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Principles of the Law of Succession to Intestate Property (continued)

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PRINCIPLES OF THE LAW OF SUCCESSION TO INTESTATE PROPERTY
(Continued)

"II. A second general rule or canon is, that the male issue shall be admitted before the female."

Blackstone's comment on this Canon. "Thus sons shall be admitted before daughters; or, as our male lawgivers have somewhat uncomplaisantly expressed it, the worthiest blood shall be preferred. As if John Stiles hath two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies; first Matthew, and (in case of his death without issue) then Gilbert shall be admitted to the succession in preference to both the daughters.

"This preference of males to females is entirely agreeable to the law of succession among the Jews, and also among the states of Greece, or at least among the Athenians; but was totally unknown to the laws of Rome (such of them I mean as are at present extant), wherein brethren and sisters were allowed to succeed to equal portions of the inheritance. . . . The true reason of preferring the males must be deduced from feodal principles; for, by the genuine and original policy of that constitution, no female could ever succeed to a proper feud, inasmuch as they were incapable of performing those military services, for the sake of which that system was established. But our law does not extend to a total exclusion of females, as the Salic law, and others, where feuds were most strictly retained; it only postpones them to males; for though daughters are excluded by sons, yet they succeed before any collateral relations; our law . . . thus steering a middle course between the absolute rejection of females and the putting them on a footing with males." ¹

¹ 2 BL. COMM. 213, 214.
Holdsworth's comment. "Even before the Conquest the preference of males to females was the rule. 'This precedence is far older than feudalism, but the feudal influence made for its retention or resuscitation.' At the same time, it is clear that as early as the reign of Henry I women could inherit after men. We shall see that this preference holds good not only in the descending, but also in the ascending line; and that, after some controversy, it has been applied to ascertain the order in which the remotest collateral is entitled to inherit." In discussing the application of this rule to remote collateral heirs who had descended from lineal ascendants, Holdsworth says: "... the Year Books still kept open the question as to the priority between the various ascendants on the father's or the mother's side. This question was discussed in 1573 in the case of Clere v. Brook. The pedigree in that case was as [set forth in Table VI]...

<table>
<thead>
<tr>
<th></th>
<th>John Young</th>
<th>John Clere</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Humphrey Young</td>
<td>Edward Clere</td>
</tr>
<tr>
<td></td>
<td>Dorothy</td>
<td></td>
</tr>
<tr>
<td>Edward Young</td>
<td>Willie Hadden = Margaret</td>
<td></td>
</tr>
<tr>
<td>Clere Hadden</td>
<td>(the purchaser)</td>
<td></td>
</tr>
</tbody>
</table>

"The question to be decided was whether Edward Young or Edward Clere was the heir to Clere Hadden the purchaser. It was held that Edward Young was the heir, because the ascendants in the paternal line and their descendants must be exhausted before recourse can be had to the mother and the maternal ascendants. So far the decision followed the Year Book cases, and added nothing to the law. But Manwood, C. B., ventured on the dictum, assented to by the
judges of the court of Common Pleas, that if there is only a question as between paternal ancestors, the descendants of the less remote female paternal ancestor will be preferred to the descendants of the more remote female paternal ancestor. For instance, the brother or sister of the purchaser's [paternal] grandmother will be preferred to the brother or sister of the purchaser's great-grandmother [paternal grandfather's mother]. This dictum seems at the time to have been accepted as good law. Thus Bacon says, 'In the first degree the law respecteth dignity of sex and not proximity; and therefore the remote heir on the part of the father shall have it before the near heir on the part of the mother; but in any degree paramount the first, the law respecteth it not; and therefore the near heir of the grandmother on the part of the father shall have it before the remote heir of the grandfather on the part of the father'; and the law is so stated by Hale.

"But, after all, this opinion really rested on a dictum, and, as Plowden and others saw, it was not a very logical

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5 According to the argument of Manwood the heirs in class 10, Table I, would be postponed to the heirs in class 11. Blackstone says that Bacon and Hale adopted this view, on the theory that all the female ancestors on the part of the father were equally worthy of blood, and so proximity should prevail. 2 Bl. Comm. 238. Yet Blackstone contended that class 10 should be preferred to class 11 for the following reasons: (1) This point was not the principal question in the case of Clere v. Brook, and so the discussion of it was only obiter; (2) It appears from the report of this case that "many gentlemen of the law were dissatisfied with this position of Justice Manwood," because the blood of the heirs in case 10 was "derived to the purchaser through a greater number of males than the blood" of the heirs in class 11, and so the members of class 10 were "more worthy of the two"; (3) According to the eighth rule laid down by Hale, class 17 (which is analogous in the maternal line to class 10 in the paternal) is preferred to class 18 (which is analogous to class 11), and so to prefer class 11 to class 10 would operate to destroy the symmetry of the legal course of descents; (4) The view of Manwood destroys the preference of the male stocks in the law of inheritance; (5) The reason given by Bacon (namely, that in any degree paramount to the first the law respecteth proximity, and not dignity of blood) is contra to many instances given by Plowden and Hale and other writers; and (6) Manwood's view is contra to the doctrine of Coke, namely, that the blood of the Kempes should not inherit till the blood of the Stiles failed. The blood of the Stiles would not fail until both classes 9 and 10 were extinct. See 2 Bl. Comm. 238, 239.
dictum. He tells us that he afterwards put it to the judges of the court of Common Pleas that, from the actual decision in the case, the correct deduction was that the descendants of the more remote female paternal ancestor should be preferred to the descendants of the less remote female paternal ancestor. For, if the brother of the purchaser's grandmother is preferred to the brother of the purchaser's great-grandmother why should not the brother of the purchaser's mother be preferred to the brother of the purchaser's grandmother?—and in that case Edward Clere would have succeeded. But the judges adhered to their opinion. They had followed the older cases in giving the preference to the paternal ascendants. They were not inclined to carry this preference of male to female any further than they were obliged, even to satisfy the claims of logic. But the claims of logic found a champion in Blackstone. He had no difficulty in showing that the logical consequence of the decision in *Clere v. Brook*, and of the other rules of inheritance, was to give the preference to the descendants of the more remote female paternal ancestor rather than to the descendants of the less remote. Largely in consequence of his advocacy the logical view has received the sanction of the legislature.  

