Principles of the Law of Succession to Intestate Property

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PRINCIPLES OF THE LAW OF SUCCESSION TO INTESTATE PROPERTY

Many of the problems involved in the law of descent and distribution of property are among the most difficult problems of legal science. While the principles of the branch of the law are covered generally and specifically by statutes, in more or less complete schemes, both in this country and in England, yet without a knowledge of the common law principles and the reasons for them it is not infrequently very difficult to interpret and apply the statute in any particular jurisdiction in cases arising under it and to understand the terminology used in the statute. It is with the implications of these problems in mind that I have collected herein readings and materials on the law of succession to intestate property, adding comment and illustrations. I have dealt mainly with general principles, for individual teachers and students are inclined to use local material—both statutory and cases.

There are two general modes of acquiring title to real property, namely, by descent and by purchase. Personal property is not without the scope of this general classification; but as to the operative effect on the title acquired under either method, the distinction is not so important as it is in case of real property. In distinguishing these modes of acquiring title, Blackstone says: “Purchase, perquisito, taken in its largest and most extensive sense, is thus defined by Littleton: ‘The possession of lands and tenements, which a man hath by his own act or agreement, and not by descent from any of his ancestors or kindred.’ In this case it is contradistinguished from acquisition by right of blood, and includes every other method of coming to an estate, but merely that by inheritance, wherein the title is vested in a person, not by his own act or agreement, but by the single
operation of law.” ¹ The same author defines “descent” as follows: “Descent, or hereditary succession, is the title whereby a man on the death of his ancestor acquires his estate by right of representation, as his heir at law. An heir, therefore, is he upon whom the law casts the estate immediately on the death of the ancestor; and an estate so descending to the heir is in law called the inheritance.” ²

“The word ‘distribution’ refers ordinarily to personal property. It is defined by Bouvier as ‘the division by order of the court having authority, among those entitled thereto, of the residue of the personal estate of an intestate after payment of the debts and charges.’ This definition is followed by the statement: ‘The term sometimes denotes the division of a residue of both real and personal estate, and also the division of an estate according to the terms of a will.’ ³ “It is true that the word ‘descent,’ in its technical legal meaning, denotes the transmission of real estate, or some interest therein, on the death of the owner intestate, by inheritance, to some person according to certain rules of law. In such meaning it is distinguished from transmission by devise, which is technically by purchase, and also from the transmission of personal property, the title of which passes to the administrator, and, after the payment of debts and claims against the estate, is governed by certain rules

¹ 2 Bl. Comm. (Lewis’ ed.) 241. While this work will be cited frequently hereafter without stating the edition, it is Lewis’ edition to which reference is made, unless otherwise indicated.

Bouvier says that “This division of the manner of acquiring title to real estate does not appear to be entirely correct; the title gained by escheat, forfeiture and merger, is acquired by act of law as well as by descent. A more natural classification would be by considering, first, when title to estates is acquired by act of law; secondly, when by acts of the parties. Among the first would be classed descent, escheat, forfeiture, merger; under the second class, alienation, devise, occupancy, prescription, and custom, treated of under two divisions.” ² Bouvier’s Institutes 352.

² 2 Bl. Comm. 201.

³ ‘Descents.’ This word cometh of the latin word descendere, id est, ex loco superiore in inferiorem movere; and in legal understanding it is taken when land, & c. after the death of the ancestor is cast by course of law upon the heir, which the law calleth a descent.” ² Coke 183.

of distribution." 4 Andrew says 5 that in England the following formal modes of acquiring title by purchase existed: Feoffment, grant, fine, common recovery, exchange, release and confirmation, grant of reversion with attornment, bargain and sale, and devise. He adds that other collateral methods existed, namely, accretion, prescription, dedication, estoppel, partition, and by judgment. A discussion of the essentials of these methods of acquiring title by purchase is beyond the scope of this paper, except in so far as a distinction between any of them and that of acquiring title by descent is necessary in connection with a consideration of some principle in the law of descent. 6

Intestate succession applies to estates of persons who die intestate or leave no valid wills disposing of their property, thereby requiring the descent and distribution of their property in accordance with the laws providing therefor. 7 It denotes the devolution of property under the statutes of descent and distribution. "Succession by law is the title by which a man, on the death of his ancestor, dying intestate, acquires his estate, whether real or personal, by the right of representation as his next heir." 8 "Succession" is, therefore, a broader term than "descent," as it applies to personal as well as real property. Yet the two terms are often used synonymously. "The word 'inheritance,' in its legal acceptance, applies to lands descended . . . In its popular acceptance, however, the word 'inheritance' includes the

4 Hudnall v. Ham, 172 Ill. 76, 83, 49 N. E. 985, 987 (1898).
5 2 ANDREWS, AMERICAN LAW (2nd ed.) 1131.
6 The distinction between acquiring title by descent and by purchase has been of importance in some cases construing the word "purchaser" in recording statutes. Speilman v. Kliest, 36 N. J. Eq. 199 (1882). It has been of importance, also, in certain types of questions in statutory construction. See Hudnall v. Ham, op. cit. supra note 4.
8 HALIFAX ANALYSIS OF CIVIL LAW 47 (Quoted in Hunt v. Hunt, 37 Me. 333, 344 (1853)).

"'Succession' is a proper term to denote the devolution of title to property from an ancestor to his immediate heir." Per Owen, J., in In re Bradley's Estate, 185 Wis. 393, 201 N. W. 973, 38 A. L. R. 1 (1925).
devolution of both real and personal property, and is co-extensive in meaning with the word 'succession.'"^9 "‘Succession,’ in the civil law, denotes the transmission of the rights and obligations of a deceased person to his heir or heirs."^10 This would include succession arising by devises and that which arises by operation of law.

The words “next of kin” refer to the persons who succeed to intestate personal property; the word “heirs” refers to the persons who succeed to intestate real property. These definitions will, in a general way, serve to distinguish between the classes of persons who succeed to the two classes of intestate property. In this country all jurisdictions have statutes providing more or less complete schemes of succession to intestate property. In a few there are separate provisions for realty and personalty; in these jurisdictions the heirs and the next of kin (also called “distributees”) may be different persons. In most jurisdictions in this country and under the recent statutes in England one course of succession is provided for realty and personalty, thus eliminating the necessity for making any distinction. Not infrequently it is necessary to arrive at the meaning of the words “legal heirs” and “next of kin” in interpreting wills; and in construing survival statutes and administration statutes^11 it is often necessary to decide who are the “next of kin.” “Next of kin” may have reference to the nearest in blood, where distribution is to made to those “who are in equal degree equally.”^12 The word “heirs” in its legal sense is interpreted to mean heirs generally. This is an important consideration in the law of estates tail. To create a fiée tail, the limitation over to the donee’s heirs must be to a certain class of his heirs and not to his general heirs.^13

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11 State v. Superior Court for King County, 158 Wash. 546, 291 Pac. 481, 70 A. L. R. 1460 (1930).
12 Taylor v. Taylor, 162 Tenn. 482, 40 S. W. (2d) 393 (1931).
The principles of descent were carefully formulated at common law. In England the law of descent, until recently, consisted of a number of common law principles based on feudalism. The first statutory modification was made in 1833. Professors Pollock and Maitland, in their *History of English Law,*\(^\text{14}\) say that the common law principles of descent assumed final form at the end of Henry III's reign. It seems that they were referring to the main outlines of descent. Professors Reppy and Tompkins, in their *Historical and Statutory Background of the Law of Wills, Descent and Distribution, Probate and Administration,* say that the common law rules of descent "were first formulated into definite shape by Sir Matthew Hale, but they found a more perfect expression in what are known as Blackstone's Canons of Descent, seven in number."\(^\text{15}\)

