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

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"V. A fifth rule is: That on failure of lineal descendants, or issue, of the person last seised, the inheritance shall descend to his collateral relations, being of the blood of the first purchaser, subject to the three preceding rules."

Blackstone's comment on this Canon. "Thus if Geoffrey Stiles purchases land, and it descends to John Stiles, his son, and John dies seised thereof without issue, whoever succeeds to this inheritance must be of the blood of Geoffrey, the first purchaser of this family. The first purchaser, perquisitor, is he who first acquired the estate to his family, whether the same was transferred to him by sale or by gift, or by any other method, except only that of descent.

"This is a rule almost peculiar to our own laws, and those of a similar original. For it was entirely unknown among the Jews, Greeks, and Romans, none of whose laws looked any further than the person himself who died seised of the estate, but assigned him an heir without considering by what title he gained it, or from what ancestor he derived it. But the law of Normandy agrees with our law in this respect; nor indeed is that agreement to be wondered at, since the law of descents in both is of feodal original; and this rule or canon cannot otherwise be accounted for than by recurring to feodal principles.

"When feuds first began to be hereditary [that is, subject to succession according to consanguinity] it was made a necessary qualification of the heir, who would succeed to a feud, that he should be of the blood of, that is, lineally descended from, the first feudatory or purchaser. In consequence whereof, if a vassal died seised of a feud of his own acquiring, or
feudum novum, it could not descend to any but his own offspring; no, not even to his brother, because he was not descended, nor derived his blood, from first acquirer. But if it was feudum antiquum, that is, one descended to the vassal from his ancestors, then [on failure of his own descendants] his brother, or such other collateral relation as was descended and derived his blood from the first feudatory, might succeed to such inheritance. . . . The true feodal reason for which rule was this, that what was given to a man, for his personal service and personal merit, ought not to descend to any but the heirs of his person. . . .

"However, in process of time, when the feodal rigor was in part abated, a method was invented to let in the collateral relations of the grantee [on failure of his descendants] to the inheritance, by granting him a feudum novum [a new fee] to hold ut feudum antiquum [as an ancient fee]; that is, with all the qualities annexed of a feud derived from his ancestors; and then [though the lineal ancestors themselves were excluded] the collateral relations [of the purchaser, that is, descendants of those ancestors] were admitted to succeed even in infinitum, because they might have been of the blood of, that is, descended from, the first imaginary purchaser. For since it is not ascertained in such general grants, whether this feud shall be held ut feudum paternum [as a paternal fee], or feudum avitum, but ut feudum antiquum merely, as a feud of indefinite antiquity,—that is, since it is not ascertained from which of the ancestors of the grantee [real purchaser] this feud shall be supposed to have descended,—the law will not ascertain it, but will suppose any of his ancestors, pro re nata [from the thing ascertained], to have been the first purchaser. . . . therefore, it admits any of his collateral kindred (who have the other necessary requisites) to the inheritance, because every collateral kinsman must be descended from some one of his lineal ancestors.
"Of this nature are all the grants of fee-simple estates of this kingdom, for there is now in the law of England no such thing as a grant of a *feudum novum* [a new fee], to be held *ut novum*; unless in the case of a fee-tail, and there we see that this rule is strictly observed, and none but the lineal descendants of the first donee (or purchaser) are admitted; but every grant of lands in fee-simple is with us a *feudum novum* to be held *ut antiquum*, as a feud whose antiquity is *indefinite*; and therefore the collateral kindred of the grantees, or descendants from any of his lineal ancestors, by whom the lands might have possibly been purchased, are capable of being called to the inheritance.

"Yet when an estate hath *really descended* in a course of inheritance to the person last seized, the strict rule of the feodal law is still observed; and none are admitted but the heirs of those through whom the inheritance hath passed; for all others have demonstrably none of the blood of the first purchaser in them, and therefore shall never succeed. As, if lands come to John Stiles by descent from his mother Lucy Baker, no relation of his father (as such) shall ever be his heir of these lands; and *vice versa*, if they descended from his father Geoffrey Stiles, no relation of his mother (as such) shall ever be admitted thereto, for his father's kindred have none of his mother's blood, nor have his mother's relations any share of his father's blood. And so, if the estate descended from his father's father, George Stiles; the relations of his father's mother, Cecilia Kempe, shall for the same reason never be admitted, but only those of his father's father. This is also the rule of the French law, which is derived from the same feodal fountain.

"Here we may observe, that so far as the feud is really *antiquum*, the law traces it back, and will not suffer any to inherit but the blood of those ancestors from whom the feud was conveyed to the late proprietor. But when, through length of time, it can trace it no farther, as if it be not known
whether his grandfather, George Stiles, inherited it from his father Walter Stiles, or his mother Christian Smith, or if it appear that his grandfather was the first grantee, and so took it (by the general law) as feud of indefinite antiquity; in either of these cases the law admits the descendants of any ancestor of George Stiles, whether paternal or maternal, to be in their due order the heirs to John Stiles of this estate; because in the first case it is really uncertain, and in the second case it is supposed to be uncertain, whether the grandfather derived his title from the part of his father or his mother."

