

1948

# William F. Kidman v. Garland Yonk, et al : Brief of Appellant

Utah Supreme Court

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Leon Fannesbeck; Attorney for Plaintiff;

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7244

IN THE  
SUPREME COURT  
OF THE  
STATE OF UTAH

In the Matter of the Estate of  
CHARLES YONK,  
Deceased.

***Appellant's  
Brief***

Appealed From The First Judicial District Court  
For Cache County, Utah

LEON FONNESBECK,  
Attorney for Plaintiff

**FILED**

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CLERK, SUPREME COURT, UTAH

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STATEMENT OF FACTS

This is an appeal by the administrator from a decree of partial distribution by which the court decreed distribution of \$26,000 on a per stirpes or representative basis, as prayed for by cross petitioners, and not equally on a per capita basis, as prayed for by the administrator.

None of the facts is in dispute. The administrator, William F. Kidman filed his amended, verified petition

praying for partial distribution of the above estate on a per capita basis, to-wit: the sum of \$1,083.33 to each of the 24 nieces and nephews of decedent. Some of the heirs, to-wit: Garland Yonk Alfred Yonk, Edith Nessen, Merlin J. Cowley, Norma C. Wilson and Hanna Bensen, through their attorney Newel G. Daines, filed their cross-petition praying for distribution of said estate on a per stirpes or representative basis, to-wit: the sum of \$5,200.00 to Garland W. Yonk, as the only child and heir of Henry Yonk, a predeceased brother of decedent; \$2,600.00 each to Merlin J. Cowley and Norma C. Wilson, as the children of Elizabeth Yonk Cowley, a predeceased sister of decedent; \$1,733.33 to each of the three children of William F. Yonk, a predeceased brother of decedent; the sum of \$742.85. to each of the seven children of Fred C. Yonk, a predeceased brother of decedent; and the sum of \$472.72 to each of the eleven children of Minnie Yonk Kidman, a predeceased sister of decedent.

It is alleged and admitted by all parties concerned that decedent Charles Yonk died interstate; that he was never married, and left no issue, father, mother, brother or sister, but left 24 nieces and nephews surviving him. It is also alleged and admitted that appellant is the duly appointed, qualified and acting administrator in said estate; that more than four months have elapsed since publication of notice to creditors. That all claims, funeral expenses, etc., and some of the charges and expen-

ses of probate have been paid; that the first annual account has been filed and approved by the court, and that it is for the best interest of all of the heirs that partial distribution of \$26,000 be made at this time. That such distribution will still leave ample funds in the estate to pay the balance of all expenses, inheritance taxes, etc., when the same are determined.

It is also admitted and alleged both by the administrator and the cross petitioners that decedent left surviving him as his heirs at law 24 nieces and nephews, children of deceased brothers and sisters, as follows:

One child of Henry A. Yonk, a predeceased brother of decedent.

Two children of Elizabeth Yonk Cowley, a predeceased sister of decedent.

Three children of William F. Yonk, a predeceased brother of decedent.

Seven children of Fred C. Yonk, predeceased brother of decedent.

Eleven children of Minnie Yonk Kidman, a predeceased sister of decedent.

It will thus be seen that the heirs at law of decedent are all in the same degree of kindred and consanguinity to the decedent, they are all next of kin, nieces and nephews, in equal degree of relationship to the de-

cedent.

The one question presented on this appeal relates to the amount of the estate to which each heir is entitled. Should distribution of this estate be made equally on a per capita basis, or should it be made on a per stirpes, representative, basis to the 24 nieces and nephews?

### ASSIGNMENT OF ERROR

Appellant assigns as error to the court below its decree of partial distribution distributing the estate on a representative basis rather than on a per capita basis, as prayed for by the administrator.

Appellant contends that the heirs, being all in the same degree of kindred to decedent, are entitled to share said estate equally. That the court should have distributed \$1,083.33 to each of the said heirs. Under our present statute as it now stands there is no direct provision for the heirs herein under conditions and facts as here presented; but we submit that before the amendment by the Code Commission in 1933, our succession statute was clear and definite, as to the rights of these heirs. The amendment to Section 101-4-5 (6) has made that statute indefinite, uncertain, ambiguous and has led to utmost confusion.

Subsections (4) and (6) of Section 101-4-5 of our statute are the principal sections involved in determining the rights of succession to the estate of decedent's

nieces and nephews herein.

Respondents' council argued to the court below, and the court upheld, that distribution to the heirs in case at bar must now be made under subsection (4). We cite that as the first error to the court below. It is our contention that subsection (4) does not apply and was not intended to apply unless brothers and sisters or some of them survive the decedent. Subsection (4) states when brothers and sisters inherit. The premise or condition which allows subsection (4) to operate and apply has eliminated all nearer relatives than brothers or sisters, and thus provides when brothers and sisters inherit. The fact that subsection (4) also says "and to the children or grandchildren of any deceased brother or sister by right of representation" does not do away with the necessity that a brother or sister must survive the decedent in order for that subsection (4) to apply.

We direct the court's attention to the earlier compilations, this statute: Section 2823 Compiled Laws of Utah, 1907; and Section 6408, Compiled Laws of Utah, 1917. Those earlier compilations contain sub-headings for each of the nine sub-paragraphs. While in Section 101-4-5, 1933, these sub-headings have all been dropped, the numbering, wording and subject matter of each of the nine sub-sections is the same as in the earlier compilations, and hence we submit the same meaning was and is clearly intended in each sub-division of the present



statute.