While the principles of descent were carefully formulated at common law, according to the spirit of the feudal system, personalty was practically ignored. The disposition of personal property was left to a different system. The ordinary, at the early common law, had the absolute disposal of intestate personalty. He was not bound, further than in conscience, to pay the debts of the intestate. "The Statute of Westminster 2, ch. 19, 13th Edw. 1st, subjected the ordinary to the suit of creditors, as executors were."\(^\text{16}\) In practice, the ordinary usually distributed the personalty "to the wife and children, and kindred of the intestate, according to the customary law, which agreed with the civil law, as it existed before the time of Justinian, by which, if there were no children, the father was preferred to all others, excluding the mother."\(^\text{17}\) Under a later statute\(^\text{18}\) the ordinary was "bound to grant administration to the nearest and most law-

\(^{14}\) Vol. 2 (2nd ed.) 260.

\(^{15}\) Pp. 77, 78.

\(^{16}\) Davis v. Rowe, 6 Rand. 355, 360 (1828).

\(^{17}\) Davis v. Rowe, *op. cit.* supra note 16, at 380.

\(^{18}\) 31st, Edw. 3rd.
ful friends of the deceased; and this is the origin of admin-
istrators." 19 "Still the ecclesiastical courts exercised jurisdic-
tion over the subject. They granted administration, they
called the administrators to account, and undertook to dis-
tribute the surplus of the personal estate among the kindred
of the intestate, according to the rules of the civil law. . . .
And this was deemed so reasonable that it was tolerated for
a long time, and the ordinaries, in the bonds taken of the
administrators to account with them, usually inserted a
clause that the overplus upon such account should be dis-
tributed as the ordinary should appoint. This matter was at
length brought before the law courts, and they decided that
the bonds of the administrator were of no avail and he not
compellable to make distribution at all. And as often after-
wards as the ecclesiastical courts attempted to compel a dis-
tribution, a prohibition was granted," 20 on the ground that,
by the grant of administration, the ecclesiastical authority
was executed, and ought to interfere no further. Thus the
administrator was entitled, exclusively, to enjoy the residue
of the personal property of the intestate, after the payment
of debts and funeral expenses. 21

"The hardships of this privilege upon those of kin to the
intestate in equal degree with the administrator was the
occasion of the making of the Statute of Distributions" 22
in 1670. 23 It has been said, frequently, that this Statute
was passed at the instance of the Civilians; that the reason
for passing it was to end the contention between the Com-
mon Law and the Ecclesiastical Courts; that its main scope
was to enlarge the jurisdiction of the latter; that it was bor-

20 Davis v. Rowe, op. cit. supra note 16, at 360, 361.
21 Williams, A Treatise on the Law of Executors and Administrators
(3rd Am. ed.) 1271.
22 Williams, op. cit. supra note 21, at 1272.
23 22 & 23 Car. II, c. 10.
rowed from the Civil Law, and was to be construed according to the rules of that Code.  

"The provisions of this Law stand in striking contrast with the Canons of Descent of the Common Law. Primogeniture, the preference of males over females, the blood of the


"The Statute of Distributions was drawn by a civilian, Sir Walter Walker, and seems to have been intended to introduce the rules of the Roman Civil Law into this branch of English law." In re Ross' Trusts, L. R. 13 Eq. Cas. 286, 293 (1871).

"It is obvious to observe how near a resemblance this Statute of Distributions bears to the ancient English law, de rationabili parte bonorum, which Sir Edward Coke... held to be universally binding, in point of conscience at least, on the administrator or executor, in case of either a total or partial intestacy. It also bears some resemblance to the Roman law of succession ab intestato, which, and because the Act was also penned by an eminent civilian, has occasioned a notion that the Parliament of England copied it from the Roman praetor, though it is little more than a restoration, with some refinements and regulations, of our old constitutional law, which prevailed as an established right and custom, from the time of King Canute downwards, many centuries before Justinian's laws were known or heard of in the Western parts of Europe. Lord Hardwicke, in the case of Stanley v. Stanley [1 Atk. 457], took occasion to observe that this statute was very incorrectly penned." WILLIAMS, op. cit. supra note 21, at 1274, 1275.

In dealing with the historical contention of counsel in In re Youngs, 132 N. Y. S. 689 (1911), the court said: "There is no doubt recognized judicial authority for their claim that the original 'Statute of Distributions' was founded on the 118th Novel of Justinian... For a long time material differences in principle have, however, been noticed in the course of critical comparison of the Statute of Distributions with the 114th and 127th Novels of Justinian. 4 Burns' Ecc. Law, 555... That the Statute of Distributions was founded on the Justinian scheme modern historical scholars have come to doubt. That statute probably finds its logical and immediate origin in the sequence of ancient customs of English-speaking peoples, as those customs were established in the reign of Charles II; but more particularly in the ancient practice of the ecclesiastical courts in granting letters of administration... The ecclesiastics, though canonists, and civilians, were eminently practical men, and they were, above all, Englishmen. Whether or not the customs and practice of the ecclesiastical courts in England do not in some respects go back in turn to a time anterior to even the legislation of Justinian is one of the interesting problems of modern historical scholarship, as yet, I believe, in this instance, unsolved."

In Carter v. Crawley, Raym. T. 496 (1680), the court, in explaining the Statute of Distributions, said: "The statute is introductivum novis juris, and therefore ought to receive a strict interpretation in restraint of distributions, which are hereby introduced against the policy of former laws... As to the rules of the Spiritual Courts in ordering distribution, I should have been glad the parties would have brought civilians to have informed us concerning the grounds of their law and practice in this particular. Not having had that assistance, I have considered in the best manner I can upon the nature of the thing, whereupon I apprehend there are two motives of dis-
first purchaser, the rule that property never ascends, the exclusion of the half blood, all these fundamental rules of the Common Law are violated by the Statute of Distributions. Its great object was equality.”

This Statute provided that ordinaries and judges, having power “to commit administration of the goods of persons dying intestate, shall and may,” upon the granting of administration, take a bond of the administrator, with two or more sureties; (2) call the administrator to account “for and touching the goods of” the intestate; and (3) upon a hearing, to order a distribution of what remained, after all debts, funeral expenses and just expenses of every sort were paid, “amongst the wife and children, or children’s children if any such be or otherwise to the next of kindred to the dead person in equall degree, or legally representing their stocks pro sua cuique jure according to the lawes in such cases and the rules and limitation hereafter sett down.” It then provided that the surplus should be distributed: One third to the wife of the intestate, and all the residue by equal portions to and amongst the children, and such persons as represent the children in case any of the children have predeceased the intestate; if no children, or representatives of children, survive the intestate, “one moyety” to the wife, and the residue to the next of kindred in equal degree and those who legally represent them. Rep-

\[\text{Davis v. Rowe, op. cit. supra note 16, at 361.}\]
representation among collaterals after brothers' and sisters' children was prohibited.\textsuperscript{26}

While statutes exist in all of the states in this country directing the distribution of intestate personalty and the descent of intestate realty, these statutes are generally based on the \textit{English} Statute of Distributions of 1670. The provisions of this Statute, and the interpretations of it in the English cases, are guides in this country in the construction and application of similar statutory provisions.

