lien thereof; contracts of decedents for the sale or purchase of real estate; legacies, including legacies charged on land; the discharge of residuary estates and of real estate from the lien of legacies and other charges; the appraisement of real estate devised at a valuation; the ascertainment of the curtilage of dwelling houses or other buildings devised; the abatement and survival of actions, and the substitution of executors and administrators therein; and the survival of causes of action and suits thereupon by or against fiduciaries; investments by fiduciaries; the organization of corporations to carry on the business of decedents; the audit and review of accounts of fiduciaries; refunding bonds; transcripts to the court of common pleas of balances due by fiduciaries; the rights, powers, and liabilities of nonresident and foreign fiduciaries; the appointment, bonds, rights, powers, duties, and liabilities of trustees durante absentia; the recording and registration of decrees, reports and other proceedings, and the fees therefor; appeals in certain cases; and, also, generally dealing with the jurisdiction, powers, and procedure of the orphans' court in all matters relating to fiduciaries concerned with the estates of decedents", absolutely.

(9) The act, approved the twenty-ninth day of June, one thousand nine hundred twenty-three (pamphlet laws, nine hundred fourteen), entitled "An act declaring the construction to be given deeds, wills, and other instruments in writing, in which real and personal property is donated, granted, devised, or bequeathed, either directly or in trust, for the benefit of one or more persons for years or for life or upon condition, with remainder over to the heirs or next of kin or to the persons thereunto entitled under the intestate laws, or other similar or equivalent phrase", absolutely.

(10) The act, approved the fourth day of May, one thousand nine hundred thirty-three (pamphlet laws two hundred seventy-one), entitled "An act relating to trusts for charitable or benevolent purposes, and providing for the combining of the same under certain conditions", absolutely.

(11) The act, approved the fifteenth day of July, one thousand nine hundred thirty-five (pamphlet laws, one thousand thirteen), entitled "An act to limit the operation of the rule in Shelley's case by providing that certain grants and devises in trust, or otherwise, shall be construed not to create estates in fee", absolutely.

(12) The act, approved the twenty-fifth day of May, one thousand nine hundred thirty-nine (pamphlet laws, two hundred one), entitled "An act declaring valid provisions in wills and trusts instruments directing that certain dividends upon, and profits realized from, corporate stock be treated, in whole or in part, either as principal or income; and repealing inconsistent legislation", absolutely.

(13) The act, approved the twenty-eighth day of May, one thousand nine hundred forty-three (pamphlet laws, seven hundred ninety-seven), entitled "An act relating to the release, reduction or limitation of powers of appointment", absolutely.

(14) All other acts and parts of acts inconsistent herewith are hereby repealed.

SECTION 21. *Effective Date.* This act shall take effect on the first day of January, one thousand nine hundred forty-eight and except as set forth in Section 3 hereof, shall apply only to conveyances effective on or after that day. As to conveyances effective before that day, the existing laws shall remain in full force and effect.

COMMENT—The Act takes effect as to all sections, including section 3, on January 1, 1948. All releases and disclaimers, however, which comply with the provisions of section 3 and which are executed before January 1, 1948, will nevertheless be effective whether or not they were evidenced in a manner recognized by prior law.

HISTORY OF

PRINCIPAL AND INCOME ACT OF 1947

SENATE BILL NO. 575

Introduced by HONORABLE JOHN M. WALKER

In the Senate

Referred to Committee on Judiciary General, April 14.
Reported as committed, April 16.
Passed first reading, April 16.
Over in order, April 17.
Amended, April 21.†
Over in order, April 21.
Passed second reading, April 22.
Passed third reading and final passage, April 23. (Vote 48-0).

In the House

Referred to Committee on Judiciary, April 28.
Reported as amended, May 27.†
Passed first reading, May 28.
Passed second reading, May 29.
Passed third reading and final passage, June 2. (Vote 200-0).

In the Senate

Senate concurred in House amendments, June 4. (Vote 50-0).†

Passed Senate and House
Approved by the Governor, July 3, 1947.

Act No. 516

† Amendments were made only to conform to original text.

PRINCIPAL AND INCOME ACT OF 1947

No. 516

AN ACT

Concerning the Ascertainment of Principal and Income, and the Apportionment of Receipts and Expenses Among Tenants and Remaindermen.

