New Jersey Court of Errors & Appeals.

IN CHANCERY OF NEW JERSEY.

BETWEEN

MARQUIS D. L. GAINES, ROBERT L. GRAHAM, JOSEPH H. HILER, ET AL,

Appellants,

AND

ANDREW J. SMITH, MELVIN S. CONDIT, AND EDMUND J. HALSEY, EXECUTORS AND TRUSTEES, ET AL,

Respondents.

Brief of Appellants' Counsel.

B. WILLIAMSON.

NEW YORK:
JOHN C. GRAFF, PRINTER, 2291 THIRD AVENUE, HARLEM.

1881.

GENEALOGICAL TABLE

OF

DR. CHARLES M. GRAHAM

Dr. Charles M. Graham, died in 1852, leaving a will by which he devised the premises in controversy, to his grandson, Edward Ennis Graham.

Edward Ennis Graham is dead (he died without issue and unmarried) as alleged in the bill in March, 1864.

Grand Uncle

Charles M. Graham, Jr. married Helen Young. He died January 17, 1862. She died September, 1874.

C. Montrose Graham, intermarried with Cornelia Ludlow, July 12, 1847. He died in May, 1849. She is still living.

Edward Ennis Graham (devisee) intermarried with Sarah J. Maxon, in Sept, 1853. He died. Aug. 3, 1855, intestate. She is still living, her present name is Bell, having married since. Bell is dead and she again a widow.

Robert L. Graham, living and unmarried, and one of the defendants in this suit.

Cousin

Edward Ennis Graham, died intestate and unmarried, July 7, 1860, being about six years of age at his death.

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Appellants,
and
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Executors and Trustees, &c., et al.
Respondents.

BRIEF OF APPELLANTS' COUNSEL.

Both parties claim under Edward Ennis Graham, the younger.

The complainants claim under his *Grand Uncle*, Edward Ennis Graham.

The defendants claim under Robert L. Graham, *his cousin.*

Edward Ennis, the younger, died seized without a will, without 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, but leaving a mother, who is still living.

The estate descended to the several persons who are of equal degree of consanguinity to Edward Ennis Graham, *the younger*, under the statute of New Jersey.

Revision Title Descent, page 298, section 6, subject to the mother's life estate.

It is claimed by the bill that at the death of the intestate the *Grand Uncle* was entitled to share the estate equally with the *cousin*.

The question for solution is whether the Grand Uncle took half of the estate as tenant in common with the cousin.

Is a Grand Uncle under the law of descent in New Jersey of equal degree of consanguinity with a cousin.

Revision 298, section 6.

It is the law of New Jersey that in computing the degrees of consanguinity the mode of computation is by the civil law.

Schenck *vs.* Vail, 9 C. E. Green, 538.

The mode of computation is not questioned. The two particulars in which the civil law more essentially differs from the common and canon law are

FIRST—By the common law the *ancestor* is the *terminus a quo,* but by the civil law the computation begins with the *intestate.*

SECOND—The common law counts the degree of kindred according to the number of persons through whom the claim must be derived from him—that is—the ancestor. The civil law counts up to the ancestor, and then downward to the claimant.

The mode of *descent,* as well by the common as the civil law, has in many material respects been modified and changed by statute both in this country and in England. In giving effect to such changes and modifications, ancient and well established *rules* have not been disregarded or considered as broken down or abolished, but have been adhered to, as conservative and necessary to preserve the principles and policy upon which descents are regulated.

In the case of *Taylor and Bray,* 3 *Vroom,* 188, the court, while acknowledging the existence of the *civil* law as the mode of computation, yet on the construction of the statute now under consideration, decided, that while the *Grandfather* was the next of kin in that case, and by the civil law entitled to the inheritance, he could not prevail because thereby the first canon of descent was violated.

Yet there is nothing in the statute declaring that the mode of computation by the *civil* law shall be disregarded, if in its application it comes in conflict with any of the canons or established rules of descent.

There is a feature in the case of *Taylor and Bray* showing the caution of the court in adopting the civil law mode of descent. In that case, the Chief Justice, in his opinion, 3 Vroom, 182, adopts it as the law of New Jersey, but in 7th Vroom, 415, Mr. Justice Depue, in delivering the opinion of the Court of Errors and Appeals on appeal, says: "It is not intended to express or intimate any opinion as "to the method of computing the degrees of consanguinity "under the section under consideration."

It is a well established rule of descent, and as well established as the first canon which controlled the application of the civil law in Bray *vs.* Taylor, which rule has never been disregarded in New Jersey, to make the computation either *from* or *to* the first common ancestor.

By the common law rule, to make the first common ancestor the *terminus a quo*, is imperative, and it has been uniformly adopted as a rule regulating descents in New Jersey.

By the table before us, *Charles M. Graham* is the first common ancestor to the intestate and to his cousin, Robert L. Graham.

Why pass the Grandfather and go to the Great-grandfather for a common ancestor. If such is the mode of computation by the civil law, has it ever been adopted in New Jersey, or has it been subject in this respect to the rule of the common law?

It is true, if you go back to the Great-grandfather and then compute by the civil law mode, you make by that

count the Great Uncle of equal degree of consanguinity with the cousin; but in so doing you break down a well established and uniform rule of the common law.

He is not in *point of fact* as near of kin; you only make him so by an artificial rule and by violating a well established rule regulating descents.

Why do this? No *Statute* in New Jersey has declared that this civil law mode of computation shall be the established mode. It has been adopted, but as has been seen in its application, is subject to modification and control adapting it to the rules which have been always recognized as existing in the descent of estates.

