

INTESTATE SUCCESSION TO LAND IN NEW JERSEY*

III. INHERITANCE BY ANCESTORS

A. When the Father Inherits.

For over a century the Descent Act provided that when an intestate was survived by neither descendants nor by a brother or sister or his or her issue, then his father should inherit in fee simple unless it came to the intestate *ex parte materna* "by descent, devise or gift, in which case it shall descend as if such person so seized had survived his or her father . . ."¹³¹ If the mother of the intestate was ever seized, the father was entitled to curtesy even if he could not take the fee because it in fact came to the intestate *ex parte materna*,¹³² but if the intestate took from his maternal grandfather as a per stirpes representative of his mother, then his father was not entitled to curtesy since the wife was never seized.¹³³ The proviso of this section remains a part of the amended section that is in force at present.¹³⁴

When the ill-fated attempt was made to abolish dower and curtesy in order to substitute life estates in a third,¹³⁵ a change

¹³¹ P.L. 1817, p. 10, §4, was COMP. STAT. (1910), p. 1919, §3.

¹³² *Post v. Rivers*, 40 N.J.Eq. 21 (1885). A testamentary trust for a daughter, construed as vesting title to realty in said daughter, was created by her mother. The daughter married and had issue and then died intestate. The issue, a son, inherited and then died intestate. *Held*: On construction of the will, that since issue had been born to the daughter and since she is held as having been seized of realty, her husband is entitled to curtesy, but he may not inherit the fee from his intestate son since it came to the intestate son *ex parte materna* and the fee descends to those who would take had the intestate survived his father.

¹³³ *Cf. Banta v. Demarest*, 24 N.J.L. 431 (1854). The lands of an intestate descended to a grandson, the only issue of a deceased daughter. The grandson died intestate seized of the fee. A great aunt of the intestate claims against the father of the intestate. *Held*: For the plaintiff great aunt. The proviso is applicable in case of descent from a grandfather to a grandson and the father is not entitled to inherit since the fee came to his son *ex parte materna*. The fact that the wife died before the land descended should not make any difference. (Since the wife was never seized it seems clear that the husband is not entitled to curtesy.)

See *Having v. Van Buskirk*, 8 N.J.Eq. 545 (1851) for previous litigation in this case.

¹³⁴ P.L. 1918, p. 1012, §3.

¹³⁵ P.L. 1915, p. 65, §§6, 7.

* Second part of an article; first part appeared in May, 1934, issue.

was made in the section under consideration. This change provided that the mother and father were to take the fee as tenants by the entirety and if the mother were dead, then the father was to take the entire fee.¹³⁶ This concession to females might be the effect of the pressure that the suffrage movement was bringing to bear,¹³⁷ concrete evidence of which is found in the proposed state constitutional amendment to give women the right to vote.¹³⁸ A few years later an attempt was made to withdraw this concession¹³⁹ and the hue and cry that probably resulted must have been the cause for the reenactment of this hard-earned concession.¹⁴⁰

Recurring to a problem previously treated, but from a different point of view, we must now determine how the word "father" must be construed. Clearly, it does not include the male parent of an illegitimate child,¹⁴¹ but it does include the male adopting parent of an adopted child.¹⁴²

B. When the Mother Inherits.

When the cause of feminism began to make itself felt in the nineteenth century¹⁴³ it is possible that the enactment of an additional section to the Descent Act was at least in part caused by this movement.¹⁴⁴ It provided that when the intestate was not survived by issue, a brother or sister or his or her issue, or a father, then his mother was to take a life estate and the remainder to descend to those who would have taken had the intestate survived his mother.¹⁴⁵ This wording was preserved

¹³⁶ P.L. 1915, p. 62, §3.

¹³⁷ See II BEARD, *supra* note 47, at 563-565.

¹³⁸ P.L. 1915, p. 718, approved six weeks later. Note, however, that New Jersey did not ratify the Nineteenth Amendment until February 1920.

¹³⁹ P.L. 1917, p. 844, §3.

¹⁴⁰ P.L. 1918, p. 1012, §3. See more complete treatment in Section VI Inheritance by Surviving Spouse.

¹⁴¹ P.L. 1930, p. 568, §13.

¹⁴² P.L. 1877, p. 124-6, §§ 3, 4; P.L. 1912, p. 53, §4; P.L. 1930, p. 324, §4.

¹⁴³ See I BEARD, *supra* note 47, at 754-761.

¹⁴⁴ P.L. 1838, p. 85. See I BEARD, *supra* note 47 at 759: "In 1839 Mississippi emancipated women from tutelage in the matter of property."

NOTE: New Jersey Married Women's Act first appeared as P.L. 1852, p. 407.

¹⁴⁵ Hickey v. Morrissey, 50 Atl. 183 (N.J. 1901). An intestate was survived by a widow and son. The son executed a will leaving all his property to his mother. He died a few days after leaving no descendants, brother or sister, or his or her issue and no father. Plaintiff questions the capacity of the son to

until the outbreak of the World War when a proviso was added that if the intestate died "without leaving any person enumerated in the amended section six . . . capable of inheriting said lands, tenements or hereditaments except a mother and not leaving wife or husband, the same shall descend and go to the said mother in fee simple . . ."¹⁴⁶ This meant that the mother had not only the life estate, but also a chance to inherit the fee. Again it might be said that this and subsequent amendments are in some way connected with the suffrage movement that finally resulted in the adoption of the Nineteenth Amendment to the United States Constitution.¹⁴⁷ The next revision gave the mother the entire fee if the intestate left no issue, brother or sister or his or her issue, or father,¹⁴⁸ unless it came to the intestate *ex parte paterna* by descent, devise or gift, "in which case it shall descend as if such person so seized had survived his or her mother . . ." An attempt to reduce the mother's possible interest to a life estate¹⁴⁹ was soon replaced by an amendment which provided that the mother should take the fee unless the proviso was applicable.¹⁵⁰

As might be expected the mother of an illegitimate has been regarded with more favor than the father. The very first legislation on inheritance from an illegitimate provided that the mother should take if the intestate died without lawful issue.¹⁵¹ Under the most recent amendment to this section the mother can take only if the intestate died without issue and had no legitimate or illegitimate brother or sister.¹⁵² In the case where the intestate was an adopted child, it is probable that the adopting mother rather than the real mother would satisfy the wording of the adoption legislation for inheritance under this section.¹⁵³

execute an effective will claiming he was a minor at the time. Hence the plaintiff claims the fee descends to her, a paternal aunt, subject to the mother's life estate under §4 of the Descent Act. *Held*: Evidence sufficient to prove incapacity of son to execute an effective will. The plaintiff paternal aunt takes the fee subject to the life estate of the mother of the intestate.