6 Blackstone's view is set forth in note 5 *supra*. 

7 Section 8 of The Inheritance Act of 1833 provides as follows: "Where there shall be a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person in preference to the mother of a less remote male paternal ancestor, or her descendants; and where there shall be a failure of male paternal ancestors of such person, and their descendants, the mother of his more remote male paternal ancestor, and her descendants, shall be the heir or heirs of such person in preference to the mother of a less remote male maternal ancestor, and her descendants." 5 *THE COMPLETE STATUTES OF ENGLAND* (1929) 120.

If the intestate had acquired his title by descent from his father, no one could be admitted as an heir, at the common law in England, who was not related by blood to that father. Or if the intestate's mother was the purchaser and he had acquired his title from her by descent, any one who took the inheritance had to be related by blood to her. But even where the ancestral property doctrine was applicable, the general doctrine advocated by Blackstone was applicable as to collateral heirs claiming through remote lineal ancestors of the intestate. See 2 *BL. COMM.* 238, 240.
The question of priority of paternal over maternal ascendants has been raised in apparently only one other case, namely, *Hawkins v. Shewen*,\(^8\) decided as recently as 1823. The question was whether a *good title* could be made to the real estate involved which had been devised by Jane Shewen. She was a first cousin once removed of the person last seised, the one through whom she had apparently acquired title as heir. The person last seised had apparently acquired his title through Mary Jones, his mother. Mary Jones was a daughter of Anthony Jones, the first purchaser. She had married Thomas Price, a fourth cousin of Anthony Jones; and the person last seised was their son. The parents of Anthony Jones were Lettice Rice Jones and David Jones. Thomas Price and the father of the testatrix were descendants of Sir Walter Rice; the latter was the great-grandfather of Mary Jones and the father of Lettice Rice Jones. Sir John Leach, the Vice Chancellor, held that the title of the testatrix *could not be made* without showing that the blood of David Jones was extinct. That is to say, "where a person seised of an estate *ex parte materna*, dies without issue, the descendants of his maternal grandfather must all be extinct before any descendant of a remoter maternal ancestor can inherit, however nearly related to the propositus, *ex parte materna*."\(^9\) The relatives of the maternal grandfather were preferred to those of the maternal grandmother, as the property had descended *ex parte materna*. This decision applies the doctrine that Blackstone advocated. It may have occasioned passage of the statute (Section 8 of the *Inheritance Act of 1833*) referred to by Holdsworth.\(^10\) While the general doctrine was not of much practical importance, Parliament embodied it in a statute in 1833.\(^11\) It has been abolished by The Administration of Estates Act of 1925.\(^12\)

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\(^8\) 1 Sim. & St. 257, 57 Eng. Rep. 103 (1823).
\(^9\) Headnote to *Hawkins v. Shewen*, *op. cit. supra* note 8.
\(^10\) Note 7 *supra*.
\(^11\) Section 8 of *The Inheritance Act*, *op. cit. supra* note 7.
\(^12\) 15 GEO. 5, c. 23, §§ 45, 46.
only collateral heirs capable of inheriting, under this Act are brothers, sisters, uncles, and aunts. No remoter lineal ancestors than grandparents can inherit under the provisions of this Act. If more than one of the grandparents survive the intestate, they inherit equally (if, of course, they constitute the heirs), and this, it seems, regardless of the source of the intestate’s title. There seems to be no priority as between maternal and paternal uncles and aunts, regardless of the source of the intestate’s title.

The *English* Statute of Distributions of 1670\(^{13}\) directed that distribution “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.” Prior to this Act the husband was “entitled to the grant of adminstration of his wife’s effects; and consequently . . . he was entitled, as all administrators were, to the exclusive enjoyment of the residue. Doubts, however, arose, whether the husband’s right was not superseded by the force of that Statute; and whether he was not thereby bound to distribute her personal estate among her next of kin.”\(^{14}\) These doubts probably were occasioned by the latter provision of the Statute set forth above. To obviate this uncertainty, the Statute of 29 Car. II, c. 3, sec. 25, sanctioned the law as it existed prior to the Statute of Distributions.\(^{15}\) If there were no lineal descendants, the father was preferred to the mother, though they were in equal degree.\(^{16}\) But this preference of the male to the female ancestor, under the Statute of Distributions, was strictly con-

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13 22 & 23 Car. II, c. 10.

“When a child dies intestate, without wife or child, leaving a father, the latter is entitled, as next of kin, in the first degree, to the whole of the personal estate of the intestate, exclusive of all others.” Williams, *op. cit. supra* note 14, at 1292.
fined to the father and mother. All other ancestors in the same degree and all descendants, male and female, succeeded together.

