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Frederick B. McCall

Allen Langston

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# A NEW INTESTATE SUCCESSION STATUTE FOR NORTH CAROLINA

FREDERICK B. McCALL\* AND ALLEN LANGSTON\*\*

The property accumulated by a person during his lifetime may, upon his death, be disposed of in one of two ways: first, in accordance with the terms of a will made by the deceased and expressive of his intent and desires regarding the ultimate disposition of his worldly acquisitions; and second, if the deceased left no will, in accordance with certain statutory enactments, indicative of the legislative intent as to the proper disposition of property left by an intestate. If a person dies leaving no will and the legislature of the state through its intestacy statutes, or canons of descent and distribution, makes in effect a will for the deceased, it should be a matter of considerable concern for us to determine whether the legislative regulation of the devolution of property is consonant with the natural but unexpressed desires of the decedent regarding the disposition of his property. In other words, is the legislative "will," by and large, coincident with the probable wishes of the majority of the people who die having made no testamentary disposition of their goods? Recent trends in intestate legislation indicate that the answer is in the negative, and that the general public, as well as the legal profession, is becoming vitally interested in the business of renovating and modernizing the laws of descent and distribution. This is true particularly in America.

Most of our states have inherited their laws of estates in land and of intestate succession from the common law of England. Much of this law traces its ancestry to the feudal system of land tenures. In a rapidly changing social and economic order many of the states are still struggling along with antiquated intestate succession acts—laws which in some instances were enacted over a hundred years ago and are ill-suited to present-day conditions. But even pride in the ancestry of these laws no longer argues for their retention, because most of the outgrown provisions of our land law inherited from England have been abolished by that country. In 1925 Parliament fundamentally changed the law of wills, the law of property,

\* Associate Professor of Law, University of North Carolina.

\*\* Member of the Raleigh, N. C., Bar; A.B., Grinnell, J. D., University of North Carolina.

and the succession of heirs and distributees. The laws enacted were the Administration of Estates Act, the Trustee Act and the Law of Property Act. The first named abolished dower and curtesy, made similar the devolution of real and personal property, vested in statutory trustees the entire legal estate of a decedent—both real and personal, abolished the action of partition, modified the law of escheat, and did away with the fiction of equitable conversion.<sup>1</sup> These enactments became effective January 1, 1926.

While England has left most of our states far behind in the matter of progressive property legislation, a few commonwealths in this country have already modernized their intestacy laws and several others have appointed commissions to study the problem and report thereon to their respective legislative bodies. In 1917, following a two-year period of work by a special commission appointed by the Governor, Pennsylvania passed the Intestate Act,<sup>2</sup> which removed many of the historic common law landmarks from the law governing decedents' estates. Curtesy and dower were abolished and a substantial share in the decedent's estate was given outright to the surviving spouse. For the purpose of disposing of the estate all distinctions between real and personal property and between ancestral and non-ancestral property were removed, thus establishing a uniform system of descent and distribution.

On the strength of the recommendations made by a commission appointed by Governor Smith in 1927 the General Assembly of New York in 1929 enacted the Decedent Estate Law,<sup>3</sup> which completely revised and modernized the laws of intestate succession of that state. This statute, which became effective September 1, 1930, likewise harmonized into one uniform system the rules of succession to real and personal property; abolished curtesy and dower in property acquired after August 31, 1930, and gave the surviving spouse of the intestate an outright share in the decedent's estate; protected the widow or surviving husband against disinheritance by an unjust

<sup>1</sup> ADMINISTRATION OF ESTATES ACT, 15 GEO. V, c. 23 (1925). See also Report of the New York Commission to Investigate Defects in the Law of Estates, Legislative Document No. 70, p. 7 (1928). (This document will be cited hereafter as *Rep. N. Y. Com.*)

<sup>2</sup> P. L. 1917, 429; Pa. Stat. (West, 1920) §§8342-8396.

<sup>3</sup> Laws of 1929, c. 229; N. Y. CONS. LAWS (Cahill, 1930) c. 13, §§80-104. For discussions of the New York law, see Laube, *The Revision of the New York Law of Estates* (1929) 14 CORN. L. Q. 461; Twyeffort, *The New Decedent Estate Law of New York* (1929) 6 N. Y. U. L. Q. REV. 377; Sullivan, *The Passing of Dower and Curtesy* (1931) 19 GEO. L. J. 306; Cummins, *Recent Reforms in the Inheritance Laws of New York* (1930) 16 A. B. A. J. 785.

testator by providing a right of election to take a specific part of the estate against the will; and concentrated the estate in the nearer and more dependent relatives. Inspired by the example set by New York, the Ohio legislature enacted a complete new Probate Code effective January 1, 1932. It revamps the laws relative to descent and distribution,<sup>4</sup> dower,<sup>5</sup> and curtesy<sup>6</sup> in accordance with the general plan of the Pennsylvania, New York, and English intestacy statutes.

In 1931 the president of the Florida State Bar Association appointed a committee to make a revision of the probate law of that state. The preliminary report of this committee<sup>7</sup> included a new probate act which purported to redraft, revise, and simplify the entire law of Florida, both adjective and substantive, regarding the devolution and administration of estates. While Florida has long had a uniform descent and distribution table, the law proposed in the preliminary report embodied a unique feature (unfortunately abandoned in the final report) in providing that the title to the real estate of a decedent, like personal property, should vest in the personal representative.<sup>8</sup> This would have permitted the abandonment of the highly technical procedure for taking possession and sale of real estate for the payment of debts. Proceedings were also provided, with adequate safeguards for the persons beneficially interested in the estate, for the sale, lease, and mortgage of property by the personal representative.<sup>9</sup>

The State of Delaware, through its legislature in 1931, authorized and directed the Governor to appoint a commission of nine charged with the duty "to investigate and to recommend as to the advisability of a revision of the laws of the State of Delaware affecting the descent and distribution of property in intestates, the duties and powers of executors, administrators, guardians, trustees and other fiduciaries, and all other statutes of this state as the Commission may deem advisable for the purpose of modernizing and simplifying the law relating to estates and trusts and the systems for the devolution

<sup>4</sup> Baldwin's Cum. Ohio Code Service (March, 1932), §§10503-1 through 10503-22.

<sup>5</sup> *Id.* §§10502-1 through 10502-7.

<sup>6</sup> *Id.* §10502-8.

<sup>7</sup> (1932) 6 FLA. ST. BAR ASSN. J. 187.

<sup>8</sup> *Id.* at 205, §57. As to final draft, see note 85 *infra*.

<sup>9</sup> *Id.* at 227-230, c. 4, §§197-217.

of real and personal property, and to prepare proposed legislation for such purposes."<sup>10</sup>

The legislative activity just discussed is illustrative of the modern trend—even in the older states where common law vestigia have longest survived—toward revision and simplification of the laws of intestate succession in this country. We shall subsequently refer more specifically to some of the provisions of these statutes.

This brings us to a consideration of the situation in our own state. North Carolina, always a conservative state so far as changes in the law of real property are concerned, still clings with stubborn tenacity to some of the antiques in its property law which it inherited from England as a part of the common law of that country. North Carolina is numbered among the eleven states<sup>11</sup> in America which still retain, subject to slight statutory modifications in case of divorce, separation, etc., dower in its common law form. This state, along with four others<sup>12</sup> and the District of Columbia, still makes provision for common law curtesy. However, as we shall point out later, North Carolina has modified the husband's right of curtesy initiate. Five states,<sup>13</sup> including North Carolina, and the District of Columbia still have, as at common law, separate statutes of descent and distribution for real and personal property. North Carolina also maintains the distinction between ancestral and non-ancestral property with reference to the inheritance of real property by collateral relations, depending upon whether or not such relations are of the blood of the first purchaser.<sup>14</sup> Under the present North Carolina law<sup>15</sup> the surviving spouse may take as heir of the deceased spouse, who has died intestate, only when the latter has left none other who can claim as his heir.

The time is ripe for North Carolina to consider seriously the proposition of abandoning these antiquated doctrines of intestate succession by regulating the devolution of property in terms of a *modern* social and economic order. We are therefore submitting herewith

<sup>10</sup> DEL. LAWS (1931) c. 303; see also Stockton, *Modernizing Laws Governing Intestacy and Devolution of Property* (1932) 54 TRUST COMPANIES 357, 363.

<sup>11</sup> Arkansas, Delaware, Illinois, Massachusetts, Michigan, Montana, New Jersey, North Carolina, Rhode Island, South Carolina, and West Virginia.

<sup>12</sup> New Hampshire, New Jersey (except that curtesy initiate has been destroyed), Rhode Island and Tennessee.

<sup>13</sup> Delaware, Kentucky, New Jersey, North Carolina and Tennessee.

<sup>14</sup> N. C. CODE ANN. (Michie, 1931) §1654, Rules 4, 5, 6.

<sup>15</sup> *Id.*, §1654, Rule 8.

a proposed new intestacy act<sup>16</sup> for North Carolina. This act is fashioned along the lines of similar recent legislation in England, New York, Pennsylvania, and Ohio; and by its terms would seem to effect a disposition of an intestate's property more nearly consonant with the natural desires of the deceased than do the present statutes. In presenting the proposed statute, we shall follow the general plan of taking up each section thereof and discussing it, so far as practicable, from three angles: (1) its historical background, (2) present legislative trends with reference thereto, (3) changes in the present North Carolina law that would be wrought by its adoption.

#### A PROPOSED STATUTE OF INTESTATE SUCCESSION

Section 1. The estates of curtesy and dower are hereby abolished. The surviving spouse in case of intestacy shall have as an heir that share in the whole estate of the deceased which is provided in Section 5 of this statute.

