Court of Errors and Appeals

OF NEW JERSEY.

Doctor Henry Van Derveer, late of the township of Bedminster, in the county of Somerset, died on the 22d of May, A. D. 1868, in that township ; he never was married, and left as his nearest of kin five first cousins, Henry Van Derveer, Gertrude Griffin, John F. Schenk, Henry S. Harris, and Israel Schenck, who claim to be his heirs at law, and to whom his real estate has descended, and in whose possession such lands have been since his death, he having died intestate. Besides the above named five first cousins he left him surviving a number of persons more remotely related to him, some of whom standing in the relation of second and third cousins filed a bill in the Court of Chancery of New Jersey on the 27th of December, A. D. 1871, for a partition of the real estate of which he died seized, or in case the Chancellor should be of the opinion that a partition could not be made without great prejudice to their interest, then that the same sho ld be sold and the proceeds divided

The lands of which said Henry Van Derveer died seized, as described and set forth in said bill, and which the complainants claim descended to them and the other parties in their said bill named, and to which each is now seized of the part or share in said bill stated, consists of several tracts, the first of which is stated in said bill as containing

one acre and sixty hundredths, situate in the township of Bedminster, in said county of Somerset, conveyed to him by Elias Brown, May 8th, 1821. Recorded May 19th, 1821, book K, page 168.

The second tract situated in same township, containing eighty-eight hundredths of an acre.

Conveyance by William J. Todd, Executor of Thomas Todd, deceased, April 1st,1848.

Recorded February 8, 1856; Book W, 2, page 315.

The third tract consists of two lots, situate in same township, the first containing 325 7-100 acres. The second containing about 30 acres.

Conveyance by Mary H. Van Derveer, Asril 1st, 1833.

Recorded May 10th, 1847, Book F, No. 2, page 451.

The fourth tract consists of four parcels. The first containing 435 acres, situate in Bedminster township. The second in same township, consisting of 20 acres, the third in same township consisting of 10 acres. The fourth situated in Bernards township, containing 51 1-4 acres, of land, which said last four tracts of land the said Henry Van Derveer inherited by descent from his sister Phebe Van Derveer, deceased.

The fifth tract consists of 2 acres, strict measure, situate in Bernards aforesaid, conveyance by Joseph Boyle, December 25th, 1846.

Recorded May 10th. 1847, Book F, No. 2, page 428.

The sixth tract situate in Bernards township aforesaid, contains 11 48-100 acres, and also another parcel situate in same township, containing 4 3-100 acres.

Conveyance by William Boyle and wife, March 26th, 1849.

Recorded February 8th, 1856, Book W, No. 2, page 217.

The seventh tract consists of a parcel of land, situate in the village of Plainfield, containing 1 94-100 acres of land, conveyance by Thomas W. Reynolds, sheriff of Union county, September 4th, 1862.

Recorded September 9th, 1862, Book 10, page 389 of Deeds for Union county.

The complainants in their bill for partition claim that they and the other second cousins and third cousins of Henry Van Derveer, deceased, are entitled to certain undivided

parts of said land of which he died seized, according to their degrees of relationship to the said Henry Van Derveer; that is to say, the second cousins whose father or mother was a first cousin of said Henry Van Derveer, but dead before said Van Derveer, leaving them surviving the said second cousins in said bill named, now claim by said bill to be entitled to have that portion of lands of which said Van Derveer died seized, to which their father or mother would have been entitled if living at the time of said Van Derveer's death as first cousins and next of kin of said deceased, and also the third cousins in said bill named claim to be entitled to have their deceased father's or mother's portion of the said lands, which their grand pa ents would have inherited if living at the death of Dr. Van Derveer.

The parties complainant in said bill named therein as second cousins are as follows: Alexander Vail, Cornelius Barcalow, Caroline Barcalow, his wife, William G. Steele, and Mary E. Steele, his wife, Jehiel Talmage, Peter S. Talmage, Peter S. Morris, Theodore F. Morris, Frank Morris, John L. Schenck, A. Voorhees Schenck, Lynn Adams, Sarah E. Adams his wife, James A. H. Cornell, Theodore F. Cornell, Frederick F. Cornell, William Demarest, Sarah E. Demarest his wife, John Van Allen, Charlotte M. F. Van Allen, William V. B. Schenck, Eliza Schenck Manning, William L. Conover, Samuel Brearly, Maria V. Brearly his wife, Eli M. Huff and Catherine Huff his wife, Henrietta Hunter, John H. Harrison and Sarah Harrison his wife, Apollos G. Schenck, John J. Schenck, Henry V. Schenck, Caleb D. Schenck, Isaac R. Schenck, Giles Green and Harriet L. Green, his wife, Andrew R. Brown and Sarah C. Brown, his wife, Philetus Davis and Margaret Ann Davis; and third cousins as follows—Samuel Lewis, Peter Layton and Jane Layton his wife, John Compton and Elizabeth Compton, his wife, Samuel Irving and Phebe Irving, his wife, Sarah King, Jacob Lewis, Ayres Leason and Mary Leason, his wife.

And the parties in said bill named as defendants, are Henry Van Derveer, Henry S. Harris, Israel Schenck, John F. Schenck, Gertrude Griffin (the five first cousins); and the parties named in said bill and therein designated as

second cousins to Henry Van Derveer, deceased, are Mary L. Shipman, and Jehiel G. Shipman, her husband, William Morris, Maria Corey, Elizabeth L Kennedy and her husband, Henry R. Kennedy, Theodore Frelinghuysen, Frederick J. Frelinghuysen, Louisa M. Chambers and Talbot W. Chambers, her husband, Sarah M. Freelinghuysen, Catharine Frelinghuysen, P. Dumont Frelinghuysen, Maria Lousia Elmendorf, John C. Elmendorf, her husband, Gertrude E. Mercer and William T. Mercer, her husband, Abraham V. Schenck, Margaret Van Nostrand, Catharine Van Zandt, Mary DeHart, Lawrence V. Davis, Frederick F. Judd, Mary E. Judd, Catharine Judd Cornwall and her husband Augustus Cornwall, Robert Voorhees, David Voorhees, Henry Voorhees, Gertrude F. Lawrence, Mary Hegeman and her husband Charles Hegeman, John H. Schenck, Maria Williamson, Elizabeth Service and her husband John O. Service, William Annin, and Jacob V. D. Annin, Lydia Annin Taylor, and her husband Gilbert V. Taylor, Elizabeth Kline, Jane Annin, Abraham S. Voorhees, Henry Voorhees.

And the parties named in said bill and therein designated as *third* cousins to Henry Van Derveer, deceased, are John T. Dumond, Frederick F. C. Dumond, Martha Dumond, Magaretta Dumond, Elizabeth F Cornell, Margaret M. Roberts wife of Joseph M. Roberts, Elizabeth L. Martenez, Mary F. Martenez, Frederick C. Martenez, Julia J. Martenez, John Smith, Margaret Smith, Maria L. Hardenburgh, John F. Judd and Amanda Judd, Minnie F. Hurlburt, Sarah Trowbridge and her husband Sabin Trowbridge, Henrietta Sedgwick, John R. Sedgwick, Abraham Jeroloman, Josephine M. Jeroloman, George W. Davis, Maria M. Davis, Samuel H. Davis, Mary A. Davis, Isaac A. Davis, Jr., John H. Davis, William E. Shortt, Catharine S. Green, and George Green her husband, Mary V. Shortt, Louisa B. Lyons, and Benjamin B. Lyons her husband, Maria Rappelyea and William Rappelyea her husband, Eleanor S. Stout and Benjamin F. Stout her husband, Henry S. Van Nuys, Louisa Thorp and Peter S. Thorp her husband, Henry Dwight Davis, Charles Eugene Davis, Louisa Ann Lockerly and Burr R. Lockerly her hus-

land, Harriet Ann Bailey and Andrew J. Bailey her husband, George W. Davis, Ida J. Davis, H. Van Derveer Schenck, Emma Lott, and her husband John S. Lott, Elizabeth Terrill and her husband Lewis Halsey Terrill, Catharine Voorhees, John Voorhees, Margaret Bailey, Winthrop Bailey, Anna Voorhees, Laura F. Voorhees, Gertrude I. Voorhees, Henry Voorhees, Almena Carman and her husband Cornelius Carman, Samuel H. Doughty, Jane Gambier and her husband Warren H. Gambier, Skillman Doughty, Henry V. S. Studdiford, Peter A. Studdiford, Samuel M. Studdiford, Theodore L. Studdiford, Peter Studdiford, Ellen A. Studdiford, Phebe Studdiford, Leavinia Studdiford, and Sarah Studdiford.

