

INTESTATE SUCCESSION TO LAND IN NEW JERSEY*

Mr. Justice Holmes has said that in the law of real property "a page of history is worth a volume of logic". Had he confined this epigram to the law of intestate succession to land, he might well have balanced "a few lines" of history with "a volume of logic".

Through the centuries since William the Conqueror, the law of land has responded to contemporaneous social, political and economic forces, though its response may not have been as conscious as it is today, due to the fact that judicial rather than statutory innovations were more frequent. This adjustment of the law to social needs is not perfect, nor is it accomplished the moment the need is felt. There is, rather, a social lag between the social need and the measure that the law fashions in order to adjust itself to it. Hence we find that while the feudal culture pattern of England was disintegrating, the law of intestate succession to land, which had been moulded to meet feudal requirements, was as yet unchanged. Before any reflection of more modern needs was visible, Blackstone epitomized this feudal law on intestate succession to land in seven canons of descent.¹

It is on this foundation that the modern law in this field

¹ 2 BL. COMM. *208-234.

- I. Inheritances shall lineally descend to the issue of the person who last died actually seized, *in infinitum*; but shall never lineally ascend.
- II. The male issue shall be admitted before the female.
- III. When there are two or more males, in equal degree, the eldest only shall inherit, but the females all together.
- IV. 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.
- V. On failure of lineal descendants, or issue, of the person last seized, the inheritance shall descend to the blood of the first purchaser; subject to the three preceding rules.
- VI. The collateral heir of the person last seized must be his next collateral kinsman, of the whole blood.
- VII. In collateral inheritances the male stocks shall be preferred to the female; (that is, kindred derived from the blood of the male ancestors shall be admitted before those from the blood of the female)—unless where the land have, in fact, descended from a female.

* This is the first part of an article; remaining portion will appear in the next issue.

has been built, but the progeny does not completely resemble the ancestor, though its parentage cannot escape recognition. Confining our attentions to the State of New Jersey, let us see how this body of law, as Blackstone knew it, has adapted and adjusted itself to the needs of society in a changing cultural environment.

I. INHERITANCE BY DESCENDANTS

A. *Requirement that the intestate be seized in fee simple in his or her own right.**

In New Jersey intestate succession to land is regulated by the Descent Act,² its first section on inheritance by descendants beginning as follows: "That when any person shall die seized of any lands, tenements or hereditaments in his or her own right in fee simple without devising the same in due form of law . . ."³ This language, clearly applicable to the usual situation where the intestate was seized in fee simple absolute, has also been held to govern the descent of reversion on the common law theory which treats a reversion as the continuation of the fee in the reversioner.⁴ Since the doctrine of equitable conversion causes land converted by its operation to descend as personalty, the situations without the scope of its operation must be distinguished; for they, too, may satisfy this require-

² COMP. STAT. (1910) p. 1917 ff.

³ COMP. STAT. (1910) p. 1917, §1.

⁴ See *Den ex dem. Holcomb v. Lake*, 25 N.J.L. 605, 614 (1855). There was a devise in fee tail to the son of the testator with proviso that if said son died before attaining twenty-one or without issue, then the property was to go over to the other children of the testator in equal shares. The testator died in 1784 and his son died in 1851 never having had lawful issue. The son devised his property to his illegitimate children and they hold the premises. The plaintiff is one of the grandchildren of the testator (all his children being dead) and brings this action claiming under the gift over in default of issue. *Held*: For the defendant in ejectment; affirmed. The son never had lawful issue but did live to be more than twenty-one. Therefore the gift over did not take effect since it was only to take effect if the son died under twenty-one and without issue. The estate reverted to the testator and descended according to section one of the Descent Act of 1780. The plaintiff would be entitled to a *per stirpes* share of one-fourth due his mother and the issue of plaintiff's aunt are also entitled to a fourth. The son effectively devised one-half that descended to him. (The reason for holding for the defendant is that the plaintiff brought his action for more than he was entitled to.)

*The discussion herein is applicable to the entire act, but does not cover Estates Tail or Life Estates *pur autre vie*.

ment of seizin. Where a testator imperatively directs that his lands be sold, then these lands are equitably converted into personalty as of the date of his death and if he is partially intestate this balance will descend as personalty,⁵ but if a sale is merely authorized, then the property remains realty until actual sale occurs and hence a legacy will descend as realty if a devisee, who survived the testator, dies intestate before the sale,⁶ dower and curtesy of a spouse of such devisee attaching,⁷ though the estate of a widow will be awarded the computed value of her dower interest only if she survived the actual conversion of the property.⁸ However, where a court orders that a fee be sold to

⁵ *Hand v. Marcy*, 28 N.J.Eq. 59 (1877). Testator provided that wife could have a specific legacy if she elected to take it in lieu of dower. Then he provided that if she made this election the other property was to be sold. One residuary legatee (one of three residuary legatees to take as tenants in common) died in the lifetime of the testator. On the election by the widow the executors sold and now ask for construction of the will as to the legacy of the deceased legatee. *Held*: The legacy lapsed and the decedent died partially intestate. Since the order to sell was imperative, the property became personalty on the death of the testator. As such it descends under the Statute of Distributions.

⁶ *Albright v. Van Voorhis*, 104 Atl. 27 (1918). Testator devised to wife for life and remainder to children or their legal representatives. In clause six of his will he provided that one parcel of land should not be sold until at least six years after his death, but the will called for conversion of all his property into personalty (with exception of this one restriction) as soon as it could be favorably done. One son died intestate within the six year period and thirty-four years later a daughter died intestate. On bill to construe it was held that since the remainders vested immediately, the heirs at law of the son were entitled on his intestate death, since his death occurred before the six year period elapsed. Since the widow died ten years before the daughter and since the sales were completed before the daughter's death, her share descends as personalty on her intestate death.

⁷ *Skinner v. Boyd*, 98 N.J.Eq. 55, *aff.* 100 N.J.Eq. 355 (1925). Testator's will provided for vesting of equitable remainders in nephews and nieces, subject to complete defeasance on their death before his widow. It further provided that the trustees be empowered to sell after the decease of his widow. On construction of the will after the death of the widow it was held that the wives of nephews and the husbands of nieces who survived the widow were entitled to dower and curtesy interests since there was a period between the widow's death and the sale by the trustees during which the nephews and nieces were seized of land. The power of sale was not imperative, but for the convenience of the estate and for purposes of the will.

⁸ *Cf. Mulford v. Hiers*, 13 N.J.Eq. 13, 15 (1860). On partition of the lands of a decedent the widow consented to accept the computed value of her dower and since it was impossible to partition without great prejudice a sale was ordered. One parcel was sold before her death and one after her death, but there was no distribution before her death. Her stepchildren claim a share of the funds from both sales while her own children claim funds as part of estate of their mother. *Held*: In the case where the land was sold before her death the computed value of her dower is part of her estate and descends to her

satisfy the debts of a decedent,⁹ or where a testator empowers his executor to sell lands to pay legacies,¹⁰ there is a conversion only to the extent necessary to effectuate the purpose and the balance descends as realty.

As to the requirement that it be fee simple "in his or her own right" doubt might be raised as to the applicability of the act to a passive trust held by another to the use of the intestate. Since the Statute of Uses would execute such a trust, the intestate would most likely be held to have satisfied this portion of the language. In connection with active trusts several problems arise. When a sole trustee dies intestate the legal title does not descend under this act,¹¹ and the eldest son takes as at

heirs (the court uses the word "heirs") but in the case where it was sold after her death her dower was extinguished by her death and hence the funds of this sale descend as if she had predeceased her husband.