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The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

PRELIMINARY COMMENT—The Principal and Income Act of 1947 is based upon and intended to replace the Uniform Principal and Income Act as enacted in Pennsylvania, (Act of May 3, 1945, P. L. 416, 20 PS 3471), which in turn was based upon the Uniform Principal and Income Act drafted by the National Conference of Commissioners on Uniform State Laws in 1931.

No attempt has been made to rewrite the 1945 Act in its entirety. The Act of 1947 makes only such changes as are necessary to eliminate certain inconsistencies and inequities revealed since the preparation of the original draft in 1931 and the enactment of the Uniform Principal and Income Act in 1945. Principal changes are made in section 9 dealing with the disposition of natural resources and in section 10 which deals with defaulted interest-bearing obligations.

SECTION 1. *Definition of Terms.* "Principal" as used in this act means any realty or personalty which has been so set aside or limited by the owner thereof, or a person thereto legally empowered, that it and any substitutions for it are to remain in trust perpetually, or are eventually to be conveyed, delivered or paid to a person, while the return therefrom, or use thereof, or any part of such return or use, is in the meantime to be taken or received by, or held for accumulation for, the same or another person.

COMMENT—This is identical with the 1945 Act except that the words "to remain in trust perpetually or are" have been added to make certain that the act applies to perpetual trusts which otherwise might be excluded: cf. 21 Oregon L. R. 217, 224; *Girard's Est.*, 49 D. & C. 217, 228; *Trexler's Est.*, 32 D. & C. 427.

"Income" as used in this act means the return derived from principal.

"Tenant" as used in this act means the person to whom income is presently or currently payable, or for whom it is accumulated, or who is entitled to the beneficial use of the principal presently and for a time prior to its distribution.

COMMENT—These definitions of "income" and "tenant" are identical with the 1945 Act.

"Remainderman" as used in this act means the person ultimately entitled to the principal, whether named or designated by the terms of the transaction by which the principal was established, or determined by operation of law.

COMMENT—The definition of "remainderman" is made to conform with the Commissioners' draft. The words "or by the testator, or creator of the trust" added by the 1945 Act are omitted as surplusage.

"Trustee" as used in this act includes the original trustee of any trust to which the principal may be subject and also any succeeding or added trustee.

COMMENT—This definition is identical with the 1945 Act.

SECTION 2. *Application of the Act; Powers of Settlor.* This act shall govern the ascertainment of income and principal and the apportionment of receipts and expenses between tenants and remaindermen in all cases where a principal has been established with or, unless otherwise stated hereinafter, without the interposition of a trust: Provided, That the person establishing the principal may himself direct the manner of ascertainment of income and principal and the apportionment of receipts and expenses or grant discretion to the trustee or other person, to do so and such provision and direction, where not otherwise contrary to law, shall control, notwithstanding this act.

COMMENT—This is similar to the 1945 Act, but some slight changes of style have been made to avoid repetition.

SECTION 3. *Income and Principal; Disposition.*

(1) All receipts of money or other property, paid or delivered as rent of realty, or hire of personalty, or dividends on corporate shares, payable other than in shares of the corporation itself of the same kind and rank as the shares on which such dividend is paid, or interest on money loaned, or

interest on or the rental or use value of property wrongfully withheld or tortiously damaged, or otherwise in return for the use of principal, shall be deemed income, unless otherwise expressly provided in this act.

COMMENT—The words "unless the testator or creator of the trust directs otherwise", added to the Commissioners' draft by the 1945 Act, were omitted as unnecessary because section 2 which applies to the whole act gives such power to the testator or creator of the trust. The words "of the same kind and rank as the shares on which such dividend is paid" were added to apply the same rule as is applied in income tax cases where dividends payable in the corporation's own shares are considered income if the new shares give the stockholder a different interest. See 28 Cal. L. Rev. 34, 36, 40. The same words are also employed in section 5(1).