The said complainants in their said bill admit that the said five first cousins above named are each entitled to a twenty-seventh part which in said bill is claimed to be a full share of said lands, and that the said lands on the death of said Van Derveer descended to his first, second and third cousins as tenants in common, in the parts or shares stated in their bill, being one twenty-seventh part thereof, as aforesaid, to each of said first cousins living, and to the representatives of deceased first and second cousins; said representatives to take the share to which their respective ancestor (first or second cousin) would have been entitled, if living, at the time of the death of said Van Derveer, and that they are now seized of the said parts or shares, to wit: Henry Van Derveer, Henry S. Harris, Israel Schenck, John F. Schenk, Gertrude Griffin, one twenty-seventh part each, Mary E. Steele wife of William G. Steele, only child of a first cousin, deceased, one twenty-seventh part; Jehiel Talmadge and Peter S. Talmadge, children of a first cousin, deceased; and Margaret M. Roberts, Elizabeth L. Martenez, Mary Martenez, Frederick Martenez, and Belle Martenez, children of a second cousin deceased, entitled collectively to one twenty-seventh part; Peter S. Morris, Theodore F. Morris, Mary L. Shipman, wife of Jehiel G. Shipman, and William Morris, children of a first cousin, deceased, and Maria Hardenburgh, only child of a second cousin, deceased, entitled collectively to one twenty-seventh part; Maria Cory, Alexander Vail and Caroline

Barcalow, children of a first cousin, and John Smith and Margaret Smith, children of a second cousin, deceased, collectively entitled to one twenty-seventh part; John L. Schenck, Sarah E. Adams, wife of Lyman Adams, and A. Voorhees Schenck, children of a first cousin, deceased, one twenty-seventh part; Theodore F. Cornell, Frederick F. Cornell, James A. H. Cornell, Sarah E Demarest, wife of William Demarest, Charlotte M. F. Van Allen, wife of John Van Allen, children of a first cousin, John F. Dumond, Frederick F. C. Dumond, Martha Dumond, Margaretta Dumond, Elizabeth F. Cornell, children of a second cousin, deceased, entitled collectively to one twenty-seventh part; Elizabeth L. Kennedy, wife of Henry A. Kennedy, Theodore Frelinghuysen, Frederick J. Frelinghuysen, Louisa M. Chambers, wife of Talbot W. Chambers, Sarah M. Frelinghuysen, Catherine Frelinghuysen, children of a first cousin, deceased, one twenty-seventh part; Frederick T. Frelinghuysen, P. Dumont Frelinghuysen, Maria Louisa Elmendorf, wife of John C. Elmendorf, Gertrude E. Mercer, wife of William T. Mercer, children of a first cousin, deceased, one twenty-seventh part; William V. B. Schenck, Abraham V. Schenck, and Eliza S. Manning, children of a first cousin, deceased, one twenty-seventh part; Margaret Van Nostrand, and Catharine Van Zandt, children of a first cousin, deceased, one twenty-seventh part; Mary DeHart, only child of a first cousin deceased, one twenty-seventh part; Lawrence V. Davis, only child of a first cousin deceased, Sarah Trowbridge, Henrietta Sedgwick, Abraham Jeroloman, Josephine M. Jeroloman, George W. Davis, Maria M. Davis, Samuel H. Davis, Mary A. Davis, Isaac Davis, Jr., John H. Davis, children of a second cousin, deceased, entitled collectively to one twenty-seventh part; William L. Conover, Maria V. Brearley, wife of Samuel Brearley, Catherine Huff, wife of Eli M. Huff, Henrietta Hunter, Sarah A. Harrison, wife of John H. Harrison, children of a first cousin, deceased, William F. Shortt, Catherine S. Green, Mary V. Shortt, children of a second cousin, deceased, entitled collectively to one twenty-seventh part; Frederick F. Judd, Mary E. Judd, Catherine Judd Cornwall, wife of Augustus Corn-

wall, children of a first cousin, deceased, and Minnie F. Hurlburt, John F. Judd, Amanda Judd, children of a second cousin, deceased, entitled collectively to one twenty-seventh part; David Voorhees, Robert Voorhees, Henry Voorhees, Gertrude Lorance, Mary Hagem n, wife of Charles Hageman, children of a first cousin, deceased; Catharine Voorhees, John Voorhees, Margaret Bailey, Winthrop Bailey, Anna Voorhees, Laura F. Voorhees, Gertrude L. Voorhees, and Henry Voorhees, children of a second cousin, deceased, entitled collectively to one twenty-seventh part; John H. Schenck, Maria Williamson, Elizabeth Service, wife of John O. Service, children of a first cousin, deceased; H. Van Derveer Schenck, Emma Lott, Louisa Thorp, Louisa B. Lyons, Maria Rappelyea, Eleanor S Stout, and Henry S. Van Nuys, children of a second cousin, deceased, entitled collectively to one twenty-seventh part; William Annin and Jacob V. D. Annin, Lydia Annin Taylor, wife of Gilbert B. Taylor, Elizabeth Kline and Jane Annin, children of a first cousin, deceased, one twenty-seventh part; Apollos D. Schenck, John I Schenck, Henry V. Schenck, Caleb D. Schenck, Isaac R. Schenck, Harriet R. Green, wife of Giles Green, Sarah C. Brown, wife of Andrew P. Brown, children of a first cousin, deceased, one twenty-seventh part, Philetus Davis, Margaret Davis, children of a first cousin, deceased, and Henry Dwight Davis, Charles Eugene Davis, Louisa Ann Lockerly, Harriet Ann Bailey, George W. Davis, Ida J. Davis, children of a second cousin, deceased, entitled collectively to one twenty-seventh part; Abraham S. Voorhees and Henry Voorhees, children of a first cousin, deceased, one twenty-seventh part; Elizabeth Terrell, Samuel Lewis, Jane Layton, Elizabeth Compton, Phebe Irving, Sarah King, Jacob Lewis, and Mary Leason, children of a second cousin, deceased, collectively entitled to one twenty-seventh part; Henry V. S. Studdiford, Peter A. Studdiford, Samuel M. Studdiford, Theodore H. Studdiford, Peter Studdiford, Ellen A. Studdiford, Peter Studdiford, Leavinia Studdiford, and Sarah M. Studdiford, children of a second cousin, deceased, collectively entitled to one twenty-seventh part.