The purpose of this section is to delete from our law the senile and well-nigh obsolete marital estates of dower and curtesy and to substitute in their stead, for the benefit of the surviving spouse, an outright share in the estate of the deceased. The states of the American Union, including North Carolina, which still retain curtesy and dower inherited them from England and the feudal system of land tenures that prevailed in that country during the middle ages when land was the foundation not only of practically all wealth but of the military powers of the king and the great lords as well. Since the conditions that once justified these estates no longer existed in England, that country abolished the inchoate right of dower as a restraint on conveyance in 1833—a century ago—by permitting the husband to convey and devise his real property without the consent of his wife.<sup>17</sup> The last vestige of dower was removed, and the estate by the curtesy was abolished in England in 1925.<sup>18</sup>

In the United States twenty-three states<sup>19</sup> have abolished dower—

<sup>16</sup> It will be noticed that the proposed statute contemplates changes only in the substantive law. It is neither final in form nor definitive in nature; rather, it is meant to be suggestive of the path to be followed in modernizing the present laws. Such a statute was suggested for consideration at the National Conference of Commissioners on Uniform State Laws held in Washington, D. C., October 4-10, 1932. It was incorporated as the "First Tentative Draft of a Uniform Intestacy Act" in the Committee Reports, pp. 55-58, Appendix B, of the National Conference of Commissioners on Uniform State Laws.

<sup>17</sup> DOWER ACT OF 1833, 3 and 4 W.M. IV, c. 105.

<sup>18</sup> ADMINISTRATION OF ESTATES ACT, 15 GEO. V, c. 23, §45 (1925).

<sup>19</sup> Arizona, 1901; California, 1850; Colorado, 1868; Connecticut, 1877; Idaho, 1887; Indiana, 1852; Iowa, 1873; Kansas, 1868; Maine, 1895; Minnesota, 1875; Mississippi, 1906; Nebraska, 1907; Nevada, 1865; New York,

vested, inchoate, or both. Vermont, in 1787, was the first state to abolish it; and Pennsylvania in 1917,<sup>20</sup> New York in 1929,<sup>21</sup> and Ohio (as to vested dower) in 1932<sup>22</sup> were the last ones to put an end to the estate. It is now under fire in several others, notably in Delaware. In the three states of Louisiana, New Mexico, and Texas the estate of dower apparently has never been known. It is said that a California lawyer, in discussing the problem with an attorney from Wisconsin, once remarked: "We look upon dower and curtesy as you do upon wager of battle and benefit of clergy."<sup>23</sup>

Curtesy has been abolished in thirty-four states<sup>24</sup> and apparently never has existed in Louisiana, New Mexico, and Texas. It will be noticed that Vermont, in 1787, was also the first state to abolish curtesy. The last state to take such a step was New York in 1929.<sup>25</sup> Our sister state of South Carolina deleted curtesy from its law in 1883.<sup>26</sup>

It is submitted that the estates of dower and curtesy should be abolished in this state, since not only are they unnecessary clogs upon the alienation of land but also for the reason that they do not represent adequate provision for the surviving spouse, especially the widow, out of the deceased spouse's estate. The right of dower as it exists in our law today is, in most cases, a snare and a delusion. Contrary to the belief of the average layman who thinks that the widow acquires outright in fee simple a one-third part of her husband's real estate upon his decease, she actually gets, *during her lifetime only*, one-third of the *income producing value* of the in-

1929; North Dakota, 1877; Ohio, 1932; Oklahoma, 1890; Pennsylvania, 1917; South Dakota, 1893; Utah, 1898; Vermont, 1787; Washington, 1871; and Wyoming, 1869. Dower was abolished in the several states on the dates given, or at least as early as that. *Rep. N. Y. Com., supra* note 1, 61.

<sup>20</sup> P. L. 1917, 429, §3; PA. STAT. (West, 1920) §8352.

<sup>21</sup> Laws of 1929, c. 229, §82; N. Y. CONS. LAWS (Cahill, 1930) c. 51, §190.

<sup>22</sup> CUM. OHIO CODE SERVICE (Baldwin, March, 1932) §§10502-1 through 10502-7.

<sup>23</sup> Baensch, *Husband and Wife as Heir of Each Other* (1925) 9 MARQUETTE L. REV. 99.

<sup>24</sup> Alabama, 1852; Arizona, 1901; Arkansas, 1925; California, 1872; Colorado, 1868; Connecticut, 1877; Florida, 1906; Georgia, 1895; Idaho, 1887; Illinois, 1874; Indiana, 1852; Iowa, 1873; Kansas, 1868; Maine, 1895; Maryland, 1898; Massachusetts, 1902; Michigan, 1915; Minnesota, 1875; Mississippi, 1906; Missouri, 1921; Montana, 1895; Nebraska, 1907; Nevada, 1865; New York, 1929; North Dakota, 1877; Ohio, 1887; Oklahoma, 1890; Pennsylvania, 1917; South Carolina, 1883; South Dakota, 1893; Utah, 1898; Vermont, 1787; Washington, 1871; and Wyoming, 1869. Curtesy was abolished in the several states on the dates indicated, or at least as early as that. *Rep. N. Y. Com., supra* note 1, 66, 67.

<sup>25</sup> N. Y. Laws 1929, c. 229; N. Y. CONS. LAWS (Cahill, 1930) c. 51, §189.

<sup>26</sup> S. C. Acts 1883, p. 339.

heritable realty of which her husband was seized during coverture.<sup>27</sup> Instead of being the recipient of a portion of the land in fee, the widow often finds herself saddled with the responsibilities of a life tenant of non-productive realty. She is inadequately protected during her widowhood when she most needs protection, and she may die without sufficient funds to give her a decent burial. And, as is often the case, a husband may die intestate leaving as the sole asset of his estate the home place, which represents the joint savings of the husband and wife. The widow will be entitled only to her dower in the property, while the fee therein will descend, if there be no issue of the marriage, to nieces and nephews or perhaps cousins of the husband,—collateral heirs who had nothing to do with the accumulation of the estate. North Carolina has expressly held that where the estate consists solely of the dwelling-house, only one-third of the value of such house, instead of the entire residence, may be allotted the widow as her dower.<sup>28</sup> And if the wife desires to take the present cash value of her dower, this value will be computed on the basis of her life expectancy according to the mortuary tables.<sup>29</sup> This means, of course, that the older she is the less valuable will be her dower. The fact that so many men make wills in favor of their wives, giving them the bulk if not all of their property, shows that the average man believes that the present laws are unfair to the widow.<sup>30</sup> The aforementioned New York Commission has very well said in its first report:<sup>31</sup> "Under the present right of dower, after the death of the husband, the law mocks the widow with a mere polite phrase without any substantial benefit to her."

The abolition of dower and curtesy by our proposed statute would remove from the law of North Carolina what seem to be unnecessary clogs upon the alienation of land. Ownership of real property no longer forms the basis of wealth; the emphasis has shifted to personal property—stocks, bonds, money. While there is no law in North Carolina that would require a husband to consult or even consider his wife in the disposition of \$100,000 worth of his personal property, yet if he wishes to convey free from the wife's dower right a vacant lot worth \$500, or a gully-washed hillside worth nothing at

<sup>27</sup> N. C. CODE ANN. (Michie, 1931) §4100; *McDaniel v. McDaniel*, 25 N. C. 61 (1842).

<sup>28</sup> *Caudle v. Caudle*, 176 N. C. 537, 97 S. E. 472 (1918).

<sup>29</sup> N. C. CODE ANN. (Michie, 1931) §§1790, 1791.

<sup>30</sup> See (1930) *Second Rep. of Com. on Revis. Ohio Probate Laws*, p. 8.

<sup>31</sup> *Rep. N. Y. Com., supra* note 1, p. 10.



all, he must consult his wife, secure her signature to the deed, and have her acknowledgment thereof and privy examination taken before the proper officer.<sup>32</sup> That dower is a great burden upon commerce in real estate is demonstrated by the fact that in some instances it may be claimed at almost any time within an indefinite period after the death of the husband. In one case<sup>33</sup> our Supreme Court held that claim for dower in an equity of redemption made nine years after the husband's death was good; that the writ of dower being in the nature of a writ of right, would not be barred for sixty years. And even where the wife joins in the mortgage conveyance of her husband to exclude her claim for inchoate dower therein, her relation to the transaction is that of surety, and should she survive her husband and the land be sold to satisfy the debt she becomes a creditor of his estate in an amount equal to her dower.<sup>34</sup> But we need not multiply illustrations; the wife's right of dower, both inchoate and consummate, is ever ready to bob up and give trouble in our law of conveyancing.

Though North Carolina, as noted, retains curtesy in practically its common law form (certainly as to curtesy consummate)<sup>35</sup> the rights of the husband in his wife's property have been so cut down by the Constitution,<sup>36</sup> by the various married women's property statutes,<sup>37</sup> and by the pronouncements of the court, that his estate by the curtesy initiate is of little value. He has no estate whatever in the land during coverture; unless his wife consents, he may not collect the rents and profits, nor sell the land and give possession, nor lease it for any term whatever, nor can his rights therein be sold under execution against him.<sup>38</sup> He has the bare right of occupancy of her land with his wife, with the right of ingress and egress, and the right to a life estate in all her lands—curtesy consummate—should he survive his wife and issue of the marriage has been born alive.<sup>39</sup> While it is true that under Article X, Section 6, of our Constitution the husband has no real interest, not even by curtesy initiate, in his wife's property and she may by will defeat his curtesy right after her death,<sup>40</sup> yet by virtue of the same article and section of the Con-

<sup>32</sup> N. C. CODE ANN. (Michie, 1931) §§997, 4101, 4102, 4103.

<sup>33</sup> Campbell v. Murphy, 55 N. C. 357 (1856).

<sup>34</sup> American Blower Co. v. Mackenzie, 197 N. C. 152, 147 S. E. 829 (1929).

<sup>35</sup> N. C. CODE ANN. (Michie, 1931) §2519.

<sup>36</sup> N. C. Const., Art. X, §6 (1868).

<sup>37</sup> N. C. CODE ANN. (Michie, 1931) §§2506, 2510.

<sup>38</sup> *Id.* §2510.

<sup>39</sup> Taylor v. Taylor, 112 N. C. 134, 16 S. E. 1019 (1893).

<sup>40</sup> Hallyburton v. Slagle, 132 N. C. 947, 44 S. E. 655 (1903).

stitution he has a "veto" power over the alienation of her realty in the form of a withheld written assent, which, if asserted by him, invalidates her conveyances of realty; and it is believed that he will in some cases exercise this restraint on her alienations by virtue of the fact that he may come into his right of curtesy consummate upon her death intestate.

