

**Disclaimers**

1. Deliberately, sources for what follows are not quoted. This is not an academic paper. There are many sources – books and articles – and what they say about the development of the law, particularly in the early stages, is far from uniform or consistent. What I have written often represents a middle ground between what is found in various sources, and what learned authors have written.
2. Nor is this a universal summary. Obviously it fails to mention succession in a number of major societies, including the Egyptian, Persian, Indian, and Chinese. However these have not had any direct influence on the law as it has developed into our time from English law.

**The concept of inheritance**

Regulated devolution of property after death depends on two essential prerequisites:

- (a) a developed concept of private property; and
- (b) a society which recognizes families and relationships between a deceased member of society who owned property and his or her relatives.

From earliest history, mankind has wanted to acquire property, has fought to protect it, and has wanted to preserve it for family and descendants. (And they have looked forward to receiving it too!) Also from early days, society has interfered to ensure that certain family members inherit upon the death of someone who owns property; and family members have, where possible, fought strangers, or each other, in order to inherit.

Roman law recognized the claims of a widow and children to inherit from a husband and father. It gave the remedy of obtaining the legal minimum entitlement, *querela inofficiosi testamenti*, to a widow and children who were passed over.

Mosaic law recognized inheritance as a right for children. Esau was able to sell his birthright to Jacob – perhaps the first recorded catching bargain where an heir was tricked into selling his expectancy for an inadequate price.

Magna Carta (1215) recognized certain rights of inheritance for family members.

St Thomas Aquinas, (1225 – 1274) in *Summa Theologica* said that marriage is an institution directed to the rearing of offspring, and hence it is “natural law” that parents should lay up for their children, and that children should be their parents’ heirs.

Blackstone (1723 –1780) in his Commentaries, (published 1765-69), said the right of relations to inherit was a civil right, not a natural right.

In fact it must be both. Instinctively we think that a spouse and children have a better right than a stranger to the property of a deceased person. But even if inheritance is a natural right, defining the people who are to inherit, and measuring their entitlements, depends upon the civil law. When and to what extent do collateral heirs enter the picture? To what extent is a person to be allowed to leave property to strangers, and to interfere with the “default entitlements” of the surviving family?

Whether transmission of property to preferred heirs rests on inherent natural right, or upon rights arising under the legal system, transmission of property upon the death of its owner is something which from very early days every state has controlled.

### Early elements developed in succession law that still remain relevant

- \* Testamentary capacity
- \* Undue influence
- \* Pattern of distribution on intestacy – direct kinship before collaterals
- \* Belief that making a gift to a child deflects challenge to the Will
- \* Children a disappointment to their parents but still entitled
- \* Problems posed by impatient beneficiaries/creditors

### Why our legislation specifically provides that

- \* Wills now dispose of after acquired property WA97 s. 34 (operates as if executed at date of death)
- \* Will not revoked by presumption due to change in circumstances. WA58 s. 17; WA97 (s. 12 is now the only way to revoke, and presumptions are not applicable)
- \* Interested witness no longer disqualified from taking a benefit WA97 (cf. WA58 s. 13 – interested witness “competent to prove”, but disqualified subject to provisos ameliorating this)
- \* Executor holds on trust for next of kin. APAs. 53(b):

### **Greece**

Ancient law in Athens directed that the estate of a deceased person should descend to his children, or on failure of lineal descendants, go to collateral relations.

**Solon** (c. 638 – c. 558 BC) changed the law to give free citizens (aged at least 20) of Athens the right to make Wills, subject to conditions which continue to be familiar today. They reflected the interference of the state in deciding who was to inherit, they limited complete freedom of testation, and the problems of lack of capacity and undue influence were already something which the law had to address. The conditions for citizens to make Wills included -

- (a) they must not be adopted, (if an adopted person died without issue his or her property passed to the adopting parents);
- (b) if they had male children they could not make a Will because the children were entitled to the estate;
- (c) they should be in their right minds, and the Will should not be made or extorted through the frenzy of a disease, or dotage of old age, such Wills not in reality being the Wills of the persons who made them;
- (d) they should not be induced to by the “charms and insinuations” of a wife; Plutarch said there is no difference between deceit and necessity, and flattery and compulsion. All are equally powerful to persuade a man from reason.

In ancient Greece Wills were usually signed before several witnesses, who put seals to them for confirmation, then placed them in the hands of trustees, who had the job of seeing the Will carried out.

### **Roman Law**

The “**Twelve Tables**” were a sort of very early codification of the existing law, prepared in and after 450 B.C. They did not specifically deal with Wills or succession to property.

#### **The Jurists**

The formal source of most early Roman private law was the edict of the urban *praetor*, (an office created in 367 BC to relieve the consuls of their judicial duties). In addition there were *jurists*. They were the key figures behind the scenes in the development of the law. Their responses to citizens’ queries built up a coherent body of law. Two examples of questions and the curt responses follow.

To Scaevola (who died 88 B.C.)

I wish the income from my farm to be given to my wife as long as she lives. I ask whether the heir's tutor can sell the farm and offer her an annual payment out of the rental income from the farm? *He can.*

I also ask whether my wife can be prevented from living there? *The heir is not obliged to provide accommodation for her.*

Is the heir obliged to maintain the farm? *If the heir's actions cause a reduction in the income from the farm, she can claim for that reduction in income.*

What is the difference between this legacy and a usufruct<sup>1</sup>? *My previous answers made the difference plain.*

To Celsus – (67 B.C. – 130 A.D.) (head of the Proculian school of law)

Domitius Labeo to Celsus, greetings. I ask whether a person who is asked write a Will, and who not only wrote it but also signed it, can be regarded as one of the witnesses to it.

Iuventius Celsus to Labeo, greeting. *Either I do not understand your question, or it is exceptionally stupid: it is quite absurd to doubt whether someone is a lawful witness because he also wrote the will himself.*

### Early Roman Wills

A testament could be made by patricians. It nominated a person as the testator's heir and made that person the representative of the testator after his death, as his heir at law would have been if he had died intestate.

The testament was nuncupatio – an oral declaration addressed to witnesses instituting an heir with such other provisions as might be added.

Later on a Will was made in writing which the testator disclosed to witnesses, and folded and tied up, declaring that the it contained the record of his last Will.

In the absence of a Will property went to the widow and children, and failing that to the deceased's "gens", his broader family`.

The operation of the early Roman Will differed significantly from our modern Will:

- (a) it could not pass after-acquired property, ie property not owned when the Will was made; (cf. *Wills Act 1997 s. 34(1)*<sup>2</sup>)
- (b) it could not be easily changed;
- (c) the heir was responsible for the deceased's debts.

Already freedom of testation was limited. The Romans would set aside a Will, as being *inofficiosa*, deficient in natural duty, if without assigning a sufficient reason it disinherited any of the children of the testator. However before the days of Justinian, if the child did receive any legacy, no matter how small, this was a proof that the testator had not lost his memory or his reason, and the Will was valid. - Hence the belief that some people still have today, that if a Will gives a small pecuniary legacy, then it can substantially disinherit children.

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<sup>1</sup> The right to use and enjoy the fruits or profits of something belonging to someone else.

<sup>2</sup> "A will takes effect, with respect to the property disposed of by the will, as if it had been executed immediately before the death of the testator."

### **Justinian and the CJC**

Justinian was emperor of the Roman Empire governing from Constantinople from 527 to 565. The codes of Justinian, the *Corpus Juris Civilis* (529-534), continued to be the basis of legal practice in the Empire throughout its Byzantine history. The CJC consists of

1. The Digest (plus the 50 Decisions)
2. The Institutes
3. The Novels

**Digest:** Between 530 and 533 a commission of 16 academic lawyers was given the task of culling everything of value from the earlier law – chiefly the published responses of the authoritative classical jurists. The 1<sup>st</sup> edition of the *Digest* was published in 530. After it was promulgated, only it, and not the prior imperial legislation, could be cited as law.