The Canons of Descent and all existing modes and rules of descent were expressly abolished in England in 1925 by \textit{The Administration of Estates Act}.\textsuperscript{27} A complete scheme of succession is set forth in this statute, covering both realty and personalty. The principle of lineal descent in the first canon and to some extent the doctrines of the fourth and fifth canons are preserved by the statutes in this country.\textsuperscript{28}

Other principles of the common law, such as the \textit{parentelic} method of computing heirs,\textsuperscript{29} the doctrine of ancestral prop-

\textsuperscript{26} The Law of Property Act of 1922 (c. 16) repealed these provisions as from January 1, 1926. "There is no saving as to deaths before 1926, and the omission of such a saving would appear to be a mistake." Note, 5 \textit{The Complete Statutes of England} (1929) 116.

\textsuperscript{27} § 45.

\textsuperscript{28} \textit{Mechem and Atkinson, Cases on Wills and Administration} 594.

\textsuperscript{29} Distribution of intestate property among collaterals according to the \textit{parentelic} scheme, as opposed to the \textit{gradual} scheme, is preserved to some extent under some statutes in this country. For instance, the Massachusetts (\textit{Gen. Laws of Mass.} (Tercentenary ed. 1932) c. 190, § 3) and Michigan (\textit{Compiled Laws of Mich.} (1929) § 13440) statutes on intestate succession provide that if there are two or more collateral kindred in equal degree but claiming through different ancestors, those claiming through the nearest ancestor shall be preferred to those claiming through an ancestor more remote. According to such a statutory provision, a nephew would be preferred to an uncle of the intestate (See \textit{Knapp v. Windsor & Wife}, 60 Mass. 156, 162 (1850)), though under either the civil law or the common law method of computing next of kin they would be equally related to the deceased.

"Whilst in the Common Law of Descents, full effect was allowed to the operation of this principle of natural equity [namely, that of representation] since it had no tendency to frustrate the policy of preserving estates entire, that object being most effectually secured by the sole succession of the eldest male, and the preference of male to female lines. It was upon this principle of natural equity, too, that the Common Law of Descents, instead of selecting, amongst collaterals, the kinsman of the intestate nearest in degree to him without regard to the degree of their common ancestor, according to the Civil Law and the Statute of
property and the common law method of computing degrees of relationship 30 have been adopted by statute to some extent in this country. The common law rule that the legal title controls the course of descent is applicable generally in this country.

The inquiry as to what particular species of property descends to the heir of the intestate, and what passes to the next of kin, has often led to much controversy. This question is beyond the scope of this paper.

The law of succession involves the inquiry as to who are the heirs of an intestate on whom the estate devolves. They may be lineal descendants, such as children, grandchildren, or great-grandchildren, or lineal ascendants, such as parents or grandparents, or collateral kindred, such as brothers and sisters, cousins, aunts and uncles, or nephews. This inquiry is the one to which this paper is mainly devoted.

The law of succession involves the inquiry as to the persons capable of inheriting, such as aliens, bastards and posthumous children. The law in respect to these classes of heirs, as well as that in respect to adopted children, will be considered herein.

Also, the doctrine of equitable conversion and its effect on succession will be considered.

The persons who are entitled to take intestate property may be either the lineal descendants or lineal ascendants or the collateral kindred of the intestate. In order to define

Distributions, preferred the more remote kinsman descended from the child of the nearest common ancestor, as representing and standing in the place of that child, to a nearer kinsman, the child or other descendant of a more remote ancestor, and in this particular, our Statute pursues the principles of the Common Law, and the Statute of Distributions." Davis v. Rowe, op. cit. supra note 16, at 392, 393.

30 Wetter v. Habersham, 60 Ga. 193 (1878); Ector v. Grant, 112 Ga. 557, 37 S. E. 984, 53 L. R. A. 723 (1901); Paul v. Carter, 153 N. C. 26, 68 S. E. 905 (1910); Ex parte Barefoot, 201 N. C. 393, 160 S. E. 365 (1931); CARTILL'S CONSOLIDATED LAWS OF NEW YORK (1923) c. 13, § 92 (This section of the New York Decedent Estate Law was omitted in the Laws of 1929.).
these classes of heirs more clearly, "it must first be ob-
served, that by law no inheritance can vest nor can any per-
son be the actual complete heir of another, till the ancestor
is previously dead. Nemo est haeres viventis [No one is heir
to the living]. Before that time the person who is next in
the line of succession is called an heir apparent, or heir pre-
sumptive. Heirs apparent are such whose right of inheritance
is indefeasible, provided they outlive the ancestor.\textsuperscript{31} . . .
Heirs presumptive are such who, if the ancestor should die
immediately, would in the present circumstances of things
be his heirs, but whose right of inheritance may be defeated
by the contingency of some nearer heir being born, as a
brother or nephew, whose presumptive succession may be
destroyed by the birth of a child. . . "\textsuperscript{32}

As Coke said, "by the common law he is only heir which
succeedeth by right of blood." In order to succeed to an
estate of inheritance, the person claiming to be heir had to be
related by blood to the ancestor leaving the estate. Rela-
tionship of individuals by blood is known as consanguinity.
As applied to collateral heirs, this term means that the col-
lateral heir is descended from the same ancestor as the
intestate. Affinity is a connection formed by marriage. This
term is used in contradistinction to consanguinity. Bouvier
says: "Affinity, or, as it is sometimes called, alliance, is very
different from kindred. Kindred are relations by blood;
affinity is the tie which exists between one of the spouses
and the kindred of the other. Thus the relations of my
wife, her brothers, her sisters, her uncles, are allied to me by
affinity. . . But my brother and the sister of my wife are not
allied by the ties of affinity."\textsuperscript{33}

Consanguinity is either lineal or collateral. Lineal con-
sanguinity is that which subsists between persons, of whom

\textsuperscript{31} Under the Canons of Descent, the eldest son or his issue was a good
example. 2 BL. Comm. 208.
\textsuperscript{33} 2 Bouvier's Institutes 364.
one is descended in a direct line from the other, as between father and son. Thus John Stiles, in Table I, is a lineal descendant of his father, Geoffrey Stiles; Matthew Stiles, the grandchild of Geoffrey Stiles, is a lineal descendant of Geoffrey Stiles. And so upwards in the ascending line, Geoffrey Stiles is a lineal ascendent of John Stiles or Matthew Stiles. Collateral consanguinity is that which subsists between persons who are descendants of a common ancestor. Thus brothers are collaterally related to each other, and so are their respective offspring. Again the intestate and his cousin-german are collaterally related, because both descend from a common grandfather. Collateral kinsmen differ from lineal kinsmen in that the latter descend one from the other; they agree in that they descend from the same ancestor or stock.

In computing the degree of relationship of a collateral relative or kinsman to the intestate, two general modes were applied in England: The gradual scheme and the parentelic scheme. According to the gradual scheme, each generation constitutes a degree, reckoning upwards or downwards. In discussing the gradual scheme, Holdsworth says: “You take a given propositus [the person whose relations are sought to be ascertained by a genealogical table], and you reckon as a degree each step from him to the person whose relationship you are seeking to determine. Thus a son is one degree from his father, two degrees from his brother, three degrees from his brother’s son.”

