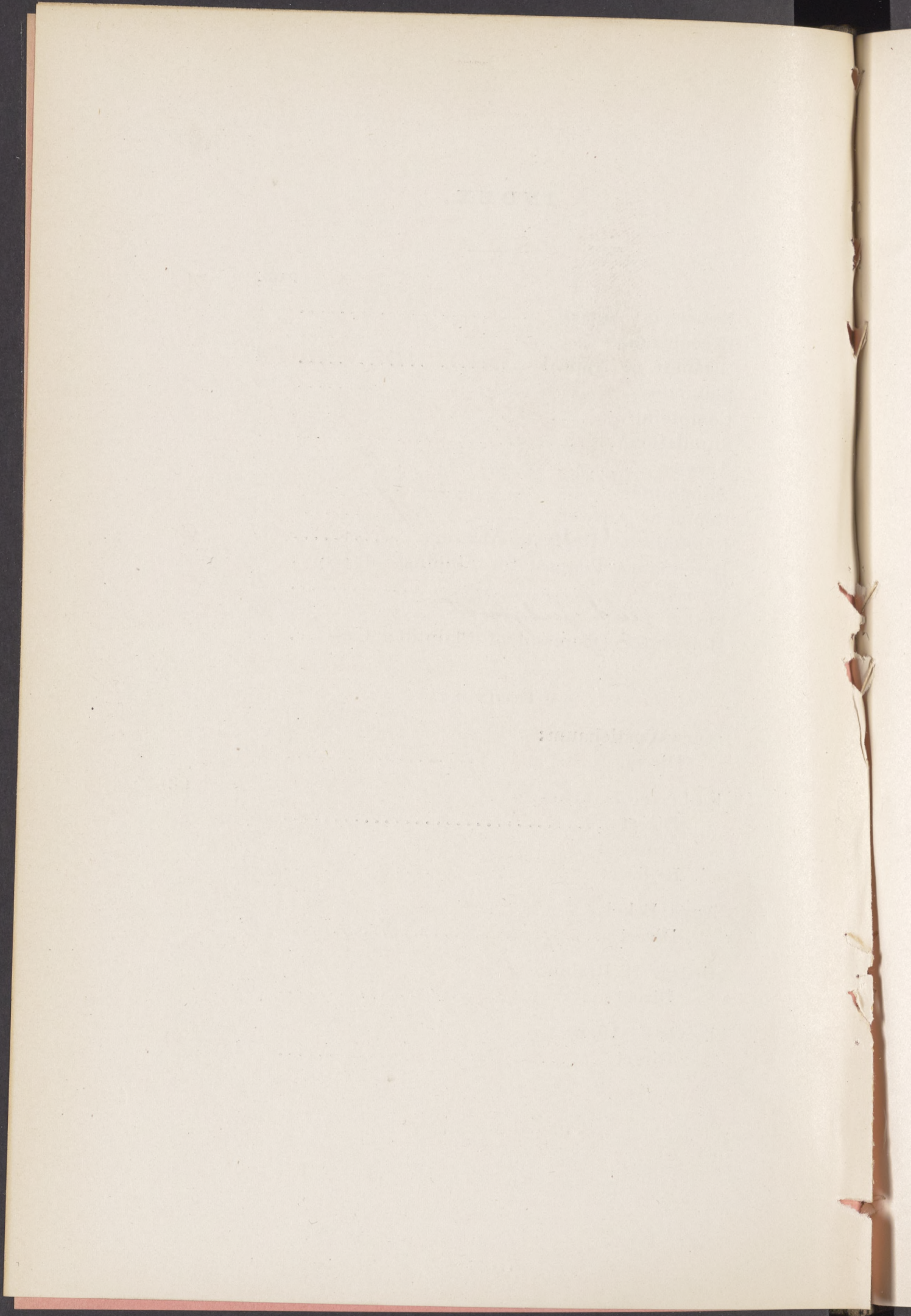


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Notice of Appeal.

(Filed September 28th, 1917.)

10

New Jersey Supreme Court.

HUDSON COUNTY.

KATHRYN E. ECKEL,
Plaintiff-Appellee,

v.

GEORGE H. BREHM,
Defendant-Appellant.

Action at

Law,

On Appeal.

20

To Kathryn E. Eckel, plaintiff, and Abner Kalisch,
attorney of plaintiff:

Take notice that the defendant, George H.
Brehm, appeals to the Court of Errors and Ap-
peals of New Jersey in the last resort in all
causes from the whole of the judgment entered
in this cause.

30

Dated, September 27th, 1917.

QUEEN & STOUT,
Attorneys for Appellant.

Service acknowledged, September 27, 1917.

ABNER KALISCH,
Attorney for Plaintiff.

40

Recognizance.

(Filed October 2nd, 1917.)

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

10

KATHRYN E. ECKEL,

Plaintiff,

v.

GEORGE H. BREHM,

Defendant.

Action at
Law.

In Ejectment.

State of New Jersey, }
County of Essex. } ss.:

20

Be it remembered that on this 1st day of October, A. D., nineteen hundred and seventeen, appeared before me, Francis J. Swayze, one of the justices of the Supreme Court of New Jersey, at Chambers in Newark, in said State, George H. Brehm, as principal, and National Surety Company by P. E. Wiles, attorney in fact, duly appointed, as surety, who jointly and severally did acknowledge themselves to be indebted to Kathryn E. Eckel in the sum of \$2,500.00, to be made and levied on their respective goods and chattels, lands and tenements and real estate, if default be made in the following conditions:

30

Whereas, the said Kathryn E. Eckel, lately recovered a judgment against the said George H. Brehm for possession of certain premises described in an action in ejectment in the New Jersey Supreme Court (Hudson County) and damages in the sum of \$400.00 besides costs of suit, amount-

40

Recognizance.

ing to \$38.01, as by the record thereof will appear; and

Whereas, the said George H. Brehm has taken an appeal from said judgment to the Court of Errors and Appeals of New Jersey in the last resort in all causes;

10

Now therefore, if the said judgment be affirmed in the said appeal or if the said appeal be discontinued by default of the said George H. Brehm or if the said George H. Brehm be non-suit in the said appeal that then the said George H. Brehm shall pay such costs, damages and sum or sums of money as shall be awarded upon or after said judgment affirmed, discontinuance or non-suit, then this recognizance to be and remain in full force and virtue, otherwise to be null and void.

20

GEORGE H. BREHM, [L. S.]
Principal.
NATIONAL SURETY COMPANY,
By P. E. Wiles, [L. S.]
Attorney in fact,
Surety.

Taken and acknowledged this 1st day of September, A. D., 1917.

30

FRANCIS J. SWAYZE,
Justice of the Supreme Court.

Power of attorney and justification of surety.
Approved as to form and sufficiency.

October 1st, 1917.

F. J. SWAYZE,
J. S. C.

40

Grounds of Appeal.

(Filed October 27th, 1917.)

**NEW JERSEY COURT OF ERRORS AND
APPEALS.**

10

KATHRYN E. ECKEL,
Plaintiff-Appellee,

v.

GEORGE H. BREHM,
Defendant-Appellant.In Ejectment
on Appeal
from New
Jersey Su-
preme Court.

20

The following are the grounds upon which the defendant-appellant appeals to the Court of Errors and Appeals of the State of New Jersey, in the last resort in all causes, from the judgment of the New Jersey Supreme Court;

1. The Court ruled, against the objection of defendant, that a tenant in common of the premises in question could maintain the action in ejectment.

30

2. The Court denied the motion of the defendant to dismiss the plaintiff's case on the ground that while it appeared by the complaint that the plaintiff claimed the possession of the whole of the lands and premises in question the evidence showed that she was only a tenant in common of said lands and premises.

3. The Court denied the defendant's request to rule that the proviso in Section 5 of the Descent Act excluded brothers and sisters of the half blood from inheriting ancestral property only when there are no brothers or sisters of the

40

Grounds of Appeal.

full blood or descendants of brothers or sisters of the full blood.

4. The Court denied the defendant's request to rule that the words "all those who are not of the blood of such ancestor (the ancestor from whom the property descended) shall be excluded from such inheritance" in Section 5 of the Descent Act, refers only to cases where the contest lies between brothers and sisters of the half blood or their descendants who are of the blood of the ancestor, and brothers and sisters of the half blood or their descendants who are not of the blood of the ancestor.

10

5. The Court refused to answer the following question in the affirmative as a matter of law:

20

"Does a half-brother of the intestate, not of the blood of the ancestor from whom the estate came, take the estate, to the exclusion of an aunt of the intestate, being the sister of the ancestor from whom the estate descended?"

6. The Court denied the defendant's request to find that the plaintiff was not entitled to possession of the premises in question.

30

QUEEN & STOUT,

Attorneys for Defendant-Appellant.

Dated October 24th, 1917.

Service acknowledged October 25th, 1917.

ABNER KALISCH,

Attorney for Plaintiff-Appellee.

40

Summons.

(Filed May 23rd, 1916.)

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

10

The State of New Jersey to George H. Brehm:

You are summoned to answer the annexed complaint of Kathryn Eckel, in an action of ejectment in the New Jersey Supreme Court. And take notice that unless you file your answer to the said complaint with the Clerk of said Supreme Court at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

20

Witness, William Gummere, Chief Justice of the Supreme Court, at Trenton, this Fifteenth day of May, Nineteen Hundred and Sixteen.

WILLIAM C. GEBHARDT,

[SEAL.]

Clerk.

Abner Kalisch,
Attorney.

30

40

Complaint.

(Filed May 23rd, 1916.)

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

KATHRYN E. ECKEL,

Plaintiff,

v.

GEORGE H. BREHM,

Defendant.

In Ejectment.

10

The plaintiff who resides at Little Ferry, in the State of New Jersey, says:

1. That on April 15th, A. D. 1916, she, the plaintiff, was possessed of a certain lot of land together with all the houses, buildings and appurtenances to the same belonging, said lot of land being situate in the City of Jersey City, in the County of Hudson and State of New Jersey, and being particularly designated and described as follows:

20

BEGINNING on the northerly side of Fifth Street, late Fourth Street, at a point distant one hundred and seventy-five feet westerly from the northwesterly corner of said Street and Jersey Avenue; thence running northerly and parallel with Jersey Avenue ninety-five feet to a certain passageway of ten feet in width running through the middle of said block parallel with and distant from Fifth Street and Sixth Street, late South Third Street; thence westerly parallel with Fifth Street twenty-five feet; thence southerly

30

40

Complaint.

parallel with Jersey Avenue ninety-five feet to Fifth Street; thence easterly at the northerly line of Fifth Street twenty-five feet to the point and place of beginning, together with passageway.

10

2. That the defendant on the said 15th day of April, 1916, wrongfully and illegally entered into, upon and took possession of said land with the appurtenances thereto belonging, and has and still does wrongfully keep the plaintiff out of possession thereof.

3. That the plaintiff's right to possession of the said land and premises described in Paragraph 1 accrued on the 15th day of April, 1916.

20

The plaintiff claims possession of the said land and the appurtenances thereto belonging, and also claims the profits the same has yielded from the time that she, the plaintiff has been wrongfully deprived of the same.

ABNER KALISCH,
Attorney of Plaintiff.

30

40

Stipulation.

(Filed June 7th, 1916.)

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

KATHRYN E. ECKEL,

Plaintiff,

v.

GEORGE H. BREHM,

Defendant.

10

} In Ejectment.

It is hereby stipulated that the defendant may have twenty days from June 6th, 1916, to file his answer to the complaint herein or give notice of any motion relative to the cause of action as he may be advised is proper.

20

Dated June 6th, 1916.

ABNER KALISCH,
Attorney for Plaintiff.

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Answer.

(Filed June 24th, 1916.)

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

10

KATHRYN E. ECKEL,
Plaintiff,

v.

GEORGE H. BREHM,
Defendant.

In Ejectment.

The defendant, who resides at Jersey City, in the State of New Jersey, says that:

20

First defense:

1. He denies the truth of the allegations contained in the complaint.

Second defense:

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1. On April 15th, 1916, one Katie Brehm, died seized of the lands, tenements and hereditaments mentioned in the complaint, without devising the same in due form of law, and without leaving lawful issue and without leaving a brother or sister of the whole blood or any lawful issue of any such brother or sister, and without leaving a father or mother capable of inheriting said lands, tenements and hereditaments and leaving no brothers or sisters of the half blood except this defendant, a brother of the half blood.

40

Answer.

2. On April 15th, 1916, this defendant, as a brother of the half blood of the said Katie Brehm, was seized of the lands, tenements and hereditaments mentioned in the complaint and entitled to the possession thereof.

10

Third defense:

1. On or about March 26th, 1885, George H. Brehm, father of this defendant, purchased and paid for with his own money, the lands, tenements and hereditaments mentioned in the complaint and took title thereto in the name of his wife, Anna E. Brehm, to have and to hold for him and his heirs and assigns forever.

2. The said Anna E. Brehm predeceased the said George H. Brehm and the said George H. Brehm owned and possessed the said lands, tenements and hereditaments from the time of his purchase as aforesaid until the time of his death.

20

3. On or about September 3rd, 1909, the said George H. Brehm, father of this defendant and the said Katie Brehm, died seized of the lands, tenements and hereditaments mentioned in the complaint, leaving a last will and testament which was duly admitted to probate by the Surrogate of the County of Hudson.

30

4. Under the said last will and testament the said George H. Brehm, devised his entire estate including the said lands, tenements and hereditaments to his three children, this defendant, the said George H. Brehm, the said Katie Brehm, and James T. Brehm, share and share alike.

5. This defendant denies that on April 15th, 1916, or at any other time the plaintiff was

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Answer.

possessed of the lands, tenements and hereditaments mentioned in the complaint or that she had or has any interest therein or right to the possession thereof.

Fourth defense:

10

1. On August 17th, 1914, this defendant, the said George H. Brehm, was appointed guardian of the person and property, including the lands, tenements and hereditaments mentioned in the complaint of the said Katie Brehm, a lunatic, by an order of the Hudson County Orphan's Court.

20

2. From the date of his appointment as guardian of the person and property of the said Katie Brehm until April 15th, 1916, this defendant performed his duties as such guardian and had the care and maintenance of the said Katie Brehm.

3. On August 17th, 1914, this defendant went into possession of the lands, tenements and hereditaments mentioned in the complaint under and by virtue of a yearly lease at the monthly rental of \$25 per month.

30

4. On April 15th, 1916, and thereafter this defendant was in possession of said premises under the terms of said lease.

QUEEN & STOUT,
Attorneys of Defendant.

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Stipulation.

(Filed August 1st, 1916.)

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

KATHRYN E. ECKEL,
Plaintiff,

v.

GEORGE H. BREHM,
Defendant.

10

In Ejectment.

It is hereby stipulated that the plaintiff in the
above cause may have twenty days from the 13th
day of July, 1916, to file his reply to the de-
fendant's answer, or take such other proceedings
relative to the cause of action as he may be
advised as proper.

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Dated July 11th, 1916.

QUEEN & STOUT,
Attorneys of Defendant.

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Reply to Answer.

(Filed August 1st, 1916.)

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

10

KATHRYN E. ECKEL,
Plaintiff,

v.

GEORGE H. BREHM,
Defendant.

In Ejectment.

20

The plaintiff, in reply to the answer filed by the defendant in the above stated cause, says that:

30

1st.—She admits the 1st Paragraph of the 2nd defense, but says that the said Katie Brehm did also leave surviving her at her death, a maternal aunt, the plaintiff, the only survivor capable and legally entitled under the laws of this State to inherit the lands, tenements and hereditaments of which the said Katie Brehm died seized and which lands are described in complainant's complaint.

40

2nd.—That the plaintiff, in reply to the 2nd Paragraph of the 2nd defense, denies that on the 15th day of April, 1916, the defendant, as a brother of the half blood of the said Katie Brehm was seized of the lands, hereditaments, mentioned in the complaint and entitled to the possession thereof, but insists that she, the plaintiff, being the maternal aunt of the said Katie Brehm, was and is the only person entitled to the lands,

Reply to Answer.

described in complainant's complaint and of which the said Katie Brehm died seized of, and was in possession at her death, the premises having been inherited by the said Katie Brehm from her mother, Anna E. Brehm.

3rd.—That the plaintiff denies the 1st Paragraph of the 3rd defense of said defendant, but says that the said George H. Brehm, father of this defendant, did not purchase the lands, tenements and hereditaments mentioned in the complaint of the plaintiff, with his money or any part of his money nor that he purchased said lands and took the title in the name of his wife, Anna E. Brehm, but plaintiff insists that the said Anna E. Brehm purchased the property with her own money and was her separate estate and was seized and in possession of said property up to the time of her death; and further that the said paragraph does not set out or constitute a legal defense to the plaintiff's action.

4th.—That the plaintiff admits Paragraph 2 of the 3rd defense of the defendant, that the said Anna E. Brehm predeceased the said George H. Brehm, but denies that the said George H. Brehm owned and possessed or ever pretended that he owned and possessed the lands, tenements and hereditaments left by his wife at her death, except that he took and possessed the same as tenant by the courtesy and which tenancy terminated at his death.

5th.—The plaintiff admits Paragraph 3 of the 3rd defense of the defendant, so far as it states that the said George H. Brehm died on the 3rd day of September, 1909, leaving a will and testa-

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Reply to Answer.

ment, but denies that he died seized of the lands, tenements and hereditaments mentioned in the complaint, his estate terminating at his death.

10 6th.—The plaintiff admits Paragraph 4 of the 3rd defense of the defendant that under said last will and testament of George H. Brehm, he devises his entire estate to his three children, George H. Brehm, Katie Brehm and James T. Brehm, but denies that the said lands, tenements and hereditaments described in plaintiff's complaint, were any part of his estate.

7th.—The plaintiff admits Paragraph 1 of the 4th defense.

20 8th.—The plaintiff admits Paragraph 2 of the 4th defense.

30 9th.—The plaintiff says that in reply to Paragraph 3 of the 4th defense that she has no knowledge under what conditions the said defendant entered into possession, and has no knowledge of any lease being made but insists that she made no lease of said premises to the defendant, and that a lease with any other person or persons was neither authorized nor sanctioned by her, and therefore insists that the right of possession of the said defendant terminated at the death of the said Katie E. Brehm.

10th.—The plaintiff in reply to Paragraph 4 of the 4th defense says that the defendant's alleged possession of said premises under an alleged lease is illegal and unlawful and without her consent.

ABNER KALISCH,
Attorney of Plaintiff.

Rejoinder to Reply to Answer.

(Filed, August 18th, 1916.)

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

KATHRYN E. ECKEL,

Plaintiff,

v.

GEORGE H. BREHM,

Defendant.

In Ejectment.

10

The defendant by way of rejoinder to the reply to the answer says that:

First.—To Paragraph 1 of the second defense of the answer, the defendant admits that the said Katie Brehm left her surviving the plaintiff, a maternal aunt, but will contend on the trial of the action that the plaintiff as the maternal aunt of the said Katie Brehm is not the only survivor of the said Katie Brehm capable and legally entitled under the laws of this State to inherit the lands, tenements and hereditaments of which the said Katie Brehm died seized and that the plaintiff as the maternal aunt of the said Katie Brehm has no right, title or interest in said lands.

20

30

Second.—To Paragraph 2 of the reply to the second paragraph of the second defense, the defendant will contend on the trial of the action, that the plaintiff as the maternal aunt of the said Katie Brehm was and is not entitled to the said lands and was not in possession thereof at the time of the death of the said Katie Brehm

40

Rejoinder to Reply to Answer.

and that the said Katie Brehm did not inherit the said lands from her mother, Anna E. Brehm.

10 Third. Defendant denies the allegation contained in the Reply to Paragraph 1 of the Third Defense of the Answer, that the said Anna E. Brehm purchased the said property with her own money and that it was her separate estate and that she was seized and in possession of said property up to the time of her death.

QUEEN & STOUT,

Attorneys of Defendant.

I consent that the within Rejoinder be filed as in time.

ABNER KALISCH,
Attorney of Plaintiff.

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Defendant's Requests for Findings of Law.

(Filed October 24th, 1917.)

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

KATHRYN E. ECKEL,

Plaintiff,

v.

GEORGE H. BREHM,

Defendant.

10

In Ejectment.

Defendant's requests for findings of law.

The defendant requests the Court to rule that the proviso in Section 5 of the Descent Act excludes brothers and sisters of the half blood from inheriting ancestral property only when there are no brothers or sisters of the full blood or descendants of brothers or sisters of the full blood.

20

Denied—W. H. S. J.

The defendant requests the Court to rule that the words, "all those who are not of the blood of such ancestor, (the ancestor from whom the property descended) shall be excluded from such inheritance" in Section 5 of the Descent Act, refers only to cases where the contest lies between brothers and sisters of the half blood or their descendants who are of the blood of the ancestor, and brothers and sisters of the half blood or their descendants who are not of the blood of the ancestor.

30

Refused—W. H. S. J.

