JAMIESON . . . . . APPELLANT;
DEFENDANT,

AND

CHRISTENSON AND ANOTHER . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Sept.* 9, 13, 16.

Griffith C.J., Barton, O'Connor and Higgins JJ.

Married Women's Property Act 1890 (*Vict.*) (*No.* 1116), *sec.* 25—*Intestates' Estates Act* 1896 (*Vict.*), (*No.* 1419)—*Married woman—Intestacy—Estate less than* £1,000—*Rights of husband and next of kin.*

The *Intestates' Estates Act* 1896, which provides that the widow of a man who dies intestate leaving an estate of the net value of not more than £1,000 shall be entitled to the whole of such estate, and, if the net value exceed £1,000, that she shall be entitled to £1,000 of it and to a charge over the whole of the estate for such sum, is not a law which makes an alteration of the law as to the "manner and proportions in which the estate real and personal as to which a married man dies intestate is distributable between his widow and his children or next of kin," within the meaning of sec. 25 of the *Married Women's Property Act* 1890.

Quære whether that section incorporates future alterations of the law as to distribution.

Held, therefore, that the estate of a married woman who died intestate leaving her surviving her husband and next of kin, the value of the estate not exceeding £1,000, was distributable one-half to the husband and one-half to the next of kin.

Judgment of *Cussen* J. (*In re Jamieson*; *Christenson* v. *Jamieson*, (1907) V.L.R., 103; 28 A.L.T., 138), affirmed.

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APPEAL from the Supreme Court.

Emma Godfree Jamieson died intestate on the 3rd December 1904, leaving her surviving her husband, John Jamieson, and her four brothers, her next of kin. John Jamieson obtained administration of the estate, which was valued at £655 12s., and claimed that he was entitled to the whole of it by virtue of the *Married Women's Property Act* 1890 and the *Intestates' Estates Act* 1896. An originating summons was taken out by two of the brothers asking for the opinion of the Court as to what share, if any, of her estate each of the next of kin was entitled to.

The summons was heard by *Cussen* J., who held that the next of kin were entitled to one-half of the distributable residue of the estate: *In re Jamieson*; *Christenson* v. *Jamieson* (1).

From this judgment John Jamieson now appealed to the High Court.

Weigall K.C. and *Davis*, for the appellant. The effect of sec. 25 of the *Married Women's Property Act* 1890 is that the distribution of the estate of a married woman dying intestate is to be precisely the same as the distribution of the estate of a married man dying intestate, and, therefore, under sec. 1 of the *Intestates' Estates Act* 1896 a widower is entitled to the whole of the estate, not exceeding £1,000, of his deceased wife who died intestate. Until 1864 the distribution of the estate of a married woman dying intestate was governed by the common law, and her personal estate went to her husband. By the *Intestates' Estates Act* 1864 (No. 230), sec. 4, the real estate of a married woman dying intestate became distributable in the same way as the personal estate of a married man dying intestate, but nothing was said in that Act about the personal estate of a married woman dying intestate. Neither the *Married Women's Property Act* 1870, nor the *Administration Act* 1872 made any alteration as to the mode of distribution, so that immediately before the passing of the *Married Women's Property Act* 1884, in the case of a married woman dying intestate, her personal estate all went to her husband, and her real estate was distributable between her husband, her children (if any) and her next of kin. Sec. 25 of that Act (which is sub-

(1) (1907) V.L.R., 103; 28 A.L.T., 138.

stantially the same as sec. 25 of the *Married Women's Property Act* 1890) only altered the mode of distribution of the personal estate of a married woman dying intestate. The *Intestates' Estates Act* 1896 is to be read as one with the *Administration and Probate Act* 1890, and forms part of the one scheme. Sec. 25 of the *Married Women's Property Act* 1890 is to be read as if it were always speaking: *In re Ralston*; *Perpetual Executors and Trustees Association* v. *Ralston* (2); so that, whatever may be the law from time to time as to the distribution of the estate of a married man dying intestate, that is to be the law as to the distribution of the estate of a married woman dying intestate. The *Intestates' Estates Act* 1896 has altered the mode of distribution of the estates of married men dying intestate.

[BARTON J.—In the *Probate Act of* 1890 *Amendment Act* 1893 (N.S.W.) express provision is made for the husband of a woman who dies intestate.]