84 “Line is the series of persons who have descended from a common ancestor, placed one under the other, in the order of their birth. It connects successively all the relations by blood to each other. . . Each generation lengthens the line and adds one degree to it. . . The word degree is a metaphorical expression borrowed from the steps of a ladder or of stairs; the kindred descending from their common ancestor, from generation to generation, are as so many steps in a stairs, or so many rounds in a ladder.

“The degree of kindred is established by the number of generations.” 2 Bouvier’s Institutes 355, 356.

85 3 Holdsworth, A History of English Law 145.
Reproduced from Blackstone's Commentaries.
Pollock and Maitland explain the *parentelic* scheme as follows: "By a person’s *parentela* is meant the sum of those persons who trace their blood from him. My issue are my *parentela*; my father’s issue are his *parentela*. Now in our English scheme the various *parentelae* are successively called to the inheritance in the order of their proximity to the dead man. My father’s *parentela* is nearer to me than my grandfather’s. Every person who is in my father’s *parentela* is nearer to me than any person who can claim kinship through some ancestor remoter from me than my father. . . . The rule then becomes this: Exhaust the dead man’s *parentela*; next exhaust his father’s *parentela*; next his grandfather’s; next his great-grandfather’s. We see the family tree in some such shape as that pictured [in Table II] . . .