When the feudal system in England first permitted succession to feuds according to consanguinity it was made a necessary qualification of the heir who would succeed to the feud that he should be lineally descended from the first feudatory or purchaser. The rule was, that the lineal descendants of the person to whom the feud was originally granted, and none others, should inherit. If a person died seised of a feud of his own acquiring, without leaving issue, it did not go to his brother but reverted to the donor. The brother was not descended from the person who first acquired the feud. All other collateral descendants were, in such cases, excluded from the inheritance for the same reason. As the personal ability of the first acquirer of the feud to perform the duties and services reserved was the motive of the donation, the feud could only be transmitted by him to his lineal descendants. But if the feud was a feudum antiquum, that is, one that had descended to the vassal (the one who died seised) from his ancestors, then, on failure of his own lineal descendants, his brother, or such other collateral relation as was descended, or derived his blood, from the first feudatory (first acquirer of the feud), might suc-

2 1 Cruise's Digest 19.
3 3 Cruise's Digest 356.
ceed to the inheritance. Thus suppose A. was the first acquirer of the feud, and that, on his death while he was seised thereof, he left two sons, C. and D. C., the eldest son, would have inherited. If C. inherited the feud and died without issue, then D. could have inherited the feud. D. was a lineal descendant of the first acquirer of the feud.

As Blackstone says, "in the process of time, when the feudal rigor was in part abated, a method was invented to let in the collateral relations of the grantee to the inheritance, by granting him a feudum novum to hold ut feudum antiquum, that is, with all the qualities annexed of a feud derived from his ancestors." In discussing this rule, Cruise, writing in 1827, says: "It has long been established in England, that every acquisition of an estate in fee simple by purchase shall be considered as a feudum antiquum, or feud of indefinite antiquity; therefore the collateral kindred of the grantee, or descendants from any of his lineal ancestors, by whom the lands might possibly have been purchased, are capable of being called to the inheritance. But where an estate has really descended, in a course of inheritance, to the person last seised, the strict rule of the feudal law is still observed; and none are admitted but the heirs of those through whom the inheritance has passed; for all others have demonstrably none of the blood of the first purchaser in them. Thus Lord Hale says, if the son purchases land, and dies without issue, it shall descend to the heirs on the part of the father; and if he leaves none, then to the heirs on the part of the mother, because though the son has both the blood of the father and the mother in him, yet he is of the whole blood of the mother; and the consanguinity of the mother are consanguinei cognati [relations on the mother's side] of the son. On the other side, if the father had purchased land, and it had descended to the son, and the son had died without issue, and without leaving any heir on the

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part of the father, it should never have descended in the line of the mother, but escheated. For though the *consanguinei* of the mother were the *consanguinei* of the son, yet they were not of consanguinity to the father, who was the purchaser. But . . . if the grandfather had purchased lands, and they had descended to the father, and from him to the son, if the son had entered, and died without issue, his fathers, brothers, or sisters [father's brothers or sisters?], or their descendants; or, for want of them, his grandfather's brothers or sisters, or their descendants; or, for want of them, his great-grandfather's brothers or sisters, or their descendants; or, for want of them, any of the consanguinity of the great-grandfather or brothers or sisters of the great-grandmother, or their descendants, might have inherited; for the consanguinity of the great-grandmother was the consanguinity of the father. But none of the line of the mother or grandmother, *viz.*, the grandfather's wife, should have inherited; for they were not of the blood of the first purchaser. And the same rule *e converso* holds in purchases in the line of the mother or grandmother; they shall always keep in the same line that the first purchaser settled them in. It follows that where lands descend to a person on the part of his father, none of his relations on the part of his mother can inherit them. And *vice versa* where lands descend to a person from his mother, no relation on the part of his father can inherit them."

When the feudal system first permitted succession to feuds according to consanguinity, neither in a *feudum novum* nor *feudum antiquum* were the collateral relations of the purchaser entitled to succeed. Thus if *A.* was grantee of a fief, and *B.* his son inherited the fief and died without issue, the brother of *A.* was not entitled to succeed to the fief, as he was not a lineal descendant of the purchaser. But under the fiction that treated a *feudum novum* as a *feudum antiquum*,

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6 3 Cruise's Digest 357, 358.
A.'s brother was entitled to succeed, because he might have derived his blood from the first imaginary purchaser.\textsuperscript{7} Under the fiction every collateral kinsman of A. was considered as having descended from some person who could have been regarded as the first purchaser of the fief.\textsuperscript{8}

While the fiction let in collateral relations, if the intestate left no issue, and if the inheritance was actually a feudum novum, yet if the inheritance had descended to the intestate from an ancestor who was the first acquirer, no collateral kinsman could succeed to it who was not of the blood of the first purchaser, as explained in the extracts from Cruise's Digest and Blackstone's Commentaries. Also, in the case of a reversion or remainder expectant upon freehold, where the actual seisin belonged to the particular tenant, the rule was that the claimant of the reversion or remainder had to trace his descent (make himself heir to) the purchaser. The intervention of the estate of freehold between the possession and the absolute fee prevented the owner of the fee from becoming the stock of inheritance, if he died during the continuance of life estate. The estate descended to the person who was heir to him who created the freehold estate, provided the reversion or remainder descended from him; or if the expectant estate had been purchased, the claimant had to make himself heir to the first purchaser of such reversion or remainder at the time when it came into possession. The mesne reversioner or remainderman did not constitute a new stock of descent; that is, the descent was not to be traced from him. He had no actual seisin, under the maxim seisina facit stipitem. He was entitled to change the course of descent, and make himself a new stock, as by making a grant or devise of the reversion or remainder. If he did not do so, the person claiming the reversion or remainder

\textsuperscript{7} 1 Stephen, New Commentaries on the Laws of England (Partly founded on Blackstone) (5th ed.) 398.

