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North Carolina's New Intestate Succession Act-III. Distributive Provisions

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III

DISTRIBUTIVE PROVISIONS

NORMAN A. WIGGINS*

Before proceeding to discuss the distributive provisions of the new law, it is well to remind ourselves that the new act¹ is applicable to the estates of decedents dying intestate, or partially intestate,² after July 1, 1960. The distribution of estates of decedents dying intestate prior to July 1, 1960 shall continue to be governed by the former North Carolina intestacy law.³ For the next few years it is going to be extremely important that the exact date of the intestate's death be determined before entering upon the administration, settlement, and distribution of the estate.

STATUTE OF DISTRIBUTION AND CANONS OF DESCENT REPEALED

It is common knowledge within the legal profession that the former North Carolina intestacy law⁴ was, for the most part, inherited from England as a part of the common law of that country.⁵ At common law the intestate's realty descended directly to his "heirs" who were determined by the Canons of Descent.⁶ Personal property passed to the intestate's "next of kin" who were determined by the Statute of Distribution.⁷

Under the new Intestate Succession Act both the Canons of Descent and the Statute of Distribution are repealed. These statutes are replaced by one uniform rule which appears as Chapter 29 of the General Statutes and this chapter governs the distribution of both real and personal property.

DISTINCTION BETWEEN REAL AND PERSONAL PROPERTY ABOLISHED

In determining persons who shall inherit property when one dies intestate there is no longer any distinction between real and personal

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¹ N.C. GEN. STAT. ch. 29 (Supp. 1959).

² N.C. GEN. STAT. § 29-8 (Supp. 1959).

³ N.C. GEN. STAT. §§ 29-1, 28-149 (Supp. 1959).

⁴ *Ibid.*

⁵ By 1711 the assembly of the colony of Carolina, in order to clarify where the common law stopped and the colonial law began, declared that the common law and all English statutes were binding in the colony, especially those statutes "confirming the inheritance and titles of land are and shall be in force here, although this province or the plantations in general are not mentioned." 1 THE COLONIAL RECORDS OF NORTH CAROLINA (1662-1712) 790 (Saunders ed. 1886). See also Bassett, *The Constitutional Beginnings of North Carolina*, 12 JOHNS HOPKINS UNIVERSITY STUDIES 46 (1663-1729) (1894).

⁶ 2 BLACKSTONE, COMMENTARIES 208-34 (1771); HALE, THE COMMON LAW OF ENGLAND 250-74 (1713).

⁷ 1670, 22 & 23 Car. 2, c. 10.

property. The new act⁸ eliminates the difference between the descent of land and the distribution of personal property. Henceforth, in the distribution of property the right of inheritance will depend upon the degree of relationship of the beneficiary or heir to the intestate and not upon whether the property is real or personal. This is made clear by the use of the term "share." The share of intestate property which any person is entitled to receive "includes both the fractional share of the personal property and the undivided fractional interest in the real property"⁹

With the abolishment of the distinction between real and personal property and with the establishment of a single class of heirs for the purpose of distributing intestate estates, there was no longer any need for the separate terms "heirs," or "heirs at law," and "next of kin." The new law recognizes this fact and replaces these terms with the single term "heir." An "heir" is defined to be "any person entitled to take real or personal property upon intestacy under the provisions of this chapter."¹⁰

DISTINCTION BETWEEN ANCESTRAL AND NON-ANCESTRAL PROPERTY ABOLISHED

The doctrine of ancestral property was founded upon the fifth common law canon of descent.¹¹ The doctrine provided that on a failure of lineal descendants of the person last seized of land the inheritance should pass to the collateral relations who were of the blood of the first purchaser (i.e., the person who first brought the land into the family). North Carolina has long retained the ancestral property doctrine as a part of its intestacy law.¹²

Under the former law two exceptions were recognized. The first exception provided that where ancestral property was transmitted and the blood of the ancestor was extinct, the collateral kin of the intestate inherited notwithstanding the ancestral property doctrine.¹³ The second exception allowed a surviving parent to inherit ancestral property from

⁸ N.C. GEN. STAT. § 29-3(1) (Supp. 1959).

⁹ N.C. GEN. STAT. § 29-2(6) (Supp. 1959).

¹⁰ N.C. GEN. STAT. § 29-2(4) (Supp. 1959).

¹¹ 2 BLACKSTONE, COMMENTARIES 221 (1771); 6 POWELL, REAL PROPERTY ¶ 1001 (1958); Note, 42 YALE L.J. 101, 103 (1932). BLACKSTONE, *op. cit. supra* at 221, stated that the origin of the ancestral property rule was feudal in nature. Other writers explain the ancestral property rule in the fact that its principal effect was that of keeping a woman's land in her own family and returning property to the side of the family from whence it came. 2 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 298-99 (1895).

¹² N.C. GEN. STAT. § 29-1(4) (1950) [N.C. Laws 1808, ch. 739]; *Elledge v. Welch*, 238 N.C. 61, 67, 76 S.E.2d 340 (1953); *Poisson v. Pettaway*, 159 N.C. 650, 75 S.E. 930 (1912).

¹³ N.C. GEN. STAT. § 29-1(5) (1950) [N.C. Laws 1808, ch. 739].

the intestate when he died without leaving issue, or brothers or sisters or issue of deceased brothers or sisters.¹⁴

The new act¹⁵ abolished the distinction between ancestral and non-ancestral property. Henceforth, it will no longer be necessary in the distribution of intestacy property to determine the source from whence the decedent acquired the property.

DISTINCTION BETWEEN RELATIONS OF THE WHOLE AND HALF-BLOOD ABOLISHED

Under the sixth common law canon of descent it was provided that collateral kindred of the half blood could not inherit the intestate's land.¹⁶ The rule for distributing personal property was the opposite, namely, that relatives of the whole blood and half-blood would share equally the intestate's personalty.

As early as 1784 North Carolina recognized the gross injustice of the exclusion of the half-blood from the inheritance of land and provided that the lands of the intestate would be inherited equally by relations of both the whole and half-blood.¹⁷ However, the cases construing the law constantly held that rules six¹⁸ and four¹⁹ of the former statute of descent had to be harmonized and construed together.²⁰ Thus, the intestate's collateral relations of the half-blood, under the provision of rule six, inherited only where, under the requirements of rule four, they were of the blood of the purchasing ancestor from whom the estate descended by gift, devise or settlement. The net effect of the requirement was that the ancestral property rule was invoked to bar inheritance by the intestate's collateral relations as the half-blood who were not as the blood of the first purchaser.²¹

The new act provides²² that in the distribution of intestate property there is to be no distinction between relations of the whole and half-blood. An application of the new rule may be illustrated with the following example. *F*, who owned Blackacre, a North Carolina farm, in

¹⁴ N.C. GEN. STAT. § 29-1(6) (1950) [N.C. Laws 1808, ch. 739, as amended].