**TABLE II**

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<table>
<thead>
<tr>
<th>Atalus</th>
<th>Pater</th>
<th>Titius</th>
</tr>
</thead>
<tbody>
<tr>
<td>Atalus</td>
<td>Titius</td>
<td></td>
</tr>
<tr>
<td>Pater</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Titius</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
```

"The remotest kinsman who stands in Parentela I is a nearer heir than the nearest kinsman of Parentela II. Between persons who stand in different *parentelae* there can be no competition."

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The *parentelic* scheme was applied in England in the law of succession to realty.\(^{37}\)

In this country the *parentelic* scheme has been adopted to some extent in some of the statutes.\(^{38}\) Otherwise, it does not appear to be applied in any jurisdiction.

The *gradual* scheme was applied in England in the law of succession to personalty.\(^{39}\)

The authorities generally state that there are two methods of computing proximity of relationship, that is, in determining the nearest *collateral* kinsman, namely, that of the civil law and that of the canon law, which was adopted by the common law. The common law and canon law method was to begin with the common ancestor of the deceased and the person whose relationship to him is to be determined, and count down to each one, each generation being one degree or step, and in whatever degree the more distant is removed from the common ancestor is the degree in which they are related. Thus the deceased is related to his brother in the first degree; to his cousin-german, uncle and nephew all in the second degree; and to his grand-nephew and first cousin once removed (second cousin) in the third degree. The civil law method is to count from the deceased to the common ancestor and then downward from him to the person whose relationship to him is to be determined, reckoning one degree for each generation, and the total number of steps indicates the degree of relationship. Thus the deceased is related to his cousin-german and grand-nephew in the fourth degree; to his nephew and uncle in the third degree; to his brother in the second degree; and to his first cousin once removed in the fifth degree.

Let us take the illustration in Table III on the next page. Suppose John Stiles dies intestate, and we seek to


determine the degree of relationship to him of Charles Stiles, nephew, and Robert Stiles, cousin-german. The common ancestor of the cousin-german and John Stiles is the grandfather of the latter. There are two degrees up to the common ancestor from John Stiles, and two degrees down to the cousin-german from the common ancestor. The degree on kinship is determined by the number of steps in the longest line; so the cousin-german is related to John Stiles in the second degree. In case of the nephew, he is related to John Stiles in the second degree, also, under the common law and canon law. According to the civil law, we would in case of the cousin-german count up to the common ancestor and down to the cousin-german, the total number of steps determining the degree of kinship, which would be the fourth degree; and in case of the nephew, he would be re-
lated to John Stiles in the third degree. Thus, under the
civil law the nephew would be one degree nearer to John
Stiles than the cousin-german.\footnote{The child of A.'s uncle or aunt is A.'s cousin-german (or first cousin); and the child of A.'s first cousin (or cousin-german) is A.'s first cousin once removed (or second cousin); and the child of A.'s first cousin once removed (or second cousin) is A.'s third cousin. The children of first cousins are second cousins to each other, and the children of second cousins are third cousins to each other. Webster's New International Dictionary (1918) 519.}

Every generation in lineal consanguinity constitutes a
different degree, reckoning upward or downward. This meth-
od of computing degrees of kinship in the direct line ob-
tains in the civil, canon and common law. It is in the col-
lateral line only that the civil law method differs from that
of the canon and common law.

In discussing the difference between the gradual and the
parentelic schemes of computation, Holdsworth uses a table

\begin{table}
\centering
\begin{tabular}{|c|c|}
\hline
\textbf{X} & \textbf{O} \\
\hline
\textbf{A} & \textbf{B} \\
\hline
\textbf{C} & \textbf{D} \\
\hline
\textbf{E} & \textbf{F} \\
\hline
\end{tabular}
\caption{Table IV}
\end{table}

which I have set forth as Table IV. He says: "Let O be the
propositus. O to F equal five degrees, reckoning up to A
and down to F. O to B equal four degrees. Thus if you
reckon according to the gradual scheme B is nearer to O
than F. Now let us see what happens if you reckon accord-
ing to the parentelic scheme. Seeing that O has no descend-
nants, you look first at \( C \) to see if he has any descendants. He has none. You then go to \( A \) and take his descendants in order. If \( D \) and \( E \) be dead, \( F \) will take . . . for, as we have seen, neither \( A \) nor \( C \) can take because they are direct ascendants. Thus \( F \), though farther from \( O \) than \( B \), if we reckon by the gradual scheme, is nearer if we reckon by the parentelic.

"Both the Year Books and the text writers show us that it is the parentelic scheme which is the basis of the law of inheritance. We will take an instance from one of the earliest Year Books of Edward I's reign. In a case reported in 1293 [Y. B. 21, 22 Ed. I. (R. S.) 36, 38] . . . the pedigree [in Table V] can be constructed from the pleadings of the parties . . .

\[
\begin{align*}
\text{TABLE V} \\
\begin{array}{c}
\times \\
| \\
Jurdan & \text{Emma} \\
| \\
Agnes & \text{Jurdan} & | \\
\text{Laurence} & \text{Thomas} & | \\
\text{John} & \\
\end{array}
\end{align*}
\]

"The plaintiff traced his claim from John, and contended that as neither Thomas, nor Jurdan the grandfather, nor Jurdan the great-grandfather had left issue, the land must descend to the issue—the parentela—of \( X \), of which he, \( W \), was the representative. He was met by the assertion that 'Jurdan the great-grandfather had a son named Jurdan and (the son had) a sister named Agnes, which Agnes had a son named Laurence, who is still alive; and if there is to be a resort, it should be to Agnes, the sister of Jurdan the grandfather and to Laurence, the son of Agnes, rather than to
Emma, the sister of the great-grandfather.' The other side could not answer this reasoning except by the averment that Agnes was illegitimate. Britton [ii 325] thus states the principle:—'For default of heirs who would have made a degree in the direct line, the right shall descend to one who shall be found in the collateral line, and for default of a degree in the collateral, the right shall resort again to the direct line at a higher degree, and if it find that degree full it shall attach there; if not, it shall go on descending in the collateral line, and so of all the other degrees.' 41

Pollock and Maitland say that whether the parentelic scheme of computing proximity of kinship 'is of extremely ancient date, or whether it is the outcome of feudalism, is a controverted question which cannot be decided by our English books and records. We can only say that in the thirteenth century it seems to be among Englishmen the only conceivable scheme. Our text-writers accept it as obvious. . .' 42

So the parentelic scheme is the basis of the law of succession to real property at the common law in England. The civil law method is the one used in computing next of kin under the English Statute of Distributions of 1670. There appears to be no scope of operation for the canon law and common law method of computing proximity of kinship at the common law and under the Statute of Distributions in England, as far as succession to property is concerned.43

41 Holdsworth, op. cit. supra note 35, at 146, 147.
42 Pollock and Maitland, op. cit. supra note 36, at 297.
43 As to collateral relationship within which marriage was forbidden under the early English law, see 32 Hen. VIII, c. 38. In Lord Coke's First Institute, Vol. 2, p. 158, wherein he states the common law method, a marginal reference is made to the statute of 32 Hen. VIII, c. 38. In the Canon Law it is provided that in the collateral line marriage is invalid to the third degree inclusively. 5 Augustine, A Commentary on the New Code of Canon Law, Canon 1076; Whitman, The Law of Christian Marriage, 7 Notre Dame Lawy. 146, 163, 164. This would extend to and include first cousins once removed (or second cousins).

Probably the common law method of computing degrees of relationship was applied only with respect to the eligibility of relatives to contract marriage.
There is apparently no instance in the law of succession to property in England where the common law method of computing proximity of kinship has been applied.

In this country the statutes generally name certain relatives and the order in which they shall succeed to intestate property. In so far as this is done, the statute is controlling; but it not infrequently occurs that none of the specified relatives survive the intestate, and then it becomes important to determine proximity of kinship in the matter of succession to his property. Generally the question is one of interpreting the expression "next of kin" or determining who the "heirs" are or who the "heir" is that is entitled to succeed to the intestate property. The general rule is, either by statute or judicial construction, that the civil law method controls. In a few jurisdictions the common law or canon law method has been adopted.44

The right to inherit property or to succeed to property is said, in most cases that have dealt with this question, to be a mere creature of the law, a civil right and not a natural right.45 This does not mean, however, that the right is not recognized at common law.46 Yet in some cases the courts have said that the right is wholly a creature of statute.47 In a comparatively recent Wisconsin case 48 the right is declared to be a natural right which cannot be wholly taken away or substantially impaired by legislation. The various ramifications involved in this question are beyond the scope of this discussion. Even under the Wisconsin

44 See authorities cited in note 30, supra.
45 "In Maryland a statute provides: 'If there be no widow or relations within the fifth degree, which shall be reckoned by counting down from the common ancestor to the more remote, the whole surplus shall belong to the State... for the use of the public schools.. .' Md. Ann. Code (Bagby, 1924) Art. 93, § 140." MECHEM AND ATKINSON, op. cit. supra note 28, at 7, note 2.
46 DESCENT AND DISTRIBUTION, 18 C. J. 804, and authorities cited.
view, it is admitted that reasonable regulations of the subject of succession may be made, such as prescribing lines of descent, limiting the persons who may take as heirs or devisees, and including collateral heirs or cutting them off entirely in the succession.\textsuperscript{49}