And the said complainants in and by their said bill as

by their prayer as therein stated and set forth, pray that the said defendants above named, should upon their respective and corporate oath andaffirmation, full, true, direct and perfect answer, make to all and singular the charges and matters aforesaid, fully and particularly, and that a fair partition and division of the said tractsand parcels of lands, farms, lots, and premises should be made according to the course and practice of the said Court, if the same should be practicable and consistent with the rights of all the parties interested therein, might be made among the complainaets, and all other persons entitled to a share of the said lands, farms, lots, and premises according to their respective rights and interests therein, and in case such partition and division should be found to be impracticable, or if it should appear that the same could not be made without great prejudice to all concerned, then that the said lands, lots and premises might be decreed by the said Court to be sold and the proceeds thereof divided among the complainants, and the several parties interested therein, according to their respective rights, shares, and interests. And that in the meantime one or more proper person or persons might be appointed to receive the rents, issues, compensations, and profits of the said lands, farms, lots and premises, for the benefit of the complainants, and all other persons interested therein; and that such rents, issues, compensations and profits might be paid to and divided among the complainants and all other parties entitled thereto according to their respective rights, shares; and interests in the same, and that an account may be taken of the rents, issues and profits of the said lands, farms, lots and premises while in the possession and occupancy of the said Henry Vanderveer, Henry S. Harris, Israel Schenck, John F. Schenk, and Gertrude Griffin, and that the same may be paid to such person or persons as may be appointed as aforesaid by this honorable Court, to receive the same; and in case the said Henry Van Derveer, Henry S. Harris, Israel Schenck, John F. Schenk, and Gertrude Griffin, shall not pay the rents, issues, and profits according to the order and decree of this Court, then that the same may be deducted from their respective shares and portions of the

proceeds of the sale of the said lands, farms, lots and premises, for the benefit of your orat rs and oratrixes, and all of the persons interested therein ; and that your orators and oratrixes may have such other and further relief as the nature and circumstance of the case may require, and as to your Honor shall seem meet and proper, together with the costs and charges of your orators and oratrixes in this behalf sustained. And the said complainants in and by their said bill did pray the Chancellor to grant unto them the State's writ of Subpœna to be directed to the defendants above named, commanding them and each of them at a certain day, and under a certain penalty therein to be expressed personally to be and appear before his Honor in the Court of Chancery, then and there to answer the premises, and to stand to, abide and perform such decree therein as to the said court should seem meet

In Chancery of New Jersey.

Between
Alexander Vail, *et. al.*,
Complainants,
and
Henry VanDerveer, *et. al.*
Defendants.

On Bill
for Partition, &c.
Demurrer.

The Demurrer of Israel Schenck, one of the Defendants to the bill of complaint of Alexander Vail and others, Complainants.

This defendant by protestation not confessing all or any of the matters and things in the complainant's bill of complaint contained to be true in such manner and form as the same are or is therein set forth and alleged to the demurrer to said bill of complaint, and for cause of demurrer say: That the facts set forth in the said bill of complaint show that the said complainants are not or is either of them seized of or entitled to any estate or interest in the land and premises mentioned and described in the said bill of complaint or any part thereof, and that the said land and premises on the death of Dr. Henry Vanderveer, who was the owner thereof in fee, descended by the laws of this State to the defendant, Henry Van Derveer, Henry S. Harris, Gertrude Griffin, John F. Schenck and Israel Schenck, as tenants in common, who thereby became and are now seized in fee, in equal parts of the whole of said land and premises to the exclusion of all other persons or person.

And for further cause of demurrer, this defendant shows as appears by the said bill of complaint, that the said defendants Henry Van Derveer, Henry S. Harris, Gertrude Griffin, John F. Schenck and Israel Schenck, were on the death of the said Dr. Henry Van Derveer, and are now his only heirs at law and nearest living relations, and of all of

equal degree of consanguinity to the said Dr. Henry Van Derveer, deceased, and that by the laws of this State, all the lands and real estate of the said Dr. Henry Van Derveer, on his death, descended to the said defendants, Henry Van Derveer, Henry S. Harris, Gertrude Griffin, John F. Schenck and Israel Schenck, in equal parts as tenants in common, to the exclusion of the said complainants, and every one of them, who, if related to the said Dr. Henry Van Derveer at all, are in a degree more remote than the said five defendants just named.

And for further cause of demurrer, this defendant shows by the facts alleged in said bill of complainant, that the said complainants are not nor is any of them, by the laws of this State, heirs at law or an heir at law of the said Dr. Henry Van Derveer, deceased, and are not now, and never have been seized of or entitled to any estate or interest of, in and to the lands and real estate of which the said Dr. Henry Van Derveer died seized, or any part thereof.

Wherefor, this defendant doth demur thereto and humbly demands the judgment of this Court, whether he shall be compelled to make any further or other answer to the said bill of complaint, and prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

JOHN SCHOMP,
Solicitor of Israel Schenck.

A. V. VAN FLEET, of Counsel with said Defendant.

STATE OF NEW JERSEY }
SOMERSET COUNTY, } ss.

Israel Schenck, of full age, being duly sworn according to law, on his oath saith, that he is the defendant, in whose behalf the foregoing demurrer is to be filed, and that the same is not interposed for delay, but in good faith.

ISRAEL SCHENCK.

Sworn and subscribed before me, this 24th day of April, A. D, 1872.

JOHN H. ANDERSON,
Master in Chancery of New Jersey.

I certify I have perused the complainant's bill of complaint in this case, and that the foregoing demurrer is well founded in point of law.

A. V. VAN FLEET.

A true copy.

HENRY C. KELSEY, Clerk.

In Chancery of New Jersey.

Between
Alexander Vail, *et. al.*,
Complainants,
and
Henry VanDerveer, *et. al.*
Defendants.

On Bill
for Partition, &c.
Appeal.

The Defendant, Israel Schenck, hereby appeals from so much of the order made in this cause, on the twenty-first day of May, in the year of our Lord, one thousand eight hundred and seventy-two, as orders that the demurrer filed therein by this defendant, be overruled, with costs to be paid by the defendant. Israel Schenck, to the Court of Errors and Appeals, in the last resort in all causes.

Dated May 23, 1872.

JOHN SCHOMP,
Solicitor of Israel Schenck.
A. V. VAN FLEET,
Of Counsel with said Defendant.

I certify that I conceive there is good cause for the appeal in the above stated cause by the defendant, Israel Schenck.

A. V. VAN FLEET,
Of counsel with said Defendant.

A true copy.

HENRY C. KELSEY.
Clerk.

In Chancery of New Jersey.

Between

Alexander Vail, *et al*, *Complainants*,
and
Henry VanDerveer, *et al*, *Defendants*.

On Bill for Partition, &c.

Demurrer.

The Demurrer of Dr. John F. Schenck, one of the Defendants to the bill of complaint of Alexander Vail and others, Complainants.

This defendant by protestation not confessing all or any of the matters and things in the complainant's bill of complaint contained to be true in such manner and form as the same are or is therein set forth and alleged to the demurrer to said bill of complaint, and for cause of demurrer say: That the facts set forth in the said bill of complaint show that the said complainants are not or is either of them seized of or entitled to any estate or interest in the land and premises mentioned and described in the said bill of complaint or any part thereof, and that the said land and premises on the death of Dr. Henry Vanderveer, who was the owner thereof in fee, descended by the laws of this State to the defendants, Henry Van Derveer, Henry S. Harris, Israel Schenck, Gertrude Griffin and John F. Schenck, as tenants in common, who thereby became and are now seized in fee, in equal parts of the whole of said land and premises to the exclusion of all other person or persons.

And for further cause of demurrer, this defendant shows as appears by the said bill of complaint, that the said defendants Henry Van Derveer, Henry S. Harris, Israel Schenck, Gertrude Griffin, and John F. Schenck, were on the death of the said Dr. Henry Van Derveer, and are now his only heirs at law and nearest living relatives, and of all of

equal degree of consanguinity to the said Dr. Henry Van Derveer, deceased, and that by the laws of this State, all the lands and real estate of the said Dr. Henry Van Derveer, on his death, descended to the said defendants, Henry Van Derveer, Henry S. Harris, Israel Schenck, Gertrude Griffin and John F. Schenck, in equal parts as tenants in common, to the exclusion of the said complainants, and every one of them, who, if related to the said Dr. Henry Van Derveer at all, are in a degree more remote than the said five defendants just named.