\textsuperscript{8} 2 Pollock and Maitland, The History of English Law (2nd ed.) 288.
had to make himself heir to the donor, who was seised in fee and created the particular estate, or to the first purchaser of the reversion or remainder.\(^9\)

Where the inheritance was of a kind of which actual seisin could have been obtained, the common law required that the claimant should make himself heir to the person last actually seised of the inheritance.\(^10\) The original purchaser, or the heir of the intestate who was last actually seised, could constitute a new stock of descent, if he obtained actual seisin. Thus, if \(A.\) had purchased land and died intestate, the land descended to his eldest son (\(B.\)) If \(B.\) died before he acquired seisin, the claimant of this inheritance had to make himself heir to \(A.\), and not to \(B.\). This distinction was of importance, especially in the case of inheritance by kindred of the half blood. Thus if \(A.\) had purchased land and died intestate, leaving two sons, \(B.\) and \(C.\), who were brothers of the half blood, \(B.\), the eldest son, was heir; but if he died before entry, \(C.\) inherited the land, not as heir to \(B.\) but as heir to \(A.\). But if \(B.\) had purchased land and died without issue, \(C.\) could not have inherited the land, under the rule relating to relatives of the half blood. If the nearest collateral heir of \(B.\) was an uncle, he inherited the land; and if the uncle acquired seisin of the land and died without issue and without nearer relatives than \(C.\), \(C.\) was heir to the uncle, for he was heir to the person last seised and of the blood of the purchaser, though not heir of the purchaser.\(^11\) While Blackstone defines the requirement of “blood of” the first purchaser as meaning lineally descended from the first purchaser, yet as to persons who claimed to succeed to the inheritance by virtue of remote and intermediate descents from the first purchaser, it was sufficient if they were related by


\(^10\) 1 Stephen, op. cit. supra note 7, at 399.

For the exceptions to the rule requiring an actual seisin to constitute the stock of descent, see a previous part of this paper in 11 Notre Dame Lawyer. 14, 46.

\(^11\) 1 Stephen, op. cit. supra note 7, at 399, 400.
half blood only to the first purchaser, provided they were the nearest collateral heirs of the whole blood of the person last seised, as was required by Canon VI.\textsuperscript{12} So while C. was related to B. by the half blood only, he was related to the uncle by the whole blood, and he was the nearest collateral relative of the uncle. To be of the "blood of" a person is to be descended from him or from the same common stock or the same couple of ancestors. This definition includes not only lineal descendants, but collaterals. Thus C. and his uncle were descended from the same couple of ancestors, namely, C.'s grandfather and grandmother.

The terms "of the blood of" and "heir" are not synonymous; nor does the former mean "next of blood." A grandson is "of the blood of" his grandfather; yet, during the life of his father, the grandson is not heir to or "next of blood of" the grandfather. A nephew is "of the blood of" his uncle; yet he is not heir to or "next of blood of" the uncle if the uncle is survived by a child or other lineal descendant.

The common law did not require that the person who succeeded to an inheritance be heir to the purchaser; it was sufficient if he was "of the blood of" the purchaser and \textit{heir} to him who was last seised (the intestate). If the one who claimed the right to succeed to an inheritance was related to the purchaser only by the half blood, yet if he was related to the intestate (the one last seised) by the whole blood, and otherwise complied with the requirements of the Canons, he was entitled to take as heir.

In some instances, to trace descent from the person last seised was, in effect, to trace descent from the first purchaser. If the intestate was the first purchaser, and died seised, he was also the one last seised.

The Inheritance Act of 1833 in England provides that descent shall be traced from the purchaser. This Act defines "purchaser" as "the person last entitled to the land," "une-

\textsuperscript{12} 2 BL. COMM. 220, n. 51.
less it shall be proved that he inherited the same, in which
case the person from whom he inherited the same shall be
considered to have been the purchaser unless it shall be
proved that he inherited the same.” 13 It also defines the
words “the purchaser” to be “the person who last acquired
the land otherwise than by descent, or than by any escheat,
partition, or inclosure, by the effect of which the land shall have
become part of, or descendible in the same manner as, other
land acquired by descent.” 14 The Law of Property Amend-
ment Act of 1859 in England provides that where there is
a total failure of heir of the purchaser, or where the lands
shall be descendible as if an ancestor had been the purchaser,
and there shall be a total failure of the heirs of such an-
cestor, then the descent shall be traced from the person last
entitled to the property as if he had been the purchaser.15