The general common-law doctrine in England that males were preferred to females in the law of succession to intestate property never obtained a footing in the United States. Kent said that it was "considered to be incompatible with that equality of right, and that universal participation in civil privileges, which it is the constitutional policy of this country to preserve and inculcate." Some of the early statutes provided that no preference should be given to males nor to the eldest male; and even where there is no express statutory provision the doctrine has been rejected. The general type of legislation on this subject, under which the question of a preference has been raised, is that the intestate property shall descend or be distributed to the next of kin in equal degree equally. This is, in substance, the same as the provision in the English Statute of Distributions; but in most states in this country the limited preference that existed under the latter Statute has not been adopted. The general rule, applicable in England under the Statute of Distributions, that equals in degree take equal portions, regardless of sex, is likewise the general rule in the United States with respect to both realty and personalty. The common-law rule, however, has been applied in a New York case where the nearest collateral heir was so remote as to be unprovided for specifically by the statute. In Hunt v. Kingston the nearest relatives of the intestate were great-aunts, descendants of great-aunts, and a great-uncle. The court held that the great-uncle inherited to the
exclusion of the females in the same degree, reasoning that as the common-law rule had not been superseded with respect to this class of heirs it was applicable. Under some statutes the paternal kin in the ascending line are preferred to the maternal kin in the same degree. 21

"III. A third rule or canon of descent is this: that where there are two or more males, in equal degree, the eldest only shall inherit; but the females all together."

Blackstone's comment on this Canon. "As if a man hath two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies; Matthew his eldest son shall alone succeed to his estate, in exclusion of Gilbert the second son and both the daughters; but, if both the sons die without issue before the father, the daughters Margaret and Charlotte shall both inherit the estate as coparceners." 1

Kent's comment. "A good deal of importance was attached to the claims of primogeniture in the patriarchal ages; and the first-born son was the earliest companion of his father, and the natural substitute for the want of a paternal guardian to the younger children. The law of Moses gave the eldest son a double portion, and excluded the daughters entirely from the inheritance, so long as there were sons, and descendants of sons; and when the inheritance went to the daughters in equal portions, in default of sons, they were obliged to marry in the family of their father's tribe, in order to keep the inheritance within it. . . . At Rome the law of succession underwent frequent vicissitudes. The law of the

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21 For instance, the Delaware statute provides: "If the intestate left no issue or their descendants, nor brothers or sisters or the issue of any deceased brother or sister, then the estate goes to the intestate's father." DEL. REV. CODE (1915) § 3267.

As between paternal and maternal relatives, at certain designated junctures, some statutes provide for division of the inheritance into moieties, one of which goes to the paternal, and the other to the maternal kindred, regardless of the number in each class. FLORIDA REV. GEN. STAT. (1920) § 3618.

1 2 BL. COMM. 214.
Twelve Tables admitted equally male and female children to the succession. The middle jurisprudence under the praetors departed from this simplicity, and fettered the inheritance of females. The Voconian law declared women incapable of inheriting; but, in the time of Cicero, the praetors extended or restrained the Voconian law at pleasure. It was gradually relaxed under the Emperors Claudius and Marcus Antonius, until at last the Emperor Justinian, in his 118th novel, destroyed all preference among the males, and all distinction between the sexes in respect to the law of descent, and admitted males and females to an equality in the right of succession, and preferred lineal descendants to collateral relations.

* * *

"The preference of males to females, and the right of primogeniture among the males, is the established and ancient rule of descent in the English common law. The right of primogeniture was derived from the martial policy of the feudal system, after it had attained solidity and maturity. It is supposed to have been unknown, or not in use, among the ancient Germans or the Anglo-Saxons, prior to the Norman Conquest. They admitted all the sons equally to the inheritance; but the weight of authority is, that females were most generally excluded, even in the primitive ages of the feudal law. When the feudal system became firmly established, it was an important object to preserve the feud entire, and the feudal services undivided, and to keep up a succession of tenants who were competent, by their age and sex, to render the military services annexed to their grants. The eldest son was the one that first became able to perform the duties of the tenure, and he was, consequently, preferred in the order of succession. Females were totally excluded, not only from their inability to perform the feudal engagements, but because they might, by marriage, transfer the possession of the feud to strangers and enemies."
"But these common-law doctrines of descent are considered to be incompatible with that equality of right, and that universal participation in civil privileges, which it is the constitutional policy of this country to preserve and inculcate. The reasons which led to the introduction of the law of primogeniture, and preference of males, ceased to operate upon the decline and fall of the feudal system; and those stern features of aristocracy are now vindicated by English statesmen upon totally different principles. They are not only deemed essential to the stability of the hereditary orders, but they are zealously defended in an economical point of view, as being favorable to the agriculture, wealth, and prosperity of the nation, by preventing the evils of an interminable subdivision of landed estates. It is contended, that the breaking up of farms into small parcels, and the gradual subdivision of these parcels into smaller and still smaller patches, on the descent to every succeeding generation, introduces a redundant and starving population, destitute alike of the means and of the enterprise requisite to better their condition. The appeal is boldly and constantly made to the wretched condition of the agriculture and agricultural improvement of France... under the action of the new system of equal partition. It is declared to be an enemy to all enterprising and permanent improvements in the cultivation of the soil and employment of machinery; to all social comfort and independence, as well as to the costly erections of art and embellishments of taste. On the other hand, Dr. Smith, the author of the Wealth of Nations, severely condemns the policy of primogeniture, as being contrary to the real interests of a numerous family, though very fit to support the pride of family distinctions. The Marquis Garnier, the French translator of that work, is also a decided advocate for the justice and policy of the principle of equal partition; and the Baron De Stael Holstein is of the same opinion, even in an economical point of view. He considers the
equal division of estates much more favorable to the wealth and happiness of society, than the opposite system." ²