And for further cause of demurrer, this defendant shows by the facts alleged in said bill of complaint, that the said complainants are not nor is any of them, by the laws of this State, heirs at law or an heir at law of the said Dr. Henry Van Derveer, deceased, and that the said complainants are not now, and never have been seized of or entitled to any estate or interest of, in and to the lands and real estate of which the said Dr. Henry Vanderveer died seized, or any part thereof.

Wherefor, this defendant doth demur thereto and humbly demands the judgment of this Court, whether he shall be compelled to make any further or other answer to the said bill of complaint, and prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

JOHN SCHOMP,
Solicitor of John F. Schenck.

A. V. VAN FLEET, of Counsel with said Defendant.

STATE OF NEW JERSEY }
SOMERSET COUNTY, } ss.

John F. Schenck, of full age, being duly sworn according to law, on his oath saith, that he is the defendant, in whose behalf the foregoing demurrer is to be filed, and that the same is not interposed for delay, but in good faith.

JOHN F. SCHENCK.

Sworn and subscribed before me, this 27th day of March, A. D., 1872.

E R. BULLOCK,
Master in Chancery of New Jersey.

We certify that we have perused the complainant's bill of complaint in this case, and that the foregoing demurrer is well founded in point of law. A. WURTS.

A. V. VAN FLEET.

A true copy. HENRY C KELSEY, Clerk.

Between Alexander Vail, *et. al.*, *Complainants*, and Henry VanDerveer, *et. al.* *Defendants.* } On Bill for Partition, &c. Appeal.

The Defendant, Dr. John F. Schenck, hereby appeals from so much of the order made in this cause, on the twenty-first day of May, in the year of our Lord, one thousand eight hundred and seventy-two, as orders that the demurrer filed therein by this defendant, be overruled, with costs to be paid by the defendant, Dr. J. F Schenck, to the Court of Errors and Appeals, in the last resort in all causes.

Dated May 23, 1872.

JOHN SCHOMP,
Solicitor of Dr. John F. Schenck.

We conceive there is good cause of appeal in the above stated cause.

A. WURTS,
A. V. VAN FLEET,
Of counsel with said Defendant.

A true copy.

HENRY C. KELSEY.
Clerk.

Court of Errors and Appeals

Between Alexander Vail, *et al*, deft's and Henry VanDerveer, *et al*, deft's. } On Bill for Partition, &c. Demurrer.

To the Honorable Court of Errors and Appeals in the last resort in all Causes.

The humble petition of John F. Schenk, the appellant, in the above stated cause, respectfully shows, that your petitioner finds himself aggrieved by an order made in the Court of Chancery, by the Honorable Abraham O. Zabriskie,

Chancellor of the State of New Jersey, bearing date on the twenty-first day of May, in the year of our Lord one thousand eight hundred and seventy-two, in a cause therein depending, wherein Alexander Vail and others were complainants and your petitioner, John F. Schenk, and others, were defendants in this respect, to wit: that the said order overrules the demurrer filed by your petitioner, John F. Schenk, to the bill of complaint of the said complainants, with costs to be paid by your petitioner, John F. Schenk; and your petitioner humbly appeals from the said order of the Chancellor, which orders as aforesaid, upon the ground that the said order is erroneous, for that the said demurrer of your petitioner was good and sufficient, and the said Chancellor should have ordered it to stand and be allowed, and not overruled it.

Your petitioner therefore prays that the said order of the Chancellor may be reversed, set aside, and for nothing holden, and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

JNO. SCHOMP,
Solicitor of Dr. John F. Schenk.
A. WURTS,
of Counsel with Appellants.
A. V. VAN FLEET,
of Counsel with Appellant.

Dated June 12, 1872.

STATE OF NEW-JERSEY,

I, Henry C. Kelsey, Secretary of State of said State and Ex-Officio Clerk of the Court of Errors and Appeals, in the last resort in all causes, do hereby certify the foregoing to be a true copy of a petition of appeal in the above stated cause as the same is taken form and compared with the original now remaining on file in the office of said Court.

[L. S.]

In testimony whereof I have hereunto set my hand and affixed my official seal this 14th day of February, A. D, 1873.

HENRY C. KELSEY.

Court of Errors and Appeals

OF NEW JERSEY.

Between
Israel Schenck, *et. al.*,
Appellants,
and
Alexander Vail, *et. al.*
Appellees.

On Apeal
from an Order
Overruling Demurrer.

To the Honorable Court of Errors and Appeals in the last resort in all Causes.

The humble petition of Israel Schenck, the appellant, in the above stated cause, respectfully shows, that your petitioner finds himself aggrieved by an order made in the Court of Chancery, by the Honorable Abraham O. Zabriskie, Chancellor of the State of New Jersey, bearing date on the twenty-first day of May, in the year of our Lord one thousand eight hundred and seventy-two, in a cause therein depending, wherein Alexander Vail and others were complainants and your petitioner, Israel Schenck, and others,

were defendants in this respect, to wit : that the said order overrules the demurrer filed by your petitioner, Israel Schenck, to the bill of complaint of the said complainants, with costs to be paid by your petitioner, Israel Schenck ; and your petitioner humbly appeals from the said order of the Chancellor, which orders as atoresaid, upon the ground that the said order is erroneous, for that the said demurrer of your petitioner was good and sufficient, and the said Chancellor should have ordered it to stand and be allowed, and not overruled it.

Your petitioner therefore prays that the said order of the Chancellor may be reversed, set aside, and for nothing holden, and that your petitioner may have such relief in the premises as to this Honorable Court shall seem meet.

JNO. SCHOMP,
Solicitor of Israel Schenck.
A. V. VAN FLEET,
of Counsel with Israel Schenck.

Dated June 12, 1872.

STATE OF NEW-JERSEY,

[L. S.] I, Henry C. Kelsey, Secretary of State of said State and Ex-Officio Clerk of the Court of Errors and Appeals, in the last resort in all causes, do hereby certify the foregoing to be a true copy of a petition of appeal in the above stated cause as the same is taken from and compared with the original now remaining on file in the office of said Court.

In testimony whereof I have hereunto set my hand and affixed my official seal this 14th day of February, A. D., 1873.

HENRY C. KELSEY.

Court of Errors and Appeals

OF NEW JERSEY.

Between
Alexander Vail, *et al.*
Appellees,
and
John F. Schenck, *et. al.*,
Appl'ts.

On Appeal
from Order Overruling
Demurrer.
Answer.

The answer of Alexander Vail, and others, upon whose application the demurrer of the said appellants was over-ruled by the Honorable Abraham O. Zabriskie, Chancellor of the State of New Jersey, to the petition of appeal of Dr. John F. Schenk, and others, in the above stated cause.

The said appellees not admitting all, or any of the matter or things to be true, as in and by the said petition of appeal are mentioned and set forth, for answer thereto says, that they believe it to be true that an order was made in the Court of Chancery, by his Honor Abraham O. Zabriskie, the Chancellor, over-ruling the demurrer filed by the said appellants, as in the said petition of appeal is mentioned and set forth, but as to the date, substance, purport, and extent thereof, these appellees humbly crave leave to refer thereunto when the same shall be produced.

And these appellees humbly conceive and are advised that the said order in the matters complained of in the said petition of appeal is correct, just, and according to law, and

therefore humbly prays that the said order may be affirmed and the said appeal dismissed with costs.