Thus, subsection (1) of 101-4-5, in both the present and earlier compilations covers succession in the normal cases where there is surviving husband or wife with children or issue; subsection (2) covers the cases where there is issue, but no surviving husband or wife; subsection (3) "Surviving husband or wife, no issue, when father, etc., inherit"; subsection (4) "When brothers and sisters inherit all"; subsection (5) "when husband or wife inherits all"; subsection (6), "No immediate family, next of kin inherit"; subsection (7) "Death of child under age, other children succeed"; subsection (8) "Death of child under age, when issue of other children succeed"; subsection (9) "When estate escheats to school fund."

Thus by the ordinary process of elimination we submit that subsection (4) states a case when all closer relatives have been eliminated and when brothers and sisters inherit. In order to inherit they must be alive. The fact that said subsection (4) says if **any** (implying some but not all) are dead that their share goes by representation to the children or grandchildren (of the dead brother or sister), does not change the rule that some brothers or sisters must be alive in order for subsection (4) to apply.

Our Section 101-4-5 (4) is identical with former provision of Section 1386 (3) Calif. Civil Code, and the



California Supreme Court has interpreted that section and held that it does not apply unless brothers or sisters survive the intestate.

In the case,—Estate of Nigro, 156 P. 1019, the California court held that Section 1386 (3), (our subsection 101-4-5 (4)) applied only when a brother or sister survived the intestate. Again in a later case, In re Ross' Estate, 202 P. 641, where grand-nieces and grand-nephews claimed to take under Section 1386 (3), our subsection (4), the California Supreme Court again reaffirmed the holding in the Nigro case that said section did not apply unless some brothers or sisters survived decedent.

Other courts have similarly interpreted such statutory provisions. In Appeal of Hall 102 A. 977, (Maine), the statute provided that when intestate left no wife, issue or parents, the estate goes to the brothers and sisters and if any be dead by representation to the children of such brother or sister. The Main court held that that statute did not apply unless brothers or sisters survived the intestate.

Counsel for contestants concede that such was the rule prior to 1933. In their written brief to the court below they stated:

“Prior to 1933 we concede that the rule would have been otherwise. Under the act before amended by the legislature in 1933, the Court will note that collateral heirs after brothers and sisters were

treated as next of kin, (subsection 6), and **that subsection (4) only applied where there was a surviving brother or sister.**"

Then counsel proceeded to argue in their brief that by the amendment to subsection (6), adding the phrase, "nor children or grandchildren of any deceased brother or sister," that children and grandchildren of deceased brothers and sisters have been excluded from inheriting under subsection (6) and therefore, without any statute to that effect, they must now be held to take under subsection (4), irrespective of whether or not any brothers or sisters survived the intestate. In their brief to the court below they stated:

"As our legislature by its amendment in 1933, thus excluded the children or grandchildren of any deceased brother or sister of a decedent from inheriting under the provisions of subsection 6, as next of kin, the only possible sub-section that they can inherit under is sub-section 4 . . . "

We think counsel's conclusion (which apparently the lower court accepted) was erroneous and unsound, for (1) they have presented no change or amendment to subsection (4) which would make that subsection apply now when it did not apply before 1933; and (2) no valid reason was shown or presented supporting the unjust conclusion that the heirs at law herein should now be held to be excluded under subsection (6), as next of kin, and therefore be excluded from taking equally under (6) now, as they admittedly did before the purported amendment.

We submit both of these arguments, e. g. (1) that the heirs herein, all nieces and nephews, do not inherit equally under (6), but now take by representation under (4), even though no brother or sister survived the decedent; and (2), that these heirs have now been excluded from taking under (6) as next of kin, (as they admittedly did take prior to 1933) were and are both erroneous, and led to the unjust and erroneous decree of distribution herein appealed from.

First it should be noted that the amendments or changes in subsections (4) and (6) **were not made by the legislature**, but were made by the Code Committee for the codification of our statutes. The only change made in (4) was as stated, to add the words "or grandchildren." We have no grandchildren of brothers or sisters involved in case at bar. We submit the addition of the words "or grandchildren" in (4) did not change the operation and effect of (4) and did not indicate, and cannot be construed to indicate an intent that (4) should now apply when it did not apply before, e. g. when no brother or sister survived the intestate.

Where the provisions of a statute are carried forward and embodied in a section of a revision or codification, in the same words, or in words which are substantially the same and not different in meaning, the latter provision will be considered a continuance of the old law and not as a new and original enactment, and this is so both where there is an express declaration to that effect in the codification or revision, and in the absence of such de-

claration; and the mere fact that acts are incorporated into a revision of the statutes, and the sections given new numbers by the revisers, does not change the force or effect of the acts. Nor does a reenactment of a chapter without the title change or enlarge the scope of the law in the absence of an indicated intent to alter the scope of the enactment.—59 C. J. 897.

It is therefore appellant's contention that the heirs herein, nieces and nephews of decedent, when no brother or sister survives, do not take under subsection (4) now, any more than they did prior to 1933. We have shown from the statute itself, from other court's interpretation of similar statutes, and from respondent's counsel's own admission, that (4) did not apply prior to 1933, when decedent left him surviving no brothers or sisters. Thus we think the court's first error was in its apparent holding that the heirs in case at bar now take under (4).

