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## Succession Under the Model Probate Code, Some Comparisons with the Montana-California Law

\*J. HOWARD TOELLE

The Model Probate Code was prepared for the Probate Division of the Real Property Section of the American Bar Association.<sup>1</sup> A principal draftsman was Lewis M. Simes, a former member of the faculty at the Montana State University Law School, now a Professor of Law at the University of Michigan Law School. A comparison of its succession provisions with those found in the present codes of Montana and California, exclusive of the community property provisions of the latter, follows herein.

The Model Code would abolish the estates of dower and curtesy,<sup>2</sup> and upon intestacy, would allow the spouse to take:

- (1) One-half the net estate if intestate is survived by issue; or
- (2) The first five thousand dollars, and one-half the remainder of the net estate, if there is no surviving issue but intestate is survived by one or more parents, or by brothers or sisters or their issue; or
- (3) All the net estate if there is no surviving issue or parent or issue of a parent.<sup>3</sup>

And, if decedent left a will, the surviving spouse could elect to receive the share in the estate that would have passed to him or her had the testator died intestate, until the value of such share amounted to \$5000, and of the residue of the estate above the part from which the full intestate share amounts to \$5000, one-half the estate that would have passed to the spouse had the testator died intestate.<sup>4</sup>

The share of the net estate not distributable to the surviving spouse or the entire net estate if there is no surviving spouse would descend and be distributed as follows:

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<sup>1</sup>SIMES, MODEL PROBATE CODE, p. 5.

<sup>2</sup>*Supra*, note 1, p. 68; § 31.

<sup>3</sup>*Supra*, note 1, p. 59; § 22.

<sup>4</sup>*Supra*, note 1, p. 68; § 32.

- (1) To the issue of intestate: if all are in the same degree of kinship to intestate, they shall take equally, or if of unequal degree, those of more remote degrees shall take by representation.
- (2) If there is no surviving issue of the intestate, then to the surviving parents, brothers, sisters, and the issue of deceased brothers and sisters of the intestate. Each living parent of the intestate shall be treated as of the same degree as a brother or sister, and shall be entitled to the same share as a brother or sister. Issue of deceased brothers and sisters shall take by representation.
- (3) If there is no surviving parent or brother or sister of intestate, then to the issue of brothers and sisters. If such distributees are all of the same degree of kinship to intestate, they shall take equally, or if of unequal degree, then those of more remote degrees shall take by representation.
- (4) If there is no surviving issue, or parent of the intestate, or issue of a parent, then to the surviving grandparents of the intestate equally.
- (5) If there is no surviving issue, or parent, or issue of a parent, or grandparent of intestate, then to the issue of deceased grandparents in the nearest degree of kinship to the intestate per capita without representation. The degree of kinship shall be computed according to the rules of the civil law; that is, by counting upward from intestate to the nearest common ancestor and then downward to the relative, the degree of kinship being the sum of these two counts.
- (6) If there is no person mentioned in the preceding five parts, then to the state.<sup>5</sup>

The Model Code would also entitle the surviving spouse or minor children to the homestead and to such personal property of the estate as is exempt from execution or forced sale under the constitution and laws of the state, or such other personal property as shall be selected, of the total appraised value of \$2000, whichever is greater, any portion or all of which could be taken in money. This property would belong to the surviving spouse, if any; otherwise, to the minor children in equal shares. Flexibility is desired, extending to articles of sentimental value

<sup>5</sup>*Supra*, note 1, p. 60, § 22.

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and the family automobile. In addition, the surviving spouse and minor children would be entitled to a reasonable allowance in money out of the estate during the period of administration according to their previous standard of living, but not for longer than a year for insolvent estates.<sup>6</sup>

The Montana code provides that a widow shall be endowed of the third part of all lands whereof her husband was seized of an estate of inheritance at any time during the marriage unless the same shall have been relinquished in legal form.<sup>7</sup> Included also are equitable estates and real estate contracted for during the husband's lifetime the title to which is completed after his death. This section,<sup>8</sup> first enacted in 1876, does not specifically provide that the "third part" shall be for and during the widow's "natural life." This, however, was the common-law dower interest, and the preceding Act of the territorial legislature of 1866 specifically so provided.<sup>9</sup>

Moreover, a closely related and following section of the present code provides that the widow shall have dower in the surplus when a mortgage causes the husband's mortgaged land to be sold which is provided to be "the interest or income of one-third part of such surplus for life as her dower."<sup>10</sup>

In *Swartz v. Smole*,<sup>11</sup> it was held that:

"... the duty of assigning dower as provided in R.C.M. 10168 rests upon those in possession of the husband's real estate, and if this is not done within a reasonable time after his death, she may sue such parties for its recovery and for damages to the extent of one-third the annual value of the profits of the land."