CLARK & HONEYMAN,
Solicitors of Alexander Vail, *et. al.*, Appellees.
A. A. CLARK,
of Counsel with Appellees.

STATE OF NEW-JERSEY :

I, Henry C. Kelsey, Secretary of State of of said State, and Ex-Officio Clerk of the Court of Errors and Appeals in the last resort in all causes, do hereby certify the foregoing to be a true copy of the "Answer" of Alexander Vail, *et. al.*, appellees in the above stated cause, as taken from and compared with the original now on file in the office of said Court.

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[L. S.]

In testimony whereof, I have hereunto set my hand and affixed my official seal this 14th day of February, A. D., 1873.

HENRY C. KELSEY.

In Chancery of New Jersey.

OPINION.

THE CHANCELLOR.

The question is one which has never been directly decided by the law courts of this state. There are dicta and supposed impressions of the bar of the state, against the right of cousins to inherit with uncles and aunts, and on the other hand, in the case of *Lerch* v. *Oberly*, it was expressly ruled in this court, that a cousin of Emma Oberly, the daughter of an aunt who had died before her, inherited equally with her surviving uncles ; the decree was framed upon that ruling, and was afterwards affirmed in the Court of Appeals. The opinion in this court was not given inadvertently, but was one that had been formed upon a careful consideration of the subject. In the Court of Appeals the question seems not to have been brought to the notice of the court, and is not alluded to in the opinion delivered by the Chief Justice, and it was not in all probability considered by them. This is rendered almost certain by the fact that in the opinion of the Chief Justice, in *Taylor* v. *Bray*, 3 *Vroom* 184, delivered a few months previously, there are dicta inconsistent with this view.

The whole question is, whether the statutes of descents have, directly or by implication, abolished and changed the established common law doctrine of representation among collaterals, and whether, in ascertaining the "degrees of consanguinity" mentioned in those statutes, we must adopt the Civil law method of computation of degrees of kindred adopted by the courts of England and of this country, in calculating who are "next of kindred" under the statute of distributions.

It is said that Chief Justice Green, in a case at Hunterdon circuit, of which there is no report except a note in Nixon's Digest, held that cousins could not inherit with uncles and aunts. The opinion of that learned jurist, though at circuit, on a question which he had examined and considered, would have great weight with me, but I have been told by counsel present, that the question was not argued, and that the decision was made by a simple question to counsel, whether it had ever been heard of in this state, that cousins inherited with uncles. I have no doubt that such opinion was entertained by many of the bar, who, if not called upon to investigate and examine the subject, would naturally conclude from the adoption of the Civil law rule, by the civil as well as the ecclesiastical courts, in ascertaining the next of kin under the statute of distributions, that it would be adopted as the rule under the statute of descents. An opinion thus formed would, no doubt, be acted upon at the circuit. But a mere ruling in one cause at the circuit in this manner, cannot be considered as settling the law.

In the case of *Taylor* v. *Bray*, above mentioned, the present Chief Justice, in some observations at the conclusion of his opinion, 3 *Vroom* 191, assumes that the degrees of consanguinity under our statute, should be reckoned by the rule of the Civil, and not of the common law. He states that formerly there was some uncertainty on this subject, but that the opinion of the profession *appears* to have become settled in favor of the Civil law method. This question was not involved in that case, and this view is no part of the decision of the case, and does not seem to have been considered by the court. The dicta of so able and learned

a jurist are entitled to great regard, but they do not amount to a definite decision by that court, which, on a legal question, would control me sitting here. The question is by him regarded more as put at rest by the opinions of the bar, than by any definite application of rules of construction ; and much reliance is placed upon the unreasonable consequences which are assumed to follow the other construction, consequences entitled to great consideration, if they were not obviated by the construction universally put upon like terms as to equal shares, when given to representatives by the statute of distributions. The question was not argued in that cause, and I can conceive that the argument, and consideration of the question, might change the views of the Chief Justice expressed in that opinion. And with the views I have formed and expressed on the question, I cannot regard this as such a settlement by a court of law as to control this court against its own views.

The common law of England, which is adopted in this state, especially as regards real estate, has certain clear and well settled rules or canons of descent, which, so far as not changed by statute, our courts have always recognized and adhered to. These canons have never been held to be repealed by doubtful words, but only by express words or necessary implication. Among these rules or canons is one, that inheritance shall lineally descend, but shall never ascend. A statute would repeal this rule, and where it directed in certain cases that a father or mother of the decedent should inherit his lands, the rule was so far repealed. But when the statute directed that in certain cases the lands should go to persons in equal degree of consanguinity to the intestate, although a grandmother is. by any rule of reckoning, kindred in the second degree, and is included in the terms of the statute, yet it was held that this rule of the common law was not repealed by such an implication as this, but that as this provision could in many cases have effect without repealing that rule, it must be intended to have been made subject to that rule, and not in derogation of it. Such is undoubtedly the correct rule of interpretation where the statute does not in any other part indicate design to change the established rule. This is most clearly and logic-

ally shown in the opinion of the Supreme Court in the case of *Taylor* v. *Bray*, above referred to.

Another common law rule, or canon of descent, the fifth enumerated by Blackstone, is, that on failure of lineal issue the inheritance shall descend to the collateral relations of the blood of the first purchaser, subject to the rules that the lineal descendants shall represent their ancestor *ad infinitum*, and that the collateral heir shall be the next collateral kinsman. The canons of male preference and primogeniture, which also qualified this rule, have been expressly repealed Now, by this cannon it was never doubted or disputed that the common law recognized representation among collaterals *ad infinitum*. And when an intestate left only female collateral heirs, as one aunt, three daughters of a deceased aunt, and one daughter, and five granddaughters by the same deceased mother, of a third deceased aunt, that all these would inherit together; each set of children taking by representation, the share of its deceased parent.

The question here is, has this rule been changed by the legislation in New Jersey? There is no express enactment changing or limiting the rule of representation among collaterals. In the statute of distributions, it is expressly enacted that no representation shall be admitted among collaterals, after brothers' and sisters' children. There was perhaps, no necessity for it there, as by the practice of the ecclesiastical courts, and by the Civil law, which those courts had adopted, there was no representation admitted, but by brothers' and sisters' children, among collaterals. But for greater precaution, either because the words next of kindred might include all representatives, as these were provided for in case of lineal kindred, or because the well established rule of representation *ad infinitum* among collaterals as to inheritance, might be held to attach, representation was expressly limited in that act. And the omission of this limitation in the part of the subsequent statute of descents, which relates to the same subject, would indicate that it was not intended to adopt it there.

Nor is there anything in the act of descents, or in the past legislation of the state on that subject, which shows an intention to abolish the common law doctrine of represen-

tation among collaterals. On the contrary, every act in the whole legislation of the state, has shown an intention, carefully and minutely declared, to provide for representation among collaterals, as well as lineal descendants, wherever they are mentioned. In case of brothers and sisters of the whole blood or half blood, it provides that in case they or any of their children, shall have died, their children, respectively, shall take their share; a provision which the courts will continue, by construction, to the most remote issue. For, by the statute, neither father nor mother, nor collateral of equal degree, can take, as long as there is *any issue* of a brother or sister of either whole or half blood. And the doctrine of primogeniture would not be revived to fill the hiatus.