2. We submit that the second error, was the lower court's apparent conclusion and ruling (as per counsel's argument) that the purported change or amendment to subsection (6) in 1933, **excluded** the heirs herein from inheriting or taking equally as next of kin under (6), as they admittedly did prior to 1933. And along with that conclusion, (excluding them from taking under (6) and in order not to disinherit such heirs, nieces and nephews, entirely—where no brothers or sisters survive the decedent, hold, without any statute to that effect, that such heirs must now be held to take by representation under

(4) and not equally under (6) as they did prior to 1933; That subsection (4) must now be held to apply in such cases although admittedly that subsection did not apply prior to 1933.

Prior to 1933, subsection (6), Sec. 6408 (6) Compiled Laws of Utah 1917, read as follows:

If the decedent leave neither issue, husband, wife, father, mother, brother, nor sister, the estate must go to the next of kin in equal degree . . .  
Section 101-4-5 (6) now reads:

If the decedent leave neither issue, husband, wife, father, mother, brother, nor sister, nor children or grandchildren of any deceased brother or sister, the estate must go to the next of kin in equal degree, . . .

It will thus be seen that the only change was to add the words "nor children or grandchildren of any deceased brother or sister" following the word "sister." What is the meaning and effect of (6) when thus amended? What was the purpose and intent of the change in (6)? Has that purpose been accomplished?

In ascertaining the meaning of a code revision resort may be had to reports of the code commissioners. 50 AM. JUR. p 469, 59 C. J. 1102, section 651. In response to our letter to the Secretary of State, as to what his records show by way of report by the Code Commissioners concerning changes in the statute (Section 101-4-5) here considered, the Secretary states in his letter of August 17, 1948 as follows:

Upon check a copy of the report of the Code Committee for the proposed revision of the Utah Statutes, 1933, we quote the following concerning Section 101-4-5 referred to in your letter: "Sections 101-4-5 (3), (4), (5), (6), have been changed to satisfy the recommendation of the Bar reader, following amendments made by the California Legislature to meet an injustice resulting from the decisions of its courts under a statute identical with ours. The effect accomplished is to keep succession in the direct line down through grandchildren."

The "injustice resulting from the decision of the California courts" referred to in the Code Committee's report were, without doubt, the Nigro case, *supra*, where decedent left no brothers or sisters, but left children and grandchildren of deceased brothers and sisters, and in *Re Ross' Estate*, *supra*, where decedent left no brothers or sisters, but left children, grandchildren, and great-grandchildren of predeceased brothers and sisters. In both of which cases, as we have already noted, the Californit Supreme Court held that the California Civil Code Section 1386 (3) (Utah Subsection (4) did not apply, when no brother or sisters survived the intestate. The California court further held in each of said cases that the estate passed under Section 1386 (5) (Utah subsection 6) to the next of kin equally and thus held, in each of said cases, that the estate went to the nieces and nephews equally, as next of kin, to the exclusion of grandchildren and great-grandchildren of other predeceased brothers and sisters.

3. Assuming, for the sake of argument, that such



a result was an "injustice", was it remedied by the amendment or changes made by the Code Committee in (4) or (6) in 1933? We think not.

The above report of the Code Committee states, or at least strongly infers, that the changes made or proposed in the Utah Statute were the same as the amendments already made by the California Legislature, for they say, "following amendments made by the California Legislature." That was an easy phrase to throw in, which undoubtedly tended to lull our Legislature into acquiescence to the proposed change without a careful check. But that was not true. The change made in the California statute is far different from the change in the Utah statute. The court will recall that prior to 1933 the Utah statute, subsections (4) and (6) were identical with California Civil Code Sections 1386 (3) and (5) respectively. We have already noted that the only change made in the Utah statute, subsection (4), in 1933, was to add the two words "or grandchildren" in (4) following the word "children." Whereas, the same section in the California Civil Code, Section 1386 (3) was entirely rewritten, and is now known as Section 225, California Probate Code, and reads as follows:

No surviving spouse nor issue. If the decedent leaves neither issue nor spouse, the estate goes to his parents in equal shares, or if either is dead to the survivor, or if both are dead in equal shares to his brothers and sisters and to the descendants of deceased brothers and sisters by right of representa-



tion. (Enacted 1931.)

Thus Section 225, Cal. Probate Code, now grants or directs," . . . in equal shares to his brothers and sisters **and to the descendants of deceased brothers and sisters by right of representation.**" Thus by the present California statute, the **grant under (4) is direct to the descendants** of brothers or sisters of intestate, just as much as it is to brothers and sisters; it is not to the brothers and sisters of decedent and then, if any be dead, to the descendants of **any** deceased brother or sister by representation. The condition precedent does not now apply to bring in the necessity of brothers or sisters surviving decedent in order for that section (4) to apply. Hence the court's prior construction of the earlier section, California 1386 (3), (Utah 4), (that said section does not apply unless brothers and/ or sisters survive decedent) would, we think, not now be held to apply to section 225 of the present California Probate Code. At least the California legislature has made a definite effort to avoid that prior interpretation of (4), which the Code Committee did not do. Likewise California Civil Code section 1386 (5), (Utah subsection 6), was amended to read as follows:

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 . . . (Enacted 1931.)