While not a decision as to the "life" or "fee" nature of this one-third interest, the court does say at page 94 of 91 Montana, "The common law right of dower is preserved in this state by Section 5813 Revised Codes 1921," and at page 95 of the same opinion, the court observes that the widow stood upon her common-law and statutory right to be endowed in the husband's real estate, a right "which is superior to the claims of creditors, though under Section 5821 a widow without issue has the right to take one-half of the real estate that shall remain after the payment of all debts."

<sup>6</sup>*Supra*, note 1, p. 79; § 42-44.

<sup>7</sup>R.C.M. 1947, § 22-101 (5813).

<sup>8</sup>LAWS OF MONTANA 1876, p. 63.

<sup>9</sup>LAWS OF MONTANA 1866, p. 38.

<sup>10</sup>R.C.M. 1947, § 22-104 (5816).

<sup>11</sup>91 Mont. 90, 5 P. (2d) 566 (1931).

And in *Dahlman v. Dahlman*,<sup>13</sup> it was held that where the deceased husband left only his widow and his father and mother surviving, the widow could elect to take one-half of the lands absolutely after debts were paid—her substitute dower—in addition to a one-half interest in the personalty and realty as an heir of her husband. This was in accord with our succession statute prior to the amendment of 1941<sup>14</sup> by which the widow would now be sole heir in this situation. The court observed that the right of election under the dower sections of the code “has no connection with the right to take as heir one-half of the residue of the estate real and personal after the claims of creditors are satisfied. It is true that when the fee to her portion in lands has vested in her under the right of succession, the dower right in such property is pro tanto merged in the fee; but this in no wise affects her right to dower in the residue of the estate.” At page 377 of 28 Montana, the court observes that:

“The Code recognizes the common-law right of dower. At the same time it extends this right to estates to which it did not attach at the common-law, and enlarges the wife’s right by the election granted her to take one-half absolutely after payment of debts if there are no issue. This estate falls to her not as heir but by virtue of her marital right. But the succession statute grants to the widow the right to succession and this right rests upon exactly the same ground as that of any other heir.”

Our code provides that every devise or bequest shall bar a widow’s dower in lands or her share in personal estate unless otherwise expressed in the will; but she may elect whether she will take such devise or bequest, or whether she will renounce the benefit of such devise or bequest and take her dower in the lands and her share in the personal estate.<sup>15</sup> This section first appears in the ninth territorial session laws of Montana of date 1876,<sup>16</sup> and will be given meaning when one reflects that the second Montana territorial session of 1866 had enacted a code of intestate succession by which the common-law had been changed so that the spouse was an heir of the husband in certain situations; *i.e.*, if intestate left no children or descendants and no father or mother or brothers or sisters or their descendants, then the estate both real and personal would go to the surviving spouse.<sup>16</sup>

<sup>13</sup>28 Mont. 373, 72 P. 748 (1903).

<sup>14</sup>LAWS OF MONTANA 1941, p. 254.

<sup>15</sup>R.C.M. 1947, § 22-107 (5819).

<sup>16</sup>LAWS OF MONTANA 1876, p. 65.

<sup>17</sup>LAWS OF MONTANA 1866, Ch. 3.

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Moreover, the seventh territorial session of 1871-72 had provided that in addition to dower, the widow should be allowed, as her absolute property, the family bible and other books not to exceed in value \$200; all spinning wheels, weaving looms, and stoves, put up or kept for use; all family pictures, twenty head of choice sheep, with their fleeces, and all yarn or cloth manufactured from the same; two choice cows; five swine, with the necessary food for them for six months; all wearing apparel of the widow and children; and all the household goods, furniture, and utensils not exceeding in value \$750; and, second, there shall be set aside for the widow or minor children the homestead of not exceeding twenty acres and the dwelling house and appurtenances or one lot if in town with dwelling house not exceeding in value \$3000.<sup>17</sup>

When, therefore, in 1876 the ninth territorial legislature passed our present code section on the widow's right of election against a will, it did so contemplating these provisions of the then current law, and the widow's share in the personal estate and her dower in the lands was given meaning accordingly.