The fact that none of the acts regulating descents, or to reform the provisions of the common laws, contain any provision like that of the statute of distributions that no representation should take place after brothers' and sisters' children, shows that there was no intention to abolish representation. The provision in the statute of distributions, so familiar to any lawyer who took part in drafting the acts relating to descent, would have suggested it, if such was the intention. The Civil law, with regard to succession, is founded on the 118th Novel of Justinian, as amended by the 126th Novel. In Novel 118, we find the provision limiting representation to brothers' and sisters' children, in nearly the same words as used in the statute of distributions. It was introduced there to limit the doctrine of representation, which was adopted in other parts of the same Novel, and had been the rule of the old Roman laws, as contained in the Digest, as it was the rule of the common law. And although the statute of distributions is not copied from the 118th Novel, but in many, if not most, of its provisions is radically different, yet there was the same reason for introducing the limitation in the statute as there was in the Novel—that is, that the common law, like the Roman law, always recognized representation. These facts make the omission in the statute of descents significant

Representation among all of the blood of the ancestor, has been a favorable doctrine among the legislators and the

people of this state. The legislature have shown this, not only by their positive provisions, but by using, in this section, the word consanguinity instead of kindred, as in the statute of distributions. This word refers to the bond of *blood*, by which the common law transmits property, *common* blood coming from the same ancestor; a word peculiarly appropriate to the common law mode of reckoning kindred, as distinguished from the canon or Civil law rules. By the doctrine of representation, common law rule is, always to count the degrees from the intestate to the common ancestor. Those who come from the nearest ancestor of the decedent, are united by the nearest common blood or consanguinity, as concerns or relates to him. And that one uncle of the deceased should take the whole inheritance, to the exclusion of the children of two other uncles who had died shortly before him, would strike as grossly unjust every citizen who had been trained to venerate the justice of the system of the state in dividing property equally among all of the blood of the ancestor; and this would be the impression, even if the inheritance was not derived from a common ancestor.

The words "of equal degree" of consanguinity, cannot be held to exclude cousins from inheriting with uncles, as long as the common law rule for reckoning degrees is adhered to; *that* includes representation; and by that, cousins are in the same degree with uncles. The common law had this settled rule; and it was the rule adopted as to real estate and adhered to in England and in this country, long after the statutes of distributions and the decisions adopting the Civil law computation under it. With this rule established as the common law rule for reckoning degrees in the subject of legislation, the legislature pass an act to regulate the descent of real estate, and mention, without further definition, degrees of consanguinity. It is impossible, by any rule of interpretation, to infer that any other meaning was intended to be given to these words, than the technical meaning given to them in the system of law, as to the particular subject in which they are used, and to which they relate. The word heirs, if used in a New Jersey statute, would mean heirs by its present laws, not heirs by the law

of England or the Civil law, or any system of foreign law.

And the doctrine of the Supreme Court in the case of *Taylor* v. *Bray*, as to ascent, applied to this case, would clearly leave the common law rule to govern it. That case was much stronger than this; the grandmother was clearly of consanguinity to the decedent, and nearer than his collateral relations. She was the person designated by the words of the statute, and by them was entitled, by whatever rule consanguinity was reckoned, and without regard to the doctrine of representation; and yet it was held that although these words, in their literal meaning, would contravene the common law rule against ascent, yet, as there was no trace in the legislation of the state of any purpose to abolish the ancient law, these words should not have that effect.

From the history of the legislation of the state, it is obvious that the sixth section of the statute of decents, on which this question arises, was introduced only for the purpose of abolishing male preference and primogeniture among collaterals, as they had before been abolished among lineal descendants, and descendants of brothers and sisters.

The first act in the legislation of the state on this subject after the Declaration of Independence, was that of May 24th, 1780 *Pamph. Laws* 81; *Pat. Laws* 43. This abolished entirely the right of primogeniture, and partially the preference of male stocks, by giving to male descendants, both lineal and collateral, as far as brothers and sisters and their issues, two shares to one for a female descendant. It also provided for inheritance by brothers and sisters of the half blood, without excepting those not of the blood of the ancestor. This act provides for lineal descendants in the first section, for brothers and sisters in the second section, and for brothers and sisters of the half blood in the third section. It carefully provides for representation among lineal descendants and issue of brothers and sisters of the whole blood in the first two sections; but does not provide this as to the half blood in the third section, which was evidently drawn by a less skillful hand; and by a blunder, not strange, perhaps, if we knew its draftsman, but which, it seems strange, could have been overlooked by those who had charge of this change of legislation, provides if a person

should die seized intestate, and without leaving a brother or sister of the whole blood, or their issue, leaving a brother or sister of the half blood, that such half blood should inherit; and as it does not mention dying without issue, the half blood would, by the literal interpretation, take in preference to children, if there was no brother of the whole blood. This act does not provide for any collaterals beyond brothers of the half blood, and the issue of brothers of the whole blood, but left the common law rules, as to primogeniture and preference of male stocks, in full force as to uncles, cousins, and all more distant collaterals, and left nephews of the half blood under the ban of the common law.

The next step taken was by the act of February 5th, 1816, (*Pamph. Laws* 7,) which was intended to abolish the rules of primogeniture and male preference entirely, and to give male and female heirs equal shares, whatever the common degree of lineal or collateral relationship might be. It provided this by general words. It enacted that the real estate of any person who should "die intestate leaving *two or more heirs* lawfully entitled to the same, should descend to, and be inherited by, his or her said heirs, whether male or female, lineal or collateral, in equal shares or portions." This act left the law as it was, so far as it declared who were heirs, but enacted that all who were heirs by the law as it then was, should inherit in equal shares, whether male or female.

Next follows the act of February 15th, 1816, (*Pamph. Laws* 26,) amending the third section of the act of 1870, relating to half blood, by inserting the words "lawful issue or" between the words "without" and "any brother," &c., and by adding a clause excluding those not of the blood of the ancestor, from whom the property came to the intestate; but it did not provide for representation. Before this, the Supreme Court, in *Den* v *Urison*, 1 *Penn.* 212, and *Den.* v *Dehart*, 2 *Penn.* 481, had held that the provisions for brothers of the half blood, must be taken as subject to the general rule of the common law in other collateral descents where the intestate had inherited the land from an ancestor, that he must be of the blood of the ancestor. But the Court of Appeals, in *Arnold* v. *Den d*

Phoenix, 2 *South.* 865, overruled these cases, evidently to arrive at an equitable result, according to their spirit, but against the letter, and the decision so made was followed in *Den* v. *McKnight*, 6 *Halst.* 385.

Next follows the act of January 29th, 1817, (*Pamph. Laws* 8, *Rev. Laws* 608,) of which the seven enacting sections are the same in effect, and almost in words, as the first seven sections of the act of 1846, now in force, except that in the last is added a provision that in a certain case a mother may inherit for life. It is to be remarked that while the act of 1870 provides for representation of children and brothers and sisters dying in the lifetime of the ancestor, by the word "issue," so as to include all their descendants to the remotest degree, the acts of 1817 and 1846 change this language, and provide that if a brother or sister should have died leaving a child or children, such child or children should inherit the share of his father or mother, and the same law of inheritance should be observed in case of the death of any child of a brother or sister, before the person dying seized. There is no direct provision for representation further than children of nephews. That depends upon the implication to be derived from the language of the sixth section, which only provides for collaterals of equal degree of consanguinity, upon failure of "issue" of brothers and sisters. The first section of the act of 1780, relating to lineal representation, is also changed in language in the acts of 1817 and 1846, but so as to include all lineal descendants to the remotest degree. These acts also provide for representation by children and grandchildren of brothers and sisters of the half blood, in the same manner as of those of the whole blood, and change the previous act in that respect. Here we see a careful provision in all legislation, both as to lineal and collateral heirs, for representation according to the canons of the common law, extending even to the half blood, when of the blood of the ancestor, and when omitted by inadvertance, provided for in the subsequent legislation.