Thus it is submitted that California has now quite clear-

ly provided by amendments to (4) and (6) that descendants of brothers and sisters, no matter how remote, take before next of kin, and such descendants are no longer classified as next of kin, but as collateral heirs, designated to take by representation. But the change made in the Utah state (4) & (6) is not similarly clear. We submit the change made in our state has caused confusion and uncertainty, as well as injustice. Did the change made by the Code Committee in (4) and (6) remedy the "injustice" mentioned by the Code Committee, resulting from the California decisions? We say "No." As we have noted in the California case, *In re Ross' Estate*, *supra*, nieces and nephews were permitted to take the entire estate as the next of kin, and grandnieces, grandnephews, great-grandnieces and great-grandnephews were excluded. This the Code Committee called "injustice", but what rights are given to this third class—great-grandnieces and great-grandnephews, under the amendments as made by the Code Committee, in 1933? The answer **none!**

Did the Committee then remedy the "injustice" which they pointed to as their reason for the change? If we are now to change to a representative basis, we submit the "injustice" has not been remedied, but that is has been aggravated. The court, in the *Ross* case, excluded both grandnieces and great-grandnieces and gave the entire estate to the nieces and nephews equally as the next of kin. Under our statute,

as the Code Committee amended it, great-grandnieces and great-grandnephews **are still excluded**, even accepting respondent's interpretation that (4) now automatically applies. If it is an "injustice" to give the estate equally to the next of kin, (after brothers and sisters) can it be justice to allow grandnieces and grandnephews to participate by representation and at the same time exclude great-grandnieces and great-grandnephews from taking by representation, when they represent another brother or sister of intestate?

If the statute is not going to grant the estate equally to the next of kin, after brothers and sisters, as our statute clearly did prior to 1933, (and we think still does), why, under the pretence of remedying an "injustice" and a particular decision of the court, provide that grandnephews may inherit but that great-grandnephews (from another brother or sister) are still to be excluded? Particularly when that was part of the "injustice" ruling in the case (Ross case) complained of?

Again, suppose that the intestate had three predeceased brothers, and that one had left children, the second had left only grandchildren, and that the third had left only great-grandchildren. Under present subsection (4) and/or (6), as contestants must argue, the surviving great-grandchildren of the third predeceased brother would be excluded from any part of the inheritance, this because children and grandchildren of the first two pre-

deceased brothers survived the intestate. The great-grandchildren (representing the third brother) could not share under subsection (4) for, even if the court should now hold that (4) applies where no brothers or sisters survive, that subsection is limited to brothers and sisters, and their children and grandchildren. Thus the grandchildren of the second pre-deceased brother would share in the estate under the terms of subsection (4), if it is to be interpreted in accordance with the contention of contestants,—(that (4) applies even though no brother or sister survives). They would take the representative share of the second brother, even though there were nieces and nephews, one degree closer to the intestate, who by the normal rules, and our construction of subsection (6), would be entitled to his estate. The children of the first brother would, of course, be entitled to share in the estate, but only by right of representation, to 1/3rd of his estate. By statute, 101-4-23, they would now “Take the same share or right in the estate of another person that their parents would have taken if living.” Thus the children of the first brother would take 1/3 of the estate; the grandchildren of the second brother would take 1/3 of the estate; but the great-grandchildren of the third brother would be excluded, even though they are representative stock of the third brother. Who would take the share which would have gone to the third brother had he been alive? The court would be unable, under the statute as it now exists, to

distribute  $\frac{1}{3}$  of the decedent's estate, and the same would probably escheat to the State, for no one of the heirs, would be entitled to claim it. If two brothers had left only great-grandchildren, then  $\frac{2}{3}$  of the estate would escheat to the State, even though the intestate had left nieces and nephews from the first brother.

4. It is at once apparent how unjust, ambiguous, uncertain and useless is the phrase "nor children or grandchildren of any deceased brother or sister inserted in subsection (6). It not only fails to remedy the "injustice" noted by the Code Committee, but it aggravates that injustice, for while it grants (if this court rules that (4) automatically applies now) part of the estate by representation to grandnieces and grandnephews, at the expense of nieces and nephews, it at the same time denied inheritance by representation (or at all) to great-grandnieces and great-grandnephews, and makes the share which would otherwise have gone to them by representation, escheat to the State,—all at the expense of nieces and nephews who would otherwise inherit that part of the estate as next of kin, under the definite and clear provision of our statute prior to 1933. It is a well settled rule of construction that the courts will avoid a construction which disinherits heirs who would otherwise take, and cause part of the estate to escheat to the State.

We think it is clear that all the Code Committee did was to insert the same phrase "children or grandchildren

of any deceased brother or sister" in subsection (3), (4), (5) and (6). They seemed to figure that settled everything. But did it? Prior to the change, subsections (3) and (4) read: "... and to the children of any deceased brother or sister by right of representation." In subsection (5) the wife inherited all, prior to 1933, if there were no brothers or sisters, but under (5), as amended by the Code Committee in 1933, the phrase "no children or grandchildren of any deceased brother or sister" was inserted following the word "sister". Suppose decedent left no nieces or grandnieces, but left great-grandnieces or great-grandnephews? Why are they arbitrarily excluded under (5) when representation is now brought in for the first time in that section? Is that justice?

As we have stated in (4) the only change was to add "or grandchildren" following the word "children" in (4). So that the phrase now reads "and to the children or grandchildren of any deceased brother or sister by right of representation." Now that whole phrase was lifted over, by the Code Committee, and instered in (6), except that it is prefixed by the negative word "nor."