¹⁴⁶ P.L. 1913, p. 297, §4.

¹⁴⁷ See II BEARD, *supra* note 47 at 562-565.

¹⁴⁸ P.L. 1915, p. 62, §4.

¹⁴⁹ P.L. 1917, p. 845, §4.

¹⁵⁰ P.L. 1918, p. 1012, §4.

¹⁵¹ P.L. 1877, p. 191, §1.

¹⁵² P.L. 1930, p. 568, §13.

¹⁵³ *Supra* note 142.

C. Other Ancestors.

The common law did not permit inheritance by ancestors and hence when the father and mother are permitted to inherit, their rights are statutory creations. Since there is no provision for inheritance by grandparents, it has been held that they may not take,¹⁵⁴ and the language in the recent amendment to the section providing for inheritance by and from an illegitimate must be so construed.¹⁵⁵ In part this section reads that "the maternal grandfather and grandmother of said illegitimate child, and the said illegitimate child . . . shall have the capacity to take and inherit from each other real estate as heirs, under the foregoing provisions of this act, in the same manner and to the same extent as if said child or children had been born in lawful wedlock" In light of the common law rule, and partial modification of it in the case of the father and the mother, this language must be construed as permitting the illegitimate child to inherit from his maternal grandparents, but not *vice versa*.

IV. INHERITANCE BY BROTHERS AND SISTERS OF THE HALF BLOOD

As the legislature was changing the common law in order to permit inheritance by some ascendants,¹⁵⁶ the possibility of inheritance by brothers and sisters of the half blood was being made more remote. The third provision of the post-revolutionary legislation provided that brothers and sisters of the

¹⁵⁴ *Bray v. Taylor*, 36 N.J.L. 415 (1872). Testator provided that widow should have life estate in one-half and his daughter life estate in one-half the lands in question. Then he provided that the daughter was to have the fee after the death of her mother. Both survived testator. The daughter married, had issue and died before 1855. The issue, a son, survived his mother and died intestate before 1855. In 1855 the widow of the testator purported to convey the fee to the plaintiff by warranty deed. On suit for breach of warranty of title it was held for the plaintiff against his conveyer. The daughter was given the fee subject to her mother's life estate and on the intestate death of the daughter this fee descended to her son. On the son's death his grandmother did not inherit the fee. The common law rule that inheritances do not ascend has been modified to allow the father and to some extent the mother to inherit from an intestate child, but it has not been modified to let in grandparents.

¹⁵⁵ P.L. 1930, p. 568, §13.

¹⁵⁶ COMP. STAT. (1910), p. 1919, §§ 3, 4.

half blood should inherit if the intestate left neither a descendant nor a brother or sister of the whole blood nor the issue of such brother or sister.¹⁵⁷ A preamble to this section was inserted as a means of restricting the inheritance to those brothers and sisters of the half blood who had some of the blood of the ancestor from whom the fee descended to the intestate. While it was held that the maternal half brothers and sisters could not take lands that came to the intestate by descent *ex parte paterna*,¹⁵⁸ two decisions, which Chancellor Zabriskie¹⁵⁹ described as being contrary to the letter of the law, but in harmony with its spirit in producing more equitable results,¹⁶⁰ held that lands may be inherited by maternal as well as paternal brothers and sisters of the half blood when the intestate obtained such lands *ex parte paterna* by gift¹⁶¹ or by devise.¹⁶² It is to be

¹⁵⁷ Act of 1780, §3, passed May 24th.

¹⁵⁸ *Den ex dem. Lloyd and Fox v. Urison*, 2 N.J.L. 212 (1807). Thomas II inherited land from his father. His mother remarried and had issue and on the death of her second husband remarried to a third and had issue. On the intestate death of Thomas II unsurvived by issue, or a brother or sister of the whole blood or his or her issue, the contest is between a paternal uncle and the half sisters of the intestate. On ejectment it was held for the paternal uncle. The statute which gives precedence to brothers and sisters of the half blood is construed to mean, in this case, brothers and sisters by the same father, but by different mothers. This construction tends to remedy the evil the statute was aimed at since the lands one inherits should stay in the blood from which it descended.

Den ex dem. Pierson v. Prince D'Hart, 3 N.J.L. 481 (1809). Stephen by the will of his paternal grandfather was given the remainder of a fee subject to a life estate. Stephen died intestate and was survived by a sister Mary who inherited from him. On the intestate death of Mary the contest arises between the issue of Mary's mother by second and third marriages and the paternal cousins of Mary. On ejectment it was held for the defendant paternal cousins. The statute (Section 3 of the 1780 Act) was intended to permit inheritance by the half blood of the ancestor from which the estate comes. Since Mary held by descent from Stephen who obtained it by testamentary devise from his paternal grandfather, it is clear that only the half blood on the paternal side should be allowed. In this case there are no brothers and sisters of the half blood on the paternal side and the half blood who now claim are excluded. It follows that the paternal cousins take.

¹⁵⁹ See *Fidler v. Higgins*, *infra* note 174 at 153.

¹⁶⁰ See *Banta v. Demarest*, *supra* note 133 at 434.

¹⁶¹ *Arnold v. Den ex dem. Phoenix*, 5 N.J.L. 862 (1818). Father conveyed the land in question to daughter Mary as a gift. Mary died intestate survived by a paternal half sister who is the lessor of the plaintiff and by maternal half-brothers and sisters who are defendants. The claim of the plaintiff is that these lands came *ex parte paterna* and hence the defendants are not entitled. The defense is that these lands came to the intestate by purchase and not by descent. *Held*: Judgment for the plaintiff reversed. This estate did not descend but came by gift. Under the Act of May 24th, 1780, the half blood on both sides share in the inheritance.

noted that both these later decisions come after the section has been amended to carry a proviso as to lands coming by "descent, devise or gift of some one of his or her ancestors . . ."¹⁶³

The 1817 amendment took the first step in making more remote the possibility of inheritance by brothers and sisters of the half blood. It provided that these half blood or their issue could only inherit if the intestate left no descendant, no brother or sister or descendant of such brother or sister, and no father. Furthermore, a proviso was added restricting the right in the case where the intestate obtained the lands by "descent, devise or gift of some one of his or her ancestors . . ." in which case "all those not of the blood of such ancestors shall be excluded from such inheritance . . ."¹⁶⁴ This proviso confined the cases of which Chancellor Zabriskie spoke to fact situations arising under the 1780 section.

The final revision which was necessitated by the addition of the section giving the mother a right to inherit made the possibility of inheritance by brothers and sisters of the half blood or their issue even more tenuous¹⁶⁵ because it inserted the mother ahead of this group in the line of those who could inherit. This revision carried the proviso appended in 1817.