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Defendant's Requests for Findings of Law.

10 The question of law for decision is this; does a half-brother of the intestate, not of the blood of the ancestor from whom the estate came, take the estate to the exclusion of an aunt of the intestate, being the sister of the ancestor from whom the estate descended.

The defendant requests the Court to answer this question in the affirmative as a matter of law.

Request denied—question answered in the negative—W. H. S. J.

The defendant requests the Court to find that the plaintiff is not entitled to possession of the premises in question.

20 Request denied—W. H. S. J.

It is consented that the foregoing requests for rulings of the Court upon points of law and the findings thereon may be filed and entered on the record as part of the findings of the Court.

ABNER KALISCH,
Attorney of Plaintiff.

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40

Decision.

(Filed August 31st, 1917.)

NEW JERSEY SUPREME COURT,
HUDSON COUNTY.

KATHRYN E. ECKEL,

Plaintiff,

v.

GEORGE H. BREHM,

Defendant.

In Ejectment.

10

ABNER KALISCH, HARRY KALISCH and
NATHAN BRODSKY, Esqs. for plaintiff.
QUEEN and STOUT, Esqs., attorneys for
defendant.

20

BERNARD G. HEYN, Esq., of counsel.

WILLIAM H. SPEER, Circuit Judge:

This is an action in ejectment. The complaint alleges that certain property described in the complaint, and which is known by the street number, 280 Fifth Street, in Jersey City, consisting of a house and lot, was, on the fifteenth day of April, 1916, wrongfully and illegally entered into by the defendant, &c. The complaint further alleges that the plaintiff's right to possession of the property in question, accrued on the fifteenth day of April, 1916. The plaintiff claims possession of the land and appurtenances, and also claims the profits the same has yielded for the time the plaintiff has been wrongfully deprived of the same by the defendant.

30

40

Decision.

In brief, the relationship of the parties is as follows: One George H. Brehm, married, and the issue of that marriage was a George H. Brehm, Jr., the present defendant. Upon the death of his wife, the said George H. Brehm married Anna Eckels, the sister of Catherine Eckels, the present plaintiff, by which marriage he had a daughter, Katie Brehm. Both Anna and George Brehm died, the property descending to Katie Brehm, the child of the second marriage. Shortly thereafter Katie Brehm died, and George H. Brehm, her half-brother, the defendant in this case, entered into possession of the property and has since continued to possess the same. Catherine Eckels is an aunt of the whole blood of Katie Brehm, deceased, being a sister of her mother Anna Brehm, from whom the property came, while George H. Brehm, the defendant, is a half-brother of the intestate, but not of the blood of Anna Brehm, from whom the estate descended.

The question of law which emerges from these facts for decision in this case is this: "Does a half-brother of an intestate, not of the blood of the ancestor from whom the estate came, take such estate, to the exclusion of an aunt of the intestate, being the sister of the ancestor from whom the estate descended?"

I have been favored by both sides with voluminous and singularly recondite briefs. I am constrained, however, by what I consider to be the inveterate understanding of the bench and bar in this state as to the proper answer to be given to the emergent question, to answer that question in the negative, and to give judgment in this case in favor of plaintiff. I believe myself to be bound to follow the construction

Decision.

placed upon the legislation, upon which the rights of the parties in this case depends, in the case of *Delaplaine v. Jones*, 8 N. J. L., 340. It may well be that what was said by Chief Justice Ewing and Mr. Justice Ford in that case was, strictly speaking, dictum, so far as the point under discussion in this case is concerned, for there the property was awarded to brothers of the half-blood who happened to be remotely related to the ancestor and were therefore of the blood of the ancestor. But a perusal of what those very learned Justices said on the point in that case, the fulness of their discussion of it, and the importance which they apparently attached to it in their consideration and disposition of the cause, leads me to the conclusion that they did not consider it mere dictum, but deemed that they were enunciating a rule of property for future guidance. But even if it were pure dictum the eminence of the Justices who pronounced it; their known learning in that department of the law; the fact that theirs was practically a contemporaneous exposition, and *contemporanea exposito est fortissima in lege*; the fact that thence hitherto it has not been questioned, but apparently acquiesced in and acted on, and the further fact that the whole sweep of judicial decision in our own state seems to be concordant with the doctrine therein enunciated, *i. e.*, *Den Lloyd v. Urison*, 2 N. J. L., 197; *Den ex dem. Pierson v. De Hart*, 3 N. J. L., 73; *Arnold v. Den*, 5 N. J. L., 1015; *Banta v. Demarest*, 24 N. J. L., 431; *Den v. McKnight*, 11 N. J. L., 394; *Haring v. Van Buskirk*, 8 N. J. Eq., 545; *Miller v. Spear*, 38 N. J. Eq., 573, would all lead me to determine this issue, at *nisi prius*, in accordance with that dictum.

Decision.

That there is strong reason in favor of the view contended for by defendant, and that the modern trend of decisions in construing similar statutes is favorable to that view, is, I think, true, and, if this case were untrammelled by the decisions of our own state, to which I have hereinbefore adverted, I should feel strong leaning toward that view myself. But sitting as I do at circuit, and confronted as I am by those decisions, I conceive it to be my duty to follow the path therein plainly indicated.

I therefore find in favor of plaintiff and will sign an order for judgment in accordance with these views.

Postea.

(Filed September 19th, 1917.)

NEW JERSEY SUPREME COURT,

HUDSON COUNTY.

KATHRYN E. ECKEL,
Plaintiff,

v.

GEORGE H. BREHM,
Defendant.

In Ejectment.

10

This case was tried before the Honorable William H. Speer, one of the Circuit Court Judges of the State of New Jersey, to whom the above case was referred by the Honorable William S. Gummere, Chief Justice of the Supreme Court of New Jersey on the day of 1915, without a jury, the same having been waived by stipulation of counsel.

20

The Court found the defendant guilty of the trespass and ejectment above laid to his charge in manner and form as the said Kathryn E. Eckel complained against him, and the said Court assesses the damages of the said Kathryn E. Eckel over and above her costs and charges four hundred (\$400) dollars.

30

WILLIAM H. SPEER,
Judge.

Judgment entered Sept. 19th, 1917.

Therefore, it is considered that Kathryn E. Eckel do recover of the said George H. Brehm the possession of the premises aforesaid in the first paragraph of the said complaint mentioned

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Postea.

with the appurtenances thereof, for as much as the said George H. Brehm is by the Court aforesaid found to be guilty of the several trespasses and ejectments aforesaid; and the Court assesses her damages and costs at four hundred (\$400) dollars now here adjudged, of increase to the said Kathryn E. Eckel, besides her lawful costs and charges to be taxed, which said damages, costs and charges amount to \$438.01.

WM. S. GUMMERE, C. J.

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30

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Harry Castlebaum, direct.

NEW JERSEY SUPREME COURT,

KATHRYN E. ECKEL

v.

GEORGE H. BREHM,

10

Tried Friday, March 16, 1917, before
SPEER, J., without a jury.

ABNER KALISCH and HARRY KALISCH for
the plaintiff.

QUEEN & STOUT, and Mr. HEYN, for the
defendant.

Mr. Kalisch: I wish to offer in evidence a cer-
tified copy of a deed by Patrick Ryan and wife
to Anna E. Brehm. The deed is dated the 26th
day of March, 1885, recorded in book 402 of deeds,
page 6, being the property now in question in this
suit.

20

Mr. Queen: I have no objection.

Marked Exhibit P1.

HARRY CASTLEBAUM, sworn.

Direct Examination by Mr. A. Kalisch:

30

Q. You are an attorney at law in this state?

A. I am.

Q. Are you familiar with the records of Hudson
County in the searching of them? A. I am.

Q. Look at the description of this property and
the reference to this record, the book and page.
Did you search the records of Hudson County as
to conveyances in the name of Anna E. Brehm?

A. I did.

40

Katherine E. Eckel, direct.

Q. Did you find any record made up of any conveyance from Anna E. Brehm of the property described in this deed? A. I do not.

10 Q. Did you also search the record of Katie Brehm? A. Well, what I did was, I searched the record to see the chain of title, the status of the title, and the status of the title shows that Anna Brehm died intestate. The application for letters of administration showed that the applicant was James T. Brehm, and in his affidavit on the application he says that Anna Brehm died leaving George, her husband, and Katie Brehm, her daughter; and following that chain down I found that George, the husband died, cutting off whatever right he had, and that Kate Brehm died, and
20 letters were granted on April 20, 1916, to George H. Brehm, who sets out that he is the only heir at law and that he is a half brother.

Q. Then the title, so far as the record is concerned, is in the name of Anna E. Brehm, is it? A. There was no conveyance from Anna E. Brehm.

Q. That is what I mean; so far as the descent is concerned the court will deal with that. Yes; Anna E. Brehm.

30

No Cross Examination.

KATHERINE E. ECKEL, sworn.

Direct examination by A. Kalisch:

Q. Your name is Katherine E. Eckel, is it? A. Yes.

Q. And, Mrs. Eckel, where do you live? A. We live in Little Ferry.

40

Q. Where do you live, I say? A. In Little Ferry.

Katherine E. Eckel, direct.

Q. How long have you lived there? A. About twenty-three years ago.

Q. Where is Little Ferry, here in this—A. Near Hackensack.

The Court: Between here and Hackensack, on the New York, Susquehanna & Western Railroad.

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Q. Did you have any sisters? A. I got two sisters in the old country, but they are dead.

Q. Don't go too fast. You have two sisters in the old country? What are their names? A. Elizabeth Beil and Anna Beil—Anna Schull.

Q. What was your name before you were married? A. Katherine Beil.

Q. Then your sisters were both married? A. Both married.

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Q. And you were married? A. I have been married, yes.

Q. You say your sisters are dead? A. They are dead, yes.

Q. Did they leave any children? A. They leave children, yes.

Q. Give us the names of the children. A. Well, the children I don't know.

Q. But they did leave children? A. They leave children, but I do not know how many.

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Mr. Kalisch: If the Court please, at the time this action was brought I did not know that there were any others who were entitled to any part of this property. From the testimony of this witness it is very evident that if she is entitled to the property, the other two sisters or those representing the other two sisters are entitled to two thirds—that is the share of the mother,

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Katherine E. Eckel, direct.

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and the share being in three parts the children would be entitled to two thirds. Of course we can always add a plaintiff under the proceedings; if your Honor has any doubt about it, we desire to add the two sisters as plaintiffs in this case.

Mr. Queen: How can that possibly be done? The witness has said that the two sisters are deceased and that they left children, and she does not even know the names of the children.

The Court: That seems to be so.

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Mr. Queen: From what the witness has said I think that it follows that the children are not of age. She has not said they were.

The Court: Yes; she has not said they were not either.

Mr. Queen: I understand that, but I gather from what she said that they are not of age.

Mr. Kalisch: We can do this: instead of claiming the whole property, we will claim our share, one third.

The Court: What is the nature of this action—ejectment?

30

Mr. Queen: Yes; a suit in ejectment. I submit, with the permission of the Court, that they cannot proceed in this action when they have said they are entitled to the whole property and now claim only a portion of it as a tenant in common, without an amendment of the complaint, and I submit also that one tenant in common is not entitled to a suit in ejectment

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Katherine E. Eckel, direct.

under these circumstances without the other tenants in common being parties to the suit.

The Court: What authority have you for that last proposition?

Mr. Queen: I haven't any authority with me because I did not anticipate the question. 10

The Court: My own impression is, there is nothing in that last point. I think a tenant in common has a right to possess the whole of the property and to ask for the whole of the property and to go into the whole of the property and to possess the property as against everybody except his co-tenants. 20

Mr. Queen: Can she commence a suit in ejectment?

The Court: He has asked now for leave to amend his complaint so as to claim not the whole but one third of it.

Mr. Kalisch: Yes.

The Court: That it seems to me is probably not a proper amendment. I think you would have to claim as tenant in common the whole of the property on behalf of yourself and the others. I have not looked up the point, but it is rather a novel proposition. 30

Mr. Queen: I have not looked at it either, because I did not anticipate it, but I only stated my point from my general knowledge of the law.

Mr. Kalisch: Then why can't we go on without the amendment?

The Court: You can do as you want 40

Katherine E. Eckel, direct.

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about that, and I will have to decide when the time comes what the rights are with respect to your going on as you choose to go, whatever that may be I do not want to decide it now, because it might be fatal to the whole case; I do not know. When I come to look at it I will see.

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Mr. Kalisch: There is no jury here, and I would like to say: we have had notice, but the notice came so shortly before this trial, that these children are represented by attorney, some attorney, and I told him—I had an interview with him, I told him that in order that his rights may be preserved he ought to ask to come in and join with me in this action and be made a plaintiff, and he said he would. I did not want this case to go off, and I waited for his action, and he has not done so, but he was empowered by the German consul—and on account of this trouble now he has not had the proper papers and cannot get them at the present time.

30

Mr. Queen: Then you have known of this question for some time?

Mr. Kalisch: About two or three weeks; and you must know that we cannot do much in corresponding between here and Germany at the present time. They were informed they should come in; I notified them myself to come in.

40

The Court: You see an infant cannot appoint an attorney; they would have to come in, if they came in as plaintiffs, by guardians.

Katherine E. Eckel, direct.

Mr. Kalisch: I do not believe they are infants.

Mr. H. Kalisch: This attorney represents the German consul, who represents the interests of those people over there.

The Court: But their rights are determined by the law with respect to this property. 10

Mr. A. Kalisch: I have not said they were infants.

The Court: No; you have not said that they were infants, but Judge Queen contends that they are, and I am just assuming for the sake of the argument that they are.

Mr. Queen: Even if they are infants the German consul would have no authority even under the treaty to represent them in this case. 20

The Court: I do not know whether he would under the treaty or not.

Mr. Queen: I have examined that matter recently and I think he has so far as letters of administration are concerned.

The Court: Well, if they are not infants they have a perfect right to appoint an attorney and the attorney has a perfect right to represent them here; there is no doubt about that. 30

Mr. Kalisch: They are not infants. We will not amend; we will leave it this way.

The Court: You see, the testimony now is, from this lady, that these sisters died leaving children. Now those children are the ones that have to be added because they represent their ancestors. 40

Katherine E. Eckel, direct.

Mr. Queen: While I do not want to question Mr. Kalisch's authority, I do not think he has said anything to the Court which would authorize him to add their names even though he knew them.

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Mr. Kalisch: There being no jury, could we not adjourn this matter and in the meantime perfect the record by adding the other plaintiffs.

The Court: My own impression is that is what you ought to do.

Mr. H. Kalisch: Don't you think it advisable to take the evidence first? Maybe it would save that much time at the next sitting.

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Mr. A. Kalisch: The defendant would not want to do that I suppose.

The Court. Of course there is this situation with respect to that, that if you were to bring in those parties as defendants they would have a right to cross examine these witnesses, and the testimony then would all be lost because as against them this evidence would not be binding at all.

30

Mr. Kalisch: I think it would be better to adjourn the matter and I will perfect the record by seeing that the attorney comes in with the other plaintiffs.

The Court: That would be better.

Mr. H. Kalisch: Supposing it appears under the decisions that a tenant in common, which these people appear to be, has the right to get possession either through lawsuit or physically—possession

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Katherine E. Eckel, direct.

of that property—and that he holds for the other tenants in common—

The Court: If that appears, all right. If you can direct my attention to any authority like that I am ready to go on with it.

10

Mr. Kalisch: These people are not joint tenants. I have always understood—it came to my mind as soon as your honor spoke about it—that they are the agents practically, they can collect the rents for the other tenants in common.

The Court: There are a lot of fine distinctions about the kind of title that these various co-tenants in property hold. You will remember from your ancient reading on the subject that joint tenants appear to hold in one way, *per my et per tout*, and other tenants in common hold in some other way. Now those things we have got to go into, and if you go on now it may be that we will overlook one of the unities and get ourselves in discord, so it seems to me it may be wise if you look it up and get the record straight and let us try it. There is no difficulty about it, and I can give you until next Friday.

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Mr. Queen: These parties have just now said that the children of the other sisters are represented by another attorney. I think they ought to inform us who it is. It may be that we have some rights with respect to him.

Mr. H. Kalisch: We do not say that the parties are represented by an attorney.

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Katherine E. Eckel, direct.

We say that this attorney represents the consul.

The Court: I am not going to tell anybody to do anything about it. You can get your record ready if you can.

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Mr. Queen: We do not know that the record can be straightened out in order to get ready for the trial next Friday.

The Court: I am not saying that you must go on then; I am saying that I can give it to you if you want it.

Mr. Queen: It may be that this matter having arisen we may have to investigate the matter in Germany. We do not know. We do not know what the facts are.

20

The Court: We will adjourn this case until next Friday morning, and at that time we will see if it is possible to straighten out the record, and at that time we will see whether it is necessary for any investigation on your part with respect to the situation in Germany, because ordinarily there would not be very much in that proposition. The title is here and it is governed by the laws of the place where the property is located, and I do not think the German consul has anything to do with the thing as a matter of fact; so that on that point it may very well be, and I suppose that is what Mr. Kalisch has in mind, that these parties have communicated with an attorney here through the German consul, which is the ordinary way of doing.

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Mr. H. Kalisch: The information that we received was this: it appears that

Katherine E. Eckel, direct.

these records are undoubtedly inspected by someone representing someone, in this instance the German consul, and he undoubtedly saw the record here in the Court and he communicated immediately with the German consul, who in that way thought that the interests of these people in Germany should be represented in this case. 10

The Court: We will adjourn to next Friday morning at ten o'clock. If you are to straighten the record so as to be ready to go on with the trial at that time you would better straighten it within the next few days and then communicate with Judge Queen. 20

Adjourned to Friday, March 23, 1917.

Trial resumed Friday, March 23, 1917.

Mr. Kalisch: I have come to the conclusion we do not care to make any amendments at all.

KATHERINE E. ECKEL, recalled.

By Mr H. Kalisch: 30

Q. You testified you had two sisters in the old country? A. Yes.

Q. That they are both dead? A. Yes.

Q. Did they leave any children, do you know?
A. They left children, but I do not know how many.

Q. Now Anna E. Brehm, what relation was she to you? A. My sister here what had the property. 40

Katherine E. Eckel, direct.

Q. And she was the one that owned the property in Jersey City? A. Yes, sir.

Q. The property I refer to is at 280 5th Street, Jersey City? A. Yes.

Q. She owned that property? A. Yes.

10

Mr. Queen: I object to that question in that form and ask that the answer be stricken out as calling for a conclusion.

The Court: I will strike it out.

Q. Is your sister Anna E. Brehm alive now?

A. What is that?

Q. Anna E. Brehm? A. It was my sister that had the property.

Q. Yes; is she alive now? A. No; she is dead.

20

Q. How long ago did she die? A. Fifteen years ago.

Q. Where? A. In Jersey City.

Q. What was her husband's name? A. George H. Brehm.

Q. Did he die after she did, or before? A. After she did.

Q. Do you know how long after? A. He is dead about, I believe, about eight years.

30

Q. Now how many children did your sister Anna E. Brehm have? A. She had Katherine and Henrietta and William and Joseph.

Q. Four children? A. Yes.

Q. And she had those children by this husband, George H. Brehm? A. This man, yes.

Q. She was only married once? A. Only once, yes.

Q. Are those children living? A. They are all dead.

40

Q. Which was the last one to die? A. The last one Katherine—Katie Brehm, last year.

Katherine E. Eckel, cross.

Q. Did she die after her mother? A. After her mother.

Q. Did she die after her father? A. Yes; after her father.

Q. Do you know whether George H. Brehm, the husband of your sister Anna Brehm, was married before he married your sister? A. Yes he was married before.

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Q. And did he have any children by his other wife? A. He had a daughter and two sons.

Q. Do you know the names of those children? A. Yes; Mary Brehm, the oldest one, and the other George Brehm, and the other James Brehm.

Q. And are any of those living? A. Only the one.

Q. Which one? A. This one.

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Q. George Brehm? A. Yes, George Brehm; that is the only one that is alive yet.

Q. Anna Brehm, she became insane? A. No; Katherine, the daughter.

Q. She was the daughter of your sister? A. Yes.

Q. That is, she was the daughter of your sister Anna E. Brehm? A. Yes.

Q. She was the daughter, of course, of your sister Anna Brehm and George Brehm? A. Yes, sir.

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Cross examination by Mr. Queen:

Q. How old did you say you are now? A. Seventy years old.

Q. Where were you born? A. In Germany—in Butendorf. (?)

Q. Who was the older, you or your sister Anna E., who afterwards married George H. Brehm?

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Katherine E. Eckel, cross.