5. It must be kept in mind that subsection (4) had been definitely construed and interpreted to apply **only** if **and when** a brother or sister survived, and that the Code Committee had that in mind, for they refer to those very decisions, so construing (4). But they made no change in (4) which would make it apply irrespective of



whether or not a brother or sister survived, as did California. We have pointed out that the small change in (4) (adding "or grandchildren") would still leave the same interpretation of that section (4) where it had been fixed by the courts,—to apply only if a brother or sister survived. In other words the condition precedent in (4), for children or grandchildren to inherit and take by representation, is that a brother or sister must survive the decedent. That condition precedent therefore still stands in (4). No change was made to overcome that interpretation of (4).

It is a rule of construction of revised statutes and codes, that if a section thereof has been codified from a judicial decision, it is to be construed in the light from the source from which it was taken. 50 A.M. JUR. Pg. 469.

Then what was accomplished in (6) by inserting the negative phrase "nor children or grandchildren of any deceased brother or sister? It will be noted that this negative phase in (6) throws these people "children or grandchildren of any deceased brother or sister" into the large class of nearer relatives who are supposed in (6) to be already taken care of in the prior subsections, and so (6) proceeds to grant succession, after them, to the next of kin. But the only sections which make it possible for them to take anything at all are sections (3), (4) and (5); and the only section which in any way ap-



plies to case at bar is (4). As we have seen, children and/or grandchildren of any deceased brother or sister, have been taken care of in (4), **if a brother or sister survived the decedent, but not otherwise.**

How are these children or grandchildren taken care of if no brother or sister survived the decedent? Not by subsection (4), as it now stands; and not by subsection (6), as it now stands, for that subsection expressly excludes them. There is no other section of our succession statute which takes care of nieces and nephews. Therefore if that negative clause in (6) is given literal effect, not only confusion, but a hiatus has been created in our statute, so far as children and grandchildren of predeceased brothers and sisters are concerned, where no brother or sister survives the decedent. Thus, instead of taking care of grandnieces and grandnephews, by apparently allowing them to take by representation along with nieces and nephews subsection (6), as amended by the Code Committee, has in fact expressly excluded both, —grandnieces and grandnephews, as well as nieces and nephews, when no brother or sister survives the intestate. So now, as the statute has been amended to read, literally, nieces and nephews can claim neither by representation, nor as next of kin, if no brother or sister survives the intestate.

If the intent of the amendment was, as the Code Committee implies in its report, to keep succession in di-

rect line down through grandchildren (but not to include all decendants of brothers and sisters), why didn't they either: (1), rewrite (4), as did the California legislature, so as to overcome the interpretation given (4) by the courts and make (4) apply irrespective of whether a brother or sister survived, and grant succession directly not only to brothers and sisters but also to their children and grandchildren? Or, (2), make subsection (6) operate and apply as a direct grant of succession to children or grandchildren of deceased brothers and sisters, and not as an exclusion of them? Thus if (6) had been amended to read: "If decedent leave neither issue, wife, father, mother, brother nor sister, then the estate must go to the children and grandchildren of deceased brothers and sisters by right of representation, and thereafter to the next of kin in equal degree." This would more nearly have accomplished their avowed purpose, though even so, such a wording would still be subject to criticism, because of the injustice to great-grandnephews, and also the possibility of escheat to the State in the case of surviving great-grandnieces and great-grandnephews, which we have set forth above. This injustice and possibility of escheat to the State, was avoided in California, where the amendment **grants succession direct to brothers and sisters and to their descendants.**

The prior judicial construction of (4) becomes, we submit, of controlling importance. In 50 AM. JUR. Pg.

312, Sec. 321:

“As an aid in the construction of a statute, it is to be assumed or presumed that the legislature was acquainted with and had in mind the judicial construction of former statutes on the subject and that the statute was enacted with the light of judicial construction that the prior enactment had received.”

From this it follows that (4) must be given the meaning which the California Courts had given it,—that (4) applies only if a brother or sister survives the intestate.

It is apparent that the bar reader and the code committee accepted the interpretation of (4) given by the California Supreme Court, for they acknowledged that the amendments were made to do away with the “injustice” of the interpretation given that section by the California court. But instead of intelligently rewriting the statute so as to change the rule, (as did the California legislature) the Code Committee merely inserted the negative phrase “nor children or grandchildren of any deceased brother or sister” into (6) and thus created an ambiguity, and made (6) meaningless. For since the identical words were again used, they must be given the same interpretation by the courts. These words in (4) meant, and had been construed to mean, that children or grandchildren of any deceased brother or sister did not take by representation unless a brother or sister of the deceased survived. Now in (6) those words must be

held to mean the same thing: i. e. that next of kin in equal degree do not inherit equally, but take by representation, when and only when they are children or grandchildren of any deceased brother or sister and where there is a brother or sister surviving.

The negative phrase "nor children or grandchildren of any deceased brother or sister" in (6) then becomes ambiguous and meaningless, for by its terms (condition precedent) **these heirs do not take under (6)**. Likewise they do not take under (4) unless a brother or sister survive. In view of the confusion and ambiguity of said phrase in (6), we submit it **should be disregarded by the court and section (6) held to stand as it did prior to 1933, unamended.**

Contestants are furthermore faced with a dilemma. Either they must argue that (4) applies regardless of whether or not a brother or sister survives, which would be against the clear provisions of that statute prior to 1933, against their own admission, and against repeated interpretations by various courts; and they must also then admit that there was no "injustice" which the Legislature should attempt to remedy in 1933, in which case they would also have to admit that the change made to (6) was meaningless, because the heirs would take under (4) and not under (6) in any event. Or they must confess, if they concede that said phrase in (4) only applied when a brother or sister survived, that the same phrase

likewise only applies in (6) today when a brother or sister survives, which is equally ambiguous and absurd for by its terms (6) does not apply if a brother or sister survives. We hope counsel will clear up, if they can, the the confusion, ambiguity, uncertainty, injustice, and possibility of escheat, which is now packed into (6).