(2) All receipts of money or other property paid or delivered as the consideration for the sale, or other transfer, not a leasing or letting of property, forming a part of the principal, or as a repayment of loans or in liquidation of the assets of a corporation, or as the proceeds of property taken in eminent domain proceedings, where separate awards to tenant and remainderman are not made, or as proceeds of insurance upon property forming a part of the principal, except where such insurance has been issued for the benefit of either tenant or remainderman alone, or otherwise as a refund or replacement or change in form of principal, shall be deemed principal, unless otherwise expressly provided in this act. Any profit or loss, resulting from any change in form of principal, shall enure to or fall upon principal, unless otherwise expressly provided in this act.

COMMENT—The words "unless the testator or creator of the trust directs otherwise" in the last sentence added to the Commissioners' draft by the 1945 Act, as in subsection (1), were omitted as surplusage and the words "unless otherwise expressly provided in this act" were substituted therefor to conform with the first sentence.

(3) All income, after payment of expenses properly chargeable to it, shall be paid and delivered to the tenant or

retained by him, if already in his possession, or held for accumulation, where legally so directed by the terms of the transaction by which the principal was established; while the principal shall be held for ultimate distribution as determined by the terms of the transaction by which it was established, or by law.

COMMENT—The words "instrument or" added in two instances before "transaction" by the 1945 Act were omitted as surplusage.

(4) Nothing in this section 3 shall apply to property in the nature of wasting assets, such as timber, minerals, coal, stone, oil, gas or other natural resources, or to property subject to depletion such as leaseholds, patents, copyrights and royalty rights, but this section 3 shall apply to the shares of corporations which own such property.

COMMENT—This additional subsection which is not a part of the 1945 Act was added to avoid any possible conflict with section 9 dealing with the disposition of natural resources, or with case law dealing with property subject to depletion, a subject omitted in the present law.

SECTION 4. *Apportionment of Income.* Whenever a tenant shall have the right to income from periodic payments, which shall include rent, interest on loans and annuities, but shall not include dividends on corporate shares, and such right shall cease and determine by death, or in any other manner at a time other than the date when such periodic payments should be paid, he or his personal representative shall be entitled to that portion of any such income next payable, which amounts to the same percentage thereof as the time elapsed from the last due date of such periodic payments to and including the day of the determination of his right is of the total period during which such income would normally accrue. The remaining income shall be paid to the person next entitled to income by the terms of the transaction by which the principal was established. But no action shall be brought by the trustee or tenant to recover such apportioned income, or any portion thereof, until after

the day on which it would have become due to the tenant but for the determination of the right of the tenant entitled thereto. The provisions of this section shall apply whether an ultimate remainderman is specifically named or not. Likewise, when the right of the first tenant accrues at a time other than a payment date of such periodic payments, he shall only receive that portion of such income which amounts to the same percentage thereof as the time during which he has been so entitled is of the total period during which such income would normally accrue, and the balance shall be a part of the principal.

COMMENT—Section 4 in its present form conforms to the Commissioners' draft. The 1945 Act made provision for apportionment of ordinary dividends as in Fiduciaries Act, section 22. However, Fiduciaries Act section 22 was inapplicable to apportionment of dividends at the beginning of a tenancy by will (*Opperman's Est.*, 319 Pa. 455) or under an *inter vivos* trust, or where not regular: *Nirdlinger's Est.*, 327 Pa. 160. Because of the difficulties of application of any other rule, it was considered advisable to retain the Commissioners' rule of no apportionment of dividends. The life tenant will gain at the beginning approximately that which he loses at the end. The inconsistent rule found in Fiduciaries Act, section 22, is removed by repeal in section 14 hereof.

SECTION 5. *Corporate Dividends and Share Rights.*

(1) All dividends on shares of a corporation, forming a part of the principal, which are payable in the shares of the corporation itself of the same kind and rank as the shares on which such dividend is paid shall be deemed principal. Subject to the provisions of this section all dividends payable otherwise than in such shares of the corporation itself, including ordinary and extraordinary dividends and dividends payable in shares or other securities or obligations of corporations other than the declaring corporation, shall be deemed income. Where the trustee shall have the option of receiving a dividend, either in cash or in the shares of the declaring corporation, it shall be considered as a cash dividend and deemed income, irrespective of the choice made by the trustee.

