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I. THE NATURE OF DESCENT

A. Descent, at common law, is the title whereby a man on the death of his ancestor, acquires his ancestor's estate by right of representation, as his heir at law.[1]

B. Under our modern statutes the term "descent" includes the course of transmission, by operation of law, of both real and personal property, when the owner of the property dies intestate, or his property or any part of it is deemed to be intestate.[2]

C. Consanguinity is the relation of persons who are descended from the same stock or common ancestor. It may either be lineal or collateral.

1. Lineal consanguinity is that relationship which exists between those who descend in a direct line, one from the other, as grandfather, father, son and grandson.
2. Collateral consanguinity is that relationship which exists between those who lineally spring from one and the same ancestor, such as in the case of all the grandchildren of a certain ancestor.

D. The common law rules of descent are as follows:

1. The estate lineally descended to the issue of the person who last died seised, but never lineally ascended.
2. The male issue were admitted to share in the estate before the female.
3. Where there were two or more males of equal degree, the oldest should inherit; but the females were to inherit all together.
4. The lineal descendants of any deceased person represented, that is, stood in the place of their ancestor.
5. On failure of the lineal descendants, or issue of the last person seised, the estate descended to the collateral relations.
6. The collateral heir of the last person seised must have been his next collateral relation, of the whole blood.
7. In collateral stocks the male was preferred to the female, unless as a fact the estate had descended from a female.[3]

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[1] 2 Bl. Comm. 201.

[2] *Hudnall v. Ham*, 172 Ill. 76, 49 N. E. 985.

[3] 2 Bl. Comm. 208-234.

E. These rules of descent have been somewhat modified by modern statutes.

1. The inheritance shall be traced from the last purchaser of the property, and upon failure of issue of the last purchaser, the estate shall pass to his nearest lineal ancestor.
2. In the United States it is the general rule that all children inherit equally, males and females being classed together.
3. The rule of primogeniture has never been recognized in this country, there being no distinction made between the children as to their interest in the estate.
4. The rule of representation also pertains in this country, where the lineal descendants are of unequal degrees of relationship; but where they are of equal degrees they take share and share alike.
5. The general American rule is that in default of the lineal stock the estate passes to the collateral line. The distribution in such a case is generally governed by statute.
6. In general relatives of the half blood are postponed to those of the whole blood. Some of the American jurisdictions make no distinction between relatives on this ground, and in none of the states are relatives of the half blood entirely excluded.
7. In some few states maternal estates go down the maternal line, and paternal estates down the paternal line, but the rule is to a large extent abolished in this country.[4]

F. There may be a descent as to all the property if there is no will, and there may be a descent as to some of the property if there is a will which is only partly operative.

G. Personal property does not go to the heirs at law but goes to the administrator or personal representative of the deceased.[5]

H. Persons taking by descent from an ancestor are determined by the seisin of the property at the time of the death of the ancestor. If he is seised of property at the time of his death this property descends to his heirs living at the time of his death. Seisin in law is sufficient.[6]

I. Where persons have perished in the same disaster they are presumed to have died at the same time.[7]

J. Legal title to the estate determines the quality of the inheritance as to whether or not it is ancestral.[8]

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[4] See Chase's Note.
As to the whole and half blood, see 29 L. R. A. 541.
See also: Section 2270 Wis. Statutes.
[5] Wis. Statutes, 3935.
[6] 18 L. R. A. (N. S.) 624.
[7] 51 L. R. A. 863.
[8] 15 R. I. 204; 3 Atl. 382.

II. Persons Taking By Descent

A. The widow may take as an heir even though the estate be limited to the heirs of the testator.[9]

B. Pretermitted Heirs.

1. A child omitted from the will by mistake takes the same share as it would have taken under the laws of intestacy unless the intention to omit the child can be clearly gathered from the will itself.
2. If an illegitimate child is to be excluded from the inheritance of the mother it must be by an express provision in the will. Otherwise it will take the same share as would any other child.
3. A child born after the will is made, unless there is a clear intention, apparent from the will itself, that the testator does not so desire.[10]

C. Adopted Children.

1. Adopted children will take from the adopting parents by descent.[11]
2. Where the state in which the property is located has a law similar or not inconsistent with the law of the state in which the adoption took place, the child will be allowed to inherit.[12]