The next year, 1877, our present succession statutes were passed.<sup>18</sup> Instead of a deferred heirship status as in 1866, the widow was given a first position as heir along with the issue, and, if there are no issue, she now takes the entire estate. Also, instead of the spelled-out items of personal property allowed to the widow in 1872, she now takes her homestead right and her interest in property exempt from execution as well as the wearing apparel of the family, the household furniture of the decedent, and reasonable provision for her support and that of her minor children to be allowed by the court.<sup>19</sup>

While, therefore, it may be regarded as unfortunate that the phraseology of the widow's right to elect against the will has not been changed to accord with her enhanced position as heir, it is believed that, under the *Dahlman* decision,<sup>20</sup> she is, in such case, entitled to her interest as heir in the spouse's realty, together with her right as distributee of the personalty under the general succession statute,<sup>21</sup> as well as her dower interest in the residue

<sup>17</sup>LAWs OF MONTANA 1871-2, p. 355.

<sup>18</sup>LAWs OF MONTANA 1877, p. 364.

<sup>19</sup>R.C.M. § 91-2401 (10144) Ch. 24, first enacted as LAWS OF MONTANA 1877, p. 272.

<sup>20</sup>*Supra*, note 12.

<sup>21</sup>R.C.M. 1947, § 91-403 (7073).

of the realty,<sup>22</sup> together with her interest under current legislation enacted for her support and that of her minor children.<sup>23</sup>

The present Montana succession statute was passed in 1877 and followed California law on the subject. California in turn had taken its rules of succession from Mexican law following the cession of California to the United States in 1848. A statute of descents was first enacted in 1850, which, with modification in 1862, became a part of the California Civil Code. It has been said that the common-law rules by which real estate, on the owner's death, vested in the heir and personalty in the personal representative, never obtained in California, title to all property, whether real or personal, vesting at once in the heir as under the Mexican system, though subject to the claims of administration.<sup>24</sup>

Our Montana code provides that when any person having title to any estate dies intestate, it is succeeded to as follows:

Clause I—If decedent leaves a surviving husband or wife, and only one child, or the lawful issue of one child, in equal shares to the surviving spouse and child or issue of such child.

If decedent leaves a spouse and more than one child living, or one child living and the lawful issue of one or more deceased children, one-third to the spouse and the remainder in equal shares to the children and to the lawful issue of any deceased child, by right of representation; but if there is no child of decedent living at his death, the remainder goes to all of his lineal descendants; and if all of the descendants are in the same degree of kindred to the decedent, they share equally, otherwise they take according to the right of representation. If the decedent leaves no spouse, but leaves issue, the whole estate goes to the issue; if such issue consists of more than one child living, or one child living and the lawful issue of one or more deceased children, then the estate goes in equal shares to the children living, or to the child living and the issue of the deceased child or children by right of representation.<sup>25</sup>

The explicit character of these provisions leaves little

<sup>22</sup>*Supra*, note 7.

<sup>23</sup>*Supra*, note 19.

<sup>24</sup>9 CAL. JUR. 450.

<sup>25</sup>*Supra*, note 21.

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occasion for construction by the courts which usually content themselves with reiterating the clause applicable to the case before them.

Clause II—If the decedent leaves no issue, the whole estate goes to the surviving spouse. This is by virtue of the 1941 amendment;<sup>26</sup> formerly one-half was shared with the father and mother, or if both were dead with the brothers and sisters of deceased, and the children of deceased brothers and sisters who took by right of representation. California has not changed this provision to increase the share of the spouse; it was amended in California in 1931 to allow *issue* of the parents to take if the parents were dead, the issue to take by right of representation.<sup>27</sup>

Clause 2 further provides that if decedent leaves neither issue nor spouse, the estate goes to father and mother equally or if either is dead to the other.