COMMENT—"itself of the same kind and rank as the shares on which such dividend is paid" was added in the first sentence to conform to the change in section 3(1). This section abolishes the so-called "Pennsylvania" rule of apportionment of dividends, and the basic significance of "intact value". The change was made when the 1945 Act was adopted and is considered sound for practical reasons.

(2) All rights to subscribe to the shares or other securities or obligations of a corporation, accruing on account of the ownership of shares or other securities in such corporation, and the proceeds of any sale of such rights shall be deemed principal. All rights to subscribe to the shares or other securities or obligations of a corporation, accruing on account of the ownership of shares or other securities in another corporation, and the proceeds of any sale of such rights shall be deemed income.

COMMENT—This is identical with the Commissioners' draft and the 1945 Act.

(3) Where the assets of a corporation are liquidated, wholly or partially, amounts paid upon corporate shares as cash dividends, declared before such liquidation began, or as arrears of cumulative preferred, or guaranteed dividends shall be deemed income, all other amounts paid upon corporate shares on disbursement of the corporate assets to the stockholders shall be deemed principal. All disbursements of corporate assets to the stockholders, whenever made, which are designated by the corporation as a return of capital or division of corporate property, shall be deemed principal. Any profit or loss resulting from the sale or liquidation of corporate shares shall enure to or fall upon principal.

COMMENT—The words "wholly or partially" were added after "liquidated" to take care of a situation where the corporate liquidation extends over a period of years.

For a like reason the word "began" after "liquidation" was substituted for "occurred". The word "cumulative" was added before "preferred" for clarity. Also for the pur-

pose of clarity the last sentence, "any profit or loss resulting upon the sale or liquidation of corporate shares shall enure to or fall upon principal" was added.

(4) Where a corporation is a party to a merger, consolidation or reorganization, or otherwise acquires the assets of another corporation, or where the capital structure of a corporation is changed, either with or without merger or consolidation, and the securities of the surviving, succeeding, reorganized or acquiring corporation with or without cash or other properties are issued to the shareholders of the original corporation in like proportion to, or in substitution for their shares in the original corporation and prior to the effective date of such merger, consolidation or reorganization there were arrearages of cumulative preferred or guaranteed dividends, and such arrearages are eliminated in the merger, consolidation or reorganization, so much of the securities and cash and other properties received as is designated by the corporation as a payment in settlement of such arrearages, shall be allocated to such arrearages, and the balance of the securities and cash and other properties received shall be deemed principal. In case the corporation does not so designate, the securities received in like proportion to or in substitution for shares upon which there were such arrearages of cumulative preferred or guaranteed dividends at their value as of the effective date of such merger, and the cash and other properties received shall be allocated first to principal, in the amount of the inventory value of the said shares of the original corporation, or in default thereof, of their market value at the time the principal was established, or of their cost where purchased later; second, to the arrearages of cumulative preferred or guaranteed dividends, or in satisfaction thereof if less than such amount; and third, the balance, if any, to principal.

COMMENT—This is a new subsection which does not appear in the 1945 Act. It is intended to settle the confusion that now exists concerning apportionment of stock received in exchange for preferred stock with an accumulation of unpaid dividends upon a merger, consolidation or reorgani-

zation: Cf. *Fisher's Est.*, 344 Pa. 607; *King Est.*, 349 Pa. 27, 355 Pa. 64.

(5) Except as otherwise provided in subsection (4) of this section, where a corporation is a party to a merger, consolidation or reorganization or otherwise acquires the assets of another corporation, and shares of stock of whatsoever character or whatsoever class or classes of the surviving, succeeding, reorganized or acquiring corporation with or without cash or other securities or properties are issued to the shareholders of a corporation which is a party to such merger, consolidation, reorganization or acquisition of assets in like proportion to or in substitution for their shares in such corporation, all shares of stock so issued and also all cash and other securities and properties which may be so issued shall be principal.

COMMENT—This subsection has been substituted for subsection (4) of the 1945 Act, which reads:

> "Where a corporation succeeds another by merger, consolidation or reorganization or otherwise acquires its assets, and the corporate shares of the succeeding corporation are issued to the shareholders of the original corporation in like proportion to, or in substitution for, their shares of the original corporation, the two corporations shall be considered a single corporation in applying the provisions of this section. But two corporations shall not be considered a single corporation under this section merely because one owns corporate shares of or otherwise controls or directs the other."