3 Kent's Com., 412, ~~3d Edition~~.

"In the mode of computing the degrees of consanguinity "the civil law, which is generally followed in this country "upon that point, begins with the intestate, and ascends "from him to a common ancestor, and descends from *that* "ancestor to the next heir, reckoning a degree from each "person, as well in the ascending as descending lines. Ac- "cording to this rule of computation, the father of the "intestate stands in the first degree, his brother in the "second, and his brother's children in the third, or his "Grandfather stands in the second degree, the uncle in "the third, *the cousins in the fourth*, and so on in a series "of geneological order."

The only difference is in the mode of computation in finding a common ancestor. In the one case the *common ancestor* is the *terminus a quo*—in the other, the intestate is that *terminus*, but the common ancestor *to* whom you count or *from* whom you count is the same.

The courts of New Jersey have always made the application of the civil law rule subservient to ancient and well established rules in conflict with it.

In Den. *vs.* Jones et al, 3 Halst., 343, Chief J. Ewing says: "This construction would impugn an ancient and "useful rule of the common law." "A man that claimeth "as heir in fee simple to any man by descent must make "himself heir to him that was last seized of the actual free- "hold and inheritance. Co. Lit., 11 b. "Nothing but "the plain and imperious requisition of a statute ought to "induce a departure from the well known and safe rules "of the common law."

It is submitted that there is no rule better established than that the first common ancestor is the terminus from which computation is to be made, in order to find the heir, that you then reckon downwards, and when that common stock is exhausted, and not till then, can you resort to another common stock.

While there are any descendants of the first common stock, they are the collaterals entitled to the inheritance.

If, in the application of the civil law, it conflicts with the well established rule referred to, it must yield to the rule.

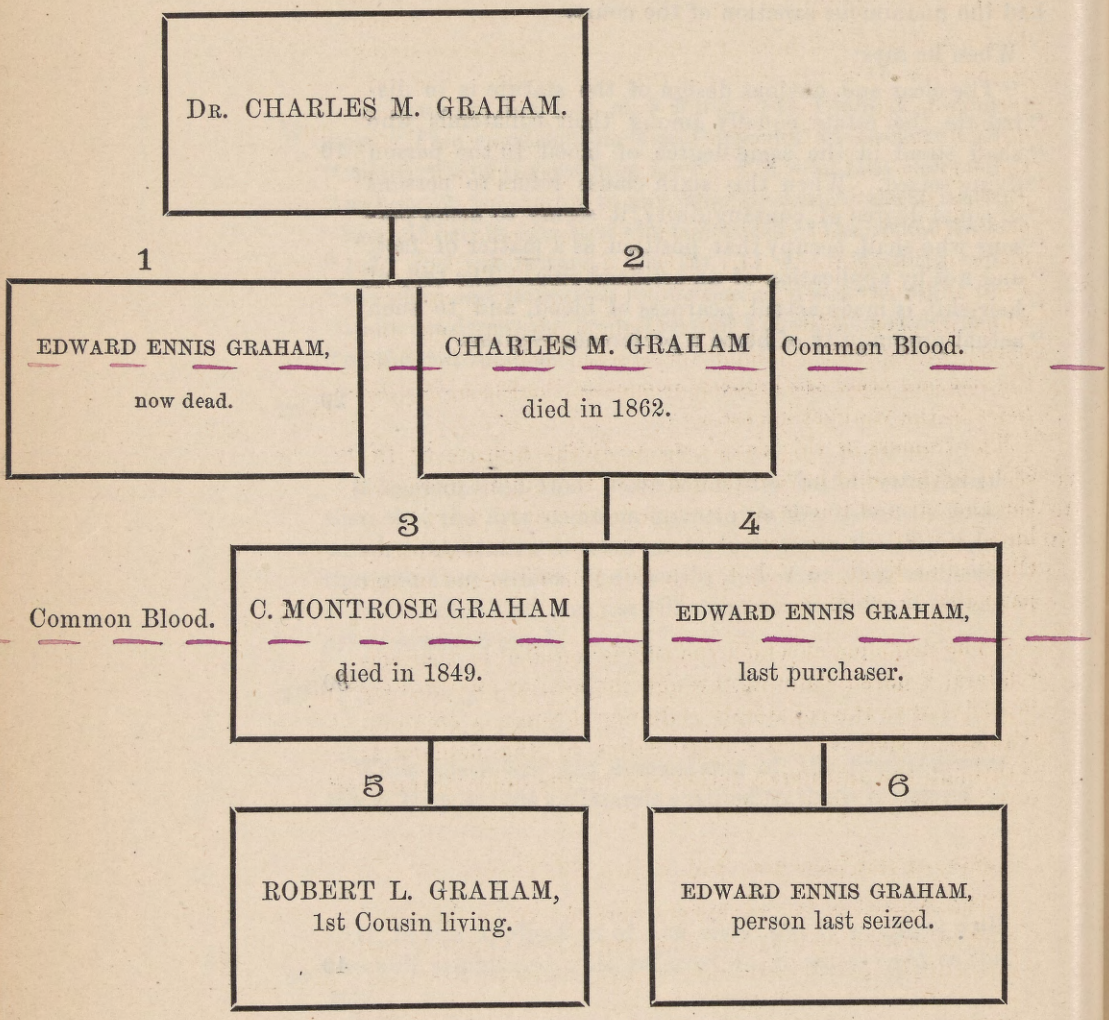
Neither has statutory sanction; and the common law rule being an ancient and well established rule, "nothing, "(using the language of Chief J. Ewing,) but the plain "and imperious requisition of a statute should induce a "departure from it."

These views I understand to be in harmony with the reasoning and conclusion of the Chief Justice in the case of Schenck *vs.* Vail, 9 C. E. Gr., 538, and which he declared had the unanimous sanction of the court,

When he says:

"The clear and obvious design of the statute is to dis-
"tribute the estate equally among their collaterals who
"shall stand in the same degree of blood to the person
"dying seized. When this sixth clause refers to persons
"of equal degree of consanguinity, it seems to mean per-
"sons who shall occupy that position as a matter of fact,
"and not by application of an artificial rule. The test of
"heir-ship is made actual nearness of blood, and to such
"actual propinquity of blood a preference is given."