Clause III—Clause 3 provides that in the absence of issue, spouse, father or mother, the brothers and sisters of decedent take equally and the children of any deceased brother or sister take by right of representation. This provision was changed in California in 1905 to include grandchildren of deceased brothers and sisters; it was further changed in 1931 to include descendants of deceased brothers and sisters who were to take by right of representation.<sup>28</sup> Under the former California wording (still Montana's), it was held that a second cousin of decedent is not an heir when there is surviving a brother who would take under this clause.<sup>29</sup> It was also uniformly held that the term "children" did not include grandchildren who could not take under this clause.<sup>30</sup> If grandchildren of a deceased brother or sister alone survived decedent, the estate went to the next of kin under what is now Clause 4 of the Montana statute.<sup>31</sup>

Clause IV—If decedent leaves neither issue, nor spouse, nor father nor mother, nor brother nor sister, the estate

<sup>26</sup>*Supra*, note 13.

<sup>27</sup>Cal. Prob. Code 1949, § 223; 9 CAL. JUR. 458.

<sup>28</sup>Cal. Prob. Code 1949, § 225; 9 CAL. JUR. 459.

<sup>29</sup>*In re Eggers' Estate*, 114 Cal. 464, 46 P. 380 (1896).

<sup>30</sup>*Estate of Curry*, 39 Cal. 529 (1870); *Estate of Caffrey, Coffey's Prob.* Dec. 439.

<sup>31</sup>*Estate of Caffrey, supra*, note 30.



goes to the next of kin in equal degree excepting that where there are two or more collateral kindred in equal degree, but claiming through different ancestors, those claiming through the nearest ancestors must be preferred to those claiming through an ancestor more remote. Thus, a niece or nephew being in the third degree would take in preference to an uncle or aunt also of the third degree since the former traces through the father while the latter traces from the grandfather.

In line with California constructions, the right of nephews or nieces to share in the property under clause 3 is contingent on the accompanying of a brother or sister of decedent. In other words, the nephews' or nieces' right to inherit under Clause 3 needs to be aided by the surviving presence of an uncle or aunt, brother or sister, of the intestate.<sup>83</sup>

It was, however, sufficient that the surviving brother or sister be of the half-blood of decedent though the parent of the niece or nephew was of the whole blood.<sup>84</sup> If there are no surviving brothers or sisters of decedent, then this Clause 4 is operative; namely, that the estate goes to the next of kin in equal degree with the exception indicated for the collaterals claiming through different ancestors; those claiming through the nearest ancestors are then preferred. It was said of this provision in California as it read formerly that:

“In every other clause of the civil code, the legislature specified inheritance by right of representation when inheritance in this manner was intended; the failure to mention it here leads to the conclusion that the legislature intended that descent should here go to all next of kin in equal degree per capita.”<sup>85</sup>

Our code provides that the rule of computation laid down for collaterals is that of the civil law.<sup>86</sup> Accordingly, nephews and nieces—3rd degree—are near-

<sup>83</sup>Estate of Nigro, 149 Cal. 702, 87 P. 384 (1906); *In re Carwody's Estate*, 88 Cal. 616, 26 P. 373 (1891); *In re Ingram's Estate*, 78 Cal. 586, 21 P. 435 (1889); Estate of Linehan, Myrick's Prob. Rep. 83, 9 CAL. JUR. 459.

<sup>84</sup>Estate of Lynch, 132 Cal. 214, 64 P. 284 (1901).

<sup>85</sup>9 CAL. JUR. 465.

<sup>86</sup>R.C.M. 1947, § 94-410 (7080).

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er in degree to decedent than grandnephews and grandnieces—4th degree—and also nearer than a cousin once removed—5th degree—and take to the exclusion of them.

Assume that decedent leaves a brother, a niece, and two grandnephews, that the niece is a child of decedent's deceased brother, and the grandnephews are issue of decedent's deceased sister. Clause 3 applies, and the brother and the niece will divide the estate, the Montana statute only making provision for *children* of deceased brothers and sisters. In California, the estate would be divided three ways, with the grandnephews taking each one-sixth—per stirpes—by virtue of the 1905 amendment providing for grandchildren<sup>86</sup> and the 1931 amendment providing for descendants of deceased brothers and sisters.<sup>87</sup> It is believed the Montana statute should be amended to make this fairer distribution.