In the law of succession to intestate property, "primogeniture" has been defined as follows: "The right that belongs to the eldest son or, failing lineal descendants, the eldest male in the next degree of consanguinity, to take all the real estate of which the ancestor died seized and intestate, to the exclusion of all female and younger male descendants of equal degree." ³ Under Canon III, the person taking intestate property as heir was the eldest son, if he survived the ancestor. If he predeceased the ancestor, leaving no issue surviving, then the second eldest son inherited. In the event of an entire failure of male issue, if there were more than one daughter, they took equally, the husband of the eldest being required to do homage. ⁴ "If there was only one daughter, she inherited in the same manner as the eldest son. In the event of an entire failure of issue, male or female, the grandchildren succeeded in the same manner as the ancestor's children, subject of course, to primogeniture and the rule as to the preference of males over females." ⁵ Suppose A., the intestate, had two sons, B. and C. If B. was the eldest son and predeceased A., leaving two sons, the eldest son of B., surviving A., would, under the Canons of Descent, succeed to the realty of A. If B. had left only two daughters, they would have succeeded in equal moieties to the realty of A., to the exclusion of C. If A. had left only two daughters, D. and E., they would have succeeded to A.'s realty as coparceners. But if both D. and E. had predeceased A., and D. had left a son and a daughter, and E. had left two sons, the son of D. would have succeeded to a half of A.'s realty and the eldest son of E. would have succeeded to the other half.

³ Webster's New International Dictionary (1918).
Primogeniture, the preference of males to females, and the doctrine of representation applied *in infinitum* in the lineal descending line. Primogeniture seems to have been applied in the collateral line to brothers, the eldest brother and his descendants inheriting lands before any younger brother or any of his descendants. There appears to be no authority as to whether it applied to remoter collaterals, such as uncles.

Primogeniture was abolished in England by The Administration of Estates Act, which went into effect on January 1, 1926.

Professors Reppy and Tompkins state the following brief history of primogeniture in this country: "In a few of the colonies the doctrine of primogeniture gained a temporary recognition. It existed in Rhode Island until the year 1770; in New Jersey, New York, Georgia and a few other states until the Revolution; in Maryland as late as 1815. In New Jersey the rule was modified by the Descent Act of 1780, under which the eldest son was given a double portion of the estate. A similar state of affairs existed in Massachusetts, Connecticut and Delaware. Under the Descent Act of 1817 the last vestige of primogeniture was eliminated in New Jersey, except in the case of a natural trust, in which case the estate descended to the eldest son, according to the law of primogeniture, such estates not being within the purview of the New Jersey statutes; and except in the case of an estate tail, until changed by the Descent Act of 1820."

Canon III "is sometimes expressly abolished [in this country] and sometimes by the establishment of another course of descent." But it has been held that the abolition of primogeniture does not affect the descent of estates tail, where such

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6 Lord Coke's *First Institute* 204.
7 15 Geo. 5, c. 23, § 45.
8 Reppy & Tompkins, *Historical and Statutory Background of the Law of Wills, Descent and Distribution, Probate and Administration* 81.
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estates subsist, and "they descend as at common law, and therefore by primogeniture." 10 Nor does the abolition "af-
fect trusts, which will still descend to the heir at common
law." 11

Section 52 of The Administration of Estates Act 12 in Eng-
land excepts the devolution of an entailed interest as an
equitable interest. If the tenant in tail has not barred the
entailed interest, it descends to the heir in tail as ascertained
under the common law. So if a gift is made to the donee and
the heirs of his body, primogeniture would be applicable.13

Cooper, in his Notes on the 118th Novel, says that the
Roman law called to the succession, in case of intestacy, "all
legitimate children without distinction . . . and, of course,
neglecting all consideration of primogeniture." 14 The gen-
eral principle was that equals in degree inherited equally,
without regard to difference of sex. These principles were
applicable under the English Statute of Distribution of 1670.

"IV. A fourth rule, or canon of descents, is this: That
the lineal descendants, in infinitum, of any person deceased
shall represent their ancestor; that is, shall stand in the same
place as the person himself would have done, had he been
living."

Blackstone’s comment on this Canon. "Thus the child,
grandchild, or great-grandchild (either male or female) of
the eldest son succeeds before the younger son, and so in
infinitum. And these representatives shall take neither more
nor less, but just so much as their principals would have done.

10 THOMPSON, op. cit. supra note 9; Collamore v. Collamore, 158 Mass. 74,
32 N. E. 1034 (1893).
11 THOMPSON, op. cit. supra note 9.
12 15 GEO. 5, c. 23.
13 See WILLIAMS, PRINCIPLES OF THE LAW OF REAL PROPERTY (24th ed.)
103 (note 2), 394. See, also, article by Morris, PRIMOGENTITURE AND ENTAILED ESTATES
14 COOPER’S JUSTINIAN’S INSTITUTES (1852) 545.
As if there be two sisters, Margaret and Charlotte, and Margaret dies leaving six daughters; and then John Stiles, the father of the two sisters, dies without issue; these six daughters shall take among them exactly the same as their mother Margaret would have done, had she been living,—that is, a moiety of the lands of John Stiles in coparcenary; so that, upon partition made, if the land be divided into twelve parts, thereof Charlotte, the surviving sister, shall have six, and her six nieces, the daughters of Margaret, one apiece.

"This taking by representation is called succession in stirpes, according to the roots; since all the branches inherit the same share that their root, whom they represent, would have done. And in this manner also was the Jewish succession directed; but the Roman somewhat differed from it. In the descending line the right of representation continued in infinitum, and the inheritance still descended in stirpes,—as if one of three daughters died, leaving ten children, and then the father died; the two surviving daughters had each one-third of his effects, and the ten grandchildren had the remaining third divided between them. And so among collaterals, if any person of equal degree with the persons represented were still subsisting (as if the deceased left one brother, and two nephews the sons of another brother), the succession was still guided by the roots: but if both of the brethren were dead, leaving issue, then (I apprehend) their representatives in equal degree became themselves principals. and shared the inheritance per capita, that is, share and share alike; they being themselves now the next in degree to the ancestor, in their own right, and not by right of representation. So if the next heirs of Titius be six nieces, three by one sister, two by another, and one by a third, his inheritance, by the Roman law, was divided into six parts, and one given to each of the nieces; whereas the law of England in this case would still divide it only into three parts, and distribute it per stirpes, thus: One-third to the
three children who represent one sister, another third to the two who represent the second, and the remaining third to the one child who is the sole representative of her mother.