⁹ *Lerch v. Oberly*, 18 N.J.Eq. 575 (1867). O. Oberly died intestate seized of lands, leaving a widow and one child, an infant of three weeks. The court ordered that the lands be sold to pay his debts and more was sold than was necessary for this purpose. Part was invested to take care of the widow's dower and the rest was given to the infant's guardian. The infant died leaving three paternal uncles, a cousin representing a deceased paternal aunt, her mother (who inherited for life) and her three maternal half brothers and sisters. The plaintiffs (uncles and cousin) claim as heirs while the defendants (mother and half blood) claim as next of kin. Procedure was that the next of kin sued the administrator for the money and the heirs brought this bill to enjoin the suit. *Held*: Bill granted and affirmed on appeal. This money retained its character as realty since it was converted by order of the court and it descends as realty. No decision as to the rights of the various parties plaintiff.

¹⁰ *Moore v. Robbins*, 53 N.J.Eq. 137 (1894). Testator directed payment of his debts, ordered the sale of realty within one year after his death or as soon as the executors deem it wise, then provides for legacies of \$116,300, a watch, and a devise of a specific plot of land. All his realty was sold for about \$15,000 (except the plot that was devised specifically). All the legacies were paid and \$63,000 remained. The heirs claim as do the next of kin. *Held*: For the next of kin (nephews and nieces). On appeal it was reversed for the heirs (children of deceased nephew who take *per stirpes* under section 2 of the Descent Act). A conversion directed for purposes of a testament will be held a conversion to the extent necessary to realize said purposes. There was sufficient personality here (which is primarily liable for legacies) to take care of the legacies and so the land sold was not equitably converted at all.

¹¹ *Wills v. Cooper*, 25 N.J.L. 137 (1855). Conveyance to B. Cooper and wife in trust for their children, Husband survived wife and died testate in 1835. His eldest son conveyed to the predecessors of the defendant in 1849 after a judgment had been procured against him (the son) in 1838 and under which the land had been sold to the predecessors of the plaintiff. The plaintiff claims to have bought an undivided one-third which was devised by the father to the son by the residuary clause of his will. *Held*: For the plaintiff. The father could not devise the trust estate and hence legal title descended to the eldest son as trustee until the youngest was twenty-one (1844). His third legal and equitable estates merged and hence could be sold. At page 161 "It

common law. When one of joint trustees dies intestate, the remaining trustees hold as survivors.¹²

B. Requirement that the children be lawful.

This section has always contained the phrase "lawful children".¹³ It would seem that only legitimate issue would be meant, including of course, posthumous children.¹⁴ At first, this was undoubtedly the case. From colonial days such a child could not be barred because he or his ancestor was an English alien,¹⁵ or later, because of the general alienism of the ancestor,¹⁶ or of the child.¹⁷ Only recently has this phrase, "lawful issue," been made to cover, to some extent, adopted and illegitimate children.

During the nineteenth century an acute situation was developing with regard to the infant dependents of the state. While care was costly, the inefficiency was gross.¹⁸ Therefore, as a measure of enlightened selfishness, perhaps, we find the enactment of the first adoption statute in 1877.¹⁹ It encouraged the removal of infants from state supported institutions while aiming to obtain better care and training. This would reduce the cost to the state and it probably would be more efficient than the state institutions. The humanitarian movement might well be the stimulus of the desire of persons to adopt children,²⁰ together with the natural desire of a childless couple to have and bring them up. At any rate, the state provided a legal means of adoption.

The attitude of the courts in construing this legislation has

descended to Ralph, as the eldest son, according to the law of primogeniture, our statute of descents not applying to naked trust estates * * *."

See Preamble: COMP. STAT. (1910) p. 5667.

¹² COMP. STAT. (1910) p. 5667, §1.

¹³ Stat. of 1780; P.L. 1817; P.L. 1931, §1.

¹⁴ COMP. STAT. (1910) p. 1921, §7.

¹⁵ ALLISON: ACTS OF GENERAL ASSEMBLY, 1702-76, p. 378. Chap. DLXVII passed A.D. 1772. This was probably received under the reception section, Article XXII of the Constitution of the State of New Jersey passed July 2, 1776.

¹⁶ COMP. STAT. (1910) p. 1922, §12.

¹⁷ COMP. STAT. (1910) p. 39, §3.

¹⁸ See I GILLEN, POVERTY AND DEPENDENCE, 341 ff, 359 (1921).

¹⁹ P.L. 1877, p. 123.

²⁰ See I CARMAN, SOCIAL AND ECONOMIC HISTORY OF THE UNITED STATES, p. 188 (1930). See I GILLEN, *supra*, note 18, Chap. 21, 22.

ranged from relative liberality²¹ to common law conservatism.²² The former courts have stressed the spirit of the legislation in their attempts to apply it as broadly as possible while the latter cling to the precise letter of the law. This divergence in attitude has resulted in holdings that seem to be objectively reconcilable only on their different fact situations or on the possible

²¹ *In re Book*, 90 N.J.Eq. 549 (1919). Fredrick adopted in 1908 in New Jersey. His adopting mother died in 1911 and his adopting parent remarried. Three years after second marriage father executed his "will". His second wife was *enceinte* with child when he died in 1917. The will leaves certain personal property to Fredrick and realty to the second wife. As to residue, two-thirds to wife and one-third in trust for Fredrick until he attains age of twenty-five, at which time he is to receive corpus provided he retain his adopted name. Fredrick files caveat claiming will is void under COMP. STAT. 1910 p. 5865, §20. *Held*: Claim denied. Fredrick cannot in one breath say he is not issue of his adopting parent and in the next breath claim as a child of the testator. The adoption law makes an adopted child equal to a natural child for purposes of real and personal property inheritance. An adopted child is within the meaning of "child" in the wills act and so the will is valid. The statutes as to adoption give rights under the statute of wills, descents and distribution, as if the adopted child were born in wedlock. The words "child, children, or issue" in these statutes must be construed to include adopted children.

Haver v. Herder, 96 N.J.Eq. 544 (1924). Will drawn 1899 leaving life estate to son George, and if George "should leave any legal heirs" the remainder to them in fee; otherwise to the testator's other children in fee. Testator died 1909. George survived his father and died survived by daughter adopted in New Jersey in 1911. The heirs of the testator's other children claim that this adopted daughter is not a "legal heir" within the meaning of the will. *Held*: For the adopted daughter. The will was drawn after the enactment of adoption legislation.

"Where a testator by a will executed and probated during the existence of our statute as to adoption, devises property to a class designated as 'heirs', 'lawful heirs' or 'legal heirs' he must be deemed, in the absence of evidence to the contrary elsewhere in the will or surrounding circumstances, to have intended to include within such class children adopted pursuant to such statute, as well as natural born children or grandchildren * * *." This is the spirit of legislation and of the policy laid down in the Book case.

In re Finkenzeller, 105 N.J.Eq. 44, *aff.* 107 N.J.Eq. 180 (1929). Child adopted in New York in 1920 while adopting parents were residents of New Jersey. The adopting mother died in 1926 survived by her husband and the child. There was a partial intestacy as to personalty and the question arises as to the rights of the adopted child. The child brings this action to compel her father to file an inventory. He denies the necessity by claiming she was not adopted in New Jersey. *Held*: Order to file an inventory. There is no case denying the right of a child adopted in New York to take by inheritance from the adopting parents, personal property having its situs in New Jersey. A child adopted in New York has the same rights as a lawful child so far as personal property of the adopting parent is concerned.

²² *Fry v. Nielson*, 99 N.J.Eq. 135 (1926). Child adopted in New York and question arises whether he can inherit land in New Jersey. *Held*: He cannot inherit. The common law rules of descent apply in New Jersey except where modified by statute. The statutes begin to regulate when the intestate leaves "two or more lawful children" (COMP. STAT. 1910 p. 1917, §1). Therefore an only child inherits by the common law. The adoption statute (P.L. 1902, p. 259)

choice of alternatives which the court faced in the particular case.