¹⁵ N.C. GEN. STAT. § 29-3(2) (Supp. 1959).

¹⁶ 2 BLACKSTONE, COMMENTARIES 208-34 (1771); 6 POWELL, REAL PROPERTY ¶ 1000 (1958).

¹⁷ N.C. Laws 1784, ch. 22, as reported in 1 IREDELL, THE PUBLIC ACTS OF THE GENERAL ASSEMBLY OF NORTH CAROLINA 156 (Martin rev. ed. 1804).

¹⁸ N.C. GEN. STAT. § 29-1(6) (1950) [N.C. Laws 1808, ch. 739, as amended].

¹⁹ Note 11 *supra*.

²⁰ In *Paul v. Carter*, 153 N.C. 26, 27, 68 S.E. 905 (1910), the court said: "These two rules [six and four] were adopted at the same time . . . and, as they relate to the same subject, or are in *pari materia*, should be construed together, and it was clearly intended that they should be."

²¹ For cases invoking the ancestral property rule to bar inheritance by the half-blood under the former law, see *Ex parte Barefoot*, 201 N.C. 393, 160 S.E. 365 (1931); *Noble v. Williams*, 167 N.C. 112, 83 S.E. 180 (1914); *Poisson v. Pettaway*, 159 N.C. 650, 75 S.E. 930 (1912).

²² N.C. GEN. STAT. § 29-3(3) (Supp. 1959).

fee simple, died intestate. *S*, the only son and heir of *F*, inherited Blackacre. Later *S* married *W* and by her had three children, *A*, *B*, and *C*. *S* died intestate in 1950. Blackacre was inherited by the three children of *S*, subject to *W*'s dower. Later *W* married *H* and two children, *D* and *E*, were born to *H* and *W*. *W* died in 1955.

On the basis of the above stated facts, assume that *B* died intestate and unmarried in 1958. *B* left surviving him his full brothers *A* and *C*, and half brothers, *D* and *E*. Under these facts *B*'s half brothers *D* and *E*, children of *W*'s second marriage to *H*, would inherit no interest in Blackacre because they were not of the blood of *S* or *F*, the purchasing ancestor who first brought the land into the family. *B*'s entire interest would pass to his full brothers *A* and *C*. This is the effect of construing together rules six and four of G.S. § 29-1 of the former intestacy law.

If under the same circumstances *B* had died July 15, 1960, this being subsequent to the effective date of the act, the whole and the half-blood brothers of *B* would have inherited equally *B*'s interest in Blackacre.

DESCENT AND DISTRIBUTION UPON INTESTACY

The new act provides that the estate of a person dying intestate shall descend and be distributed subject to the payment of costs of administration, claims, and state inheritance taxes.²³ To aid in determining what is included in the term "estate" it is defined to mean

all the property of a decedent including but not limited to . . . an estate for the life of another; and . . . all future interests in property not terminable by the death of the owner thereof, including all reversions, remainders, executory interests, rights of entry and possibilities of reverter, subject, however, to all limitations and conditions imposed upon such future interests.²⁴

The definition of "estate" includes property in which the decedent owns a present inheritable interest, and property in which he owns a future, nonpossessory interest which is not terminable by his death. An estate for the life of another was included in the definition in order to preserve the effect of former G.S. § 29-1(11). For example, if *A* transfers Blackacre to *B* for the life of *C* and *B* dies intestate before *C* (who is the measuring life), *B*'s interest in Blackacre will descend as if it were an inheritable estate to the heirs of *B* during the remainder of *C*'s life.

The term "estate" should be distinguished from the term "net estate." It is a share of the "net estate" which the heir is entitled to inherit. As defined by the new act the term "net estate" means "the estate of a

²³ N.C. GEN. STAT. § 29-13 (Supp. 1959).

²⁴ N.C. GEN. STAT. § 29-2(2) (Supp. 1959).

decendent, exclusive of family allowances, costs of administration, and all lawful claims against the estate."²⁵

It should be pointed out that the new law makes no change in the long accepted principle that the personal property of the decedent is the primary fund for the payment of the intestate's debts.²⁶ Only when there is an insufficiency of personal property can the administrator resort to realty for the payment of debts.

SHARES OF PERSONS WHO TAKE UPON INTESTACY

To facilitate the distribution of intestate property the new act treats separately the share of the surviving spouse²⁷ and the shares of persons other than the surviving spouse.²⁸ For purposes of this discussion we will give individual treatment to each subject.

Share of Surviving Spouse

Formerly in North Carolina a surviving wife, when the husband died leaving issue surviving, received a child's share of the personal property²⁹ and a dower interest in the realty.³⁰ If the husband died leaving no issue surviving, the wife's share of the personal property was increased.³¹ Similarly, a surviving husband, when the wife died leaving issue surviving, received a child's share of personalty³² and a curtesy interest in the realty.³³ If the wife died, leaving no issue surviving, the husband inherited all of his wife's personal property but received no interest in her real property.³⁴ The husband and wife could never inherit real property directly from each other except in those relatively rare cases where there were no other heirs to make a claim.³⁵

²⁵ N.C. GEN. STAT. § 29-2(3) (Supp. 1959).

²⁶ N.C. GEN. STAT. § 28-81 (Supp. 1959); *Alexander v. Galloway*, 239 N.C. 554, 80 S.E.2d 369 (1959).

²⁷ N.C. GEN. STAT. § 29-14 (Supp. 1959).

²⁸ N.C. GEN. STAT. § 29-15 (Supp. 1959).

²⁹ N.C. GEN. STAT. § 28-149(2) (1950) [N.C. Sess. Laws 1945, ch. 46, § 1].

³⁰ N.C. GEN. STAT. §§ 30-4 to -14 (1950) [30-4: N.C. Pub. Laws 1871-72, ch. 193, § 44; -5: N.C. Laws 1827, ch. 46, as amended; -6: N.C. Pub. Laws 1868-69, ch. 93, § 35; -7: N.C. Sess. Laws 1945, ch. 73, § 1; -8: N.C. Sess. Laws 1945, ch. 73, § 2; -9: N.C. Pub. Laws 1923, ch. 65; -10: N.C. Pub. Laws 1923, ch. 67, § 2; -11: N.C. Pub. Laws 1868-69, ch. 93, § 39; -12: N.C. Pub. Laws 1868-69, ch. 93, §§ 40, 41, as amended, N.C. Pub. Laws 1891, ch. 133, as amended, N.C. Sess. Laws 1945, ch. 116; -13: N.C. Pub. Laws 1868-69, ch. 93, § 42, as amended, N.C. Pub. Laws 1893, ch. 314, as amended, N.C. Pub. Laws 1931, ch. 393, as amended, N.C. Pub. Laws 1939, ch. 339; -14: N.C. Pub. Laws 1868-69, ch. 93, § 43].