Under the general rule that, except where restricted by constitutional or treaty provisions, the state has plenary power over the descent and distribution of property within its borders, the problem of statutory construction exists. It is said the general rules of statutory construction are applicable to statutes of descent and distribution.\textsuperscript{50} This problem is complicated because of the following factors: (1) Some states have statutes expressly adopting the common law of England; and (2) The statute involved in a given case in this country may have been based on the \textit{English Statute of Distributions of 1670}. The first factor may be eliminated on the theory that the state statute in controversy may include a \textit{complete} scheme of succession and so supercede the common law.\textsuperscript{51} Where the particular state statute is based on the English Statute, the judicial construction placed on that Statute, in so far as it is similar to the state statute, is generally adopted.

\textbf{Blackstone’s Canons of Descent}

"I. The first rule is, that inheritances shall lineally descend to the issue of the person who last died actually seised \textit{in infinitum}, but shall never lineally ascend."

Blackstone’s Comment on this canon. "... no person can be properly such an ancestor, as that an inheritance of

\textsuperscript{50} \textit{Descent and Distribution}, 18 C. J. 806.
\textsuperscript{51} See: Kochersperger v. Drake, 47 N. E. 321 (Ill. 1897); Steinhagen v. Trull, 151 N. E. 250 (Ill. 1926).

Notwithstanding the so-called \textit{completeness} of the statutory scheme, there are certain common law principles that may be applied.
lands or tenements can be derived from him, unless he hath had actual seisin of such lands, either by his own entry, or by the possession of his own or his ancestor's lessee for years, or by receiving rent from a lessee of a freehold, or unless he hath had what is equivalent to corporeal seisin in hereditaments that are incorporeal, such as the receipt of rent, a presentation to the church in case of an advowson, and the like. But he shall not be accounted an ancestor, who hath had only a bare right or title to enter or be otherwise seised. And, therefore, all the cases which will be mentioned in the present chapter are upon the supposition that the deceased (whose inheritance is now claimed) was the last person actually seised thereof. For the law requires this notoriety of possession, as evidence that the ancestor had that property in himself, which is now to be transmitted to his heirs. . . . The seisin, therefore, of any person, thus understood, makes him the root or stock, from which all future inheritance by right of blood must be derived, which is very briefly expressed in this maxim, seisina facit stipitem [seisin makes the stock].

"When, therefore, a person dies so seised, the inheritance first goes to his issue; as if there be Geoffrey, John, and Matthew, grandfather, father, and son, and John purchases lands, and dies, his son Matthew shall succeed him as heir, and not the grandfather Geoffrey, to whom the land shall never ascend, but shall rather escheat to the lord.

"This rule, so far as it is affirmative and relates to lineal descents, is almost universally adopted by all nations; and it seems founded on a principle of natural reason, that (whenever a right of property transmissible to representatives is admitted) the possessions of the parents should go, upon their decease, in the first place to their children, as those to whom they have given being, and for whom they are therefore bound to provide. But the negative branch, or total exclusion of parents and all lineal ancestors from
succeeding to the inheritance of their offspring, is peculiar to our own laws, and such as have been deduced from the same original. For, by the Jewish law, on failure of issue, the father succeeded to the son in exclusion of brethren, unless one of them married the widow and raised up seed to his brother. And by the laws of Rome, in the first place, the children or lineal descendants, were preferred; and on failure of these, the father and mother or lineal ascendants succeeded together with the brethren and sisters; though by the law of the twelve tables the mother was originally, on account of her sex, excluded. Hence this rule of our laws has been censured and declaimed against as absurd, and derogating from the maxims of equity and natural justice. Yet that there is nothing unjust or absurd in it, but that on the contrary it is founded upon very good legal reason, may appear from considering as well the nature of the rule itself, as the occasion of introducing it into our laws.

"We are to reflect, in the first place, that all rules of succession to estates are creatures of the civil polity, and juris positivi [of positive law] merely. The right of property, which is gained by occupancy, extends naturally no further than the life of the present possessor, after which the land, by the law of nature, would again become common, and liable to be seised by the next occupant; but society, to prevent the mischiefs that might ensue from a doctrine so productive of contention, has established conveyances, wills, and successions, whereby the property originally gained by possession is continued and transmitted from one man to another, according to the rules which each state has respectively thought proper to prescribe. There is certainly, therefore, no injustice done to individuals, whatever be the path of descent marked out by the municipal law.

"If we next consider the time and occasion of introducing this rule into our law, we shall find it to have been grounded upon very substantial reasons. I think there is no doubt to
be made, but that it was introduced at the same time with, and in consequence of, the feodal tenures. For it was an express rule of the feodal law, that *successionis feudi talis est natura, quod ascendentes non succeedunt* [the nature of feudal succession is such that those in the ascending line do not inherit] . . . . Our Henry the First indeed, among other restorations of the old Saxon laws, restored the right of succession in the ascending line; but this soon fell again into disuse, for so early as Glanvil's time, who wrote under Henry the Second, we find it laid down as established law that *haereditas nunquam ascendit* [the inheritance never ascends], which has remained an invariable maxim ever since. The circumstances evidently show this rule to be of feodal original; and taken in that light, there are some arguments in its favor, besides those which are drawn merely from the reason of the thing. For if the feud of which the son died seised was really *feudum antiquum* [an ancient fee], or one descended to him from his ancestors, the father could not possible succeed to it, because it must have passed him in the course of descent, before it could come to the son; unless it were *feudum maternum*, or one descended from his mother, and then for other reasons . . . the father could in no wise inherit it [as he did not derive his blood from the purchaser]. And if it were *feudum novum* [a new fee], or one newly acquired by the son, then only the descendants from the body of the feudatory himself could succeed, by the known maxim of the early feodal constitutions, which was founded as well upon the personal merit of the vassal, which might be transmitted to his children, but could not ascend to his progenitors, as also upon this consideration of military policy, that the decrepit grandsire of a vigorous vassal would be but indifferently qualified to succeed him in his feodal services. Nay, even if this *feudum novum* were held by the son *ut feudum antiquum*, or with all the qualities annexed to a feud descended from his ancestors, such feud must in all respects have descended
as if it had been really an ancient feud; and therefore could not go to the father because if it had been an ancient feud the father must have been dead before it could have come to the son. Thus whether the feud was strictly novum, or strictly antiquum, or whether it was novum held ut antiquum, in none of these cases the father could possibly succeed. These reasons, drawn from the history of the rule itself, seem to be more satisfactory than that quaint one of Bracton, adopted by Sir Edward Coke, which regulates the descent of lands according to the laws of gravitation."  

Lineal ascendants entitled to inherit as collateral descendents, in some instances. In commenting on lineal ascent, Stephen says: "Such at least have been alleged . . . as the reasons of the rule which excluded the ascending line. The reasoning, however, was not consistently applied, for it has been justly observed, that if the father is not to inherit the estate, because it must be presumed to have already passed him in the course of descent, the elder brother should, upon the same principle, never be heir to the younger; and if the object is merely to pass over a decrepit feudatory, the father’s eldest brother should never succeed to his nephew; and yet a succession in both these collateral lines was always permitted by law.”  

In Cruise’s Digest is a very interesting discussion on lineal ascent: "‘If (says Littleton, § 3) there be father and son, and the father hath a brother that is uncle to the son, and the son purchase land in fee simple, and die without issue, living his father; the uncle shall have the land, as heir to the son, and not the father, yet the father is nearer of blood, because it is a maxim in law, that inheritance may lineally descend, but not ascend. Yet if the son, in this case, die

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1 2 BL. COMM. 209, 210, 211, 212.  
2 1 STEPHEN, NEW COMMENTARIES ON THE LAWS OF ENGLAND (Partly founded on Blackstone.) (5th ed.) 413, 414.
without issue and his uncle enter into the land, as heir to
the son, as by law he ought, and after the uncle dieth with-
out issue living, the father shall have the land, as heir to
the uncle, and not as heir to the son.'

"Lord Coke has observed on this passage, that if the
uncle does not enter the father cannot inherit from him,
because he must make himself heir to the person last seised,
which the uncle was not; for the person last seised was the
son, to whom the father cannot make himself heir.

"A father or mother may, however, be cousin to their
own child, and in that relation may inherit from him, not-
withstanding the relation of father or mother.

"A son died seised of lands in fee, without issue, or brother
or sister, but leaving two cousins his heirs at law, one of
whom was his own mother; and the question was whether
the mother could take as heir to her son. It was determined
614], that though a father or mother could not, as father
or mother, inherit immediately after their son, yet if the
case should so happen, that the father or mother were