We therefore find that while a child formally adopted in New Jersey has been held within the term "legal heirs" by a court concerned with the broad policy of the legislation while construing a testament,²³ he is not within the term "children" when used by a grantor,²⁴ or a testator,²⁵ though the one that used the language was a stranger to the adoption in each case. Similarly, the adopted child is within the meaning of the word "issue" when a statute is being liberally construed,²⁶ but not when a will containing a testamentary devise to the adopting parent or "his issue" is being construed, the adoption being foreign.²⁷

An early decision to the effect that the adopting parent is not the next of kin of the adopted child since the statute did not

gives rights to children to inherit only when they are adopted under its provisions. A child adopted in a foreign state does not obtain the rights granted in the statute. The right of an adopted child is in derogation of the common law and must be construed strictly and hence one not adopted in New Jersey cannot inherit New Jersey land.

²³ *Haver v. Herder*, *supra*, note 21.

²⁴ *Ahlemeyer v. Miller*, 102 N.J.L. 54 (1925). Conveyance in 1891 to Miller and wife for life, then to survivor for life, remainder to their children. In default of children then one-half to heirs of husband and one-half to heirs of wife. In 1895 they adopted John in New Jersey. The survivor of the husband and wife died in 1922 (the wife) survived by her brother. John is in possession claiming under the adoption statute as child and only heir. He claims under Descent Act and under the rule in *Shelley's Case* and under Adoption Statute. *Held*: On ejectment brought by the wife's brother that the adopted child has no title. A limitation in a deed or will to a child or children is not deemed to include an adopted child, where the grantor or testator is a stranger to the adoption. The adoption statute excludes adopted children from taking property limited to heirs of the body. The adopted child is only allowed to inherit from the adopting parent. A limitation of a remainder to "children" does not include adopted children.

²⁵ *Stout v. Cook*, 75 Atl. 583 (1910). There was a devise of a remainder to the child or children of the deceased sons or daughters of the testator to be paid on the death of each son or daughter. The will was effective 1861. One son adopted a daughter in New York in 1900 and after his death the question arises as to whether or not she may take under the will. *Held*: On bill to construe she does not take. There was no adoption statute in New Jersey until 1877 and none in New York until 1873. The testator had in mind only blood relatives. A child adopted under the New Jersey statute can only inherit from the adopting parent. The statute does not create a capacity to take as a child of the parent under the will of some other person.

²⁶ *In re Book*, *supra*, note 21.

²⁷ *Dulfon v. Keasbey*, 111 N.J.Eq. 223 (1932). Testator executed his will in 1923 and died in 1927 survived by a widow and three sons. One son died in 1931 leaving a widow and an adopted son, Ray who had been adopted in Cali-

provide for the former's being heir of the latter²⁸ has probably been superseded by statute.²⁹ In general, it would see that the adopted child may inherit from his true parents³⁰ as well as from his adopting parents³¹ and there are *dicta* to the effect that inheritance from ascendants of the adopting parents is possible when the adopting parent has predeceased such ascendant and the adopted child survives such ascendant.³² The inference is that the issue of an adopted child may represent such child on the intestacy of the adopting parents.³³

Since the amendments to the adoption legislation are usually in favor of the adopted child one might expect that the

fornia shortly after the will was executed. The will provides that if the testator's sons die, their "issue" are to take instead. The question arises as to whether Ray can take personalty under the will and it was held that he cannot. The tenor of the will shows that the testator meant children of the bodies of his sons and not adopted children. The California statute does not make an adopted child kin of the grandfather. The adoption occurred after the execution of the will and hence child is not in group intended to be benefited. The testator is a stranger to the adoption and is not presumed to intend to benefit the adopted child.

"Were this a case of intestacy, and the adopting parent had predeceased his father, there could be no question that, under the established statutory system for the transfer of property upon death, the adopted child would take under our descent and distribution acts."

Note: It is admitted that the cases can be distinguished on their facts, but it is urged that the attitude of the court seems to be the dominant factor.

²⁸ *Heidecamp v. Jersey City Ry. Co.*, 69 N.J.L. 284 (1903). An adopted child was accidentally killed by the defendant's servants and her administrator brings action for wrongful death for benefit of next of kin. Trial court held that adopting father is not next of kin and natural mother is only entitled to nominal damages and directed verdict accordingly. On appeal this was affirmed. The adoption statute does not make adopting father heir of the child and he is therefore excluded as next of kin. Next of kin of adopted child are his next of kin by blood. Since the mother abandoned the child and released all claims to services of said child, there was no substantial legal damage to her. Even if she could show such damages the plaintiff cannot complain, the mother herself must do so.

²⁹ P.L. 1912, p. 53, §4.

³⁰ P.L. 1902, p. 261, §3 (unless the child was illegitimate).

³¹ P.L. 1930, p. 324, §4.

³² See *Dulfony v. Keasbey*, *supra*, note 28 (*dicta* quoted).

³³ See *Dorsett v. Vought*, 89 N.J.L. 303, 305 (1916). Defendant's mother had been informally adopted by the testator who died partially intestate. His will referred to the defendant and her sister as children of his deceased adopted daughter. On this description the defendant claims that the estate descended to him and his sister. The plaintiff sues in ejectment for one-fourth (being one of four first cousins of the testator). *Held*: For the plaintiff. The defendant is not a legal heir of the testator since the language in the will is insufficient to constitute the defendant an heir. The first cousins of the testator are his heirs at law. The defendant is not an heir because his mother was not legally adopted and so as her descendant he may not represent her as an heir of the deceased.

future decisions of the courts will tend to be more liberal in the construction of this legislation. Justification for this expectation may be found in the decisions on foreign adoptions. A conservative decision refused to allow a child adopted in New York to take realty in New Jersey on the intestacy of the adopting parent.³⁴ Three years later a liberal court refused to follow the analogy of this holding and allowed a child adopted in New York to take personalty in New Jersey on the intestacy of the adopting parent³⁵ and six years after the first opinion we find *dicta* broad enough to overrule it.³⁶ In light of the fact that the Court of Errors and Appeals has affirmed the second opinion only, with regard to personalty it might well draw the analogy from the second case of personalty to realty, follow the available *dicta* in the third case, and so overrule the first holding. Further justification for this refusal could be had in the fact that section 1 of the Descent Act which entered into the first opinion³⁷ has since been amended.³⁸

Before the adoption statute was passed it was possible by contract to assure to a child the right to inherit from those who formally adopted him³⁹ and this method has been used after the passage of the statute. While a contract to adopt will not be specifically enforced in equity after the death of the

³⁴ Fry v. Nielson, *supra*, note 22.

³⁵ *In re Finkenzeller*, *supra*, note 21.

³⁶ See Dulfon v. Keasbey, *supra*, note 27 (*dicta* quoted).

³⁷ COMP. STAT. (1910) p. 1917, §1.

³⁸ P.L. 1931, p. 39, §1.

³⁹ Van Dyne v. Vreeland, 11 N.J.Eq. 370 (1857). Contract when plaintiff was eight weeks old whereby his aunt and uncle promised the plaintiff's parents to treat plaintiff as their own son and that all the property they had should be given to him, so that it should belong to him on the death of his uncle and aunt. Plaintiff's parents, in consideration of this promise, consented to allow said uncle and aunt to adopt their son. The plaintiff has lived with his aunt and uncle all his life and has worked their farm and now they have deeded premises to others in order to defraud him. The defendants file a demurser to the plaintiff's suit for equitable relief. *Held*: Overruled. The plaintiff may enforce the contract as a third party beneficiary. He has worked twenty-five years in reliance on this contract and it is no objection to equitable relief to say that the defendants could not enforce the contract after having received performance for so long. The conveyance is admittedly for the purpose of defrauding the plaintiff and hence the conveyees may be made to hold for the defendants for their lives and then to convey to the plaintiff (if the plaintiff proves his case).