6. We further point out that the change made in the statute in 1933 was a change by the Code Commission, and that a change so made is not entitled to the same weight as a legislative enactment, and will not be regarded as altering the law where the statute as revised is ambiguous. *Duncan v. Idaho County* (Idaho, 1926) 245 P. 90, where the Idaho court said: . . .

“in the case of *Libby v. Pelham*, 166 P. 565, 30 Idaho this court said that changes made by a revision of a statute, as distinguished from legislative enactment, will not be regarded as altering the law, unless it is clear such was the intention; and, if the statute as revised is ambiguous, reference may be had to prior statutes.”

Conflict between original act and code or revision. Where there is a conflict between an act as it was passed by the legislature and as it appears in a code or revision, the act as originally passed will control. 59 C. J. page 1102.

7. We therefore respectfully submit that until the present uncertainty, ambiguity, and possibility of escheat in (6), is cleared up by the legislature, this court should disregard the negative phrase “nor children or



grandchildren of any deceased brother or sister," inserted into (6) by the Code Committee.

For the sake of argument, we may concede that the apparent purpose of inserting that negative phrase in (6), was to take nieces and nephews out of their former classification as next of kin, to whom our statute grants succession equally, on a per capita basis, and classify them as collateral heirs. But appellant contends that this is not enough. There must be a corresponding grant of succession of estate to them as such collateral heirs, otherwise there is a hiatus in the statute. Merely changing their classification is not sufficient.

It is not enough to say that now that nieces and nephews have been pushed out of (6) they must be deemed to take under (4). For, as we have shown, (4) had been interpreted and construed to apply **only** when **brothers or sisters survived**, and (4) was not changed or amended so as to make it apply, irrespective whether or not brothers or sisters survived. Hence the heirs herein, who took under (6) equally, prior to 1933, cannot now be held to take by representation under (4).

Again we say that said negative phrase in (6) should be disregarded and ignored because of its confusion and uncertainty, and the heirs herein should be held to take equally as next of kin under (6).

8. This is in accordance with the general rule as to kindred of equal and unequal degree laid down in 26 C.

J. S. 1029:

Except where part of the members of that class are deceased, and taking by right of representation is permitted, kindred of the degree nearest to the intestate succeed to the estate, to the exclusion of those of more distant degrees; and, both by express statutory provision and otherwise, **where the next of kin of the intestate who are entitled to share in the estate are in equal degree to the deceased, they share equally in his estate.**

The Editors of C. J. S. here cite many cases, including *Kincaid v. Cronin*, 22 N. E. 2d 576 (Ohio), where the Ohio court said:

The rule of equality will be enforced in all cases to the class of those in the nearest degree of consanguinity to the intestate.

and *Johns v. Scobie*, 86 P. 2d 820, 121 A. L. R. 1404, where the California court held that when the intestate's heirs were all **nephews and nieces they were all entitled to equal shares, under the law of succession**, and therefore took title to the estate as tenants in common upon the death of the intestate.

Again in 26 C. J. S. 1029 the general rule as to representation and taking per stirpes or per capita is stated as follows:

Where the persons entitled to the estate are in unequal degrees of consanguinity to the intestate, the more remote take per stirpes; but where all are in equal degrees in consanguinity, they take per capita.

16 Am Jur. 806, lays down a similar principle:



Descendants, whether lineal or collateral of equal degree of kin to decedent take per capita and not per stirpes.

Nieces and Nephews, sec. 35b, of 26 C.J.S. 1040:

In cases where brothers and sisters are entitled to inherit, the children of a deceased brother or sister are entitled to take their parent's share; and, where no brothers and sisters survive, nephews and nieces take as the next of kin . . . .

9. Wherever the principle of representation is applied in our statute, 101-4-5, the general rule is adhered to: that the persons entitled to take the estate share equally if they are in equal degree, and take by right of representation only where they are in unequal degree.

Thus, in subsection (1): "remainder in equal shares to his children, and to the issue of any deceased child by right of representation."

Again in subsection (1): "If all the descendants are in the same degree of kindred to the decedent, they share equally, otherwise they take by right of representation."

In subsection (2): "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."

In subsection (3): "in equal shares to the brothers and sisters of the decedent, and to the children or grandchildren of any deceased brother or sister by right of representation."

In subsection (4): "in equal shares to the brothers and sisters of the decedent, and to the children or grandchildren of any deceased brother or sister by right of representation."

In subsection (6): "the estate must go to the next of kin in equal shares."

In subsection (7): "in equal shares to the other children of the same parent, and to the issue of any such other children who are dead, by right of representation."

In subsection (8): "If all the issue are in the same degree of kindred to the child (Uncle), they share the estate equally, otherwise they take by right of representation." (This section we submit as practically controlling, in case at bar, to show the intent of the legislature and the meaning of our statute as a whole.)

In not a single instance is the principle of representation applied by any act or grant of succession in our statute, when all the heirs are in equal degree of kindred to the decedent. Only when there is an unequal relation is the representative principle applied; and that is true in the case of collateral heirs as well as in the case of lineal descendants.