Assume that decedent leaves no brother nor sister, but leaves a niece and two grandnephews, that the niece is a child of decedent's deceased brother, and the grandnephews are issue of decedent's deceased sister. Clause 4 applies, and the niece takes all the estate since she is in the 3rd degree while the grandnephews are in the 4th degree as next of kin are measured by the civil law. It is believed that an amendment to Clause 4, in line with the 1931 change in California, allowing descendants of deceased brothers and sisters to represent the stirpes would make for a fairer distribution. Thus, in California, the provision for next of kin in Clause 4 remains, but takes effect further removed from decedent than was formerly there provided.<sup>88</sup>

## Clauses V and VI—

While the California-Montana code provisions have been said to be

<sup>86</sup>*In re Ross Estate*, .....Cal....., 202 P. 641 (1921).

<sup>87</sup>*Supra*, note 28.

<sup>88</sup>Cal. Prob. Code 1949, § 226 (If the decedent leaves neither issue, spouse, parent, brother, sister, nor descendant of a deceased brother or sister, the estate goes to the next of kin in equal degree, excepting that, when there are two or more collateral kindred in equal degree, but claiming through different ancestors, those who claim through the nearest ancestor must be preferred to those claiming through an ancestor more remote.)

“based on the general sentiments of mankind, and not on the obsolete feudal reasons on which the common-law doctrine of inheritance of realty was based,”<sup>39</sup>

these clauses sound suspiciously like the ancestral property notions of the feudal common-law. They provide that if decedent dies under age without having married, all the estate that came to decedent by succession from a parent goes in equal shares to the other children of the same parent and to the issue of any other of such children who are dead, by right of representation; or if all the children of such parent are dead, and any of them has left issue, to such issue, and if all the issue are in the same degree of kindred to decedent, they share equally, otherwise they take by right of representation.

Ordinarily, when a person dies leaving neither spouse nor issue, the estate goes to his parents or the survivor of them. But under this section if a child dies without having been married, any property which came to him by succession from a parent goes to the other children of that parent. The question arises: Is not the relationship more vital than the origin of the estate? If the mother is ordinarily the heir, it may be asked why she should be eliminated in favor of the brothers and sisters because the property came from the father.<sup>40</sup> A certain confusion results when the statute contains a general rule followed by exceptions for particular cases. The whole modern trend is away from the doctrine of ancestral property, and it is not to be found in the Model Probate Code. It is believed that this exception accomplishes no useful purpose and that it should be repealed.

As to the half-blood relatives, the Montana code provides that they inherit equally with those of the whole-blood unless the inheritance came to intestate by descent, devise or gift of some one of his ancestors, in which case all those not of the blood of such ancestors must be excluded from the inheritance. This is another vestigial survival of the feudal ancestral property doctrine. A majority of the states have

<sup>39</sup>Estate of Smith, 131 Cal. 433, 63 P. 729 (1901); 9 CAL. JUR. 450.

<sup>40</sup>See *Comments on the Probate Code*, 19 CAL. L. R. 614.

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repudiated the doctrine of ancestral estates.<sup>42</sup> Only thirteen jurisdictions have statutes similar to this California-Montana type regarding the status of the half-blood. The trend in most jurisdictions has been to narrow the instances in which half-blood are excluded from inheriting. Following this trend, California has restricted the discrimination against the half-blood who are not of the blood from which the property came to instances where there are whole blood of the same degree.<sup>43</sup> It is believed that the statute should be repealed, and the Model Code provision substituted that kindred of the half-blood shall inherit the same share which they would have inherited if they had been of the whole blood.<sup>44</sup>

Clause VII—This clause provides for escheat to the state if decedent leaves no spouse or kindred.

The English statute of succession was amended a few years ago to cut off the right of inheritance by distant relatives.<sup>45</sup> It has been urged that there is no good reason why cousins, at any rate those beyond the 4th degree, namely first cousins, should have any right of inheritance.<sup>46</sup> Such distant relatives usually have no such contact with deceased as to make them dependent on him or to bring them within the circle of his warm affection. If decedent did not care enough for such distant relatives as to make testamentary provision for them, it may well be argued that the state should take the property. In the San Francisco area, prolonged litigation by distant relatives has developed in some notable cases to establish heirship. Such cases are calculated to be long and costly, an invitation to heir-hunting and false testimony, a burden on the time of courts, and a waste of the taxpayer's money. However, since the state is viewed with perhaps a measure of justified suspicion, in these days of free spending and high taxes, it is doubted that any proposed change at this point would meet with success.