³¹ N.C. GEN. STAT. § 28-149(3) (1950) [N.C. Pub. Laws 1868-69, ch. 113, § 53, as amended].

³² N.C. GEN. STAT. § 28-149(8) (1950) [N.C. Pub. Laws 1913, ch. 166, § 1, as amended, N.C. Pub. Laws 1921, ch. 54].

³³ N.C. GEN. STAT. § 52-16 (1950) [N.C. Pub. Laws 1868-69, ch. 193, § 30].

³⁴ N.C. GEN. STAT. §§ 28-149(9), 52-16 (1950) [N.C. Pub. Laws 1868-69, ch. 113, as amended; N.C. Pub. Laws 1868-69, ch. 193, § 30]; *Blankenship v. Blankenship*, 234 N.C. 162, 66 S.E.2d 680 (1951) (the husband was not entitled to curtesy unless there was issue of the marriage born alive).

³⁵ N.C. GEN. STAT. § 29-1(8) (1950) [N.C. Pub. Laws 1925, ch. 7].

The new law³⁶ provides that the intestate share of the surviving spouse shall be as follows:

If the wife or husband was survived by,

(1) a spouse and one child or lineal descendant³⁷ or descendants of one deceased child, the spouse will take one-half of the net estate; or

(2) a spouse and two or more children or lineal descendants of deceased children, the spouse will take one-third of the net estate; or

(3) a spouse, no child or lineal descendants of a deceased child, but one or both parents, the spouse will take a one-half undivided interest in the real property, the first \$10,000 of personal property and one-half of the remainder of the personal property; or

(4) a spouse but no child, or lineal descendants of a deceased child, or parent, the spouse will take all of the net estate.

It will be observed that several important changes have been made by the new act. For the purpose of inheritance of intestate property the husband and wife are placed on an equal footing. A surviving spouse, whether widow or widower, is given an outright fractional share in the assets of the deceased spouse, and such share includes both real and personal property. The surviving spouse is made a statutory heir³⁸ of the deceased spouse and placed first in the line of inheritance. Notwithstanding the size of the estate or the number of other heirs, the surviving spouse's share of the deceased spouse's estate will never be less than one-third of the net estate.³⁹ In the absence of parents and descendants of the decedent, the surviving spouse is given all of the decedent spouse's intestate estate. The share given to the surviving spouse is a protected share which is guaranteed by an amendment to the dissent statute.⁴⁰ Under the amendment the surviving spouse, whether husband or wife, may dissent from the will of the deceased spouse and take his or her intestate share.

Shares of Other Persons

After the surviving spouse's share has been deducted or if the intestate left no surviving spouse, the rest of the estate shall be distributed as follows:⁴¹

³⁶ N.C. GEN. STAT. § 29-14 (Supp. 1959).

³⁷ "Lineal descendants" of a person mean all children of such person and successive generations of children of such children." N.C. GEN. STAT. § 29-2(5) (Supp. 1959).

³⁸ N.C. GEN. STAT. § 29-2(4) (Supp. 1959).

³⁹ A second or successive spouse dissenting from the will of a deceased spouse may under certain conditions take only one-half of the amount provided by G.S. § 29-14. N.C. GEN. STAT. § 30-3(b) (Supp. 1959).

⁴⁰ N.C. GEN. STAT. §§ 30-1 to -3 (Supp. 1959).

⁴¹ N.C. GEN. STAT. § 29-15 (Supp. 1959).

If the intestate was survived by,

(1) one child or the lineal descendants of one deceased child, the child or descendants will take all of the net estate; or

(2) two or more children or lineal descendants of deceased children, the children and descendants will take all of the net estate; or

(3) no children or descendants of a deceased child but one or both parents, the net estate will be divided between the parents or all will go to the surviving parent; or

(4) no child, lineal descendants of a deceased child, or parent but brothers and sisters or lineal descendants of deceased brothers or sisters, the brothers and sisters and lineal descendants of deceased brothers and sisters will take all of the net estate; or

(5) no child, lineal descendants of a deceased child, parent, brother or sister, or lineal descendant of a deceased brother or sister but one or more grandparents, one-half of the net estate will go to the paternal grandparents or surviving grandparent or their lineal descendants and the other half to the maternal grandparents or surviving grandparent or their lineal descendants; or

(6) no grandparent or uncle or aunt or lineal descendants of a deceased uncle or aunt on the paternal side, the one-half share of the net estate which would have passed to the intestate's paternal kindred will go to the intestate's maternal kindred; or

(7) no grandparent or uncle or aunt or lineal descendants of a deceased uncle or aunt on the maternal side, the one-half share of the net estate which would have passed to the intestate's maternal kindred will go to the intestate's paternal kindred.

The new act makes a significant change in the former intestacy law. Under the former law real property could not ascend, and the intestate's brothers and sisters or their descendants were favored over parents in the inheritance of real property.⁴² On the other hand, the intestate's parents were prior to the brothers and sisters of the intestate in the inheritance of personalty.⁴³ The new act abolishes the limitation on the inheritance by parents⁴⁴ and provides that in the absence of children and lineal descendants of deceased children the parents are next in the

⁴² N.C. GEN. STAT. § 29-1(6) (1950) [N.C. Laws 1808, ch. 739, as amended]; *Weeks v. Quinn*, 135 N.C. 425, 47 S.E. 596 (1904).

⁴³ N.C. GEN. STAT. § 28-149(6) (1950) [N.C. Pub. Laws 1915, ch. 37, § 1, as amended, N.C. Pub. Laws 1927, ch. 231, § 1]; *Parsons v. Swift & Co.*, 234 N.C. 580, 587, 68 S.E.2d 296, 300 (1951); *In re Estate of Pruden*, 199 N.C. 256, 258, 154 S.E. 7, 8 (1930).