Apply this test to this case as shown on the following genealogical table:



And thus we see that the *fathers* of No. 6 (*the intestate*) and of No. 5 (the first cousin) are of the same common blood. Whereas, No. 1 (the Grand Uncle) and No. 2 (the Grandfather of No. 5 and 6) are of the same common blood, and so much farther removed from the person dying seized (No. 6) to wit: one generation in blood. The very term consanguinity used in the statute implies that propinquity or nearness of blood is to be considered in computing the degrees, and is in harmony with the language of Chief Justice Beasley, above quoted, for if propinquity or nearness of blood is not to be considered, then under the claim made in this case, a brother of Dr. Charles M. Graham and a son of Robert L. Graham would take equally property of which the last Edward Ennis Graham (No. 6) had died seized through *two* common ancestors or persons in which the *common blood* of the ancient ancestor had been *divided twice* in the younger ancestor.

The framers of this sixth section of the Statute of Descent never could have intended to so thoroughly disregard the ancient and universal principle in regard to *nearness of* blood and of *one nearest* common ancestor, as laid down by Chancellor Kent, in Vol. 4, (6th Ed.,) near the end of star page 402, in which he says:

"The principle on which the rule is founded is, that col-
"lateral kindred claiming through the *nearest ancestor are*
"*preferred* to the collaterals claiming through a common
"*ancestor more remote.* The claims of the nephew is
"through the intestate's father and of the uncle through
"the intestate's grandfather."

Again, at star page 406, Vol. 4 6th Ed.,) says:

"The American law of descent does not go on the prin-
"ciple of searching out the first purchaser through the
"mists of the past generations, except the estate be ances-
"tral, and then it stops at the *last purchaser* in the ances-
"tral line. Its general object is to continue the estate in
"the family of the intestate, and in effecting it to pay due
"regard to the claims of the successive branches of that
"family, *and principally to the loud and paramount claim*
"*of proximity of blood to the intestate.*"

2d Washburne on Real Property, (2nd Ed.) page 409, sec. 38, says:

"To prove heir-ship in a collateral line, a party must "show the descent of himself and of the person last seized "from some common ancestor, and the *exhaustion of all* "*the lines* of descent which would have the right to claim "before him."

10

See 2 Blackstone Com',s (Wendell's Ed.) star page 226, in which he says:

"Though the common ancestors are not named in de- "ducing the pedigree, yet the law still respects them as "the *fountains of inheritable blood*, and therefore, in order 20 "to ascertain the collateral heir of John Stiles, it is first "necessary to recur to his ancestor in the first degree; and "if they have left any other issue besides John, that issue "will be his heir. On default of such, we must ascend "one step higher to the ancestors in the second degree, and "then to those in the third, and fourth, and so upwards "*in infinitum*, till some couple of ancestors be found who "have other issue descending from them besides the deceased "in a parallel or collateral line. From these ancestors the 30 "heir of John Stiles must derive his descent..

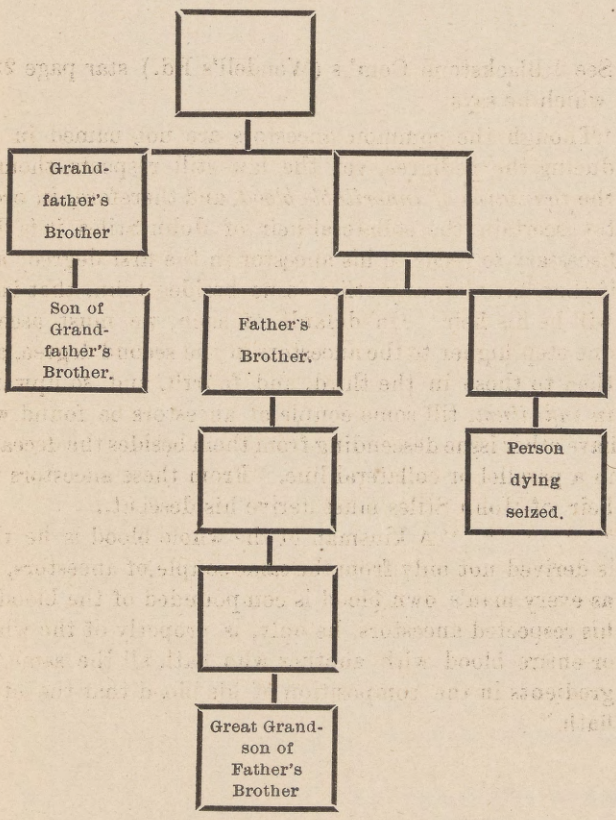
* * * * "A kinsman of the whole blood is he that "is derived not only from the same couple of ancestors, for "as every man's own blood is compounded of the blood of "his respected ancestors, he only, is properly of the whole "or entire blood with another who hath all the same in- "gredients in the composition of his blood that the other "hath."

