

1948

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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

Respondent's Brief

Case No. 7244

Appeal from the District Court of the First Judicial
District of the State of Utah, in and for the
County of Cache

Hon. Marriner M. Morrison, Judge

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CLERK, SUPREME COURT, UTAH

I hereby acknowledge receipt of two copies of respondents brief this 24th day of November 1948.

A handwritten signature in black ink, appearing to read "Paul H. Kinner", written over a horizontal line.

Attorney of Appellant

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In the Supreme Court of the State of Utah

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

Respondent's Brief

Case No. 7244

STATEMENT OF FACTS

The respondents agree with the statement of facts as set forth by the appellant, they are not in dispute.

ARGUMENT

The only question involved in this appeal is whether, where a person dies intestate leaving as his only surviving heirs nephews and nieces, they inherit under the laws of this State by representation, that is, per stirpes, or per capita.

The trial Court held, and properly so, that they inherit by representation or per stirpes.

The right of succession to property of an ancestor is a mere privilege given by the State or Sovereign and is not a natural or an inherent right, (16 Am. Jur. page 77, section 12, and 26 C.J.S. page 996, section 2), and as

corollary to this proposition, a person seeking to inherit must look solely to the statutes in determining what interest he takes. (16 Am. Jur. page 783, section 18, 26 C.J.S. 1004, section 6.)

As to the construction of statutes of succession by; the Courts, the editors of American Jurisprudence and Corpus Juris Secundum have set forth the rules as follows:

“18. Generally. The general rules of statutory construction govern the construction of statutes of descent and distribution. The fundamental rule is to ascertain and give effect to the intention of the legislature. This intention, however, must be the intention as expressed in the statute itself, and, where the meaning of the language is plain, it must be given effect by the courts. The spirit of the statute, it is said, must be extracted from the works, and not from conjecture aliunde. The statute cannot be changed by the court in order to make it conform to its conception of right and justice in particular cases * * * (16 Am. Jur. 783, section 18.)

“* * * Rules of law, rather than equitable principles, are to be applied in the construction of the statute; and, the court should endeavor to give effect to the legislature's intent, irrespective of the intestate's intent; and where the meaning of the language employed in the statute is explicit and unmistakable, the court will not substitute its will for that of the legislature; or give the words used any interpretation other than that which they literally import, or ingraft an exception where none exists in the language of the statute. * * * (26 C.J.S. page 1006, section 6.)

The law of succession in this state is controlled by 101-4-5, U.C.A. 1943. This section is complete and comprehensive as to descent and distribution, and was intended to, and does, cover all situations therein arising. The statute as it now stands is the same as enacted by the legislature in 1933 and therein known as 101-4-5, Revised Statutes of Utah, 1933. The law of succession in 1907 was known as Section 2828, Compiled Laws of Utah, 1907. This section was later known in the Compiled Laws of Utah, 1917, as Section 6408.

In setting forth the law of succession our legislature generally placed heirs into three classes, and provided for their various interests accordingly. That is, (1) lineal descendants; (2) collateral descendants; and (3) next of kin.

The interest of lineal descendants is controlled by sub-sections 1, 2, 7, and 8 of 101-4-5, U.C.A., 1943; collateral heirs by sub-sections 3 and 4, 101-4-5, U.C.A., 1943; next of kin, that is, collateral heirs after "children and grandchildren of a deceased brother and sister" is controlled by sub-section 6, 101-4-5, U.C.A. 1943. Where there are no lineal descendants or collateral heirs, or next of kin, decedent's property escheats to the State for the benefit of the school fund. (Sub-section 9, 101-4-5, U.C.A. 1943.)

From 1907 to the present date our statutes regarding the laws of succession have remained unchanged except for two amendments. In 1925 the legislature raised the amount a surviving spouse could inherit from \$5,000.00 to \$25,000.00 before the excess thereof was distributed

equally between the surviving spouse and the mother and father, or either of them, of the decedent. (Laws of Utah, 1925, page 195.) In 1933 the law of succession was substantially amended by our legislature. Although the subparagraphs were maintained, it dropped the sub-titles, further amending sub-sections 3, 4 and 6.