cousin to the son, and as such his heir, they might take
notwithstanding; and that here, though the heir was also
mother, this did not hinder her from taking in the capacity
or relation of cousin." 8

The Exclusion of Ascendants from the Inheritance. If an
intestate left no lineal descendants the common law rule
was that ascendants were incapable of inheriting his realty.
The realty would escheat rather than go to a lineal ascen-
dant. It was not easy to find an explanation for this rule.
Bracton resorted to a metaphor. An inheritance was said to
descend; it was said to be like a heavy body which falls
downward. It could not fall upward. Pollock and Maitland
criticised this explanation as follows: "We cannot say that

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3 3 Cruise's Digest (1827) 231.
the inheritance always descends, for in the language of Bracton's time it is capable of 'resorting,' of bounding back. My land can not ascend to my father, but it can resort to my father's brother. Thus we are driven to say that, though the heavy body may rebound, it never rebounds along a perpendicular line. These legal physics, however, are but afterthoughts."

The reason, based on the feudal system, that Blackstone advanced, was not applied consistently in practice. If the father of an intestate did not succeed to the inheritance because it was presumed to have passed him in the course of descent, the same reason would have excluded an elder brother from taking an estate by descent from a younger. If the inheritance did not pass to the father of the intestate, lest the lord would have been attended by an aged, decrepit feudatory, the same reason would have been still stronger to have excluded the father's eldest brother from the inheritance. Yet both of these classes of relatives were admitted to an inheritance at the common law.

Section 6 of the Inheritance Act of 1833 in England provides that "Every lineal ancestor shall be capable of being heir to any of his issue; and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor or his issue." There seems to be only one case in which this statute has been construed to any extent. In *Re Don's Estate* it is said that the word "ancestor" is used

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6 3 & 4 Will. 4, c. 106.
in its popular sense as meaning *progenitor*, as distinguished from its technical meaning in which it is put in opposition to “heir” (in which sense it is said that a younger brother may be the ancestor of his elder brother); and “the father is to come next before the brothers, who before the Act would have been the persons to take in default of issue.” While the father would have priority over the mother of the intestate, under this statute, the mother would not be entirely excluded. Female relatives or descendants were only postponed to male descendants, under the Canons of Descent. It seems, also, that the *parentelic* scheme of computing proximity of kinship is not eliminated from consideration by this statute. Thus, if the intestate leaves no issue or parents, the brothers and sisters would be called to the inheritance next in order; and the descendants of the latter classes would take in preference to grandparents.

Section 46 of The Administration of Estates Act of 1925 in England, in providing the order of succession to intestate realty and personalty, includes parents and grandparents. There is no lineal ascent beyond grandparents.

Under the Statute of Distributions of 1670 in England lineal ascendants were entitled to succeed to the property of an intestate. If the intestate left no issue surviving him, his father, if living at the time of the death of the child intestate, succeeded to the child’s personalty. It appears that the father was entitled to the personalty to the exclusion of the mother. The reasons are obvious. If the intestate was survived by his mother, but not by any issue, father, or brothers or sisters, the mother was entitled to all of his personalty. If the intestate was not survived by children, but was survived by a wife and father, his per-

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8 Re Don’s Estate, *op. cit. supra* note 7.
9 15 Geo. 5, c. 23.
sonalty went in moieties to the wife and father. But the Statute of 1 Jac. 2, c. 17, provided "That if after the death of the father any of his children should die intestate, without wife or children, in the lifetime of the mother, every brother and sister and the representatives of them shall have an equal share with the mother." According to the provisions of this statute, if the intestate was not survived by children or father, but was survived by his mother and brothers and sisters, or the representatives of the latter (nephews and nieces), and a wife, the wife was entitled to a moiety, and the other moiety was divided between the mother and these collaterals. Before this Statute of James, the mother would have been entitled to a moiety and the wife a moiety.

Generally, under the Statute of Distributions in England, the Civil Law method of computing degrees of proximity of kinship has been applied. But there was one exception. According to the Civil Law, the brother and the grandmother of an intestate would be related to him in equal degree of consanguinity. It is said that the Civil Law preferred the grandmother to the brother or any other person in the collateral line, as she was in the lineal ascending line. But the English chancellors preferred the brother to the grandmother, in the distribution of intestate personality, on the ground that the brother made title immediately from his deceased brother, while the grandmother could only claim mediately through the father of the deceased. The purpose of the Statute of James was to prevent the possibility of the mother marrying again and transferring all the personality, she acquired from the child, to another husband. Blackborough v. Davis, 1 P. Wms. 41, 49, 24 Eng. Rep. 285, 288 (1701).


17 Earl of Winchelsea v. Norcliff, op. cit. supra note 16; Note, 22 Eng. Rep. 1080, 1081; Collingwood and Pace, 1 Vent. 413, 424, 86 Eng. Rep. 262, 269 (1664). While the latter case was decided before the passage of the Statute of
less, if the intestate left no nearer kindred than a grandfather or grandmother and uncles and aunts, the grandfather or grandmother was preferred, under the Statute of Distributions, both as to distribution of personalty and as to administration, the grandfather or grandmother being in the second degree and the uncles and aunts being in the third degree.\(^8\) But great-grandfathers or great-grandmothers, being in the third degree, were entitled to distributive shares with uncles and aunts.\(^9\) As between paternal and maternal lineal ascendants, however, there was no preference, for dignity of blood was not regarded as material under the Statute of Distributions. Thus if the intestate left a paternal grandfather and a maternal grandmother, as the only next of kin, his personalty was divided equally between them.\(^20\)

Lineal ascendants were entitled to inherit, under the Civil Law. In *Cooper's Justinian*\(^21\) the Civil Law rules are stated as follows: If the intestate left no descendants, his father or mother, or any other surviving relatives, in the ascending line, inherited in preference to collaterals, except brothers and sisters. If there were ascendants, the nearest in degree were preferred, whether male or female, whether descended from the paternal or maternal line. A father or mother would have excluded an ascendant in a more remote degree. If the intestate left no father or mother, but several ascendants in equal degree, the property was not always divided equally between them; but one half was

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Distributions, it was approved by Chief Justice Holt in *Blackborough v. Davis*, *op. cit. supra* note 14.


"It has been expressly held that the grandfather is next of kin before an aunt or uncle, and which is the necessary result when the degrees are computed by the Civil Law. . . . *Phillips v. Peteet*, 35 Ala. 696." *Cox v. Clark*, 93 Ala. 400, 9 So. 457, 458 (1891).


\(^21\) P. 543.
SUCCESSION TO INTESTATE PROPERTY

given to the ascendants representing the father, whatever their number, and the other half to the ascendants representing the mother.

Under the statutes in this country, the Civil Law method of distributing an intestate’s property among his ascendants is not followed. The general tendency in the statutes has been to distribute an intestate’s property among his next of kin in equal degree, making no distinction between ascendants and descendants, and between kindred on the father’s side and those on the mother’s side. This problem was involved in *Knapp v. Windsor & wife.* The claimants of the property of the intestate, in this case, were a paternal grandmother and the maternal grandfather and grandmother. It was argued that, in accordance with the Civil Law rule, one half of the inheritance went to the grandparent on the father’s side and the other half went to the two grandparents on the mother’s side. But the court held that each grandparent, being a next of kin in equal degree, under the Massachusetts statute, took a third. The court said: “It is quite manifest ... that this kind of representation among ascendants, so that one half shall go to the paternal ancestors, and one half to the maternal, without regard to numbers, on each side, has no existence and no analogy in our law, and therefore that the rule of the civil law, founded upon positive enactment, and not on any great principle of general equity, can throw little light on the subject, or have any weight in deciding the present question.”

Due to the diversity of statutes in this country, we can not formulate any general rules as inheritance by lineal ascendants. There is no definite uniformity in the provisions

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22 60 Mass. 156 (1850).

Where the ancestral property doctrine is not applicable, the Supreme Court of Michigan says that as between the paternal grandmother and the maternal grandmother of the intestate, they would share equally, since they are of the same degree of kindred. *In re Wortman’s Estate*, 210 Mich. 541, 177 N. W. 967 (1920).
of the various statutes. Professor Reppy says: "Thus, for example, in some states both parents may take, Harrison v. Harrison (1916) 21 N. M. 372, L. R. A. 1916E, 854, 155 Pac. 356; Brown v. Baraboo (1895) 90 Wis. 151, 30 L. R. A. 320, 62 N. W. 921; in some the father is preferred over the mother, Matter of Kane (1902) 38 Misc. 276, 77 N. Y. S. 874; Wright v. Wright (1898) 100 Tenn. 313, 45 S. W. 672; in a few the parent takes only a life estate, Konutz v. Davis (1879) 34 Ark. 590; in still others, such as Illinois, where there are surviving brothers and sisters, the parent shares with the brothers and sisters, but takes a double portion, Cronkhite v. Strain (1904) 210 Ill. 331, 71 N. E. 392."