These statutory provisions altered the law as it was stated
in the Canons, under which the person who last died actually
seised of land constituted the stirps or stock from whom de-
scent was to be traced, the maxim being seisina facit stipi-
tem.16 According to these changes, descent was to be traced,
not from the person who was last entitled or possessed, but
from the person who last took by purchase.17 If intestate,
who died seised of land, had acquired it by purchase, that is,
in any other manner than by descent, escheat, partition or
inclosure, the person claiming the land as heir had to make
the intestate the propositus, or person from whom consangu-
inity was to be traced; while, on the other hand, if the land
was acquired by the intestate by descent from some ancestor
who had purchased it, or by descent from an ancestor who
had acquired it by descent from an ancestor who had pur-
chased it, and so on, such purchasing ancestor had to be

13 3 & 4 Wm. 4, c. 106, § 2.
14 § 1.
15 22 & 23 Vict. c. 35, § 19.
17 This principle is subject to the limitations existing under the doctrine
known as breaking descent.
made the *propositus*. The principles were very important in connection with the ancestral property doctrine and that concerning inheritance by kindred of the half blood. It often happened, especially in instances of long descents, that it was "uncertain by whom an estate was originally purchased." The Inheritance Act of 1833, in defining "purchaser" as the person last entitled to the land, provided a rule of evidence that was especially valuable in such cases. So if A. died seised of land, and it was uncertain as to whether he had purchased it or had inherited it, the person claiming it as heir had to prove descent from A. as the purchaser.\(^{18}\) On the other hand, if the land had descended to A. from his father, who was the first purchaser, the claimant had to prove that he was heir to the father of A.—the father being the *propositus* instead of A. No relations of A. *ex parte materna*, in the latter instance, were entitled to inherit the land. Again, if the land had descended to A. from his mother, who was the first purchaser, the descent had to be traced from her, and A.'s relatives *ex parte paterna* were excluded from the inheritance.

The Law of Property Amendment Act of 1859 provided for such a case as the following. "A purchaser of lands might die intestate, leaving an only son and no other relations. On the death of the son intestate there would be a total failure of the heirs of the purchaser; and previous to this enactment the land would have escheated to the lord of the fee. But after this enactment, although there were no relations of the son on the father's side, yet he might have relations on the part of the mother, or his mother might herself be living;\(^{19}\) and these persons, who were before totally excluded, were then admitted"\(^{20}\) to the inheritance.\(^{21}\)

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\(^{18}\) 1 Stephen, *op. cit. supra* note 7, at 395, 396.

\(^{19}\) A.'s brother of the half blood was not entitled to inherit from him in such cases.

\(^{20}\) The Inheritance Act of 1833 provided for inheritance by lineal ascendants.


\(^{21}\) As to the order in which they would have been admitted, see Williams and Eastwood, *op. cit. supra* note 20, at 395, 396.
The Administration of Estates Act of 1925 in England provides a new code of intestacy. Apart from the cases that are excepted from the operation of this Act, descent is now to be traced from the intestate himself whether he be the purchaser or not; it is not traced, as it was before this Act became operative, from the last purchaser.\textsuperscript{22}

In the United States the law of succession to intestate property, as a general rule, makes no distinction between property acquired by purchase and by descent. Some statutes make an exception to this rule in case of ancestral property, providing that such property descends to the kindred of the blood of the ancestral purchaser; and even then they stop at the last purchaser in the ancestral line. In this country we never look to the source whence the estate of the intestate was derived, to determine who shall inherit, unless the particular controlling statute makes that circumstance material. The statutes, as a general rule, do not limit the inheritance, when it passes collaterally or ascendingly, to those who are of the blood of the first purchaser. They do not require the claimant to trace his blood from the first purchaser. They generally class the persons who are to inherit in succession, and require that they shall have a certain connection or relation to the intestate, but do not require these persons to connect themselves by blood with any one beyond the intestate, or with the first purchaser, from whom the estate descended to the intestate, except in certain instances and then only in some of the states. In classifying the persons who are to inherit, generally lineal ascendants take in preference to collaterals. If there be no lineal descendants and no lineal ascendants or no statutory provision permitting the latter to inherit, the estate of an intestate descends to the collateral kindred in the nearest degree of relationship to the intestate, subject, of course, to the \textit{per stirpes} doctrine.\textsuperscript{23}

\textsuperscript{22} \textit{Williams and Eastwood}, op. cit. supra note 20, at 406.
\textsuperscript{23} In Den v. Jones & Searing, 8 N. J. Law 340, 349 (1826), the civil law rule is stated as follows: "\ldots in that code, where the half blood is not excluded,
“VI. A sixth rule or canon therefore is: That the collateral heir of the person last seised must be his next collateral kinsman of the whole blood.”

Blackstone’s comment on this Canon. “... the heir need not be the nearest kinsman absolutely, but only sub modo [in a particular way], that is, he must be the nearest kinsman of the whole blood; for if there be a much nearer kinsman of the half blood, a distant kinsman of the whole blood shall be admitted, and the other entirely excluded; nay, the estate shall escheat to the lord, sooner than the half blood shall inherit.