**Fifty Decisions:** In 531, Justinian issued the “fifty decisions” to resolve various differences among the writings of classical jurists. A second edition of the Digest, incorporating the fifty decisions, was then issued.

**The Institutes:** prepared in 534. They were in the nature of a students’ text to accompany the advanced Digest.

**The Novels, (*Novellae Constitutiones*),** are the collections of the new statutes that Justinian issued after the 2nd edn of the Code, between 535 and the date of his death in 565.

### **c 540 Inheritance under Justinian law**

By the end of Justinian’s reign some of the rules relating to inheritance were -

- (a) there was a minimum age to make a Will, 14 for males and 12 for female
- (b) the testator should possess testamentary capacity;
- (c) the Will should be signed or acknowledged by the testator in the presence of seven witnesses, or published orally;
- (d) a Will could still not dispose of after acquired property;
- (e) the heirs, who were formerly liable to pay all of the debts of the deceased, now made an inventory of the property of the deceased and they were liable only to the extent of the assets which they inherited;
- (f) privileged Wills could be made by certain persons, such as soldiers;
- (g) something similar to what we call a *donatio mortis causa* was recognized as an effective *oral mortis causa* trust: if a person on his deathbed had by word of mouth directed his heir-at-law to give something to the complainant, the heir was required on his oath to deny the averment, or else to satisfy the gift.

### **Children’s rights to inherit**

There were by then rules requiring a testator to provide for their children. Ch III of Novel 115, enacted in AD 542, provided as follows:

Therefore we order that no father or mother, grandfather or grandmother, great-grandfather or great-grandmother shall, under any circumstances, forget to mention their son, daughter, or other descendants in their wills, or disinherit them unless they have left them, by donation, legacy, or trust, or in some other way, the shares to which they are entitled by law; or it has been proved that their children are ungrateful, and have expressly stated the instances of their ingratitude in their wills.

The proportion to which children were “entitled”, at first a quarter share of the estate, was called the *legitim*.

Novel 115 C.3 set out the only 14 grounds upon which descendants should be considered “ungrateful”, and disinherited. No other basis of ingratitude could be relied upon. The 14 grounds of ingratitude are in summary as follows:

- (1) the child has laid violent hands upon parents;
- (2) the child is guilty of a grave and dishonourable wrong against his parents;
- (3) the child has brought criminal accusations against parents for offences that did not involve the Emperor or the State;
- (4) the child is a malefactor or consorts with malefactors;
- (5) the child attempts to plot against the life of his parents;
- (6) a son, has illicit relations with his step-mother or his father’s concubine;
- (7) a son has acted as informer against his parents and has subjected them to great expense;
- (8) the child who has the capacity to do so refuses a request by an ill parent to provide security for the debts of the parent;
- (9) a son, prevents his parents from making a will, and they are afterwards enabled to make a Will;
- (10) a son, continues to associate with actors or gladiators, contrary to the wishes of his parent, unless that is the profession of the parent;
- (11) a daughter, refuses to be married and prefers to lead a life of debauchery, where the parent desires to provide the daughter with a husband and bestow a dowry; but if at 25 she is still single she can marry a free man at her choice because it is her parents’ fault she is not married;
- (12) the child fails to treat a parent who has become insane with the proper respect and care (assuming the parent is subsequently cured of insanity);
- (13) the child does not pay a ransom demanded by the captors of a parent retained in captivity;
- (14) the child does not acknowledge the Catholic faith and does not commune in the church where the true religion is taught and where the doctrines of the holy Councils of Nicea, Constantinople, Ephesus and Chalcedon are accepted.

In *Burke v Burke*, [2015] NSWCA 195, Emmett JA wrote at [125]

It might have been preferable for the legislature to be more specific. For example, the somewhat amorphous criteria in s 60(2)<sup>3</sup> might be compared with the specific causes for the disinheritance of children laid down by Justinian in Ch III of Novel 115, enacted in AD 542. ... While I hasten to add that I do not suggest that all of the above grounds would be appropriate for New South Wales in the 21st century, such criteria would leave much less to the difficult exercise of discretion by judges.

Novel 115 C. 4 had similar restrictions in relation to Wills made by children: they were not permitted to pass over their parents unless they specifically mentioned any of nine specified grounds:

1. If parents deliver their children to public authorities for a crime punishable with death, except for the crime of treason.

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<sup>3</sup> (The matters to be considered by the Court in deciding whether to make a family provision order)

2. If it is shown that parents have plotted against the life of their children by poison or incantations or in some other manner.
3. If a father has illicit relations with his daughter in law or with his son's concubine.
4. If parents forbid their children to dispose by testament of property over which the latter have power of testamentary disposition; and all the provisions which we made in that respect as to prohibiting parents from making testaments shall be observed.
5. If a husband perchance gives poison to his wife, or a wife to her husband, for the purpose of causing death or mental aberration, or the one plots in some manner against the other; then such a crime, being a public one, shall indeed be investigated and punished according to law, and children have the right in their testaments to leave nothing of their property to persons who are known to have committed such a crime.
6. If parents neglect to take care of a child or children who are mad, then all the provisions made in the case of mad parents shall apply.
7. We also add the case of misfortune of captivity in which children find themselves who are not liberated therefrom through the inattention and negligence of their parents. In such case the parents shall in no manner receive the property of the children, and all provisions made on that subject about parents and cognate or agnate relatives who inherit on intestacy and about outside designated heirs shall govern.
8. If one of the aforesaid children who is orthodox learns that his parent or parents are not Catholics, the same provisions shall apply to them which we made above as to parents.
9. If children accordingly state such cause or causes in their testament and the designated heirs prove one or more of them, the testament shall remain in force and effect. If this is not done, the testament is invalid as to the appointment of heirs and the property shall be given to the persons who inherit on intestacy. But legacies, trusts, manumissions<sup>4</sup>, appointments of guardians and other provisions shall, as above mentioned, remain valid.

If a child did not receive at least his *legitim*, and had not been disinherited on permissible grounds, then the remedy was to have the Will declared null to the extent necessary for him to take his proper entitlement. The practice of the centumviral Court<sup>5</sup> had been to recognize the right of children to one quarter of the estate. Justinian increased this to one third, or half if there were five or more children entitled to participate

Justinian also altered the law which had allowed as a defence to a *querela inofficiosi* claim that the testator had left him some legacy in his Will.

In *Kleinig v Neal*, [1981] 2 NSWLR 532; Holland, J (when considering factors a court must take into account in claims by children) said at 540 -

"... another circumstance is that the parent was responsible for bringing the child into the world and having done so assumed a duty to be concerned for the child's welfare. A wise parent will recognise that perfect harmony between parent and child is in the nature of things not to be looked for and that, coming to adulthood, a child will want to make his own life just as the parent had done before him. Differences of outlook between different generations is not

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<sup>4</sup> (The freeing of a slave)

<sup>5</sup> (the "100" representatives, being three from each of 35 tribes, which became the civil Court)

exceptional, it is the general rule, so some friction between parent and child or disappointment in a parent's hopes and expectations concerning his child will be accepted by the wise parent as almost inevitable. If it occurs, the parent who is just as well as wise will not allow such disharmony or disappointment to blind him to the needs of his child for maintenance, education or advancement in life. The duty of a parent towards his child to provide for those needs on his death, if he can, continues in spite of such disharmony or disappointment and the statute obliges the court to consider whether it has been performed."