⁴⁴ There should be no quarrel with the abolishment of this limitation. It is common knowledge that the former limitation on the inheritance of realty by the parents was a carry over from the English common law under which property could not ascend. The exclusion of the parents was in line with the feudal concept that the inheritance should be kept in the blood per stirpes. 2 POLLOCK & MATTLAND, *THE HISTORY OF ENGLISH LAW* 292 (1895).

line of inheritance for both real and personal property. In the absence of parents, brothers and sisters or descendants of brothers and sisters, the intestate's property is divided equally between the parental and maternal grandparents. If either paternal grandparent predeceases the intestate, the surviving parental grandparent takes the entire one-half of the net estate. If neither paternal grandparent survives the intestate, the paternal uncles and aunts and their lineal descendants take the one-half of the net estate which would have gone to the paternal grandparents. An identical treatment is accorded to the one-half share which passes to the maternal grandparents. In the absence of any paternal kindred the one-half share which would have passed to the paternal kindred passes to the intestate's maternal kindred. A like treatment is accorded to the share of the maternal kindred in case no maternal kindred survive the intestate.

North Carolina, with slight modification, has adopted the parentelic system for the distribution of intestate property. On the parentelic basis the descendants of the parents of the deceased have priority over other descendants of a more remote ancestor of the deceased. For example, a grandnephew of the deceased takes ahead of an uncle of the deceased because the grandnephew is within the parentela of, that is, is a descendant of, the deceased's parents, while the uncle is within the parentela of the deceased's grandparents.

ADOPTED CHILDREN

The new act⁴⁵ consolidates the various references to adoption which were formerly made in the statutes of descent⁴⁶ and distribution.⁴⁷ Under the former and present law, for the purpose of intestate succession, the child upon adoption is taken out of the bloodstream of his natural parents and placed in the bloodstream of his adoptive parents. The new act qualifies the rule in one respect. If the natural parent has previously married, is married to, or shall marry the adoptive parent, the adopted child is considered the child of such natural parent for all purposes of intestate succession.⁴⁸ In other words, under the circumstances hereinbefore stated, the adopted child is placed back into the bloodstream of the natural parent the same as if the act of adoption had not occurred. With the exception of this qualification, the new act restates the former excellent law of adoption without change.

⁴⁵ N.C. GEN. STAT. § 29-17 (Supp. 1959).

⁴⁶ N.C. GEN. STAT. § 29-1(14), (15) (1950) [N.C. Sess. Laws 1947], ch. 832]; N.C. GEN. STAT. § 48-23 (Supp. 1959).

⁴⁷ N.C. GEN. STAT. § 28-149(10), (11) (1950) [N.C. Sess. Laws 1947, ch. 879, § 11].

⁴⁸ N.C. GEN. STAT. § 29-17(e) (Supp. 1959).

LEGITIMATED CHILDREN

G.S. § 29-18 of the new law provides that when a child born illegitimate has been legitimated in accordance with the applicable North Carolina law or the applicable law of any other jurisdiction, such child and his heirs are considered legitimate for all purposes of intestate succession. It should be noted that the act establishes for persons legitimated in jurisdictions other than North Carolina the same rights of intestate succession as for persons legitimated in North Carolina. The section eliminates a conflict in wording⁴⁹ which appeared under the former law by making it clear that the legitimated child and his heirs inherit both from and through the parents.

When a child born out of wedlock is subsequently legitimated the rights of intestate succession by, through, and from such child depend generally upon a construction of the applicable legitimation statute. Such statutes, being remedial in purpose and in derogation of the common law, often receive a very narrow construction.⁵⁰ It is hoped that when G.S. § 29-18 comes up for judicial construction it will receive a broad construction in order to effectuate the purpose of the statute.

ILLEGITIMATE CHILDREN

At common law a child born out of wedlock was *filius nullius*, a child of no one, and could inherit from no one; and no one, except a spouse and lineal descendants, could inherit from him.⁵¹ The common law rules were so stringent that even intermarriage by the parents did not legitimate the child.

Every American jurisdiction has passed legislation eradicating, in part, some of the stigma of illegitimacy from the offspring.⁵² Under the former North Carolina law⁵³ an illegitimate child could inherit from his mother, but not through his mother from her relatives. If the mother left both legitimate and illegitimate children, the illegitimate could not inherit property from his mother which came to her from the father of her legitimate children.⁵⁴

Under the new Intestate Succession Act⁵⁵ the illegitimate child is made a member of his mother's family so that upon intestacy he and his descendants take by, through, and from his mother and his other ma-

⁴⁹ Compare N.C. GEN. STAT. § 29-1(16) (1950) [N.C. Sess. Laws 1957, Ch. 832] ("such child and his issue . . .") with N.C. GEN. STAT. § 28-149(12) (1950) [N.C. Sess. Laws 1947, ch. 879] ("such child . . .").

⁵⁰ *In re Estate of Wallace*, 197 N.C. 334, 148 S.E. 456 (1929).

⁵¹ 6 POWELL, REAL PROPERTY ¶ 1003 (1958).

⁵² Vernier & Churchill, *Inheritance by and from Bastards*, 20 IOWA L. REV. 216 (1935).

⁵³ N.C. GEN. STAT. §§ 28-152, 29-1(9), (10) (1950) [N.C. Pub. Laws 1868-60 ch. 113, §§ 57, 58; N.C. Pub. Laws 1913, ch. 71, § 1].

⁵⁴ *Ibid.*

⁵⁵ N.C. GEN. STAT. § 29-19 (Supp. 1959).

ternal kindred, lineal and collateral, and they take from him. This plan of succession is carried out in G.S. §§ 29-21⁵⁶ and -22⁵⁷ as to intestate succession from an illegitimate person by making the mother and her family the illegitimate's successors in the absence of a surviving spouse and lineal descendants. With this exception the estate of the illegitimate who dies intestate descends and is distributed in the same manner as if he were legitimate.

POSTHUMOUS HEIRS

At common law⁵⁸ and under the former intestacy law⁵⁹ the right of the posthumously born child to inherit a full intestate share was recognized. It will be recalled that North Carolina has held⁶⁰ that the posthumous or unborn child may recover his intestate share of his deceased father's land from a bona fide purchaser who obtained title through a judicial partition sale.

In some states the applicable statute limits intestate succession to posthumous children.⁶¹ Statutes in other states limit intestate succession to lineal descendants.⁶² In rewriting the former law, G.S. § 29-9 of the new act makes it clear that "lineal descendants and other relatives of an intestate born within ten lunar months after the death of the intestate, shall inherit as if they had been born in the lifetime of the intestate and had survived him."