The purpose of the new subsection is to make it clear that in the enumerated circumstances, not involving the discharge of cumulative preferred, or guaranteed dividends, all cash, securities, or other property which may be received shall be deemed principal and not income. This subsection is necessary to make it clear that transactions of the kinds enumerated are not to be deemed dividends.

(6) In applying this section, the date when a dividend accrues to the person who is entitled to it shall be held to be the date specified by the corporation as the one on which the

stockholders entitled thereto are determined, or in default thereof, the date of declaration of the dividend.

COMMENT—This is identical with subsection (5) of the 1945 Act.

SECTION 6. *Premium and Discount Bonds.* Where any part of the principal consists of bonds or other obligations for the payment of money, they shall be deemed principal at their inventory value, or in default thereof, at their market value at the time the principal was established, or at their cost where purchased later, regardless of their par or maturity value, and upon their respective maturities or upon their sale, any loss or gain realized thereon shall fall upon or enure to the principal: Provided, however, that the scheduled increment in value of bonds, issued on a discount basis and subject to definite appreciation in value on a fixed schedule, shall constitute income as of each date on which an increment occurs, and shall be made available as income for such disposition as is provided by the terms of the transaction under which the principal was established by transferring from the principal on each such date an amount equivalent to the increment then occurring.

COMMENT—The first portion of this section is identical with the 1945 Act. The portion of the section beginning with "provided that" has been added to make it possible for fiduciaries to invest in accumulation bonds such as those of the U. S. Government. The added material is suggested by a 1943 amendment to the Oregon Act (Section 74-106) L. 1943 c. 238. See also 44 Mich. L. R. 833, 842; 28 Cal. L. R. 34, 43; 21 Oregon L. R. 217, 243.

SECTION 7. *Principal Used in Business.*

(1) Whenever a trustee or tenant is authorized by the terms of the transaction by which the principal was established, or by law, to use any part of the principal in the continuance of a business, which the original owner of the property comprising the principal had been carrying on, the net profits of such business attributable to such principal shall be deemed income.

(2) Where such business consists of buying and selling property, the net profits for any period shall be ascertained by deducting from the gross proceeds during, and the inventory value of the property at the end of such period, the expenses during, and the inventory value of the property at the beginning of such period.

(3) Where such business does not consist of buying and selling property, the net income shall be computed in accordance with the customary practice of such business, but not in such way as to decrease the principal.

(4) Any increase in the value of the principal used in such business shall be deemed principal, and all losses in any one calendar year, after the income from such business for that year has been exhausted, shall fall upon principal.

COMMENT—This is identical with the 1945 Act.

SECTION 8. *Principal Comprising Animals.* Where any part of the principal consists of animals employed in business, the provisions of section 7 shall apply, and in other cases where the animals are held as a part of the principal, partly or wholly, because of the offspring or increase which they are expected to produce, all offspring or increase shall be deemed principal to the extent necessary to maintain the original number of such animals, and the remainder shall be deemed income, and in all other cases, such offspring or increase shall be deemed income.

COMMENT—This is identical with the 1945 Act.

SECTION 9. *Disposition of Natural Resources.* Where any part of the principal consists of property in lands from which may be taken timber, minerals, coal, stone, oil, gas or other natural resources and the trustee or tenant is authorized by the terms of the transaction by which the principal was established or by order of court to sell, lease or otherwise develop such natural resources, or where such natural resources have been leased or developed prior to the transaction by which the principal was established, and no provision is made for the disposition of the net proceeds

thereof after the payment of expenses and carrying charges on such property, one-third of the net proceeds, if received as rent or payment on a lease, or as royalties, shall be deemed income, and the remaining two-thirds thereof shall be deemed principal to be invested to produce income: Provided, that if a surviving spouse of the person establishing the principal shall be the sole tenant, he shall be entitled to such proportion of the net proceeds as he would be entitled to under the intestate laws, if the person establishing the principal were to die intestate at the time of the receipt of such proceeds, a resident of the Commonwealth and owning such proceeds, but this shall not include the $10,000 allowance. Such proceeds if received as consideration for the permanent severance of such natural resources from the land, payable otherwise than as rents, or royalties, shall be deemed principal to be invested to produce income.