That was not a novel sentiment! C. 5 of Novel 115 said:

These things have been enacted so as to abolish testamentary wrongs to parents and children. ... The aim is to destroy the wrongs to parents and children arising from disinheritance and omission from the will. Parents should remember that they too were children and received the same advantage.

### **The impatient inheritor/creditor**

It happens today that clients seek to discuss a parent's Will either when the parent's demise seems imminent, or on the day of the funeral (if not before). That, too, is not a novel trend. Chapter 5 of Novel 115 had something to say to people too impatient to wait for the fruits of the death:

We further remember having enacted a law by which we ordered that no-one should be permitted to detain the bodies of dead persons on account of a debt, or to hinder their burial. At present we have learned that some persons detained on account of a debt the father of a deceased son when he was returning home from a funeral. We have therefore thought it pious and humane to forbid such cruel conduct by this law. We accordingly ordain that no-one shall be permitted to sue the heirs of the deceased or his parents children wife agnate<sup>6</sup> cognate<sup>7</sup> or other relatives or his sureties before the expiration of nine days after they begin to mourn, or to molest them in any way, send them any summons, or call them into court on account of any debt of the deceased or for any other cause which specially involves the aforesaid persons on account of such deceased.

### **Intestate succession**

Novels 118 and 127, revolutionised intestate succession. Intestate succession for real and personal property now became based solely on blood kinship, agnates were excluded. Where anyone died intestate leaving children, they took in priority to the deceased's parents. Grandchildren being children of a child who predeceased took their deceased parent's entitlement. No distinction was made between children of either sex, whether descended from males or females.

(This is all surprisingly consistent with modern rules of intestate succession.)

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<sup>6</sup> (person descended from a common male ancestor)  
<sup>7</sup> (blood relative)

**Pre 1066      England before the conquest - Anglo Saxon period**

Before 1066 lands were devisable by Will. Testamentary disposition, of land and personal property, was possible and exercised by means of a Will called a *cwide*<sup>8</sup>. This was more in the nature of a record of what the testator had said, than being a formal Will as we know it. There were apparently no universal rights for widows and children.

**Post 1066      England after the conquest**

**Land**

The Norman feudal system introduced a new system of land tenure and inheritance. Alienation without the consent of the lord was not permitted, and this also prevented the gift of land by Will. The King's Courts developed stringent restraints on alienation of land. The rule of primogeniture was strictly enforced. The heir's right in expectancy was respected to the extent that his consent was generally necessary even for an alienation of land inter vivos by his father. The Lord exacted a fine on transmission of land, including by inheritance, and if it was not paid then there was some discretion on his part as to where the land would go.

Dying without an heir led to land passing to the Lord by escheat.

**Blackstone**, (writing in 1766, Book I, Ch 23), suggests that the restraint on alienation was founded on policy reasons – the desire to prevent the “wanton disinheritation of the heir” by a Will which, through the “dotage or caprice of the ancestor” would transfer the land from those of his blood to utter strangers.

**Early courts**

**c 1200** The common law had its early origin during the reign of Henry II, 1154 –1189, with the development of local courts and King's courts. There were also ecclesiastical courts established by the church. Their jurisdiction concerned marriage, divorce, defamation, and church discipline. Originally Church Courts applied the cannon law of the Roman Catholic Church.

There was no clear distinction in the early days as to the judges. Church Courts were not exclusively manned by clerics. Bishops and archdeacons sat in the County Court and the Hundred Court. Earls and sheriffs sat in the Church Court.

The common law paid little attention to chattels, and was content for jurisdiction over Wills to be exercised by Church Courts. Since Wills could deal only with money and chattels, jurisdiction over disputed Wills developed in the Church Courts. They decided questions of validity of Wills, and would make a grant of Probate if the Will was valid.

By 1200 it was established that jurisdiction in cases of disputed wills belonged solely to the church courts. The King's courts, and the local courts no longer sought to exercise jurisdiction in Will disputes.

Since Church Courts had no jurisdiction over land, questions of title to land were determined in the Kings Courts. Title was proved by the devisee producing the Will as a document of title; but the validity of the Will depended on the Church Court having granted Probate.

The difference between real and personal property which survives to the present time goes back to this abandonment of jurisdiction to the church courts.

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<sup>8</sup> He *cwaeth his cwide* – meant he says (quoth) his say.

### **Chattels and money – limits on freedom of testation**

Wills could be made orally, including on one's deathbed.

Until relatively recent time it was not usual practice for a person to make a will in the course of normal life. Wills were something which were attended to when death looked like a possibility or a certainty,

A “**tripartite principle**” applied. If the deceased was survived by widow and children, then the personal estate was divided into three parts: the wife's part, the bairns' part (which went to the children equally, and was still called the *legitim*), and the dead's part. Or, if only widow or only children survived, then it was divided into two parts. Children had to bring into hotchpot any advances received during the deceased's lifetime.

The deceased's power of disposition was confined to the dead's part. A special form of writ was available to the widow and children for the purpose of their claiming their proper portions.

Dying without confession was not acceptable, and dying intestate was unusual. The opportunity of making an oral Will on one's deathbed, at the time of making final confession, led to the dead's part usually being given to the church *pro salute animae* – for the safety of the soul. So in practice, testamentary freedom was very largely reduced.

### **1188 The office of Executor – Henry II**

**Glanville**, writing in c 1188 *The Laws and Customs of England*, said that

- a man could not devise land, but he could bequeath one-third of his chattels after payment of debts, or half if he left only a wife or only children;
- cases concerning the validity and construction of testaments were for matters for the Court Christian.
- the heir had to pay the deceased's debts, and if the assets were insufficient he must pay them from his own property;
- executors were persons chosen by the testator to take charge of the distribution;
- if no executor was nominated, then the nearest kin could take on the task of distribution;
- if the heir or another person detained the personal property, the widow and children could have the king's writ to enforce their proper entitlements; and
- if a person died intestate his chattels belonged to the lord, (who, presumably, gave the widow and children their customary shares)

The origin of the executor is not known, but the office was known to Glanville. However in those early days the executor had more limited functions than now, mainly confined to distribution of the estate. The heir, not the executor, still represented the testator both in relation to real and personal property.

### **1215 Magna Carta - King John**

#26 (Dealing with debts due to the Crown).

... If no debt is due to the Crown, all the movable goods shall be regarded as the property of the dead man, except the reasonable shares of his wife and children.

**1215** The share of the widow and children was called the *pars rationabilis* (reasonable part), and was sued for by the writ *de rationabili parte*.

#27 If a free man dies intestate, his movable goods are to be distributed by his next of kin and friends, under the supervision of the Church. The rights of his debtors are to be preserved.

However #27 was not included in later confirmations of the Charter, and for some time it was uncertain whether on intestacy the chattels passed to the lord, the next of kin, or the church.

It was still the heir, not the executor, who sued to recover debts due to the estate, (at first by proceeding in the Church Courts, but by 14<sup>th</sup> century in the King's Courts) The executor's liability became limited to the extent of the goods he received from the deceased. Their duties expanded, and came to include the duty to take possession of those goods which the testator could dispose of by Will. The Executor was thus becoming more of a legal personal representative.

Actions by and against the executor as LPR, and actions to recover legacies, took place in church courts. The King's courts began to entertain actions by and against executors, and to prohibit such actions from proceeding in ecclesiastical courts. But they did recognize the executor as the testator's representative. Since the executor was the creature of the church Court, and an officer of that Court, this reinforced the jurisdiction of the Church courts to decide on the validity of a Will and to appoint a LPR.