Sub-section 3 deals with the incident where a decedent dies leaving a spouse but no issue. Prior to 1933 that portion of the sub-section pertinent to this discussion read as follows:

“* * * If there be no father or mother, then one-half of such excess goes in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brothers or sisters by right of representation.”

In 1933 the legislature, after the word “children,” inserted the words “or grandchildren” in this subparagraph, and sub-section 3 as amended read:

“If there be no father nor mother, then one-half of such excess goes in equal shares to the brothers and sisters of the decedent, and to the children *or grandchildren* of any deceased brother and sister by right or representaion.” (Italics added.)

The purpose of this amendment was to bring the law in harmony in all its aspects regarding the distribution of property to collateral heirs, as will be further noted, herein, thus providing that in each instance, collateral heirs to and

including children and grandchildren of deceased brothers and sisters should inherit per stirpes, or by representation.

The question to be decided here is controlled by sub-sections 4 and 6 of the present act and they are the same as sub-sections 4 and 6 of the 1933 act. These sub-sections prior to 1933 read as follows:

(4) "When brothers and sisters inherit all: If there be neither issue, husband, wife, father nor mother, then in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister by right of representation."

(6) "Where next of kin inherit: 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, excepting that when there are two or more collateral kindred in equal degree but claiming through different ancestors, then that claiming through the nearest ancestor must be preferred to those claiming through an ancestor more remote."

Thereafter, in 1933, these sub-sections were amended to read as follows:

"(4) If there is neither issue, husband, wife, father nor mother, then 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."

“(6) If the decedent leaves 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, excepting that when there are two or more collateral kindred in equal degree but claiming through different ancestors, those who claim the nearest ancestor must be preferred to those claiming through an ancestor more remote.” (Italics supplied.)

The underscoring represents that portion of the statute which was added by the legislature in its amendment of 1933.

The foregoing sub-sections 4 and 6 are the sub-sections that the appellant would have the court believe are ambiguous, indefinite and uncertain. We believe, however, that a mere perusal of them refutes such an assertion. In determining the question before the court they must be read together. Prior to 1933, collateral heirs after brothers and sisters were treated as next of kin, where there was no surviving brother or sister, (subsection 6). However, by the amendments of 1933, our legislature provided that “children or grandchildren of any deceased brother or sister” of a decedent would not thereafter inherit as next of kin under the provisions of subsection 6 — they were expressly excluded from its provisions, but they would inherit as collateral descendants under subsection 4.

Sub-section 4 says:

“And the children or grandchildren of any deceased brother or sister by right of representation,”

and the legislature defined the term "inherit by representation" as follows:

"* * * "by right of representation" takes place when the descendant of any deceased heir take the same share or right in the estate of another person that their parents would have taken if living* * *." (101-4-23).

AUTHORITIES

As stated before, whatever interest the heirs in this case receive is controlled by the statutes. 26 C.J.S. page 1030, section 23, says:

" * * There are exceptions to this rule, under the statutes of a few states, it being held in such states that nephews and nieces, although they alone are the heirs or next of kin, take the real and personal property per stirpes* * *". (Underscoring added)*

Also to the same effect is American Jurisprudence. 16 Am. Jur. page 811, section 42:

" * * Where all of those who take are more remotely removed from the ancestor than children but are all of equal degree of relationship, whether or not they take per capita or per stirpes depends on the statute and the construction given it. The general rule is that they take per capita; this is true, at least, where those who take are grandchildren or great-grandchildren. In a few jurisdictions, however, even in such a case, the heirs take per stirpes and not per capita. A similiar difference of rule prevails where*

the inheritance falls to collateral kindred. In some jurisdictions, where all the collaterals entitled to claim are equally near of kin — for instance, second cousins, twice removed — they take per capita, because they all take in their own right. In other jurisdictions the view is taken that they take per stirpes. Where those who take are of different degrees of relationship, so that some claim as representatives of others, such representatives take per stirpes. Where the estate falls to collaterals beyond the statutory limitation of the right to take by representation, they take per capita. * *.”* (Italics supplied.)