A. She was not the oldest, she was the middle one; my oldest sister was Elizabeth.

Q. Now let me have the names of your sisters. What is the names of the oldest one? A. Elizabeth Beil.

10 Q. What is the name of the next one? A. Anna Beil.

Q. And the next one? A. The next Katherine Beil.

Q. And there were only three? A. And Anna Maria Beil.

Q. What is the name of the last one you mentioned? A. Anna Maria Beil.

Q. Did you have any brothers? A. No brothers.

20 Q. Is the eldest sister living or dead? A. She is dead.

Q. When did she die? A. She died about sixteen years ago.

Q. Was she married or not? A. Yes, she was married.

Q. Did she leave any children? A. She left children, yes.

Q. Are they living or dead? A. I do not know.

Q. You do not know? A. I do not know.

Q. Did she leave a will or not?

30 Mr. H. Kalisch: I object.

The Court: I shall sustain the objection to that. It calls for a conclusion.

Q. Do you know whether she left a will?

Mr. Kalisch: I object.

The Court: I sustain the objection to that. How does she know what a will is? She might mistake the label on a tomato can for a will. We can't tell that. What

Katherine E. Eckel, cross.

she left, she can say in the way of a paper, and it is for the Court to say whether it is a will or not.

Q. Where did she live at the time of her death?

A. Who? My oldest sister?

Q. Did she live in the old country at the time of her death? A. In the old country, my oldest sister, and the youngest one.

Q. Do you know whether she left any paper in regard to her property at the time of her death?

Mr. Kalisch: I object to that.

The Court: Why?

A. I can't understand this.

Mr. Kalisch: The position we take now is that this plaintiff, being a tenant in common, if she is a tenant in common with others, has the right to possession as against all the world. I have gone into the matter since last Friday and more or less confirmed what your Honor suggested, and I do not see what difference it makes whether anyone else was interested in the property so long as this defendant cannot show a better title than the plaintiff.

The Court: What do you say to that?

Mr. Queen: There are two questions involved in the suit; first, the right of possession— and that under one theory of the ejectment suit carries with it the determination of the title. Second, the plaintiff is suing the defendant for mesne damages for rent for the property from the time when she says that she was en-

Katherine E. Eckel, cross.

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titled to the possession up to the present time; and while my adversary has stated his view of the law as to one tenant in common having the right to sue a person in possession, I find that that theory of that law is not so firmly and definitely established as he has stated.

The Court: Have you found any case against it?

Mr. Queen: No case in this state against it.

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The Court: I do not think there is any case in this state against it. The practice is all the way he suggests it. I have looked at it myself. I do not see any question about it at all in this case, absolutely none.

Mr. Queen: I desire to cite to your Honor the cases cited in 7 Ruling Case Law, as to the right of one tenant in common to sue a person who was in possession; and then the second question, as to how much of the title one tenant in common can recover—whether he can recover—

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The Court: He does not recover the title; he recovers the possession.

Mr. Queen: But that under the theory of an ejectment suit determines the title to the property.

The Court: I do not think so. Ejectment is a possessory action.

Mr. Queen: That is true, but it carries with it the title to the property.

The Court: The title is a mere incident.

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Mr. Queen: And that is the distinguish-

Katherine E. Eckel, cross.

ing point in the theory of the suit in ejectment. It is first of all a possessory action.

The Court: The judgment in ejectment is not even binding as *res judicata* on the question of title for the very reason that it does not determine title.

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Mr. Queen: Applying it to the right of possession, whether the judgment of one tenant in common would give her the possession to the whole property when she only has the right to possession of an undivided share of the property, I desire to now make the point that this action ought not to proceed in behalf of this person because it appears that she is a tenant in common and that there are other persons who are tenants in common with her.

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The Court: All right. I will rule on that right away and I will hold that there is nothing in the point and you may have the objection entered to my determination of that point.

Mr. Queen: My objection is noted, of course.

The Court: Yes; I want it noted myself so that it may be passed upon by some reviewing court, if you want to have it so passed upon.

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Mr. Queen: Now, I think we should have it noted on the record that there are other parties in interest and that they should be permitted to be brought in either by the plaintiff or the defendant as parties to this suit.

The Court: Well, the plaintiff does not

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Katherine E. Eckel, cross.

want to. Are you making application to bring them in on your side?

Mr. Queen: Yes, sir.

10 The Court: All right; I will permit that to be done. If you will get the authority to do it and can do it I will permit you to bring them in. I do that because I am perfectly clear that the law is settled that if the case proceeds now in the name of the one tenant in common that that tenant in common would recover as mesne damages the whole mesne damages and would hold the shares of the others as trustee for the others. Now if you want to bring the others in so that they may participate in the results of the suit and so far as that phase of the case is concerned have all the parties before the Court I will permit that to be done.

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Mr. Queen: I understood your Honor to say that this suit being a possessory suit—

The Court: It would not be *res judicata* as to the title; that is my understanding of the law.

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Mr. Queen: Then we would have to try the case all over again if any other tenant in common came along and brought suit against George H. Brehm, the defendant here, for possession, claiming title to the property.

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The Court: Yes; and the burden would be upon that person to show that he or she had a better title which carried the right to possession than the party who sues here. Anybody could do that. You cannot stop a suit, but you can stop a re-

Katherine E. Eckel, cross.

covery of course, but you cannot stop a suit.

Mr. H. Kalisch: I did not understand whether your Honor had admitted these other plaintiffs or whether you were to admit them if they had the authority.

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The Court: I am giving them an opportunity to manifest authority to represent the other parties and bring them in. That is the point. Now do you want to proceed with the case now and bring the others in later or do you want to have the opportunity to bring them in?

Mr. Queen: I of course, am not in communication with the parties. I do not even know who they are, and I think that we may proceed now, there being no objection on the part of the plaintiff, and put in our defense with the permission to bring the other parties in later.

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The Court: That, of course, the other side will have to be heard on.

Mr. H. Kalisch: I shall object to that because my understanding is that—

The Court: You do not have to object very strenuously, because I am perfectly clear that to proceed now with the other persons parties to this suit would open up several attitudes of evidence which along the lines of the ruling I have just made would be inadmissible in the case in its present posture, and therefore to go on and try the case now on the theory that the others are to be brought in and let that evidence be lugged into the case which has no relevancy possible to it would be to do an

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Katherine E. Eckel, cross.

injustice to you. Therefore I say to the other side that if you desire to have the parties brought in the case as if they were in I am willing to let you proceed.

10 Mr. H. Kalisch: I have no such authority.

The Court: No; I say if you want to have the case halted until they manifest that they are actually going to be in you have that right.

Mr. H. Kalisch: No; I want to go on.

20 The Court: Then of course if you go on you go on upon the theory that they are in and the evidence is to be brought out. That is the very point I am making with you now. Otherwise we would have to come back here and go over all the evidence again.

Mr. H. Kalisch: I do not want to go on with the idea that these other co-tenants are in. I do not want to do that, nor do I think it is necessary to have them in.

The Court: It is not necessary but it is proper.

30 Mr. Kalisch: They do not represent them.

The Court: They represent themselves and they have a perfect right to have the adjudication of this court made so that when the payment is made they have a right to control the disposition of the proceeds if there are any proceeds by way of mesne profits.

40 Mr. Kalisch: The judgment, if any, would be paid to an officer of the court. I suppose he would be the one to distri-

Katherine E. Eckel, cross.

bute it and it would not be in their mouth to say, I don't suppose—

The Court: But they want to be heard because the judgment would be against them.

Mr. A. Kalisch: If we go on I can readily see, if the other parties are brought in, that we should have to go all over this case again because we have other— 10

The Court: That is what I think. You are dealing with their case and they have a right to be heard on it if they are in.

Mr. Kalisch: If they are in.

The Court: Yes.

Mr. A. Kalisch: This evidence will stand? 20

The Court: Yes.

Mr. A. Kalisch: I should say this: that if these defendants are unable to get the consent of those who are interested to join them either as defendants or plaintiffs, I think there ought to be some time limit set.

The Court: Oh, absolutely. I am not going to put this case up in the air like Mahomet's coffin and let it stay there. I will fix a definite limit right now. There will not be any question about that. 30

Mr. Kalisch: We won't go on with it.

The Court: What time do you think you will need to obtain consent to put these other parties in as defendants?

Mr. Queen: It is impossible for me to say. I did not know until last Friday that there were such parties. I do not know 40

Katherine E. Eckel, cross.

who they are. I understand from this witness that they are in Germany.

The Court: I am not going to put the case off under any such circumstances as that. That I will not do.

10

Mr. Queen: They were in communication with the parties or with some one representing them.

The Court: They do not have to bring them in. They are under no obligation to do it. One tenant in common has the indubitable right to go ahead with the suit. He does not have to bring them in, and you cannot make him bring them in, but you can apply to have them made parties under the practice act, and they can be made parties, but that does not compel them to act. They simply sit by and say "Go get them and bring them in if you want to."

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Mr. Kalisch: There has been some correspondence with reference to the consul having the right to represent—they have had the answer that under the treaty the consul has a right to designate an attorney to preserve the rights of an alien here or a citizen on the other side.

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The Court: I inquired last week whether that was so and Judge Queen said there was not any such authority, there was not any such thing in the treaty.

Mr. Queen: That is true.

The Court: He says it is in the treaty and he has a right to designate an attorney; so if that is the fact—

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Katherine E. Eckel, cross.

Mr. Queen: I think he is confusing the power of the consul on letters of administration in favor of aliens who are resident here.

Mr. Kalisch: She wrote to the secretary of state of the United States and had an answer that it is in the treaty. She left her answer home. 10

Mr. Kalisch: I do not know just what the situation would be in the present international crisis.

The Court: I tell you what I am going to do. I am going to do this: I am going to give you two weeks to obtain authority to represent these parties, have them brought in and made parties defendant in the suit, and if in that time it cannot be done I am going to let the case go on without these persons being made parties at all, because you can readily ascertain in that time whether you can do it or not, and if the war is going to interfere with it nobody knows how long that is going to last and I surely will not hold this case up while the plaintiffs are waiting for the war to stop. 20 30

Mr. H. Kalisch: I have not looked into the question, but it strikes me now, what are the rights of aliens in case a condition of war exists between Germany and this country?

The Court: I am not going to determine that question just now because it does not exist except in the declamatory sense.

Mr. Kalisch: There is an old lady here. I suppose I can ask her the relationship. 40

Katherine E. Eckel, cross.

The Court: If you have an old lady here I think it would be only the proper thing—and she is quite old—to have her evidence taken and let them have an opportunity to cross examine her.

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Mr. Kalisch: Is there any question about the relationship?

Mr. Queen: I am not through with the cross examination of this witness.

The Court: We will go on with that now; we will go on with the cross examination now.

By Mr. Queen:

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Q. What was the name of the second sister?

A. Anna Brehm—Anna Beil.

Q. And you are the third one? A. I been the third.

Q. When did you come to this country? A. In '65.

Q. Who came with you? A. Oh, lots of people; I don't know no more.

Q. Did any member of your family come with you? A. Yes; I got one.

30

Mr. H. Kalisch: I do not see where all this testimony is relevant, when she came and how she came over here.

The Court: I do not for the life of me see myself. If you have some theory I would like to hear it.

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Mr. Queen: My purpose is this—and it was set up in our answer—that this is not ancestral property; that Anna E. Beil came to this country in 1865 without any property, without any money; that she never had—she shortly after that time

Katherine E. Eckel, cross.

became the wife of George H. Brehm, first a domestic in his family and then his wife, and that she never had any beneficial interest in this property. It was the property of George H. Brehm, bought with his money and put in the name of his wife.

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The Court: What have I to do with that in this Court? If his money was furnished, the utmost possible thing it would seem to me that I would have to do with it would be to notice as a matter of passing curiosity the resulting trust that would arise by some possibility in favor of the party who furnished the money but who took the title in somebody else's name.

Mr. Queen: Here this property came from George H. Brehm—it was his property—and through him to his wife Anna E. Brehm, and then through her to Katie Brehm. We contend that it was not thereby ancestral property and therefore is not within the proviso of the fifth section of the descent act.

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The Court: I am not going to sit here and determine where the equitable title of the property is. I know of no case that warrants my doing that. If the object of this is to show that there was destitution on the one side and money on the other and that somebody paid for the property and the title was taken in this lady's name and that therefore, a trust resulted and the beneficial interest was in the man, I won't hear it, because I do not think it has any place in this court. I know of no case that

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Katherine E. Eckel, cross.

says that any such evidence is admissible even. I will not try equities here. This is a law court.

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Mr. Queen: Your Honor would have to decide in this case who the ancestor was and that being so your Honor would have to determine whose property it was; and my object in this cross examination was to show whose property it was.

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The Court: If it is a mere effort to show who furnished the money to buy the property I will not listen to it, because I will not determine the equities in the matter. Your evidence, if it were all in and most favorable to you, would, according to your own statement of the object, be that one person furnished the money and took the title in somebody else's name, and the legal consequence of that would be that a trust would result in favor of the person who furnished the money, and I am not here to determine whether there was a resulting trust or not. I am not saying that there is not a remedy in that situation; I am not saying that a court of equity would not listen to it and give you all the relief in the world. I am not saying that a court of equity would not give an injunction against my proceeding with this case, because there is an equity to be determined—but I do say I won't determine whether there is an equity here because that is not my function.

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Mr. H. Kalisch: I might state to your Honor that that is the only defense—I think I am stating it right—that is set up in the answer.

Katherine E. Eckel, cross.

Mr. Queen: Oh, no; that is only a side issue of the defense.

The Court: I am not going to determine that.

Mr. Queen: There are two defenses, and that is one of them.

10

The Court: I am going to get over these fences as they are in front of me.

Mr. Queen: But I do not want my friend to get it on the record that that is the only thing we have to say.

Mr. Kalisch: I am not getting it on the record.

Mr. Queen: I do not know where you are putting it.

Mr. Kalisch: I do not see any other defense in your answer.

20

Mr. Queen: The record is all here.

The Court: And I am here. Of course, the answer makes the defense, and not the declaration of counsel. Whatever the situation is it is in the answer.

Mr. Queen: I understand then, your Honor, excludes the evidence as to where the money came from to pay for this property?

30

The Court: Precisely, on the ground that it is irrelevant and immaterial in this Court, because it would simply result in my being obliged to determine an equity; in other words, whether there is an equitable title by way of a resulting trust, and that I have no function to decide; and you may have an objection entered on the record.

Mr. H. Kalisch: That is my point.

40

Katherine E. Eckel, cross.

Mr. Queen: Will my adversary admit that the money for this property came from George H. Brehm?

10 The Court: I imagine he would not, because he would expect to find you chasing down to the Court of Chancery with a bill to enjoin his client from proceeding further with the case on the theory that there was an equitable title to determine and the admission in this Court would be sufficient basis for the decree.

Mr. Queen: I might have done it if your Honor had not suggested it.

20 Mr. Kalisch: I am able to prove that it did not. I do admit that there is another answer in the defense of the defendant. He says he denies all the allegations of our complaint. Outside of that he has no defense.

30 The Court: It is a question in my mind, Mr. Queen, if the theory that you entertain, is, as I gather now from the fugitive conversations we have had back and forth about the case, whether you are in the right court to raise that defense—a very grave question, because if an equitable title of that kind is necessary to be established in order to show that it is ancestral property and then your notion with respect to the construction of the statute is correct, that the property follows the ancestral line and so on, if that is a good defense, I think I could not handle it in this Court. That would be my impression about it offhand. I have not looked at it carefully at all

40 from that viewpoint.

Katherine E. Eckel, cross.

Mr. Queen: That is only one phase of our answer. The chief point raised in our answer is that under the proper construction of the proviso of the fifth section of the act, even though it is ancestral property the brother of the half blood is not precluded from taking. 10

The Court: All right. Then we will go ahead with the examination of this lady.

By Mr. Queen:

Q. When your sister came to this country in 1865 where did she first go to live? A. What do you say?

Mr. Kalisch: I object to that.

The Court. What difference does that make? I do not see any relevancy to it. 20

Q. Do you know where George H. Brehm lived at the time of the death of his wife Anna E. Brehm? A. When he got married to her, you mean?

The Court: At the time of her death.

A. I didn't understand you.

Question repeated. 30

A. In fifth Street, Jersey City.

Q. And he lived there until he died, did he not? A. When she died?

The Court: No, he lived in Fifth Street until he died?

A. Yes, I lived there.

The Court: He did, did he?

Katherine E. Eckel, cross.

A. He did too, yes.

Q. And was Katie Brehm living there with him after the death of her mother, or was she not?

A. The daughter, you mean?

10 Q. The daughter, Katie Brehm. A. Yes; she lived there in the same house.

Q. What is the name of Katie Brehm's brother? I mean her full brother. A. I can't understand right.

Mr. Kalisch: There is no evidence she had a full brother.

20 The Court: I will sustain the objection to the question if it is based on the theory that the question contains an unwarranted assumption of fact.

Mr. Kalisch: I make that objection.

The Court: I sustain the objection.

Q. Did Katie Brehm have any brothers or sisters? A. She had no live—they are all dead, you know; she had one.

Q. Did she have any brothers or sisters born to her father and mother?

Mr. H. Kalisch: Do you understand that?

30 (Question repeated.)

A. Yes.

Mr. Kalisch: Katie Brehm?

A. Yes.

Q. Did they die before Katie Brehm? A. They are all dead before she died, yes, sir.

Q. They are all dead? A. They are all dead.

Q. They all died before Katie Brehm died? A. Yes.

40

Katherine E. Eckel, redirect.

Q. And they did not leave any children, did they? A. No children.

Q. And Katie Brehm continued to live in the house with different members of the Brehm family from the time of the death of the father George H. Brehm down to the time of her death, did she not? A. Yes, George H. Brehm—George Brehm was in the house when she died. 10

Q. That is George H. Brehm, the half brother? A. Yes—step brother.

Q. You know that Katie Brehm was a lunatic, don't you? A. The man must come here; I don't understand.

Mr. Kalisch: I object to that.

The Court: I will sustain the objection.

Mr. Kalisch: I would like the answer stricken out, if there is one. 20

(Answer repeated.)

Mr. Kalisch: Oh! All right.

Mr. Queen: You dispute that Katie Brehm was a lunatic?

Mr. A. Kalisch: We put in the evidence of Mr. Casselbaum who testified as to the brother being appointed a guardian—the record was put in of the fact. 30

The Court: Apparently that is admitted.

Mr. H. Kalisch: I want to clear up a situation that I think possibly may cause a little confusion.

Redirect examination by Mr. H. Kalisch:

Q. You were asked how many children George Brehm had with his second wife, your sister. A. Yes. 40

Katherine E. Eckel, redirect.

Q. Do you know how many? A. I know how many.

Q. How many? A. Four.

Q. Do you know their names? A. Yes.

10 Q. Will you let us have them? A. Katherine Eckel—Katherine Brehm.

Q. One. A. Henrietta Brehm, William Brehm and Joseph Brehm.

Q. Which one died last? A. Katie Brehm.

Q. Did the others leave any children? A. No children; they was not married.

Q. The were not married? A. No.

Q. And Katie Brehm was not married? A. No.

20 Mr. H. Kalisch: There is present here a gentleman who represents the German consul, an attorney at law of the state of New Jersey, and if they want to make any use of him for the purpose of seeing whether they have any authority to make these parties plaintiff, those that reside in Germany, he is here.

The Court: You would better introduce him to Mr. Queen and Mr. Heyn and let them talk to him.

30 (Counsel confer with the attorney.)

The Court: Is there any other witness you desire to put on today?

Mr. Queen: Mr. Heyn, my associate, and I were just considering under the circumstances whether we would insist upon—under the fifth section of the descent act—whether we would insist upon our request to bring in the other tenants in common.

40 Mr. Heyn: We want to expedite the case.

Katherine E. Eckel, redirect.

Mr. Queen: If the court should determine the construction of the act as we contend it would not make any difference to us excepting that we might then some time have to defend another suit.

The Court: Yes.

10

Mr. Queen: If the court should determine that our contention is not correct, why then perhaps it would not make any difference to us at all, except that we might then, according to our theory, as to the right of one tenant in common to bring a suit, have the advantage of being permitted to defend another suit in order to contest that question; so that my present view of it is that the case might be expedited by proceeding without the other defendants being brought in. There are very few questions of fact. It is practically a question of law on our second point of the construction of the fifth section of the act.

20

The Court: So far as I can see, why isn't it best to agree on the facts? It seems to me there is nothing in the case that requires evidence. You both state the same facts every time you talk about them. Why can't you stipulate your facts and put the law question up? Why isn't that the easiest way of settlement? And then if you find you cannot agree on any particular fact take evidence on that. That would expedite it more than to take all the evidence.

30

Mr. Queen: I think the facts are practically all in now on the second question,

40

Katherine E. Eckel, redirect.

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especially in view of the ruling of the Court on the first question. We have evidence which tends to prove that this property was the property of George H. Brehm, that he bought it and paid for it with his money, and that he lived in it after the death of his wife Anna E. Brehm, exercised dominion over it.

Mr. Kalisch: He had a right to.

Mr. Queen: And that it was the family homestead, before that time and right on down, as the property of George H. Brehm and not as the property of Anna E. Brehm, which the plaintiff claims descended to Katie Brehm.