By the reign of **Henry III**, (R. **1216-1272**), the ecclesiastical jurisdiction had been fully established. Now ecclesiastical courts were granting probate of Wills, requiring the executor to prove the Will in the proper court, now conducted by the bishop of the diocese ("the ordinary") where the testator died. The executor was required to swear an oath that he would render an account of his dealings to the ordinary. Church Courts could now remove an executor from office for misconduct.

**1258 Bracton**

In case of sudden death and intestacy, the lord should not seize the chattels and they should go to his friends and the church.

**1279 The Statutes of Mortmain<sup>9</sup> Edward I**

Under the feudal system taxes were payable upon the granting of an estate in land, or its transfer by conveyance or inheritance. The Statutes of Mortmain were two enactments, in 1279 and 1290, by King Edward I, intended to preserve revenues by preventing land from passing into the possession (the "dead hand") of the Church. If an estate was owned by a religious corporation that never died then these taxes were never paid. The Statutes of Mortmain provided that no estate should be granted to a corporation without royal assent. (This revenue problem, of land passing to the Church persisted with the mechanism of the use, until Henry VIII eventually solved the problem by simply disbanding the monasteries and confiscating Church lands.)

**1285 Statute of Westminster II - Edward I**

Although the church claimed the right to administer the goods of an intestate, some clergy abused the prerogative, and creditors were not always paid. The *Statute of*

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<sup>9</sup> Possession of property by a corporation such as the church was known as mortmain – the "dead hand" of the church.

*Westminster II*, 1285, declared that the ordinary should be bound to pay the debts of the intestate in the same manner as executors were bound to pay their testators' debts.

**1350** 1350 onwards, Church Courts began to apply Civil and Canon Law.

**1357 Origin of the office of administrator - Edward III**

Until this time in the case of intestacy the Ecclesiastical Court itself actually administered and made the distribution. However as a result of its officers' conduct being negligent and even fraudulent, Edward III passed legislation, 31 Edw III c. 11, which required the ordinary to appoint an administrator from among the deceased's "next and most lawful friends". The administrator, as the deputy of the ordinary, was made capable of suing and being sued in the King's Courts as if he were an executor, and so the two roles were largely assimilated.

So now the legislation directed that

- (1) in case of intestacy the ordinaries should depute the "next and most lawful friends" to administer the goods; (later on a statute of Henry VIII required administration be granted to the widow or next of kin or both.)
- (2) these deputies should have an action to recover debts due intestate in the king's court;
- (3) they should be answerable in the King's Court in the same manner as executors;
- (4) they should be accountable to the ordinary in the same manner as executors were accountable.

This legislation originated the office of administrator; but it failed to designate the persons entitled to the residue after payment of debts.

The legislation assimilated these administrators with executors, and so, like executors, upon appointment they became the personal representatives of the deceased. By the control which they exercised over the appointment of administrators, the Church Courts gradually assumed a general jurisdiction over the administration of the estate.

Over the succeeding centuries the tripartite principle ceased to apply in England, and as the principle gradually disappeared, freedom of testation in relation to chattels gradually developed. (It was different in Scotland where the tripartite principle continued to apply in favour of surviving spouse and children into the 20<sup>th</sup> century.)

By the end of the 15<sup>th</sup> Century the Church Court was the body which made grants of representation. Probate of a valid Will would be granted in the court of the bishop in whose diocese the deceased died. In cases of intestacy letters of administration would be granted. Appeal lay from the lower Church Courts to the courts of the archbishops in the Court of Arches in Canterbury, and the Chancery Court of York. From there an appeal could be brought to the Pope (until this was forbidden by legislation in 1532).

The administration of either testate or intestate estates would take place in or under the supervision of the Church Court. Executors and administrators were required to file inventories and accounts. Delay or negligence might result in removal of the LPR. One useful sanction of the church courts in their control over LPRs was excommunication or other spiritual punishment.

**1517 Commencement of the Reformation**

After the Reformation Oxford and Cambridge began to offer degrees in Civil Law, and the Church courts began to apply Civil and Canon law.

### 1500 onwards Development of the Use

- \* European civil law prevented some classes of persons from inheriting under a Will
- \* T could nominate an heir, and annex a request that he give the property to the chosen recipient. A *fidei commissum*. Legal sanction was given to the execution of the trust.
- \* During reign of Edward III (1327-1377) this device was introduced into English law as a “Use”, enabling the use of land to be granted/devised for the benefit of a religious house, without directly passing ownership to the house.
- \* Laity followed enthusiastically, using the doctrine to devise land by Will, and to defeat their creditors.
- \* **Use**: a trust or confidence reposed by the grantor/**feoffor** when transferring the fee to the transferee/**feoffee**.
- \* **Feoffee** agreed to, and was bound to dispose of the land as directed by the *cestui que trust*, and to allow the *cestui que use* to enjoy the use of the land and receive rents and profits.
- \* Proper title of the feoffee was “feoffee to the uses of the beneficial owner”.
- \* The common law considered the feoffee to uses as having the entire ownership of the land.
- \* Chancery recognized that the cestui que use had the equitable estate, and enforced his rights.
- \* (Hence the modern analysis, there are not parallel legal and equitable estates in property, but that a trust operates by engrafting the rights of the beneficiary onto the legal estate, not carving them out of the legal estate: (cf. *Livingston* (1965) and *DKLR Holdings*, (1982).)
- \* **Writ of subpoena** which had been devised by a Chancellor in the reign of Richard II was now used to compel the feoffee to appear, disclose the trust, and perform it.
- \* Thus the *cestui que use* could compel performance of the Use.
- \* **Doctrine of Uses** once established rendered the use of land distinct from the ownership. Uses began to be given by Will. Being only an equitable right to enjoyment of land, it was not affected by the rule of law against testamentary disposition of land.

### 1536 Statute of Uses 1536 - Henry VIII

- \* In order to prevent people from dealing with land in this manner it executed the uses, and annexed possession to the use.
- \* All uses except for those imposing an active duty on a [trustee], became invalid and the [beneficiaries] were held to be legal owners, so that they paid the relevant taxes and dues. The uses were now the land itself, and being land they were now no longer devisable.

### 1540 Statute of Wills 1540

The **Statute of Wills 1540** (with ancillary legislation in 1542-3) was enacted after a storm of protest against the loss of the power to effectively devise land. It made it possible for (most) landholders to directly devise their land upon their death by permitting the devise by will to any other person, but not to bodies corporate, of land held in fee simple, the whole of the land held in socage tenure<sup>10</sup>, and two-thirds of their lands tenements and hereditaments held in chivalry<sup>11</sup>.

The *Statute of Wills* created some of the formal requirements that continue to this day. A will must be in writing, signed (but in those days not necessarily by the testator), and witnessed by at least two other persons. It recognized problems of

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<sup>10</sup> (tenure of land by a tenant in return for payment of rent, or the provision of agricultural services, not being military services)

<sup>11</sup> It was only in 1837 that all interests in land, of whatever nature, became devisable.

capacity: femmes-covert, infants, idiots, and persons of non sane memory, could not make a Will.

This legislation giving power to devise land to a devisee was seen as enabling a testator to defeat his creditors, including specialty creditors. The devisee took and, unlike the heir who took the land pursuant to the feudal system and also became liable to discharge the deceased's debts, the devisee took free of any such liability. This was not remedied until the *Statute of Fraudulent Devises* in 1691.

The will of a man was revoked by marriage and the birth of a child, of a woman by marriage only. A will was also revoked by an alteration in circumstances, (cf. *Wills Act* 1958 s. 17<sup>12</sup> and s. 12 of the 1997 Act).