Following this proviso, it has been held that the fee cannot be inherited by the paternal brothers and sisters of the half blood if said fee came to the intestate from a maternal ancestor

¹⁶³ Den *ex dem.* Hance v. Knight, 11 N.J.L. 385 or 456 (1828). A testator devised to executors giving them power of sale and instructed that the property was to be divided equally between his widow and those of his three children who should attain the age of twenty-one. Only one attained twenty-one. After the testator's death his widow remarried having issue Hannah. Then the testator's remaining child died intestate. The executors, the "widow" of the testator and her second husband, conveyed to a dummy who reconveyed. The "widow" had title under this conveyance when she died. Her husband remarried having issue Sarah. His will directed this land to go to Sarah and Hannah. The plaintiffs, as lessees of Hannah, claim in ejectment as heirs of the testator's widow and child. The defendants claim under the will of the second husband. *Held*: The widow and the child that attained twenty-one each took a half interest in the fee. The half sister of this child inherited his share to the exclusion of her half sister Sarah. The conveyance to the dummy was valid as to the widow's half interest. Hence this half is disposed of under the will of the second husband. Therefore the plaintiff's suit in ejectment is granted in one-half the fee.

¹⁶⁴ P.L. 1816, p. 26, appearing in the more comprehensive act of P.L. 1817, p. 10, §5. The latter act will henceforth be referred to rather than the former.

¹⁶⁵ *Supra* note 163.

¹⁶⁶ P.L. 1838, p. 85 as §2.

by descent,¹⁶⁶ unless these paternal half blood are of the blood of the maternal ancestor from whom the estate descended as well as of the half blood of the intestate.¹⁶⁷

It is urged that since under section two of the Descent Act an adopted child is permitted to inherit from the legitimate children born to his adopting parents and since an illegitimate child is allowed to inherit from the legitimate or illegitimate children born to his mother, it is incongruous not to permit brothers and sisters of the half blood to inherit from each other under the same section. The cause for this distinction is readily seen. When the mother and father were being given rights to inherit from their children, neither an adopted child nor an illegitimate child had a statutory right to inherit. Hence the legislative choice in favor of parents as against brothers and sisters of the half blood is readily understood as simply a preference for one over the other. But when adopted and illegitimate children are being given rights under section two a distinction is being made that is unreasonable, but evidently not apparent. The habit of putting the brothers and sisters of the half blood behind the father and mother in the line of inheritance continues though the content of prior sections is varied by extraneous legislation. The case of a brother or sister of the half blood is even stronger than that of the illegitimate since the

¹⁶⁶ *Eckel v. Brehm*, 91 N.J.L. 658 (1917). Father had issue, G. Brehm, Jr. by a first marriage and Katie Brehm by a second marriage. The property of the second wife descended to Katie. After death of father, Katie died intestate. Her half brother entered and a maternal aunt of Katie brings ejectment claiming the half brother is not entitled since the land came to the intestate Katie *ex parte materna* by descent. *Held*: For the plaintiff aunt. The half brother of the intestate, not of the blood of the ancestor from whom the estate descended does not take the estate to the exclusion of a maternal aunt of the intestate.

¹⁶⁷ *Den ex dem. Delaphaine v. Jones*, 8 N.J.L. 340 or 419 (1826). N. Delaphaine married Mary and had three children by her. She died. Then Mary's father died and her share descended *per stirpes* to her three children. N. Delaphaine then married Mary's sister Lydia I who had taken from her father by descent. Lydia I gave birth to Lydia II. Lydia I and N. Delaphaine died before Lydia II. Lydia II died intestate, an infant. The plaintiffs in this action are the half brothers and sisters of Lydia II being the issue of her aunt Mary and her father. The defendants are an uncle and three aunts, the brother and sisters of Lydia I and Mary. They are claiming the entire share which descended to Lydia I and which descended to Lydia II. *Held*: For the plaintiff half brothers and sisters. This land descends according to P.L. 1817, p. 10, §5. The plaintiffs are of the blood of the ancestor since the ancestor was their aunt and they are of the half blood of the one last seized since they have a common father.

former is lawfully born while the latter is not, yet the latter has a much better chance to inherit than the former. Similarly, the case of a brother or sister of the half blood is stronger than that of the adopted child. The former has some blood of the intestate while the latter probably has none. As soon as this unreasonable distinction is called to the attention of the legislature, more favorable treatment of brothers and sisters of the half blood may be expected.

V. INHERITANCE BY COLLATERALS

In the first revision of the Descent Act we find the first appearance of the section regulating the inheritance by collaterals.¹⁶⁸ In part, the provision read that if the intestate died "without leaving lawful issue, and without leaving a brother or sister of the whole blood, or half blood, or the issue of such brother or sister, and without leaving a father capable of inheriting by this act . . ." then the fee should ". . . go to the several persons all of equal degree of consanguinity" to the intestate unless the fee came to the intestate by "descent, devise or gift of some one of his or her ancestors in which case all those not of the blood of such ancestor shall be excluded from such inheritance, if there be any person or persons in being, of the blood of such ancestors, capable of inheriting . . ." the fee. The amendment in 1838 was made necessary because of the legislation giving the mother a right to inherit before brothers and sisters of the half blood and before collaterals.¹⁶⁹ One change was the correction necessitated by this new section on the rights of the mother and the other a change in phraseology that made for clarity in meaning.

The next amendment permitted collaterals of the half blood to take and also provided that in case some collaterals were excluded by the proviso then the collaterals whether of the whole or half blood who could take under the proviso might take even if they were of more remote degree than the collaterals who were excluded.¹⁷⁰ Subsequent amendments were

¹⁶⁸ P.L. 1817, p. 11, §§6, 7.

¹⁶⁹ P.L. 1838, p. 86, §3.

¹⁷⁰ P.L. 1905, p. 358, §6.

probably intended to clarify the language of this section, but added nothing of substantial importance to the discussion here.¹⁷¹

There are three methods of calculating degrees of consanguinity¹⁷² and there seems to have been doubt in the minds of some lawyers as to which method was to be used to calculate for the purposes of this section. It was evidently a surprised bar¹⁷³ that read the opinion of Chancellor Zabriskie holding that the common law method was to be used and hence representation among collaterals was to be permitted.¹⁷⁴ The deci-

¹⁷¹ P.L. 1915, p. 62, §6; P.L. 1917, p. 845, §6.