Finally, the husband cannot by will deprive his wife of dower if she chooses to dissent from the will,<sup>41</sup> but, as pointed out above,<sup>42</sup> the wife may, by her will, cut off her husband's curtesy right. The adoption of our proposal to abolish dower and curtesy and to substitute in lieu thereof for the surviving *spouse* an outright share in the estate of the deceased would tend to destroy this inequality. This statement of course assumes an amendment of our present laws to allow *each spouse* to dissent from the will and take his share under the new law as in the case of intestacy.

Section 2. If either spouse shall, without the consent of the other, sell, convey, or in any way encumber that parcel of real property, whatever its extent or value, which at the time of the conveyance is used as the principal residence or domicile of the family, such conveyance or encumbrance, or any rights attained thereunder, shall not have the effect, as against the spouse not consenting, to deprive him or her of the full use and enjoyment of all the rights, privileges and duties of a life tenant therein for the term of his or her natural life. Provided, that a mortgage or deed of trust given without the consent of the spouse of the purchaser to secure purchase money or any part thereof shall be effectual to pass the whole interest in the land according to the terms of the instrument. In all other cases and with respect to all other types of property the owner thereof may sell, convey, or encumber the same, giving good and perfect title thereto, irrespective of the consent or want thereof of his or her spouse.

There is not, within our knowledge, a law such as is here proposed in force in any jurisdiction. This section is predicated upon the effort to get rid of dower and yet preserve to the surviving spouse the chief benefit supposed to accrue to the widow under the dower right.

When every other argument for the retention of dower has been met, its proponents reply that whatever may be said of inchoate dower as a clog upon commerce in land, or the inadequacy of vested dower as a protection for the widow after the death of her husband, it is still true that inchoate dower and the possibility that it may

<sup>41</sup> N. C. CODE ANN. (Michie, 1931) §§4096-4098.

<sup>42</sup> *Supra* note 40.

become vested does actually protect the wife of an inconsiderate or estranged husband in that it makes it impossible for him to give good title to the family home without the wife's consent. A sale or mortgage is forestalled and a place of residence preserved for the wife. This argument was put forward so vigorously in Ohio that the commissioners who drew up the new Probate Code for that state decided to retain inchoate dower and the signature of the wife on instruments of conveyance as a protection for the homesite. *Vested* dower, however, was abolished with reference to any property owned by a consort at his decease.<sup>43</sup>

The instant proposal is an attempt to protect the non-consenting spouse with reference to disposition of the homesite and yet allow complete and free alienation, by the owner, of all his other property.

The nearest approximation in the North Carolina law to this section is the so-called "Home Site Statute,"<sup>44</sup> which differs from the section under discussion in that it purports to protect only the non-consenting *wife* against her husband's disposition of the family residence. Our section also protects the husband. The North Carolina Supreme Court has experienced difficulty in satisfactorily construing the present home site statute,<sup>45</sup> and, unless it is completely rewritten and reenacted,<sup>46</sup> it probably never will serve any useful purpose.

This section, construed with section one, would permit the husband to freely alienate all of his property, without his wife's consent, except the homesite and the homestead (if the latter has been allotted).<sup>47</sup> It would, of course, change the present section<sup>48</sup> of our statutes which permits the husband to convey the title and right to possession of his realty to a grantee, *subject to the wife's dower right*.

Considerable difficulty will be encountered when we attempt to adjust the present law to that part of our statute which would permit the wife to convey her realty without her husband's consent. Such an adjustment would involve a change in the Constitution which now requires for the validity of a married woman's conveyance of

<sup>43</sup> CUM. OHIO CODE SERVICE (Baldwin, March, 1932) §10502-1. See comment of the Commission appended to this section.

<sup>44</sup> N. C. CODE ANN. (Michie, 1931) §4103.

<sup>45</sup> *Boyd v. Brooks*, 197 N. C. 644, 150 S. E. 178 (1929).

<sup>46</sup> See (1932) 11 N. C. L. REV. 64, for discussion of the Act and for proposed new statute.

<sup>47</sup> N. C. Const., Art. X, §8; *Dalrymple v. Cole*, 170 N. C. 102, 86 S. E. 988 (1915).

<sup>48</sup> N. C. CODE ANN. (Michie, 1931) §4101.

her realty the written assent of her husband.<sup>49</sup> But there is the possibility that even this difficulty may be obviated if the people of this state will adopt section 8 of article VIII of the new Constitution recently submitted to them by the General Assembly.<sup>50</sup> This section, corresponding to section 6, Article X of the present Constitution, no longer requires the written assent of the husband to his wife's conveyances.

Such a statute as we propose would avoid the weakness of the English law and of the New York statute which leave the fellow spouse helpless, even as regards the homesite, should the owner decide to dispose of his real property. It would also lack the weakness of the law of those states which sanction inchoate dower and thus place it in the power of a spouse to render unmarketable the title to all privately owned real estate. The general effect of the instant statute is believed to be in keeping with the growing belief that the owner of property, whether it be real or personal, should be left to deal with it with the utmost freedom that is consistent with the rights of the only other person who could be greatly and immediately concerned with the disposition of the same.

**Section 3. All rules and canons of descent of real property and the statute of distribution of personal property, in so far as they are inconsistent with this Act, are hereby abolished and repealed.**

The purpose of this section is to abolish the two separate statutes regulating the descent of real property<sup>51</sup> and the distribution of personalty<sup>52</sup> which now obtain in North Carolina, and to clear the way for the adoption of one uniform system of rules governing the devolution of an intestate's property. This would remove North Carolina from the list of those five states and the District of Columbia<sup>53</sup> which still have separate intestate succession statutes, and would bring to our law an improvement already made by the remaining forty-three states of this country and by England.<sup>54</sup> We should, however, mention the fact that of the forty-three states which have adopted uniform descent and distribution tables, ten<sup>55</sup> have retained

<sup>49</sup> N. C. Const., Art. X, §6.

<sup>50</sup> P. L. 1933, c. 383.

<sup>51</sup> N. C. CODE ANN. (Michie, 1931) §1654.

<sup>52</sup> *Id.*, §137.

<sup>53</sup> *Supra* note 13.

<sup>54</sup> *Supra* note 1.

<sup>55</sup> Alabama, Indiana, Michigan, Nebraska, Oregon, Rhode Island, Virginia, Washington, West Virginia and Wisconsin. See *Rep. N. Y. Com., supra* note 1, 70.

some distinction between real and personal property in connection with the shares to be taken by the surviving spouse.

The distinction, now existing in our law, between the rules governing the descent of real property to the heirs and those regulating the distribution of personal property to the next of kin came to us as a part of our heritage from England. The distinction between the two systems is purely historical in its origin. The common law rule of inheritance of real estate came through the feudal law of England while the statutes of distribution of personal property were derived from the Roman law and were in England administered by the Ecclesiastical Courts and the courts of Chancery until 1857 when the jurisdiction of these matters was transferred to the newly set up Probate Court.<sup>56</sup>

The English canons of descent determined at first the inheritance of real property in terms of those who could support and defend the feudal government. Later, under a changed social and economic order, these same canons of descent were employed to keep the great landed estates intact and in the line of blood whence they came. Out of this background comes the explanation for the rule of primogeniture, of the priority of males over females and of whole-bloods over half-bloods, of dower and curtesy.

How may we account for the different way in which personal property was distributed? According to Judge Clark: "At common law the king took all the personalty, which in that rude age was usually of very little value; afterwards the crown passed this prerogative to the Church which took all the personalty except the reasonable parts for the widow and the children, and the church officials claimed to dispose of it *in pios usus*. But they were accountable to no one, and were not even required to pay the debts of the decedent. By statute 31 Edw. III (A. D. 1358) the churchmen were required to appoint an administrator who should be next of kin, and this relationship was computed by the civil law and not by the canon law, which was used in computing relationship in the descent of land. But by statute 21 Henry VIII (A. D. 1530) the administrator was appointed by the Ordinary, and was required to be the widow or next of kin or both, who, after paying the intestate's debts and the reasonable parts for the widow and children, retained the surplus in his own right until the statutes of 22-23 and 29 Charles II (*circa* 1672 and 1679 A. D.) which required the surplus to be distributed among

<sup>56</sup> Stockton, *supra* note 10, at 358.

the next of kin in the manner provided by those statutes, known as the "Statute of Distribution."<sup>57</sup>

In 1784<sup>58</sup> the legislature of North Carolina revised its laws of descent and abolished, among other things, primogeniture and to some extent the rule of the whole-blood's inheriting to the exclusion of the half-blood. In 1808 the rules were again revised by a commission headed by Judge Gaston and in the same year a new statute of descents<sup>59</sup> pursuant to the recommendations of the commission was enacted. With slight statutory modifications, North Carolina still uses today the canons of descent drafted by Judge Gaston in 1808. Our separate statute of distributions, with some minor changes, traces its ancestry directly to the old English Statute of Distribution enacted in the time of Charles II.

It is submitted that the retention of the two distinct systems is purely arbitrary and productive of an artificial inequality in the settlement of an estate. Again it is important to observe that wealth no longer consists chiefly of real property, as it did when our statute of descents was adopted. It is now largely made up of stocks and bonds and other securities, but, of course, may include real estate. The records of the Surrogate Court of New York County disclose the interesting fact that the estates of 96 per cent of all the persons who die intestate consist entirely of personal property.<sup>60</sup> As a general rule the nature of property owned by a person at his death is a matter of pure accident, and it seems illogical that the right of inheritance by the spouse, or by the brother and sister, or by the parent of the deceased, no issue surviving, should depend perchance upon the *nature* of the property left.

A uniform table of descent and distribution, establishing a single class of heirs and next of kin, will eliminate most of the problems of equitable conversion. It has been well said: "From the standpoint of the administration of the estate one system of intestate succession would certainly insure a much more practical and just distribution. The principle of equitable conversion, which is not contemplated or understood by the average citizen, would be discarded and could no longer harass an administrator. It would no longer be possible for the exoneration of realty, recognized at common law, and in some of our states still not changed by statute, to

<sup>57</sup> Wells v. Wells, 158 N. C. 330, 332, 74 S. E. 114, 115 (1912).