Wills making bequests of personal chattels operated upon whatever chattels the testator possessed at the date of death; but devises still operated only upon such land as belonged to the testator at the time of executing and publishing his Will. Thus, as in Roman law, no after-acquired land would pass under the devise, unless after the purchase the devisor republished the Will. (A codicil still "republishes" a Will and "brings down the date" of the Will to the date of the codicil.)

This is explained in *Blackstone* II p 378: A Will of land made by permission and under these Statutes is considered by the courts not so much in the nature of a testament as of a conveyance declaring the uses to which the land shall be subject. ... And upon this notion, that a devise affecting lands is merely a species of conveyance, is founded this distinction between such devises and testaments of personal chattels: that the latter will operate upon what the testator dies possessed of, the former only upon such real estates as were his at the time of executing and publishing his Will.

#### **Will / Testament**

**Will** appointed an executor or trustee and devised land by means of the Use. A **Testament** made a gift of money or personal property and did not, (or did not need to), appoint an executor and trustee. After 1540 the two concepts combined so that a Will, and a Will and Testament, are now the same thing.

(After the establishment of the Church of England as the established Church, the law applied was a combination of European civil law and ecclesiastical law as it developed in the Church of England. The jurisdiction exercised by these courts encompassed Church law properly so called, matrimonial law, and what we now know as Probate law. It becomes appropriate now to refer to courts exercising the ecclesiastical jurisdiction, rather than "Church Courts" as such.)

#### **1567 Doctors' Commons**

A group of ecclesiastical lawyers who had the degree of Doctor of Civil and Canon law established buildings in London called Doctors' Commons, which housed the principal ecclesiastical and admiralty courts, and residences for judges and proctors.

Proctors were lawyers licensed by the Archbishop of Canterbury to practise in the courts of ecclesiastical jurisdiction.) The building was in Paternoster Row, near St Paul's Cathedral.

After appeals to the Pope from the courts of the Archbishops were forbidden, a new Court, the High Court of Delegates, was established to hear these appeals.

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<sup>12</sup>

"No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances."

**1601 Charitable Uses Act of 1601 (Statute of Elizabeth I)**

The preamble to the *Charitable Uses Act* of 1601 (“the Statute of Elizabeth”) contained a list of purposes or activities of general benefit to society, and which formed the foundation of the modern definition of charitable purposes. A devise to a corporation for a charitable use was made valid.

**1601 Executor de son tort – liability extended to administrators**

**43 Eliz. c.8** 1601 Statute to deal with the fraudulent administration of intestate estates. It recited that that persons entitled to administer intestate estates often refused to do so, and secured the appointment of men of straw as administrators, from whom they received the intestate property without payment of the deceased’s debts. Now those recipients became chargeable as was the executor of his own wrong.

**1649-1660**

**The Commonwealth.** During the Commonwealth jurisdiction of the courts of ecclesiastical jurisdiction was in eclipse, and special courts with district registries were set up for probate and grant of administration and suits for legacies transferred to common law. In 1660 tenure by knight service was abolished, which had the consequential effect of making most land (not copyholds) devisable

**1661** The former jurisdiction of the courts of ecclesiastical jurisdiction was restored.

**1670 Statute of Distributions - Charles II**

Legislation now identified the beneficiaries to whom intestate’s personal property should be distributed, after debts were paid.

The Act also directed that upon granting administration the ordinary should take a bond, conditioned upon the administrator exhibiting an inventory, administering the goods according to law, rendering a true account and delivering the residue according to the decree of the ordinary. The bonds were made suable in any courts, and the ordinaries were expressly empowered to call administrators to account and to compel distribution.

However the Ordinary’s jurisdiction was not declared to be exclusive, and the Chancery Court continued to administer estates in cases brought before it. Only Chancery could give discovery and grant injunctions, so serious cases concerning the administration of estates continued to gravitate towards it.

Common law courts continued their jurisdiction over actions for debts. But both secular courts still recognized the ecclesiastical courts’ exclusive jurisdiction to make grants of representation: all the courts required that there be a grant before the legal representative’s title was regarded as established.

Probate remained ineffective to effect a devise of land. Still, in order to prove title to land, the Will had to be produced.

**1677 Statute of Frauds**

Blackstone says that “innumerable frauds and perjuries were quickly introduced by this parliamentary method of inheritance, for so loose was the construction made upon the 1540 Act by the Courts of law that bare notes in the hand writing of another person were allowed to be good wills within the statute.”

The *Statute of Frauds and Perjuries* 1677 addressed this. Before this simple notes, even in the handwriting of another person, constituted a sufficient will, if published by the testator as such. This Statute now directed that all devises of lands and

tenements should be in writing, signed by the testator or some other person in his presence and by his express direction, and be subscribed in his presence, by three or four credible witnesses. (Cf. s. 9 of WA97)

(The Act also required that certain types of contracts grants, and assignment or surrender of interests in real property be in writing.)

#### **1691 Statute of Fraudulent Devises, 1691 William III**

Under the old law creditors they could follow the debtor's land into the hands of the heir. But the ability to devise land broke the connexion and creditors did not have the same remedy against the devisee of their debtor.

Statute of Fraudulent Devises, 1691, provided that all wills and dispositions of real property by persons with power to dispose of the land by will should be deemed to be fraudulent and void against creditors, and the creditors could maintain action jointly against both the heir and the devisee.

#### **The 18<sup>th</sup> Century**

With the rise of professional lawyers administering ecclesiastical law in metropolitan courts, ecclesiastical law had now become a discrete part of English law. However the church courts did not flourish. The king's courts had able judges whilst the church courts in the dioceses were staffed by persons lacking legal knowledge, and they were lax in their administration. The primary means of enforcement was excommunication. They were unable to offer useful remedies in cases of fraud. The Court of Chancery had developed jurisdiction to make orders in personam. It offered the subpoena, remedies to enforce discovery, and orders for the taking of accounts. It understood and enforced the equities which can arise in the administration of an estate. Doctrines of satisfaction, ademption, marshalling, conversion, election, and subrogation, were all worked out in Chancery and came to be applied in the administration of deceased estates.

So business flowed away from the ecclesiastical courts to the chancery courts, leaving the ecclesiastical courts retaining their jurisdiction over grants of Probate and administration.

#### **1751 Wills Act 1751 - George II**

The courts did not allow persons with an interest in the suit to be a competent witness, and this included being witnesses to a Will. Beneficiaries and even creditors were not competent witnesses. This Act restored the competency of such persons – by declaring void all legacies given to witnesses or their spouses. It also permitted the evidence of creditors to be given, subject to their credit being considered by the Court.

Will of a man was revoked by marriage and the birth of a child. Will of a woman by marriage only.

A will was also revoked by an alteration in circumstances, including a disposition of land devised by an existing Will. This was seen as an action by the grantor to give legal effect to his change of intention.

As with Roman law, a Will spoke from the time of the making, so that it could not pass after-acquired property without republication

## Construction of Wills

Rules and maxims laid down by Blackstone 1765-1769 (Book II, pp 379-381)

1. That the construction be favourable, and as near the minds and apparent intents of the parties, as the rules of law will permit. The construction must also be reasonable and agreeable to common understanding.
2. Where the intention is clear, too minute a stress be not laid on the strict and precise signification of words.
3. The construction be made upon the entire deed, and not merely upon disjointed parts of it.
4. The deed be taken most strongly against him that is the agent or contractor, and in favour of the other party.
5. If the words will bear two senses, one agreeable to, and another against, law, that sense be preferred which is most agreeable thereto.
6. In a deed if there be two clauses so totally repugnant to each other that they cannot stand together, the first shall be received and the latter rejected; wherein it differs from a Will, for there, of two such repugnant clauses the latter shall stand. Yet in both cases, we should rather attempt to reconcile them.
7. That a devise be most favourably expounded to pursue if possible the will of the devisor who, for want of advice or learning, may have omitted the legal and proper phrases.