See 12 N.J.Eq. 142 where interests of all parties were cared for.

promisor,⁴⁰ a contract that a person is to have the right to inherit from the one informally adopting him,⁴¹ or a contract that the latter's property will be devised to the former,⁴² will be specifically enforced after the death of such promisor. In the absence of a contract to assure the rights of inheritance, or to devise, an informally adopted person cannot inherit from the informal adopting parent,⁴³ nor can the issue of the former inherit from the latter as descendants of the latter after the death of the former.⁴⁴

A moralistic combination of circumstances made the plight of an illegitimate especially difficult. While the early Church indicted primitive infanticide⁴⁵ it tended to regard every mother of an illegitimate child as synonymous with a prostitute and hence while providing that the child be allowed to live and be taken care of, it made him an object of scorn.⁴⁶ No better picture of this paradox can be obtained than in Hawthorne's

⁴⁰ *Elmer v. Wellbrook*, 110 N.J.Eq. 18 (1932). The plaintiff was illegitimate. Her mother married the intestate on his promise to take plaintiff as his own. No formal adoption occurred. The plaintiff brings a bill for specific performance of a contract to adopt in order that she be allowed to take as his heir. *Held*: Bill dismissed. In this state a contract to adopt will not be enforced in equity after the death of the promisor. As the plaintiff was not legally adopted she cannot inherit.

⁴¹ *Ferrando v. Cassella*, 113 N.J.Eq. 119 (1933), *aff.* 115 N.J.Eq. 578 (1934). Plaintiff at the age of twenty-six made a contract with his aunt with whom he had lived since he was a youngster whereby she agreed to adopt him and provide for him like a lawful child. She also agreed that he was to have the same right to inherit from her as if he were her own son. This contract was made because the adoption statute only covers minors and the plaintiff's mother would not consent to the adoption while he was a minor. The plaintiff now brings this bill for specific performance of the contract on the intestacy of his aunt. *Held*: For the plaintiff. Such agreements are frequently enforced. The decree provides that the plaintiff take the same interest as if he were a natural born son of the intestate.

⁴² *Salomonsson v. Olafsson*, 105 N.J.Eq. 87 (1929). Contract whereby husband and wife agreed with father of Alfred that if he would let them have the boy to bring up as their own child, they would devise to him all their property. He was baptized in the name of his foster parents, but they died intestate and no formal adoption occurred. The proceeds of the land in question are here for distribution on bill for partition. Alfred files a counterclaim to which the following defense is made: (1) Alfred is not entitled because he was not formally adopted, and (2) his prayer for specific performance of the contract to devise must be denied because the proof is insufficient. *Held*: Though the first defense is good, the second defense fails and Alfred is entitled to relief since the contract to devise is sufficiently proved.

⁴³ *Elmer v. Wellbrook*, *supra* note 40.

⁴⁴ *Dorsett v. Vought*, *supra* note 33.

⁴⁵ See I GILLEN, *supra* note 18, at 356.

⁴⁶ See I GILLEN, *supra* note 18, at 355.

"SCARLET LETTER". The reader's reason clashes with his emotion, condemnation with pity. Though Calvinistic morality is an essential element of the American cultural pattern, it sometimes lies dormant, being superseded by more pressing interests.⁴⁷ At such times legislation favoring illegitimates has its best chance to be passed by the legislature.

After the Civil War the economic philosophy of *laissez faire* burst forth into full bloom.⁴⁸ Individualism was rampant, the state existing for the good of the individual. Why then, should the hard earned fortune of an illegitimate escheat to the state if he had no descendants? The first legislation on inheritance from an illegitimate is given its *raison d'être*. But the concession is only a minor one,⁴⁹ the fear of offending the more moralistic elements of society nevertheless being present. Amendments follow. One comes when the country is thinking of Imperialism shortly after the Philippines were acquired and while Japan and Russia are at war.⁵⁰ An ill-fated amendment appeared during the World War⁵¹ and the last when the cause of Prohibition was losing ground.⁵² On the occasion of each enactment it would seem that the cause of morality is in the background and other issues are predominant—economic *laissez faire*, imperialism, war, individual liberty.

It is to be noted that the problem of illegitimacy in the law of intestate succession to land has two aspects. One is inheritance by an illegitimate, the other inheritance from an illegitimate. The treatment of each has been different. While it has been possible under the common law for a child to inherit from an illegitimate parent it seems to have been impossible for an illegitimate child to inherit from either of his parents until very recently.⁵³ This recent legislation enables an illegitimate

⁴⁷ See I BEARD, THE RISE OF AMERICAN CIVILIZATION (1930), pp. 596-599. We find that abolitionist sentiments of the North gave way to economic considerations in the annexation of Texas. This is an example of what is meant by the cause of morality becoming dormant.

⁴⁸ See II BEARD, *supra* note 47, at Chap. 20.

⁴⁹ P.L. 1877, p. 191, §1.

⁵⁰ P.L. 1905, p. 220.

⁵¹ P.L. 1915, p. 64, §13 repealed by P.L. 1917, p. 301, §13. But P.L. 1905, p. 220 was reenacted in P.L. 1917, p. 847, §13.

⁵² P.L. 1930, p. 568, §13.

⁵³ P.L. 1930, p. 568, §13.

and his heirs and next of kin to inherit from his mother and his maternal grandparents.

Because the rights of illegitimate children in the law of intestate succession to land were and are so limited, and because undesirable stigmata are attached to those born of extra-marital relationships, the actions of the legislature as well as of the courts reflect a desire to declare a child legitimate, if possible. We find that not only is a child legitimate if conceived, before a marriage between his parents takes place, and born after such marriage,⁵⁴ but one is also legitimate if born before such a marriage takes place in New Jersey,⁵⁵ or in a state having a statute which legitimates such issue.⁵⁶ Even where a statute provides that a decree nullifying a marriage shall not render illegitimate any children born from such union, except when the marriage was bigamous,⁵⁷ the courts will be slow to annul a marriage after issue born,⁵⁸ and will require strong grounds,⁵⁹ because it might be said that the child is legitimate only because of a statute.

⁵⁴ *Caruso v. Caruso*, 104 N.J.Eq. 588 (1929). Child conceived before marriage but born two and one-half months after marriage. On bill to annul a marriage the court held that such a child was legitimate at common law and refused to annul the marriage and rely upon P.L. 1924, p. 318, to legitimate the child. The reason given was that it might be said that the child is legitimate only because of a recent statute.

⁵⁵ *Jackson v. Jackson*, 94 N.J.Eq. 233 (1922). A child was born out of wedlock in 1885 and a common law marriage was contracted between the parents in 1886. Statute of 1915, p. 133, provides for retroactive legitimization of illegitimates, if the parents subsequently marry. On the intestate death of the father it was held that the child was entitled to inherit the fee subject to his mother's dower.

⁵⁶ *Dayton v. Adkisson*, 45 N.J.Eq. 603 (1889). The father and mother of the defendant did not marry until after the birth of the defendant and her twin. The marriage was performed in Pennsylvania where a legitimization statute existed. The father's will provided that the trustee convey New Jersey land to each child when he attains twenty-one. The defendant's twin died before he attained twenty-one and now the question arises as to who is entitled to the equitable interest of the deceased son. The defendant sister claims and a maternal aunt claims on the trustee's bill in the nature of interpleader. *Held*: The trustee is to convey the brother's share to his sister. A child born out of wedlock in Pennsylvania and rendered legitimate by Pennsylvania law may inherit lands in New Jersey.

⁵⁷ P.L. 1907, p. 475; P.L. 1924, p. 318; P.L. 1928, p. 140. Note that the bigamy exception does not appear in the 1924 act.

⁵⁸ *Caruso v. Caruso*, *supra* note 54.