<sup>58</sup> P. L. 1784, c. 225; I POTTER'S REVISAL (1821) c. 204.

<sup>59</sup> Acts of 1808, c. 739.

<sup>60</sup> Rep. N. Y. Com., *supra* note 1, 8.

take all the personal property which should have gone to the parent, in order to give the brother real estate with an unencumbered title."<sup>61</sup>

The abolition of the distinction between real and personal property, suggested by this section and the succeeding sections of our statute, contemplates changes in the present North Carolina law not only with reference to the devolution of the property of an intestate but also in regard to the settlement of the estate by the personal representative. For instance, no longer would the administrator be required to exhaust the personal property before any real estate could be used in the payment of debts. This requirement of the present law,<sup>62</sup> together with those other sections of the statutes which govern the administration of estates and proceed upon a distinction between the two types of property,<sup>63</sup> would necessarily have to be amended to conform to the plan of the proposed statute. We propose to place in the hands of the personal representative the deceased's property—*regardless of its nature*—to be used under the supervision of the probate judge in the payment of the debts, and to be ultimately distributed, according to one uniform table, to the persons designated by the statute as those entitled to take.

Section 4. In intestate succession there shall be no distinction between real and personal property, or between ancestral and non-ancestral property. And in the devolution of property there shall be no distinction between relations of the whole blood and those of the half blood in any case.

Such a statute as the one here proposed would accomplish two results. In the first place it would wipe out the distinction between various classes of property for the purposes of inheritance; and, in the second place, it would greatly simplify the administration of estates by enabling the administrator and the heirs to look at the property, whatever its description, simply as property of a given value, and not as property of a given class subject to a given rule of law only if it belong to that class, but subject to an entirely different rule if found to belong to another class. Under the statute here proposed the administrator would not be required to look back of the intestate in investigating the title to property for the purpose of administration. At present it may often happen that purchased property will go to one set of heirs, while ancestral or descended

<sup>61</sup> Stockton, *supra* note 10, at 359.

<sup>62</sup> N. C. CODE ANN. (Michie, 1931) §§74, 136.

<sup>63</sup> In particular, N. C. CODE ANN. (Michie, 1931) §§54-57; 66-69; 75-77. In general, N. C. CODE ANN. (Michie, 1931) c. 1, arts. 11, 12, 13.

property will go to another set. This situation cannot be justified if it be admitted that the purpose of the law is simply to carry an intestate's property to those closest to him in an effort to provide for those who probably would have been the objects of his bounty had he expressed his wishes in the matter. And it is highly improbable that "any decedent, in this day and age, had in mind when he died, fine-drawn distinctions between ancestral and non-ancestral land."<sup>64</sup>

Certainly it can no longer be contended that now, as in the feudal period in which the distinctions between the various kinds of property and estates originated, the basis of wealth and power is the landed estate; or that there should now be a system of devolution of real property which is designed primarily to guarantee fealty and loyalty to the government, rather than to give the property of a decedent to those nearest to him.

Undoubtedly, the statutes of a number of the states, including North Carolina, which distinguish between ancestral and non-ancestral realty for purposes of devolution trace their ancestry to the doctrine which originated in the common law rule of descent that only those collaterals who were of the blood of the "first purchaser" of the land could inherit. The common law of descent inquired into the source of the intestate's title in order to return the land, in the event of the failure of lineal descendants, to the relatives of the person who first brought it into the family.<sup>65</sup>

However, England, from whence came the notion that descent must be traced from the first purchaser, has obliterated all distinctions between ancestral and non-ancestral property and has by the English Law of Property Act of 1925 provided that both realty and personalty shall pass to the executor or administrator and shall be distributed to the same persons.<sup>66</sup> And, in this country at least twenty-three states<sup>67</sup> make no distinction between ancestral and non-ancestral realty. The states which have most recently abolished the

<sup>64</sup> Simes, *Ancestral and Non-ancestral Realty* (1928) 2 CINN. L. REV. 387, 406.

<sup>65</sup> Note (1932) 42 YALE L. J. 101.

<sup>66</sup> See ADMINISTRATION OF ESTATES ACT, 15 GEO. V, c. 23 (1925); TOPHAM, NEW LAW OF PROPERTY (3rd ed., 1927) c. XII.

<sup>67</sup> Florida, Georgia, Illinois, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, New Hampshire, New Mexico, Ohio, New York, Pennsylvania, South Carolina, Texas, Vermont, West Virginia, Virginia, Washington and Wyoming. See digest of statutes of descent in 3 *Thompson Real Property* (1924), §§2365-2414, for all states except New York and Ohio.



distinction are New York<sup>68</sup> and Ohio.<sup>69</sup> North Carolina is one of the six states<sup>70</sup> which retain in their intestacy laws rather extensive provisions regarding ancestral and non-ancestral realty.

Under the present North Carolina law on the failure of lineal descendants, where the inheritance has been transmitted by descent from the ancestor, or has been derived by purchase from the ancestor by one who in the event of the ancestor's death would have been his heir or one of his heirs, under the fourth canon of descent the collateral relatives who inherit the estate must be of the blood of the first purchaser,<sup>71</sup> through whatever intermediate devolution by descent, gift, or devise it may have passed, and however remote it may be from the first ancestor.<sup>72</sup> Where, however, the inheritance has not been transmitted by descent or derived as aforesaid from an ancestor, or if so transmitted or derived, the blood of the ancestor is extinct, the property will go to the next collateral kindred regardless of the usual rules governing the descent of ancestral property.<sup>73</sup> Another exception to the rule is also made. The surviving father or mother of one seized of land, who dies without leaving issue capable of inheriting, or brothers or sisters or issue of such, will take the inheritance—under the proviso in the sixth rule of the canons of descent—without regard to the question whether or not such parent is of the blood of the ancestor from whom the land descended.<sup>74</sup>

The proposed statute would eliminate these ancestral estate laws and along with them not only the difficult problem of statutory construction but also that of properly applying the statutes to the numerous factual situations that may arise under them. The effect of

<sup>68</sup> N. Y. CONS. LAWS (Cahill, 1930) c. 13, §§81, 83.

<sup>69</sup> Baldwin's Cum. Ohio Code Serv. (March, 1932) §§10503-1.

<sup>70</sup> N. C. CODE ANN. (Michie, 1931) §1654, rules 4, 5 and 6; CONN. GEN. STAT. (1918) §5063; IND. ANN. STAT. (Burns, 1926) §§3229, 3330; N. J. COMP. STAT. (Supp. 1925) §57 (5) (6); R. I. GEN. LAWS (1923) §5551; TENN. CODE (Shannon, 1932) §8380.

<sup>71</sup> N. C. CODE ANN. (Michie, 1931) §1654, rule 4.

<sup>72</sup> *Poisson v. Pettaway*, 159 N. C. 650, 75 S. E. 930 (1912). In this respect North Carolina differs from other jurisdictions retaining the doctrine of ancestral estates, which hold that the ancestor from whom the estate must be traced is the one from whom the property immediately came to the intestate, rather than the first or original purchaser. See Note (1932) 42 YALE L. J. 101; Note (1916) L. R. A. 1916-C 902, 914 *et seq.*

<sup>73</sup> N. C. CODE ANN. (Michie, 1931) §1654, rule 5.

<sup>74</sup> N. C. CODE ANN. (Michie, 1931) §1654, rule 6; *Weeks v. Quinn*, 135 N. C. 425, 47 S. E. 596 (1904).

the new law would be to cause all property to pass according to one common rule whatever its character and from whatever source derived.

Closely bound up with the ancestral estate doctrine in North Carolina is the question of inheritance by the collateral kindred of the half-blood, i. e., collateral relatives of the intestate descended from different spouses of a common ancestor. Under the common law the doctrine of the whole blood obtained, by which the heirs of the whole-blood excluded those of the half-blood. In 1784 the North Carolina legislature enacted that "whereas, it is almost peculiar to the law of Great Britain and founded in principles of the feudal system, which no longer apply to that government and can never apply to this state, that the half-blood should be excluded from the inheritance, the lands of an intestate . . . shall descend to . . . as well those of the half-blood as those of the whole-blood, as tenants in common."<sup>75</sup> This law, in its essence, has continued in force in this state since 1784 and is to be found today in Rule 6 of the canons of descent to the effect that "collateral relations of the half-blood shall inherit equally with those of the whole blood."<sup>76</sup> However, Rule 6 must be construed with Rule 4 regarding the inheritance by collaterals of ancestral estates,<sup>77</sup> and when so construed, it has been held, the collateral relations of the half-blood inherit equally with those of the whole blood only when the former are of the blood of the ancestor from whom the estate was derived.<sup>78</sup> Rule 5 modifies the harshness of this construction by expressly providing for inheritance by kindred not of the blood of the ancestor in default of kindred of his blood.<sup>79</sup>

In a state such as North Carolina where the distinction between half-blood and whole blood relations has been abolished by law, but that between ancestral and non-ancestral is continued in full force, it will be found that, as a practical matter, the latter rule works in such a way as to seriously impair the former. A study of the North Carolina cases indicates that the rule requiring that real property shall be kept in the blood of the purchasing ancestor is seldom in-

<sup>75</sup> 1 POTTER'S REVISAL (1821) 465, c. 204, §3.

<sup>76</sup> N. C. CODE ANN. (Michie, 1931) §1654, rule 6.

<sup>77</sup> *Supra* note 71.

<sup>78</sup> *Dozier v. Grandy*, 66 N. C. 484 (1872); *Paul v. Carter*, 153 N. C. 26, 68 S. E. 905 (1910).