Thus, the Montana scheme of intestate succession is in accord with the modern trend so far as real and

<sup>42</sup>42 YALE L. J. 101 ; 29 CAL. L. R. 79.

<sup>43</sup>*In re Warnock's Estate*, 36 Cal. App. (2d) 464, 97 P. (2d) 831 (1940).

<sup>44</sup>*Supra*, note 1, p. 64, § 24.

<sup>45</sup>Administration of Estates Act (1925), 15 Geo. V, ch. 23, § 46.

<sup>46</sup>*Supra*, note 40, p. 613.

personal property are distributed in exactly the same way, but the system is faulty in that:

1. It does not make adequate provision for the widow, and it makes a distinction between the right of a surviving husband and that of a surviving wife. The widow's dower remains, but in 1895, the husband's curtesy was abolished. The Model Probate Code would abolish both the estates of dower and curtesy. It is said that these estates tend to clog land titles and make alienation more difficult.<sup>46</sup> Also, at the present time, so much of the wealth of a decedent is likely to be in the form of bonds and shares, that dower and curtesy do not make adequate provision for a surviving spouse. The substitutes for them in the Model Code provide intestate shares that are more liberal in case of a solvent estate; however, both are subject to decedent's debts. Under the Model Code, the spouse may also liberally elect against the will.
2. Certain vestiges of the feudal doctrine of ancestral property survive contrary to the modern trend in Clauses 5 and 6. Under English rules it was once the law that the heir must trace descent from the person last seized. This doctrine was adopted in American statutes in some states by provision for a different line of descent when realty came to intestate by descent, devise or gift from some one of his ancestors. Gradually these statutes have been repealed. It is believed that this Montana survival, while not so sweeping as the foregoing, should also be repealed.
3. The half-blood statute perpetuates an unjustified discrimination in favor of the whole-blood which has no place in a modern code.

The Model Code would first give a very substantial share to the surviving spouse. The lineal heirs would take to the most remote degree. By the English rule, lineal descendants take per stirpes, the children being the stirpes though all children are dead. But the Model Code provides that distribution is per stirpes only if the claimants are in unequal degrees, and in that case the stirpes are those represented by living claimants in the

<sup>46</sup>*Supra*, note 1, p. 68, § 31.

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nearest degree to the intestate." This would be different from the interpretation of the Montana-California code provision in *Maude v. Catherwood*,<sup>48</sup> where the estate of S. Clinton Hastings, first Chief Justice of the California Supreme Court and founder of the Hasting's College of Law, was in controversy. The court found that taking by representation enabled one great-grandchild to take a portion twice as large as each of the shares of three grandchildren who, of course, are a degree closer in kinship. Legislative adoption of the Model Code would avoid this result. Under it:

"Representation refers to a method of determining distribution in which the takers are in unequal degrees of kinship with respect to intestate, and is accomplished as follows: after first determining who are in the nearest degree of kinship of those entitled to share in the estate, the estate is divided into equal shares, the number of shares being the sum of the number of living persons who are in the nearest degree of kinship and the number of persons in the same degree of kinship who died before the intestate, but who left issue surviving; each share of a deceased person in the nearest degree shall in turn be divided in the same manner among his surviving children and the issue of his children who have died leaving issue who survive the intestate; this division shall continue until each portion falls to a living person. All dis-

<sup>47</sup>*Supra*, note 1, p. 62, § 22.

<sup>48</sup>155 P. (2d) 111. The question presented was at what generation the estate should be divided. Appellant contended that, since no children survived, it should be divided into six parts at the level of grandchildren rather than at the level of children, and that the two great-grandchildren should take the shares of their parents by representation. Under this method, the grandchildren and the great-grandchildren would each have received a like amount, namely, one-sixth. Under the court's method, one-eighth went to some grandchildren and great-grandchildren and one-fourth to one great-grandchild. In 33 CAL. L. R. 327, it is suggested that if the statute is to continue to provide as it now does, that when all the descendants are of the same degree to testator they take in equal shares, there should be an additional proviso, that where they are of unequal degrees of consanguinity, "those who are living and of the nearest degree take the shares they would take, if all the descendants of the same degree who had died but whose issue survive, were alive, and that the issue of such deceased descendants take their shares by representation."