40

Mr. Christian, in his note 35 to 2nd Blackstone's Com's, (Wendell's Ed.) page 225, says:

"The editor conceives that the true and only way of as- "certaining an heir-at-law in any line or branch is by the "representation of brothers or sisters in each generation, "and that the introduction of the computations of kindred "either by the *canon or civil law* into a treatise upon de- "scents may perplex and can never assist." * * * *

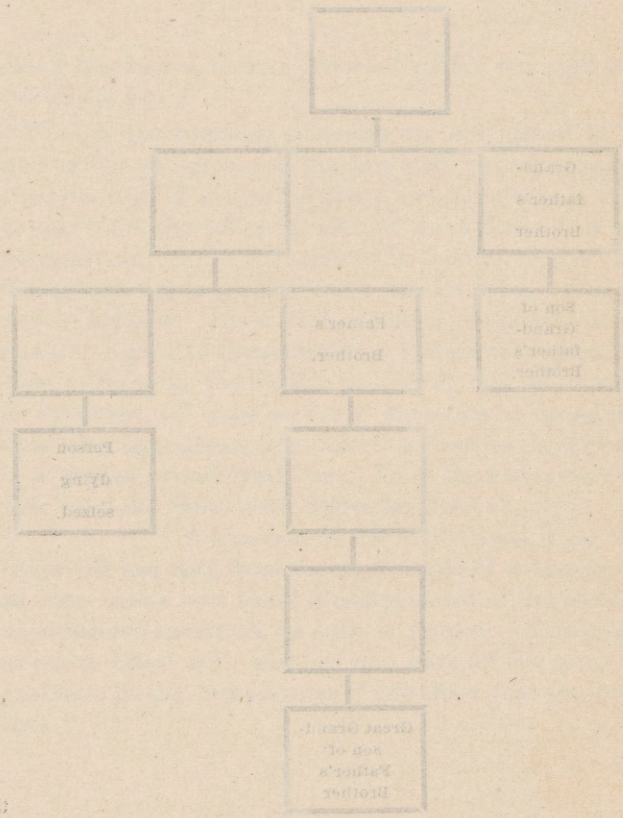
"It is certain that a Great-grandson of the father's "brother will inherit before a son of the grandfather's "brother. Yet the latter is the *next collateral* kinsman ac- "cording to both the canon and civil law computation, for "the former is in the fourth degree by the canon and the "sixth by the civil law, and the latter is in the third by the "canon and the fifth by the civil law; but in the descent of "real property, the former must be preferred."



It has never been suggested by court or counsel in any of our decisions, that in New Jersey a Grand Uncle inherits with the cousin.

Nixon's Dig., (2 Ed.) title Orphans' Court, page 568, in a note enumerating the persons entitled to letters of administration, says:

"The next of kin are Children, Grandchildren, Parents, "Brothers, Sisters, Grandfather, Uncles, Aunts, Nephews, "Cousins, in the order named."



The counsel in their brief on the argument before the Vice-Chancellor saw fit to refer to

Page 205 of 2 Wend's Blackstone's Com's.,

as to the method of determining the degrees of kindred, and as to the common and civil law methods of computation.

We think they would have been more enlightened upon the question at issue had they referred to star page 202 of 2 Wend. Blackstone, wherein he treats of *title by descent*, and defines consanguinity to be "*vinculum personarum ab* "*eodem descendentium*, the connection or relation of per- "sons descended from the *same stock* or *common ancestor.*" * * * * And after defining *lineal consanguinity* and who answers to that description, says at star page 204, "Collateral kindred answers to the same description. *Col-* "*lateral* relations agreeing with the *lineal* in this, that "they descend from the *same stock* or *ancestor;* but dif- "fering in this, that they do not descend one from the "other. Collateral kinsmen are such then, as lineally "spring from *one and the same ancestor*, who is the *stirps* "or root, the *stirpes, trunk* or *common stock* from whence "these relations are branched out. As if John Stiles hath "two sons, who have each a numerous issue; both these "issue are lineally descended from John Stiles as their "*common ancestor;* and they are collateral kinsmen to each "other, *because* they are all descended from this *common* "*ancestor*, and all have a portion of his blood in their "veins, which denominates them *consanguineous.*

"We must be careful (he says) to remember that the "very being of collateral consanguinity *consists in this de-* "*scent* from *one and the same common ancestor.*"

Now, to be "consanguineous" all must descend from *one and the same common ancestor.*

Then there remains but one other question to be determined in this case, to wit: Who is to be that *one and the same* common ancestor? Is it Adam, Noah, Dr. Charles M. Graham or Charles M. Graham the second?

For it is evident from this language that there cannot be two persons, *one and the same.*

It does seem to us self evident, that under this definition, *until all the descending line from Charles M. Graham the second,* is exhausted, *none of the collateral descendants,*

or line from Dr. Charles M. Graham can be considered, or denominated "*consanguineous.*"

If then, this is what is understood by so eminent an authority as Sir Wm. Blackstone (and which we think is upheld by every elementary writer) to be the meaning of the term consanguinity, and collateral consanguineous relation, when applied to the very words of the statute of New Jersey, to-wit: "persons of equal degree of consanguinity to the person so seized." Who does it refer to? It can only mean first the descendants of the Grandfather Charles M. Graham, and if he left none, then the descendants of the Great-grandfather Dr. Charles M. Graham.

But on the pages following, to-wit: 206 and 207 of 2 Wend, Black. Com's., in which is given the methods of computing degrees both by the civil and common law.

Mr. Christian, in note 5 to star page 207, says: "The "difference of the computation by the civil and canon "laws may be expressed shortly thus: The civilians take "the sum of the degrees in both lines to the *common* "*ancestor.* The canonists take only the number in the "longest line. * * * * It is said (Mr. Christian con- "tinues) that the canon law computation has been adopted "by the law of England, yet I do not know a single in- "stance in which we have occasion to refer to it. But the "civil laws computation is of great importance in ascer- "taining who are entitled to the administration and to "the distributive shares of the intestate's personal prop- "erty.

And Mr. Christian here refers to page 515 of 2 Black. Com's. in which the text treats of the statute of distribution, and under which page appears the note cited by our adversaries before the Vice Chancellor as an authority to show that Grand Uncles and Aunts and Cousins are in the same degree.

Then at the beginning of star page 208 of 2 Wend, Blackstone's Com's., says: "The nature and degrees of "kindred, being thus in some measure explained, I shall "next proceed to lay down a series of rules or canons of "inheritance according to which estates are transmitted "from the ancestor to the heir."