<sup>79</sup> *Supra* note 73.

voked for any other purpose than to cut out half-blood relations of the intestate.<sup>80</sup>

In thirteen states which distribute realty and personalty without regard to the source of the intestate's title, kindred of the half-blood take equally with those of the whole blood of the same degree of consanguinity.<sup>81</sup>

It is believed that our proposed statute, which, for devolution purposes, abolishes all distinctions between real and personal property and between ancestral and non-ancestral realty and between relations of the whole blood and those of the half-blood in any case, will not only greatly facilitate the effective administration of intestate estates but also will be productive of results socially desirable in the light of modern American conditions.

Section 5. All real and personal property of a person dying intestate shall vest in the administrator to be distributed after the payment of all lawful claims and debts against the estate in the following manner:

i. If there be no surviving spouse, to the children of such intestate or their lineal descendants, per stirpes.

ii. If there be a surviving spouse and one child, or its lineal descendants surviving, one-half to the surviving spouse and the remainder to the child, or its lineal descendants, per stirpes.

iii. If there be a spouse and more than one child, or their lineal descendants surviving, one-third to the surviving spouse and the remainder to the children equally, or to the descendants of any deceased child, per stirpes.

iv. If there be no children, or their lineal descendants, three-fourths to the surviving spouse and one-fourth to the parents of the intestate equally, or the surviving parent; if there be no parents, then the whole to the surviving spouse.

v. If there be no spouse, and no children or their lineal descendants, to the parents of the intestate equally, or to the survivor of such parents.

vi. If there be no spouse, no children or their lineal descendants, and no surviving parent, to the brothers and sisters of the intestate, or their lineal descendants, per stirpes.

<sup>80</sup> See, for instance, *Dozier v. Grandy*, 66 N. C. 484 (1872); *Wilkerson v. Bracken*, 24 N. C. 315 (1842); *Little v. Buie*, 58 N. C. 10 (1859); *Paul v. Carter*, 153 N. C. 26, 68 S. E. 905 (1910); *Poisson v. Pettaway*, 159 N. C. 650, 75 S. E. 930 (1912); *Noble v. Williams*, 167 N. C. 112, 83 S. E. 180 (1914).

<sup>81</sup> ILL. REV. STAT. (Smith-Hurd, 1931) c. 39, §1; IOWA CODE (1931) §§ 11986-12040; KAN. REV. STAT. ANN. (1923) c. 22, §128; ME. REV. STAT. (1930) c. 89, §§1, 2, 20; MASS. GEN. LAWS (1921) c. 190, §§1-4; N. H. PUB. LAWS (1926) c. 307, §§1-19; N.-M. STAT. ANN. (1929) c. 38, §§101-120; N. Y. CONS. LAWS (Cahill, 1930) c. 13, §§81, 83; OHIO GEN. CODE ANN. (Page Supp., 1932) §§10503-1, 10503-4; ORE. CODE ANN. (1930) c. 10, §§101, 102, 203; PA. STAT. ANN. (Purdon, 1930) c. 20, §§62, 75; VT. GEN. LAWS (1917) §§3416, 3417; WASH. COMP. STAT. (Remington, 1922) §§1341, 1347, 1364.

vii. If there be no spouse and no parents or their lineal descendants, to the grandparents of the intestate equally, or the survivor or survivors of such grandparents.

viii. If there be no such grandparent or grandparents, then to the uncles and aunts, or their lineal descendants, per stirpes.

ix. If there be no persons of the classes contained in the preceding 8 subsections, then to the next of kin, in equal degrees, as determined by the rules of the civil law, without representation.

x. If there be no surviving spouse or blood relatives, to the stepchildren of the intestate or their lineal descendants per stirpes; if no stepchildren or their lineal descendants, then to the step-parents of the intestate.

xi. If there be no step-children or their lineal descendants or step-parent, then to the surviving spouse of any deceased child of the intestate. If there be no such surviving spouse of a deceased child, then to the next of kin of any deceased spouse of the intestate.

xii. If there be no such next of kin of the deceased spouse, then to the State of North Carolina.

This section proposes that for the purpose of administering an intestate's estate, the title to both real and personal property shall vest in the administrator and shall constitute assets for the payment of the decedent's debts. It proposes that the law be carried further in disregard of the distinction between the two broad classes of property than has been attempted in any other jurisdiction except England. In that country under the provisions of the English Administration of Estates Act of 1925<sup>82</sup> the title to the real estate of a deceased person devolves upon his personal representative in the same manner as the personal property, and, for purposes of settling the estate, it may be managed, disposed of to pay debts, or distributed to the heirs by the personal representative in practically the same manner as the personal property is handled. No American state has gone this far. New York, with admittedly one of the most modern probate codes in this country, while not vesting title to the realty in the personal representative, has granted a statutory power of sale over real estate to an executor and to a trustee, as well as the power to mortgage and to lease, but in all instances to be exercised only upon the approval of the surrogate, and where it has not been prohibited by a testator in his will. New York has also made an additional grant of power to an administrator of the management of realty, with a power of sale, mortgage or lease for estate purposes, subject to the control of the surrogate.<sup>83</sup> That

<sup>82</sup> 15 GEO. V, c. 23.

<sup>83</sup> N. Y. CONS. LAWS (Cahill, 1930) c. 13, §123; N. Y. CIV. PRAC. LAW Surr. Ct. Act, (Cahill, 1931) art. 13.

state has also simplified the procedure for the sale of real estate by a personal representative.

While in its preliminary draft of a proposed new probate act for Florida, the State Bar Association Committee recommended that the title to the real estate of a decedent, like personal property, should vest in his administrator for the benefit of his heirs and creditors,<sup>84</sup> the final draft of the proposed act<sup>85</sup> shows that the committee has receded from its original position. It is now recommended that the personal representative shall take only possession of all the estate of a decedent, real and personal (except homestead), together with all the rents, income, and profits accruing therefrom by virtue of lease, mortgage or sale; and that all such property and the rents, income, and profits therefrom shall be assets in the hands of the personal representative for the payment of debts and for the settlement of the estate.<sup>86</sup>

The statute we propose would be similar in its operation to the English law. Radical though it may seem, we believe that it would greatly simplify the administration of estates. It would operate to the advantage of those taking under the proposed intestacy statute in that it would enable the administrator to sell either or both kinds of property when to do so would benefit the estate, or to sell one kind of property when it would be advantageous to do so in order to raise funds to take care of the other. And, under the statute, the administrator, subject to the approval of the probate court, could sell and mortgage realty in the proper administration and distribution of the estate; thus would be obviated the expense and delay incident to the separate special proceedings that now must be brought to sell land to make assets or for partition.

Certainly it is not to be contended that the administrator who can be trusted with the highly liquid assets of the estate, such as cash, stocks, bonds, and negotiable paper cannot be trusted with land. It would be more difficult to defraud the estate in the sale of land, with the attendant necessity of recording all instruments that affect the title thereto, than it would be to defraud it in the disposal of such forms of personal property as those enumerated above. And it is also true that the person of average business experience has no more difficulty in understanding the real estate market well enough to dispose of the land to advantage, or more wisely, than

<sup>84</sup> See notes 7 and 8 *supra*.

<sup>85</sup> (1932) 6 FLA. ST. BAR ASSN. J. 511-550.

<sup>86</sup> (1932) 6 FLA. ST. BAR ASSN. J. 530, §105.

he would have in understanding the stock or bond market well enough to dispose of such securities in an intelligent way. It is true that the personal property is more readily disposed of than is the real property of an estate, but that is no argument for throwing an additional difficulty in the way of the disposition of the land.

Under the present law of North Carolina, title to real property vests in the heir immediately upon the death of the ancestor, while the title to personalty vests in the personal representative pending the final settlement of the estate and distribution to the heirs or next of kin. And pending such settlement all parties concerned are harassed by all the vexatious problems of equitable conversion and exoneration of the heirs, which problems must necessarily arise under the existing laws. This section is designed to further minimize such problems by treating all property alike and by compelling the persons who succeed to intestate property to count their rights therein in terms of valuation alone rather than according to the accidental circumstance of being an heir to one class of property or another.

Since sections 3 and 4 of the proposed statute would obviously repeal North Carolina's two separate statutes<sup>87</sup> regulating the descent of real property and the distribution of personalty, section 5 of the proposed statute is designed to replace the two systems and to present in their stead one uniform system of rules governing the devolution of an intestate's estate.

In the various subsections of the statute an attempt has been made to keep the property as close as possible to the intestate in order to care first for those who would have been the natural objects of his bounty had he expressed his wishes in the matter of the disposition of his estate during his lifetime. In thus concentrating the estate in the nearer and more dependent relatives the statute follows the example set by the modern intestate succession laws of England, New York,<sup>88</sup> and Ohio.<sup>89</sup>

On the accompanying page will be found comparative tables which indicate, graphically, the distribution of an intestate's estate under the present North Carolina, New York, and English statutes, and under the proposed new statute for North Carolina. These

<sup>87</sup> Notes 51 and 52, *supra*.

<sup>88</sup> For an excellent analysis and comparison of the English and New York statutes, see STEPHENSON, *ENGLISH EXECUTOR AND TRUSTEE BUSINESS*, c. VII.

<sup>89</sup> CUM. OHIO CODE SERVICE (Baldwin, March, 1932) §§10503-1 through 10503-22.

NORTH CAROLINA UNDER PROPOSED STATUTE		NEW YORK		ENGLAND		NORTH CAROLINA UNDER PROPOSED STATUTE	
COMPARISON OF INTESTATE SUCCESSION AMONG NEAREST RELATIVES	Where wife dies intestate leaving	HUSBAND receives	Personal property (all that remains after payment of debts)	\$5,000 and $\frac{3}{4}$ of residue	Personal chattels and £1,000, plus residuary estate in trust for life	$\frac{3}{4}$ of all property	
	HUSBAND (no issue born alive)	PARENTS receive	Nothing	$\frac{3}{4}$ of estate in excess of \$5,000	Remainder interest in whole estate (in excess of £1,000) ripening at death of husband.	$\frac{3}{4}$ of all property	
	NEPHEW	NEPHEW receives	Real estate (Free of encumbrance if personalty is sufficient)	Nothing	Nothing	Nothing	

\*Distinction between real and personal property has been abolished.