INHERITANCE BY ALIENS

At common law the alien was excluded from the inheritance of real property, and likewise the heirs could not inherit realty from the alien. Blackstone concluded that the exclusion of the alien was predicated upon the theory that the alien possessed no inheritable blood.⁶³ Furthermore, if unlimited inheritance rights were granted, the nation might eventually be subjected to foreign influence.⁶⁴ This alleged lack of inheritable

⁵⁶ N.C. GEN. STAT. § 29-21(1) (Supp. 1959) provides, "If the intestate is not survived by a child, children or any lineal descendant of a deceased child or children, but is survived by his or her mother, a one-half undivided interest in the real property and the first ten thousand dollars (\$10,000.00) in value plus one-half of the remainder of the personal property" is taken by the surviving spouse and the mother takes the rest.

⁵⁷ N.C. GEN. STAT. § 29-22(3) (Supp. 1959) provides that after the surviving spouse's share has been deducted, or in the absence of a surviving spouse, "if the intestate is not survived by a child, children or any lineal descendant of a deceased child or children, but is survived by his mother, she shall take the entire net estate or share"

⁵⁸ 2 BLACKSTONE, COMMENTARIES 208-34 (1771); 6 POWELL, REAL PROPERTY ¶ 996 (1958).

⁵⁹ N.C. GEN. STAT. § 29-1(7) (Supp. 1959).

⁶⁰ Deal v. Sexton, 144 N.C. 157, 56 S.E. 691 (1907).

⁶¹ ATKINSON, WILLS 75 (1953).

⁶² *Ibid.*

⁶³ 2 BLACKSTONE, COMMENTARIES 242 (1771).

⁶⁴ 1 BLACKSTONE, COMMENTARIES 372 (1771).

blood on the part of the alien also prevented a citizen from inheriting from another citizen if he were compelled to trace descent through an alien. By 1700 England had altered the law to the extent necessary to permit her natural born subjects to inherit even though the ancestors through whom they claimed were of alien blood.⁶⁵

The alien, at common law, could inherit and transmit inheritance to personal property. This benefit was limited to alien friends. It was only by special favor of the king that the alien enemy could inherit and transmit inheritance to personalty.⁶⁶

The rules which prohibited the alien from inheriting realty were adopted by North Carolina as a part of its common law.⁶⁷ Apparently, Parliament realized the incongruity of the application of the alien rule in the colonies and in 1740 it passed legislation allowing any colonist to become a British subject after seven years of residence in the colony.⁶⁸ This provision enabled those who otherwise would have been treated as immigrant-alien to become citizens of England. Thus, indirectly the limitation on the inheritance by aliens and those claiming through them was eased.

After the revolution North Carolina wasted no time in rejecting the common law limitation on the inheritance by aliens. By 1776 North Carolina had a provision in her constitution⁶⁹ which enabled every person settling within the state, who took an oath of allegiance to the same, to acquire, hold, and transfer realty. Prior to the Intestate Succession Act of 1960, the 1776 provision had found its way into statute, albeit not in the statutes of descent and distribution.⁷⁰ Under the prior law the alien could inherit and transmit inheritance to personalty. The absence of a provision to the contrary allowed the alien to continue to possess this common law right to inherit and to transmit inheritance to personalty even after the passage of the 1776 provision.⁷¹ Under the new act it is provided that "it shall be no bar to intestate succession by any person, that he or any person through whom he traces his inheritance, is or has been an alien."⁷²

The new law does nothing more than to rewrite and place in its proper setting that part of G.S. § 64-1 which deals with the rights of inheritance by aliens. The present law governing the inheritance by

⁶⁵ 11 & 12 Will. 3, c. 6.

⁶⁶ 1 BLACKSTONE, COMMENTARIES 372 (1771).

⁶⁷ 1 THE COLONIAL RECORDS OF NORTH CAROLINA (1662-1712) 170 (Saunders ed. 1886).

⁶⁸ An act for naturalizing such foreign protestants, and others therein mentioned, as are settled, or shall settle in any of his Majesty's colonies in America, 1740, 13 Geo. 2, c. 7.

⁶⁹ N.C. CONST. § 40 (1776), published in TAYLOR & YANCEY, NORTH CAROLINA REVISED LAWS 51 (1821).

⁷⁰ N.C. GEN. STAT. § 64-1 (Supp. 1959).

⁷¹ N.C. GEN. STAT. § 4-1 (Supp. 1959).

⁷² N.C. GEN. STAT. § 29-11 (Supp. 1959).

aliens as set forth in G.S. § 64-1 seems sufficient. North Carolina has never been troubled with any large alien population. Thus, while it may be reasonable to impose some qualifications upon the alien's right to inherit in California, so as to protect society against the possible mismanagement of property by a large number of disinterested or absentee owners, the same considerations have not been and are not now present in North Carolina.⁷³

DISTRIBUTION OF PROPERTY AMONG CLASSES

One of the most difficult questions which arises in the distribution of intestate property is that of deciding whether the property should be distributed per stirpes or per capita. The common law and the civil law did not agree on the answer. The former adhered to the per stirpes rule, and thus several sets of nephews and nieces would divide among themselves the shares of property to which their respective deceased parents would have been entitled. The civil law followed the common law where lineal descendants were involved; but when the distribution was to the collateral line and all persons entitled to take stood in the same degree, they took per capita.⁷⁴

The former North Carolina law required that in the distribution of personalty, if all the claimants were of equal degree, the distribution would be per capita. Per stirpes distribution of personalty was allowed only where it was necessary to bring the claimants into equality of position as next of kin.⁷⁵ Thus, if the intestate's next of kin were all nephews and nieces, his personalty received a per capita distribution. However, if a sister of the intestate survived, the nieces and nephews could only take by representing their deceased parents; hence they inherited per stirpes.⁷⁶ On the other hand, the former law⁷⁷ provided for the devolution of real property to lineal descendants and collateral relations on a per stirpes basis.

Article three of the new act⁷⁸ provides North Carolina with a method for the distribution of intestate property which departs from, and is more

⁷³ But cf. N.C. GEN. STAT. §§ 64-3, -5 (Supp. 1959), which were passed in 1959 and which make the rights of the nonresident alien to inherit property depend upon reciprocity.

⁷⁴ ATKINSON, WILLS 41-50 (1953); Page, *Descent Per Stirpes and Per Capita*, 1946 WIS. L. REV. 1.

⁷⁵ N.C. GEN. STAT. § 28-149(4), (5), (6) (1950) [N.C. Pub. Laws 1868-69, ch. 113, § 53, as amended; N.C. Pub. Laws 1868-69, ch. 113, as amended; N.C. Pub. Laws 1915, ch. 37, § 1, as amended, N.C. Pub. Laws 1927, ch. 231, § 1]; Wooten v. Outland, 226 N.C. 245, 37 S.E.2d 682 (1946); Ellis v. Harrison, 140 N.C. 444, 53 S.E. 299 (1906); Skinner v. Wynne, 55 N.C. 41 (1854).