20

The Court: My own impression is that you will expedite this case a lot if you just get together and stipulate all the facts that you can agree on. Then if you meet any point that you cannot, come and put your evidence in on that point so that I can determine that as a disputed question of fact, and then you can review that decision.

30

Mr. Heyn: There is only one question of fact. I do not think there is any disputed question of fact except this question of the rent. They claim we were not in lawful possession.

40

Mr. Kalisch: But there was not any question of the possession because the husband had the right of courtesy and we do not deny that he had a right to be possessed after her death. He was always up to the time of his death in possession, not by right of ownership but by courtesy.

Katherine E. Eckel, redirect.

There were some thirty odd years transpired during which he had possession of the property.

Mr. Queen: My point is that George H. Brehm was guardian of Katie Brehm and in possession of the property at the time of the death of Katie Brehm under a lease, the term of which had not then expired. 10

Mr. Heyn: That is the brother George Brehm, not the father.

Mr. Queen: I am speaking of the defendant.

Mr. Kalisch: Made by whom?

Mr. Queen: By himself as guardian, to himself as individual. 20

Mr. Kalisch: We agree on \$25 a month.

The Court: What are we going to do about the further progress of the evidence?

Mr. Queen: And that evidence I want to offer unless the other side agree on it.

Mr. Kalisch: What is the object of that?

Mr. Queen: This is a possessory action, and if we are in possession under a right of possession— 30

The Court: You have no right to oust them. That is the purpose of that. You see the sole object of an ejectment action is to obtain possession. If they show they had the right of possession at the time you brought your suit manifestly you have not any right to get them out even though you might have a title.

Mr. Kalisch: But they claim a lease— 40

Anna Eckel, direct.

The Court: That is the point he makes.

10

Mr. Queen: Will you agree to stipulate that George H. Brehm, the defendant here, was the guardian of Katie Brehm and that he was in possession of the premises at the time of the death of Katie Brehm under lease the term of which had not then expired?

Mr. H. Kalisch: No; I cannot consent to that.

Mr. Heyn: That is the only question of fact.

The Court: Have you any further evidence?

20

Mr. H. Kalisch: Yes, we have; if we are not going to stipulate we might just as well put in our case.

The Court: Do I understand now, Judge, that the notion of bringing in these other defendants is out of the case?

Mr. Queen: Yes.

ANNA ECKEL, sworn.

Direct examination by Mr. H. Kalisch:

30

Q. You are married? A. No.

Q. Miss Eckel, you live at Little Ferry? A. Yes.

Q. With your mother? A. Yes.

Q. Do you remember your aunt Anna Brehm? A. Yes.

Q. Do you remember her husband, George Brehm? A. Yes.

Q. Do you know where they lived? A. 280 Fifth Street.

40

Q. Jersey City? A. Jersey City.

Anna Eckel, direct.

Q. Do you remember how many children they had? A. They had four; I knew three of them; one died before I knew them.

Q. That one that died, had that one been married? A. No; there was not any of them married.

10

Q. None of them married. Do you remember the last one that died? A. Katie was the last one.

Q. Do you remember when your aunt Anna E. Brehm died? A. I was with her when she died; but I do not remember the year.

Q. After her death did your uncle George Brehm reside at the house on Fifth Street? A. Yes; he lived there until he died.

Q. He lived there until he died? A. Yes.

20

Q. Do you remember whether your uncle George Brehm had been married before he married your aunt Anna E. Brehm? A. Yes; he was married before.

Q. Did he have any children by that marriage? A. He had three.

Q. Do you know their names? A. George, James and Mary.

Q. Are they living? A. Two dead and one is living.

30

Q. Which one is living? A. George.

Q. In what way is Anna E. Brehm your aunt? A. She is my mother's sister.

Q. Do you know who is in possession of that property now?

Mr. Queen: We admit that the defendant George H. Brehm is in possession and that he was in possession at the time of the death of Katie Brehm and is still in possession.

40

Motion for Dismissal of Plaintiff's Case.

A. That is right.

Mr. H. Kalisch: He was not in possession since her death—you mean the husband?

10

Mr. Queen: I thought you said George H. Brehm, the defendant.

Mr. Kalisch: I asked her if she knows who is in possession.

A. George Brehm.

Q. The defendant in this suit? A. Yes.

The Court: I suppose the fact of putting in the denial admits that under the statute.

20

Mr. Kalisch: They did not deny it. They denied all the material allegations under the statute I understood.

The Court: I think, however, under the statute the fact that he defends admits the fact of his being in possession. However, it is admitted on the record now.

No Cross Examination.

PLAINTIFF RESTS.

30

Mr. Queen: We move for a dismissal of the plaintiff's case on the ground that it appears by the complaint that the plaintiff is entitled to possession of the whole of this property, and it appears by the evidence that she is a tenant in common and as such she is not entitled to maintain this suit; and also on the ground that there is no proof that the defendant George H. Brehm was wrongfully in pos-

40

George H. Brehm, direct.

session of the property at the time of the death of Katie Brehm.

The Court: I think that the evidence so far as it has gone does show that the plaintiff was entitled to the possession of the entire property, being a tenant in common, and I think if it is admitted that George H. Brehm was in possession and the evidence shows that the plaintiff was entitled to the possession it necessarily follows that the possession of George H. Brehm was wrongful. I therefore deny the motion and you may have your objection entered on the record. 10

Objection noted for defendant. 20

DEFENDANT'S TESTIMONY.

GEORGE H. BREHM, sworn.

Direct examination by Mr. Queen:

Q. You are the defendant in this suit, are you?

A. Yes, sir.

Q. What was your father's name? A. George H. Brehm.

Q. What was your mother's name? A. Katherine Maurer. 30

Q. Your father was married twice, I understand. A. Yes.

Q. And by your own mother did he have any other children beside yourself? A. Two.

Q. What were their names? A. James T. Brehm and Mary.

Q. Are they living or dead? A. Dead.

Q. When did James T. Brehm die? A. 1912.

Q. Did he leave any children? A. No. 40

George H. Brehm, direct.

Q. When did your sister die? A. April the 15th, 1916.

Q. I am speaking of your own sister. A. My own sister?

Q. Yes. A. That is in—I could not say that.

10 Q. How many years ago was it? A. Yes, many years ago.

Q. Was she married or not? A. Not married.

Q. She died before your father died? A. Yes.

Q. How long after your mother died did your father marry his second wife? A. A year after.

Q. Do you remember about what year that was? A. 1835, I think—no, eighteen—six—no, I could not say that. I was thinking about the time she was born.

20 Q. But it was about a year after your mother died? A. Yes.

Q. Where did he live at that time, do you know? A. He lived at the corner of Wall Street and Broadway. From there he moved down to 60 State Street.

Q. Where did you say he moved to?

The Court: Down to 60 State Street.

Q. When did he move to 280 Fifth Street?

30 A. He got tired of paying rent and he went to buy a property for his family, to buy a home—

Mr. Kalisch: I object to that.

A. —for his family at 280 Fifth Street.

Mr. Kalisch: I object to it as not responsive.

The Court: That is an objection you cannot raise.

40 Mr. Kalisch: And I think it is entirely incompetent and irrelevant. If the ques-

George H. Brehm, direct.

tion were asked him it would be objectionable.

The Court: I think I will permit it to be answered. You may have your objection noted.

Mr. Kalisch: It is hearsay. 10

A. About thirty years—just about thirty.

Mr. Kalisch: Apparently it is hearsay. May I be permitted to ask the source of his knowledge?

The Court: Yes. I will strike out so much of it as says he got tired of paying rent for that manifestly is hearsay, but the fact that he moved I permit.

Mr. Kalisch: He added something else there: 20

(Entire answer repeated.)

Q. At that time was he married to Anna E. Brehm or was he not? A. He was married when he lived corner of Wall and Broadway.

Q. How long did your father live at 280 Fifth Street? A. About thirty.

Q. Up to the time of his death? A. Yes.

Q. Who lived in the house at 280 Fifth Street from the time of his death up to the time of the death of Katie Brehm? A. I did. That is after I took charge of it. 30

Q. After what? A. Anna E. Brehm died before George H. Brehm, my father, and then Katie Brehm and I took —

Q. When did you move there? A. I moved there in nineteen—it will be three years next September coming.

Q. Who lived there from the time of the death 40

George H. Brehm, direct.

of Katie Brehm up to the time that you moved there? A. September the 15th, 1914.

Q. Did Katie Brehm live there all that time?
A. Yes.

10 Q. Who lived there up to the time that you came there? A. James T. Brehm.

Q. Your brother? A. Yes.

Q. Were you the guardian of Katie Brehm?
A. Yes.

Mr. H. Kalisch: I object to that and ask that the answer be stricken out.

The Court: You have already admitted it.

20 Mr. Kalisch: I think the record ought to be produced for the purpose of showing just exactly what his powers were. I know that he was the guardian, but if they are going to prove a lease I think we ought to know just exactly what authority he had to make a lease to himself.

30 The Court: Unless they show by the letters of guardianship the extent of his authority, the mere fact that he says that he was the guardian does not prove that he had authority to make the lease. He may have been only the tutor of the girl, the guardian of her person. We do not know anything about it.

Q. When James T. Brehm lived at 280 Fifth Street do you know as a fact whether or not he lived there under a lease?

Mr. Kalisch: I object to that.

40 The Court: Objection sustained. First of all it calls upon him to give his con-

George H. Brehm, direct.

clusion that the instrument, if there was an instrument under which he lived there, was a lease.

A. He was appointed—

The Court: No!

10

Mr. Queen: The Court has not permitted you to speak.

The Witness: Excuse me.

Mr. Queen: He did not understand it.

The Court: He does now.

Q. Did you pay rent for the premises—of these premises? A. No; but I have it.

Mr. Kalisch: I object to that.

The Court: Why? He says no, but he has it.

20

Q. Did you understand my question? Did you pay rent for these premises before the death of Katie Brehm? A. No. You mean while Katie was alive?

Q. Yes. A. \$25 a month.

Q. Then you did pay rent? A. Yes.

Q. To whom did you pay it? A. Kept it—in the bank—put it away in the bank as guardian of Katie Brehm.

30

Q. Then did you pay it to yourself as guardian of Katie Brehm? A. I paid it to—put it in the account of Katie Brehm.

Q. When did you go in possession, what time of the year, and what year? A. 1914, September the 15th.

Q. On what terms did you go into possession?

Mr. Kalisch: I object to that.

The Court: That depends on circum-

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George H. Brehm, direct.

stances whether it is a good answer or not. It might be he went in by some agreement with your client. If he tries to prove something that is not right I will strike it out. There is no jury here.

10

A. I took pity on my sister, to take charge of her—to take care of her while she was sickly.

Q. Did you have any written lease for the premises?

Mr. Kalisch: I object.

The Court: Objection sustained.

Mr. Queen: I think the witness ought to state whether there was any lease in writing.

20

The Court: I will not permit him to express his opinion as to whether an instrument is a lease.

Q. Did you have any paper—A. No.

Q. —under which you went into possession of the property? A. As guardian while the lady was—while the sister was alive, when I was appointed as guardian.

Q. What time of the month did Katie Brehm die? A. April the 15th.

30

Q. And when did you say you went into possession? A. 1914, November the 15th.

The Court: Is it clear that a guardian can make a lease to himself? His interest would impel him to do the best he could for himself and his duty would require him to do the best he could for his ward, and he would be occupying a rather inconsistent position of dealing with himself for and against—

40

George H. Brehm, direct.

Mr. Queen: We have an order of the Orphans' Court fixing the amount of the rent.

The Court: Oh, I did not understand that.

Mr. Queen: I do not want to state to the Court it was fixing the amount of the rent. I wanted to find a copy of the order so as to determine just what it did say. 10

Mr. Kalisch: I suppose in case of non-payment of rent he would have to bring an ejectment suit against himself to put himself out.

Mr. Queen: I do not find it, and I am not going to ask the Court to wait longer.

Q. Did you continue to pay to yourself as guardian \$25 a month from the time you went into possession of the property up to the time of the death of Katie Brehm? 20

Mr. H. Kalisch: I object to that.

A. Up till Katie Brehm died.

Mr. Kalisch: I object to that.

The Court: Well, it is putting the cart before the horse. If he had a right to make a lease to himself that ought to be proved first, and if he did have a right then manifestly, the fact that he paid rent for it would be evidential; but until they show that—this does not hurt anybody. 30

Mr. Queen: There was an order but I have not been able to find it.

No Cross Examination.

Lewis C. Allen, direct.

LEWIS C. ALLEN, sworn.

Direct examination by Mr. Queen:

Q. Are you connected with the Surrogate's office of Hudson County? A. Yes, sir.

10 Q. Have you in your custody the book of wills containing the will of George H. Brehm? A. I have.

Q. Have you it with you? A. Yes, sir.

Q. In what book is the will probated?

Mr. H. Kalisch: I object. I suppose they are going to offer the will of George—

The Court: They are going to. This is merely a preliminary question.

20 Mr. Kalisch: I object to it merely because it is immaterial where it is found.

The Court: I suppose if the will itself is immaterial it is immaterial where it is; so if you want to rest an objection on that ground I will entertain it now.

Mr. Kalisch: I object to it now.

The Court: What do you think the relevancy of this will is?

Mr. Queen: The relevancy of it is this—

30 The Court: This man was one of the tenants in common, wasn't he?

Mr. Queen: No; this was George H. Brehm, the person who bought and paid for this property, the husband of Anna E. Brehm and the father of Katie Brehm and also the father of George H. Brehm, the defendant in this action.

The Court: Now what relevancy do you think the will has?

40 Mr. Queen: The will has this relevancy,

Lewis C. Allen, direct.

that it shows that George H. Brehm considered himself the owner of this property and that by his will he devised the property—the second clause of his will says: “I give, devise and bequeath my entire estate to my three children, namely, George H., James T. and Katie Brehm, share and share alike.” 10

The Court: What have we to do with his consideration about the ownership of the property? The question is who did own it. Suppose there were a lot of other people who considered themselves owners of it?

Mr. Queen: And that he devised the property to these three children, George H., James T. and Katie Brehm. I did not mean to state—my associate calls my attention to it—that the will shows that he devised this particular property. 20

The Court: It is a general devise as you read it. I do not see any relevancy to it at all myself. His attitude of mind toward the property is a matter of inconsequence it seems to me if he has not some attitude of proprietorship over it. 30

Mr. Queen: The question is from whom the descent of this property came, whether it came from George H. Brehm or whether it came from Anna Brehm to Katie Brehm.

The Court: All right. Now how does this throw any light on that subject?

Mr. Queen: It simply is one of the pieces of evidence that shows that George H. Brehm was the owner of the property and that he— 40

Lewis C. Allen. direct.

The Court: I do not think it even mentions the property.

Mr. Queen: And that he attempted to devise it to his three children.

The Court: Where?

10

Mr. Queen: George H., James T. and Katie Brehm.

The Court: There is nothing in the will that shows that.

Mr. Queen: I know the will does not show that, but I think from this we may argue as to what George H. Brehm, the father of Katie Brehm and of George H. Brehm, the defendant in this suit, considered the title to this property—where he considered it.

20

The Court: I do not see anything in the will that indicates he thought he had anything to do with it. He does not mention it. He does not describe it. He simply makes a general devise of his property. Why should we argue from that that he thought he owned the property?

Mr. Queen: To put it in a little different form—our theory is that George H. Brehm was the ancestor from whom this property came, that he then attempted to devise it to his three children. He devises all his estate and we say this property was a part of his estate.

30

The Court: How does the will show that? The will simply shows that he was, or considered himself, an ancestor and that he sought to devise some property, but it does not have anything to do with this property or in any way indicate that he

40

Lewis C. Allen, direct.

thought he was an owner of this property or had devised it. I think the will is colorless as a piece of evidence.

Mr. Queen: I offer in evidence the will of George H. Brehm, as contained in Liber 77 of Wills of Hudson County on page 100. 10

Mr. Kalisch: I object.

The Court: All right. For the reasons you and I have both stated, I will rule it out and you may have an objection entered on the record.

Testimony Closed.

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[507]

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that it was an answer to the question
of what was the will in 1850.
The question after in evidence the will
of George H. Smith, as contained in the
will of the Hudson County on page

100

Mr. Kellish: I object.

The Court: All right. For the purpose
you and I have both stated, I will rule
that you may have an objection on
the record.

Testimony closed.

101

New Jersey Court of Errors and Appeals.

KATHRYN E. ECKEL,
Plaintiff-Appellee,

v.

GEORGE H. BREHM,
Defendant-Appellant.

Action at Law.

On Appeal from
Supreme Court.

BRIEF FOR APPELLANT.

This is an action in ejectment. The case was tried before Judge Speer without a jury at the Hudson Circuit. Judgment for plaintiff was entered on *postea* pursuant to findings of the trial judge.

Statement of the Case.

The action in ejectment arose out of the following relationship of the parties which is not disputed. Kathryn E. Eckel, plaintiff below, is an aunt of Katie Brehm, being a sister of Katie Brehm's mother. George H. Brehm, defendant below, is a brother of the half blood of Katie Brehm. He is a son of George H. Brehm, Sr., who was twice married. He is a son of the first marriage and Katie Brehm is a daughter of the second marriage. Kathryn E. Eckel is a sister of Anna E. Brehm, second wife of George H. Brehm, Sr. Katie Brehm died intestate at Jersey City, April 15th, 1916, leaving her surviving

no issue and no father or mother and no brother or sister of the full blood and no descendants of brothers or sisters of the full blood. George H. Brehm is the only surviving issue of the first marriage. He was guardian of Katie Brehm who was a lunatic and resided with him in the premises in question at the time of her death. Anna E. Brehm, second wife of George H. Brehm, Sr., was one of four sisters who were all born in Germany. She and Kathryn E. Eckel migrated to this country in 1865. The other two sisters died in Germany leaving children there. Title to the premises in question was taken in the name of Anna E. Brehm who died before her husband. George H. Brehm, Sr., predeceased George H. Brehm and Katie Brehm and at the time of the death of Katie Brehm the record title of the premises in question stood in the name of Anna E. Brehm.

The question involved is:—

Whether the proper construction of the proviso in Section 5 of the Descent Act excludes brothers and sisters of the half blood from inheriting ancestral property when there are no brothers or sisters of the full blood or descendants of brothers or sisters of the full blood.

This question is raised by the trial judge refusing defendant's requests for findings of law (Case, pp. 19-24).

Grounds of Appeal Relied Upon.

3. The Court denied the defendant's request to rule that the proviso in Section 5 of the Descent Act excluded brothers and sisters of the half blood from inheriting ancestral property only when there are no brothers or sisters of the full blood or descendants of brothers or sisters of the full blood.

4. The Court denied the defendant's request to rule that the words "all those who are not of the blood of such ancestor (the ancestor from whom the property descended) shall be excluded from such inheritance" in Section 5 of the Descent Act, refers only to cases where the contest lies between brothers and sisters of the half blood or their descendants who are of the blood of the ancestor, and brothers and sisters of the half blood or their descendants who are not of the blood of the ancestor.

5. The Court refused to answer the following question in the affirmative as a matter of law:

"Does a half brother of the intestate, not of the blood of the ancestor from whom the estate came, take the estate, to the exclusion of an aunt of the intestate, being the sister of the ancestor from whom the estate descended?"

6. The Court denied the defendant's request to find that the plaintiff was not entitled to possession of the premises in question.

ARGUMENT.

POINT I.

The proviso in Section 5 of the Descent Act excludes brothers and sisters of the half blood from inheriting ancestral property only when there are no brothers or sisters of the full blood or descendants of brothers or sisters of the full blood.

1. Right of half blood to take by descent.

(a) At common law.

Prior to the English Statute governing the rights of half blood in the descent of real estate,

3 and 4 Will IV., Chapter 106, the half blood in England were barred from inheritance of real estate.

Blackstone in Book 2, Chapter 14, in endeavoring to justify the distinction between full blood and half blood inheritance says:

"It is certainly a very fine spun and subtle nicety; but considering the principles upon which our law is founded it is not an injustice nor always a hardship, since even the succession of the whole blood was originally a beneficial indulgence, rather than the strict rule of collaterals, and though that indulgence is not extended to the demi-kindred, yet they are rarely abridged of any right which they could possibly have enjoyed before."

Referring to this effort on the part of Blackstone to justify the feudal barring of the half blood, Sir Henry Maine in his *Ancient Law*, Chapter 5, says:

"In all the literature which enshrines the pretended philosophy of law, there is nothing more curious than the pages of elaborate sophistry in which Blackstone attempts to explain and justify the exclusion of the half blood."