And to which Mr. Christian appends note No. 6 in the following language: "The student will do well to discard

"this explanation of the *nature or degrees of kindred* en-
"tirely from his recollection while reading what follows
"upon the canons of descent which are not in the least
"dependent upon, or illustrated by, the rules either of the
"civil or of the canon law as to degrees of consanguinity.
"This preliminary disquisition in fact should have pre-
"ceded the chapter on the distribution of personal estate
"and is entirely out of place here."

The counsel in their brief on the argument before the Vice Chancellor refer as an authority in this case to Thomas *vs.* Kitteriche, decided in 1749 and reported in 1 Vesey Sen., 334 and 335. If they will refer to the 4th English Edition, published in 1818 by Belt, they will there find a note in these words:

"But in *descents* our law agrees with the canon and re-
"jects the civil law."

This definition of consanguinity and consanguineous relation, and that the lines of descendants of the first ancestor must be extinct before we resort to the one next higher, we take to be in harmony with the decision in 9 C. E. Green, as expressed at page 542, when the court in giving construction to this 6th section, say:

"The words *ex vi terminorium* excludes all those who do
"not stand in the *same degree of blood.*" And again, at page 544, say: "The provision is, that in a certain designated
"juncture where they are several persons all of equal degree
"of consanguinity to the person dying seized, the said
"lands, &c., shall descend and go to the said several per-
"sons of equal degree of consanguinity in equal parts. This
"is a *designatio personarum* and the persons described are
"made ascertainable by reference to the fact of their *oc-*
"*cupying a place in the same line in the gradation of de-*
"*scent from their ancestor.*"

New Jersey Court of Errors & Appeals

JUNE TERM, 1882

BETWEEN

MARQUIS D. L GAINES,

And others,

Appellants,

AND

ANDREW J. SMITH,

And others,

Respondents.

Appeal from Decree overruling Demurrer.

The following are the pleadings upon which the decree overruling demurrer, and from which decree the appeal is taken.

Bill filed Nov. 1, 1881, and is as follows:

To the Honorable THEODORE RUNYON, *Chancellor of the State of New Jersey.*

Humbly complaining show unto your Honor your orators, Andrew J. Smith, Melvin S. Condit and Edmund D. Halsey, all of the County of Morris, and State of New Jersey:

That on or about the seventh day of July, eighteen hundred and sixty, one Edward Ennis Graham, of the County of Monmouth, in said State, being the third of that name,

and being at that time an infant of the age of six years, departed this life intestate, seized and possessed of a certain tract of land situate in the township of Rockaway, in the County of Morris aforesaid, butted and bounded as follows:

Beginning at the sixteenth corner of a tract of one hundred and twenty and eighty-one hundredths acres, returned to Lemuel Cobb on the eleventh day of July, seventeen hundred and ninety-nine, recorded in Book S. 12, page 291; from thence running on a course (first) North sixty-four degrees and thirty minutes East fifteen chains; thence (second) North twenty-two degrees East ten chains and sixty-five links; thence (third) South twenty-seven degrees East one chain and ninety links; thence (fourth) North forty-six degrees East ten chains and seventy-links; thence (fifth) South seventy-six degrees East twelve chains; thence (sixth) North two degrees West three chains and eighty-two links; thence (seventh) North fifty-one degrees West three chains; thence (eighth) North fifty-two degrees and thirty minutes East sixteen chains and twenty-five links; thence (ninth) North fifty-six degrees West four chains; thence (tenth) North seventy seven degrees East ten chains; thence (eleventh) North five chains; thence (twelfth) North thirty-three degrees West thirty-one chains and seventy links; thence (thirteenth) South fifty-five degrees West seventy chains and thirty links; thence (fourteenth) South thirty-three degrees East thirty-seven chains and seventy links to the place of beginning.

That said Edward Ennis Graham, the third, left him surviving no descendants, nor any brother or sister either of the whole or half blood, or the descendants of any, nor a father, but left a mother, Sarah Jane Graham, who afterwards intermarried with one Thomas Bell, junior, whose name she now bears. That said Edward Ennis Graham, the third, derived said land and premises by descent from his father, Edward Ennis Graham, being the second of that name, who died seized of the same intestate, on or about the third day of August, eighteen hundred and fifty-five, and who acquired the same by devise from his grandfather,

Doctor Charles Montrose Graham, of the city of New York. That the sole and only next of kindred of the said Edward Ennis Graham, the third, at the time of his death in the year eighteen hundred and sixty, as aforesaid, were: (first,) one Edward Ennis Graham, the first of that name, of the city of Newbern and State of North Carolina, who was the great uncle of said Edward Ennis Graham, the third, being the son of Doctor Charles Montrose Graham, the testator above mentioned, and the brother of Charles Montrose Graham, the second; and, (second,) one Robert L. Graham, who was the son of Charles Montrose Graham, the third, (who was the son of Charles Montrose Graham, the second, and the brother of Edward Ennis Graham, the second,) and the first cousin of said Edward Ennis Graham, the third.

That the said Edward Ennis Graham, the first, as great uncle, and the said Robert L. Graham, as first cousin, were in equal degree of consanguinity to said Edward Ennis Graham the third, and at the death of the latter, in the year eighteen hundred and sixty, as aforesaid, the said lands above described descended to the said Robert L. Graham, and the said Edward Ennis Graham, the first, as tenants in common in equal shares, subject to the life estate of the mother of said Edward Ennis Graham, the third, the said Sarah Jane Graham, now Sarah Jane Bell, in and to the same.

That said Sarah Jane Bell, together with her said husband, Thomas Bell, junior, sold and conveyed all her right title and interest in said premises to one Andrew B. Cobb, of the County of Morris, by deed of bargain and sale, dated the eighth day of February, eighteen hundred and sixty-seven, by virtue of which deed of conveyance the said Andrew B. Cobb became and was seized of an estate therein for the life of said Sarah Jane Bell.