⁷⁶ *In re Estate of Poindexter*, 221 N.C. 246, 20 S.E.2d 49 (1942); 2 BLACKSTONE, COMMENTARIES 517 (1771).

⁷⁷ N.C. GEN. STAT. § 29-1(1), (3), (4) (1950) [N.C. Laws 1808, ch. 739]; Clement v. Cauble, 55 N.C. 82 (1854).

⁷⁸ N.C. GEN. STAT. § 29-16 (Supp. 1959).

equitable than, the former law. The new law⁷⁹ provides that property will be distributed per capita to all persons in equal degree. Under the new rule surviving persons in the degree nearest the intestate will take the same shares which they would have taken under the former law. However, all property which would have gone to the deceased members in the degree nearest the intestate will go as a unit to all persons surviving them in the next degree and be divided per capita among such persons.

The operation of the new rule for the distribution of property may be illustrated by the following examples:⁸⁰

(1) Assume *I* (the intestate) dies owning an estate valued at \$90,000. *I*'s spouse predeceased him; *I*'s only survivors are his three living children *A*, *B*, and *C*. Under G.S. § 29-16(1) *I*'s estate will be divided equally among *A*, *B*, and *C*, with each child taking \$30,000. *A*, *B*, and *C* take the same shares which they would have taken under the former law.

(2) Assume the same facts as in example (1) except that *I*'s survivors are his son *A*; his grandsons *D* and *E*, children of *I*'s deceased son *B*; his grandsons *F*, *G*, and *H*, children of *I*'s deceased son *C*.

Under the former North Carolina law⁸¹ surviving son *A* would have received \$30,000 as his intestate share. Grandsons *D* and *E* would have represented their father *B* and received \$15,000 each as their intestate share of *I*'s estate. Grandsons *F*, *G*, and *H* would have represented their deceased father *C* and received \$10,000 each as their intestate share of *I*'s estate.

The new act directs just how each share is to be calculated. Applying paragraph (1) of G.S. § 29-16(a) to determine the share of a surviving child we find that there is one surviving member of this class, son *A*, and two deceased members, sons *B* and *C*. Thus, the estate is to be divided by three, giving son *A* a \$30,000 share which is precisely what he would have received under the former law.

There remains \$60,000 to be distributed. Applying paragraph (2) of G.S. § 29-16(b) to determine the share of a surviving grandchild we find that there are five members of this class and no deceased members. The remainder of the estate, \$60,000, is divided by five, giving grandsons *D*, *E*, *F*, *G*, and *H* \$12,000 each as their intestate share. The net result of the application of the new law is to increase the shares of *F*, *G*, and *H* from \$10,000 to \$12,000. The shares of *D* and *E* under the former law

⁷⁹ G.S. § 29-16 does not use the term "per capita." Instead, the statute sets out in detail how the intestate share of each heir shall be calculated.

⁸⁰ Examples other than those herein set forth may be found in more detail in the "Special Report of the General Statutes Commission on an Act to Rewrite the Intestate Succession Laws of North Carolina."

⁸¹ Authorities cited notes 75 and 77 *supra*.

would have been \$15,000. Under the new law the shares of *D* and *E* will be \$12,000.

(3) Assume the same facts as in example (2) except that at the time of *I*'s death grandson *H*, the child of deceased son *C*, is dead leaving lineal descendants, *J* and *K* surviving. *J* and *K* are the great-grandsons of the intestate. Under these facts, the shares of grandsons *D*, *E*, *F*, and *G* remain the same, \$12,000 each. However, there is still \$12,000 to be distributed. Applying paragraph (3) of G.S. § 29-16(a) to determine the share of a surviving great-grandchild we find that there are two members of this class and no deceased members. The remainder of the estate, \$12,000, is divided by two, giving the great-grandsons of *I* \$6,000 each as their intestate share.

(4) Assume that *I*, the intestate, dies owning real estate valued at \$90,000. His spouse predeceased him. *I*'s three children *A*, *B*, and *C* predeceased him. *A* left one child *D*; *B* left three children, *E*, *F*, and *G*; and *C* left two children, *J* and *K*.

Under the former North Carolina law⁸² the property would descend per stirpes. *D* would represent his deceased father *A* and inherit a one-third undivided interest worth \$30,000. *E*, *F*, and *G* would represent their deceased father *B* and share a one-third undivided interest worth \$30,000, each taking an interest worth \$10,000. *J* and *K* would represent their deceased father *C* and share a one-third undivided interest worth \$30,000, each taking an interest worth \$15,000.

To eliminate this patent inequity in the descent of *I*'s real property, § 29-16(a)(2) of the new law distributes the property equally, per capita, among the surviving grandchildren with each child taking a one-sixth interest worth \$15,000.

Since the new law places no limitation on the right of succession by lineal descendants of an intestate, it is possible that the intestate might die leaving surviving him lineals more remote than great-great-grandchildren for whom provision is made under G.S. § 29-16(a). To avoid unnecessary repetition paragraph (5) of G.S. § 29-16(a) provides for the use of the same formula for determining the shares of persons not expressly provided for in the statute.

G.S. § 29-15(5) provides that in the absence of grandparents, one half of the property is to be distributed to paternal uncles and aunts and the other half to the maternal uncles and aunts. G.S. § 29-16(c)(1) provides that in determining the share of each surviving uncle or aunt, the property should be divided by the number of surviving uncles and aunts plus the number of deceased uncles and aunts who have left children or grandchildren surviving the intestate. Suppose the intestate dies with three paternal uncles and two maternal uncles as his only heirs.

⁸² N.C. GEN. STAT. § 29-1(3) (1950) [N.C. Laws 1808, ch. 739].

The question has been raised as to whether G.S. § 29-16(c) could be construed to mean that the entire property is to be divided by five instead of one-half of the property being divided by two. I do not believe that such a construction is possible. It will be noted that G.S. § 29-16(c) provides, "If the intestate is survived by uncles and aunts . . . their respective shares in *the property which they are entitled to take under G.S. § 29-15* shall be determined in the following manner" (Emphasis added.) G.S. § 29-15(5) does not allow the paternal kindred of the intestate to receive more than one-half of the intestate's net estate when maternal kindred survive.

LINEAL SUCCESSION UNLIMITED

The new act restates the old law⁸³ to the effect that "there shall be no limitation on the right of succession by lineal descendants of an intestate."⁸⁴ All jurisdictions are in agreement that lineal descendants, no matter how remote, should take the intestate's property prior to his collateral relatives. Therefore, the question concerning the extent to which representation is to be permitted is limited to those cases dealing with inheritance by collaterals.