“A kinsman of the whole blood is he that is derived, not only from the same ancestor, but from the same couple of ancestors. For as every man’s own blood is compounded of the bloods of his respective ancestors, he only is properly of the whole or entire blood with another, who hath (so far as the distance of degrees will permit) all the same ingredients in the composition of his blood that the other had. Thus, the blood of John Stiles being composed of those of Geoffrey Stiles his father, and Lucy Baker his mother, therefore his brother Francis, being descended from both the same parents, hath entirely the same blood with John Stiles; or he is his brother of the whole blood. But if, after the death of Geoffrey, Lucy Baker the mother marries a second husband, Lewis Gay, and hath issue by him, the blood of this issue, being compounded of the blood of Lucy Baker (it is true) on the one part, but that of Lewis Gay (instead of Geoffrey Stiles) on the other part, it hath therefore only half the same ingredients with that of John Stiles; so that he is only his brother of the half blood, and for that reason they shall never inherit to each other. So also, if the father has two sons, A. and B., different by venters or wives; now these two

but postponed to the whole, no rule exists to limit the descent of the inheritance to the blood of the first purchaser, nor is any consideration had, whether the estate first came by father’s or mother’s side. 1 Bro. Civ. Law 223.”
brethren are not brethren of the whole blood, and therefore shall never inherit to each other, but the estate shall rather escheat to the lord. Nay, even if the father dies, and his lands descend to his eldest son A., who enters thereon, and dies seised without issue; still B. shall not be heir to this estate, because he is only of the half blood to A., the person last seised; but it shall descend to a sister (if any) of the whole blood to A., for in such cases the maxim is, That the seisin or possessio fratri facit sororem esse haereditem. [The seisin of the brother makes the sister heir.] Yet, had A. died without entry, then B. might have inherited, not as heir to A. his half brother, but as heir to the common father, who was the person last actually seised.

"This total exclusion of the half blood from the inheritance, being almost peculiar to our own law, is looked upon as a strange hardship by such as are unacquainted with the reasons on which it is grounded. But these censures arise from a misapprehension of the rule, which is not so much to be considered in the light of a rule of descent, as of a rule of evidence, an auxiliary rule, to carry a former into execution. And here we must again remember, that the great and most universal principle of collateral inheritances being this, that the heir to a feudum antiquum must be of the blood of the first feudatory or purchaser, that is, derived in a lineal descent from him. It was originally requisite, as upon gifts in tail it still is, to make out the pedigree of the heir from the first donee or purchaser, and to show that such heir was his lineal representative. But when, by length of time and a long course of descents, it came (in those rude and unlettered ages) to be forgotten who was really the first feudatory or purchaser; and thereby the proof of an actual descent from him became impossible, then the law substituted what Sir Martin Wright calls a reasonable, in the stead of an impossible, proof; for it remits the proof of an actual descent from the first purchaser, and only requires, in lieu of it, that the
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claimant be next of the whole blood to the person last in possession (or derived from the same couple of ancestors), which will probably answer the same end as if he could trace his pedigree in a direct line from the first purchaser. For he who is my kinsman of the whole blood can have no ancestors beyond or higher than the common stock, but what are equally my ancestors also; and mine are vice versa his. He, therefore, is very likely to be derived from that unknown ancestor of mine from whom the inheritance descended. But a kinsman of the half blood has but one-half of his ancestors above the common stock the same as mine; and, therefore, there is not the same probability of that standing requisite in the law, that he be derived from the blood of the first purchaser.

"To illustrate this by example. Let there be John Stiles, and Francis, brothers, by the same father and mother, and another son of the same mother by Lewis Gay, a second husband. Now, if John dies seised of lands, but it is uncertain whether they descended to him from his father or mother... his brother Francis, of the whole blood, is qualified to be his heir; for he is sure to be in the line of descent from the first purchaser, whether it were the line of the father or the mother. But if Francis should die before John without issue, the mother’s son by Lewis Gay (or brother of the half blood) is utterly incapable of being heir, for he cannot prove his descent from the first purchaser, who is unknown, nor has he that fair probability which the law admits as presumptive evidence, since he is to the full as likely not to be descended from the line of the first purchaser as to be descended; and, therefore, the inheritance shall go to the nearest relation possessed of this presumptive proof, the whole blood.

"And, as this is the case in feudis antiquis, where there really did once exist a purchasing ancestor, who is forgotten, it is also the case in feudis novis held ut antiquis, where the
purchasing ancestor is merely ideal, and never existed but only in fiction of law. Of this nature are all grants of lands in fee-simple at this day, which are inheritable as if they descended from some uncertain indefinite ancestor, and therefore, any of the collateral kindred of the real modern purchaser (and not his own offspring only) may inherit them, provided they be of the whole blood, for all such are, in judgment of law, likely enough to be derived from this indefinite ancestor; but those of the half blood are excluded, for want of the same probability. Nor should this be thought hard, that a brother of the purchaser, though only of the half blood, must thus be disinherited, and a more remote relation of the whole blood admitted, merely upon a supposition and fiction of law, since it is only upon a like supposition and fiction that brethren of purchasers (whether of the whole or half blood) are entitled to inherit at all; for we have seen that in *feudis stricte novis* [in fees strictly new] neither brethren nor any other collaterals were admitted. As, therefore, in *feudis antiquis* we have seen the reasonableness of excluding the half blood, if by a fiction of law a *feudum novum* be made descendible to collaterals as if it was *feudum antiquum*, it is just and equitable that it should be subject to the same restrictions as well as the same latitude of descent.