Seisina facit stipitem. Kent discusses this maxim as follows: "By the common law, the ancestor from whom the inheritance was taken by descent, must have had actual seisin, or seisin in deed, of the lands, either by his own entry, or by the possession of his, or his ancestor's, lessee for years, or by being in the receipt of rent from the lessee of the freehold, in order to transmit it to his heir. The heir, to be entitled to take in that character, must be the nearest male heir of the whole blood to the person who was last actually seised of the freehold. . . . It is this seisin

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23 REPPY, CASES ON THE LAW OF SUCCESSION 130, note 59.

In Smith v. Gaines, 35 N. J. Eq. 65, 66 (1882), the court said: "The first canon of descent declares that inheritances shall never lineally ascend. This canon, though modified by statute so as to let in the father, and also the mother to a limited extent, in certain designated junctures, is still in force in this State."

In Rocky Mountain Fuel Co. v. Koviacs, 26 Colo. App. 554, 144 Pac. 863 (1914), the words "lineal heirs," used in a statute giving a right of action for wrongful death, were interpreted to include a father or mother.

The words "next of kin in equal degree" include grandparents. See Knapp v. Windsor & wife, op. cit. supra note 22.

Where the real estate of an intestate descends equally to his father and mother, it has been held that they take as tenants in common and by moieties, and not by entitities; and upon the death of one of the parents, the other surviving, the share of the deceased parent does not go to the survivor, by right of survivorship. Brown v. Baraboo, 90 Wis. 151, 62 N. W. 921, 30 L. R. A. 320 (1895). This rule is to be distinguished from the common law rule applicable where real estate is granted to a husband and wife; in such a case they take by entitities, and not by moieties. The survivor would take the whole.
which makes a person the *stirps* or stock from which all future inheritance by right of blood is derived. If, therefore, the heir, on whom the inheritance was cast by descent, dies before he has acquired the requisite seisin, his ancestor, and not himself, becomes the person last seised of the inheritance, and to whom the claimants must make themselves heirs.”

Under this Canon, *seisin* creates the *root* or *stock* of descent; without seisin there could be no *propositus*. For one to succeed to the realty of another, as a lineal descendant, it was necessary that the latter (the *propositus*) be seised. One could not transmit title to his lineal descendants, under this Canon, unless he had the requisite seisin. If the supposed *propositus* was himself an heir to another person and outlived that other person but died before entry (that is, before he had acquired a seisin), he could not transmit the interest he otherwise would have had to his own lineal descendants. For a person to be a *propositus* or an *ancestor*, so that an inheritance of lands or tenements could be derived from him, he had to have an actual seisin of such lands or tenements, either by his own entry, or by the possession of his own or his ancestor’s lessee for years, or by receiving rent from a lessee of the freehold, or have the equivalent of a corporal seisin in hereditaments that are incorporeal, such as receipts of rent, the presentation to the church in case of an advowson, and the like. No one was considered an *ancestor* who had only a bare right to enter.

The nature of the seisin which a person (the supposed *ancestor* or *propositus*) acquired, and which would, under this Canon, constitute him an ancestor, to whom a claimant sought to make himself an heir, either lineal or collateral,

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24 4 Kent's Comm. (14th ed.) 385, 386.

Thus, where *A.* died intestate and seised of Blackacre, leaving *B.* as his heir, and *B.* died before entry, leaving *C.* as his heir, but, at the death of *B.*, *D.* was heir of *A.*, *D.* would inherit Blackacre, and *C.* would not be entitled to inherit any interest in Blackacre. *C.*, not being an heir of the person last seised, could not inherit Blackacre.
depended materially on the question of whether the estate had been obtained by the person (the supposed ancestor or propositus) by descent or by purchase. Where one obtained hereditaments by purchase, and such hereditaments were of a corporeal nature, he generally acquired at the same time the corporal seisin or possession. Where the transfer was founded on feudal principles, it was attended with actual livery of seisin. In some instances where the supposed ancestor acquired an estate by purchase, he could transmit it to his heirs without having had an actual seisin. Kent gives several instances: 25 "... if, upon an exchange of lands, one party had entered, and the other had not, and died before entry, his heir would still take by descent, for he could not take in any other capacity. It is likewise the rule in equity, that if a person be entitled to a real estate by contract, and dies before it be conveyed, his equitable title descends to his heirs. The possession of a tenant for years is the possession of the person entitled to the freehold; so that one who has a reversion or remainder in fee expectant upon the determination of a term for years, is in the actual seisin of his estate, for the possession of the termor is in law that of the remainderman or reversioner. There may also be a seisin of a remainder, or reversion expectant upon a freehold estate. The seisin or possession of one parcencer or tenant in common is the seisin and possession of the other. So, also, the possession of a guardian in socage is the possession of his infant ward, and, sufficient to constitute the technical possessio fratris, 26 and transmit the inheritance

25 4 KENT'S COMM. 386, 387, 388.
26 This is a technical term applied in the law of descent to denote the possession by one in such privity with another person as to be considered the latter's own possession. Of some inheritances, such as remainders, reversions, and executory devices, there could be no seisin, or possessio fratris; "and if they are reserved or granted to A. and his heirs, he who is heir to A. when they come into possession is entitled to them by descent, that is, that the person who would have been heir to A. if A. had lived so long and had then died actually seised." 2 BR. COMM. 228, note 76.

to the sister of the whole blood. If the estate be out in a
freehold lease when the father dies, then there is not such
possession in the son as to create the *possessio fratris*. The
tenancy for life in a third person suspends the descent, un-
less the son enters in his lifetime, or receives rent after the
expiration of the life estate. It is a well-settled rule of the
common law, that if the person owning the remainder or
reversion expectant upon the determination of a freehold
estate, dies during the continuance of the particular estate,
the remainder or reversion does not descend to his heir, be-
cause he never had a seisin to render him the stock or *term-
inus* of an inheritance. The intervention of the estate of free-
hold between the possession and the absolute fee prevents
the owner of the fee from becoming the stock of inheritance,
if he dies during the continuance of the life estate. The es-
tate will descend to the person who is heir to him who
created the freehold estate, provided the remainder or re-
version descends from him; or if the expectant estate had
been *purchased*, then he must make himself heir to the first
purchaser of such remainder or reversion at the time when
it comes into possession. The purchaser becomes a new stock
of descent, and on his death the estate passes directly to
his heir at law. He takes the inheritance, though he may be
a stranger to all the mesne reversioners and remaindermen,
through whom the inheritance had devolved. . . . Should
the person entitled in remainder or reversion exercise an act
of ownership over it, as by conveying it for his own life, it
would be an alteration of the estate sufficient to create in
him a new stock or root of inheritance. It would be deemed
equal to an entry upon a descent.”

27 In Stringer v. New, 9 Mod. 363, 88 Eng. Rep. 509 (1741), A. was tenant
for life, with a remainder in tail and a reversion in fee expectant. He conveyed
to B., by lease and release. His father was the devisor, creating these estates.
A. had a sister of the half blood, who was a daughter of his father by a former
*venter*; he had also a sister of the whole blood. The court held that A., had
altered the course of descent as to the reversion in fee, so as to constitute him-
self a new *stock* of descent, saying that if he had not altered the course of
descent, the reversion in fee would have descended “to the sister of the half
blood, who was the elder daughter, and equally heir to the father with the
I have considered seisin only with respect to lineal descendants. Its importance with respect to collateral relations will be considered under Canon V. The Administration of Estates Act in England abolishes "all existing modes, rules and canons of descent," and prescribes, with some exceptions, a course of devolution for both realty and personality. The doctrine included in the maxim *seisina facit stipitem* has no scope of operation under the provisions of this Act.

This common law doctrine was followed by the courts in some of the early decisions in this country. Now it has been abrogated in most, if not all, states, so that property descends without regard to the maxim *non jus, sed seisina facit stipitem* (not right, but seisin makes a stock from which the inheritance must descend). The statutes in this country have generally altered the common law rule; and they extend title by descent generally to all the real estate owned by the intestate ancestor at his death, including every interest and right, legal and equitable, in lands, tenements, and hereditaments, either seised or possessed by the intestate, or to which he was in any manner entitled. 28 If the intestate has any interest in or ownership of the property in question, regardless of seisin, he is the *propositus* in the law of succession, under most, if not all, statutes in this country. 29

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(To be continued.)

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28 See: *Tiffany, Real Property* (2nd ed.) 1891; 4 *Kent's Comm.* 388; *Descent and Distribution*, 18 C. J. 817, and cases cited.

29 As to what property is subject to descent and distribution, see *Descent and Distribution*, 18 C. J. 811, 812, and authorities cited.

In Kean's Lessee v. Hoffecker, 2 Harr. 103, 29 Am. Dec. 336, 337 (1836), the court said: "In England seisin is necessary to make the stock of descent, but not so in this State. With us, title or any manner of right, legal or equitable, is sufficient."