Nothing in this section shall be construed to abrogate or extend any right, which may otherwise have accrued by law to a tenant to develop or work such natural resources for his own use.

COMMENT—This is an entirely new section which replaces section 9 of the 1945 Act. Under the common law of Pennsylvania, royalties derived from a contract for the exploitation of natural resources were income if the resources had been exploited prior to the creation of the trust or although not so exploited if the fiduciary was given power to sell or lease the resources. Such royalties were income even though the particular lease constituted a sale of the resources: *Blodgett's Est.*, 254 Pa. 210. The common law rules were very liberal to the income beneficiary. Under section 9 of the act of 1945, the royalties were made entirely principal if, as is usually the case, the contract created a sale of the resources in place, and it made no difference that the royalties were deemed rents. In doing this, section 9 of the act of 1945 went to the opposite extreme from the common law and was extremely harsh to the income beneficiary. On the other hand the common law of Pennsylvania sometimes operated inequitably. In some cases the life tenant (cf. *Bedford's Ap.*, 126 Pa. 117; *McClintock* v. *Dana*, 106 Pa. 386, 391; *Wentz's Ap.*, 106 Pa. 301) or income beneficiary (cf. *Neel* v. *Neel*, 19 Pa. 323) has received the entire pro-

ceeds from the development of property which in many instances, as in the case of strip mining, has destroyed much of the value of the property. In others the entire proceeds of the natural resources have been paid to principal, depending on whether the natural resources had been leased or developed before the principal was created or whether authority was given to develop it. In most instances the creator of the interests has not contemplated the development or consciously made the decision in favor of either the income beneficiary or of the remainderman.

The rule for disposition of natural resources in the present section 9 is believed to be fair to both the tenant and the remainderman. The provision for a greater share for a spouse, in certain circumstances, is believed to be in accord with the probable wishes of the person establishing the principal. Under section 2 the person establishing the principal can establish his own rules. Section 15 expressly provides that this section shall apply only to wills, trust agreements, and trust relations made or created after its effective date.

Principal subject to Depletion. Section 10 of the 1945 Act has been omitted because of difficulty of its application, especially in determining whether the trustee or tenant is under a duty to convert. Whether the tenant receives the entire return or 5% of the value of the property is resolved under that section by the determination of the duty to convert. It is believed that omission of this section and the determination of the problems that arise thereunder by existing case law is preferable.

SECTION 10. *Interest-Bearing Obligations in Default.*

(1) Whenever the interest on an interest-bearing obligation, owned by a trust, shall be in default, in whole or in part, and the obligation shall be converted into money or property which can be fairly apportioned, or both, before the principal is finally distributed, then the tenant, or in case of his death, his personal representative shall be entitled to share in the net proceeds received from the property as delayed income to the extent hereinafter stated.

COMMENT—This is an entirely new section and replaces section 11 of the 1945 Act. Section 11 of the 1945 Act as applied to property unproductive when the principal was created introduced a novelty in Pennsylvania law. Since it

applies to "realty or personalty" it would appear to apply to stock on which no dividend has been paid as well as to mortgages and other interest-bearing obligations. Section 10 as proposed deals only with the salvage of interest-bearing obligations. It is fairer and avoids numerous mechanical difficulties introduced by the 1945 Act. Section 10 codifies with slight changes the practice in mortgage salvage operations introduced by *Nirdlinger's Est., No. 2,* 327 Pa. 171, and developed in other cases. Modifications suggested by experience have been made as hereinafter indicated.

(2) Such delayed income shall be the difference between the net proceeds received from the conversion and the amount which, had it been placed at simple interest at the rate of four per centum per annum for the period during which such interest was in default, in whole or in part, would have produced the net proceeds at the time of conversion. In no event shall delayed income exceed the defaulted interest upon the obligation. The net proceeds shall consist of the gross proceeds, including property other than money received from the conversion, less any expenses incurred in converting and preserving the asset, and less all carrying charges which have been paid out of principal, pending conversion, but shall not include net income received pending conversion.