¹⁷² 2 BL. COMM. *224 ff.:

"The civil law regards consanguinity principally with respect to successions, and therein very naturally considers only the person deceased, to whom the relation is claimed; it therefore counts the degrees of kindred according to the number of persons through whom the claim must be derived from him; and makes not only his great-nephew but also his first-cousin to be both related to him in the fourth degree; because there are three persons between him and each of them. The canon law regards consanguinity principally with a view to prevent incestuous marriages between those who have a large portion of the same blood running in their respective veins, and therefore looks up to the author of that blood, or common ancestor, reckoning the degrees from him; so that the great-nephew is related in the third canonical degree to the person proposed; and the first cousin in the second, the former being distant three degrees from the common ancestor (the father of the propositus) and therefore deriving only one-fourth of his blood from the same fountain; the latter and also the propositus himself, being each of them distant only two degrees from the common ancestors (the grandfather of each), and therefore having one-half of each of their bloods the same."

The common law method should need no explanation.

¹⁷³ See *Schenck v. Vail*, 24 N.J.Eq. 538, 549 (1873). Intestate was survived by collateral relatives only. They were more than one hundred first, second and third cousins. The defendant first cousins filed demurrers which were overruled and they appealed. *Held*: Reversed. The sixth section of the Descent Act applies to this case. No representation is permitted among collaterals and hence first cousins are preferred to those of more remote degree. The civil law system is used to calculate degrees of consanguinity under section six. The canon law method is not to be used nor is the common law method to be used.

Note: On page 549 appears a statement reflecting the surprise of the bar on reading *Fidler v. Higgins*.

¹⁷⁴ *Fidler v. Higgins*, 21 N.J.Eq. 138 (1870). Lands which had descended to an infant were ordered sold to pay the debts of her deceased father. The infant died intestate and survived by a mother, a paternal uncle and aunt and by paternal cousins. The plaintiff was guardian of the infant and the defendant executor. The bill was filed to determine the disposition of the funds remaining after the debt had been paid. *Held*: The funds retain the character of realty and descend as such. The cousins take *per stirpes* the share that would have gone to their deceased parent—namely one-third. In determining descent of realty the common law method of calculating consanguinity is to be used. This method permits of representation among collaterals. The civil law method is

sions subsequent to this attempt to correct the law clearly show that the judges refused to be put on the right path and in no uncertain terms it is laid down that the civil law method and not the common law nor canon law method was to be used to calculate degrees of consanguinity¹⁷⁵ and therefore representation among collaterals was not permissible, since the method calls for *per capita* inheritance in which, by statute, males do not exclude females of equal degree.¹⁷⁶

used for purposes of the Distribution Act because historically personalty was distributed by the civil law method.

¹⁷⁵ *Schenck v. Vail*, *supra* note 173.

Smith v. Gaines, 35 N.J.Eq. 65, *aff'd* 36 N.J.Eq. 297 (1882). Intestate was survived by great uncle and a first cousin. The great uncle sues for partition on the theory that they are both of equal degree of consanguinity to the deceased and hence each entitled to a half. The cousin demurs. *Held*: Demurrer overruled. The civil law system of computing degrees of consanguinity is used under section 6. A great uncle and a cousin are each four steps removed and therefore of equal degree. Hence they take as tenants in common in equal parts.

Miller v. Speer, 38 N.J.Eq. 567 (1884). The father and mother of the intestate were cousins. The intestate inherited the lands in question from her father and was survived by collateral relatives. Plaintiffs are maternal uncles (being also related on the paternal side) and the defendants are paternal cousins. *Held*: For the plaintiffs. The plaintiffs are three degrees removed and the defendants four degrees. This land came to the intestate *ex parte paterna* but since the plaintiffs are descended from the same grandfather as the intestate's father, they are "of the blood of such ancestor" of the intestate and so come within the meaning of the statute.

Kutschinski v. Bourginynon, 102 N.J.Eq. 89 (1927). A devise having lapsed, there was a partial intestacy of a decedent who was survived by collateral relatives only. The executor brings this bill to construe and declare rights, joining the collaterals. *Held*: The first cousins living at the time of the death of the decedent take to the exclusion of the second cousins.

Dobbelaar v. Hughes, 109 N.J.Eq. 200 (1931). Plaintiff rented from J. E. Hughes in 1891 and has been in possession ever since. A short time after execution of this lease the lessor became insane and a commission was appointed. Plaintiff paid rent to said commission until Hughes died in 1902. Hughes was survived by an uncle and several cousins. This uncle died in 1904 survived by a widow and a daughter who is the defendant here. The plaintiff claims by adverse possession and wants to quiet title. *Held*: For the defendant. The fee descended to the uncle to the exclusion of the cousins and on the uncle's intestate death his daughter inherited subject to her mother's dower. (The remainder of the decision discusses the question of the plaintiff's claim by adverse possession, deciding for the defendant.)

¹⁷⁶ *Bailey v. Ross*, 32 N.J.Eq. 544 (1880). Intestate was survived by a mother, two uncles, an aunt, and cousins (children of two deceased uncles). He left land which he had bought. His mother held the land for life and during such life estate the two uncles and aunt died. The case comes up on bill for partition. *Held*: The fee subject to the life estate descended to the two uncles and aunt as tenants in common on the death of the intestate. The cousins cannot take as representatives of uncles that predeceased the intestate. According to statute males do not exclude females of equal degree and so the uncles did not inherit to the exclusion of the aunt. The heirs of the two uncles and aunt are entitled to the fee *per stirpes*.

The word "ancestor" in the proviso refers to the immediate person from whom the intestate derived his title and hence when the ancestor is the father of the intestate, only the paternal collaterals may take, but when the ancestor is the brother of the intestate both paternal and maternal collaterals take since both classes are of the blood of the brother.¹⁷⁷ Following this logic we find that when the ancestor is the survivor of tenants by the entirety and the heirs of the intestate must be determined among collaterals, the fee goes to the nearest collateral of the blood of the survivor.¹⁷⁸ However, it has been held that when a mother is the ancestor, the fee may not be inherited by the maternal grandmother of the intestate, in spite of the fact that the grandmother is only two degrees removed from the intestate, because the common law did not permit inheritance by ascendants.¹⁷⁹ Though it has been held that a husband is not an ancestor of his wife for the purpose of this section,¹⁸⁰ there is

¹⁷⁷ *Wills v. Le Munyon*, 90 N.J.Eq. 353 (1919). Intestate inherited one-half interest in the fee from his father directly and the other one-half from his father through his brother. He was survived by his mother and collateral relatives. It is admitted that his mother cannot inherit the fee because it came to the intestate *ex parte paterna*. Meanwhile his mother died and so the disposition to collaterals is to be made without subjection to her dower. The plaintiff paternal uncles and aunt bring a bill to quiet title. The defendants are maternal uncles and aunt who admit the plaintiffs' claim to the land which descended directly to the intestate from his father but contest the exclusive right of the plaintiffs to the land which descended to the intestate from his brother. *Held*: For the defendants. The word "ancestor" in the proviso to section six refers to the person from whom the one last seized derived title and not to an ancestor more remote from whom the immediate ancestor derived title. Since the maternal uncles and aunt are of the blood of the deceased brother, they share with the paternal uncles and aunt.