See the Pa. Stat., Purdon Compact Ed. 1936, Title 20, § 55: "Each of the grandchildren, if there be no children, in like manner shall receive such share as he or she would have received if all the other grandchildren, who shall then be dead, leaving issue, had been living at the death of the intestate, and so in like manner to the remotest degree. In every such case, the issue of such deceased child, grandchild, or other descendant shall take by representation of their parents, respectively, such shares only as would have descended to such parents if they had been living at the death of the intestate."

tributees except those in the nearest degree are said to take by representation.”

In general, Anglo-American statutes dealing with inheritance by collateral heirs are based on two systems, the parentelic system and the civil law system, though most of them represent a combination of the two. Under the parentelic system, if there are no lineal descendants, the nearest ascendants, namely the parents, take, and then their issue to the remotest degree by representation. In the absence of the parents and their issue, grandparents take, and if none, then the issue of grandparents in like manner as the issue of parents. This process may be continued indefinitely as more and more ascendants and their issue are permitted to take.

In accordance with the civil law system, the heirs are those who are nearest in degree to intestate. Degrees are determined by counting from decedent up to the common ancestor and then down to the claimant. The total is the degree of relationship of claimant to decedent. As between two claimants, the one removed from intestate by the smaller number of degrees is the distributee. It differs from the common law method of reckoning consanguinity in that in the latter, after determining the common ancestor, it was proper to count down on one side of the collateral line only, and if there was a difference in number on the two sides, it should be that side on which the most remote of them was found. Thus, under the common law method, uncles, nephews and first cousins would all be in the second degree; but in the civil law system, uncles and nephews would be in the third degree while first cousins would be in the fourth degree.<sup>48</sup> The civil law method is regarded as making for fairer distribution and now obtains in all states except North Carolina, and, to some extent, in New York.<sup>49</sup>

The parentelic system is followed in the Model Code up to a certain point. However, parents take equally with, and not in preference to brothers and sisters. As to inheritance by issue of deceased grandparents, the civil law system is followed.<sup>51</sup>

It is interesting to students of the Montana Intestate Succession Law that the second Montana territorial session of 1866 gave us a code more nearly resembling the modern Model Probate Code than the 1877 product that came to us by way of California. The

<sup>48</sup>See the two systems explained in *McDowell v. Addams*, 45 Pa. 430 (1863).

<sup>49</sup>BINGHAM-COSTIGAN, *CASES ON WILLS*, 3rd Ed., p. 14.

<sup>51</sup>*Supra*, note 1, p. 63.

## SUCCESSION UNDER MODEL CODE

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1866 law provided that, subject to the payment of debts and the widow's dower, both realty and personalty should descend and be distributed to:

1. The children and descendants in equal parts,
2. If there were no descendants, to the father and mother and brothers and sisters in equal parts,
3. And if none in this second class, then to the spouse, and if no spouse, to the grandfather, grandmother, uncles and aunts and their descendants in equal parts, and
4. If there were no survivors in classes 1, 2, or 3, then to the great-grandfather and grandmother and their descendants in equal parts and so on in other cases passing to the nearest lineal ancestors and their children and their descendants in equal parts.<sup>53</sup>

Thus, this early Act did not incorporate the objectionable ancestral property doctrine of clauses 5 and 6 of the present code. While it gave to the widow only a deferred position as heir, its dower provision for her was not wholly unsuited to the landed society of 1866; and as to the half-blood, it provided that if part of the collaterals be of the whole blood of intestate and part of the half-blood, those of the half-blood shall inherit only half as much as those of the whole blood.<sup>54</sup> This proviso was to be applied without regard for the origin of the property and it, at any rate, had the merit of not wholly excluding the half-blood. A salute to the memory of the 1866 draftsmen!

<sup>53</sup>*Supra*, note 16, ch. 3. Per stirpes inheritance was also provided.

<sup>54</sup>*Supra*, note 16, ch. 3, § 4.