⁵⁹ *Cf. Daniele v. Margulies*, 95 N.J.Eq. 9 (1923). The plaintiff wife brings this petition for a decree to nullify her marriage. She bases her action on the lunacy of the defendant at the time of the marriage ceremony, she having been ignorant of his state of mind at that time. When the plaintiff discovered that

It is exceedingly unfortunate that the legislature has not heeded the plea of the courts for a statutory pronouncement of the rights of an heir who is criminally responsible for the death of his ancestor.⁶⁰ The courts have been faced with the problem of the murder of one tenant by the entirety by the other tenant⁶¹ and of the murder of the insured by the beneficiary of a life insurance policy,⁶² but as yet have not been confronted with the

he had *dementia praecox* she separated from him. There was issue born of this union. On the proof of all the foregoing facts the question arises whether they are sufficient to justify an annulment. *Held*: Petition granted. Want of capacity to consent to marriage is ground for nullifying it, if it was not later ratified effectively. The issue is legitimate under the legitimation statute.

⁶⁰ See *Sorbello v. Mangino*, 108 N.J.Eq. 292, 297 (1931). Husband and wife were tenants by the entirety. The husband was convicted for the murder of his wife. He now desires to dispose of the property as survivor. The plaintiffs, children of the marriage, claim their father is entitled to a life estate only and want him enjoined from conveying or attempting to convey. *Held*: Dismissed. The evidence of conviction in a criminal court is inadmissible in equity and without it there is insufficient proof to show the guilt of defendant. *Dicta*: The courts have taken three positions as to whether or not legal title passes to a murderer when such passage is the result of his criminal act. (1) The title passes to him; (2) no title passes on the theory that the wrongdoer should not profit by his own act; and (3) legal title passes but equity will impress a constructive trust on his title and compel conveyance to those entitled on the basis of the exclusion of the murderer. The legislature ought to make provision for this type of case and deprive the murderer of his right to inherit.

⁶¹ Cf. *Sorbello v. Mangino*, *supra* note 60.

Cf. *Sherman v. Weber*, 113 N.J.Eq. 451 (1933). Husband and wife held as tenants by the entirety and the husband murdered his wife thirty minutes before he committed suicide. Each left a will and the problem arises as to how the property will pass. *Held*: Since the wife was older than her husband the property passes under his will subject to a trust in favor of the devisees of the wife to the extent of the value of her half interest in the net income of the property for her normal life expectancy. No greater rights should accrue to the husband by reason of his criminal act.

"Equity will do justice by restoring the property rights, as nearly as may be, as they were at the time the husband slew his wife, adjudging that because of the act thru which the husband became seized of the fee, he was trustee thereof for the interest his wife would have had, had he permitted her to go live her normal expectancy of life and that while title in fee was vested in the husband and passed under his will to the defendants, the defendants hold subject to such trust * * *."

⁶² Cf. *Swavely v. Prudential Insurance Co.*, 10 N.J.Misc. 1 (1931). Plaintiff and wife were insured in the defendant company, their contract calling for payment to the survivor. The plaintiff murdered his wife and now sues to recover under the policy. Defense: The plaintiff may not recover since he murdered his wife. Plaintiff makes motion to strike this defense. *Held*: Denied. All courts agree, regardless of the position they take as to inheritance of realty by one criminally responsible for death of an ancestor, that a beneficiary of an insurance policy cannot recover if he has murdered the insured.

See *Merritt v. Prudential Ins. Co.*, 110 N.J.L. 415 (1933) where the wife's personal representative was held to have stated a cause of action for the amount of the policy, the proceeds being held payable to estate of decedent. See (1933) 2 MERCER BEASLEY L. REV. 100.

problem of the murder of an ancestor by an heir desiring to inherit under the Descent Act. However, if the demonstrated attitude of a single Vice-Chancellor may be used as a criterion,⁶³ it would seem that the courts will tend to make use of the constructive trust device when they are confronted with a case where the claimant is criminally responsible for the death of the decedent.⁶⁴

C. Shares going to males and females.

In the absence of any Colonial legislation on intestate succession to land⁶⁵ and in the absence of any reported cases,⁶⁶ it must be assumed that the English law of primogeniture prevailed in Colonial New Jersey.⁶⁷ Shortly after the War for Independence we find expression of a dislike for this rule of intestate succession. It would seem that the recent revolutionists were intent on putting into effect the eighteenth century social and political philosophy which furnished the emotional justification for their break with England.⁶⁸ This philosophy stresses equality and democracy, while primogeniture, in favoring the one over the many and in tending toward perpetuation of an aristocracy, is practically its antithesis.⁶⁹ At any rate, as is often the case in legal change, the reform was a half-way measure which provided that, in dividing the property of the intestate, males were to be given two shares and females one,⁷⁰ and it is important to note that these shares were defeasible.⁷¹ Shortly after the next war with England a comprehensive revi-

⁶³ Cf. *Sorbello v. Mangino*, *supra* note 60. *Sherman v. Weber*, *supra* note 62 (Vice-Chancellor Fielder).

⁶⁴ This discussion is intended as applicable to anyone claiming under the Descent Act under such circumstances.

⁶⁵ Search through Allison's laws from 1702-76 fails to reveal any legislation relative to the descent of realty except the act dealing with inheritance by English aliens which was discussed *supra* note 15.

⁶⁶ The N.J.L. reports begin 1790 while the N.J.Eq. reports begin 1830.

⁶⁷ See I CARMAN, *supra* note 20, at 317.

⁶⁸ The social philosophy referred to is clearly evident in the Declaration of Independence. This type of inspiration for the war must be clearly distinguished from economic causation such as the interference with growing trade and commerce by the British.

⁶⁹ See I CARMAN, *supra* note 20, at 317.

⁷⁰ Law of 1780, passed May 24th. Section 1.

⁷¹ Law of 1780, passed May 24th. Section 2.

sion of the statute on intestate succession was undertaken.⁷² A year prior to this work we find the reformation completed with the shares for males and females being made equal and indefeasible⁷³ and they have remained so to this day.⁷⁴

In the case where there was only one child, primogeniture was untouched until a few years ago. As the Colonial legislation of 1780,⁷⁵ as well as the revision after the War of 1812,⁷⁶ began to regulate descent when there were two or more children, or their issue, the common law rule of primogeniture was operative when the intestate left only one child or the issue of such child.⁷⁷ It was not until 1931 that this section was amended to cover the case where the intestate left only one child or the issue of such child.⁷⁸

*D. Proviso that advancement be deducted.**

Since an advancement must be brought into hotchpot before the amount of each share is determined,⁷⁹ it is important to ascertain what is and what is not an advancement. It is said

⁷² P.L. 1817, p. 8.

⁷³ P.L. 1816, p. 7.

⁷⁴ COMP. STAT. (1910) p. 1917, §1.

⁷⁵ Law of 1780, passed May 24th. Section 1.

⁷⁶ P.L. 1817, p. 8, Section 1.

⁷⁷ Cf. Fry v. Nielson, *supra* note 23.

⁷⁸ P.L. 1931, p. 39, §1.

⁷⁹ See Shotwell's Adm. v. Struble, 21 N.J.Eq. 31, 36 (1870). Before death the intestate had two attacks of paralysis. A week after the first he gave a \$3000 promissory note to a daughter by his first wife. A month later he gave her a sealed bill for \$3000. She brought suit on them and her stepmother had her enjoined by a suit for discovery and prayer for injunction. The daughter moves to dissolve the injunction and her motion is denied. The widow is entitled to discover the value of land which the stepdaughter claims she released to her father in consideration of the first promissory note. If the land was only worth \$400 (the amount the stamps on the deed call for), then the balance (\$2600) is an advancement. Or perhaps recovery may be had on the note for only \$400, equity declaring the amount above that void. As to the sealed bill, the claim is that the seal is sufficient consideration, but it is possible to question a specialty on the grounds of fraud, undue influence, imbecility of intestate, etc. The widow is entitled to knowledge as to the consideration. If the stepdaughter recovers, it is an advancement if no consideration is shown and hence must be brought into hotchpot.