That the said Andrew B. Cobb departed this life on or about the thirty-first day of January, eighteen hundred and seventy-three, having first duly made and published his last will and testament in writing in the presence of two witnesses, in such manner as to pass title to real estate in

New Jersey, in and by which said will he did among other things, devise said land and premises to your orators, who by virtue thereof, became seized and possessed of said premises for the life of said Sarah Jane Bell.

That said Edward Ennis Graham, the first, of Newbern, North Carolina, departed this life on or about the eleventh day of March, eighteen hundred and sixty-four, having first duly made and published his last will and testament in writing, in the presence of two witnesses, in such manner as to pass the title to real estate in New Jersey, in and by which will he did devise said land and premises to one Elizabeth McK. C. Roberts, of Newbern, North Carolina, and afterwards, on the twentieth day of September, eighteen hundred and eighty-one, the said Elizabeth McK. C. Roberts, by deed of conveyance of that date, did grant and convey all her right, title and interest in said land and premises to your orators.

That by the records of conveyances in the County of Morris, it appears that the said Robert L. Graham, on or about the twenty-fourth day of January, eighteen hundred and seventy-four, by deed of conveyance of that date, sold and conveyed all his right, title and interest in said land and premises to one Marquis D. L. Gaines, of the County of Morris; that said Marquis D. L. Gaines, on or about the tenth day of February, eighteen hundred and seventy-four, by deed of conveyance of that date, did sell and convey to one Joseph H. Hiler, of said County of Morris, the one undivided one-third part of said land and premises, and on the same day and year last aforesaid, the said Gaines, by deed of conveyance of that date, did sell and convey unto one Edward D. Ewen, of the city of New York, another equal undivided one-third part of said land and premises, and that the said Marquis D. L. Gaines, on or about the sixteenth day of June, eighteen hundred and seventy-four, by deed of conveyance of that date, did sell and re-convey unto said Robert L. Graham, the equal undivided one-fourth part of the one-third part, being the one-twelfth part, of said land and premises, and on the same sixteenth day of June, eighteen hundred and seventy-four, the said

Joseph H. Hiler, by deed of conveyance of like date, did sell and convey unto said Robert L. Graham, the equal undivided one-fourth part of the one-third part, being the one twelfth part thereof.

That the said several conveyances in this paragraph mentioned appear to have been made upon the basis of the said Robert L. Graham being at first the owner of the whole of the title to said land and premises, instead of an equal undivided one-half thereof; and what may be the effect and result of such conveyances upon the quantum of the estate in said land and premises held by the said Gaines, Hiler, Ewen and Robert L. Graham respectively, your orators are not advised.

That said Edward D. Ewen departed this life on or about the day of , eighteen hundred and seventy , having first duly made and published his last will and testament in writing, in such manner as to pass the title to real estate, in and by which will he did authorize and empower his executors therein named to sell and dispose of the residue of his estate, including his right, title and interest in said lands and premises, and out of the proceeds thereof to invest the sum of ten thousand dollars for the benefit of his Aunt Harriet Ewen during her life, and at her death to pay and divide the said sum of ten thousand dollars to and among his nephews and nieces, namely: Lewis T. Ewen, Arthur Ewen, Eugene Ewen and Isabella Ewen, and to divide the residue of said proceeds into two parts, and invest the same, and to appropriate the interest of the one-half thereof to the support and maintenance of one William O. Ewen during his life, and at his death to pay the said one-half part to one Lewis T. Ewen, and to pay the interest of the other one-half part to one Austin D. Ewen during his lifetime, and at his death to pay over and divide the same to and among his nephews and nieces, Arthur Ewen, Eugene Ewen and Isabella Ewen; and did appoint Austin D. Ewen and Hiram B. Blauvelt, of the city of New York, executors thereof.

That your orators are the owners of an estate for the life of said Sarah Jane Bell, in the whole of said lands and

premises, and are the owners of the equal undivided one-half part of the title thereof in remainder after the death of said Sarah Jane Bell, and the said Joseph H. Hiler, Robert L. Graham, Marquis D. L. Gaines, the said Austin D. Ewen and Hiram B. Blauvelt, as executors of the last will and testament of Edward D. Ewen, the said Harriet S. Ewen, William O. Ewen, Austin D. Ewen, Lewis T. Ewen, Arthur Ewen, Eugene Ewen and Isabella Ewen, beneficiaries under the wills of said Edward D. Ewen, are the owners of the other one equal undivided one-half part of the title thereto in remainder after the death of said Sarah Jane Bell.

That on or about the twenty-fourth day of January, eighteen hundred and seventy-four, the said Marquis D. L. Gaines executed a mortgage on the same premises to the said Robert L. Graham, to secure the sum of seven hundred and fifty dollars, or some other sum.

That on or about the sixteenth day of October, eighteen hundred and seventy-nine, as your orators have been informed and believe, Daniel M. Lyon and William H. Lyon recovered a judgment against said Joseph H. Hiler in the Circuit Court of Morris County, for the sum of four hundred and forty-eight dollars and twenty-two cents or some other sum, by virtue of which judgment the said Daniel M. Lyon and William H. Lyon claim to have some lien upon the said undivided share of the said Joseph H. Hiler.

That there are large deposits of iron ore upon said premises, some veins of which were opened and worked before the death of said Edward Ennis Graham, the third, and your orators believe there are also large deposits thereon which were not so worked, and the question how far and to what extent your orators as tenants for the life of said Sarah Jane Bell are entitled to work said veins of ore, is in dispute between your orators and the persons above-named who own or are interested in the one-half part thereof, which descended as above stated to said Robert L. Graham, and while it has been decided by this Court that your orators are entitled to work all mines and veins which were opened and worked before said life estate com-

menced, yet the question still remains undecided which particular mines and workings were so opened, and your orators will be subject to many difficulties and dangers in prosecuting mining operations in the old workings, and cannot at all open or work any new veins.