The trial courts construction of our act to the effect that the nephews and nieces of the decedent in this case take by representation or per stirpes and not per capita, is not only clear from the act itself, but such is supported by the authorities as well, for in every instance in which courts have construed statutes substantially the same as ours, they have without exception so held.

In the case of *In Re Swenson et. al vs. Lewis*, 160 N. W. 253, the Supreme Court of Minnesota was concerned with the history of legislation regarding their succession laws similar to our own. Prior to 1905, the pertinent parts of their act to this discussion read:

“Subsection 5. If the intestate leaves no issue, nor wife, nor husband, nor father, nor mother, his estate shall descend in equal shares to his brothers and sisters and to the lawful issue of any brother or sister by right of representation.”,

and subsection 6 of their act read:

“If the intestate leaves no issue and no husband or wife, and no father, mother, brother, or sister, his estate shall descend to his next of kin in equal degree

* ~ *

In 1905, the legislature of Minnesota amended its succession laws, subsection 5 becoming subsection 4 of the new act. In substance it remained, however, unchanged. It read:

“If there is neither surviving issue, nor spouse, nor father, nor mother, his estate shall descend in equal shares to his brothers and sisters and to the lawful issue of any brother or sister by right of representation.”

Subsection 6 became subsection 5 and read as follows:

“If the intestate leave neither issue, spouse, father, mother, brother nor sister, *nor living issue of any deceased brother or sister*, his estate shall descend to his 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 shall be preferred to those claiming through an ancestor more remote.”

The underscoring represents the words in italics as they appear in the decision. The Court said:

“* * * Subdivision 5 of the former statute became subdivision 4 of the present statute without change in substance. But subdivision 6 of the former statute, was changed in substance by inserting the words, “nor living issue of any deceased brother or sister,” so that it now reads as printed above, the inserted words being in italics.

By the first subdivision of both statutes, if the surviving kin first in the line of descent are issue of the decedent, they take by right of representation, that is, per stirpes; and neither statute makes any other or different provision for a case in which there are no living children of the decedent and the first in the line of descent are his grandchildren. Under both statutes the per stirpes rule continues so long as issue of the decedent be living. By the fifth subdivision of the former statute which is the same in substance as the fourth division of the present statute, if the first in the line of descent are brothers and sisters, they also take by right of representation. *The present statute makes no other or different provision for a case in which there are no living brothers or sisters and the first in the line of descent are nephews and nieces or their issue; but by subdivision 6 of the former statute, if there were no living brothers or sisters and the first in line of descent were nephews and nieces or kin of a more remote degree, they took per capita and not per stirpes. The former statute made the change from the per stirpes rule to the per capita rule at the point where there were no living brothers or sisters and the first in the line of descent*

were nephews and nieces or kin of a more remote degree. The present statute makes the change from the per stirpes rule to the per capita rule at the point where there are no living brothers or sisters, "nor living issue of any deceased brother or sister," and the first in the line of descent are kin of a more remote degree than a brother or sister. The present statute continues the per stirpes rule so long as issue of a brother or sister be living. It follows that in the present case the nephews and nieces take per stirpes and not per capita. * ** (Italics supplied.)

The prerogative Court of New Jersey in the Appeal of Messler, et. al 127 A. 85, also held that where nephews and nieces were the only surviving heirs that they inherited by representation. The Court said:

"(1) In 1918 the Legislature, by chapter 63 of the Laws of that year (P.L. 1918, p. 197), amended subsections 3 and 4 of section 69 chapter 47 of the Acts of 1914 (P.L. 1914, p. 69) which had amended certain subsections of section 169 of subdivision 14, relating to distribution under the Orphans' Court Act, (Comp. St. vol. 3, page 3874, et. seq.)