In the sixth section of the act of 1817, the descent to collaterals beyond the issue of brothers and sisters, is provided for. It was intended to supply the provision of the

act of February 5th, 1816, thereby repealed, and to correct the evident defects in the language of that act. The object in both cases, was simply to abolish primogeniture and male preference in all cases, as had been done before, among lineal descendants, and brothers and sisters, and their issue, except that males had two shares. The language of the act of 1816, clearly, simply, and fully effects the purpose; it showed no design, and could not be interpreted to change or limit the common law doctrine of representation; its defect was, that it provided only for such persons as were then, by law, the "lawful heirs of the intestate." A female cousin was not then a lawful heir, if she had a brother living; the act was no doubt intended to include that very case, and would now be construed to include it in a case of descent while it was in force. Yet it was better to change the language so as to include it expressly, and not by construction only. The section does not provide that the several persons in equal degree, shall be those in the nearest degree. That was provided for by the common law rule, which it did not intend to interfere with, but only to provide that when there were several in that nearest degree, according to the common law rule, they should inherit equally.

The general intent of all the legislation was to preserve the doctrine of representation among collaterals as well as lineals, and in no case is there any positive attempt to change or abrogate it.

The doctrine of the common law as to representation among collaterals must therefore be held, like the rule as to ascent, not to be affected by the provisions of this sixth section.

The consequences supposed to flow by the words of this act, it is said, must prevent permitting such representation. It is assumed that if cousins are held to be in the same degree as uncles, six children of a deceased uncle would inherit with a surviving uncle *per capita*, each one-seventh. But this difficulty should not change the construction of the language, settled by other cases in precisely the same situation, and according to the established rules of construction. It should be avoided by giving to the provision

itself that meaning which was evidently intended. The words "shall descend and go to the said persons of equal degree of consanguinity, as tenents in common in equal parts," should be construed by holding that the words "in equal parts" refer to a division *per stirpes*, and not *per capita*; a division in the manner in which the common law would divide it among female heirs or others taking in equal shares. The words of the section, if taken literally, and without regard to the evident object of the legislation, would warrant a division *per capita*. But these or like words in legislation on kindred subjects, have always received the interpretation contended for. The statute of distributions, 22 *d and* 23*d Car.* 2 *ch.* 10, directs the distribution of "the residue by *equal portions* to, and amongst the children of, such persons dying intestate, and such persons as legally represent such children, in case any of said children be then dead;" "and in case there be no children, the residue to be distributed equally to every of the next of kindred of the intestate, who are in equal degree, and those who represent them;" provided there be no representation among collaterals, after brothers and sisters children. This has been re-enacted in this state in the same words, and still continues to be the law of this state. If literally construed, a distribution by 'equal portions," or "equally" to children or to next of kin, and those who represent any such as should have died, must be *per capita*, and the six grandchildren of a deceased daughter would each take an equal share with a surviving son, and the children of a deceased brother would take equally with the surviving brothers and sisters. Such construction has no where ever been given to these acts, but the equal portions and equal divisions, have been held to be equally *per stirpes*, and not *per capita*.

All the acts regarding descent, have been and must be by common consent, construed according to their evident intention, and not according to the literal import of the words. The act of 1817, as now in force, according to its literal interpretation, does not abolish primogeniture or male preference, where an only child has died before his father, leaving children. The oldest son, on the death of

the grandfather intestate, would take the whole. The act only provides for the case of an ancestor leaving two or more children. If he leaves one child, it would take by the common law. Then it provides that if any child shall have died, the share which such child would have been entitled to "under this act," shall descend to his issue equally. The provision of the act of 1780, was substantially the same. Yet no one would contend that in such case the oldest son of such only child inherited the whole, to the exclusion of his brothers; such doctrines would overturn titles as accepted for ninety years past. The manifest intent of the legislation must control the construction. So evident was this, that these words have been continued in the revisions of 1799, 1820, and 1846, although Mr. Griffith, in his Register, Vol. 4, p. 1250, called attention to them. The revisors, whose duty it was to correct defects of expression, did not think it required any alteration.

Again: the third section of the act of 1780, which directs in terms, that brothers and sisters of the half blood shall inherit before children of lineal descendants of the person dying seized, never was or can be construed according to this literal meaning, but according to the intent only to provide for cases where there were no lineal descendants, or brothers of the whole blood. And this interpretation could be only on the ground that the rule of preferring lineal descendants, is so engrafted on our laws, and deeply rooted in the opinion of our people, that the intention to change it will not be inferred until legislation has so expressly declared. Representation among collaterals is just as much cherished in our legislation, and the right of cousins to inherit with uncles is just as much impressed upon the minds of the community as a matter of equity and justice, as the preference of descendants to the half blood. In most cases the injustice would not seem so glaring, but if an orphan minor should die at twenty in the family of an aunt, where she had been brought up, and the children of that aunt, who had been as brothers and sisters, should be excluded from all share of her patrimony, because their mother had died a few months before her, and the whole should go to an uncle comparatively a stranger, the

injustice of the rule would strike the public in such manner as would produce legislative changes of this construction of the law.

The act of February 5th, 1816, by its literal construction, would give the estate to all lawful heirs in equal shares. At that time, the children of a deceased son, and and also of such deceased son's deceased grandchild were heirs, yet these would never have been held to take equally with a son *per capita*, but only *per stirpes*; the equality intended, if not expressed.

Such being the rule by which the term "in equal parts," in this section, must be construed, the difficulty assumed to arise from the consequences vanishes. And a construction by which the section is held to direct the descent to those in equal degree of consanguinity, according to the rules of the common law, including the doct ine of representation in equal parts, equal *per stirpes*, in case of representation, would be in harmony with the rules of construction in other cases, and give effect to the undisputed intent of the legislature.

If the Civil law rule for reckoning collateral degrees has been adopted as the law of this state, for computing degrees of consanguinity under the sixth section of the act of descents, that would put the question at rest, and render useless the reasoning to show that it is not the *proper* rule.

It has not been adopted by legislation, nor by any decision of our courts. It is said that the general opinion of the profession is in favor of it. The fact may be so; but many of the profession with whom for years I have conferred on this subject, have viewed it as unsettled, and some of no mean eminence have contended that it was not the correct rule. The report of the master in this case, a lawyer of eminence, of long experience and extended practice, to whom the office of Chief Justice was tendered near twenty years ago, shows that the profession are not unanimous in their opinion. Opinions formed, or rather acquiesced in, from the fact that the rule of the Civil law had been applied to the statute of distributions, should not have much weight. And the opinion of the profession, and of legislators evinced by the statutes, and that of the public, has

been held not to change the common law. Until the first decision in *Gough* v. *Bell*, it was the general impression of the bar, of conveyancers, of legislators, and I had almost said of the bench, that the owner of lands along the shore had title to low water mark. Yet this was held not to affect the rule of law, and it was decided that the state owned the soil to high water line, subject to certain rights and easements of the land owner.

The only authority I find for this position is a quasi dictum of Chancellor Kent, who says, 4 *Com.* 412, that in computing the degrees of consanguinity, the Civil law is *generally followed* in this country. He merely states the fact, but refers to no cases or authorities in which it has been so decided or held; I am unable to find a single case in which it has been so held, where the statute of the state has not adopted that rule or one like it. The case nearest to it is one in the Supreme Court of Connecticut, *Hillhouse* v. *Chester*, 3 *Day* 166. The statute of Connecticut under which that case arose, gave "the residue both of the real and personal estate, equally, to every the next of kin of the intestate in equal degree, and those who legally represent them." Previous statutes and recitals in their preambles, showed that in Connecticut, real estate had generally been administered and divided among the heirs, in common with the chattles or moveable estate, and that the lands of a woman, upon marriage, passed to her husband, and were disposed of by him, like her personal estate. And in the legislation of the state, land had been treated as of small value as compared with personal estate. On these considerations, and because the words "next of kin" were used, as applied to personal property, together with land, and were taken from the English statute of distributions, under which they had received a settled meaning, the court held the same meaning must be given to those words as in the statute of distributions, and applied to lands in the same sense as to chattles, with which they were connected in the same sentence. In the New Jersey statutes of descents, the words of the statute of distributions are not used, and the other reasons on which that decision is based, do not exist in this state.