Your orators, therefore, are desirous that a partition and division of said lands and premises may be made between your orators and the several persons above named, who now own or are interested in the said one undivided one-half part thereof, which descended as aforesaid from said Edward Ennis Graham, the third, to said Robert L. Graham, according to their several and respective interests therein; your orators desiring to occupy and enjoy as joint tenants the one-half-part of said land and premises in severalty, and not desiring any subdivision of said one half-part among themselves; or in case (as your orators believe and aver the fact to be) the said lands and premises cannot be divided among the owners thereof without great prejudice to their interests, then that the same may be sold and the proceeds thereof divided among your orators and the said other persons so interested therein, according to their several and respective interests therein.

But your orators are advised that no valid or effectual partition, division or sale of the said premises, can be effected without the aid and interposition of some competent court; and that this Honorable Court has full and competent jurisdiction in the premises.

In consideration whereof, and to the end that the said Marquis D. L. Gaines, Robert L. Graham and Joseph H. Hiler, the said Austin D. Ewen and Hiram B. Blauvelt, executors as aforesaid, the said Harriet S. Ewen, William O. Ewen, Austin D. Ewen, Lewis T. Ewen, Arthur Ewen, Eugene Ewen and Isabella Ewen, and the said Daniel M. Lyon and William H. Lyon, may full, true, direct and perfect answer make, but not under oath, answer under oath being hereby waived, to all and singular, the charges and matters aforesaid, as fully and particularly, as if the same were hereagain repeated, and they thereunto particularly interrogated, and that a fair partition and divi-

sion of the above-described premises may be made according to the course and practice of this Court, if the same be practicable and consistent with the rights of all the parties interested therein, among your orators and other persons, entitled to shares of the said premises, according to their respective rights and interests therein; and in case such partition and division in fact of the said premises shall be found to be impracticable, or if it should appear that the same cannot be made without great prejudice to the owners of the said premises, then that the said tract of land and premises may be decreed by this Honorable Court to be sold, and the proceeds thereof, after paying the costs and charges of this suit, divided among your orators and the several parties interested therein according to their respective rights, shares and interests.

May it please your Honor to grant unto your orators the State's writ of subpœna to be directed to the said defendants above named, commanding them and each of them, at a certain day and under a certain penalty therein to be expressed, personally to be and appear before your Honor in this Honorable Court, then and there to answer the premises and to stand to and abide and perform such decree therein as to your Honor shall seem meet.

And your orators will ever pray, &c.

PITNEY & YOUNGBLOOD,
Solicitors of Complt's.

H. C. PITNEY,
Of Counsel.

A true copy.

G. S. DURYEE, *Clerk.*

The following is the Demurrer filed to the said bill.

Demurrer filed January , 1881.

In Chancery of New Jersey.

BETWEEN

ANDREW J. SMITH,
MELVIN S. CONDIT, and
EDMUND D. HALSEY,
Complainants,

AND

MARQUIS D. L. GAINES,
and others,
Defendants.

Demurrer.

The demurrer of Marquis D. L. Gaines, Robert L. Graham, Joseph H. Hiler, Austin D. Ewen and Hiram B. Blauvelt, executors of Edward D. Ewen, Harriet S. Ewen, William O. Ewen, Austin D. Ewen, Lewis T. Ewen and Isabella Ewen, to the bill of complaint of Andrew J. Smith, Melvin S. Condit and Edmund D. Halsey, complainants.

The defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainants' bill mentioned to be true in such manner and form as the same are therein and thereby set forth and alleged, say that they are advised by their counsel that the complainants' said bill is insufficient, and to which, by the rules of this Honorable Court, these defendants ought not to be compelled to answer; and for cause of demurrer thereun-

to, these defendants show that it appears by the said bill, and from the facts therein stated and alleged, that the said complainants have no such interest or title in the said land and premises in the said bill particularly described, and of which partition is sought, to entitle them to any partition thereof; that the said Edward Ennis Graham, the first, as great uncle of the said Edward Ennis Graham, the third, was not as being of equal degree of consanguinity with the said Robert L. Graham, the first cousin of the said Edward Ennis Graham, the third, entitled as tenant in common to an equal share with the said Robert L. Graham, of the said estate, in the said land and premises of which the said Edward Ennis Graham died so seized, as in and by the said bill alleged; but on the contrary, these defendants aver and say, that upon the facts in the said bill alleged and set forth, the said land and premises in the said bill mentioned and of which partition is sought, upon the death of said Edward Ennis Graham, the third, descended to the said Robert L. Graham as the sole person next of consanguinity, to the said Edward Ennis Graham, the third. And these defendants further say, that upon the facts stated in the said bill, the said complainants are not in any manner interested or concerned in the said lands and premises by reason of any title by them derived from or through the said Edward Ennis Graham, the third.

And for further cause of demurrer, these defendants show that the said complainants have not, by their said bill, shown any sufficient matter of equity to entitle them to the relief sought in and by their said bill against these defendants, and therefore, for the said causes and for other errors, defects and imperfections in the said bill these defendants demur thereto, and demand the judgment of this Court, whether they should make any answer to the said bill, and pray to be hence dismissed with costs.

B. WILLIAMSON,
Solicitor.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } *ss.*

Robert L. Graham, Joseph H. Hiler, Austin D. Ewen and Hiram B. Blauvelt, executors, &c., of Edward D. Ewen, deceased, and the said Austin D. Ewen, individually, and as the agent of Marquis D. L. Gaines, William O. Ewen, Harriet S. Ewen, Lewis T. Ewen and Isabella Ewen, defendants named in the foregoing demurrer, being severally duly sworn each for himself, or as agent, says that the said demurrer is not interposed for the purpose of delay, but in good faith.