**Blackstone**, (Book I, Ch 23), suggests that the early restraint on alienation was founded on policy reasons – the desire to prevent the “wanton disinheritation of the heir” by a Will which, through the “dotage or caprice of the ancestor” would transfer the land from those of his blood to utter strangers. He thought it a good policy because it maintained the balance of property, and prevented one man from growing too big or powerful for his neighbours, “since it rarely happens that the same man is heir to many others, although by art and management he may frequently become their devisee”.

### 1804 Napoleonic Code

This sentiment applied across the Channel. After the French Revolution the revolutionaries aimed to put equality at the centre of succession laws, by designating the heirs and preventing a testator from disinheriting his children. (No provision was made for widows). Testamentary freedom was not completely abolished, but it operated as an adjunct to the Code by specifying the amount of the estate of which the testator was free to dispose. If there were no ascendants and no descendants there was freedom of testation. If the testator had one child then half the estate went to the child; if two children, then they received two-thirds; and if there were three or more they received three-quarters; and the testator could dispose of the balance.

**1823** *Imperial Statute* (4 Geo IV c 96) The “Third Charter of Justice; Letters Patent issued pursuant to this legislation, together with

**1828** *Australian Courts Act* (9 Geo IV c 83)

established the New South Wales Supreme Court as a Court of record with common law jurisdiction of the courts of King’s Bench, Common Pleas, and Exchequer; and the equitable jurisdiction of the Chancery Courts; and as a (secular) Court of ecclesiastical jurisdiction with power to grant Probate and letters of administration under the seal of the court in respect of estates of persons who died leaving property in the colony. In the ecclesiastical jurisdiction the Court was to apply the law manner and custom of England, in particular the Diocese of London, as at 25 July 1828. The ecclesiastical (in the sense of church law) and the matrimonial causes jurisdiction of the ecclesiastical courts was not conferred.

- 1830** *Executors Act* (Eng)  
 Until 1830 if a will appointed executors and made no express disposition of the residue of his personal estate, then the executors were beneficially entitled to it. This Act now made them trustees for the next of kin. Section 53(b) of the *Administration and Probate Act* still provides that in the case of partial intestacy the LPR holds the property not disposed of by any Will holds that property on trust for the next of kin, “unless it appears by the will that the personal representative is intended to take such part beneficially”.
- 1832** A report by the Commissioners on the Practice and Jurisdiction of the Ecclesiastical Courts recommended abolition of Court of Delegates and transfer of its appellate jurisdiction in ecclesiastical cases to the Privy Council. One of the continuing problems was *bona notabilia* where the deceased had goods in a diocese other than the one in which he died, exceeding the value of £5, grant of probate or letters of administration had to be made by one of the Archbishops’ courts  
 The report proposed that same formalities apply to Wills of personal property and Wills of real property, and that probate should be effective for all Wills.
- 1833** A further Report recommended abolition of testamentary jurisdiction of ecclesiastical courts, a central registry of Wills, and that will contests and grants of administration be undertaken by Chancery courts. It took 24 years to be implemented!
- 1833** *Inheritance Act* 1833 (Eng) - **William IV**  
 Defined the rules for descent of land. Devisees were now taken to have acquired land by as devise, not by descent.  
 Previously creditors by bond and specialty had claims against the heir, who took by descent, but did not have the same remedy against a devisee. This had been addressed by the *Statute of Fraudulent Devises* in 1691, but other distinctions also obtained.. Intricate rules had developed to distinguish certain cases, eg. If land was devised, but the Will gave the devisee only what he would have been entitled to receive as heir, then he took by descent, not by devise.
- 1833** *Administration of Estates Act* (Eng) - **William IV**  
 Provided that a deceased person’s freehold and copyhold estates should be liable generally for payment of his debts.
- 1833** *Dower Act* (Eng) - **William IV**  
 Abolished right of dower and curtesy.  
 Dower was the part of or interest in the real estate of a deceased husband given by law to his widow during her life. Curtesy was the life interest which a widower might, under certain conditions, claim in the land of his deceased wife.
- 1837** *Wills Act 1837* (Eng) - (progenitor of our own legislation)  
 Uniform rules were prescribed for the execution, revocation, revival and construction of wills of both real and personal property. (It repealed the 1540 *Statute of Wills*.)

Main provisions were

- 1 All property, real and personal, and of whatever tenure, may be disposed of by will. This was the first time in the modern age that complete freedom of testamentary disposition was established. It removed limitations on testamentary disposition of certain types of land tenure which had been excluded from the operation of the 1540 Statute.
- 2 No will made by any person under the age of twenty-one is valid. (Previously Will of personalty could be made by males aged 14 and females aged 12)

- 3 Every will is to be in writing, signed at the foot or end thereof by the testator or by some person in his presence and by his direction, and such signature is to be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, who are to subscribe the will in the presence of the testator. It is usual for the testator and the witnesses to sign every sheet.
- 4 Gifts to a witness or the husband or wife of a witness are void.
- 5 A will is revoked by a later will, or by destruction with the intention of revoking, but not by presumption arising from an alteration in circumstances.
- 6 Alterations in a will must be executed and attested as a will.
- 7 A will speaks from the death of the testator, unless a contrary intention appear.
- 8 An unattested document may be, if properly identified, incorporated in a will.

***Wills Act 1852*** (Eng)

The requirement of signature at the foot or end is satisfied if the signature shall be so placed at or after, or following, or under, or beside, or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will.

**1855** *An Act for adopting [the English Wills Act 1852]* (Vic)

**1857** *Court of Probate Act* (Eng) - **Establishment of the Court of Probate**

In 1857 the jurisdiction of the courts of ecclesiastical jurisdiction in all testamentary matters was taken away and the Court of Probate was established with power to grant probate and letters of administration. Responsibility for probate matters was transferred to a network of civil probate registries on 11 January 1858.

Doctors Commons had been given a Royal Charter. As abolition approached the members became unwilling to admit new fellows, since this would dilute the proceeds distributable upon winding up. The last to be admitted was Dr Thomas Tristram. The 1857 Act made it lawful for Doctors Commons to vote to dissolve itself and to surrender its Royal Charter.

Probate was made effective to confirm the entitlement by succession to real property. The Act in s. 23 specifically provided that no suits for legacies or for the distribution of residues should be entertained by either the ecclesiastical courts or the newly created Court of Probate. Supervision of the administration of estates remained firmly in the hands of the Chancery Courts.

The act is a lengthy one, due to the fact that there are minute provisions granting to the old officials of the ecclesiastical courts places in the newly organized Court of Probate, not only in the principal registry in London but in district registries throughout the kingdom.

**1858** *Administration of the Estate of Deceased Persons Amendment Act* Vic

1 Mortgaged land to be the primary source for payment of the secured debt. (cf. s. 40)

**1859** *Law of Property Amendment Act* (Eng)

Fraudulent concealment of a will material to the title by a vendor or mortgagor of land or chattels became a misdemeanour punishable by fine or imprisonment or both.