The Civil law rule of reckoning degrees of kindred, has been adopted both by the English courts and in this state, in giving effect to the statute of distributions. This was so held by Sir Jos. Jekyll, Master of the Rolls in 172 , in *Mently* v. *Petty*, *Finch's Prec.* 593; by Lord Hardwicke, in 1749, in *Thomas* v. *Ketteriche*, 1 *Ves.* 333; and by Sir John Strange, in 1750, in *Lloyd* v. *Tench*, 2 *Ves.* 213; and has been ever since acquiesced in. In the construction of that statute, the courts have always regarded the fact that it was for the purpose of regulating a matter which was the proper subject of the jurisdiction of the ecclesiastical courts, which proceeded in matters of property according to the rules of the Civil law. That statute as stated by Holt, C. J., in *Pett* v. *Pet*, 1 *Lord Raym.* 571, and 1 *P. W.* 25, was drawn up by Sir Walter Walker, an eminent civilian. He had applied without success to the common law courts, to compel the ecclesiastical courts to make distribution. These last mentioned courts originally held that the ordinary being entitled to the administration, could retain the surplus. But after the Reformation, it was the practice of the ordinary in granting administration, to require of the administrator, either a bond that he would distribute the surplus in the manner the ordinary directed, or that he should pay in advance certain portions to such persons.— But after the statute of Edward III, directed that the ordinary should grant administration to the *best friend* of the intestate, he could exact no such conditions, and it was held that neither the ecclesiastical or civil courts could compel distribution. This was the occasion of the statute. Hence, in construing it, the courts regarded the rules of the Civil law, and of the ecclesiastical courts, as the proper rule for the construction of it. And Chief Justice North, in his learned and elaborate opinion in 1681, in *Carter* v. *Cawley*, published in *Sir T. Raym*, *R.* 496, refers to the rules of the Civil law as acknowledged in the ecclesiastical courts for the construction of that act, and states that he had consulted Sir Leoline Jenkins, Judge of the Prerogative Court, and Sir Robert Wiseman, Dean of the Arches, as to the rule in those courts; and adds at the end of his opinion a certificate on the same subject, procurred from five learned

doctors of the Civil law. This opinion of Chief Justice North, was on the question whether the representation allowed in the act to brothers' and sisters' children, must be confined to the children of brothers and sisters of the intestate, or should extend to those of the brothers and sisters of any surviving next of kin; and although not concurred in by the court at that time, there being no decison, was afterwards in a series of cases adopted as the rule of construction. Lord Commissioner Hutchins in *Beeton* v. *Darkin*, 2 *Vern.* 168, doubted; and Holt, C. J., in *Backborough* v. *Davis*, 1 *P. W.* 41, was much inclined to adopt the rules of the common law, before the changes as to primogeniture and preference of males and the prohibition of ascent in time of Henry I., as still the law by which the statute of distribution, was to be construed; the alteration not having extended to personal estate. He says: "The laws of England, and not any foreign laws ought to govern this case." And he concludes that if the case was controlled by the Civil law, it was by that law as known in 1100, the time of Henry I, and not by the laws of Justinian which were not discovered until 1125, and had for centuries been everywhere disused. But the rule laid down by Chief Justice North, was adhered to and adopted in *Maw* v. *Harding*, 1791, 2 *Vern.* 234; in *Walsh* v. *Walsh*, *Finch's Prec.* 54, decided in 1695; in 1700, by the King's Bench on application for mandamus in Pett's case, 1 *P. W.* 25; *Holt R.* 259; 1 *Salk.* 250; 1 *Lord Raym.* 571 ; and in 1719, by Lord Chancellor Parker, in *Bowers* v. *Littlewood*, 1 *P. W.* 593.

If the courts in construing the statute of distributions, thus felt constrained to adopt the rule of the Civil law, because that was the law by which such matters had been determined, and the law of the ecclesiastical courts, which before had, and still retained that jurisdiction, and because the act had been drawn and procured by an eminent civilian, who probably used the term, "next of kindred," in the sense established in that law; the same reasoning should make them adopt the common law rule, in interpreting a statute, concerning the descent of real estate; a matter which had always been goverened by the rules of the com-

mon law, and had been held, most peculiarly, subject to these rules, and exclusively under the jurisdiction of the courts of law. There is hardly any case, in which the Civil law has been referred to in such matters; none in which it has been taken as the guide.

Nor is the matter affected by the consideration, that the act of descents having used the same term which had been used in the statute of distributions, the meaning of which had been settled at law, it should have the same meaning here. It is not the same term; "next of kindred," and of "equal degree of consanguinity," are radically different. The latter peculiarly applies to the descent of real estate; by its very structure, referring to the common ancestor, through whose blood the estate is supposed to come, and is most appropriately used to express the common law rule, which calculated only the degrees of the intestate from the common ancestor, and held all from his blood in the same degree. Besides, the same word is often used in different meanings in different statutes, when as here, it is applied to a different subject matter. And here, there is not the necessity, as in the statute of Connecticut, to apply one or the other of these meanings to both subject matters, because they were connected in the same sentence.

This is the situation of the case: Law Judges of the highest authority, have intimated opinions different from the view taken by me of the question in the cause; and my own opinion is settled in such way, that it can only yield to a determination by the courts of law, to whom this question, and every question as to the descent of real estate, properly belongs. It is, therefore, right that I should not determine the cause, without sending the question to the Supreme Court, for their opinion to be certified upon it. But the matter involved is less than $400, and unnecessary costs should be avoided. Such a question may and probably will eventually, be taken to the Court of Appeals for settlement there, and as it can be settled there with little more delay or expense than in the Supreme Court, I will decide the cause here upon my own view of the case, and overrule the exceptions.

In Chancery of New Jersey.

Between
Alexander Vail, *et al.*
Complainants,
and
Henry Van Derveer, *et al.*
Defendants

On Bill, &c.

The Chancellor having heard the arguments of the counsel for the respective parties of the demurrer filed in the above cause, by Henry Van Derveer, one of the said defendants.

It is ordered on motion of A. A. Clark, of counsel with complainants, that the said demurrer be over-ruled with costs to be paid by the defendant, John F. Schenck.

A. O. ZABRISKIE,
Chancellor.

Dated May 21, 1872.
[A true copy.]
HENRY C. KELSEY, CLERK.

Between
Alexander Vail, *et al*,
Complainants,
and
Henry Van Derveer, *et al.*
Defendants.

On Bill &c.

The Chancellor having heard the arguments of the counsel for the respective parties of the demurrer filed in the above cause, by Henry Van Derveer, one of the said defendants.

It is ordered on motion of A. A. Clark, of counsel with complainants, that the said demurrer be over-ruled with costs to be paid by the defendant Israel Schenck.

A. O. ZABRISKIE,
Chancellor.

Dated May 21, 1872.
[A true copy.]
HENRY C. KELSEY, CLERK.

It was ordered by the Chancellor that the opinion by him delivered in the case of Elizabeth Fidler, Complainant, and William B. Higgins, *et al.*, Defendants, at the October Term of the Court of Chancery, A. D. 1870, should be printed as his opinion in this case, and made a part of this case for the consideration of this Court.

JOHN SCHOMP,
A. V. VANFLEET,

Solicitors for and of Counsel with Israel Schenck and John F. Schenck, Defendants, &c.

A. A. CLARK,

Solicitor for and of Counsel with Complainants.