ROBERT L. GRAHAM,
JOSEPH H. HILER,
AUSTIN D. EWEN,
H. B. BLAUVELT.

Subscribed and sworn to before me, this 10th day of December, A. D., 1881.

WILLIAM T. GRAFF,
Notary Public, N. Y. Co.

I have examined and perused the complainant's bill in the above suit, and certify that the said demurrer is well founded in point of law.

B. WILLIAMSON,
Of Counsel.

The order overruling Demurrer was filed

Appeal taken

Petition and Appeal and Answer are in ordinary form.

Petition Filed

Answer Filed

ANDREW J. SMITH,
And others,
vs.
MARQUIS D. L. GAINES,
And others,

Opinion of Van Fleet, Vice Chancellor, filed March 1, 1882.

ARGUED ON BILL AND DEMURRER.

Mr. B. WILLIAMSON, for Demurrants.

Mr. H. C. PITNEY and Mr. BARKER GUMMERE, for Complainants.

VAN FLEET, V. C.

This is a suit for partition. The bill is filed by a great uncle against a first cousin. The bill proceeds upon the theory that the parties to the suit were of equal degree of consanguinity to the person last seized of the lands sought to be divided, and that in consequence of his dying intestate without leaving nearer kindred, the lands, by force of the sixth section of our statute directing the descent of real estate, descended to them as tenants in common in equal parts.

To this bill the defendant has interposed a demurrer, denying that the complainant stands in equal degree of consanguinity with him to the person last seized, and claiming that he alone is the next or nearest collateral kindred of the person last seized, and as such is entitled to the whole of the inheritance. The question thus raised, it will be perceived, is one simply involving an inquiry as to whether the litigants are of equal degree of consanguinity to the person last seized.

The fact that the whole inheritance must go to a single individual if the defendant's claim is found to be true, will

not prevent him from succeeding to the whole; for though this section in its literal structure, makes provision only for inheritance by "several persons all of equal degree of consanguinity," and declares that they shall take "as tenants in common in equal parts," yet it has been construed to define the right of inheritance of a single individual, as well as that of several persons or a class.

The plain design of the section has been declared to be, to give the estate to the nearest collateral kindred, if there be more than one survivor in that class, then to such survivors equally; if but one survivor, to that one wholly.

Taylor vs. Bray, 3 *Vr.*, 188

Nor, on the other hand, is the great uncle to be precluded from succeeding to the inheritance, because, in order to reach him, the inheritance must ascend. The first canon of descent declares that inheritance shall never lineally ascend.

This canon, although modified by statute so as to let in the father and also the mother to a limited extent, in certain designated junctures, is still in force in this State. *Bray vs. Taylor*, 7 *Vr.*, 415. But it simply excludes lineal ancestors, not collateral kindred. Littleton says: "If there be father and son, and the father hath a brother that is uncle to the son, and the son purchase land in fee simple, and die without issue, *living* his father, the uncle shall have the land as heir to the son, and not the father, yet the father is nearer of blood but it is a maxim in law that inheritance may lineally descend, but not lineally ascend."

1 *Coke on Litt.*, § 3, 10 C.

The question in dispute between the parties seems to me to be entirely free from the least difficulty. It has been authoritatively settled in this State, that the civil law method of computing degrees of consanguinity is the one that must be adopted in ascertaining who are entitled to take land under this section of the statute.

Schenck vs. Vail, 9 *C. E. Gr.*, 538.

By this method you count upward from either of the persons related, to the common ancestor, and then downward again to the other, reckoning a degree for each person, both ascending and descending.

2 *Black Com.*, 207. 1 *Wms. on Exrs.*, (6 *Am. Ed.*,) 421. *Bingham on Descent*, 299. 4 *Kent's Com*, 412.

Computed by this rule each of the claimants here is related to the person last seized in the fourth degree.

To illustrate: To ascertain the degree of relationship of the *propositus* to his first cousin, we count from the *propositus* up to his father, one degree; then from his father to the common ancestor, which is his grandfather, two; then down from his grandfather to his uncle, three; and from his uncle to his cousin, four. They are related in the fourth degree.

A like computation will give the degree of consanguinity existing between the *propositus* and his great uncle. From the *propositus* up to his father is one degree; from his father up to his grandfather is two; and from his grandfather up to his great-grandfather, who in this computation is the common ancestor, is three; and then descending, from his great-grandfather to his great-uncle is four. They too are related in the fourth degree.

Other examples showing how degrees are computed by the rule of the civil law will be found given in 1 *Wms. on Exrs*, (6 *Am. Ed.*,) 421, *and in* 3 *Wms. on Exrs.*, 2069, where a table is given showing computations extending to the sixth degree.

Chief Justice Beasley, in *Taylor vs. Bray*, 3 *Vr.*, 185, announced as a proposition which to his mind was free from all reasonable doubt, that under this section of the statute, uncles and aunts would take before, and in exclusion of cousins. The reason is evident—an uncle or aunt is related in the third degree, while a cousin stands one degree more remote. Mr. Christian, in note 58 to 2, *Black Com.*, (*Wendell's Ed.*,) 516, says: "If the next of kin of an intestate are great-uncles or aunts, first cousins and great nephews or nieces, they all being related in the

fourth degree, (by the civil law method of computation) will each be admitted to equal distributive share of his personal property."

But this is not a question to be solved by argument or authorities. The rule by which degrees of consanguinity are to be computed, in ascertaining upon whom the law, as prescribed by this section, casts the inheritance, having been authoritatively settled and defined by the Court of last resort, the duty of subordinate tribunals is fully performed when they simply make a calculation in accordance with such rule and pronounce judgment in conformity to the result thus ascertained.

The demurrer is overruled with costs.