Starke, for the respondents. The *Intestates' Estates Act* 1896 is confined to widows. The title describes it as an Act to make better provision for the widows of certain intestates, and sec. 3 speaks of "the provision for the widow intended to be made by this Act." The Act does not alter the law of distribution of estates, but it takes out of certain estates a certain sum before distribution. If the Act were dealing with distribution, sec. 4 would be superfluous. Sec. 25 of the *Married Women's Property Act* 1890 only refers to the law as to the distribution of the estate of a married man dying intestate as it existed on the 1st August 1890, and not to future alterations of the law relating to such distribution. [He also referred to *Widows and Young Children Maintenance Act* 1906, and *Williams on Executors*, 10th ed., p. 1228.]

Weigall K.C., in reply, referred to *Hardcastle's Statutory Law*, 4th ed., p. 29 (note *e*).

Cur. adv. vult.

GRIFFITH C.J. The question for determination in this case is

(2) (1906) V.L.R., 689; 28 A.L.T., 45.

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whether a widower is entitled to the whole of the estate of his deceased wife who died intestate, and which amounts to less than £1,000. The appellant claims the whole of the estate by virtue of the *Intestates' Estates Act* 1896, which is entitled "An Act to amend the law by making better provision for the widows of certain intestates in the distribution of such intestates' property." That Act by sec. 1 provides that when the net value of the estate of a man who dies intestate is less than £1,000 his widow, if any, shall take the whole of it, and by sec. 2 that, if the net value is more than £1,000, she shall have a charge upon the whole estate to the extent of £1,000, and that the residue is to be divided according to the ordinary law as it stood before the Act. There is nothing in that Act in terms relating to a widower, but the appellant contends that he is entitled to have that Act read as if it referred to widowers as well as to widows, and he rests that argument upon sec. 25 of the *Married Women's Property Act* 1890, which is a re-enactment of an identical provision in the *Married Women's Property Act* 1884. That section provides that:—"The estate real and personal as to which any married woman dies intestate after the commencement of this Act shall subject to the payment of the duties and fees payable under Part V. of the *Administration and Probate Act* 1890 or any subsisting statutory modification thereof and of her funeral administration or testamentary expenses and debts in the ordinary course of administration be distributable between her husband and her children or next of kin in the like manner and proportions in which the estate real and personal as to which a married man dies intestate is distributable between his widow and his children or next of kin."

It is contended that that section makes the estate of a married woman who dies intestate divisible in exactly the same way as the estate of a married man who dies intestate under the law for the time being in force, that is, that the Act applies to all persons who die after the commencement of the Act, and that it is to continue to be the law, so that, whatever the law may be in respect of the estates of married men, it shall also be the law with respect to the estates of married women.

That argument is founded upon the words being in the present

tense—" is distributable " between the widow and children or next of kin. I was at first disposed to think that there was a good deal of force in that argument, but, on further consideration, I am disposed to think that is not the proper construction.

When the Act of 1884 was passed, the law was that, as to a married woman's real estate, if she died intestate, it was divisible in the same manner as the personal estate of a married man, substituting husband for wife. The widower, if any, took one-third or one-half according as there were or were not children, and the children or next of kin took the remainder. But, with regard to personal estate of a married woman, it all went to the husband. This Act, therefore, changed the law and laid down a new rule for the distribution of the estates of married women, and laid it down by reference to the existing law as to the distribution of the estates of married men. I do not see in the section any words of futurity with respect to the distribution of the estates of married men, and, having regard to the fact that the section refers to future alterations of another law mentioned in it, I think that it is at least very doubtful whether any future alteration of the law with respect to the distribution of the estates of married men is to be taken to apply. The learned Judge from whom the appeal is brought thought that the section embodied future alterations of the law with respect to the estates of married men.

But, assuming the section to be open to that construction, still I am of opinion that the appellant has not brought himself within sec. 1 of the *Intestates' Estates Act* 1896. I can see nothing in that Act suggesting an intention to benefit widowers. It is a law to make better provision for the widows of certain intestates. That of itself is a very strong reason for not giving it an extended operation. But I do not think that, even if the wider interpretation were given to sec. 25 of the *Married Women's Property Act* 1890, the *Intestates' Estates Act* 1896 is a law which alters the "manner and proportions in which the estate real and personal as to which a married man dies intestate is distributable between his widow and his children or next of kin," within the meaning of sec. 25 of the *Married Women's Property Act* 1890.