"This mode of representation is a necessary consequence of the double preference given by our law, first to the male issue, and next to the first-born among the males, to both of which the Roman law is a stranger. For if all the children of three sisters were in England to claim per capita, in their own right as next of kin to the ancestor, without any respect to the stocks from whence they sprung, and those children were partly male and partly female, then the eldest male among them would exclude not only his own brethren and sisters, but all the issue of the other two daughters; or else the law in this instance must be inconsistent with itself, and depart from the preference which it constantly gives to the males and the first-born among persons in equal degree. Whereas, by dividing the inheritance according to the roots, or stirpes, the rule of descent is kept uniform and steady; the issue of the eldest son excludes all other pretenders, as the son himself (if living) would have done; but the issue of two daughters divide the inheritance between them, provided their mothers (if living) would have done the same; and among these several issues, or representatives of the respective roots, the same preference to males and the same right of primogeniture obtain as would have obtained at the first among the roots themselves, the sons or daughters of the deceased. And if a man hath two sons, A. and B., and A. dies leaving two sons, and then the grandfather dies; now the eldest son of A. shall succeed to the whole of his grandfather's estate; and if A. had left only two daughters, they should have succeeded also to equal moieties of the whole, in exclusion of B. and his issue. But if a man hath only three daughters, C., D., and E., and C. dies, leaving two sons, D. leaving two daughters, and E. leaving a daughter and a son who is younger than his sister; here, when the grandfather
dies, the eldest son of C. shall succeed to one-third, in exclusion of the younger; the two daughters of D. to another third in partnership; and the son of E. to the remaining third, in exclusion of his elder sister. And the same right of representation, guided and restrained by the same rules of descent, prevails downwards in infinitum.”

Canon IV states the common-law doctrine of inheritance per stirpes or by representation. In determining the amount of the intestate’s property to which a remote heir or relative is entitled, inheritance per stirpes is generally used in contradistinction to inheritance per capita. These two terms have occasioned a great amount of difficulty in the cases in construing wills, deeds, life insurance contracts, and other instruments. The doctrine of inheritance per stirpes or by representation is important also in connection with the doctrine of advancements to heirs, that is, in determining whether the remote heir takes in his own right or takes as a representative of the immediate heir hence subject to the advancements. In the latter type of cases the courts generally use the term representation; whereas, in distinguishing this type of inheritance from inheritance per capita, they use the term per stirpes. However, there is no material distinction in the meaning of the two terms (inheritance by representation and inheritance per stirpes).

Inheritance per stirpes signifies that the particular descendants (remote heirs) inherit such portion (share or interest) only as their immediate ancestor would have inherited if he had survived the death of the intestate. Thus, if the intestate has left a son, and the children of a deceased son, as his only lineal descendants and as the only relatives who are entitled to inherit his property, one-half of his property would be inherited by his surviving son and the other half by the children of the deceased son. The children of the de-

cessed son, that is, the grandchildren of the intestate, inherit the same portion that their father (the son of the intestate) would have inherited if he had survived the death of the intestate. On the other hand, if the intestate had two sons, both of whom predeceased him, one leaving two sons and the other three sons, and these grandsons survived the intestate and constituted the only heirs entitled to his property under the statutes of the particular jurisdiction, they would, in some states in this country, inherit *per capita*, that is, each one would be entitled to one-fifth of the intestate's property.²

As Canon IV is stated, it applies to inheritance *per stirpes* by lineal descendants. But Blackstone discusses inheritance *per stirpes* by collateral descendants under this Canon instead of under Canon V. He uses the word *descendants*, instead of *children* or *issue*, in stating the Canon. According to his discussion, he uses the word *descendants* as meaning remote, as well as immediate, lineal descendants, that is, as including children, grandchildren and so on in the descending line. His use of this word includes within its meaning collateral descendants, as well as lineal descendants.

The *English* common law rigidly adhered to the doctrine of inheritance *per stirpes* in the lineal descending line; that is, representation took place *in infinitum* in the lineal descending line, subject, of course, to the doctrines of preference of males to females and primogeniture. Stephen illustrates these principles as follows: "As if a man hath two sons, A. and B., and A. dies, leaving two sons, and then the grandfather dies; now the eldest son of A. shall succeed to the whole of his grandfather's estate; and if A. had left only

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In Blackstone's comment it is said that the doctrine of inheritance *per stirpes* applied *in infinitum* in the lineal descending line, where, of course, the doctrines of preference of males to females and primogeniture did not apply. Thus, if the intestate had three daughters, all of whom predeceased him, one leaving two daughters, one leaving three, and other leaving one, the inheritance would be divided into three parts, instead of six.
two daughters, they should have succeeded also to equal moieties of the whole, in exclusion of B. and his issue. But if a man hath only three daughters, C., D., and E., and C. dies, leaving two sons, D. leaving two daughters, and E. leaving a daughter and a son who is younger than his sister; here, when the grandfather dies, the eldest son of C. shall succeed to one-third, in exclusion of the younger; the two daughters of D. to another third, in partnership; and the son of E. to the remaining third, in exclusion of his elder sister." 8

At the common law in England the doctrine of representation in inheritance overrides, to some extent, the doctrine of preference of males to females. Thus the daughters, granddaughters and other lineal female descendants of the eldest son who died in his father's lifetime will exclude the father's second son from the inheritance.