TABLE No. 2 NORTH CAROLINA UNDER PROPOSED STATUTE

NORTH CAROLINA UNDER PROPOSED STATUTE		NEW YORK		ENGLAND		NORTH CAROLINA UNDER PROPOSED STATUTE	
Where there survives in addition to the ISSUE only	A SPOUSE	THE ISSUE RECEIVES	Realty except dower or curtesy. Personalty—All but child's part (except where widow and 1 child or its issue— $\frac{3}{8}$ )	$\frac{3}{4}$ of estate	$\frac{3}{4}$ in statutory trust until of age or married, then outright, also remainder interest in the $\frac{1}{2}$ on trust for spouse	$\frac{1}{2}$ of estate if only one child $\frac{2}{3}$ of estate if more than one child	
	OTHER KIN		Whole estate	Whole estate	All in statutory trust until of age or married, then outright	The whole estate	
Where there survives in addition to SPOUSE only	ISSUE		Dower or curtesy in realty. Personalty—Child's part (except widow takes $\frac{3}{8}$ if 1 child or its issue)	$\frac{3}{4}$ of estate	Personal chattels and £1,000 plus $\frac{1}{2}$ of estate in trust for life (increased by subsequent failure of trust for issue)	$\frac{1}{4}$ of estate if only one child $\frac{3}{4}$ of estate if more than one child	
	PARENTS	THE SPOUSE RECEIVES	Dower or curtesy in realty. Personalty— $\frac{1}{2}$ if widow, all if husband	\$5,000 and $\frac{1}{4}$ of residue	Personal chattels and £1,000 plus residue in trust for life	$\frac{1}{4}$ of estate	
	BROTHERS, SISTERS OR DESCENDANTS		Dower or curtesy in realty. Personalty— $\frac{1}{2}$ if widow, all if husband	\$10,000 and $\frac{1}{4}$ of residue	Personal chattels and £1,000 plus residue in trust for life	Whole estate	
	GRANDPARENTS OR UNCLER AND AUNTS		Dower or curtesy in realty. Personalty— $\frac{1}{2}$ if widow, all if husband	Whole estate	Personal chattels and £1,000 plus residue in trust for life	Whole estate	
	OTHER KIN		Dower or curtesy in realty. Personalty— $\frac{1}{2}$ if widow, all if husband	Whole estate	Whole estate outright	Whole estate	
Where there survives in addition to PARENTS only	NO KIN		Whole estate	Whole estate	Whole estate outright	Whole estate	
	ISSUE		Nothing	Nothing	Nothing	Nothing	
	A SPOUSE	THE PARENTS OR THE SURVIVOR RECEIVES	Realty except dower or curtesy (if no brothers, sisters or their descendants) Personalty— $\frac{1}{2}$ where widow, nothing where husband	$\frac{3}{4}$ of estate in excess of \$5,000	Remainder interest in whole estate (in excess of £1,000) ripening at death of spouse	$\frac{1}{4}$ of estate	
	BROTHERS, SISTERS OR DESCENDANTS		Personalty but no realty	Whole estate	Whole estate outright	Whole estate	
	OTHER KIN		Whole estate	Whole estate	Whole estate outright	Whole estate	
Where there survives in addition to the BROTHERS, SISTERS OR DESCENDANTS only	ISSUE	THE BROTHERS, SISTERS OR DESCENDANTS RECEIVE	Nothing	Nothing	Nothing	Nothing	
	PARENTS		Realty but no personalty	Nothing	Nothing	Nothing	
	A SPOUSE		Realty except dower or curtesy. Personalty— $\frac{1}{2}$ where widow (if no parents) but none where husband	$\frac{3}{4}$ of estate in excess of \$10,000	Remainder interest in whole estate (in excess of £1,000) ripening at death of spouse	Nothing	
	OTHER KIN		Whole estate	Whole estate	Whole estate outright	Whole estate	

\*Descendants of brothers and sisters in New York limited to nephews and nieces as against spouse, in North Carolina whole-blood preferred as to ancestral real estate only; in England distinction between real and personal property has been abolished.

tables (with the exception of the last column to the right) were prepared by Messrs. Richard G. Stockton and Lawrence Watt by whose permission they are reproduced herewith.

It will be noticed that the first subsection of the proposed statute gives all the property to the children or lineal descendants of the intestate if there be no surviving spouse, which is exactly what would happen under Rule 1 of the North Carolina canons of descent<sup>90</sup> and under subsection 4 of the statute of distribution.<sup>91</sup>

Subsection two divides the property between the surviving spouse and the only child of the intestate, because it would seem that these two people should have the property between them, their relationship to the intestate being such that normally they would be equally the objects of his affection and bounty. But if there are two children or more, subsection three fixes the share of the spouse at one-third of the total estate, because upon such survivor devolves the responsibility of the care and support of the children. It would hardly seem reasonable to cut down the means of adequately discharging this responsibility indefinitely in proportion to the number of charges under it. And if the children are of such age that they will no longer look to the surviving parent for support, then said parent will have reached that stage in life which would call for such a share in the property of the deceased as will most nearly insure to the parent an independent and comfortable old age.

It must be remembered that the share of the surviving spouse indicated in these subsections is in lieu of curtesy, dower, and all other rights, estates, and exemptions enjoyed by him under the present law of this state. We have already pointed out the inadequacy of the marital estates of dower and curtesy and their unfairness to the surviving spouse. Our statute follows the trend of modern intestacy legislation in giving to the surviving spouse—whether husband or wife—an outright fee simple interest in all the property, the share depending somewhat upon the number of children surviving the intestate. England, Pennsylvania, New York, and Ohio, have recently revised their laws to effectuate this end.

We look upon the marital relation today as a real partnership in which each partner in his own way is helping to accumulate and preserve a common estate. Upon the death of either partner intestate it seems only fair and just that the survivor should take outright a

<sup>90</sup> N. C. CODE ANN. (Michie, 1931) §1654, rule 1.

<sup>91</sup> *Id.*, §137, subsec. 4.



definite portion of the estate—certainly in preference to the collateral kindred of the deceased.

Under the present North Carolina law the surviving spouse may inherit real property from the intestate *only if there are no other heirs capable of taking*.<sup>92</sup> The effect of this rule may be illustrated by the case of *Powers v. Kite*,<sup>93</sup> in which the Supreme Court held that upon the death of an illegitimate son (intestate, married, and without issue) leaving a legitimate half sister, born of the same mother, his real estate descended to such sister to the exclusion of the son's widow.<sup>94</sup>

Under the statute of distributions the widow takes one-third of the personalty of the intestate if there are not more than two children; a child's part if there are more than two children; and only one-half if there are no children at all.<sup>95</sup> The surviving husband, however, gets all of his wife's personal property, after the payment of her just debts, if there are no children; and he takes a child's part whenever there are children or their legal representatives.<sup>96</sup> Note the difference between husband and wife so far as taking personal property under the present law is concerned. If the husband leaves a wife and one child, the wife takes one-third and the child two-thirds; if the wife leaves a husband and one child, the husband takes one-half and the child one-half. Under the proposed statute no distinction is made between real and personal property or in the share taken by the surviving spouse—whether husband or wife.

The proposed law provides that in the absence of children, the surviving spouse will divide the estate with the parents of the intestate, the parents taking one-fourth. But in case the parents are dead, the spouse will be allowed to take all to the exclusion of all other kindred. If there is no spouse but surviving parents, then the parents will take the whole estate—collateral kindred inheriting the property, if at all, only through the parents, or in the absence of parents. In the absence of parents the collateral kindred will take in the following order: brothers and sisters, grandparents, uncles and aunts; then any next of kin of whatsoever class as determined by the civil law. Each class takes to the exclusion of all subsequent classes except in those classes in which representation is allowed.

<sup>92</sup> N. C. CODE ANN. (Michie, 1931) §1654, rule 8.

<sup>93</sup> 83 N. C. 156 (1880).

<sup>94</sup> See also *Bryant v. Bryant*, 190 N. C. 372, 130 S. E. 21 (1925).

<sup>95</sup> N. C. CODE ANN. (Michie, 1931) §137, subsecs. 1, 2, 3.

<sup>96</sup> *Id.*, §§7, 137, subsec. 8; *McIver v. McKinney*, 184 N. C. 393, 114 S. E. 399 (1922).

Under the present law parents can inherit realty from their children if such children die leaving no issue, nor brother nor sister, nor issue of such, and without regard to whether or not the property was ancestral.<sup>97</sup> As to personalty, if in the lifetime of its father and mother, a child dies intestate, without leaving husband, wife or child, or the issue of a child, its estate is equally divided between the father and mother. If one of the parents is dead at the time of the death of the child, the surviving parent takes all the personalty.<sup>98</sup>

This proposal carries the possibility of distribution much further than any law now in existence in any American jurisdiction in that after the blood of the intestate has become extinct the property will be distributed to the step-children,<sup>99</sup> step-parents, and finally to the next of kin of a deceased spouse before escheat to the state is allowed. This makes the possibility of such escheat very remote indeed.

It will be noticed also that this statute provides for the determination of the next of kin of the deceased by the rule of the civil law. This changes the present North Carolina law which provides that the degrees of relationship shall be computed by the rules which prevail in descents at common law.<sup>100</sup> North Carolina is almost alone in this respect; the rule generally adopted in most jurisdictions is that of the civil law.<sup>101</sup>

Section 6. There shall be no right of representation among lineal or collateral kindred of an equal degree of consanguinity, such kindred in all cases being required to take per capita. Among collateral kindred there shall be no right of representation among those further removed than the children of brothers and sisters of the intestate.

Since this section would make some radical changes in the present North Carolina law, it might be well to make a brief statement of the law as it now stands. At present, under the rules governing the descent of real property, the right of representation is indefinite, as well among collateral as lineal kindred.<sup>102</sup> And in the descent of real estate the lineal descendants stand in the same place as their an-

<sup>97</sup> N. C. CODE ANN. (Michie, 1931) §1654, rule 6; *Weeks v. Quinn*, 135 N. C. 425, 47 S. E. 496 (1904).