¹⁷⁸ *Daly v. Connolly*, 10 N.J.Misc. 407 (1932). Tenants by the entirety held land until the husband died in 1890. His widow died intestate in 1915. The fee descended to their son and he died seized intestate, survived by collateral relatives only. The plaintiffs are paternal first and second cousins who bring ejectment. The defendants are maternal first and second cousins. The maternal second cousin admits the sole right of the maternal first cousin but claims an interest if the plaintiffs are held to be entitled. *Held*: For the defendant first maternal cousin. The one last seized inherited from his mother. The mother is the "ancestor" within the meaning of section six. As the first maternal cousin is the nearest relative of the blood of such ancestor, she alone inherits the fee.

¹⁷⁹ *Bray v. Taylor*, *supra* note 154.

¹⁸⁰ *In re Quinn*, 94 N.J.Eq. 490 (1922). Husband had bought realty which he devised to his wife. On her intestacy survived by collateral relatives only, the contest is between these collaterals of the wife and the heirs of the husband. The latter claim that under section six the former may not take because the fee came by devise from the husband and hence those of his blood should inherit. *Held*: For the wife's heirs. Lands purchased by a husband and by him devised to his wife are not said to have come to her by devise from some one of her

sufficient reason to believe that this is no longer the law. In fact at the time that this decision was written there existed a statutory proviso which greatly weakened one of the grounds for the decision.¹⁸¹ A statute now exists making the surviving spouse heir of the intestate spouse under certain circumstances,¹⁸² and on the faith of this statute together with a decision on a previous statute which made the one the heir of the other,¹⁸³ one could say that today a husband or wife might be construed as the ancestor of the survivor for the purposes of this section.

Relatives of the half blood, other than brothers and sisters and their issue, were not able to inherit under any of the sections of the Descent Act¹⁸⁴ until specific provision was made for the inclusion of such collaterals.¹⁸⁵ While blood collaterals of an adopted child may be able to inherit from him in case he acquired a fee by purchase, it is evident that if an adopted child acquired a fee by descent from his adopting parents and died intestate as to it, then those of the blood of the adopting

ancestors since the husband is not an ancestor within the meaning of the statute. "There is between them neither blood relationship nor statutory or other right of either to inherit from the other."

¹⁸¹ P.L. 1917, p. 845, §6, proviso 2.

¹⁸² COMP. STAT. (Supp. 1930) p. 454, §13 (b).

¹⁸³ Barry v. Rosenblatt, 90 N.J.Eq. 1 (1918). A father devised to his three children, one of which the plaintiff married on January 26, 1912. The plaintiff's wife died April 17, 1916, intestate and without issue. The defendant holds under conveyance from the surviving children of the testator and the plaintiff brings partition under P.L. 1915, page 65, §6, which was in force at the time the plaintiff's wife died. *Held*: For the plaintiff. The plaintiff is heir of his wife under the statute and a sale is decreed. The legislature may alter descent of realty and provide that a person shall be an heir even if he was not an heir at common law. The husband is made an heir of his wife by this section and the same is constitutional in spite of the fact that section seven has been held unconstitutional for a defect in titling (*Reece v. Stires*, 87 N.J.Eq. 32).

¹⁸⁴ *Stretch v. Stretch*, 4 N.J.L. 182 (1818). A testator devised his land in equal portions to his two sons by one wife and to his one son by another wife. One of the former devised his share to his brother of the whole blood Luke. Therefore Luke had two-thirds of his father's fee. Luke died intestate and his land descended to his son Aaron who then died intestate. Meantime Luke's half brother Joseph had died leaving seven issue of which Jonathan was the eldest. Jonathan entered the lands of which his cousin of the half-blood Aaron died seized and refuses to share it with his brothers and sisters and so they bring ejectment. *Held*: For the defendant Jonathan. The statute regulating descent of real estate does not provide for inheritance by cousins of the half blood and neither are the plaintiffs or the defendants entitled to inherit by common law. Since the defendant is in possession he may hold against the plaintiffs and anyone else who cannot show a better title.

¹⁸⁵ P.L. 1905, p. 358, §6.

parents would be entitled.¹⁸⁶ However, an adopted child may not be a collateral of the relatives of the adopting parents.¹⁸⁷ While it is probable that an illegitimate child may be a collateral of his maternal relatives, it is more certain that only maternal collaterals may take from an illegitimate who dies intestate.¹⁸⁸

VI. INHERITANCE BY THE SURVIVING SPOUSE

Before the turn of the century an addition to section six of the Descent Act provided that if there were no person capable of taking under the first six provisions of the Act, and if their intestate left a husband, or a wife, then the fee "shall descend to said husband or wife in fee simple . . ."¹⁸⁹ The effect of this

¹⁸⁶ P.L. 1877, p. 124, §3, proviso 2.

¹⁸⁷ P.L. 1877, p. 124, §3, proviso 1.

¹⁸⁸ P.L. 1930, p. 568, §13.

¹⁸⁹ P.L. 1894, p. 209.

* While dower and curtesy are not part of the law of intestate succession to land, in the strict sense of the term, statutory changes of considerable importance as to the quantity of the inheritance which is subjected to these interests deserve notice. Since enjoyment of the inheritance is affected by these interests, their extent is of great interest to those who inherit. For this reason a discussion of these statutory changes is appended in the following note. This discussion is not meant to be an exhaustive study of the law of dower and curtesy.

A. Widow's Dower.

In colonial times and during the first few years of independence the English common law rules of dower probably prevailed in New Jersey. With the first legislation relative to intestate succession to land pending in 1780, the importance of dower rights was recognized and a saving clause was appended to the Act (Laws of 1780, passed May 24th, §4) directing that the widow's right of dower should not be affected. Legislation, positive in character, and comprehensive in scope, soon followed, and provided that the widow of one dying testate or intestate be endowed of a life estate in one-third the land in which the deceased had a legal or equitable estate of inheritance during the coverture, unless the widow had properly released her claim by deed (Laws of 1799, passed January 31st, §1). This remained law for over a century. In 1915 an act was passed containing a saving clause as to rights which were vested prior to the enactment, abolishing dower and curtesy and substituting life estates in one-third the land, tenements and hereditaments of which the deceased was seized in fee simple and which had not been duly devised (P.L. 1915, p. 65, §§6, 7). The abolition of dower and curtesy was held unconstitutional on purely mechanical grounds (*Reece v. Stires*, 87 N.J.Eq. 32) and was repealed (P.L. 1917, p. 848). When dower rights were finally changed, the change was quantitative rather than qualitative; the widow's share being increased from a life estate in one-third to a life estate in one-half the land in which the husband had a legal or equitable estate of inheritance during the coverture unless the widow had properly released by deed (P.L. 1927, p. 124 §1).