The Roman law, like the English common law, adhered rigidly to the doctrine of inheritance per stirpes in the lineal descending line. In Cooper's Justinian's Institutes 4 the civil law is stated as follows: "A son, a daughter, and a grandson or granddaughter by another son, are called equally to the inheritance; nor does the nearest exclude the more remote; for it seems just that grandsons and granddaughters should succeed in the place of their father. By like reason, a grandson or granddaughter by a son, and a great-grandson or great-granddaughter by a grandson, are all called together. And since grandsons and granddaughters, great-grandsons and great-granddaughters, succeed in the place of their parent, it seemed convenient that inheritances should not be divided into capita, but into stirpes,—so that a son should possess one-half, and the grandchildren (however numerous) of another son, the other half of an inheritance..."

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Blackstone's comment on this Canon indicates that in the collateral line representation *in infinitum* prevailed. He says that if the "next heirs of Titius be six nieces, three by one sister, two by another, and one by a third... the law of England... would... divide [his inheritance]... only into three parts, and distribute it *per stirpes*, thus: One-third to the three children who represent one sister, another third to the two who represent the second, and the remaining third to the one child who is the sole representative of her mother."

While the representatives of the three sisters of Titius are in equal degree of relationship to the intestate, yet they inherit *per stirpes* and not *per capita*; they do not inherit in their own right as the nearest collateral relatives (in determining the amount each takes), but they take by representation. If the doctrine of representation applied to nieces, it would seem to have been applicable to remoter collateral relatives. That is to say, the doctrine was applicable *in infinitum* in the collateral line. Blackstone says that the Roman law differed somewhat from the English common law in the application of the doctrine of representation in the collateral line. Thus, in the above illustration, the nieces of Titius, being in the same degree of relationship to him, would, under the Roman law, inherit *per capita*, that is, they would inherit in their own right and not by representation. The inheritance would be divided into six parts and each niece would inherit a sixth interest. But if any person of equal degree of relationship with any person represented survived the intestate, the inheritance "was still guided by the roots." Thus if one of the sisters of Titius had survived his death, she would have inherited a third, and the remaining two-thirds would have been inherited *per stirpes* by the children of each of the two deceased sisters.

In the collateral line the *English* Statute of Distributions of 1670 allowed representation only in the case of nephews
and nieces of the intestate. Section 4 of this Statute provided that there should be no representation admitted among collaterals after brothers' and sisters' children. In the cases decided under this Statute the following principles were developed: (1) When nephews and nieces concur with a brother or sister of their deceased uncle or aunt, they succeed per stirpes; (2) When nephews and nieces concur alone, they succeed per capita; (3) When uncles and aunts concur with a deceased uncle's son, there is no representation in favor of the cousin-german, and the uncles and aunts succeed to the personalty; (4) When grandnephews and grandnieces concur alone, they succeed per capita; (5) When brothers and sisters of the intestate concur alone, they succeed to his personalty per capita; (6) When grandnephews and grandnieces, grandchildren of a deceased brother of the intestate, concur with nephews and nieces, children of other deceased brothers and sisters of the intestate, the nephews and nieces succeed to the personalty; and (7) When the children of the intestate's brother or sister concur with the children of a halfbrother or halfsister, they

6 In Welch v. Welch, op. cit. supra note 5, the court stated this principle as follows: "If the intestate had three brothers, and two of them being dead, and one of them left three or more children, and the other one child only, and the other brother be living, the share of the one child shall be equal to the share of all the three of the other brother, because they claim as representatives . . . ."
7 Welch v. Welch, op. cit. supra note 5. Thus if the intestate had three brothers, all of whom predeceased him, one leaving one child, another six, and another two, these children of the three deceased brothers of the intestate would share equally in the intestate's personalty, as next of kin; that is, they would succeed per capita.
8 "A man dies intestate, leaving an uncle and uncle's son, and the only question was, Whether the son of the deceased uncle should come in for a distribution with the living uncle, by the Statute of Distributions? And all the court were of the opinion that he should not." Maw v. Harding, Prec. Ch. 28, 24 Eng. Rep. 15 (1691).
11 Pett's Case, op. cit. supra note 5.
succeed *per capita.* These illustrations exemplify the following principles that were applied under the Statute of Distributions in England with reference to the doctrine of representation, as this doctrine was applied in the collateral line: (1) Equals in degree inherited equally; (2) Representation was limited to the intestate’s nephews and nieces; (3) Representation was only resorted to to prevent the exclusion of persons in a remoter degree; and (4) Collateral heirs of the halfblood came within the doctrine of representation.  

In the lineal descending line, representation was applied *in infinitum,* under the Statute of Distributions. It was only in the collateral line that there was any restriction.

The Administration of Estates Act of 1925 in England provides expressly for inheritance *per stirpes* by the issue of children of an intestate; and in *Williams and Eastwood on Real Property* it is said that since the statutory trusts allow issue to take *per stirpes,* first cousins would inherit *per stirpes,* under the section of this statute providing for uncles and aunts. The doctrine of representation does not seem to be applicable in favor of any other relatives of an intestate in England, where this Statute applies, in the law of succession to realty and personality.