D. An illegitimate child is the heir of its mother. It may also be the heir of the man acknowledging himself to be the father of the child provided such acknowledgement is made in writing before competent witnesses, and such writing need not be made for purposes of inheritance. The illegitimate child may inherit irrespective of whether or not the putative father intermarries with the mother.[13]

E. There is a division in the authorities on the question of whether or not a murderer may take by descent the property of an intestate ancestor whom he has murdered. The majority holding seems to be that where the statutes governing descent are clear as to what persons shall succeed to the estate, such persons shall take even though they murdered the ancestor for the express purpose of getting such property. The dissenting view holds that even where the statute is clear in its terms public policy is against a person succeeding to the estate of a person whom he has murdered.[14]

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[9] 201 Mass. 218. 87 N. E. 466.
[10] 57 Cal. 484.
13 L. R. A. (N. S.) 780.
[11] 50 Iowa 532.
[12] 81 Conn. 152; 70 Atl. 453.
[13] 64 Neb. 581; 90 N. W. 630.
See: 126 Wis. 660.
Also: 65 L. R. A. 177.
[14] 105 Minn. 444; 117 N. W. 830.
Contra: 5 L. R. A. 340.

F. The civil death consequent upon life imprisonment for a felony does not divest the criminal of his estate; he may take by descent; and his property will go by descent upon his natural death intestate.[15] But an assignment of a distributive share of his father's estate made by a son under a life sentence was held invalid,[16] and the wife of a man civilly dead was allowed to take as a widow.[17]

G. In Wisconsin no distinction is to be made between aliens and citizens in the descent of property.[18]

III. Debts of Decedent

It seems to be the universal rule in the United States that the real estate of the decedent is assets for the payment of his just debts of every description. As to the methods of reaching this property by action, local statutes should be consulted.[19]

IV. Breaking Descent

A. If the ancestor devises to his heirs lands of the same quality of estate which he would have taken by descent, the descent is not broken.

B. If the heir takes a different quality of estate than he would have taken under the law he takes by devise or purchase, and not by descent, and the descent is therefore broken.

C. The fact that an annuity is charged upon the lands devised to the heir does not break the descent. The heir takes by descent and not by purchase. If the will gives the same quality of estate as would have descended, even though the estate be burdened in the will by an incumbrance, the descent is not broken.[20]

D. A devise in trust with instructions to the trustees that they are to convey the property to the heirs of the testator is a breaking of the descent.[21] This is the English rule.

E. Where the heir takes the same quality of estate through the intermediation of trustees as he would have taken by descent the descent is not broken.[22] This is the American rule.

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[15] 1 L. R. A. 264; 6 Am. St. Rep. 368.
[16] 73. Am. St. Rep. 62. (Cal.)
[17] Myr. Prob. (Cal.) 168.
[18] Wis. Cons. I, 15.
[19] 10 Encyc. Pl. & Pr. 26-30.
[20] *Biederman v. Seymour,* 3 Beav. 368; (Eng.)
Wis. Statutes, 2270.
[21] 2 K. & J. 391 (Eng.)
[22] 7 Cush. (Mass.) 161.

V. Shifting Descents

A. A child is in being for the purpose of taking an estate immediately upon conception.[23]

B. An afterborn child may by right inherit of the father and the share taken will be the same as he would have taken if born before the decease of the ancestor.[24]

VI. Transfer of Expectancies

A. Where a child receives during his lifetime parts of the estate which he has a right to expect to receive after the death of the ancestor such part of the estate constitutes an advancement and is chargeable against the interest of the heir after the death of the ancestor. An advancement does not have to be paid back to the ancestor before his death but constitutes a deduction to be made later from the share which the heir will receive. In Wisconsin an advancement may be charged in three ways: If the gift is made as an advancement; if it is charged as such by the giver; or if it is acknowledged as such by the donee.[25]

B. An expectancy is not an estate in land but is a mere possibility of inheritance. As such it may be transferred but under certain conditions. Such transfer must have the consent of the ancestor, and must be made for a consideration adequate to the value of the property.[26]

Wisconsin Citations

Statutes; 3959; 2445; 3789; 3790; 2270; 3935; 2274; 4024.

Cases: 126 Wis. 191; 53 Wis. 514 (Adopted Children); 73 Wis. 445; 90 Wis. 151; 94 Wis. 146.

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[23] 43 Am. Dec. 472.
[24] 119 A. St. Rep. 943.
[25] 68 Atl. 595.
Wis. Statutes, 3959.
[26] 9 L. R. A. 477.