Maine suggests the following explanation:

"In agnation, too, is to be sought the explanation of that extraordinary rule of English law, only recently repealed, which prohibited brothers of the half blood from succeeding to one another's property. In the customs of Normandy the rule applies to uterine brothers only—that is, to brothers by the same mother, but not by the same father—and, limited in this way, it is a strict deduction from the system of agnation under which uterine brothers are no relation at all to one another. When it was transplanted to England the English Judges,

who had no clue to its principle, interpreted it as a general prohibition against the succession of the half blood and extended it to consanguineous brothers; that is, to sons of the same father by different wives."

Whatever may have been the artificial distinction which the common law attempted to lay down, it seems to have been adopted for the purpose of promoting escheats to the Crown (2 Pollock & Marbland, History of Eng. Law, 2nd Ed., 305). The injustice of the common law rule was not only acknowledged in England, where by the statute above quoted, the rule was to a great extent abolished, but in our own State as early as 1780 and at an early date in other States, the law here was largely modified and the rights of the half blood were established by Legislative enactments.

(b) Under Section 5 of the Descent Act.

Annexed we have printed at length the changes in the Descent Act from 1780 to the present time having reference to the question at issue.

The Statute of 1780, which was passed on May 24th of that year (Patterson, 43), is quoted in full in the appendix to this brief. It is to be noted that this statute specifically recognizes the rights of brothers and sisters of the half blood to inherit, and *this without limitation of any kind*, except as between male and female, directed by the first section of the Act. In other words, the right of inheritance was granted to brothers and sisters of the half blood where there were no brothers or sisters of the full blood and there was no limitation as to ancestral property. It follows that the subsequent statutes, having reference to ancestral property, must be considered as a limitation upon the

rights of brothers and sisters of the half blood.

The Statute of April 5, 1816, repealed that section of the earlier statute distinguishing between persons male and female.

The Statute of February 15, 1816, is the first statute of this State containing a limitation somewhat similar to the present statute, with respect to ancestral property. It provides for the descent of real estate to brothers and sisters of the half blood equally as tenants in common, unless "when such inheritance came to the said person so possessed by descent, devise or gifts of some one of his or her ancestors, in which case all those children not of the blood of such ancestor shall be excluded from such inheritance." This act repeals the third section of the Act passed May 24, 1780, *supra*.

The fifth section of the Act, passed January 29, 1817, substantially is a reaffirmation of the earlier act, and contains the following words:

"Provided always that in case the said land, tenements or hereditaments come to the person so dying seized, by descent, devise or gift of some one of his or her ancestors, all those who are not of the blood of such ancestor shall be excluded from such inheritance."

This last mentioned act is the first enactment in this State recognizing rights of relatives of the half blood other than brothers and sisters and is the forerunner of Section 6 of the present Descent Act.

The Act of February 20, 1838 (Elmer's Digest, 131), contains practically the same proviso as in the Act of 1817.

The Act of April 16, 1846 (R. S., 337; Nixon's Digest, 235), contains this proviso:

"Provided, always, that in case the said

lands, tenements or hereditaments come to the person so dying seized, by descent, or gift of some one of his or her ancestors, all those who are not of the blood of such ancestors shall be excluded from such inheritance."

Section 5 of the Descent Act is in the same language as Section 5 of the Act of 1846.

The Descent Act of this State differs from similar Acts in some other States in that it designates certain persons as a class to whom the inheritance shall descend and it is only after these classes are exhausted that degrees of kindred are to be computed in the case of more remote relatives. The question to be determined is whether the proper construction of the proviso in Section 5 excludes brothers and sisters of the half blood from inheriting ancestral property when there are no brothers or sisters of the full blood or descendants of brothers and sisters of the full blood.

There is no case in this State exactly in point.

Our contention is that the words in the proviso,

"All those who are not of the blood of the ancestors shall be excluded from such inheritance,"

refers only to a case where the contest lies between brothers and sisters of the half blood or their descendants, *who are of the blood of the ancestors*, as against brothers and sisters of the half blood or their descendants *who are not of the blood of the ancestors*. For instance, let us assume that the mother of Katie Brehm in the case at bar had survived her husband and had remarried, having issue of her second marriage, and let us assume further that there was a con-

test between the present defendant and the issue of the second marriage of Annie Brehm. In that event there would be two classes of brothers and sisters of the half blood. The issue of the first marriage (George H. Brehm in this case) would not be of the blood of the ancestor of Katie Brehm. In such a case the proviso of the statute would clearly apply and the present defendant, George H. Brehm, would be excluded from the inheritance and the descent of such property would unquestionably go to the brothers and sisters of the second marriage, who were of the blood of the ancestor. In the case at bar, however, there are no brothers and sisters of the half blood who are of the blood of the ancestor. George H. Brehm is the only representative of the class specified in Section 5. It will be remembered that Section 5 has reference only to brothers and sisters of the half blood, and their descendants, the brothers and sisters of the full blood having been recognized in prior sections, the proviso applying only to a case where there are no brothers or sisters of the full blood. Any other construction of this section would inevitably lead to the conclusion that in the event that a decedent left a brother or sister of the half blood, leaving no relatives of the full blood surviving, the estate would escheat, unless, indeed, Section 6 of the Act confers any rights of inheritance upon brothers and sisters of the half blood.

It is submitted that Section 6 of the Act bears out our contention in every respect. It confers rights of inheritance upon more remote relatives of the full and the half blood than brothers or sisters and their descendants; in the event only that there are no brothers or sisters of the whole blood or half blood or issue of any such brother

or sister, and the significant part of the proviso as to ancestral property in Section 6 is contained in the words:

“If there be any person or persons in being of the blood of such ancestors capable of inheriting the said lands, tenements or hereditaments.”

In other words, under Section 6, if there are relatives of the half blood more remote than brothers or sisters and if there are no relatives *of the blood* of the ancestor, the property will descend to the more remote relatives of the half blood and will *not* escheat. The construction of Section 5 absolutely excluding from the inheritance brothers and sisters of the half blood, not of the blood of the ancestor, will lead to the absurd conclusion that more remote relatives of the half blood, not of the blood of the ancestor are protected by Section 6 in the event that there are no relatives of the blood and that those remote relatives of the half blood will in such an event inherit pursuant to Section 6, to the exclusion of brothers and sisters of the half blood.

Under the Statute of 1780 brothers and sisters of the half blood, as has been pointed out, were made a specially favored class. Their right of inheritance was unlimited and under the decisions of the courts of this State at that time this was recognized and it was held that the Statute of 1780 conferred right of inheritance upon brothers and sisters of the half blood only and not upon their descendants.

Stretch *v.* Stretch, 4 N. J. L., 211.

It is unnatural to exclude a close relative of the decedent, a brother or a sister, even though of the half blood, from the inheritance, and we con-

tend that this is expressly recognized by the statute of this State, as it has been by the decisions of many courts in other States.

In the case at bar Kathryn E. Eckel happens to be an aunt of this decedent, but if her construction of the Act is adopted, a third or fourth cousin of the decedent's mother, who happens to be of the blood of the decedent's mother, would inherit, to the exclusion of a half blood brother of the decedent.

Our contention, which is borne out by the construction of similar statutes in other States, is that the proviso in Section 5 should be confined to those cases in which there are, in the same degree of relationship to the intestate, relatives of the half blood, some of whom are of the blood of the ancestor. In other words, Section 5 singles out brothers and sisters of the half blood and their descendants, and confers a prior right upon the members of that class who are of the blood of the ancestor, but if there are no brothers or sisters of the blood of the ancestor, it is not the intention of the statute to pass the inheritance over to the more remote relatives, whose right to inheritance is to be determined by computation based upon the degree of kinship. The construction contended for by us has been adopted in other States, although the difficulties in those States were greater than those which exist in the case at bar.

As has been pointed out, the Statute of 1780 conferred a complete unlimited right upon brothers of the half blood to inherit and this irrespective as to whether the property was ancestral or not.

The limitation contained in the proviso of the present act operates not only as a limitation upon the broad rights of brothers and sisters of the

half blood conferred by the Statute of 1780, but furthermore, the proviso operates upon the grant to half blood brothers and sisters and their descendants, conferred in the enacting clause of Section 5. Under well-known rules of statutory construction the proviso should be strictly construed in favor of brothers and sisters of the half blood and their descendants. The general rule is cited in 36 Cyc., at page 1162:

"The enacting clause is, of course, the principal part of the Statute, and as its terms may be presumed to have embodied the main object of the Act, the proviso should be strictly construed (citing *Clark Thread Co. v. Kearney*, 55 N. J. L., 50)."

As will appear from the cases hereafter cited, modern American jurisprudence shows a decided tendency to construe the rights of the half blood broadly, so as to favor relatives of the half blood and so as to limit the restriction as to ancestral property of feudal origin and to favor the close relatives of the decedent, even though of the half blood, and particularly brothers and sisters.

As has been stated the question now before this Court has not been decided in New Jersey under the present or similar statutes. The early case of *Den v. Urison*, 2 N. J. L., 197, was overruled by the case of *Arnold v. Phœnix*, 5 N. J. L., 1015. The latter case arose under the Statute of 1780. It is most significant in its bearing upon the question of the intent of the Legislature in adopting the proviso as to ancestral property. That case (*Arnold v. Phœnix*) presented a contest between two sets of brothers and sisters of the half blood, some of whom were of the blood of the ancestor and some of whom were not. The Court held that under the Statute of 1780

all of the half blood brothers and sisters took as tenants in common. In other words, although the property was ancestral, those half blood brothers and sisters who were of the blood of the ancestor *were not* preferred to the half blood brothers and sisters who were not of the blood of the ancestor. The decedent in the last mentioned case died in 1811, and while the case was not tried until 1817, it is quite possible that the contest had arisen on and before February 15, 1816, when the law was passed adopting a proviso similar to the one contained in the present statute. The statute of February 15th, 1816, was entitled, "An Act directing the descent of real estate *to persons of the half blood.*"

If the plaintiff's construction is adopted, the effect of the Statute of 1816 was to limit the earlier statute conferring rights of inheritance upon half blood brothers and sisters, while it is our contention that the purpose of the statute and the proviso was not to limit rights of the half blood but merely to exclude brothers and sisters of the half blood *not* of the blood of the ancestor if there were brothers and sisters of the half blood who *were* of the blood of the ancestor.

It will be noted that up to this time the statute conferred no right upon more remote half blood relatives, Section 6 of the statute not having been adopted until 1817.

In the case of *Stretch v. Stretch*, 4 N. J. L., 211, it had been held that under the Statute of 1780, half blood more remote than the class specified in the statute did not inherit.

If our opponent's construction is correct, this would have been a more proper title for the law of February 15, 1816, "An Act limiting the descent of real estate to persons of the half blood and promoting escheats."

The case most relied upon by our opponents is *Delaplaine v. Jones*, 8 N. J. L., 340.

In that case the property was awarded to brothers of the half blood who happened to be remotely related to the ancestor and were therefore of the blood of the ancestor. It is obvious that while the opinion of the learned judges who sat in this case is of course entitled to respect, the question at issue in the case at bar was not decided, but was purely dictum. We cannot find that the construction contended for by us was presented to the Court, and of course, the case was not decided in the light of what may be called the modern doctrine as to the rights of the half blood. The dictum in the *Delaplaine* case has not become and could not be regarded as a basis of a rule of property. There is a wide distinction between a rule of property based upon a *binding* though possibly erroneous decision and a claim of a rule of property based upon the dictum of a Court. There is a presumption that a binding decision of the precise question has in the course of time ripened into a rule of property. No such presumption obtains in the case of a dictum.

The Supreme Court of the United States in an action for ejectment, *Carroll v. Carroll*, 17 How., 275, at page 286, held:

“And therefore, this Court and other courts organized under the common law, has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties. In *Cohens v. The State of Virginia*, 6 Wheat., 399, this Court was much pressed with some portion of its opinion in the case of *Marbury v. Madison*, and Mr. Chief Justice Marshall, said: ‘It is a maxim not to be disregarded that general

expressions in every opinion are to be taken in connection with the case in which these expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent; other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.' ”

Who will say that if the precise question had been argued and all the consequences of the construction contended for by our opponent had been pointed out that the decision of the learned Court in the Delaplaine case would not have differed from the dictum contained therein. As it was, the learned judge writing the opinion at page 350, quoted from a decision in Kings Bench, 2 Mod., 206, as follows:

“Such construction should be made of the statute as would be most agreeable to the will of the dead person if he had devised his estate by will and it was not to be imagined that if such will had been made but something would have been given to the children of the half blood.”

So in the case at bar, it was hardly probable that a decedent would have excluded a brother of the half blood from the inheritance of the property which they jointly occupied at the time of her death, and to have it or a substantial part of it perchance pass to cousins in a foreign country of whom she probably had never heard.

The supposed case which finds some analogy in the case at bar well illustrates the weakness of

the argument in favor of the rights of those of the blood of the ancestor. The property though ancestral, belonged to the decedent, who might have disposed of the same by deed or by will. It might have been greatly improved with the money of the last purchaser. The search for some one of the blood of the ancestor might lead into the house of a practical stranger who would take in preference to the half blood brother or in default of such a person the estate might escheat.

The term ancestral estate smacks of feudal times and in the construction of the statute consideration should be given to the changes in conditions since the doctrine of ancestral property first arose. Consideration should also be given to the consequences above pointed out of adopting the construction of the statute contended for by the appellee.

That the Trial Judge was inclined to the view contended for by the appellant is shown by the reasons given for his findings. He says:

"That there is strong reason in favor of the view contended for by defendant, and that the modern trend of decisions in construing similar statutes is favorable to that view, is, I think, true, and, if this case were untrammelled by the decisions of our own State, to which I have hereinbefore adverted, I should feel strong leaning toward that view myself. But sitting as I do at circuit, and confronted as I am by those decisions, I conceive it to be my duty to follow the path therein plainly indicated" (Case, p. 24).

We respectfully submit that, there being no binding decision in this State, the construction which has been followed in most other states and which seems to correspond more closely to reason and natural justice should be adopted in the case at bar.

(c) Courts of other States have construed similar statutes of those States in the manner contended for by appellant.

Robertson *v.* Burrell, 40 Ind., 328;

Pond *v.* Irwin, 113 Ind., 243; 115 N. E., 274;

Rowley *v.* Stray, 32 Mich., 70;

Ryan *v.* Andrews, 21 Mich., 229;

Matter of the Estate of Smith, 131 Cal., 433 and cases cited;

Farmers Loan & Trust Co. *v.* Polk, 166 A. D. (N. Y.), 43;

Woerner's American Law of Administration, 2nd Ed., Page 154.

In Robertson *v.* Burrell, 40 Ind., 328, a contest arose between paternal brothers and sisters of the half blood of the decedent and uncles, two brothers of the mother of the decedent, the property having been inherited by the decedent from a maternal ancestor. In other words, the half blood brothers and sisters were not of the blood of the ancestor. The brothers of the mother were of the blood of the ancestor. The VI Act of the Statute of Descents of Indiana at that time provided as follows:

"Kindred of the half blood shall inherit equally with those of the whole blood; but if the estate shall have come to the intestate, by gift, devise, or descent, from any ancestor, those only who are of the blood of said ancestor shall inherit; provided that on failure of such kindred other kindred of the half blood shall inherit as if they were of the whole blood" (p. 331).

In holding that the brothers and sisters of the half blood inherited the ancestral property though not of the blood of the decedent, who

were of the blood of the ancestor, the court said (p. 334):

"The circuit court placed the construction upon the section contended for by counsel for the appellees and held that the sister and brothers of the half blood were only postponed in favor of half brothers and sisters who were of the blood of the ancestor from whom the land descended, and not in favor of the uncles and cousins of the deceased of the blood of such ancestor; and, that as the deceased left no brothers or sisters of the blood of such ancestor, the sister and brothers not of the blood of such ancestor inherited the land * * *.

"After the best examination which we can bestow upon the question, we have come to the conclusion that the construction placed upon the section by the circuit court is correct. We think it should be construed as if it read as follows: 'Kindred of the half blood shall inherit equally with those of the whole blood; but, if the estate shall have come to the intestate by gift, devise, or descent, from any ancestor, those kindred of the half blood only who are of the blood of such ancestor shall inherit; provided, that on failure of such kindred of the half blood having the blood of such ancestor, other kindred of the half blood shall inherit as if they were of the whole blood.'

"In arriving at the meaning of a statute, the whole system of legislation upon the subject-matter may be taken into consideration, in order to aid in the construction of it; hence, other statutes in *pari materia*, whether they have been repealed or not, may be considered. Smith Com. Con. Constr., 751. We have accordingly examined our legislation on this subject from the beginning. The ordinance of 1787 provided that there should 'in no case be a distinction between kindred of the whole and half blood.' 1 G. & H., 710. The first express mention which we find of

kindred of the half blood in the statutes of the State is in the Revised Statutes of 1838, p. 237, where it is provided that half brothers or sisters, or their descendants, shall, if there be brothers or sisters of the whole blood, inherit each to the amount of one-half the share of a full brother or sister; and if there is no brother or sister of the whole blood alive, then the half brothers or sisters or their descendants shall inherit in the same way as if they were full brothers or sisters or their descendants.

"The statute of 1843, p. 436, Sec. 4, provided as follows: 'Kindred of the half blood, and their descendants, shall inherit equally with those of the whole blood in equal degree of consanguinity to the intestate; unless the inheritance shall have come to the intestate by descent, devise, or gift of some of his ancestors; in which case such kindred of the half blood and their descendants shall not inherit, except they also be of the blood of such ancestor; but if in any such case there be no relatives of the whole blood, in equal or nearer degree of consanguinity to such intestate, nor their descendants, entitled to take such inheritance according to the provisions of this article, then such kindred of the intestate, of the half blood, and their descendants, shall take the same as if they were of the whole blood.' It cannot be reasonably supposed that the legislature, after having thus liberally provided for kindred of the half blood in the revisions of 1838 and 1843, intended by that of 1852 to postpone them until after there was a failure of all kindred of the intestate who have the blood of the ancestor from whom the estate descended, however remote in degree."

In *Pond v. Irwin*, *supra*, a contest arose between a half brother of the decedent and the brother of the ancestor (the mother of decedent).

The Statute of Indiana, 1861, Section 2472, provided as follows:

“Kindred of the half blood shall inherit equally with those of the whole blood; but if the said inheritance shall have come to the intestate by deed, gift or devise or descent from any ancestor, those only who are of the blood of the ancestor shall inherit, provided that on failure of such kindred, other kindred of the half blood shall inherit, as if they were kindred of the whole blood.”

In holding that under this Statute the half brother not of the blood was preferred to the brother of the ancestor, the Court stated:

“Applying the section as thus construed to the case before us, it means, by way of illustration, that if Elizabeth Bratton had also left surviving her a half brother or half sister on her mother’s side—that is, of the blood of the mother—he or she would have taken the estate which descended to the said Elizabeth from her mother, to the entire exclusion of John R. Bratton, and who is not of the same maternal blood; but that as she, the said Elizabeth, left no brother or sister, either of the whole blood or half blood on the mother’s side, her entire estate in the land descended to John R. Bratton as if he were of the whole blood. With this construction, and as thus applied, we are entirely content. We might perhaps without the palpable violation of the phraseology used, give to the section under consideration the construction insisted upon by the appellant, but if the question was one of first impression, we would not regard such a construction as imperative. When a statute does not really require a different interpretation, we believe that justice is best promoted by preferring brothers and sisters of the half blood to others more distantly related and in that view, we think that the conclusion heretofore

reached on the question here involved, ought to be favorably considered."

The case of *Rowley v. Stray*, *supra*, was decided in the Supreme Court of Michigan, Judge Cooley writing the opinion. The Statute of Descents in that State provided that in case of an intestacy, the property should descend to certain persons, such as issue, widow, father, brother or sister. It then provided (Section 4314), that degrees of kindred shall be computed according to the rules of the civil law, and kindred of the half blood should inherit equally with those of the whole blood in the same degree, unless the inheritance came to the intestate by descent, devise or gift of some one of his ancestors, in which case, all those who are not of the blood of said ancestor shall be excluded from such inheritance. A contest arose between the brothers and sisters of the half blood and the decedent's grandmother, the mother of his father. The property had been inherited by the decedent from his father. The half brothers were the issue of a second marriage by the decedent's mother and they were, therefore, not of the blood of the ancestor.

In that case Judge Cooley says:

"The plaintiff claims that as the intestate left surviving him neither issue, nor widow, nor father, nor mother, the land under the third subdivision of Section 4309 descended to the brothers and sisters; and although it was ancestral estate, yet as there are no brothers or sisters of the whole blood, this circumstance becomes immaterial and those of the half blood must inherit. On the other hand, the position of the defendants is that as the father's mother and the brothers and sisters of the half blood all stand to the deceased in the same degree of relationship

computed by the rules of the civil law, and as the latter are not of the father's blood, they are excluded by the express terms of Section 4314, and the father's mother becomes the sole heir. And this position would seem to be impregnable if descent under the facts of this case is to be determined on a computation of the degrees of kinship.