The *Intestates' Estates Act* 1896 provides that the widow of a

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designated person shall have a charge on the whole of his estate to the extent of £1,000, and, if the estate does not exceed £1,000, that she shall take the whole of it. By sec. 3 it is provided that "The provision for the widow intended to be made by this Act shall be in addition and without prejudice to her interest and share in the residue of the estate of such intestate remaining after payment of the sum of One thousand pounds in the same way as if such residue had been the whole of such intestate's estate and this Act had not been passed." It appears to me that the effect of that Act is to take £1,000 out of the estate for the benefit of the widow, and to leave the rest of the estate to be divided according to the law in force for the time being in relation to the distribution of the estates of intestates. For these reasons I think the judgment appealed from was right and that the appeal should be dismissed.

BARTON J. I also am of opinion that the appeal fails. I am the more inclined to adopt the interpretation placed by Mr. *Starke* upon sec. 25 of the *Married Women's Property Act* 1890 because I think the words "is distributable" have a simple and natural meaning, and I see no reason for placing any other meaning upon them. "Is" primarily means "is now," and not "may from time to time be." In like manner the *Intestates' Estates Act* 1896 has also its ordinary and natural meaning, as applying in favour of widows only, and I cannot see any reason to doubt that the intention so expressed is the intention with which that Act has been passed. That being so, the appellant's claim must fail.

O'CONNOR J. I am of the same opinion.

HIGGINS J. read the following judgment:—I am of opinion that the appeal should be dismissed. I agree with *Cussen* J. that the provisions of sec. 25 of the *Married Women's Property Act* 1890 do not apply to such an enactment as the *Intestates' Estates Act* 1896 at all. Sec. 25 provides that the free surplus of the estate of a married woman, as to which she dies intestate, shall "be distributable between her husband and her children or next

of kin in the like manner and proportions in which the estate real and personal as to which a married man dies intestate is distributable between his widow and his children or next of kin." At the time of the Act, 1890, the manner and proportions in which a married man's estate was distributable were settled by the Statutes of Distribution; and if he left a widow and no children, the widow would take half and the next of kin half. Then came the Act of 1896, which does not prescribe the "manner and proportion" in which a man's estate is "distributable between his widow and his children or next of kin"; but gives the whole estate, if it does not exceed £1,000, to the widow. The words of sec. 25 do not fit the case, either taken literally or in their spirit. The Act of 1896 is headed "An Act to amend the law by making better provision for the widows of certain intestates in the distribution of such intestates' property." It is an Act obviously designed to meet the peculiar needs of widows when the wage earner has gone, and to *prevent* distribution between the widow and next of kin—not to prescribe *the manner and proportions of distribution between them.* The only doubt I feel in the case is as to the dictum of the learned Judge, that "*primâ facie* the Act (*Married Women's Property Act*) is to be read as if speaking at the moment when the occasion for its application arises" (1), so as to be applicable to Statutes passed after 1890. I know of no such presumption. The case of *Bird* v. *Adcock* (2) points in the other direction. The words of sec. 25 are "is distributable" not "may be distributable," not "is from time to time distributable." Moreover, this very section, when alluding to the duties under the *Administration and Probate Act* 1890, refers also to "any subsisting statutory modification thereof" — tending to show, on the principle of *expressio unius exclusio alterius*, that, when using the words "is distributable" in the latter part of the section, the legislature did not mean to incorporate future statutory modifications. So that, even if after 1890 there were a statutory alteration of the Statutes of Distribution, I am strongly inclined to think, as the learned Chief Justice has said, that sec. 25 would not apply to

(1) (1907) V.L.R., 103, at p. 105; 28 A.L.T., 138, at p. 139.

(2) 47 L.J.M.C., 123.

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the Statute as altered. But I refer to this matter merely to avoid being treated as accepting, by silence, the contrary view; and I cordially concur in the decision of the learned Judge.

Davis. The costs of the appeal should be paid out of the estate. The appellant is a trustee, and should not be compelled to pay costs except for misconduct. *Amos* v. *Fraser* (1); *In re Jones*; *Christmas* v. *Jones* (2).

[GRIFFITH C.J. That principle does not apply to the costs of an appeal. Here the appeal is for the appellant's own benefit. The costs might be paid out of the estate if the respondents consented. This is certainly a case in which it was desirable that the opinion of this Court should be obtained.]

Starke. The respondents do not consent to costs being paid out of the estate.

GRIFFITH C.J. We do not see any sufficient reason for departing from the ordinary rule. The appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitors, for appellant, *Backhouse & Skinner.*

Solicitors, for respondent, *Davies & Campbell.*

B. L.

(1) 4 C.L.R., 78.

(2) (1897) 2 Ch., 190, at p. 198.