In *Williams and Eastwood on Real Property* the effect of the changes made by The Administration of Estates Act, with respect to Canons II, III, and IV, is stated as follows: "Males are not preferred to females, nor the elder male preferred to the younger; and, with regard to descendants, all descendants of equal degree take equally, and children take *per stirpes* the share of their deceased parent [referring to the issue of deceased children of the intestate and to first cousins]. . . ."
The doctrine of representation seems to be in force generally in the United States, as far as lineal descendants are concerned. There is, however, little authority in the cases dealing with the extent of the application of the doctrine.\[18\] The general rule seems to be that lineal descendants in unequal degree of consanguinity to the intestate inherit *per stirpes*.\[19\] Thus if the intestate leaves \(B\), a son, living, and \(D\) and \(E\), children of another son who has predeceased the intestate, as his only heirs and lineal descendants, \(B\), the son, and \(D\) and \(E\), the grandsons, stand in different degrees of consanguinity to the intestate; and \(B\). will, therefore, be entitled to one-half of the inheritance, and \(D\) and \(E\). to the other half, as tenants in common. That is, lineal heirs of a deceased heir of the intestate take by representation and not as direct heirs, *in determining the amount inherited*, where the descent is arrested in an heir of equal degree of consanguinity to the intestate as their deceased ancestor. But where the lineal heirs are all of equal degree of consanguinity to the intestate, as where all are grandchildren, in some jurisdictions they inherit *per capita* and not *per stirpes*.\[20\] The latter is said to be 'the minority rule in this country.'\[21\] Under the *English* common law, the grandchildren, where they constitute the only class of heirs, are said to inherit *per stirpes*;\[22\] but under the *English Statute of Distribu-

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\[18\] Kent says that the doctrine of representation applies to the issue of children or of grandchildren, "and so on to the remotest degree," and that this rule "probably is to be found in the laws of every state in the Union." 4 *Kent's Comm.* (14th ed.) 390. But see note 27, infra.

\[19\] *Descent and Distribution*, 9 R. C. L. 30; 4 *Kent's Comm.* (14th ed.) 390, 391.

\[20\] In re Martin's Estate, 120 Atl. 862 (Vt. 1923). See Cox v. Cox, 44 Ind. 368, 372 (1873).

\[21\] 3 *Thompson, Commentaries on the Modern Law of Real Property*, § 2323.

\[22\] "The rule of inheritance *per stirpes* is rigidly adhered to in the English law of descent of real estates. Parteners, in one single instance, do inherit *per capita*, but this is where the claimants stand not only in equal degree, but are entitled in their own right, as daughters or sisters of the common ancestor. They never take *per capita* when they claim the land *jure representationis*; and, therefore, if a man hath two daughters, and they both die in his lifetime, the eldest
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of 1670, while it is said that "there may be representatives by grandchildren, and great-grandchildren, without restriction, because the restriction is only among collaterals, and there it goes only to children," yet where the lineal descendants are all of equal degree of consanguinity to the intestate, as where all are grandchildren, or great-grandchildren, they inherit as next of kin, that is, \textit{per capita}. This is in accord with the general spirit and policy of the Statute of Distributions of 1670, which aimed at a just and equal distribution. The general principle applicable under this Statute is that \textit{equals in degree inherit equally}.

In the collateral line the doctrine of representation applies in some jurisdictions to \textit{descendants}, in whatever degree, of brothers and sisters of an intestate. Thus it has been applied in favor of grandnephews and grandnieces, so that they are entitled to share in the inheritance \textit{per stirpes} with surviving nephews and nieces. Some statutes provide expressly that the \textit{children} or \textit{grandchildren} of deceased brothers and sisters of an intestate shall inherit by representation. Where the lineal descendants of brothers and sisters of the intestate are all in the same degree of consanguinity, such as nephews and nieces or grandnephews and grand-

leaving three, and the youngest one daughter, these four granddaughters, though in equal degree, yet claiming by right of representation, they inherit \textit{per stirpes}, and the one of them takes as large a portion as the other three." \cite{KENT-14TH-EDITION-391-392}

\cite{WELCH-2-READING-189-22-ENG-REP-1153-1692}.

\cite{WILLIAMS-3RD-EDITION-1285}.

\cite{MARTIN-STATE-OF-DISTRIBUTIONS}.

\cite{CALIFORNIA-CIVIL-CODE-1386}.

\cite{BLAKE-85-IND-65-1882; IN-RE-STROHMER'S-ESTATE, 226 N. Y. S. 886-1933. Cf. IN-RE-SAMSON'S-WILL, 257 N. Y. 358, 178 N. E. 557-1931} (construing a will giving residue of estate to next of kin, according to the statute of distributions).
nieces, and constitute the only class of heirs, some statutes provide expressly that they shall inherit equally, that is, *per capita.*

7 The doctrine of representation is applicable, under some statutes, to the *issue* 28 of uncles and aunts of an intestate; under other statutes, it is applicable to *descendants* of uncles and aunts. 29 In some states the statutes limit the doctrine of representation in the collateral line to *children* of *brothers and sisters of the intestate.*

In defining and limiting the doctrine of representation, the various statutes of descent and distribution in this country have used three words to include the remote heirs of an intestate, namely, *descendants, children, and issue.* Blackstone used the word *descendants* in stating Canon IV. The meaning of this word, as he used it, has been considered. The choice of any of these words is important and has occasioned a great amount of difficulty in construing statutes of descent

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"By the statute of distributions of this State, these heirs [a niece and three nephews], standing in the same degree of relationship to the intestate, inherited his estate in equal proportions. But by the statute of New York . . . these heirs inherited *per stirpes* and not *per capita* . . ." Haven v. Foster, 9 Pick. 112, 126, 19 Am. Dec. 353, 355 (1829).

28 "The intestate's brothers and sisters, uncles and aunts, or other relations, standing in the same degree, shall take *per capita,* that is to say, by persons; and where a part of them are dead and a part are living, the issue of those dead shall take *per stirpes,* that is to say, the share of their deceased parent." Ariz. Rev. Code Ann. (1928 § 984.