COMMENT—This subsection differs from the 1945 Act by limiting the tenant's recovery to the defaulted interest on the obligation. The definition of net proceeds excludes the bringing into the apportionment calculation of income received pending the salvage operation and simplifies the calculation to be made.

(3) The tenant shall be entitled to receive from time to time and to keep the net income from any form of property or obligation into which such interest-bearing obligation may be converted, until it is finally converted into money or property which can be fairly apportioned, or both, and his share of the delayed income shall be reduced by the amount of income received and by the value of any beneficial use of the property which he may have had.

COMMENT—The present practice of giving income pending conversion to the tenant, established in *Nirdlinger's Est.*, 331 Pa. 135, is preserved. Numerous hardships and difficulties of securing refund are avoided by providing expressly that the tenant may retain income though it exceeds his share in the final apportionment. Cf. *McDowell's Est.*, 52 D. & C. 258; *Doherty's Est.*, 49 D. & C. 453, 53 D. & C. 8.

(4) In the case of successive tenants, the delayed income shall be divided among them, or their representatives, according to the length of the period for which each was entitled to income.

COMMENT—This is identical with section 11(5) of the 1945 Act. It is not considered contrary to *Spear's Est.*, 333 Pa. 199, because under subsection (1) of this section no apportionment will be made unless the conversion into cash or apportionable property occurs "before the principal is finally distributed". Cf. *Doherty's Est.*, 49 D. & C. 453, 53 D. and C. 8; *McDowell's Est.*, 52 D. & C. 258.

SECTION 11. *Expenses; Trust Estates.*

(1) All ordinary expenses and charges, incurred in connection with the trust estate or with its administration and management, shall be paid out of income, but such expenses, where incurred in disposing of or as carrying charges on unproductive estate, shall be paid out of principal, and where incurred in disposing of, or as carrying charges on underproductive estate, shall be paid out of principal to the extent that the income from the property shall not be equal to such expenses.

COMMENT—This subsection, unlike section 12(1) of the 1945 Act, omits as unnecessary reference to individual items of income and to the items contained in subsection (2). To eliminate any doubt carrying charges on underproductive as well as unproductive property are expressly included.

(2) Trustees' compensation, compensation of assistants and court costs and attorneys' and other fees may be apportioned between income and principal as the court may direct.

COMMENT—This is a new subsection and expresses more clearly what was added to subsection (1) of the Commissioners' draft by the 1945 Act.

(3) All other expenses including cost of investing or reinvesting principal, and other costs incurred in maintaining or defending any action to protect the trust or the property or assure the title thereof, unless due to the fault or cause of the tenant, and costs of or assessments for improvements to property, forming part of the principal, shall be paid out of principal. Any tax levied by any authority, federal, state or foreign, upon profits or gain defined as principal under the terms of subsection (2) of section 3 shall be paid out of principal, notwithstanding said tax may be denominated a tax upon income by the taxing authority.

COMMENT—The first sentence is identical with the first sentence of section 12(2) of the 1945 Act, except that reference to commissions on principal and attorneys fees now included in the new subsection 2 is omitted. The second sentence is identical.

(4) Interest and penalties on inheritance and estate taxes, levied by any authority, federal, state or foreign, shall be paid out of principal to the extent that such interest and penalties are in excess of the rate of return which has been or shall be realized from the estate during the time that such interest and penalty have accrued.

COMMENT—This is a new subsection not included in the 1945 Act. Existing legislation (cf. Internal Revenue Code, § 891; Fid. Act, § 48.1) and case law (cf. *Mellon Est.*, 347 Pa. 520) do not indicate clearly whether interest and penalties on Federal estate taxes would be paid wholly by principal, wholly by income, or be apportioned. The allocation suggested seems equitable, and should not be too difficult of practical application.

(5) Expenses paid out of income, according to subsection (1) hereof, which represent regularly recurring charges, shall be considered to have accrued from day to day, and

shall be apportioned on that basis, whenever the right of the tenant begins or ends at some date other than the payment date of the expenses. Where the expenses to be paid out of income are of unusual amount, the trustee may distribute them throughout an entire year, or part thereof, or throughout a series of years. After such distribution, where the right of the tenant ends during the period, the expenses shall be apportioned between tenant and remainderman on the basis of such distribution.