<sup>98</sup> N. C. CODE ANN. (Michie, 1931) §137, subsec. 6.

<sup>99</sup> The new intestacy statute of New York carries the distribution to this extent. N. Y. CONS. LAWS (Cahill, 1930) c. 13, §83, subsec. 14. So does Ohio: CUM. OHIO CODE SERVICE (Baldwin, March, 1932) §§10503-4 (9).

<sup>100</sup> N. C. CODE ANN. (Michie, 1931) §1654, rule 6.

<sup>101</sup> 3 THOMPSON, REAL PROPERTY (1924) §2338.

<sup>102</sup> N. C. CODE ANN. (Michie, 1931) §1654, rules 1, 3, 4; *Johnson v. Chesson*, 59 N. C. 146 (1860).

cestor and together take what he would take if alive, i. e., they take *per stirpes*. Also, the next collateral relations of the person last seized take realty *per stirpes* and not *per capita*.<sup>103</sup>

Under the Revised Code of 1854<sup>104</sup> in the distribution of the personal property there was admitted among collateral kindred no representation after brothers' and sisters' children.<sup>105</sup> Our present statute of distributions allows representation among collateral to same extent as in the descent of real property.<sup>106</sup> Where a fund consists solely of personalty and the claimants at the time of the intestate's death are all in equal degree the next of kin of the intestate, the statute of distribution requires that the fund be distributed *per capita*.<sup>107</sup> Representation in this kind of property—that is, descent *per stirpes*—when allowed, is resorted to only when it is necessary to bring the claimants to equality of position as next of kin. (It is otherwise as to realty).<sup>108</sup> If, for instance, A dies leaving four grandchildren—three children of a deceased son and one child of a deceased daughter—each grandchild takes one-fourth of the personalty because they are all of equal degree. But if A leaves one daughter and three grandchildren, children of a deceased son, the daughter takes one-half and each grandchild one-sixth.<sup>109</sup> In the foregoing illustration if the property to be distributed had been realty instead of personalty, the one child of the deceased daughter would have taken one-half of the property and the children of the deceased son would have divided the other one-half amongst them, each taking one-sixth. This division of the realty would obtain under our present law although the grandchildren were collateral relations of an equal degree of consanguinity, with each grandchild equally near and dear to the intestate.

The instant proposal, by following the general pattern of our suggested statute which abolishes all distinction between real and personal property, would eliminate some of the confusion and inequality now prevailing under the present laws regarding the distribution of the various types of property of an intestate. This sec-

<sup>103</sup> *Clement v. Cauble*, 55 N. C. 82 (1854); *Haynes v. Johnston*, 58 N. C. 124 (1859); *Crump v. Faucett*, 70 N. C. 345 (1874).

<sup>104</sup> REV. CODE, c. 64, §§1 and 2.

<sup>105</sup> See *Johnston v. Chesson*, 59 N. C. 146 (1860).

<sup>106</sup> N. C. CODE ANN. (Michie, 1931) §137, subsecs. 3, 4, 5; *Moore v. Rankin*, 172 N. C. 599, 90 S. E. 759 (1916).

<sup>107</sup> *Ellis v. Harrison*, 140 N. C. 444, 53, S. E. 299 (1906).

<sup>108</sup> *Supra* note 107.

<sup>109</sup> ELLER AND STEPHENSON, GUIDE-POSTS IN PREPARING WILLS (2d ed., 1925) 8 and 9.

tion purports to state the law applicable to both kinds of property and to state it in such a manner as will keep the property in the hands of those to whom the intestate would probably have given it had he expressed his wishes and yet will protect it against too minute sub-division among a great number of distant collateral relations by depriving those more than three degrees removed of any right of representation.

The first part of the proposed section would distribute all property, both real and personal to all kindred of an equal degree of consanguinity *per capita*. This would embody the rule now obtaining in North Carolina regarding personalty when it is not necessary to bring the claimants to equality of position as next of kin.<sup>110</sup> And even if the intestate should leave, for instance, one son living and two grandchildren by a deceased daughter and four grandchildren by a deceased son, our statute would give one-third of the property to the surviving son and would distribute the remaining two-thirds *per capita*—one-ninth each—to the six grandchildren who are of an equal degree of consanguinity.

“If one dies leaving seven children, natural feeling suggests that they should share his estate equally, because they are all his children; and so if one leaves as his next of kin seven grandchildren, the same feeling suggests that they should share his estate equally, because they are all his grandchildren—equally near to him, and for that reason presumed to be equally the objects of his affection without reference to the fact that some of his children, all of whom are dead, were blessed with more children than the others; for our affections, and the law which follows them, deal with the living and not with the dead. For the same reasons, if one leaves as his next of kin seven nieces and nephews, natural feeling suggests that they should share his estate equally, in the absence of anything to show that he intended to give a preference to those whose parents had the fewest number of children.” So argued Judge Pearson as early as 1854 in a brilliant and vigorous dissent filed by him in the celebrated case of *Clement v. Cauble*.<sup>111</sup> That case decided that in the descent of real estate the next collateral relations of the person last seized, who are of equal degree, take *per stirpes* and not *per capita*.

The reason for the old English rules of representation among collateral kindred in the descent of real property was the necessity,

<sup>110</sup> *Supra* notes 107 and 108.

<sup>111</sup> 55 N. C. 82, 95 (1854).

under the feudal system, for finding the person among the kinsmen of the deceased who would make the best soldier. The rules of descent did not have as their basis the equitable distribution of the estate to those most nearly connected with the deceased by the ties of nature. The legislature of this state has expressly recognized the fact that the reason for the rule no longer exists here and has long since abolished primogeniture and the preference of males over females; therefore the related rule of representation among collateral kindred of an equal degree should also be discarded as having no longer a place in our law.

We might mention here that Ohio allows no representation among the next of kin.<sup>112</sup> The rule prevailing in America is to the effect that if the descendants, either lineal or collateral, stand in an equal degree from the common ancestor, they will take the inheritance *per capita*; but if they stand in unequal degree, they will take *per stirpes*.<sup>113</sup>

While the right of representation is firmly imbedded in our jurisprudence and is eminently just in certain situations where close relatives would be left without a right to participate in the distribution of an estate but for it, yet it would seem to be good policy to reasonably limit the right as among the remote relatives of the deceased so as to prevent too minute a subdivision of the estate. To this end, therefore, we propose in the second part of section six to limit the right of representation among collateral kindred to the children of brothers and sisters of the intestate. This would amount to our adoption of a rule, applicable to the distribution of *both realty and personalty*, which prevailed in North Carolina as to *personalty* until 1863 when it was repealed by the legislature.<sup>114</sup>

Under the statutes of descent and distribution in a number of states, it has been held that no representation shall be admitted among collaterals after brothers' and sisters' children or descendants.<sup>115</sup> New York now expressly provides by statute that no representation

<sup>112</sup>CUM. OHIO CODE SERVICE (Baldwin, March, 1932) §§10503-4 (8).

<sup>113</sup>3 THOMPSON, REAL PROPERTY (1924) §2340.

<sup>114</sup>Laws 1862-63, c. 18.

<sup>115</sup>Ector v. Grant, 112 Ga. 557, 37 S. E. 984, 53 L. R. A. 723 (1901); Quinby v. Higgins, 14 Me. 309 (1837); McComas v. Amos, 29 Md. 132 (1868); Conant v. Kent, 130 Mass. 178 (1881); Clary v. Watkins, 64 Nebr. 386, 89 N. W. 1042 (1902); Davis v. Vanderveer, 23 N. J. Eq. 558 (1872); Page v. Parker, 61 N. H. 65 (1881). See also 3 THOMPSON, REAL PROPERTY (1924) §2339.

shall be admitted among collaterals after brothers' and sisters' descendants.<sup>116</sup>

Section 7. Illegitimate children shall inherit from their mother, from their maternal kindred in all degrees, and from each other and the descendants of each other as fully as if born in wedlock. But when the parents of an illegitimate child shall marry subsequent to its birth, it shall be deemed to have been made legitimate for all purposes of this statute.

By both the common and civil law the most important disability under which an illegitimate labored was that he possessed no inheritable blood and was incapable of becoming heir to either his father or mother or to any one else; nor could he transmit inheritance, save only to heirs born of his own body.<sup>117</sup> The rigor of these early rules as to the status of bastards has been considerably mollified by statutory enactment in North Carolina. By the law of this state illegitimates may now inherit realty from their mother, except as to realty conveyed or devised to the mother by the father of her legitimate children; but illegitimate children and their issue are excluded from inheriting from the lineal or collateral kindred of their mother when they claim through their mother by representation.<sup>118</sup> Also, as between illegitimate children and their representatives they are considered legitimate and their estates descend in the same manner as if they had been born in wedlock; and if an illegitimate child dies without issue, his mother may inherit from him.<sup>119</sup> And, as Dean Mordecai says, "We have gone so far as to pay them the compliment of permitting their legitimate brothers and sisters to inherit from them."<sup>120</sup> Under our statute of distributions regarding personal property, illegitimates are considered among the next of kin to their mother and to each other.<sup>121</sup>

The first part of the proposed section would further lighten the burden of illegitimates by permitting them to inherit, by representing their mother, from their maternal kindred either lineal or collateral. In other words, they would be allowed to take *through* their mother as well as *from* her as if they were legitimate. Thus the bastard would be given a right in the property of those who are most properly and most certainly to be regarded as its relatives. Of course

<sup>116</sup> N. Y. CONS. LAWS (Cahill, 1930) c. 13, §83 (10).

<sup>117</sup> 3 THOMPSON, REAL PROPERTY (1924) §2348.

<sup>118</sup> N. C. CODE ANN. (Michie, 1931) §1654, rule 9.

<sup>119</sup> *Id.*, §1654, rule 10.

<sup>120</sup> 1 MORDECAI, LAW LECTURES (2d ed. 1916) 647; *McBryde v. Patterson*, 78 N. C. 412 (1878).