* Perhaps the most fruitful field of litigation in the entire act. It is to be noted that the proviso as to advancements applies only to issue of the intestate. *Quaere*: What would happen in the case of an advancement to a brother or sister when it is certain the donor will not have issue?

that an advancement is an irrevocable gift,⁸⁰ the subject matter of which may consist of land in fee⁸¹ or in tail,⁸² money given outright,⁸³ on condition⁸⁴ or in the nature of a promissory obligation.⁸⁵

It is presumed that a conveyance to an heir apparent recit-

⁸⁰ *Dammers v. Croft*, 111 N.J.Eq. 462 (1932). A son, who was speculating in Florida realty had previously been given money by his father. On meeting business reverses the son and his wife executed a mortgage to the father purporting to secure a debt. The plaintiff, a creditor of the son, claims the money given by the father to the son was an advancement and on his bill to set aside the mortgage claims it was executed to defraud creditors. *Held*: For the plaintiff. The mortgage cannot stand as the money was given as an advancement and cannot be converted into a debt since an advancement is a pure and irrevocable gift. It is a consummated gift and cannot afterwards be converted into a debt without the intervention of some new consideration.

⁸¹ *Brands v. Dewitt*, 44 N.J.Eq. 545 (1888). Intestate conveyed lands to each of his two sons from whom he took releases as to the shares they might be entitled to on his intestate death. To another son he gave money on the same basis. After his death his seven children contracted to sell and divide equally. The contract of sale was made before the releases were discovered. Then trouble began. The releasors refused to join in the deed because they could get nothing by it and the vendee refused a deed without their signatures. Then six of the seven agreed to share equally, the vendee saying he'd settle with the one who refused to contract. On partition of the fund it was held that by the second contract the parties thereto were estopped from claiming more than one-seventh each. But the one who did not join is entitled to one-fourth since the contract did not bind her. Since the vendee is one of these seven children, his seventh will be used to make up the one-fourth share because he promised to take care of the non-contracting sister. For consideration a son may release to his father his possible share of the latter's intestate estate and estop himself from claiming, but this contract must be in writing.

⁸² *Den ex dem M'Ginnes v. M'Peake*, 2 N.J.L. 291 (1807). Plaintiff's father-in-law conveyed to his daughter (the plaintiff's wife) an estate tail in lands which constituted more than one-eighth of his estate. The father-in-law then died intestate survived by six daughters and one son (who is entitled to a double share). The plaintiff brings ejectment for one-eighth of the estate as being due to his wife. The defendants claim sufficient advancement in the conveyance of the estate tail and refuse to allow sister to share unless she brings estate tail into hotch-pot. At the trial evidence of advancement was excluded and judgment had for the plaintiff. On appeal this was reversed and a new trial ordered in order that the evidence be heard. Advancements are to be deducted and an estate tail may be considered an advancement.

⁸³ *Havens v. Thompson*, 26 N.J.Eq. 383 (1875). Father made advancements to son Ben to extent of about \$2000. For the last he took a receipt "in lieu of dowry". Relying on this as sufficient to bar Ben's claims, he did not make a will. Everyone accepted this as the situation. Then came the defendants, creditors of Ben, and levied on his share of the inheritance and were ready to sell when they were enjoined (23 N.J.Eq. 321). On this bill to quiet title it was held that the defendants could not attach. A son may for money advanced, contract with his father not to claim on the latter's intestacy. This is in the nature of an advancement. Attaching creditors of son stand in no better position than he.

Brands v. Dewitt, *supra* note 81.

Adm'rs of Tucker v. Tucker, 8 N.J.Eq. 348 (1850). Intestate survived by

ing a nominal consideration was made by way of advancement,⁸⁶ but this presumption may be rebutted, the burden being on the recipient to do so.⁸⁷ Even when the conveyance recites a valuable consideration, said recital is only *prima facie* evidence that may be rebutted to show that the conveyance was

five children and grandchildren representing three deceased children. To one of these deceased children the intestate had sent money abroad, the son being ill. This amounted to about \$4000. The administrators, believing this to be an advancement interplead the parties. Testimony is given by four persons to the effect that the intestate had told them he was advancing to his son. Book entries of the sums sent abroad are also introduced. *Held*: This was an advancement and must be so considered in calculating the distributive shares.

⁸⁶ See *Ex'r's. of Wanamaker v. Van Buskirk*, 1 N.J.Eq. 685 (1832). Testator in habit of advancing \$150 to each daughter upon her marriage. He would take an obligation for repayment of same, without interest, with understanding that it would be collected for the benefit of children if the daughter predeceased her husband, but if she survived him, then the obligation to be cancelled. In this case this was done to secure the daughter and children against the intemperate habits of the husband and additional security was required by the execution of a mortgage. *Held*: This is an advancement and to be accounted for as such. It is not a debt. Since testator provided that all his children share equally, it is necessary that these advancements be brought into hotch-pot.

Cf. Howell v. Howell, 15 N.J.Eq. 75 (1862). Plaintiffs bought land subject to a mortgage. Being unable to pay it, their father mortgaged his premises to pay off plaintiff's mortgage. The plaintiff drew deed to father to secure repayment. The father died testate as to his own lands, but intestate as to this land. His will devises to plaintiffs subject to payment of debts. The plaintiffs, asking for relief against deed to their father, desire to have the defendants, heirs of their father, declared as holding in trust for the plaintiffs. *Held*: There is a resulting trust when son pays purchase price and title is taken in name of father. The plaintiffs must be regarded as having paid the entire consideration, and the "loan" by the father as an advancement since the sons had to pay interest on the mortgage which the father executed on his own premises. His will provides that plaintiffs may take his land if they pay his debts. Therefore the equity in the father's land which was not mortgaged was to go to the plaintiffs. The mortgage decreases the value of this equity and so the amount raised is an advancement in this equity subject to their payment of his debts. The heirs were held to hold in trust for the plaintiffs.

⁸⁷ *Shotwell's Adm'r. v. Struble*, *supra* note 79.

⁸⁸ *Hattersley v. Bissett*, 51 N.J.Eq. 597 (1893). Father executed will devising certain premises to each of his four children. His two daughters at that time were keeping house for him. Then one of them died. The other daughter continued to keep house for him for six years (until his death). Before he died he conveyed to said daughter certain premises which by his will were to go to the others. Neglecting to change his will, he died intestate with respect to the portion devised to the daughter who predeceased him. The remaining daughter claims under the will as well as a part of land of which the testator died intestate. The plaintiff claims, in a partition suit as to the intestate property, that his defendant sister was given an advancement greater than her share of the estate and hence she is entitled to nothing. *Held*: Petition of brother denied and on appeal this was affirmed. There is a rebuttable presumption that a deed reciting only a nominal consideration was executed by way of advancement. Here it is evident that it was given to her for services in keeping house. The intent was not to make an advancement, but a gift over and above

made by way of advancement.⁸⁸ No advancement is presumed if land is conveyed to an heir apparent without the consent of the ancestor, the latter having paid the consideration,⁸⁹ but if the conveyance to the heir apparent is made with the consent of the ancestor, the latter having paid the consideration, it is thought that the presumption of advancement might be rebutted by such evidence as uninterrupted possession of the ancestor under claim of title together with proof that both the ancestor and the heir apparent regarded a document other than the

what she would get by will and on intestacy.