COLLATERAL SUCCESSION LIMITED

The inheritance by collaterals of intestate-property often involves the application of the doctrine of representation.⁸⁵ The English common law applicable to the descent of real property allowed unlimited representation by collateral kin of the intestate.⁸⁶ Under the English Statute of Distribution⁸⁷ all representatives among collaterals more remote than the children of deceased brothers and sisters were excluded.

Formerly, North Carolina,⁸⁸ following the old common law rule applicable to the descent of real property, permitted unlimited representation by collateral kin of the intestate. As originally drafted by the committee and submitted by the General Statutes Commission to the legislature, the new act cut off the right of succession by collateral kin

⁸³ N.C. GEN. STAT. §§ 29-1(3), 28-149(1), (3), (5) (1950) [N.C. Laws 1808, ch. 739; N.C. Sess. Laws 1945, ch. 46, § 1; N.C. Pub. Laws 1868-69, ch. 113, § 53, as amended].

⁸⁴ N.C. GEN. STAT. § 29-6 (Supp. 1959).

⁸⁵ Representation arises when a person stands in the place of another as heir and becomes entitled to inherit what the deceased person would have inherited had he lived.

⁸⁶ 2 BLACKSTONE, COMMENTARIES 208-34 (1771).

⁸⁷ 1670, 22 & 23 Car. 2, c. 10; see Reppy, *The Ordinance of William the Conqueror—Its Implications in the Modern Law of Succession*, 42 Ky. L.J. 524, 551-52 (1954).

⁸⁸ N.C. GEN. STAT. § 29-1 (Supp. 1959); *Moore v. Rankin*, 172 N.C. 599, 601, 90 S.E. 759 (1916). Only North Carolina and sixteen other states permit unlimited representation by collateral kin of the intestate. In the majority of the states representation cannot go further than those claiming to stand in the place of deceased brothers and sisters. See 6 POWELL, REAL PROPERTY ¶ 999 (1958).

who were more than five degrees of kinship removed from the intestate. It was provided that if there were no persons within five degrees of kinship to the intestate his property would escheat. This was a reasonable provision since property of the intestate is seldom distributed to a person more remote than the fifth degree of kinship.⁸⁹

The legislature did not agree with the Commission and the committee and amended G.S. § 29-7 to provide that the intestate's property will never escheat when he leaves a blood relative capable of inheriting, notwithstanding the remoteness of the degree of kinship of such relative. The result of the amendment would seem to be that the principle of the fifth degree limitation on collateral succession is removed only in order to prevent escheat. Thus, in the distribution of intestate property where the possibility of escheat is not present, the fifth degree limitation on collateral succession is still applicable.

Under this section the terminal point for collateral kin of the intestate who are in the same parentela with the intestate's parents and who inherit through the intestate's brothers and sisters is the intestate's great-grandnieces and great-grandnephews. The cut-off point for collateral kin of the intestate who are in the same parentela with the intestate's grandparents and who inherit through the intestate's uncles and aunts is the decedent's first cousins once-removed or, as they are sometimes called, the intestate's second cousins. If there is no collateral relative within five degrees of kinship at the death of the intestate but there are other collateral kin who survive, these collateral kin would inherit the intestate's property in order to prevent escheat.

ADVANCEMENTS

The doctrine of advancements evolved from a rather ancient origin, having prevailed, at least by custom, as a part of the doctrine of "bairns' part" in England during the thirteenth century.⁹⁰ The English statute

⁸⁹ One noted authority in commenting on the rule which allows unlimited representation in a minority of jurisdictions said, "Even as collateral inheritance itself serves only to benefit laughing heirs when permitted for distant relatives, so also excessive use of the representative device in connection with remote collaterals exaggerates this unfortunate characteristic. All states would be better serving current needs by restricting representation to descendants of brothers and sisters of a decedent." 6 POWELL, REAL PROPERTY ¶999, at 643 (1958).

⁹⁰ 2 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 348 (4th ed. 1952) states, "If a testator leaves neither wife nor child he can give away the whole of his movable goods. If he leaves wife but no child, or child but no wife, his goods must, after his debts have been paid, be divided into two halves; one of these can be disposed of by his will, it is 'the dead's part,' the other belongs to the widow, or (as the case may be) to the child or children. If he leaves both wife and child, then the division is tripartite; the wife takes a share, the child or children a share, while the remaining third is governed by the will; we have 'wife's part,' 'bairns' part,' and 'dead's part.' Among themselves children take equal shares; the son is not preferred to the daughter; but the heir gets no share unless he will collate the inheritance that has descended to him, and every child who has been 'advanced' by the testator must bring back the advancement into hotchpot before claiming a

of distribution⁹¹ incorporated into its provisions the advancement doctrine. Likewise, the principle was included in the statute of distribution which was codified in North Carolina in 1715.⁹² By 1784 the advancement principle was made applicable to real property in North Carolina.⁹³

Since its adoption much of the law of advancements has been developed in the decisions of the court. While the new Intestate Succession Act makes some changes in the substantive law of advancements, its principal contribution is the codification of much of the present case law.

The underlying principle of the doctrine is to bring about an equality of division of the intestate's estate between the heirs, it being the presumption that in the absence of a will the decedent would have so intended. Thus, North Carolina under the former law⁹⁴ and under the new act⁹⁵ holds that only entire or total intestacy will bring the advancement doctrine into play.

An advancement is defined under G.S. § 29-2(1) as follows:

"Advancement" means an irrevocable inter vivos gift of property, made by an intestate donor to any person who would be his heir or one of his heirs upon his death, and intended by the intestate donor to enable the donee to anticipate his inheritance to the extent of the gift; except that no gift to a spouse shall be considered an advancement unless designated in writing as an advancement.

Under the former law⁹⁶ the doctrine of advancements was restricted to gifts from a parent to a child. The new rule extends the doctrine of advancements "to any person who would be his heir or one of his heirs." It is recognized that most advancements will pass from the intestate donor to his child or possibly a grandchild. However, if more remote kindred receive an advancement, there seems to be no good reason why they should not account.

An exception is made for the surviving spouse. The new law declares that "no gift to a spouse shall be considered an advancement unless designated in writing as an advancement." As a general rule gifts between the spouses are intended as gifts and not as advancements. However, if the spouse making the gift desires that it be treated as an advancement he has only to designate it as such in writing.

bairns' right." 2 BLACKSTONE, COMMENTARIES 516 (1771); 6 POWELL, REAL PROPERTY ¶ 1009 (1958); Ebert, *Advancements*, 51 MICH. L. REV. 665 (1953).