COMMENT—This is the same as section 12(3) of the 1945 Act.

SECTION 12. *Expenses; Non-trust Estates.*

(1) The provisions of section 11 so far as applicable shall govern the apportionment of expenses between tenants and remaindermen where no trust has been created; subject, however, to any legal agreement of the parties, or any specific direction of the taxing, or other statutes, but where either tenant or remainderman has incurred an expense for the benefit of his own estate, and without the consent or agreement of the other he shall pay such expense in full.

(2) The special taxes or assessments for an improvement, representing an addition of value to property, forming part of the principal, shall be paid by the tenant, where such improvement cannot reasonably be expected to outlast the estate of the tenant. In all other cases a portion thereof only shall be paid by the tenant, while the remainder shall be paid by the remainderman. Such portion shall be ascertained by taking that percentage of the total which is found by dividing the present value of the tenant's estate by the present value of an estate of the same form as that of the tenant, except that it is limited for a period corresponding to the reasonably expected duration of the improvement. The computation of present values of the estates shall be made on the expectancy basis set forth in the American ex-

perience tables of mortality and no other evidence of duration or expectancy shall be considered.

COMMENT—This is the same as section 13 of the 1945 Act.

SECTION 13. *Short Title.* This act may be cited as the Principal and Income Act of 1947.

COMMENT—Because of the substantial changes it is considered inadvisable to refer to the Act as the "Uniform Principal and Income Act".

SECTION 14. *Repeal.* The act approved the third day of May one thousand nine hundred and forty-five (pamphlet laws four hundred sixteen), entitled "An act concerning the ascertainment of principal and income and the apportionment of receipts and expenses among tenants and remaindermen, and to make uniform the laws with reference thereto", and Section twenty-two of the act approved the seventh day of June, one thousand nine hundred and seventeen (pamphlet laws four hundred forty-seven), entitled "An act relating to the administration and distribution of the estates of decedents and of minors, and of trust estates; including the appointment, bonds, rights, powers, duties, liabilities, accounts, discharge and removal of executors, administrators, guardians, and trustees, herein designated as fiduciaries; the administration and distribution of the estates of presumed decedents; widow's and children's exemptions; debts of decedents, rents of real estate as assets for payment thereof, the lien thereof, sales and mortgages of real estate for the payment thereof, judgments and executions therefor, and the discharge of real estate from the lien thereof; contracts of decedents for the sale or purchase of real estate; legacies, including legacies charged on land; the discharge of residuary estates and of real estate from the lien of legacies and other charges; the appraisement of real estate devised at a valuation; the ascertainment of the curtilage of dwelling houses or other buildings devised;

the abatement and survival of actions, and the substitution of executors and administrators therein, the survival of causes of action in suits thereupon by or against fiduciaries; investments by fiduciaries; the organization of corporations to carry on the business of decedents; the audit and review of accounts of fiduciaries; refunding bonds; transcripts to the court of common pleas of balances due by fiduciaries; the rights, powers, and liabilities of nonresident and foreign fiduciaries; the appointment, bonds, rights, powers, duties, and liabilities of trustees *durante absentia;* the recording and registration of decrees, reports and other proceedings, and the fees therefor; appeals in certain cases; and, also, generally, dealing with the jurisdiction, powers, and procedure of the orphans' court in all matters relating to fiduciaries concerned with the estates of decedents", and their amendments and all other acts or parts of acts which are inconsistent with the provisions of this act are hereby repealed absolutely.

SECTION 15. *Time of Taking Effect.* The provisions of this act shall become effective upon the enactment thereof, and shall apply to all estates of tenants or remaindermen and to all wills, trust agreements and trust relations theretofore or thereafter made or created. Except that the provisions of section 9 hereof shall apply only to wills, trust agreements, trust relations and to estates of tenants or remaindermen thereafter made or created: And, provided further, That the provisions of this act shall not apply to receipts and expenses received or paid prior to the effective date of this act.

COMMENT—"Except that the provisions of section 9 hereof shall apply only to wills, trust agreements, trust relations, and to estates of tenants or remaindermen thereafter made or created" has been added to the 1945 Act.