B. Husband's Curtesy.

It is difficult to believe that there was no legislation relative to curtesy until

addition is to provide another means of defeating escheat since escheat seems to be inconsistent with the philosophy of the nineteenth century.¹⁹⁰ Apparently the provision is applicable to all lands of which the intestate died seized in fee simple, no matter how or when obtained. Though the expectancy thus provided for is extremely tenuous, more advantageous legislation is foreshadowed.

Under the pressure of the suffrage movement several amendments to the Descent Act were made at once.¹⁹¹ The sections dealing with the rights of the father and mother to inherit from an intestate child¹⁹² were like the gift of the "wooden horse" to the Trojans. Well could a woman say "*Timeo danaos et dona ferentes*," for the effect of sections six and seven was to substitute life estates in one-third the lands of which the intestate spouse died seized, while progressively abolishing dower and curtesy. The wife was more adversely affected by this change than was the husband because the husband could thenceforth alienate and devise his property free from a wife's inchoate right of dower,¹⁹³ while the wife could not alienate her separate property without the joinder of her husband.¹⁹⁴ While it might be argued that the curtesy right is considerably greater than a life estate in one third as heir, most men would gladly have traded the former for the latter in order to free their own lands of the widow's inchoate right of dower since men usually hold most of the property, dower consequently attaching to more land than does curtesy. Though this prospective¹⁹⁵ abolition of

quite recently (P.L. 1927, page 128, §1) and that the common law rules on the subject were applied. The legislation has two important aspects. While the share is reduced to a life estate in one-half the lands in which the wife had a legal or equitable estate of inheritance, the requirement that issue be born alive has been abolished (P.L. 1928, page 380, making a change in wording by eliminating the word "lawful"). The wisdom of this latter departure from the common law requirement that issue be born alive is partially dependent upon whether or not the courting of elderly women of property is to be encouraged.¹⁹⁰ See treatment of this possible explanation in connection with the discussion of the first legislation as to inheritance from an illegitimate. This discussion appears in the section dealing with inheritance by descendants.

¹⁹¹ P.L. 1915, p. 62 ff.

¹⁹² P.L. 1915, p. 62, §3; P.L. 1915, p. 62, §4.

¹⁹³ The statement is not meant to infer retroactivity, but to cover cases in which no vested rights could be shown before the passage of the statute.

¹⁹⁴ COMP. STAT. (1910), p. 3237, §14.

¹⁹⁵ *Class v. Strack*, 85 N.J.Eq. 319 (1915). The plaintiff bought at a foreclosure sale, the mortgage not having been executed by the wife of the fee

dower and curtesy was held unconstitutional due to a drafting error¹⁹⁶ the section providing for a life estate to the surviving spouse as an heir was upheld¹⁹⁷ after both sections were repealed.¹⁹⁸

Several years ago a new section was added to the Descent Act.¹⁹⁹ It provided that if a married person died seized of an estate in fee simple in his or her own right without having effectively devised the same and without leaving lawful issue,²⁰⁰ but leaving a husband or wife, then in that case the surviving spouse should take the land in fee simple absolute. There follows a proviso to the effect that this section should only apply to property purchased by the deceased during coverture. This new section has had an interesting judicial career, especially the proviso.

It has been held that the surviving spouse takes the lands in fee simple as heir of the intestate, if the deceased husband,²⁰¹

owner. The sale occurred on May 14, 1915. The defendant, wife of the former owner, claims an inchoate right of dower during the lifetime of her husband and so the plaintiff brings this bill to quiet title claiming the foreclosure as a bar to dower. *Held*: Dismissed. The defendant's rights were vested before the statute was passed abolishing dower and curtesy. This court doesn't have to decide the constitutionality of this statute purporting to abolish dower and curtesy because this case arises on facts which must be decided on law prior to such enactment.

¹⁹⁶ *Reece v. Stires*, 87 N.J.Eq. 32 (1917). Intestate is survived by various heirs. Among them Marcy has a husband, and Leshar has a wife. On bill for partition and sale the question arises as to the interests of the spouses of these heirs. The intestate died March 7, 1916 (after the passage of P.L. 1915, p. 65, §§6, 7). *Held*: The husband of Marcy has a vested remainder if they have had issue, if not, a contingent remainder under our construction of "inchoate right of curtesy." The wife of Leshar has an inchoate right of dower since P.L. 1915, p. 65, §7 is unconstitutional because its contents deal with matter other than that which the title of the act describes. (N. J. Const., Article IV, §7, pl. 4.)

¹⁹⁷ *Barry v. Rosenblatt*, *supra* note 183.

¹⁹⁸ P.L. 1917, p. 848.

¹⁹⁹ P.L. 1926, p. 77.

²⁰⁰ *Meeker v. Campbell*, 105 N.J.Eq. 294 (1929). A woman having had three children by a first marriage, remarried. She had no issue during her second marriage and died intestate seized of the fee in question. Her second husband survived. Her children by the first marriage bring this bill for partition joining their stepfather as defendant. *Held*: Partition decreed. Since the intestate had issue, the defendant may not take under P.L. 1926, p. 77. The defendant is not entitled to curtesy since he had no issue by the intestate.

²⁰¹ *Weyer v. Weyer*, 106 N.J.Eq. 112, *aff'd* 107 N.J.Eq. 593 (1930). Son purchased from father for \$15,000 (\$5,000 purchase money mortgage to father, \$5,000 purchase money mortgage to sister, \$5,000 cash to sister). The mortgage to the sister was paid and the son died in 1928 survived by wife but no children. The wife claims under P.L. 1927, page 77. The defense is an oral contract to will to father and sisters. *Held*: For the plaintiff wife. The consideration paid

or the deceased wife,²⁰² bought lands, obtaining a deed therefor during their coverture²⁰³ before,²⁰⁴ or after,²⁰⁵ the passage of

by the son was adequate and hence proof is inadmissible to show failure of consideration or part performance. The statute is applicable to lands purchased before its enactment. Since a valuable consideration was paid, the property is clearly within the meaning of the proviso as to its being purchased during coverture.