"Perhaps by this time the exclusion of the half blood does not appear altogether so unreasonable as at first sight it is apt to do. It is certainly a very fine-spun and subtle nicety; but considering the principles upon which our law is founded, it is not an injustice, nor always a hardship, since even the succession of the whole blood was originally a beneficial indulgence, rather than the strict right of collaterals; and though that indulgence is not extended to the demi-kindred, yet they are rarely abridged of any right which they could possibly have enjoyed before. The doctrine of the whole blood was calculated to supply the frequent impossibility of
proving a descent from the first purchaser, without some proof of which (according to our fundamental maxim) there can be no inheritance allowed of. And this purpose it answers, for the most part, effectually enough. I speak with these restrictions, because it does not, neither can any other method, answer this purpose entirely. For though all the ancestors of John Stiles, above the common stock, are also the ancestors of his collateral kinsman of the whole blood, yet, unless that common stock be in the first degree (that is, unless they have the same father and mother), there will be intermediate ancestors, below the common stock, that belong to either of them respectively, from which the other is not descended, and therefore can have none of their blood. Thus, though John Stiles and his brother of the whole blood can each have no other ancestors than what are in common to them both, yet with regard to his uncle where the common stock is removed one degree higher (that is, the grandfather and grandmother), one-half of John's ancestors will not be the ancestors of his uncle. His patruus, or father's brother, derives not his descent from John's maternal ancestors; nor his avunculus, or mother's brother, from those in the paternal line. Here then the supply of proof is deficient, and by no means amounts to a certainty; and the higher the common stock is removed, the more will even the probability decrease. But it must be observed, that (upon the same principles of calculation) the half blood have always a much less chance to be descended from an unknown indefinite ancestor of the deceased, than the whole blood in the same degree. As, in the first degree, the whole brother of John Stiles is sure to be descended from that unknown ancestor; his half brother has only an even chance, for half John's ancestors are not his. So, in the second degree, John's uncle of the whole blood has an even chance; but the chances are three to one against his uncle of the half blood, for three-fourths of John's ancestors are not his. In like manner, in the third degree, the chances are only three to one against
John’s great-uncle of the whole blood, but they are seven to one against his great-uncle of the half-blood, for seven-eighths of John’s ancestors have no connection in blood with him. Therefore, the much less probability of the half blood’s descent from the first purchaser, compared with that of the whole blood, in the several degrees, has occasioned a general exclusion of the half blood in all.

“But, while I thus illustrate the reason of excluding the half blood in general, I must be impartial enough to own, that, in some instances, the practice is carried further than the principle upon which it goes will warrant. Particularly when a kinsman of the whole blood in a remoter degree, as the uncle or great-uncle, is preferred to one of the half blood in a nearer degree, as the brother; for the half brother hath the same chance of being descended from the purchasing ancestor as the uncle; and a thrice \(^1\) better chance than the great-uncle or kinsman in the third degree. It is also more especially overstrained, when a man has two sons by different venters, and the estate on his death descends from him to the eldest, who enters and dies without issue, in which case the younger son cannot inherit this estate, because he is not of the whole blood to the last proprietor. This, it must be owned, carries a hardship with it, even upon feodal principles, for the rule was introduced only to supply the proof of a descent from the first purchaser; but here, as this estate notoriously descended from the father, and as both the brothers confessedly sprung from him, it is demonstrable that the half brother must be of the blood of the first purchaser, who was either the father or some of the father’s ancestors. When, therefore, there is actual demonstration of the thing to be proved, it is hard to exclude a man by a rule substituted to supply that proof when deficient. So far as the inheritance can be evidently traced back, there seems no

\(^1\) In a footnote at this point it is said that “This ought to be twice; for the half brother has one chance in two, the great-uncle one in four. The chance of the half brother is therefore twice better than that of the great-uncle.”
need of calling in this presumptive proof, this rule of probability, to investigate what is already certain. Had the elder brother, indeed been a purchaser, there would have been no hardship at all, for the reasons already given; or had the *frater uterinus* only, or brother by the mother's side, been excluded from an inheritance which descended from the father, it had been highly reasonable.”

Pollock and Maitland explain the principle embodied in Canon VI as follows: “No one who is connected with the *propositus* only by the half blood can inherit from him. A man buys land and dies without issue; his half brother, whether consanguineous or uterine, can not inherit from him. If there is no kinsman or kinswoman of the whole blood forthcoming, the land will escheat to the lord. Of course all

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2 2 BL. COMM. 227, 228, 229, 230, 231, 232.