Gordon v. Barkleew, 6 N.J.Eq. 94 (1847). Intestate had three daughters and three sons. During his life he gave to one son a house and lot which he evaluated in his records at \$2250. The son was not given a deed, but relying on the gift made improvements with father's knowledge to extent of \$4300 and also paid mortgage interest and paid off part of the mortgage debt. To another son was deeded a farm which he evaluated at about \$1000. To the third son he made an advancement by allowing him to receive the consideration obtained on the sale of some land. The three daughters bring bill for partition. *Held*: Conveyance for nominal consideration, in the absence of evidence to the contrary, is an advancement. When a son lives on land for twenty years without a deed and then on the sale thereof is allowed to receive consideration, then same is an advancement. When a son lives on premises for some thirty-five years without a deed thereto and makes improvements with father's knowledge, such premises should be allotted to said son on value less improvements, if the value is less than his share. If it is more than his share then it is important to decide whether or not it is an advancement, because if it is he cannot be forced to account for more than his share, but if it is not an advancement he ought to pay the difference to the estate.

⁸⁷ *Jakolite v. Danielson*, 13 Atl. 850 (N.J. 1888). Father conveyed to one son land worth \$400 and to another land worth \$1500. On father's death other children claim these are advancements which one son denies. His defense is that it was given to him in consideration of his forbearing to go to California during the gold rush. About six years afterwards he erected a house on an acre of his father's land and finally the deed was given him. This happened while the sons were working the farm for their father under a contract of the commission basis type. *Held*: On bill for partition, that these are advancements. The burden is on recipient to rebut the presumption of advancement. The son has been unsuccessful here.

⁸⁸ *Speer v. Speer*, 14 N.J.Eq. 240 (1862). Intestate survived by son and two daughters. One daughter files bill for partition and claims son is not entitled to share since father made advancement for more than an equal share. She claims remainder should be divided between her sister and herself. *Held*: For the plaintiff daughter. When father conveys to son by deed reciting a valuable consideration (\$4500), same is only prima facie evidence and may be rebutted by showing the intention that it be an advancement. Declarations by father may be introduced to show his intent.

⁸⁹ *Cf. Peer v. Peer*, 11 N.J.Eq. 432 (1857). Plaintiff paid one-sixth purchase money for conveyance to the defendants, for which defendants gave her an obligation which permitted her to use the premises for twelve and one-half years and then went on to provide for a conveyance to plaintiff after such period of one-sixth the land or a return of her money. Her son, with or without her knowledge, obtained a conveyance to himself for one-sixth the land. He predeceased his mother and now the defendants claim as his heirs. She brings

conveyancing instrument as evidence of title in the ancestor.⁹⁰

An advancement must be distinguished from a loan to an heir apparent since the latter raises a debt⁹¹ and may not be converted into an advancement after the debtor's death.⁹² However, if the debt was reduced to judgment before the death of the debtor, then his estate will be charged with the debt and his heirs will take his share *per stirpes* less the amount of the debt,⁹³ but if the debt was not reduced to judgment before the death of the debtor, then his heirs take his share *per stirpes* without deduction for the amount of the debt.⁹⁴ When the ancestor predeceases the debtor, a loan may be converted into an ad-

this bill to be relieved as to her title. *Held*: For the plaintiff. If the conveyance to the son was made without knowledge of his mother then it was not an advancement and there was no valid title in son, the mother having paid the purchase price. If conveyance was made with consent of parent presumption of advancement may be rebutted by such evidence as uninterrupted possession of the parent claiming title as well as evidence of her, the defendant's and her son's regarding the obligation of the defendants as evidence of her title. The obligation of the defendants made them express trustees and son therefore took subject to this trust and his heirs took subject thereto.

⁹⁰ Cf. *Peer v. Peer*, *supra*, note 89.

⁹¹ *Green v. Hathaway*, 36 N.J.Eq. 471 (1883). Son indebted to father evidenced by notes and bonds, one of the bonds being secured by a mortgage. Son declared to third persons that if he could not pay same, they were to be considered as advancements. Son died insolvent without having paid same. On bill for partition, representatives of said son were given his share of the intestate father's estate and these debts were not deducted. Other children of intestate father appeal. *Held*: Affirmed. Proofs here are insufficient to show an advancement since they are declarations by the son, being his expectations or suppositions and not the result of a promise or a compact. These papers show existence of a debt.

⁹² *Batton v. Allen*, 5 N.J.Eq. 99 (1845). Father at various times loaned money to one son and set him up in business. It seems the son could not succeed in any venture he attempted. He executed notes, etc., as evidence of his debt. The father secured a judgment against him and had execution thereon. Then the son died and father subscribed to the following on the execution in the sheriff's hands: "I hereby discharge X, sheriff, from all liability whatever of the above stated execution, the defendant being dead, and no further proceedings required on same." On the intestacy of the father the representatives of this son were allowed to take without deduction for these debts. On appeal, held error. Judgment should have been added to surplus of the estate and then the division made. The judgment must be satisfied from the share going to representatives of this son. Several persons testified to oral statements of the father that he intended an advancement. There were debts of son to father and could not be converted into an advancement after son's death. The testimony is too indefinite—the proof of oral statements is not sufficient. The son's estate is liable for his debt.

⁹³ *Batton v. Allen*, *supra* note 92.

⁹⁴ *Green v. Hathaway*, *supra* note 91.

vancement,⁹⁵ or the same result may in effect be reached,⁹⁶ in the case where the ancestor mortgaged his property to obtain funds to make the loan and the debtor now claims a share of the mortgaged premises on the intestacy of the ancestor.⁹⁷

When an heir apparent executes a release of his expectancy in consideration of an advancement, he,⁹⁸ as well as his creditor who levies on his share,⁹⁹ is estopped from claiming on the intestacy of the ancestor, but the creditor may levy on whatever the heir is entitled to after advancements (not by way of release) have been deducted.¹⁰⁰ By contract subsequent to the intestacy, the heirs may waive releases given by any of their number,¹⁰¹ but an heir who does not join in such a contract is not estopped from setting up such releases in order to have his share determined on the basis of the exclusion of the releasors.¹⁰² In the case of a release both parties must intend that the gift be an advancement,¹⁰³ but in the absence of a release, the intent of the ancestor is determinative as to whether the gift is an advancement¹⁰⁴ or not.¹⁰⁵ To prove intent the declara-

⁹⁵ Cf. *Howell v. Howell*, *supra* note 84.

⁹⁶ *Manning's Ex'r. v. Brown*, 20 Atl. 381 (N.J. 1890). Plaintiff's testator got judgment against Brown, the son, for \$489.72. The Browns, son and father, confessed judgment to "X" for a \$1,750 debt of the son, the father having been surety. Then father gave mortgage and bond to secure debt to "X". The premises were foreclosed and after satisfying mortgage a surplus of \$1,070 remained. Heirs of Brown, the father, file petition for surplus and to have their equities adjusted; claiming that the son's share should be charged with the amount of the mortgage before he or the plaintiff can participate in the net receipts. *Held*: Petition granted. The son was the debtor and the father surety. The father had conveyed his lands by way of mortgage for the payment of the debt and when the mortgage was enforced, the son was part owner of the land (the father having died). In such a case, notwithstanding the entire premises so mortgaged is liable, it is highly equitable that the interest of the real debtor should first be charged with the liability so created. The plaintiff's judgment became a lien on the property the moment the son came into possession and if any surplus remains after the charge above stated is first satisfied, it will be subjected to the payment of the plaintiff's judgment. (Note: The word "advancement" was not mentioned throughout the entire opinion.)

⁹⁷ Cf. *Howell v. Howell*, *supra* note 84; *Manning's Ex'r. v. Brown*, *supra* note 96.

⁹⁸ *Brands v. Dewitt*, *supra* note 81.

⁹⁹ *Havens v. Thompson*, *supra* note 83.

¹⁰⁰ Cf. *Manning's Ex'r. v. Brown*, *supra* note 96.

¹⁰¹ *Brands v. Dewitt*, *supra* note 81.

¹⁰² *Brands v. Dewitt*, *supra* note 81.

¹⁰³ *Havens v. Thompson*, *supra* note 83.

¹⁰⁴ *Adm'rs. of Tucker v. Tucker*, *supra* note 83.