Kicey v. Kicey, 114 N.J.Eq. 116 (1913). Marriage before 1926, and acquisition of land by husband before 1926, but after marriage. The land was bought. On the intestate death of the husband after 1926 he is survived by brothers and sisters and his wife. The brothers and sisters bring partition. *Held*: Dismissal affirmed. The statute affects lands acquired before its enactment since the legislature may change the law of descent at any time. The rights of an "heir expectant" under one statute may be changed since said right is only an expectancy. The descent and dower and curtesy legislation are neither interdependent nor related. The common law dislike for inheritance by ascendants has not been followed by our statutes. Repealer by implication is not favored.

²⁰² *Malague v. Marion*, 107 N.J.Eq. 333 (1930). By contract three children of the intestate divided the real and personal property that descended to them. One of these children was the defendant's wife who was given all the real property while the other two children took personalty. Therefore the wife of the defendant obtained one-third of this land by descent and two-thirds by trading her share of personalty. The wife died in 1928 without issue survived by her husband. The wife's sister, plaintiff in this action, claims that the deed is void and that the defendant is entitled to curtesy in one-third only. *Held*: For the defendant. The defendant takes a fee in the two-thirds that his wife obtained by giving up her interest in the personalty. The wife obtained this two-thirds by purchase within the meaning of P.L. 1926, page 77, since title to realty is acquired either by descent or by purchase. The remaining one-third descends to the plaintiffs subject to the defendant's curtesy. (In this case Vice Chancellor Berry commits himself to the definition of "purchased." It is to be noted that in this case the two-thirds must be considered as bought with the personalty that the wife was entitled to.)

Anderson v. Greenleaf, 11 N.J.Misc. 330 (1933). Conveyance in 1925 to the plaintiff's wife during coverture. In 1932 she died seized, intestate, and without issue, being survived by her husband. The plaintiff claims under P.L. 1926, page 77, and joins the wife's brother as defendant. The defendant made no appearance at trial or on this appeal. *Held*: Final judgment for the plaintiff. Though the deed does not show payment of consideration, acquisition by deed is by "purchase." "Purchased" in the statute applies to all forms of acquisition except by descent. The statute is retroactive as to lands acquired before its enactment.

²⁰³ *Maul v. Martin*, 116 N.J.Eq. 479 (1934). Intestate obtained property in 1919 while married to his first wife. He was divorced from her and married again. At his death he was survived by his second wife and two aunts. A transfer inheritance tax assessment was levied on the theory that the aunts inherit. On appeal by the widow the tax was affirmed. The widow did not inherit under P.L. 1926, p. 77, because the land was not purchased by the husband during his coverture with the appellant. In order to inherit under this statute the acquisition must have occurred during the coverture of the intestate with the surviving spouse.

²⁰⁴ *Borgquist v. Ferris*, 112 N.J.Eq. 324, rehearing 112 N.J.Eq. 557 (1933). A woman made a contract to purchase land and married before a deed was obtained. She died in 1931 survived by a husband but no issue. Her heirs at law bring this bill for partition joining the husband as defendant. The theory of the plaintiffs is that, the contract to buy being made before marriage, the

this enactment, as long as death occurred after passage thereof.²⁰⁶ The same is true if the intestate obtained the fee by testamentary devise before the enactment of the section,²⁰⁷ but not if it came to the intestate by descent.²⁰⁸ In the case of a gift of land made by a father to a childless married daughter before the enactment of this section, it has been held on her intestate death after the passage of this section, that the section was not

acquisition was not during the coverture. *Held*: Bill dismissed. The acquisition of legal title was during coverture and the word "purchased" means acquisition of legal title. On rehearing the court disagreed with the decision in *McGoldrick v. Grebenstein*, 108 N.J.Eq. 335 (1931) where it was held that the dower and curtesy legislation repealed P.L. 1926, page 77, by implication. This court holds that these statutes are not inconsistent but are on different subjects entirely.

²⁰⁶ *Johnson v. Jupilat*, 114 N.J.Eq. 139 (1933). Wife of defendant bought lands in 1932. She died intestate, seized thereof, survived by her husband and a brother. The brother brings the action claiming that P.L. 1928, page 380 (curtesy legislation) repealed P.L. 1926, page 77, and therefore the defendant husband is entitled to a life estate in one-half and the plaintiff the fee subject to the defendant's interest. *Held*: For the defendant. The statutes do not deal with the same subject. One makes the husband an heir under certain circumstances while the other regulates an estate which devolves upon him by marriage. The 1926 act did not repeal curtesy. The husband could take under both acts, the lesser interest merging into the greater.

"There appears to me no inconsistency in a legislative scheme which gives to a husband, in all events, a life interest in one-half of his wife's lands, and also gives him the fee in property *bought* by his wife during coverture, if she makes no other disposition of it, and leaves no children to inherit it. . ."

"The curtesy statute governs many situations not within the scope of the Act of 1926. For instance: When the wife dies testate; when she leaves issue; when she acquires the land before marriage; or takes title by operation of law and not by purchase; when she loses title (as by execution sale) before her death."

"Whatever the force of this legislative interpretation, I am satisfied that P.L. 1926, page 77, remains unrepealed, and that the defendant husband inherited the fee thereunder. This conclusion is supported by the decision of Vice-Chancellor Berry in *Malague v. Marion*, 107 N.J.Eq. 333, but it is at variance with what was said by Vice-Chancellor Fielder in *McGoldrick v. Grebenstein*, 108 N.J.Eq. 335. Every opinion of that distinguished judge has such weight that I disagree with him most reluctantly. In that case, however, the actual decision went no further than that P.L. 1926, page 77, did not operate on land acquired by the wife before the enactment."

²⁰⁶ *Weyer v. Weyer*, *supra* note 201.

²⁰⁷ *Stabel v. Gertel*, 111 N.J.L. 296 (1933). Defendant married wife in 1903 and in 1916 she obtained by devise from her father the fee in question. The wife died in 1932 intestate and without issue, leaving a husband and two sisters. The two sisters bring ejectment against the husband of the intestate. *Held*: For the defendant husband. Title came to the wife by purchase. "Purchased" in the act means acquisition of lands by means other than descent or inheritance. The statute is applicable to all lands of which the intestate was seized as long as death occurs after enactment.