10. There can be no question that where an ambiguity or uncertainty has been created, rules of statutory construction give the Court, nay, make it impera-

tive and a matter of the court's duty, to interpret the statute fairly and according to its prior plain meaning, and to give effect to the general rules and principles of law gleaned from a reading of our statute as a whole. The Court should not be caught upon a literal snag of an ambiguous negative phraseology inserted apart from its setting, meaning and the context of the entire statute.

¶1. Three cases were cited by contestants to the court below, in support of their position. All are distinguishable from case at bar. The first, in re Swenson's Estate, 160 N. W. 253, (Minn.), is different both as to the facts and the law. All of the heirs were not of equal degree, as a niece had died leaving children surviving her and representing her share. Thus the primary reason for making equal distribution, because the heirs are all of equal degree, did not exist in that case. The Minnesota statute was also very different from the Utah statute. To all lineal descendants the representative principle was there strictly applied regardless of whether they were in equal degree or not. The Utah statute says they shall share equally if they be in equal degree. The representative principle by the Minnesota statute was applied to all the "lawful issue of any brother or sister." Subsection (4) of the Utah statute applies it only to "children or grandchildren of any deceased brother or sister." Thus it is apparent at once that the intent and purpose of the Minnesota Legislature was to force all

lineal and collateral heirs to take by right of representation whether they were of equal degree or not. As we have pointed out the Utah statute in every instance, where the representative principle is applied, says that if the heirs be of equal degree they share equally, otherwise they take by right of representation. We do not believe the negative phrase inserted in (6) has overcome this.

In the second case, cited by contestants, Appeal of Messler, 127 A. 85, (N.J.) the statute was amended to expressly provide that children of deceased brothers and sisters should take by right of representation, thus:

. . . "Then equally among the parents and brothers and sisters, and the representatives of deceased brothers and sisters; provided that no representation shall be admitted among collaterals after deceased brothers' and sisters' children." The Utah statute has no such provision.

The third case, Houseley v. Laster, (Tenn.) 140 S.W. 2d 146, was based on a similarly clear statute: "If no father or mother, or brothers and sisters, or the children if such brothers and sisters representing them, equally." Contestants would have a more plausible case if the Utah statute read as does the New Jersey or Tennessee statute.

But the Utah statute reads different. The construc-

tion contended for by respondents, —distribution to the heirs herein by representation rather than per capita, is, we submit, not supported by our statute, 10-4-5, as a whole. Nor can they claim such distribution (by representation) under any specific section of our statute. The fact that the Code Committee attempted to classify them, (nieces and nephews), as collateral heirs rather than as next of kin, is, we repeat, not sufficient, where **no corresponding grant of succession** is provided by statute.

In addition to the foregoing, we wish to point out that in said three cases cited by respondent to the Court below as having changed the rule of succession from per capita to the representative principle, succession to estate was in each case, correspondingly granted by the statute to the heirs in their new status and classification, to-wit: to collateral heirs to take by representation, from their prior status as next of kin, who took equally on a per capita basis. Thus in each of said three cases the statute had reclassified nieces and nephews from their status as next of kin to that of collateral heirs, and the statutes, in each case, as the courts point out, was clear and unequivocal not only as to classification, but also as to **grant of succession of estate on a representative basis** rather than on a per capita basis.

In the case *Re Swanson's Estate*, the Minnesota

court recognized the rule that where the statutory amendment was ambiguous and the legislative intent uncertain, and not clear, that the court would disregard the purported amendment and would carry out the prior statute, as was urged in that case. But the Minnesota court said:

In the present case the law as revised is clear and unambiguous, and manifests a plain intent which will not permit us to hold that the Legislature intended to continue the former statute by which a surviving father took the whole estate to the entire exclusion of a surviving mother. Neither is there any rule which will permit us to disregard the new clause which the Legislature inserted in subdivision 5 of the present statute. The insertion of this clause leaves the statute clear and unambiguous, and under such circumstances we cannot reject this clause nor declare it meaningless, but must give it the effect which the Legislature plainly intended.

(Judgment affirmed")

We have pointed out that just the opposite is true of the Utah Statute (6). By inserting the negative phrase "nor children or grandchildren of any deceased brother or sister," in (6) neices and nephews have been excluded from (6), and by failing to amend (4) so as to make that section apply, whether or not a brother or sister survives intestate, the heirs herein have literally been excluded as heirs of the intestate.

Such a result could not have been intended by the legislature. Neither can it be argued that it was intended to change from next of kin to the representative



principle where, as here, all of the heirs are nieces and nephews in equal degree of consanguinity to intestate. Hence we come back to our main contention, that the confusion and uncertainty created by the purported amendment to (6) compels the court to ignore it, and distribute the estate under (6), with the negative phrase deleted, which will thus distribute the estate herein to the heirs (all nieces and nephews) equally.

**Deletion of Statute** . . . However there are cases in which words of a statute are so meaningless, or inconsistent with the intention of the legislature otherwise plainly expressed in the statute, that they may be rejected as surplusage and omitted, eliminated or disregarded. 50 Am. Jur. Pg. 219.

**Extent and limitation of adherence to Foreign Construction**, 50 Am. Jur. pg. 473.

The presumption and general rule that the adoption of a foreign statute carries with it the prior construction in the originating state is regarded as of special force, and strong, persuasive, and is entitled to great weight, and respectful consideration, so that only strong reason will warrant a departure from it.