¹⁰⁵ *Grumley v. Grumley*, 63 N.J.Eq. 568 (1902). Intestate had son by first wife and two children by second wife. First son inherited some property from

tions of the ancestor may be introduced,¹⁰⁶ his testamentary disposition of the balance,¹⁰⁷ the testimony of one with whom he was intimate,¹⁰⁸ or the fact that the conveyance was made in consideration of services rendered.¹⁰⁹

While a release must be in writing signed by the releasor,¹¹⁰ evidence sufficient to prove an advancement may be: (1) book entries by the ancestor in his own hand buttressed by the testimony of several persons as to oral statements made by the ancestor that the gift was intended as an advancement;¹¹¹ (2) records in the ancestor's own hand reciting the value of the advancement;¹¹² (3) conveyance for nominal consideration in the absence of rebutting evidence;¹¹³ (4) evidence that the heir apparent lived on the land for many years and received the consideration when the land was sold by the ancestor;¹¹⁴ and (5) admission by the heir apparent that services, which might have been the consideration for the conveyance, were rendered gratuitously, together with evidence of a previous attempt to convey the residue to another and the explanation of the attorney who drew up the deed of gift that it was made because the ancestor wanted to do more for the particular heir apparent than for his other heirs.¹¹⁵ Evidence insufficient to prove an

his mother. Later father conveyed property to him, the explanation for which is that it was bought with money intestate thought was really that of his first wife and hence due her son. This testimony comes from the brother of the intestate with whom he was very intimate. The money had come to the intestate from his wife's savings and he regarded it as morally belonging to her son. *Held*: On partition that this son is entitled to an equal share of his father's intestate property. The conveyance to him was not an advancement but made in pursuance of a moral duty. This rebuts the presumption of advancement.

¹⁰⁶ *Speer v. Speer*, *supra* note 88.

¹⁰⁷ *Howell v. Howell*, *supra* note 84.

¹⁰⁸ *Grumley v. Grumley*, *supra* note 105.

¹⁰⁹ *Hattersley v. Bisset*, *supra* note 86.

¹¹⁰ *Brands v. Dewitt*, *supra* note 81.

¹¹¹ *Adm'rs. of Tucker v. Tucker*, *supra* note 83.

¹¹² *Gordon v. Barkalew*, *supra* note 86.

¹¹³ *Gordon v. Barkalew*, *supra* note 86.

¹¹⁴ *Gordon v. Barkalew*, *supra* note 86.

¹¹⁵ *Schlicher v. Keeler*, 62 Atl. 4 (N.J. 1905). Father of seven children had land worth \$25,000 and gave plaintiff a parcel worth \$10,000, by deed reciting nominal consideration. Now plaintiff, on the intestate death of her father, brings bill for partition, claiming a share in residue. Defense is that plaintiff was given more than enough by way of advancement. *Held*: This was an advancement and plaintiff is entitled only if other shares run above hers in amount. Evidence shows intent that it be an advancement. The recitation of

advancement may be: (1) admission by the heir apparent that if a debt to the ancestor could not be paid, then the same would be considered an advancement;¹¹⁶ (2) testimony by several persons that the ancestor orally stated that he had fully advanced to an heir apparent;¹¹⁷ and (3) evidence that the gift was made pursuant to a moral duty.¹¹⁸

II. INHERITANCE BY BROTHERS AND SISTERS OF THE WHOLE BLOOD AND THEIR ISSUE*

The post-revolutionary section providing for the inheritance by brothers and sisters of the intestate provided that if the intestate die without issue, "or having issue, and such issue shall die under the age of twenty-one without issue . . ." then the fee was to "descend to and be inherited by the brothers, or by the brother and sister or sisters, or by the brothers and sister or sisters . . ." in the proportion of two shares to males and one to females.¹¹⁹ A proviso followed as to the representation of such brothers and sisters by their issue, and it has been construed to mean representation to the most remote degree.¹²⁰

On comparison with the analogous section in the 1817

consideration, her own disclaimer that it was given for services, father's attempt to convey remainder to son shows he had provided for plaintiff as much as he intended to, and evidence by attorney who drew up the deed to plaintiff that father wanted to do more for his daughter than the rest and so was making this gift—all these show intent to advance.

¹¹⁶ Green v. Hathaway, *supra* note 91.

¹¹⁷ Batton v. Allen, *supra* note 92.

¹¹⁸ Grumley v. Grumley, *supra* note 105.

¹¹⁹ Act of 1780, §2 passed May 24th.

¹²⁰ Den *ex dem.* Rodman v. Smith, 2 N.J.L. 7 (1806). A brother of the intestate had two sons and two daughters. The brother predeceased the intestate as did his two daughters. The daughters were survived by issue. The issue of one are the lessors of the plaintiff in this action against the two nephews of the intestate who claim the entire fee as representatives of their father. *Held*. For the plaintiff in ejectment. The children of the deceased niece, by representation, stand in the place of their mother and take the share she would have taken had she lived. The word "issue" is not restrained to brothers' and sisters' children, but extends to all lineal descendants of brothers and sisters to the most remote degree.

* There has been practically no reported litigation on this section (§2) of the Act. The section, in being continued until the present day reflects a preference for the brothers and sisters and their issue over father and mother, but the effect of the recent statute (P.L. 1926, p. 77) on this section must not be overlooked since it, to a limited extent, shows a preference for the surviving spouse of the intestate over brothers and sisters and their issue.

revision,¹²¹ we find that a change is made as to the issue of the intestate who die without issue before attaining the age of twenty-one. Under this later legislation the inheritance of the issue of the intestate is not subject to be defeated by this condition. Furthermore, the revision is more carefully drawn in its description of brothers and sisters and provides for the case where there is only one brother, one sister, or only sisters, none of which is covered by the earlier language. In the light of the fact that the last section of the 1780 act covers all possible combinations of brothers and sisters of the half blood, one must assume that the section was drawn with the intent to exclude the cases mentioned on the theory that the common law provided adequately for them.¹²² Though it was apparent that brothers and sisters of the whole blood were meant, the revision made this clear.

While it is evident that the phrase "brothers and sisters" includes a posthumously born brother or sister¹²³ and a child adopted by the parents of the intestate,¹²⁴ the question of whether or not an illegitimate is included requires more treatment. After the turn of the century, legitimate brothers and sisters of an illegitimate could inherit from him provided their mother had predeceased the illegitimate.¹²⁵ The language of the statute is "heirs at law of said mother" and apparently would not include other illegitimate issue of the said mother. The amendment that was approved shortly before the United States entered the World War¹²⁶ for the first time provided that an illegitimate brother or sister could inherit on the intestacy of an illegitimate, if their mother had died leaving no lawful heirs. This amendment was short lived, being disapproved by the same legislature three days later in the reenactment of the 1905 section,¹²⁷ but this superceding legislation did not go into

¹²¹ P.L. 1817, p. 9, §3. This section remains in force today with a change which made three sentences into one. It is however known as §2 in COMP. STAT. (1910), p. 1918.

¹²² 2 BL. COMM. *214 (Canon III).

¹²³ P.L. 1817, p. 9, §2. Known today as §9 in COMP. STAT. (1910), p. 1921.

¹²⁴ P.L. 1877, p. 126, §4, proviso 3, now P.L. 1930, p. 324, §4, proviso 3.

¹²⁵ P.L. 1905, p. 220, §13.

¹²⁶ P.L. 1917, p. 301, §13.

¹²⁷ P.L. 1917, p. 847, §13.

effect for over three months.¹²⁸ It was not until the present depression was well upon us that the illegitimate child in all cases was able to inherit from the other issue of his mother.¹²⁹ At no time has the illegitimate been able to inherit from the other issue of his father.¹³⁰

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¹²⁸ COMP. STAT. (1910), p. 4973, §13.

¹²⁹ P.L. 1930, p. 568, §13.

¹³⁰ P.L. 1930, p. 568, §13