<sup>121</sup> N. C. CODE ANN. (Michie, 1931) §140.

this would directly change that part of Rule 9 of our canons of descent which prohibits an illegitimate child from representing its mother in claiming her part of the estate derived from her kindred.<sup>122</sup> Inheritance by illegitimates to the extent proposed by us seems to be allowed in Indiana,<sup>123</sup> Iowa,<sup>124</sup> and Massachusetts.<sup>125</sup>

The last part of the proposed section is in effect but a restatement of the present law providing for the legitimation of the bastard by the subsequent marriage of the parents.<sup>126</sup>

Section 8. Any child of an intestate born within ten lunar months of the death of its father shall have the same rights in his estate as if born within his lifetime.

This section is, in effect, a restatement in another form of the present North Carolina law.<sup>127</sup>

Section 9. When a child shall have been legally adopted, it shall inherit as a natural child from its adoptive parents, but from its natural parents only when there is no other next of kin of such parents. The natural parents of such child shall inherit from it only when there is no other next of kin of such child or its adoptive parents.

This section would revamp considerably the prevailing North Carolina law. Under our law today if the child has been adopted for life and the person adopting dies intestate, the child may inherit both the realty and personalty of the deceased adopting parent in the same manner and to the same extent that such child would have inherited had it been the actual child of the person adopting it.<sup>128</sup> Nor does there appear to be anything in our law to prevent such adopted child from inheriting also from its natural parents. Where an adopted child dies seized of realty, without brothers and sisters, and the property is claimed by both the natural and adopted fathers, the law confers it upon the natural father under our general statutes of descent.<sup>129</sup> (In this respect North Carolina seems to follow the prevailing view in America to the effect that natural parents inherit to the exclusion of adoptive parents).<sup>130</sup> However,

<sup>122</sup> Note 118 *supra*.

<sup>123</sup> Parks v. Kimes, 100 Ind. 148 (1884).

<sup>124</sup> Johnson v. Bodine, 108 Ia. 594, 79 N. W. 348 (1899).

<sup>125</sup> Hayden v. Barrett, 172 Mass. 472, 52 N. E. 530, 70 Am. St. 259 (1899).

<sup>126</sup> N. C. CODE ANN. (Michie, 1931) §279.

<sup>127</sup> *Id.*, §1654, rule 7.

<sup>128</sup> *Id.*, §185.

<sup>129</sup> Edwards v. Yearby, 168 N. C. 663, 85 S. E. 19 (1915).

<sup>130</sup> See Dodson v. Ward, 31 N. M. 54, 240 Pac. 991, 42 A. L. R. 521 (1925); noted in (1926) 12 VA. L. REV. 511.

when an adopted child dies intestate leaving no husband or wife or child or issue of child, North Carolina permits the adopted parents to take the child's *personal* property the same as if they were natural parents.<sup>131</sup> Except in the case just stated, an adopted child's property, upon intestacy, will escheat to the state before it will go to the adopting parents, even though they may have reared the child from babyhood and lavished upon it all the care which its natural parents either would not or could not give it.

Our proposed statute goes further perhaps than any prevailing American law in permitting the adopted child and adoptive parents to inherit from each other.

In view of the legal relationship set up by adoption and of the rights, duties, and obligations flowing therefrom governing the adoptive parent and the adopted child, it would seem that in the eyes of the law these persons should be regarded in all respects as parent and child. The legal status existing between natural parent and child having been materially altered by the adoption process, it would seem anomalous, to say the least, to permit the natural parent, who has given up the custody and support of the child to the adoptive parent who has assumed such responsibilities, to inherit the deceased child's property to the exclusion of the adopting parent.

Because, however, of the blood-ties existing between natural parent and child, we thought it better to allow the natural parent to inherit from his child—and vice-versa, than through failure of those entitled to take, permit the property to escheat to the state.

Section 10. When any parent shall have wilfully abandoned his child or his or her spouse has obtained custody of the child under order of court granting a divorce on the ground of abandonment or extreme cruelty, the parent guilty of such misconduct shall lose all right to succeed to any part of the child's estate should it die intestate. Provided, that when it can be shown that the parent has contributed regularly to the support of the child by order of the court, through alimony or otherwise, his right to participate in the estate of the child shall not be defeated under the provisions of this section.

It is intended that this section should serve the same purpose in our statute as the proviso in subsection 6 of section 137 of the Consolidated Statutes. That proviso was added by the legislature in 1927<sup>132</sup> to obviate, in future cases, the result reached by the North Carolina Supreme Court in the case of *Avery v. Brantley*,<sup>133</sup> which

<sup>131</sup> N. C. CODE ANN. (Michie, 1931) §137, subsec. 6.

<sup>132</sup> P. L. 1927, c. 231.

<sup>133</sup> 191 N. C. 396, 131 S. E. 721 (1926); noted in (1926) 5 N. C. L. REV. 72.



was decided in 1926. In that case the father of a child had abandoned her and her mother after conviction for assault upon the mother. The wife afterwards divorced the husband and cared for the child until its death. When the mother recovered damages for the wrongful death of the child, the father claimed under Consolidated Statutes, section 137, subsection 6, one-half the intestate child's estate. It was held that he was entitled to recover, the statute declaring that a parent who abandons a child and leaves its care and custody to others shall forfeit all his rights with respect to the care, custody and services of such child<sup>134</sup> not applying to the situation. The proposed section would prevent a parent, as an unworthy beneficiary, from inheriting from an abandoned child who has died intestate.

Section 11. No gift shall be deemed to have been made as an advancement unless so expressed in writing or charged in writing, by the intestate, as an advancement, or acknowledged in writing by the donee.

In its legal sense, and as employed in the law of descent and distribution, an advancement is an irrevocable gift *in praesenti* of money or property, real or personal, to a child by a parent to enable the donee to anticipate his inheritance to the extent of the gift.<sup>135</sup> By the present North Carolina law children of parents who die intestate are charged with, and must account for, all advancements, both of realty and of personalty.<sup>136</sup> In the determination of the question whether a transfer of property from parent to child is a gift, a sale, or an advancement, the intention of the grantor is the controlling element. And only such intention as exists at the time of the transaction is to be considered.<sup>137</sup> Under the present law, in the absence of direct evidence of the intention of the donor at the time of the gift, such intention must be gathered from the nature of the gift and the circumstances under which it was made—to show which parol evidence is competent.<sup>138</sup> Presumptions are also resorted to in determining whether or not an advancement was intended. Thus a substantial gift of property by a parent to his child, or a conveyance of land in consideration of love and affection or of a nominal sum, is ordinarily presumed to be an advancement, and the burden of proof is on the grantee or donee to show that an advance-

<sup>134</sup> N. C. CODE ANN. (Michie, 1931) §189.

<sup>135</sup> 18 C. J. 911.

<sup>136</sup> N. C. CODE ANN. (Michie, 1931) §1654, rule 2; §§138, 139.

<sup>137</sup> Nobles v. Davenport, 183 N. C. 207, 111 S. E. 180 (1922).

<sup>138</sup> Kiger v. Terry, 119 N. C. 456, 26 S. E. 38 (1896).

ment was not intended.<sup>139</sup> But if the transfer is made for a valuable and adequate consideration, there is no presumption of an advancement but rather the contrary; the burden then to prove it an advancement is upon the person claiming it to be such.<sup>140</sup>

In order to remove some of the indefiniteness and uncertainty now prevailing in our law as to whether or not an advancement is intended in a particular transaction, we propose that no gift shall be deemed to have been made as an advancement unless so expressed or charged as such *in writing* by the donor, or acknowledged as such *in writing* by the donee. It will still be a question of intention, but the proposed statute will have prescribed the manner of proof of the intention. Necessarily, under such a statute, the courts would have to exclude parol evidence if such evidence were offered to show an advancement. They would also have to hold that an advancement not in writing was, in legal effect, no advancement at all unless the heirs and distributees waived the statutory requirement.<sup>141</sup>

About nine states<sup>142</sup> in this country have adopted advancement statutes similar to the one we herewith propose.

Section 12. If the beneficiary of such advancement dies in the lifetime of the intestate, his descendants shall, to the extent of the advancement, be barred from participation in the estate of the donor or grantor of the advancement to the same extent and upon the same conditions as would the beneficiary of the advancement had he survived the donor.

This section, provides, in effect, that in the division of an intestate grandparent's estate, the grandchildren must account for advancements made to their deceased parent, as the representatives of such a parent, before they can participate in the estate of the grandparent. In other words, where a grandchild takes, *by way of representation*, his deceased parent's share of the grandfather's estate, such grandchild takes the share subject to any advancements made to his deceased parent during the latter's lifetime. This is substantially the present law in North Carolina.<sup>143</sup> As a general proposition, the grandchild

<sup>139</sup> Nobles v. Davenport, *supra* note 137; Kiger v. Terry, *supra* note 138.

<sup>140</sup> *Supra* note 139.

<sup>141</sup> 18 C. J. 919.

<sup>142</sup> California: CAL. PROB. CODE (Deering, 1931) §1050; Illinois: 3 ILL. STAT. ANN. (Callaghan, 1924) c. 39 §7; Maine: ME. REV. STAT. (1930) c. 89, §4; Massachusetts: 2 MASS. GEN. LAWS (1921) c. 196 §5; Michigan: 3 MICH. COMP. LAWS (1929) §13448; Nebraska: NEB. COMP. STAT. (1922) §1234; New Hampshire: 2 N. H. PUB. LAWS (1926) c. 307, §§14, 15; Rhode Island: R. I. GEN. LAWS (1923) §5568; Wisconsin: WIS. STAT. (1931) §318.27.

<sup>143</sup> Headen v. Headen, 42 N. C. 159 (1850); Skinner v. Wynne, 55 N. C. 41 (1854); Crump v. Faucett, 70 N. C. 345 (1874).

has already received, indirectly at least, the benefit of any advancement made to his living parent.

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We submit this proposed intestate succession statute to the members of the legal profession of North Carolina for their thoughtful study and consideration. It is hoped that this statute, together with our comments thereon, will serve to focus the attention of the bench and bar upon the necessity for a critical reexamination of the utility of the existing intestacy laws of the state and upon the desirability of modernizing them along the lines suggested to the end that they may best subserve the needs of a new social and economic order.