²⁰⁸ *Malague v. Marion*, *supra* note 202.

applicable,²⁰⁹ but this decision has been questioned,²¹⁰ and probably will not be followed.²¹¹

The effect of this judicial construction is to make "purchased" mean "acquired by purchase". It might be argued that as long as it is technically correct to call one who obtains title "by purchase" a "purchaser," there should be no objection to a further extension of the legal vocabulary making "purchased" synonymous with "acquired by purchase". Research fails to disclose any similar construction of "purchased" that would be controlling on the court.²¹²

The first indication of this innovation appeared when Vice-Chancellor Berry,²¹³ in referring to an old text, said that title to realty is acquired either by descent or by purchase, the inference being that anything not falling under the former category necessarily fell under the latter. Undoubtedly the Vice-Chancellor was correct, but it does not necessarily follow that lands which come by devise or by gift are "purchased". Other sections of the Descent Act²¹⁴ group "descent, devise or gift" together in negative provisos. Having in mind the intention of the legislature to make this section a part of the Descent Act, it might reasonably have been held that "purchased" meant everything but "descent, devise or gift". It is difficult to ascertain what the legislature intended "purchased" to mean, but it is urged that the legislature probably intended that it should mean "bought" since this section seems to have been suggested

²⁰⁹ *McGoldrick v. Grebenstein*, 108 N.J.Eq. 335 (1931). After daughter's marriage to the plaintiff, her parents in 1920 conveyed land to her as a gift. She died intestate in 1930 survived by husband and her brothers and sisters. The plaintiff husband claims under P.L. 1926, page 77, and the defendant brothers and sisters argue repealer by implication by P.L. 1928, page 380. *Held*: For the defendant brothers and sisters. At time of the marriage and at time of acquiring title by the wife, the law gave the plaintiff no claim in any of this land. Wife had no issue and so husband couldn't claim curtesy. P.L. 1928, page 380, reduced this to one-half the estate for life for those having curtesy as an inchoate right. P.L. 1926, page 77, was intended by the legislature to apply to lands acquired after its passage and hence the plaintiff does not come under it since he is governed by the law at the time of his marriage. The plaintiff is not entitled to anything.

²¹⁰ *Cf. Borgquist v. Ferris*, *supra* note 204.

²¹¹ *Cf. Kicey v. Kicey*, *supra* note 202.

²¹² But *Cf. U. S. v. Whipple Hardware Co.*, 191 F. 945, 112 CCA 357 (3rd Cir. 1911).

²¹³ See *Malague v. Marion*, *supra* note 202 at p. 336.

²¹⁴ COMP. STAT. (1910), p. 1917, §§3, 4, 5, 6.

by the community property systems that exist in some of our western states. The proviso of this section is especially indicative of its parentage, though it is admitted that the offspring is a hybrid due to the cross-fertilization of a preference for inheritance by descendants with the essential core of the community property system.

Had such a construction been adopted it would be in line with the evident policy of the Descent Act to keep the inheritance of lands in the blood of the ancestor, if the intestate acquired his title by "descent, devise or gift of some one of his or her ancestors . . ."²¹⁵ Whether or not the results produced by the suggested construction would be more equitable depends entirely upon the criteria which are used as a basis of judgment. Under the suggested construction the surviving spouse would be entitled only when the lands were "bought" during coverture; and since it is probable that both partook in the earning and saving of the funds used to buy the property, the survivor ought to be entitled to the undisposed remainder²¹⁶ in the absence of descendants who are the natural objects of the bounty of both. Under the present interpretation, the surviving spouse is given preference over the blood relatives of the intestate even when it came to the deceased by devise or gift of some one of his or her ancestors. Perhaps this should be so, but other sections of the act do not seem to reflect such a policy.²¹⁷ It would seem that a person's right to inherit should not depend on whether his father-in-law or mother-in-law died testate or intestate.

However, there is an evident method by which the results of this construction may be evaded. A childless person who has received lands by gift or devise may do justice to those of his or her blood if he or she prefers them to his or her spouse by making a will devising the property. In fact it is possible to avoid practically all the effects of the entire Descent Act by making an effective testamentary disposition of one's property.

²¹⁵ COMP. STAT. (1910), p. 1917, §§3, 4, 5, 6.

²¹⁶ Maul v. Martin, *supra* note 203.

²¹⁷ COMP. STAT. (1910), p. 1917, §§3, 4, 5, 6.

CONCLUSION

It is frequently said that synthesizing philosophy comes when a development has passed its peak and is on the decline. Augustine²¹⁸ synthesized the Roman civilization while the barbarians of the north were preparing to tear it down.²¹⁹ Thomas Aquinas²²⁰ summarized the medieval period while disintegrating tendencies were being felt.²²¹ Similarly Blackstone²²² was able to epitomize in seven canons of descent the English law on intestate succession to land while new social and political forces were arising²²³ which would eventually strike at the very roots of some of his canons. This is and must be the inevitable fate of the law if it is to change to meet new social needs. Old theories and iron-bound categories must give way and they do give way unwillingly, slowly. While adjusting itself to meet new needs the law adopts new theories. Perhaps on minute examination the new will be shown inconsistent with the old. No matter—after a time both will disappear and their successor will emerge, possessing some elements of each of these previous theories but within it the seeds of its own doom, much like Hegel's synthesis immediately became a thesis for which an antithesis was soon found.

At present the New Jersey law on intestate succession to land is experiencing the introduction of new strains and their effects have not been fully noted. Experimentation continues. A foreign idea as to community property is introduced and its effects on the old law cannot as yet be fully appreciated. Its parentage is not recognized. Other elements come in to disrupt the old picture. Changing conditions call for more humane

²¹⁸ "THE CITY OF GOD" written after Alaric had sacked Rome.

²¹⁹ Rome fell about 476.

²²⁰ "SUMMA THEOLOGICA" written about 1250.

²²¹ During the thirteenth century European civilization felt the effects of many social movements such as the Crusades, the growth of trade and commerce, the introduction of Greek and Oriental learning and the rise of towns and guilds. These forces were destined to make a new culture pattern which would replace medieval civilization.

²²² "COMMENTARIES" published from 1765-1769.

²²³ Rousseau and Montesquieu are of the many whose philosophy together with economic changes and scientific discoveries produced the dominant theme in modern culture.

treatment of the illegitimate, adoption acquires status, but brothers and sisters of the half blood practically escape notice. Our civilization repudiates the view regarding the woman as an inferior and the law begins to reflect the change in attitude. Old preferences continue and new situations are dealt with by makeshift devices. Meantime the social panorama is rapidly changing and the law strains to keep apace. But all this is evidence of vitality and youth. The law of intestate succession is still aiming toward a closer adaptation and a fine adjustment to contemporaneous social needs. This adjustment has not been reached, but social engineers point out various paths from which to choose. Political events, meantime, restrict the scope of choice among these paths.

At present the effect of all these divergent and conflicting strains, forces and theories cannot be fully appreciated. Their resultant effect is not yet apparent. In short, the time has not arrived for a new synthesis. Inconsistencies in theory and incongruities in classification must first be ironed out. Then the work of the synthesizing philosopher will begin; but it will herald the dawn of a new era.

MILTON ALPERT.

LAKEWOOD, N. J.