29 "When the intestate's children, or brothers and sisters, uncles and aunts, or any other relations of the deceased standing in the first and same degree alone come into the partition, they shall take *per capita,* namely, by persons; and, when a part of them being dead and a part living, the descendants of those dead have right to partition, such descendants shall inherit only such portion of said property as the parent through whom they inherit would be entitled to if alive." Tex. Comp. Stat. (1928) art. 2577.

80 The Michigan statute provides for inheritance by the brothers and sisters of an intestate "and the children of deceased brothers and sisters"; "and if such persons are in the same degree of kindred to the intestate, they shall take equally, otherwise they shall take by right of representation." Mich. Comp. Laws (1929) § 13440. In In re Chapoton, 104 Mich. 11, 61 N. W. 892 (1895), it is held that the word "children" refers only to *sous and daughters,* and that grandchildren of deceased brothers and sisters do not take by representation. The same construction was placed on a similar statute in Maryland by the court in Hoffman v. Watson, 72 Atl. 479, 483 (Md. 1909). Cf. In re Klein's Estate, 116 N. W. 394 (Mich. 1908).
and distribution in this country. A similar difficulty exists in construing wills, deeds, and other instruments in which any one of these words is used. It is said that "the word 'descendant,' according to its accurate lexicographical and legal meaning, designates the issue of a deceased person, and does not describe the child of a parent who is still living. The word is correlative of 'ancestor.' The word 'issue' is a word of broader import, and may include the children of a living parent as well as the children or descendants of one who is dead. But in an accurate sense one cannot have a living ancestor, nor can a living person, although he may have children, have descendants." 81 Webster's definition of "descendant" is as follows: "One who descends, as offspring, however remotely;—opposed to ancestor or ascendant." He defines "issue" as meaning: "Progeny; a child or children; offspring. In law, sometimes in a general sense, all persons descended from a common ancestor; all lineal descendants; also, any one of such persons . . ." 82 In an Ohio case the court says there is a "broad distinction between the terms 'children' and 'descendants,' the one indicating only lineal descendants, while the other includes both lineal and collateral relations." 83 In an Illinois case the court said that "the word 'descendant,' as defined by the standard dictionaries and by text-writers, means one who is descended lineally from another, to the remotest degree." 84 In a Virginia case the court said: "While the words 'children' and 'descendants' [are] . . . not synonymous, 'descendants' includes 'children—comprises issue of every degree.'" 85 In a Missouri case the court said: "'Descendants . . . includes all who proceed from the body of the person named; as children grandchildren and great-grandchildren.'" 86

82 WEBSTER'S NEW INTERNATIONAL DICTIONARY (1918).
83 Turley v. Turley, 11 Ohio St. 173, 181 (1860).
84 Wyeth v. Crane, 174 N. E. 871, 872 (Ill. 1931).
85 French v. Logan's Adm'r, 60 S. E. 622, 623 (Va. 1908).
86 Lich v. Lich, 138 S. W. 558, 564 (St. Louis Ct. of App. 1911).
It is said that "the words 'child' or 'children,' in legal or common parlance, do not include grandchild or grandchildren, or any others than the immediate descendants in the first degree of the person named as ancestor." 37 This definition is the one that has been applied generally; and it accords with that given to the word children in the English Statute of Distributions of 1670, in limiting the doctrine of representation in the collateral line.

The word "issue" may mean only children; or it may mean descendants generally, when used in wills, 38 deeds, 39 contracts of life insurance, 40 and other instruments; but when used in statutes of descent and distribution, it generally is construed to mean descendants generally, and is not limited to children. 41

However, the context of a statute, or of an instrument, in which any of these three words (children, issue, or descendants) is used, may limit or enlarge the generally accepted meaning. Thus, the Supreme Court of Indiana, in Kyle v. Kyle, 42 construed the word "child," as used in the statute of descent, to mean children or their descendants. Similar variations in the meaning of the terms per stirpes, issue, and descendants, have occurred in many cases in which the courts have construed wills, deeds, and other instruments, in which these terms have been used. Where the context of a statute or the use of any of these terms in instruments does not re-

37 In re Woodward's Estate, 86 N. W. 1004, 1007 (Minn. 1901).
38 Drake v. Drake, 134 N. Y. 221, 32 N. E. 114, 17 L. R. A. 664 (1892); Sumner v. Wescott, 86 Conn. 217, 84 Atl. 921 (1912).
39 Robeson v. Cochran, 255 Ill. 355, 99 N. E. 649 (1912) (The court said: "The word 'issue' means lineal descendants, although it may appear from the context of the will or deed to have been used with the limited meaning of children, or children and grandchildren.").
40 Hemenway v. Draper, 91 Minn. 235, 97 N. W. 874 (1904) (Contract to pay the amount of the policy "to the brothers and sisters, 'or their living issue, according to the rights of representation,' ")
41 Rice v. Burkhart, 130 Iowa 520, 107 N. W. 308 (1906); Alexander v. Wallace, 8 Lea 569 (1881); Schafer v. Ballou, 35 Okl. 169, 128 Pac. 498 (1912).
42 18 Ind. 108 (1862).
quire a different meaning, the generally accepted meaning of each of these terms has been used.

Not only do difficult questions of construction of statutes, wills, and other instruments arise in applying the doctrine of representation, but in another connection the doctrine has occasioned some conflict of authority and difficulty, namely, the right to charge the inheritance or distributive share with indebtedness to the estate as against persons who claim through or under heirs or distributees. One view is that the heir of a deceased child of an intestate takes the share in his grandfather's estate which his parent would have taken if living subject to deduction for his parent's debt to the grandfather. The weight of authority seems to be that the grandchild, in such a case, takes directly from his grandfather and in his own right, and not through and in the right of his immediate ancestor, and so does not take subject to any deduction for such a debt.

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48 Descent and Distribution, 9 R. C. L. 111.