"It is very evident, however, that the statute has classified heirs by a designation of relationship instead of by computation of degrees of kindred, and that it is only when no persons are found answering to the designation, that resort is had to computation. The descent, saying nothing of representation of deceased persons, who, if living, would have been heirs, is: first, to children; second, to the widow and father, if any; third, to brothers and sisters and the mother; fourth, to the mother when there is neither issue, widow, father, brother nor sister; and when none are found in either of these classes, then, fifth, to the next of kin in equal degree under the rules which the statute lays down. It is obvious from this statement that when under the statute an estate passes to designated relatives, it does so because of the particular relationship, and not because the persons who take are of kin to the intestate within any certain degree, measured by some arbitrary standard or mode of computation. A computation of degrees is not resorted to at all in this case and if it were to be applied, it would in some cases change the order of descent very materially. One's child is no nearer of kin to him than his mother; though by the statute he is two degrees nearer in the line of descent; and the same may be said of a grandparent, as compared with a brother or sister; each being related to the propositus in equal degree, but the former being two removes further off in the line of descent marked out by the Statute. It is, therefore, manifest that the general intent of the statute

is not that the descent shall be governed by nearness in blood to the intestate; favored classes are designated, and it is only when those fail that resort is had to computation of degrees of kindred. And as these favored classes include the children and their descendants, the widow, the father and mother, and brothers and sisters, the happening of a case where these all fail is quite exceptional and leaves the provision for finding the heir by a computation of degrees of kindred as one merely for the contingency when the classes whom it is the policy of the statute to favor are found wholly to fail.

"There being in this case neither issue, nor widow, nor father, nor mother, the case is in the very words of the third subdivision, 4309, and brothers and sisters must take, unless this provision is qualified by some other. It is conceded that when brothers and sisters are mentioned, the half blood are included, and so are the authorities (citing cases). The only provision which defendants rely upon as qualifying this, is that contained in Section 4314, that 'kindred of the half blood shall inherit equally with those of the whole blood in the same degree, unless the inheritance came to the intestate by descent, devise or gift of some one of his ancestors, in which case, all those who are not of the blood of such ancestors shall be excluded from such inheritance.' This provision, it is insisted, qualifies the whole statute and excludes the half blood from participation in ancestral estate in every case where kindred of equal degree and of the blood of the ancestor are found. If this construction is sound, it is difficult to understand why a grandparent, who is to exclude the brothers and sisters of the half blood from the inheritance, should not participate with brothers and sisters of the whole blood, or why the mother should not share the estate with the child. The only answer to such a suggestion is that the descent is

not made to depend on nearness of kindred but on the statutory classification. But this answer is quite conclusive. It is only when a preferred class fails entirely that we are to look further to ascertain who in that contingency is to become the heir. And it is only when all the preferred classes fail, that a computation of degrees of kindred becomes necessary.

"In the present case the preferred class having living representatives proves to be that which embraces brothers and sisters. If the estate were not ancestral, those of the whole or of the half blood would take equally; being ancestral, those of the half blood would be excluded if there were any of the whole blood to take, but as there are none, there can be no exclusion. If we understand Section 4314 as a qualification of the whole statute, then we must apply it distributively to the several subdivisions of 4309, and so applied, it can mean no more than this: that when the inheritance falls to a certain designated class of persons, these will share it equally, unless the estate was ancestral, in which case, the half blood not of the blood of the ancestor shall be excluded. The exclusion goes no further. It favors the whole blood of the particular class only and does not pass the inheritance over to a subsequent class so long as any of the preferred class remain. * * * A discrimination against the half blood is the exception and is not to be extended by construction beyond the obvious intent. And nothing seems plainer to us than that under this statute the half blood are only excluded, when there are others in the same statutory class who are to be preferred by reason of being of the blood of the ancestor from whom the estate came to the intestate. This was the view taken by us when *Ryan v. Andrews*, 21 Mich., 249, was before us, and further reflection has confirmed us in it."

Applying the rules laid down by Judge Cooley in the case last cited to the case at bar, it is apparent that the New Jersey Statute, as did the Michigan Statute, has designated certain favored classes contained in Sections 1 to 5 inclusive of the Descent Act. It is only by Section 6 of the Descent Act that computation of the degrees of kinship must be resorted to in order to determine who are the next of kin. If there are two sets of brothers and sisters of the half blood, those of the blood of the ancestor will be preferred to those who are not, but if, as in the case at bar, there are no brothers and sisters of the blood of the ancestor, then the inheritance "does not pass the inheritance over to a subsequent class, so long as any of the preferred class remain." The reasoning of Judge Cooley applies with particular force to our New Jersey Statute, because Section 6 of the act, while making particular provision for the half blood more remote than the brothers and sisters, in the event that there are no persons of the blood of the ancestor, does not provide for brothers and sisters of the half blood. This follows from the words in the proviso of Section 6, not contained in the proviso of Section 5:

"If there be any person or persons in being
* * * of the blood or half blood of such
ancestors, capable of inheriting the said
lands."

It is evident that the Legislature intended that before resort should be had to Section 6 it would be necessary to exhaust the favored classes contained in Sections 1 to 5, whether they were of the blood of the ancestor or not.

In *Smith's Estate*, 131 Cal., 433, 63 Pac., 729, Section 1394 of the California Code, provided as follows:

"Kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance came to the intestate by descent, devise or gift of some one of his ancestors, in which case, all those who are not of the blood of such ancestors must be excluded from such inheritance."

The question decided by the Court was whether under this statute half-sisters of the decedent, who were not of the blood of the ancestor, would inherit as against more remote relatives of the blood of the ancestor. We quote from the head-note of this case, as follows:

"The exception of Section 1394 of the Civil Code, excluding kindred of the half blood in favor of kindred of the whole blood, where the former are not of the blood of the ancestor from whom the estate came by descent, devise or gift, applies only when such kindred are in the same degree and has no application where the degrees are not the same."

The New York Statute contains a provision similar to that found in the proviso of Section 5 of the New Jersey Act. Section 90 of the Decedent Estate Law provides:

"Relatives of the half blood and their descendants shall inherit equally with those of the whole blood and their descendants, in the same degree, unless the inheritance came to the intestate by descent, devise or gift from an ancestor; in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance."

While the question in the case at bar, as appears from the recent case of *Farmers Loan & Trust Company against Polk*, 166 A. D., page 43, has not been squarely decided in New York, the Appellate Division of New York in the case last cited, says (p. 50):

"The learned counsel for the respondents contend that the exception in the statute excluding relatives of the half blood should be confined to those cases in which there are, *in the same degree of relationship to the intestate*, relatives of the whole and half blood, some, but not all of whom, are of the blood of the ancestor, and not to exclude relatives of the half blood altogether, for, under such a construction the property would escheat to the estate, if there happened to be no relative of any degree of the blood of the ancestor, and argues in support thereof that it would be most unreasonable to hold that the Legislature intended that relatives of the half blood should participate equally with those of the whole blood, with respect to all of the realty of an intestate which did not come to him from an ancestor, but that as to realty which came to him from an ancestor, the relatives of the half blood, not of the blood of the ancestor, could not inherit at all, even though there are no relatives of the blood of the ancestor to inherit. The point is both interesting and important. We have not been referred by counsel to any authoritative decision on it in our own jurisdiction, and we have found none, but it has arisen under similar statutes in other States; and the construction urged has quite generally, but not in all cases, been adopted (citing cases)."

The distinctions which have been pointed out in the above cases are Mr. Woerner's in his text book, *The American Law of Administration*, second edition, page 154, where, in referring to statutes of the kind under discussion, it is stated:

"It is also to be noted that the distinction between the devolution of ancestral and other estates is not usually construed as diverting the descent of an ancestral inheritance from the *nearest of kin*, but only from those not of the ancestral blood, who are in the same degree of kinship with others who

are of the ancestor's blood. Thus, if the statute classifies the heirs by designation of relationship and not by computation of degrees of kindred, computation can be resorted to only if no persons are found to answer the designation of the statute."

POINT II.

The judgment should be reversed.

Respectfully submitted,

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JOHN W. QUEEN,
BERNARD G. HEYN (New York Bar),
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November Term, 1917.

Descent Acts From 1780, Referring to the Question at Issue.

"An Act to Alter the Law Directing the Descent of Real Estates" (Passed May 24th, 1780, Paterson 43).

Section 3.—*And whereas* by the law, as it now stands, the issue of an ancestor by one venter cannot inherit to the issue of such ancestor by a different venter, whereby the real estate of an ancestor in some instances goes out of the family, to the great injury of the remaining issue of such ancestor; for remedy whereof, *Be it further enacted by the authority aforesaid*, that if any person possessed of, or entitled to a real estate,

in his or her own right, in fee simple, shall die without making a will disposing thereof, and without any brother or sister, or any issue of such brother or sister, of the whole blood, and shall leave a brother or brothers, a sister or sisters, a brother and a sister, or sisters or brothers, and a sister or sisters, of the half blood, the said real estate of such person shall descend to and be inherited by such kindred, as the case may be, of the half blood, in the manner and proportions between male and female directed by the first section of this act.

“A Supplement to an Act Entitled ‘An Act to Alter the Law Directing the Descent of Real Estates’ ” (Passed February 5th, 1816).

Section 1.—Be it enacted by the Council and General Assembly of this State, and it is hereby enacted by the authority of the same, that from and after the fourth day of July next, whenever any person who is lawfully seized or possessed of, or entitled to, any real estate in his or her own right, in fee simple, within this State, shall die intestate, leaving two or more heirs lawfully entitled to the same; such real estate shall descend to, and be inherited by his or her said heirs, whether male or female, lineal or collateral, in equal shares or proportions.

Section 2.—*And be it enacted*, that so much and no more, of the act entitled, “An act to alter the the law directing the descent of real estates,” passed the twenty-fourth day of May, A. D. one thousand seven hundred and eighty—and so much of the fourteenth section of the act entitled, “An Act to ascertain the power and authority of the Ordinary and his Surrogates, to regulate the jurisdiction of the prerogative court, and to establish an Orphans’ Court in the several counties of

this state," passed the sixteenth day of December, one thousand seven hundred and eighty-four, as directs that real estate descending by inheritance to persons male and female, shall be inherited by and divided between them in such proportions, as that each male heir shall have two shares, each of which shares shall be equal to the share of each female heir, be, and the same is hereby repealed.

"An Act Directing the Descent of Real Estate to Persons of the Half Blood" (Passed February 15th, 1816).

Section 1.—Be it enacted by the Council and General Assembly of this state, and it is hereby enacted by the authority of the same, that if any person possessed of, or entitled to a real estate in his or her own right, in fee simple, shall die without making a will disposing thereof, and without lawful issue, or any brother or sister, or any issue of such brother or sister of the whole blood, and shall leave a brother or brothers, a sister or sisters, a brother and a sister, or sisters or brothers and a sister or sisters of the half blood, the said real estate of such person shall descend to such brothers or sisters or to such brother or brothers and sister or sisters, as the case may be of the half blood as tenants in common, in equal parts unless when such inheritance came to the said person so possessed by descent, devise or gifts of some one of his or her ancestors in which case all those which are not of the blood of such ancestor shall be excluded from such inheritance.

Section 2.—And be it enacted, that the third section of the act directing the descent of real estate, passed the twenty-fourth day of May, seventeen hundred and eighty, be and the same is hereby repealed.

"An Act Directing the Descent of Real Estates."
(Passed January 29th, 1817.)

Section 1.—*Be it enacted*, by the Council and General Assembly of this State, and it is hereby enacted by the authority of the same, That when any person shall die seized of any lands, tenements or hereditaments in his or her own right in fee simple, without devising the same in due form of law, leaving two or more lawful children, such lands, tenements or hereditaments shall descend to and be equally inherited by all the lawful children of such person so seized, as tenants in common, and in equal parts without regard to sex: Provided always, That if any child of the person so dying seized shall have died before his said ancestor leaving lawful issue, the share or part of the said lands, tenements or hereditaments which such child so dying would have been entitled to, under and by virtue of this act, if such child had survived the person so dying seized, shall descend to and be inherited by such issue, in the manner and in equal parts as before mentioned. And the same law of inheritance and descent shall be observed in case of the death of the grandchildren, and other descendants, to the remotest degree: And provided also, That if any such ancestor shall in his life time have given or advanced any part of his or her lands, tenements or hereditaments to any of his or her issue, such issue shall not be entitled to any part or share of such ancestor's real estate descending under or by virtue of this act, unless the real estate so given or advanced, shall not be equal in value to the respective shares of the other issue in the same degree of affinity, as the case may be, and then

no more than will be sufficient to make such share equal in value to the respective shares of the other issue in the same degree of consanguinity to the said deceased ancestor.

Section 2.—And be it enacted, That all posthumous children shall, in all cases whatsoever, inherit in like manner as if they were born in the life time of their respective fathers.

Section 3.—And be it enacted, That when any person shall die seized of any lands, tenements, or hereditaments in his or her own right in fee simple, without devising the same in due form of law, and without leaving lawful issue, leaving a brother or sister, or leaving a brother or brothers, and a sister or sisters of the whole blood, the inheritance shall descend to such brother or sister, or to such brother or brothers, and sister or sisters, as the case may be, as tenants in common, in equal parts. And in case any such brother or sister who would have inherited by this law, if living, shall die before the said person so seized, and leave a lawful child or children, such child or children surviving the said person so seized, shall inherit, if a child solely, and if children, as tenants in common in equal parts, such share as would have descended to his, her or their father or mother, if such father or mother had survived the person so seized. And the same law of inheritance and descent shall be observed in case of the death of any child of such brother or sister before the person so seized, leaving a child or children.

Section 4.—And be it enacted, That when any person shall die seized of any lands, tenements, or hereditaments as aforesaid, without devising the same in due form of law, and without leaving

lawful issue, and without leaving a brother or sister of the whole blood, or any lawful issue of any such brother or sister, leaving a father, then the inheritance shall go to the father of the said person so seized, in fee simple, unless the said inheritance came to the person so seized from the part of his or her mother by descent, devise, or gift, in which case it shall descend as if such person so seized had survived his or her father.

Section 5.—And be it enacted, That when any person shall die seized of any lands, tenements, or hereditaments as aforesaid, without devising the same in due form of law, and without leaving a brother or sister of the whole blood, or any lawful issue of any such brother or sister, and without leaving a father capable of inheriting the said lands, tenements or hereditaments, by this act, and shall leave a brother or sister of the half blood, or a brother or brothers and a sister or sisters of the half blood, the inheritance shall descend to such brother or sister of the half blood, or to such brother or brothers, and sister or sisters of the half blood, as the case may be, as tenants in common in equal parts; and in case any such brother or sister of the half blood who would have inherited by this act if living, shall die before the person so seized and leave a lawful child or children, such child or children surviving the said person so seized, shall inherit if a child solely, and if children, as tenants in common in equal parts such share as would have descended to his, her or their father or mother, if such father or mother had survived the said person so seized. And the same law of inheritance and descent shall be observed in case of the death of any child of

such brother or sister of the half blood, before the person so seized, leaving a child or children: Provided always, That in case the said lands, tenements or hereditaments came to the person so dying seized, by descent, devise or gift of some one of his or her ancestors, all those who are not of the blood of such ancestor shall be excluded from such inheritance.

Section 6.—And be it enacted, That when any person shall die seized of any lands, tenements or hereditaments as aforesaid, without devising the same in due form of law, and without lawful issue, and without leaving a brother or sister of the whole blood, or half blood or the issue of any such brother or sister, and without leaving a father capable of inheriting by this act the said lands, tenements or hereditaments, and shall leave several persons all of equal degree of consanguinity to the person so seized, the said lands, tenements or hereditaments shall then descend and go to the said several persons of equal degree of consanguinity to the person so seized, as tenants in common, in equal parts, however remote from the person so seized the common degree of consanguinity may be. Unless where such inheritance came to the said person so seized by descent, devise or gift of some one of his or her ancestors, in which case all those who are 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 said lands, tenements or hereditaments.

Section 7.—Provided always, and be it enacted, That nothing herein contained shall be construed or taken to bar or injure the rights or estate of a husband as a tenant by the courtesy, or a

widow's right of dower, or to make void or in any way affect any marriage settlement.

Section 8.—And be it enacted, That the act entitled, “An Act to alter the descent of real estate,” passed the twenty-fourth day of May, *Anno Domini* one thousand seven hundred and eighty. And so much of the fourteenth section of the act entitled, “An Act to ascertain the powers and authority of the Ordinary and his Surrogates, to regulate the jurisdiction of the Prerogative Court, and to establish an Orphans’ Court in the several counties of this State,” passed the sixteenth day of December, one thousand seven hundred and eighty-four, as directs that real estates descending by inheritance to persons male and female shall be inherited by and divided between them in such proportions, as that each male heir shall have two shares, each of which shares shall be equal to the share of each female heir; and the act entitled “An Act to alter the law directing the descent of real estates,” passed February 5th, one thousand eight hundred and sixteen; and also the act entitled, “An Act directing the descent of real estate to persons of the half blood,” passed February fifteenth, one thousand eight hundred and sixteen, be and the same are hereby repealed.

“Supplement to the Act Entitled, ‘An Act Directing the Descent of Real Estates.’” (Passed February 20th, 1838. Elmer’s Digest 131.)

Section II.—When any person shall die seized of any lands, tenements, or hereditaments as aforesaid, without devising the same in due form of law, and without leaving lawful issue, and without leaving a brother or sister of the whole blood, or any lawful issue of any such brother or sister, and without leaving a father or mother

capable of inheriting the same lands, tenements, or hereditaments by this act, and shall leave a brother or sister of the half blood, or a brother or brothers, and (or?) a sister or sisters of the half blood, the inheritance shall descend to such brother or sister of the half blood, or to such brother or brothers, and (or?) sister or sisters of the half blood, as the case may be, as tenants in common, in equal parts; and in case any such brother or sister of the half blood, who would have inherited by this act, if living, shall die before the person so seized, and leave a lawful child or children, such child or children surviving the said person so seized, shall inherit, if a child, solely, and if children, as tenants in common, in equal parts, such share as would have descended to his, her, or their father or mother, if such father or mother had survived the person so seized; and the same law of inheritance and descent, shall be observed in case of the death of any child of such brother or sister of the half blood, before the person so seized, leaving a child or children; *Provided*, in case the said lands, tenements, or hereditaments came to the person so dying seized, by descent, devise, or gift of some one of his or her ancestors, all those who are not of the blood of such ancestors, shall be excluded from such inheritance.

Section III.—When any person shall die seized of any lands, tenements, or hereditaments, as aforesaid, without devising the same in due form of law, and without lawful issue, and without leaving a brother or sister of the whole blood or half blood, or the issue of any such brother or sister, and without leaving a father or mother capable of inheriting by this act, the said lands,

tenements, or hereditaments; and shall leave several persons all of equal degree of consanguinity to the persons so seized, the said lands, tenements, or hereditaments, shall then descend and go to the said several persons of equal degree of consanguinity to the persons so seized, as tenants in common, in equal parts, however remote from the person so seized the common degree of consanguinity may be; unless where such inheritance came to the said person so seized, by descent, devise or gift of some one of his or her ancestors; in which case all those who are 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 said lands, tenements, or hereditaments; *Provided always*, that nothing contained in this act, nor in the act to which this is a supplement, shall be construed or taken to bar or injure the rights or estate of a husband, as a tenant by the curtesy, or a widow's right of dower, or to make void or in any way affect any marriage settlement.

Section IV.—The fifth, sixth and seventh sections of the act entitled, “An act directing the descent of real estates,” passed the twenty-ninth of January, eighteen hundred and seventeen, be, and the same are hereby repealed.

“An Act Directing the Descent of Real Estates.” (Passed April 16th, 1846, R. S., 337; Nixon's Digest, 235.)

Section 5.—When any person shall die seized of any lands, tenements or hereditaments, as aforesaid, without devising the same in due form of law, and without leaving lawful issue, and without leaving a brother or sister of the whole blood, or any lawful issue of any such brother

or sister, and without leaving a father or mother capable of inheriting the said lands, tenements or hereditaments by this act, and shall leave a brother or sister of the half blood, or a brother or brothers, and a sister or sisters of the half blood, the inheritance shall descend to such brother or sister of the half blood, or to such brother or brothers, and sister or sisters of the half blood, as the case may be, as tenants in common, in equal parts; and in case any such brother or sister of the half blood, who would have inherited by this act, if living, shall die before the person so seized, and leave a lawful child or children, such child or children, surviving the said person so seized, shall inherit, if a child, solely, and if children, as tenants in common, in equal parts, such share as would have descended to his, her or their father or mother, if such father or mother had survived the person so seized; and the same law of inheritance and descent, shall be observed in case of the death of any child of such brother or sister of the half blood, before the person so seized, leaving a child or children: *Provided always*, that in case the said lands, tenements or hereditaments came to the person so dying seized, by descent, devise or gift of some one of his or her ancestors, all those who are not of the blood of such ancestors, shall be excluded from such inheritance.