- 1860** *Intestate Estates Act*, (Vic)  
Where no person entitled and ready to take a grant of representation the Curator of Estates may apply. Cf s. 5 of the *State Trustees (State Owned Company) Act 1994*
- 1861** *Larceny Act* (Eng)  
At common law there could be no larceny of a will of lands. But by the *Larceny Act 1861* stealing, injuring or concealing a will, whether of real or personal estate, was punishable with penal servitude for life.  
Forgery of a will (at one time a capital crime) now rendered the offender liable only to the same penalty.
- 1864** *The Wills Statute 1864*, (Vic)  
First comprehensive legislation in Victoria (ie not adopted from English or NSW legislation) for Wills
- All property able to be disposed of by Will.
  - Minimum age for making a Will 21.
  - Will to be signed at foot or end with two witnesses.
  - Gift to attesting witness are void.
  - No will is revoked by presumption of intention on the ground of alteration of circumstances.
  - Will speaks from date of death as to the property of which it disposes.
  - Anti lapse provision in case of gifts to children who predecease. Will is revoked by marriage.
  - Executors are trustees for next of kin and do not take beneficially where property not disposed of by the Will.
- 1864** *Intestates Real Estate Act Vic*
- Undevised real property to vest in the administrator as from date of death
  - Concealment of Will a misdemeanour
  - Curator to administer where no person entitled and ready to take the grant
- 1870** *Married Women's Property Act* (Eng)  
From the early thirteenth century until 1870, English Common law held that most of the property that a wife had owned as a femme sole came under the control of the husband at the time of the marriage". A woman needed her husband's consent to make a Will.
- Before 1870, the identity of the wife became legally absorbed into her husband, effectively making them one person under the law. Once a woman became married her money and personal property was no longer her own and her husband could dispose of it. Money which a married woman inherited automatically became the property of her husband. She retained legal ownership of her land but no longer had the right to sell or mortgage it without her husband's consent. She could not make contracts or incur debts without his approval. Nor could she sue or be sued in a court of law.
- As Blackstone said: a femme covert may purchase an estate without the consent of her husband, and the conveyance is good during the coverture until the husband avoids it by some act declaring his dissent. ... But the conveyance or other contract of a femme covert is absolutely void, and cannot be affirmed or made good by any subsequent agreement.
- By contrast, single and widowed women were considered in common law to be femmes sole, and they had the right to own property in their own names.

The *Married Women's Property Act* of 1870 provided that wages and property which a wife earned through her own work would be regarded as her separate property. A wife was allowed to keep any property she inherited from her next of kin as her own, subject to that property not being bound in a trust. She could also inherit money up to £200. She could continue to hold rented property in her own name and to inherit rented property.

Married men and women were both made legally liable to maintain their own children.

**1872** *Administration Act* (Vic)

- 3 Ecclesiastical jurisdiction of Supreme Court to be exercised under the name of "Its Probate Jurisdiction".
- 5 Jurisdiction to grant Probate or administration where deceased left real or personal property within the colony
- 6 Real estate vests in legal personal representative retrospectively as from date of death
- 7 Real estate in the hands of legal personal representative is an asset available for payment of debts
- 8 Executor or administrator to represent the estate of the deceased
- 11 Grant of Probate or Letters cta to be evidence of the Will and of the death
- 15 Appointment of a Registrar of Probates
- 16 Practice of the Court in its Probate jurisdiction to be pursuant to rules made by the judges and otherwise pursuant to its former ecclesiastical jurisdiction.
- 25 Executors may be allowed commission
- 29 Caveat procedure introduced

**1873** *The Supreme Court of Judicature Act* (Eng)

The Court of Chancery, the Court of Queen's Bench, the Court of Common Pleas, the Court of Exchequer, the High Court of Admiralty, the Court of Probate, and the Court of Divorce and Matrimonial Causes were consolidated into the Supreme Court of Judicature, subdivided into the High Court of Justice and the Court of Appeal. The status of the House of Lords as the final appellate Court was taken away, but restored in 1875.

The High Court was divided into five specialist divisional courts Queen's Bench, Common Pleas, Exchequer, Chancery, and the new Probate, Divorce and Admiralty division. In 1881 Common Pleas and Exchequer were consolidated into Queen's Bench.

The status of the House of Lords as the final appellate Court was taken away, but restored in 1875. The jurisdiction of the courts of common law and equity were combined and a uniform system of pleading and procedure was adopted.

Where equity and the common law diverted, the rule of law prevailed.

**Legal Practitioners**

A **Proctor** was, prior to 1873, a practitioner in the ecclesiastical (and admiralty) courts, licensed by the Archbishop of Canterbury to undertake the duties that were performed in common law courts by attorneys, and in the courts of equity by solicitors.

An **Attorney** was a lawyer who practised in the common law courts. They were officers of the courts and were under judicial supervision.

A **Solicitor** was a lawyer who practised in the courts of equity. They were considered to be more respectable than attorneys, and by the mid-19th century many attorneys were calling themselves solicitors.

The 1873 *Judicature Act* combined the proctors attorneys and solicitors into the common profession of "**Solicitor of the Supreme Court**".

- 1882** *Married Women's Property Act* (Eng)  
Until this legislation a married woman could only make a will with her husband's permission and he could choose not to carry out its terms if he wished.
- 1884** *Married Women's Property Act*, (Vic) - Victoria passed legislation in 1884, New South Wales in 1889, and the remaining Australian colonies passed similar legislation between 1890-97.  
Married woman made capable of holding property and contracting as a femme sole; property of a woman marrying after the legislation was to be held by her as a femme sole, and property acquired by a married woman after the Act was to be held by her as a femme sole.
- 1886** *The Intestate Estates Act* 1886 Vic  
Power of Curator of estates to distribute six months after refusing to recognize a claim against the estate.  
Cf s. 30A *State Trustees (State Owned Company) Act* 1994
- 1887 *Probate Act* 1887 Vic  
Recognition of grants made in UK and other Australian colonies
- 1890** *Wills Act* (Vic)
- 1890** *Administration and Probate Act* 1890 Vic  
Consolidated existing law
- 1892** *Administration and Probate Act* 1892 Vic  
Power to the Court to summon a person having possession of the Will, or an executor who neglects to prove or renounce. Cf s. 30
- 1896** In the late 19<sup>th</sup> century New Zealand was a leader in law reform amongst the common law countries  
  
Sir Robert Stout<sup>13</sup> was noted for support of liberal causes including women's suffrage. In 1896 and again in 1897 he introduced legislation giving dependants a fixed share of the estate. The Bills failed to pass. He left Parliament in 1898.
- 1897** *Land Transfer Act* (Vic)  
This made probate effective as to Wills which disposed of land alone. It also provided that both real and personal property should vest in the personal representative, regardless of any devises in the Will. (As is still the case), land passed to the devisee only on assent or conveyance by the LPR.

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<sup>13</sup> (Premier of New Zealand between 1884 and 1887, and CJ of New Zealand from 1899 to 1926)

## Family Provision

### 1900 *Testator's Family Maintenance Act* (NZ)

Robert McNab, (1864 – 1917) a lawyer and politician, took over the battle. He introduced legislation recognizing freedom of testation, but subject to the right of a dependant to apply for an order if that person was left without proper provision. The New Zealand *The Testator's* (sic) *Family Maintenance Act* passed in 1900, giving the Court discretion “should any person die, leaving a will, and without making adequate provision for the proper maintenance and support of his or her wife husband or children” to order such provision as it deemed fit, provided that the applicant's character or conduct was not disentitling.

New Zealand was the first common law country to break away from what had by then become the traditional principle of absolute freedom of testation. It was followed in all Australian States, and progressively in the Canadian provinces, but only incrementally. The New Zealand legislation gave remedies to husbands wives and children of all ages. (It did not initially apply to intestacies.)

### 1903 *Administration and Probate Act* 1903 Vic

Property appointed by testamentary general power of appointment deemed to form part of the estate for purposes of death duty

### 1906 *Widows and Young Children Maintenance Act* 1906

Victoria was the first Australian jurisdiction to adopt the New Zealand legislation. However it was a remedy for widows and children only. It excluded males over the age of 18, and females either married or over the age of 21, and it also did not apply to intestacy.