“Of Blackstone's effort [to justify the distinction between the whole and the half blood] Sir Henry Maine in his Ancient Law, chap. 5, p. 146, says: 'In all the literature which enshrines the pretended philosophy of law, there is nothing more curious than the pages of elaborate sophistry in which Blackstone attempts to explain and justify the exclusion of the half blood.' Maine suggests the following explanation: ‘In agnation, too, is to be sought the explanation of that extraordinary rule of English law, only recently repealed, which prohibited brothers of the half blood from succeeding to one another's lands. In the customs of Normandy the rule applies to uterine brothers only—that is, to brothers by the same mother but not by the same father—and, limited in this way, it is a strict deduction from the system of agnation, under which uterine brothers are no relations at all to one another. When it was transplanted to England, the English judges, who had no clue to its principle, interpreted it as a general prohibition against the succession of the half blood, and extended it to consanguineous brothers; that is to sons of the same father by different wives.’ . . . Pollock and Maitland, in their History of English Law, do not agree with Sir Henry Maine. They say (vol. 2, p. 305): 'Our persuasion is that the absolute exclusion of the half blood, to which our law was in the course of time committed, is neither a very ancient nor a very deep-seated phenomenon; that it tells us nothing of the original constitution of feuds nor of the agnatic family. In truth the problem that is put before us when there is talk of admitting the half blood is difficult and our solutely of it likely to be capricious. We can not say nowadays that there is any obvious proper place for the half blood in a scheme of inheritance, especially in our 'parentelic' scheme. The lawyers of the thirteenth and fourteenth centuries had no ready solution, and we strongly suspect that the rule that was ultimately established had its origin in a few precedents. About such a matter it is desirable that there shall be a clear rule; the import of the rule is of no great moment. Our rule was one eminently favourable to the king; it gave him escheats; we are not sure that any profounder explanation of it would be true.” Per Summers, J., in Stockton v. Frazier, 81 Ohio St. 227, 90 N. E. 168, 26 L. R. A. (N. S.) 603 (1909).
descendants of a man or woman are of kin to him or her by the whole blood. A man leaves a daughter by his first wife, a son by his second wife; his son inherits from him. A man leaves no sons and no issue of sons, but five daughters, two by his first wife and three by his second wife; they will all inherit from him together and take equal shares. Any question about the half blood can only arise when this man has ceased to be and one of his descendants has become the propositus, and no one of them, according to our law, will become the propositus until he obtains an actual seisin of the land. A man leaves a son and a daughter by a first wife, and a son by a second wife. His eldest son inherits and is entitled to seisin. If, however, he dies without issue before he has obtained seisin, then his father is still the propositus. That father has a daughter and a son. The son inherits before the daughter. He is not inheriting from his half brother; he is inheriting from his father. On the other hand, if the eldest son acquires seisin, all is altered. When he dies without issue he is the propositus. We have now to choose between a sister by the whole blood and a half brother, and we hold, not merely that the sister is to be preferred, but that the land shall sooner escheat to the lord than go to the half brother."

Canon VI was changed by Section 9 of the Inheritance Act of 1833 in England. This Statute provides for inheritance by relatives of the half blood; they are not excluded, as they were under the Canon, but are postponed to the whole blood relatives in the same degree. The order of succession stated in this Statute, with respect to inheritance by the half blood, is that they shall be entitled to inherit "next after any relation in the same degree of the whole blood, and his issue,

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3 There is no reason why the same principle would not have been applicable to other kindred related to the propositus by the half blood.


5 3 & 4 Will. 4, c. 106.
where the common ancestor shall be a male, and next after the common ancestor where such common ancestor shall be a female, so that the brother of the half blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother shall inherit next after the mother."

The Administration of Estates Act of 1925 in England, in stating the order of succession to real and personal property on intestacy, provides for inheritance by brothers and sisters of the half blood next after brothers and sisters of the whole blood, and for inheritance by uncles and aunts of the half blood next after uncles and aunts of the whole blood.

Prior to the decision in Watts v. Crooke the rule in England in regard to succession to intestate personalty by relatives of the half blood appears not to have been uniform; but that decision, which was in 1690, definitely established the rule to be that under the English Statute of Distributions of 1670 brothers and sisters of the half blood were entitled to share equally in intestate personalty with brothers and sisters of the whole blood. This rule extended generally to kindred of the half blood in the same degree, although no authority has been found dealing with any other relatives than brothers and sisters.

The provisions of the statutes in the states in this country dealing with succession to intestate property by relatives of the half blood are very divergent. In some states no distinc-
tion is made between relatives of the whole blood and those of the half blood with regard to the descent and distribution of intestate property. In Illinois, for instance, the statute provides that "in no case shall there by any distinction between the kindred of the whole and the half blood." This Statute abrogates entirely, in all cases, the common-law rule that kindred of the half blood could not inherit. In Massachusetts the statute provides that "kindred of the half blood shall inherit equally with those of the whole blood in the same degree." While the language of this Statute is not as broad as the Illinois Statute, the practical effect is the same.

The statutes in some states, while not considering the source of the intestate's title, discriminate against collateral heirs of the half blood in various ways. Some statutes provide that as to collaterals within the same degree of relationship to the intestate those of the whole blood shall receive twice as much as those of the half blood. Thus, where the collateral heirs are a brother of the whole blood and a brother of the half blood, the former is entitled to two-thirds and the latter one-third. The Missouri Statute provides that when the inheritance passes to ascending and collateral kindred of an intestate, if all of the collaterals be of the half blood, they shall have "whole portions, only giving to the ascendants double portions."