Section 6.—When any person shall die seized of any lands, tenements or hereditaments, as aforesaid, without devising the same in due form of law, and without lawful issue, and without leaving a brother or sister of the whole blood or half blood, or the issue of any such brother or sister, and without leaving a father or mother capable of inheriting by this act the said lands,

tenements or hereditaments, and shall leave several persons all of equal degree of consanguinity to the person so seized, the said lands, tenements or hereditaments shall then descend and go to the said several persons of equal degree of consanguinity to the person so seized, as tenants in common in equal parts, however remote from the person so seized the common degree of consanguinity may be, unless where such inheritance came to the said person so seized by descent, devise or gift of some one of his or her ancestors, in which case all those who are 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 said lands, tenements or hereditaments; *Provided always*, that nothing contained in this act, shall be construed or taken to bar or injure the rights or estate of a husband, as a tenant by the curtesy, or a widow's right of dower, or to make void or in any way affect any marriage settlement.

Section 5 of the Descent Act (2 Comp. Stat., 1919) is in the same language as Section 5 of the Act of 1846.

Section 6 of the Descent Act (2 Comp. Stat., 1920) is changed, the italicized words being added to Section 6 of the Act of 1846 and that part commencing "and provided further" being added.

Section 6.—When any person has or shall die hereafter, seized of any lands, tenements or hereditaments as aforesaid, without devising the same in due form of law, and without leaving lawful issue, and without leaving a brother or sister, of the whole blood or half blood, or the issue of any such brother or sister, and without

leaving a father or mother, capable of inheriting under this act, the said lands, tenements or hereditaments, and shall leave several persons, *either of the whole or half blood*, all of equal degree of consanguinity, *although more remote than any person or persons, who may be expressly excluded by any provision of law*, to the person so seized; the said lands, tenements and hereditaments shall then descend and go to the said several persons of equal degree of consanguinity, *either of the whole or half blood*, to the person so seized, as tenants in common, in equal parts, however remote from the person so seized the common degree of consanguinity may be, *and whether of the whole or half blood*, unless where such inheritance came to the said person so seized by descent, devise or gift of some one of his or her ancestors, in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance, if there be any person or persons in being, *although more remote, and however remote*, of the blood *or half blood* of such ancestors capable of inheriting the said lands, tenements or hereditaments; provided always, that nothing contained in this act shall be construed or taken to bar or injure the rights or estate of a husband as a tenant by the curtesy, or a widow's right of dower, or to make void, or in any way affect any marriage settlement; and provided further, that when any person has heretofore died, or shall hereafter die, so seized of any lands, tenements or hereditaments as aforesaid, without devising the same in due form of law, and without leaving any person, as hereinbefore enumerated, capable of inheriting the same, but leaving a husband or wife, the same shall de-

scend and go to said husband or wife in fee simple; and provided further, that nothing herein contained shall be operative or have any effect, in any case or cases, wherein any proceedings have been had or taken or are now pending, on behalf of the state, under and by virtue of the law as now existing, to escheat said lands, nor shall this act affect, or in anywise impair, any title to any land heretofore obtained under and by virtue of any proceedings heretofore had and taken in pursuance of law.

The amendments to the Descent Act P. L. 1915, page 61, do not change Section 5 of the Act as contained in the Compiled Statutes.

The amendments to Section 6 in the Act of 1915 omit the proviso relating to dower and curtesy; otherwise it is the same as Section 6 as contained in the Compiled Statutes.

New Jersey Court of Errors and Appeals

CATHERINE E. ECKELS,

Plaintiff-Respondent.

vs.

GEORGE H. BREHM,

Defendant-Appellant.

In Ejectment.

On Appeal.

Brief for Plaintiff-Respondent.

This is an action in ejectment. The complaint alleges that certain property described in the complaint, and which is known by the street number, 280 Fifth Street, Jersey City, consisting of a house and lot, was, on the fifteenth day of April, Nineteen Hundred and Sixteen, wrongfully and illegally entered into by the defendant. The complaint further alleges that the plaintiff's right to possession of the property in question, accrued on the fifteenth day of April, Nineteen Hundred and Sixteen. The plaintiff claims possession of his land and appurtenances and also claims the profits the same has yielded from the time the plaintiff had been wrongfully deprived of the same by the defendant.

Relationship of the Parties.

In brief, the relationship of the parties is as follows:

One George H. Brehm married, and the issue of that marriage was a George H. Brehm, Jr. Upon the death of his wife, the said George H. Brehm married Anna Eckels, the sister of Catherine Eckels, the present plaintiff, by which marriage he had a daughter, Katie

Brehm. Both Anna and George Brehm died, the property descending to Katie Brehm, the child of the second marriage. Shortly thereafter Katie Brehm died, and George H. Brehm, her half brother, the defendant in this case, entered into possession of the property. Catherine Eckels, a sister of Anna Brehm, now claims the property. Catherine Eckels is an aunt of the whole blood of Katie Brehm, deceased, being a sister of her mother, Anna Brehm, from whom the property came; while George H. Brehm, the defendant, is a half brother of the intestate, but not of the blood of Anna Brehm, from whom the estate descended.

The Question in Issue.

DOES A HALF-BROTHER OF AN INTES-
TATE, NOT OF THE BLOOD OF THE AN-
CESTOR FROM WHOM THE ESTATE
CAME, TAKE THE PROPERTY, TO THE
EXCLUSION OF AN AUNT OF THE INTES-
TATE, BEING THE SISTER OF THE AN-
CESTOR FROM WHOM THE ESTATE
DESCENDED?

The Rights of the Half-Brother at Common Law.

That such a question as above stated could ever arise, comes as a surprise to any student of the common law, for at common law, half blood were expressly excluded from inheriting. This proposition, that half blood could not inherit under the common law, is so well known to students of real property and the descent thereof

that but a few citations will be necessary to establish its truth.

1 *Cooley-Blackstone*, Chapter 14, and 14 Cyc., p. 45, Sec. H, and authorities there cited.

So, if the defendant is to look to the common law for his right to possession, being of the half blood, he is absolutely prohibited from the inheritance by the very force of the common law. But the defendant may claim that it is in the general law on this subject that he bases his right to possession. A review of the general law on this question will hardly bear out his contention.

In 14 Cyc., p. 28, Sec. 3, we find:

"The general rule is that the land of an intestate obtained by gift, devise or descent from an ancestor goes to the blood of the ancestor from whom it came, in preference to the next of kin of deceased, *not of his blood.*"

In 14 Cyc., p. 46, Sec. 2, and the authorities quoted there, the following proposition is clearly maintained:

"When the estate of an intestate came by gift, devise or descent from an ancestor, the rule, that *those only who are of the blood of such ancestor can inherit*, generally excludes kindred of the half blood who are not of the blood of such ancestor";

and the proposition that:

"If, however, there are no brothers or sisters of the whole blood, those of the half blood are usually admitted, in preference to kindred of the whole blood of a more remote degree, the half blood being merely postponed to the whole blood of the same degree,"

is expressly refuted in *Kelly v. McGuire*, 15 Ark., p. 555; *Valentine v. Wetherill*, 31 Barb., p. 655, and *Amy v. Amy*, 12 Utah, p. 278, 42 Pac., p. 1121.

In 14 Cyc., page 49, and the authorities there cited, in the note to 71, the following rule is cited:

“In those states where the source whence the property of the intestate came governs its descent, the rule is, that collateral heirs of the blood of the ancestor from whom the real estate has descended, or has been inherited, or the collateral heirs of the blood of the first purchaser inherit, to the exclusion of the collateral heirs of other blood.”

In 14 Cyc., p. 50, Sec. C, we find the following statement:

“Where the statute contains a reference to the blood of the first purchaser, then real estate devised by or descended from the father of an intestate who dies, leaving neither brother nor sister, passes to the paternal uncles and aunts of the intestate, or to the paternal aunt, to the exclusion of the intestate’s half brother, who is not of the blood of the father. * * * So, *vice versa*, where real estate is derived immediately from the mother, it goes to the mother’s brothers and sisters, or to their lineal descendants.”

And in 14 Cyc., p. 52, Sec. 2, and authorities there cited:

“ * * * but brothers and sisters of the half blood, not of the blood of the ancestor from whom the property came, are excluded by brothers and sisters of the whole blood, by nephews and nieces, by

first cousins, and by other remote collateral heirs who are of the blood of the ancestor from whom the intestate took the property.”

Thus we see, from the careful study of the general law on the question at issue, that those of the half blood are zealously guarded from inheriting property of those who are not of their blood, but are postponed in inheriting to the remote collaterals who are, however, of the blood of the ancestor from whom the property descended.

Authorities from Other States.

And such, indeed, has been the position taken by the courts of many of our States. It is true that such decisions must be considered carefully, because for the most part depending on statutes however similar to ours, yet differing in a slight degree for the most part by which often far different conclusions have been reached, for a slight change in the preamble of the statute, in a word, in the body of the statute, yes, even in the history of the descent of real estate in that state, would necessarily lead to a different conclusion. Therefore great care has been taken to select only those cases that depend on similar statutes as ours, and in which the facts are analogous to those in question.

“Under the statute of distribution, property of an intestate which came to him by devise or deed of gift, but which he would have inherited without such devise or gift, is limited to those heirs who are of the blood of the person so giving or devising.”

(*Brewster v. Benedict*, 14 Ohio, p. 368.)

In *Penn v. Cox*, 16 Ohio, p. 30:

“The law favors the stock of the ancestor by whose labor or endeavor the property was originally acquired.”

In *Lee's Estate*, 14 Larc. Bar. 127, in *Campbell v. Ware*, 27 Ark., p. 564, the Court held that only persons of ancestral blood could inherit ancestral estates.

In *Kelly's Heirs v. McGuire*, 15 Ark., p. 555, the Court held:

“If the estate is ancestral and comes from the mother's side, then it descends to the line on the part of the mother (from) whence it came, to the exclusion of the father's line.”

In *Drake v. Rodgers*, 13 Ohio St., p. 21, we find this proposition stated:

“When an only child dies without issue, land which has descended to him from an ancestor, vests in his next of kin *of the blood of the ancestor*, and on the birth of a brother of the half blood, does not pass to such brother,”

reversing *Dunn v. Evans*, 7 Ohio, p. 169.

In the case of *Amy v. Amy*, 12 Utah, p. 278, under a similar statute as ours, the Court said:

“Children of a deceased husband by a former wife, cannot inherit from the deceased an estate acquired by descent.”

In *Henzy v. Gross*, 39 Atl., p. 949, this proposition is maintained:

“Real estate inherited from a father does not, on the death of the intestate, descend to his half brother. The Act of 1833 is

subject to Section 9, declaring, 'No person not of the blood of an ancestor shall inherit same, but it, subject to any life estate, shall pass to such persons as would be entitled, had the person, not of the blood of the ancestor, never existed.'"

In *Conkling v. Brown*, 57 Barb., p. 256, the Court held that half brothers and sisters are absolutely excluded if they are not of the blood of the ancestor.

Quoting from the opinion of Hon. William Inglis and Charles O'Connor, in the note to page 269, we find:

"In this case, B. Moore is the ancestor from whom the inheritance came to A. M. Winter, deceased, by descent. It is evident that A. M. Winter's half brother and half sister are not of the blood of B. Moore. The statute, therefore, excludes them from inheriting—the statute seeks only to exclude from inheritance those not of the blood of the ancestor, and this is supported in the opinion of Chancellor Kent. The policy of preserving an ancestral inheritance in cases of intestacy, not of the blood of the ancestor from whom it came, is also found
* * * and authorities quoted."

The cases cited in 16 Cent. Dig., 45, are authorities for the following propositions:

"Kindred of the half blood inherit equally with those of the full blood, except that if the estates come by descent, devise or gift from an ancestor, *those only* of the blood of such ancestor can inherit."

And again:

"On the death of one seized of an estate of inheritance, leaving no brother or sister

of the whole blood, but a half sister, and also remote collateral heirs, the collateral heirs of the blood, take, in preference to the half sister."

The case of *Perkins v. Simmonds*, 28 Wis., p. 90, is one closely analogous to the one at bar, and comes up under a statute similar to ours.

On page 92 the Court says:

"The question to be determined is, whether on the death of P. J. Prescott, the land descended to his next of kin, to the exclusion of his sister of the half blood, or whether it descended to such sister of the half blood. It is claimed by counsel for the appellant that this provision (the provision referred to excludes half brothers and sisters not of the blood of the ancestor) is not applicable in a case where the intestate leaves issue, or a brother or sister, even though of the half blood, or mother or father. This position is not sustained by authority, and the argument fails to convince us that the statute admits of the construction contended for. The words of the section are general: 'All those not of the blood of the ancestor shall be excluded.' If this estate came to the intestate by descent from J. Prescott, his father, upon what principle can we say that it shall descend to the sister of the half blood, who was not of the blood of John Prescott? Besides, it seems to me that the Legislature would naturally be more solicitous to preserve the estate of an ancestor in the hands of *his* nearest kindred. * * *

And I conclude, therefore, that if the land came to P. J. Prescott by descent from his father, John Prescott, it did not descend

to the sister of the half blood on the death of P. J. Prescott, but goes to the brother and sister of John Prescott, who were living at that time."

The same case also maintains this proposition:

"That the provision in a statute of descent, that where an inheritance came to an intestate by descent, devise or gift, from an ancestor kindred of the half blood who are not of the blood of such ancestor, shall be excluded, applies in *all cases* falling within its terms, and is not limited to cases in which the intestate does not leave either issue, brother or sister or father or mother."

In the case under consideration the contest was between an aunt and a half brother of the deceased, and there, too, the Court held that the aunt was entitled to the estate, in preference to the half brother, not of the blood of the ancestor from whom the estate descended, and is a clear and sufficient answer to the defendant's contention in his brief, in folios 18 to 22 inclusive, in that the Court there held that the provision applies not only where the intestate does not leave a brother or sister of the whole blood, but *applies in all cases, and to the total exclusion of the half blood who are not of the blood of the ancestor.*

Thus we see that other States, both by legislative enactment and judicial interpretation, have closely guarded the rights of half blood to inherit, and then only under one condition, that they shall also be of the blood of the ancestor from whom the estate descended.

And the case of *Perkins v. Simmonds*, quoted above, clearly holds that the mentioning of

the half blood gives them no preference in the right of succession, unless they are also of the blood of the original creator of the estate.

The History of Legislation and Judicial Construction in this State on this Subject.

Although it is true that the common law and the general law and the laws of other States are all a material aid to us in the analysis of the question at issue, it is in the laws of this State, and in the judicial construction thereof that we must find the solution of our problem. To do this, a brief history of the laws of descent in this State must be attempted.

The first law affecting the common law rule precluding half blood from inheriting was passed in our own State as early as 1780. The statute of 1780, which was passed on May 24th of that year (Paterson 43) specifically recognizes the rights of brothers and sisters of the half blood to inherit, and this without any distinction of any kind, except as between male and female, directed by the first section of the act. The statute of April 5th, 1816, repealed that section of the earlier statute distinguishing between persons male and female. The next change came in the law of February 15th, 1816, which expressly excluded all those who were not of the blood of the ancestor from whom the estate came, from inheriting, containing a limitation similar to the present statute with respect to ancestral property. This act was repealed and supplied by the fifth section of the Act of 1817, Rev. St., 609, which again expressly excluded from inheriting in such cases all who were not of the ancestral blood through which the estate came, and contains the following words:

“Provided always that in case the said land, tenements or hereditaments came to

the person so dying seized, by descent, devise or gift of someone of his or her ancestors, all those who are not of the blood of such ancestor shall be excluded from such inheritance."

And the same exclusive proviso was re-enacted on February 20th, 1838, Elmer's Digest, p. 131, and was readopted in the revision of 1846, Rev. St., p. 339, Sec. 5, and is identical with Sec. 5 of the present Descent Act, which section was not amended in the laws of 1915.

Decisions in Law and Equity Under the Previously Enumerated Statutes.

In *Den, Lloyd v. Urison*, 2 N. J. L., p. 197, (212), the Court held that:

"Brothers of the half blood do not inherit as such, unless the real estate came from a common ancestor, or is acquired by the intestate."

And this, despite the statute of 1780, which enacted that:

"If any person shall die * * * and shall leave a brother or sister of the half blood, such half blood shall inherit the estate as directed in the first section of the Act."

Although the literal words of the statute allowed the inheritance to descend to half brothers and sisters, the Court refused, by judicial construction, to allow the estate so to descend, and for the following reason, as the Court says:

"In the strictness of feudal times, none but lineal descendants could inherit real estates; when that rigor somewhat abated, collateral relations were let in, and this has continued to the passing of the present

act of 1780, regard being always had to the right of primo-geniture, and to the line of the whole blood by which an estate descended; but as the reason which gave to the eldest son the whole estate had long ceased, our Legislature, in the first section of the act altering descents, directed that all the sons of an ancestor, dying intestate, should equally share his estate. But still these brethren of *one father*, by different *venters*, could not inherit to each other, whereby the estate of such ancestor sometimes went out of *his* family. To remedy this evil, was the intention of the Legislature, in the third section of the act. This intention is not left to vague and uncertain conjecture, on merely probable grounds, but is reduced to an absolute certainty, and that by the best of all possible proofs, the positive declarations of that body themselves; and we cannot be at a loss in exploring intentions so manifestly set forth as in the preamble to this section.

“If then, this estate, late Thomas Wright’s, should pass to his half sisters, by the mother’s side, total (160) strangers to the blood and family of Joseph Wright, the first purchaser, to the exclusion of James Wright, his son, would not this be the identical mischief complained of under the old law, and which the present act was declaredly intended to prevent? I think this is beyond doubt.”

We quote this to show what changes the judges at that time thought the Legislature meant to make in the common law as it had previously existed, confirming the importance of the maxim relied on by Speer, *J.*, in deciding the

case below, to wit, *contemporanea expositio est fortissima in lege*.

And so, too, in *Den ex Dem Pierson v. De Hart*, 3 N. J. L., p. 73 (482), where a similar question arose under the old statute, the Court, on page 80 (489) says:

"The great and only evil to be remedied is that the real estate of an ancestor in some instances goes out of the family, to the great injury of the remaining issue of such ancestor."

And here, too, the Court, despite the wording of the Act, and on the strength of the previously quoted case, refused to allow the half blood to partake of the inheritance.

It is not surprising, therefore, to find that these cases, contrary to the letter of the law, overruled in the later case of *Arnold v. Den*, 5 N. J. L., p. 1015 (862), for this case, although decided in 1817, was a construction of the statute of 1780, which expressly permitted half blood to inherit, regardless of the source of the descent of the land in question.

It is, however, in the case of *Banta v. Demarest*, 24 N. J. Law, 431, decided in 1854, on the Statute of 1846, that we get the clearest exposition of law and its purposes. Potts, *J.*, in deciding this case, on page 433, says:

"The object of the statute is to limit the inheritance to the blood of the ancestor whence it came. The rule itself has a strong foundation in the equity that springs from the consideration, that in cases of descent the estate comes, not as the fruit of the industry of the heir, but the bounty of the ancestor."

And again, on page 434, the Court says:

“The third section of the Act of 1780 which was the first act changing the common law rule of descent, directed that when any person died seized of real estate, intestate, leaving no brothers or sisters of the whole blood, and leaving brothers and sisters of the half blood, the estate should descend to them; and the question as to the construction of this section first came up in the case of *Den v. Urison*, 2 Penn., 212. The majority of this Court there held, *notwithstanding the plain language of the section*, that it meant only her brothers and sisters of the half blood, on the side of the parent through whom the land descended. But in the subsequent case of *Arnold v. Den*, 5 N. J. Law, 1015, the Court of Errors held to the literal meaning of the words of the section, and overruled the former case. Prior to this decision of the last case, the legislature repealed this section of the Act of 1780, and passed an act, Feb. 15, 1816, which expressly excluded all those who were not of the blood of the ancestor from whom the estate came, from inheriting. This act was repealed and supplied by the fifth section of the Act of 1817, Rev. St. 609, which again expressly excluded from the inheritance in such cases, all who were not of the ancestral blood through which the estate came; and with the same exclusive proviso, this act was readopted in the revision of 1846, Rev. St. 339, Sec. 5. *So that there is not, on the whole, anything in the course of legislation or judicial construction in this State, which evinces any intention to abandon the general rule.*”

It is fairly obvious from the language of the Court in the above case, that their interpretation of the proviso was, that the half blood were to be absolutely excluded, both by the letter of the law, and by the course of judicial construction theretofore existing.

But it is, on the authority of *Den v. Searing*, otherwise known as the Delaplaine case, 8 N. J. Law, 340, that we are quite willing to rest this present case; and we contend furthermore, that it is in the decisions of the laws of this State that the final solution of the question at issue must be sought. For, however much light the common law and the general law, and the cases from other states, may throw on this subject, if we find that the decisions of New Jersey Courts, upon which rights of property have been predicated, govern the question at issue, then this case must be decided according to the doctrines of the Laws of this State under the well known rule of *stare decisis*. And we submit that the facts in the Delaplaine case are analogous, if not identical, with the ones at issue.