### 1907 *Administration and Probate Act* 1907 Vic

Section 5 gave power to Court to discharge or remove an executor. Cf s. 34 today.

### 1908

The British House of Commons commissioned a report into the limitations imposed on testamentary dispositions in France, Germany, Italy, Russia, and USA. Nothing more was done in England until 1928.

### 1911 *Administration and Probate Act* 1911 (Vic)

Sections 3, 4, any executor or administrator may serve notice on person making a claim where the claim is rejected. Power given to the Court to order that the claim be barred. Cf. Section 30

### 1912 *Administration and Probate Act* 1912 (Vic)

Section 2: Power to an executor to renounce Probate whereupon his rights wholly cease

### 1915 *Administration and Probate Act* 1915 (Vic)

Part V Maintenance of Widows and young children of deceased persons

109 Where the widow or children of any deceased person is left without sufficient means for their maintenance and support, the Court may order such provision as seems proper to be made out of the estate in or towards the maintenance and support of the widow or children.

108 “Children” excluded males over 18, and females over 21 or married.

113 Court was required to have regard to the net value of the estate and whether the applicants were entitled to independent means.

114 Power to refuse an application if the character or conduct of applicant was such as to disentitle him or her.

115 Provision for a widow was in no case to exceed £1000 pa, nor be more than the income or interest which the widow would have been entitled to receive under intestacy

**1925** *Administration of Estates Act* (Eng) provided for a single set of rules for intestate succession to both real and personal property

**1928** *Administration and Probate Act* 1928 (Vic)

Consolidated all of the existing Victorian provisions

15 Real estate of intestate person vested in Chief Justice pending grant of administration

45 Widow entitled to first £1,000 in intestate estate

47 If issue, spouse entitled to  $\frac{1}{3}$ , and if no issue entitled to  $\frac{1}{2}$ ; balance to children

#### Part V Maintenance of Widows and Young Children

139 Widow or children could apply if a person disposed of property by his Will and failed to make adequate provision for their proper maintenance and support. The Legislation still excluded male children over 18, females over 21 or married, and widowers.

It still did not apply to intestacy.

**1928** **Viscount Astor** moved in the House of Lords that a Select Committee be appointed to see whether a change was necessary in the laws governing testamentary provision for wives husbands and children, “based on the experience of Scotland, Australia and other portions of the Empire.”

The proposal was stoutly resisted. Viscount Haldane offered the opinion that judges were not sufficiently capable or wise to understand all the circumstances and family complications in every case.

Viscount Cave LC (said to be the least distinguished Chancellor of the early part of the 20<sup>th</sup> Century) spoke about the undesirability of washing family linen in public, and requested Viscount Astor to withdraw the motion.

Undeterred, Viscount Astor presented a Bill “to secure that the family and dependants of a testator or testatrix shall be properly provided for out of the available assets by the Will, proposing fixed statutory shares”. He proposed that permission to contract out should be given. The Bill failed, as did another the following year, but public and newspaper reaction was favourable.

**1929** **Eleanor Rathbone**, daughter of the social reformer William Rathbone, went to Somerville College, Oxford, over the protests of her mother. She then worked with her father to investigate social and industrial conditions in Liverpool. They opposed the Second Boer War. They were involved in establishing the School of Social Science at the University of Liverpool, where she lectured in public administration. She supported the suffragette movement. She was elected to Parliament as an independent in 1929.

In that year she introduced a similar Bill into the House of Commons, and it was extensively debated and again vigorously opposed. It was said that it would cause family misunderstanding and litigation, would unnecessarily interfere with too many people who did not need it; and would create more hardships than it would relieve; would cause the breakup of small estates while merely increasing the business of lawyers and legal costs.

Nonetheless it passed the second reading and was referred to a joint committee which took evidence from lawyers, judges, Public Trustee, Law Society, and judges of the Chancery Division. The Committee was satisfied that there was a substantial number of cases in which widows or widowers and children, who were unable to support themselves, who had been unjustifiably left without provision. The Judges of the Chancery Division approved the general principle of restricting testation where necessary to assure subsistence.

However whilst supporting the reform in principle, the Committee decided the mechanism of the Bill was too complicated and impracticable, and they expressed a preference for legislation along the lines of the New Zealand system. The report was too late in the session and the Bill proceeded no further.

There were further Bills in 1934, 1936, 1937, and 1938. As arguments based on principle gradually failed, the opposition was driven back to argue that, even if the objective was desirable, the proposed legislation would not work and it gave no guidance to the Court. The courts and conditions of the people in New Zealand and the Dominions which warranted such wide judicial discretion were “quite different” from those in England. The Bill would encourage litigation and even become a weapon for blackmail ...

**1938** *Inheritance (Family provision) Act* Eng

The Bill succeeded, and became law on 13 July 1938. It followed the approach of giving the Court discretion to fix appropriate provision, rather than specifying fixed shares.

The legislation made eligible to apply a spouse, unmarried daughter, infant son, and a son or daughter who by reason of mental or physical disability was incapable of maintaining himself or herself. If the Court were of opinion that the Will “does not make reasonable provision for the maintenance of that dependant” the Court could order that “such reasonable provision as the Court thinks fit shall be made out of the net estate for the maintenance of that dependant”.

**1928** *Wills Act* (Vic)

**1933** *Administration and Probate Act* 1933 (Vic)

2,3 grants on presumption of death

**1956** *Administration and Probate Act* 1956 (Vic)

Entitlement of spouse in intestate estate first £10,000, and then normal share as in intestacy

**1958** *Administration and Probate Act* 1958 (Vic)

TFM now appeared in Part IV

If any person dies without making adequate provision for the proper maintenance and support of the widow, widower, and children. Age limitations on children who could apply were removed. Discretion to refuse an application if there was disentitling conduct remained.

**1958** *Wills Act* (Vic)

**1962** *Administration and Probate (Family provision) Act* 1962 (Vic)

Family provision now applies to intestacies, and the range of eligible applicants is expanded.

Amended s. 91 – where person dies and distribution of estate by Will or under the provisions for intestate distribution fails to make adequate provision for proper maintenance and support of deceased’s widow, widower, or children. Widow now included a former wife entitled to maintenance, children with no age limitation, and extending to illegitimate children dependent on the deceased, or in respect of whom there was a maintenance order

- 1964** *Wills (Formal Validity) Act* (Vic)  
Recognition of Wills made in foreign places.
- 1965** *Wills (Minors) Act* (Vic)  
Minimum age for making a Will reduced to 18.
- 1967** *Administration and Probate (Amendment) Act* 1967 (Vic)  
Spouse entitled to first \$10,000 in an intestacy.
- 1977** *Wills (Interested Witnesses) Act* (Vic)  
Introduced Part V of the Act. An interested witness who received a gift under a Will, or whose spouse received a gift under a Will, that he or she had witnessed, could now keep the gift if the Court was satisfied that the entitlement was known to and approved by the testator, and not included as a result of any undue influence.
- 1977** *Administration and Probate (Amendment) Act* 1977 (Vic)  
In an intestate distribution the spouse now became entitled to the first \$50,000
- 1981** *Wills Act* (Vic)  
Insertion of s. 22A – in certain cases evidence of surrounding circumstances became admissible in construction of a Will
- 1994** *Administration and Probate (Amendment) Act* 1994 (Vic)  
5 Power to deposit will with Registrar  
8 Entitlement of spouse to obtain intestate partner’s share in the family home  
9 Spouse entitled to first \$100,000 in an intestacy.
- 1997** *Wills Act* (Vic)  
Finally a witness to a Will is no longer disqualified from taking a benefit under the Will, and legislation making a witness to the Will “competent” to give evidence to prove the execution of the Will disappeared.  
The law has come full circle from 1751!