⁹¹ 2 POLLOCK & MAITLAND, THE HISTORY OF ENGLISH LAW 346-353 (1895).

⁹² N.C. Laws of 1715, ch. 48, § 6, as set forth in SWANN, A COLLECTION OF ALL THE PUBLIC ACTS OF ASSEMBLY OF THE PROVINCE OF NORTH CAROLINA: NOW IN FORCE AND USE 28 (1751).

⁹³ Harrelson v. Gooden, 229 N.C. 654, 50 S.E.2d 901 (1948).

⁹⁴ Jerkins v. Mitchell, 57 N.C. 207 (1858).

⁹⁵ N.C. GEN. STAT. § 29-23 (Supp. 1959).

⁹⁶ Thompson v. Smith, 160 N.C. 256, 75 S.E. 1010 (1912); but see Wolfe v. Galloway, 211 N.C. 361, 190 S.E. 213 (1937), where a gift to a grandchild was construed to be an advancement.

The new act codifies the former case law⁹⁷ to the effect that whether the gift is an advancement or not depends upon whether it was "intended by the intestate donor to enable the donee to anticipate his inheritance to the extent of the gift." This rule is going to continue to present a difficult problem of evidence. Who can say just what the intestate donor did intend? Did the donor intend to take advantage of his exemption or exclusion under the Internal Revenue Code or did he intend to enable the donee to anticipate his inheritance or did he intend to accomplish both objectives with this one gift? To avoid these problems the attorney should make an effort to ascertain, if possible, his client's intention concerning any conveyance which later could be considered an advancement.

Under the former law⁹⁸ it was presumed that gifts of property and money from the parent to the child were advancements. The burden of proof was upon the advancee to show that an advancement was not intended. Under G.S. § 29-24 the old law is changed. The new law⁹⁹ provides: "A gratuitous inter vivos transfer is presumed to be an absolute gift and not an advancement unless shown to be an advancement." Henceforth, the burden of proof is upon the person asserting that the gift was an advancement. The presumption is *prima facie* and should continue to be rebuttable by parol evidence.¹⁰⁰

G.S. § 29-25 restates the old law to the effect that if the amount of the advancement equals or exceeds the advancee's share of the donor's estate, he is barred from receiving any other portion of the estate but no refund can be obtained. If the amount of the advancement is less than the advancee's share, he is entitled to receive such additional portion as will give him his full share of the donor's estate.

Under the old law¹⁰¹ the amount charged as an advancement was the value of the property at the time it was made. G.S. § 29-26 of the new act provides that the value of the advancement is to be determined as of the time when the advancee came into possession or enjoyment or at the time of the death of the intestate, whichever first occurs. However, if the value of the property advanced is fixed by the intestate donor in a signed writing which designates the gift as an advancement, such value is deemed the value of the advancement regardless of the time when the donee came into possession or enjoyment of the property.

G.S. § 29-27 of the new act extends the rule governing the accounting for advancements when the advancee predeceases the intestate donor. It

⁹⁷ *Harrelson v. Gooden*, 229 N.C. 654, 50 S.E.2d 901 (1948).

⁹⁸ *Nobles v. Davenport*, 183 N.C. 207, 111 S.E. 180 (1922); *Kiger v. Terry*, 119 N.C. 456, 26 S.E. 38 (1896); *Hollister v. Attmore*, 58 N.C. 373 (1860).

⁹⁹ N.C. GEN. STAT. § 29-24 (Supp. 1959).

¹⁰⁰ *Kiger v. Terry*, 119 N.C. 456, 26 S.E. 38 (1896).

¹⁰¹ *Harrelson v. Gooden*, 229 N.C. 654, 50 S.E.2d 901 (1948); Note, 31 N.C.L. REV. 207 (1953).

provides that where an advancement has been made and the advancee dies before the intestate donor, leaving an heir who takes by intestate succession from the intestate donor, the advancement is to be taken into account in the same manner as if it had been made directly to the heir.¹⁰²

The new law¹⁰³ provides that a donee has to account for an advancement when ordered to do so by the clerk of superior court of the county in which the administrator or collector has qualified. This accounting (or "inventory" as the statute calls it) must be given under oath. If the donee fails to render the required inventory he is presumed to have received his full share of the intestate donor's estate.

G.S. § 29-29 provides the procedure whereby the advancee may acknowledge by a signed writing that he has been advanced his full share of the donor's estate. The signed acknowledgment bars both the advancee and those claiming through him from further participation in the donor's estate. There should be no objection to the acceptance of this principle. It is in effect a codification of the present case law.¹⁰⁴

¹⁰² Under the former law the doctrine of advancements was limited for the most part to gifts from parents to children. Under the former law real property always descended per stirpes, and grandchildren always had to account for prior advancements to their parents. In cases of advancements of personalty, if the intestate was survived by children, grandchildren representing deceased parents took per stirpes and had to account for prior advancements to their ancestor. If the intestate was not survived by children, the grandchildren took per capita and did not have to account for prior advancements to their parents.

¹⁰³ N.C. GEN. STAT. § 29-28 (Supp. 1959); for requirements under the former law, see N.C. GEN. STAT. § 28-151 (1950) [N.C. Pub. Laws 1868-69, ch. 113, §§ 55, 56].

¹⁰⁴ In *Cannon v. Nowell*, 51 N.C. 436 (1869), plaintiff, son of the intestate, accepted land from his father under an agreement that he was not to receive any more land from his father. The court held: "heirs take by positive law when the ancestor dies intestate, and the course of descents cannot be altered by words excluding particular heirs, or by any agreement of parties." Annot., 28 A.L.R. 427, 434 (1924). In *McDonald v. McDonald*, 58 N.C. 211, 214 (1859), the plaintiff executed a written assignment of his expectancy in the estate of his ancestor. The court held that the plaintiff "did not have anything which he could assign or transfer to another either at law or in equity. But he had a right to make a contract to convey whatever interest he might in the future have in his cousin's property, and such a contract, when fairly made upon a valuable consideration, the court of chancery will enforce whenever the property shall come into his possession." In *Price v. Davis*, 244 N.C. 229, 93 S.E.2d 93 (1956), four daughters for a specified consideration paid them by their father, executed a release of any right to share in their father's estate. The court held that if the release of expectancy is based upon reasonable consideration it will be upheld. In handing down its decision the court noted that *Cannon v. Nowell*, *supra*, had never been followed by the North Carolina court. For a good treatment of the subject, see ATKINSON, WILLS 725 (1953).