The contest in the Delaplaine case was between the brothers and sisters of the half blood of Lydia Astin Delaplaine, by the same father and different mothers, on the one hand, and her uncles and aunts on the other hand. In the case at bar, the issue is between George H. Brehm, a brother of the half blood of the deceased Katie Brehm, by the same father and different mothers, on the one hand, and the aunts of Katie Brehm, who were of the blood of the ancestor from whom the deceased Katie Brehm inherited her property, on the other hand.

Of course, there is the additional feature in the Delaplaine case, that the brothers and sis-

ters of the half blood, while they were not related to the deceased by reason of having the same mother, were, however, related to the mother of the deceased, because their father had married the sister of the deceased's mother, thus making the brothers and sisters of the half blood "of the blood" of the ancestor from whom the property came.

In the above case, Ewing, *C. J.*, in construing the operation and the effect of the proviso, says, on page 343:

"First. The proviso does not, nor was it intended, to form any new, distinct, or independent canon or rule of descent; its sole purpose is to limit and restrain in certain cases, the generality of the body of the section. By the body of the section, without the proviso, the half blood, would in all cases, have inherited. Such, however, was not the design of the legislature. Under certain circumstances, it was intended to exclude them from the inheritance; and the purpose of this proviso is to evince this design, and to declare under what circumstances they shall be excluded. The result is proved, 1st: by the general nature of the proviso in a statute; its general object is to qualify, limit or restrain the general enactment which has preceded it. 2ndly: By the style and purport of the proviso in question, which is manifestly in its style merely exclusive, and in its purport solely framed to limit and restrain what otherwise would have been general. Such being the scope of this proviso, it may not be safely carried farther. Where the person last seized became so by descent, devise or gift, from an ancestor, *the proviso simply declares that*

those who are not of the blood of such ancestor shall not inherit leaving those who are of the blood of such ancestor to inherit by force of the general language of the body of the section."

And again, on page 344:

"The word 'those' in the proviso, is a relative term; it respects the half blood previously mentioned, and is the same as if it had been said, all of the half blood who are not the blood of the ancestor shall be excluded. In the case comprehended in the proviso, two qualities are obviously required to be of the half blood of kin who died seized and to be of the half blood of the ancestor."

And on page 345:

"From this examination of the statute, it appears to me to result, that the rule or canon of descent produced by the influence of the proviso on the body of the section, may be thus expressed. When the lands, tenements or hereditaments came to the person dying seized, by descent, devise or gift from some one of his ancestors, that is to say, from some person from whom lands might by the established canons of descent, come to him by descent, in the absence of other and nearer heirs, then the brothers and sisters of the half blood of the person dying seized, who are of the blood of the ancestor from whom the lands, tenements or hereditaments came, shall inherit the lands; but brothers and sisters of the half blood, who are not of the blood of such ancestor shall be excluded from the inheritance."

On page 349, we have the exact facts of the case at bar, stated and answered by the Court, to wit:

“In the argument of one of the defendants’ counsel he put the supposition that instead of an Andruss, Nicholas Delaplaine had married a Pierson, and asked, would not her children have been excluded? *I answer, certainly; and for the very reason expressed in the statute, because they would not have been of the blood of Lydia Delaplaine. For the rule deduced from the statute, as I understand it, cuts off all such half blood, and would, in fact, exclude the half blood in the present case, but for the circumstance of the marriage of Nicholas Delaplaine with two sisters, whereby the children of one sister are of the blood of the other sister. And when they are within the words and within the spirit and meaning of the law, which was to prevent the lands of the ancestor from going out of the blood of such ancestor, these brothers and sisters cannot be excluded, because other half blood, not partaking of the blood of the ancestor, and, therefore, if admitted to inherit, carrying the estate out of the family, would, and ought to be excluded.*”

And again, on page 351, in the concurring opinion of Ford, J.:

“It will be admitted that according to the plain language of this section, all the estates in land are not to descend by the same rule; one great class, and by far the greatest, consists of those estates which the intestate may have acquired by his or her own industry, and all these will descend to half blood; *but there is a small class of estates*

designated in the proviso, such as the intestates acquired by descent, devise or gift from an ancestor, which are to descend to none who are not of the blood of such ancestor; they evidently consist of such estates for which the intestate never paid any consideration; they came from an ancestor who took no pay for the property, but disposed of it as a token of special bounty to his own blood. Now the half blood as such could not be allowed to take estates appropriated without consideration to such blood, without turning the ancestor's bounty out of the blood in which it was intended; for one truth will stand out for ever as big as a mountain, that the admission of half blood as such will carry estates away from the whole blood of such an ancestor. Therefore the legislature, with distinguished magnanimity, have referred such estates back to the blood of the ancestor from whom they so generously came, and for the benefit of whose blood they were evidently left and intended. While the fifth section directs therefore as a general rule, that real estates may descend to half blood, it takes care to make an exception of these three kinds of estates that are not to descend according to the general rule; and it is plain that these, as being excepted cases, would have been under the government of no rule, if one had not been provided for them in this proviso."

And again, on page 352:

"A most important rule or canon touching estates that come in such case, by Descent, Devise or Gift of an ancestor, is, therefore, laid down by the legislature in this proviso, in the following words: 'All Those Who

Are Not Of The Blood Of Such Ancestor Shall Be Excluded From The Inheritance.'

The manifest and necessary consequence of Excluding all those who are Not of that blood, is a limitation of the inheritance to those who Are of the blood. It expresses the rule in negative words, declaring to whom the estate shall Not descend; but it is manifestly introductory of an Affirmative rule, that it Shall descend to the blood of the ancestor from whom it came. Such ancestor may be a collateral and very remote relative of the person last seized, even in cases of Descent, and much more so in cases of Devise or Gift. Now it is in the blood of Such Ancestor, however remote, that the estate is to rest, without the smallest reference to the Blood Of The Person Last Seized. The policy of the section is plainly this, when the Whole Blood in a particular line becomes extinct, estates acquired by Descent, Devise or Gift from an ancestor, shall be remitted back to the blood from which they last came, in order to follow a legal direction in that line."

And again, on page 355:

"The present case of a man marrying two sisters forms an anomaly; the issue of such a marriage disposed of in such a form, may not occur again in a century. In all cases but such as this, the court will be compelled to adjudge the inheritance under this proviso, to those who are next of blood to the Ancestor. These half blood relatives of the deceased infant, happen in this singular case, to be remotely of the blood of Lydia Andruss the ancestor; but let us suppose, as it is quite lawful to do, for illustration, that

they had None of her blood, and did not ask for the inheritance; a most important and decisive question then arises, How the estate shall descend? It cannot descend under the 3d section of the statute, because the infant and not the ancestor, was the last owner; and beside, if the estate had come by Devise or Gift from the ancestor, she would not have died seized of the estate without disposing of it; for these reasons it could not come under the words or provisions of the 3d section; but it would come under the government of this proviso, and no other law, it being an estate by descent from an ancestor, to a person who had died without issue or brother or sister of the whole blood, or father, Leaving A Brother And Sisters Of The Half Blood; In Which Case the proviso is peremptory that the estate shall go only to those who are of the blood of the ancestor Lydia Andruss; and according to our Supposition the half blood relatives of the infant are not of it."

It must be then, quite apparent that the meaning of Section Five of the Descent Act was firmly settled in the Delaplaine case; and in view of the fact that rights of property have been predicated upon the rule as laid down in that case, the Court should adhere to such rule without regard to how it might be inclined to decide if the question were new. And if in the case at bar, we were to permit the property to go to the defendant, who is not of the blood of the ancestor, it would be in direct conflict with the rule laid down in the Delaplaine case, which clearly states that the object of Section Five is to prevent property from going out of the blood of the ancestor, and that when the whole blood

in a particular line becomes extinct, estates should be remitted back to the blood from which they last came, in order to follow a legal direction in that line.

Nor is it merely in the decisions of cases at law that we find this rule of inheritance promulgated and maintained, but the Courts of Equity have adopted it and defended it as their very own.

In the case of *Haring v. Van Buskirk*, 8 N. J. Equity, 545, Chancellor Halstead, on page 548, says:

“It seems to me that every reason for excluding Demarest in the first case exists in the second case put. The estate came from Haring, Ann Eliza’s father. Demarest has none of the blood of Haring. By the right of representation, the right of proximity is transferred from the root to the branch, and gives the branch the same preference that the root had as next of blood. The last clause of the third section of our act is founded upon, and adopts the rule that no one can succeed who is not of the blood of the first purchaser.”

And so, too, Dixon, *J.*, in deciding the case of *Miller v. Spear*, Stewart Equity, 570, reversing the case of *Spear v. Miller*, 10 Stewart Equity, 492, says on page 573:

“But, in the next place, the construction adopted below cannot be maintained without overruling *Delaplaine v. Jones*, 3 Hal. 340. In that case the lands in dispute had come to the intestate by descent from her mother, and were claimed for the half-brother and half-sisters of the intestate,

children of her father, and not of her mother, on the one side, and for the brother and sisters of the intestate's mother, on the other side. The title depended upon the construction of the fifth section of the statute now before us, which casts the inheritance, in certain cases, upon brothers or sisters of the half blood, with the proviso that if it came to the person dying seized by descent, devise or gift of some one of his or her ancestors, all those who are not of the blood of such ancestor shall be excluded from such inheritance. The kindred of the half blood insisted that they were of the blood of the intestate's mother, by the fact that she was their mother's sister (their father having married two sisters), and that, therefore, they were heirs of the intestate by virtue of their half blood. The uncle and aunts urged that the proviso required the heritable blood to be traced through the ancestor from whom the estate descended, and that, by such blood, they were related to the intestate in the third degree, while their opponents stood only in the fourth. The court held with the former, and decided that a half-brother or sister of the person dying seized may inherit an estate which has come to the intestate from an ancestor, provided he or she can trace any degree of consanguinity to such ancestor. This decision was rendered over half a century ago, and within a few years after the passage of the statute involved (P. L. of 1817, p. 8), and has remained as an undisputed rule of property ever since. It should not now be overturned. It applies directly to the case before us. There, as here, the law excluded from the

inheritance those who were not of the blood of the ancestor from whom the estate had descended to the person dying seized; there as here, the right to inherit was claimed through another than that ancestor, and there, as here, it was sought to exclude such right, not because the claimants were not literally of the blood of such ancestor, but because the relationship on which the claim rested was not derived through him. But the decision was that relationship to the person dying seized determines the inheritance, provided only the descent shall not be case upon those who are not partakers of the blood of the ancestor from whom the estate came.

In accordance with this ancient authority, and also with the statute, as we read it, the appellants are entitled to the lands in controversy."

The conclusion that necessarily follows in reading the Equity cases quoted above, is, that having been decided upon the authority of the Delaplaine case, the rule laid down in the Delaplaine case, viz: limiting the inheritance only to the half-blood who are also of the blood of the original ancestor, has become a fixed and permanent policy in the State of New Jersey.

It is contended, however, that the decision in the Delaplaine case is mere dictum, and as such does not govern the case at bar. The question is an important one. If, as the defendants claim, it is dictum, it can but furnish a guide to the decision of the Court in the present case. But if it is not dictum, but part of the *res adjudicata*, then we have a rule of law in this State followed in subsequent cases, which must govern the one now at issue.

In *Brown v. Chicago & North-Western Ry.*, 44 L. R. A., page 579, the Court, in considering the question of dictum, says:

"It is erroneous opinion that nothing is decided in a case except the result arrived at. Propositions assumed by the Court to be within the case and questions presented, considered and decided by the Court, leading up to the final conclusions reached, are not *obiter dicta*, but if dicta at all, are judicial dicta, and are as effectually passed upon as the ultimate question solved."

And again, quoting *Quackenbush v. Wis. & N. R. Co.*, 71 Wis. 417, and *Pray v. Hegeman*, 98 N. Y., 351:

"The judgment is authority upon all points assumed to be within the issues which the record shows the Court considered and decided in reaching it."

And so, too, in our State, in the case of *School Trustees v. Stocker*, 42 N. J. Law, 115, the Supreme Court on page 117, says:

"A proposition assumed or decided by the Court to be true, and which must be so assumed or decided in order to establish another proposition which expresses the conclusion of the Court, is as effectually passed upon and settled in that Court as the very matter directly decided."

A careful reading of the numerous excerpts submitted from the Delaplaine case and from *Miller v. Spear*, shows conclusively that the conclusion, that the children of the half blood that are not of the blood of the ancestor cannot inherit, which conclusion was reached in answer to the supposititious case put by the defendants'

counsel, was but a link in the reasoning of the Court by which it arrived at its major conclusion.

Speer, *J.*, in deciding the question of dictum raised by the defendant below says:

"I have been favored by both sides with voluminous and singularly recondite briefs. I am constrained, however, by what I consider to be the inveterate understanding of the bench and bar in this State as to the proper answer to be given to the emergent question, to answer that question in the negative, and to give judgment in this case in favor of the plaintiff. I believe myself to be bound to follow the construction placed upon the legislation, upon which the rights of the parties in this case depends, in the case of *Delaplaine v. Jones*, 8 N. J. L. 340. It may well be that what was said by Chief Justice Ewing and Mr. Justice Ford in that case was, strictly speaking, dictum, so far as the point under discussion in this case is concerned, for there the property was awarded to brothers of the half blood who happened to be remotely related to the ancestor, and were therefore of the blood of the ancestor. But a perusal of what those very learned Justices said on the point in that case, the fulness of their discussion of it, and the importance which they apparently attached to it in their consideration and disposition of the case, leads me to the conclusion that they did not consider it *mere dictum*, but *deemed that they were enunciating a rule of property for future guidance*. But even if it were pure dictum the eminence of the Justices who pronounced it; their known learning in that de-

partment of the law; the fact that their's was practically a contemporaneous exposition, and *contemporanea expositio est fortissima in lege*; the fact that thence hitherto it has not been questioned, but apparently acquiesced in and acted on, and the further fact that the whole sweep of judicial decision in our own State seems to be concordant with the doctrine therein enunciated, *i. e.*, *Den Lloyd v. Urison*, 2 N. J. L. 197; *Den ex dem. Pierson v. De Hart*, 3 N. J. L. 73; *Arnold v. Den*, 5 N. J. L. 1015; *Banta v. Demarest*, 24 N. J. L. 431; *Den v. McKnight*, 11 N. J. L. 394; *Haring v. Van Buskirk*, 8 N. J. Eq. 545; *Miller v. Spear*, 38 N. J. Eq. 573, would all lead me to determine this issue, at *nisi prius*, in accordance with that dictum."

How then, in view of this, and in the light of the decisions on dictum previously quoted, can it be said that the decision in the Delaplaine case is mere dictum? No, it is part of the frame-work by which the Court establishes its final decision, and as such is *res adjudicata*; and if so, the Delaplaine case and the subsequent cases decided on its authority, stand uncontroverted, and as the final authority on this subject in this State, and therefore govern the case at bar.

Study of the Statute of Descent.

In fact, a study of the statute itself, forces us to the same conclusion arrived at by the study of all the other sources, namely, that the half blood, in order to inherit ancestral estates, must be of the blood of the ancestor from whom the estate descended.

Simplifying Section 5, for that is the one we are interested in, and being the one by virtue of which the defendant claims his right to inherit, simplifying this section by omitting all clauses not pertinent to the issue and placing the proviso where it properly belongs, the section will read as follows:

“That where any person shall die, seized of any lands, tenements, hereditaments, as aforesaid, and shall leave a brother or sister of the half blood, the inheritance shall descend to such brother or sister of the half blood, provided always, that in case the said lands, tenements or hereditaments came to the person so dying seized by descent, devise or gift, or someone of his or her ancestors, all those who are not of the blood of such ancestor, shall be excluded from such inheritance.”

Reading this section, in this simplified form one can scarcely escape the conclusion that the statute merely intended that only half blood brothers or sisters who were of the blood of the ancestors should inherit, while those who are not of the blood of the ancestor should be excluded.

And this conclusion is borne out by the wording and phraseology of Section 6 of the Statute, which reads as follows:

“When any person has or shall die hereafter, seized of any lands, tenements or hereditaments as aforesaid, without devising the same in due form of law, and without lawful issue, and without leaving a brother or sister, of the whole blood or half blood, or the issue of any such brother or sister, and without leaving a father or mother, *capable of inheriting* under this act, the said lands, tenements or hereditaments, etc.”

It is obvious that the phrase "Capable of Inheriting" refers back to brother and sister of the half blood and father and mother, these being the only ones whose right to inheritance is qualified in some way, by this Act. Now, if the contention of the defendant, that by mentioning the half blood in the previous section, they take in preference to any who are not mentioned, is right, what, then, is the meaning of the phrase "Capable of Inheriting" in the Sixth Section? Certainly, this phrase shows that there is some qualification to the right of inheritance on the part of the father and mother or brother and sister of the half blood, carried over from the previous sections, and this qualification, in the case of brother and sister of the half blood, is the one referred to in Section 5, limiting the inheritance to such half brothers and sisters who are of the blood of the ancestor from whom the estate descended. For if the brothers and sisters of the half blood would take, by virtue of the Fifth Section, in preference to those classes not yet designated, and irrespective of whether or not they were of the blood of the ancestor, the phrase, "Capable of Inheriting" in the Sixth Section, would have no meaning nor application.

We contend that the phrase "Capable of Inheriting," has a meaning, to wit: that when any person shall die, etc., without leaving issue, or brother or sister, or father, capable of inheriting, or mother, capable of inheriting, or half brother or half sister capable of inheriting, then the land shall descend as provided by the remaining part of the section. Such a construction brings Section 6 into logical accord with Section 5, explains the proviso in Section 5, demonstrates that the phrase, "Capable of Inheriting" in

Section 6 is not superfluous and has a definite meaning, and brings the statute in harmony with the decisions of the Courts heretofore referred to.

If we have rightly construed Section 5, and the effect of the proviso in that section, it logically follows that the proviso in Section 6 would also bar those half brothers and sisters who are not of the blood of the ancestor. And the present plaintiff, being a sister of the creator of the estate, and an aunt of the whole blood of the intestate, would inherit the ancestral estate.

Summary.

We have considered the question at issue from all possible angles, and we have arrived at the same conclusion in each case.

At the Common Law the half blood could never inherit. The authorities derived from a study of the General Law on this question, are well nigh unanimous in their conclusion, that the half blood, where they are permitted to inherit, can only inherit, if they are of the blood of the person creating the estate.

1 Cooley-Bl. Chapter, 14.

14 Cyc., pp. 28, 44, 46, 49, 50, 52.

The cases collected from other States also bear out our contention.

Brewster v. Benedict, 14 Ohio, 368.

Penn. v. Cox, 16 Ohio, 30.

In re. Lee's Estate, 14 Larc. Bar. 12.

Kelly v. McGuire, 15 Ark., 555.

Campbell v. Ware, 27 Ark., 564.

Drake v. Rodgers, 13 Ohio St. 21, 16 Cent. Dig., 102.

Henzy v. Gross, 39 Atl. 949.

Conkling v. Brown, 57 Barb. 265.

Amy v. Amy, 12 Utah, 278.

Perkins v. Simmonds, 28 Wis. 90.

So, too, in this State, the history of legislative enactment and judicial construction shows clearly that the brothers and sisters of the half blood are only permitted to inherit when they are also of the blood of the ancestor from whom the estate descended.

Den Lloyd v. Urison, 2 N. J. L. 197 ()212.

Den ex dem. Pierson v. De Hart, 3 N. J. L. 73 ()482.

Arnold v. Den, 5 N. J. L. 1015, ()862.

Banta v. Demarest, 24 N. J. L. 431.

Den v. Searing-Delaplaine, 8 N. J. L. 340.

Den v. McKnight, 11 N. J. L. 394.

Haring v. Van Buskirk, 8 N. J. Eq. 545.

Miller v. Speer, 38 N. J. Eq., 573.

The contention that the decision in the Delaplaine case is mere dictum, has been refuted, as we believe, by the numerous excerpts quoted from the decision itself, and by the cases in which the question of dictum was discussed.

Brown v. Chicago & N. W. Ry., 44 L. A. R., 579.

Quackenbush v. Wisconsin & N. R. Co., 71 Wis. 472.

Pray v. Hegeman, 98 N. Y. 351.

School District v. Stocker, 42 N. J. L. 115.

We respectfully submit that in view of the facts and law adduced by the plaintiff in support of his contention, that the plaintiff, Catherine Eckels, being an aunt of the whole blood of the intestate, is entitled to the possession of the ancestral property, to the exclusion of George H. Brehm, the defendant, the half brother of the intestate, not of the blood of Anna

Brehm, the creator of the estate. And we contend this all the more readily in a case such as this where the circumstances warrant it, the law compels, and the dictates of humanity and justice require it.

Respectfully submitted,

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For Appellee.