### **Construction of Foreign Courts**

It is a general rule of law, in statutory construction, that it is proper to resort to the decisions of courts of other states, construing statutory language which is identical or of similar import. 50 Am. Jur. pg. 315. (This applies particularly in the construction of (4).

### **Indefiniteness and Uncertainty**

In the enactment of statutes reasonable precision is required. Indeed, one of the prime requisites of any statute is certainty, and legislative enactments may be declared by the courts to be in-

operative and void for uncertainty in the meaning thereof. This power may be exercised where the statute is so incomplete, or so irreconcilably conflicting, or so vague or indefinite, that the statute cannot be executed and the court is unable, by the application of known and accepted rules of construction to determine what the legislature intended with any reasonable degree of certainty. 50 Am. Jur. Sec. 472, pg. 484.

**Ambiguity.** The courts regard an ambiguity to exist where the legislature has enacted two or more provisions which appear to be inconsistent. There is also authority for the rule that uncertainty as to the meaning of a statute, may arise from the fact that giving a literal interpretation to the words that would lead to such unreasonable, unjust and impracticable or absurd consequences, as to compel a conviction that they could not have been intended by the legislature.

In conclusion, we submit that the construction contended for by the administrator, and the distribution which follows from such construction, is much more equitable and just. The estate herein came from an uncle to the heirs. It did not come from any brother or sister of intestate. Neither did any part of this estate ever pass to any predeceased brother or sister of decedent. At no time did they have any power or control over any part of this estate.

The heirs herein are all nieces and nephews. They are all equally related in the same degree of consanguinity to decedent; who apparently had no favorites, for he left no will. These nieces and nephews were apparently

all equally near and dear to the intestate; and in as much as they were all equally related to him, we respectfully submit, not only from the law and the statutes which we have argued (and the analogy to be drawn from sub-sections (1) and (8), but also as a matter of justice and equity and fair play, this estate should be distributed to the heirs herein equally, as his next of kin.

More controlling still is the fact that (6), as now amended by the Code Committee, makes the statute vague, ambiguous and accomplishes such unjust results by penalizing the heirs of decedent who come from large families, but who are equally related to intestate, that this court should refuse to accept the interpretation contended for by respondents.

50 Am. Jur. page 372. E. Avoidance of Undesirable Consequences.

No. 368. Generally. The results which will follow one construction or another of a statute is often a potent factor in its interpretation. Frequently, the undesirable or mischievous consequences of a different construction are used by the courts to indicate the correctness of the interpretation adopted by them by the application of other rules of construction. Similarly, courts sometimes take the time and space to refute the undesirable consequence claimed to attach to a statute under an interpretation of it favored by the courts. Indeed, there are cases in which the consequences of a particular construction are, in and of themselves conclusive as to the correct solution of the question. In any event, it is generally regarded as permissible to consider the consequences of a proposed interpretation of a statute, where the act is ambiguous in terms

and fairly susceptible of two constructions. Where the language of a statute is doubtful and the necessity for construction arises, the court may consider whether the legislature could have intended a construction that would be highly injurious, rather than one beneficial and harmless . . .

Where the literal construction of an act will produce results so extraordinary that they cannot be deemed to have been within the legislative intent, the general language of the act may be restricted so as to accomplish the general intent and purpose of the act. In this respect, there is authority for the rule that uncertainty as to the meaning of a statute may arise from the fact that giving a literal interpretation to the words would lead to such undesirable consequences as to compel a conviction that they could not have been intended by the legislature.

369. Inequitable Results. The law is presumed to be equitable, and it is a reasonable and safe rule of construction to resolve any ambiguity in a statute in favor of an equitable operation of the law. However, where the statute is unambiguous, the consideration whether the provisions of the statute are strictly equitable or otherwise, should not influence the court in determining the effect thereof. The courts may not give to a statute a meaning to which its language is not susceptible, merely to avoid what the court believes are inequitable results. The fact that the effect of the statute as applied to a particular case may be inequitable does not make it absurd so as to justify a departure from its plain meaning.

370. Injustice or Unfairness. In the construction of a statute, consideration of what causes injustice may have potent influence. It is not to be supposed that the framers of a statute contemplated a violation of rules of natural justice, and it should not be presumed to have been within the legislative intent to enact a law having an unjust result. To the contrary, it is to be presumed that the legisla-

ture intended the law not to work an injustice. Accordingly, it is a general rule that where a statute is ambiguous in terms and fairly susceptible of two constructions, the injustice which may follow one construction or the other may properly be considered, and the courts, to support their construction of a statute, frequently refer to the justice thereof, or to the injustice which would result from a different construction of the law. Indeed, it is the duty of courts to render such an interpretation of the laws as will best subserve the ends of justice, in so far as this may be accomplished in accordance with well established rules of statutory construction, and it is considered a reasonable and safe rule of construction to resolve any ambiguity in a statute in favor of a just or fair interpretation thereof, or in favor of such an interpretation as would promote and effectuate justice, and result in a fair application of the statute. A construction should be avoided which renders the statute unfair or unjust in its operation, where the language of the statute does not compel such a result. The terms employed by the legislature are not to receive an interpretation which conflicts with acknowledged principles of justice if another sense, consonant with those principles, can be given to them. Moreover, the fact that unjust results follow the literal application of the language of a statute justifies a search of the statute for further indications of legislative intent. On the ground that a technicality should not be permitted to override justice, the general intention of the legislature is generally held to control the strict letter of the statute where an adherence to the strict letter would lead to injustice.

Respectfully submitted,

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