The statutes in Connecticut and Mississippi merely postpone the heirs of the half blood to those of the whole blood in equal degree. In

10 GEN. LAWS OF MASS. (Tercentenary ed., 1932) c. 190, § 4.
12 ARIZ. REV. CODE ANN. (Struckmeyer, 1928) § 981; KY. STAT. (Carroll, 1922) § 1395; Comment, 42 YALE L. JOUR. 101, 105, n. 25.
13 MO. REV. STAT. (1919) § 306.
14 CONN. GEN. STAT. (1930) § 4982.
South Carolina the statute postpones brothers and sisters of the half blood to those of the whole blood; but collateral kindred of the half blood in remoter degrees share equally with kindred of the whole blood in the same degree of relationship.16 In Georgia the statute postpones kindred of the half blood on the maternal side to those of the whole blood on the paternal side.17

Some states have, by statutes, retained the ancestral property doctrine, merging it and inheritance by kindred of the half blood.18 The statutes in this group of states embody substantially the same terminology. Taking the Wisconsin Statute as an example, it provides as follows: "... kindred of the half blood shall inherit equally with those of the whole blood in the same degree, unless the inheritance come to the intestate by descent, devise or gift of some one of his ancestors; in which case all those who are not of the blood of such ancestors shall be excluded from such inheritance."19 Under this type of statute it has been held that, in default of kindred of the blood of the ancestor, kindred of the half blood are entitled to inherit equally with kindred of the whole blood in the same degree.20 Also, it has been held, under this type of statute, that kindred of the half blood not of the blood of the ancestor inherit in preference to kindred of the whole blood of the ancestor but in a remoter degree

16 S. C. CODE OF LAWS (1932) § 8906; Comment, 42 YALE L. JOUR. 101, 106, n. 27.
17 GA. ANN. CODE (Michie, 1926) § 3931.
18 The following states have been listed in this group: Alabama, California, Idaho, Michigan, Minnesota, Montana, Nebraska, Nevada, North Dakota, Oklahoma, South Dakota, Utah and Wisconsin. Comment, 42 YALE L. JOUR. 101, 104, 105, n. 21.
19 WIS. STAT. (1929) § 237.03.
20 In re Edwards' Estate, 259 Pac. 440 (Cal. 1927).
of relationship to the intestate.\textsuperscript{21} The statutes in a few states expressly provide that on failure of kindred of the whole blood of the intestate, kindred of the half blood shall inherit as if they were of the whole blood.\textsuperscript{22} Under this type of statute it has been held that kindred of the half blood not of the blood of the ancestor inherit in preference to kindred of the whole blood of the ancestor in a remoter degree of relationship to the intestate.\textsuperscript{23}

Apart from specific statutory regulation of inheritance by kindred of the half blood of the intestate and apart from a contrary intention manifested in the statutes of descent and distribution, the statutory provisions regulating the course of descent are generally construed to include the kindred of the half blood along with kindred of the whole blood in the same degree of relationship to the intestate.

"VII. The seventh and last rule or canon is: That in collateral inheritances the male stocks shall be preferred to the female (that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near), unless where the lands have, in fact, descended from a female."

Blackstone's comment on this Canon. "Thus the relations on the father's side are admitted \textit{in infinitum}, before those on the mother's side are admitted at all; and the relations of the father's father, before those of the father's mother. . . . in this the English law is not singular, but warranted by the examples of the Hebrew and Athenian laws . . . though among the Greeks in the time of Hesiod, when a man died

\textsuperscript{21} In re Belshaw's Estate, 212 Pac. 13 (Cal. 1923). \textit{Contra}: Thompson v. Smith, 227 Pac. 77 (Okla. 1923); Amy v. Amy, 42 Pac. 1121 (Utah, 1895).

\textsuperscript{22} \textit{Ind. Stat. Ann.} (Baldwin, 1934) § 3295; \textit{N. C. Ann. Code} (1931) § 1654 (5).

\textsuperscript{23} Pond v. Irwin, 15 N. E. 272 (Ind. 1888) (Intestate died seised of realty derived by descent from her mother. Held, her half brother, the son of her father by a second wife, was entitled to inherit the realty, as against the brother of her mother.).
without wife or children, all his kindred (without any distinc-
tion) divided his estate among them. It is likewise war-
ranted by the example of the Roman laws, wherein the
agnati, or relations by the father, were preferred to the
cognati, or relations by the mother, till the edict of the Em-
peror Justinian1 abolished all distinction between them. It
is also conformable to the customary law of Normandy,
which indeed in most respects agrees with our English law
of inheritance.” 2

The principles that were and are applicable, in connection
with the provisions of this Canon, have been considered in
a previous part of this paper, both with respect to the law
in England and in the United States.3

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1 118TH NOVEL.
2 2 BL. COMM. 234, 235.
3 See 11 NOTRE DAME LAWY. 121-128.

Professor Costigan says: “In the United States, with the possible exception of
estates tail and with the further exception that in some states lands descended
from one ancestor go to the kindred in the same line, this Seventh Canon seems
not to be law.” COSTIGAN, CASES ON WILLS, DESCENT AND ADMINISTRATION (2nd
ed.) 467, n. 10.