The amendments to subsections 3 and 4, made by the Act of 1918, make these subsections now read as follows:

'Subsection 3: If there be no husband or widow, as the case may be, then all of the said estate to be distributed equally to and among the children; and in case there be no child, nor any legal representative

of any child, 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'.

Subsection 4: 'If there be no husband or widow, child or any legal representative of any child, nor a parent, brother or sister, *nor the representative of a deceased brother or sister*, then all of the estate to be distributed equally to the next of kindred, in equal degree, of or unto the intestate and their legal representatives as aforesaid.'

The words in italics are the pertinent parts of the amendments with which we are now concerned, and it is clear that the effect of these amendments is to take the children or representatives of deceased brothers and sisters of the intestate out of their former classification as next of kin of the decedent and to place them among the collateral relatives of the intestate among whom the statute now directs the personal estate shall be equally divided, before other next of kin of more remote degree can participate in its distribution."

The Court again said:

"The further effect of the amended statute is that it deprives nieces and nephews, in equal degree, in their capacity as the representatives of deceased brothers and sisters of the intestate, of the possibility of distribution being made among them per capita, as

next of kin, for the terms of the statute, in its reference to the representatives of deceased brothers and sisters, are not mere words of description, but are clearly intended to indicate the capacity in which the (children) representatives of deceased brothers and sisters of decedent shall take part or share of the estate.”

In the case of *Housely v. Iaster, et. al.* 140 S.W. 2d. 146, the Supreme Court of Tennessee, in interpreting statutes substantially the same as our own, reached the same conclusion. The Court said:

“We are of the opinion that the probate judge decided the question properly. Section 8389 of the Code of 1932 regulates the distribution of the surplus person-
ality of an intestate. Subsection 5 of that statute provides:

“If no father or mother, to brothers and sisters, or the children of such brothers and sisters representing them, equally.”

It should be observed that the children of brothers and sisters, under this statute, take as representatives of such brothers and sisters, — each representative or representative group, equally.”

The Court again said:

“That our construction is correct is indicated by subsection 6 of section 8389 providing “If no brother or sister, or their children, to every of the next of kin of

the intestate who are in equal degree, equally.” So, after passing the children of brothers and sisters, distribution is to the next of kin, equally, per capita. Distribution, to the children of brothers and sisters, however, is not made to such children as next of kin, but as representatives of their parents. This is made clear in Lewis V. Claiborne, *supra*.

Section 8390 of the Code provides: “There is no representation among collaterals, after brothers’ and sisters’ children.” Up to the point indicated, however, there is representation among collaterals, that is, up to and including brothers’ and sisters’ children. We are referred by counsel to Sizer’s Prichard Law of Wills and Executors, section 767, as expressing views contrary to those above indicated. Plainly, however, the learned author was discussing distribution among lineal distributees, not among collateral distributees.”

CALIFORNIA DECISIONS SUSTAIN THE RULE THAT THE HEIRS HERIN INHERIT BY REPRESENTATION OR PER STIRPES

The crux of appellant’s argument is merely this, that inasmuch as the law of succession does not effect the result he wishes, that this Court shall arbitrarily ignore the express language of the statute, and judiciously legislate the result he desires. Notwithstanding his declaration that the provisions of subsection 6, 101-4-5, U.C.A. 1943, does not apply, he nevertheless asks the Court to disregard its provisions and hold that the heirs herein take as next of kin thereunder.

His first proposition is merely this, that subsection 4 of our act does not apply because there is no surviving brother or sister. This, because of the result reached by the California Court in the case of Estate of Nigro, 156, P. 1019, and in Re Ross Estate, 202 P. 641. It is true that such was their holding. However, the appellant failed to advise the Court that the conclusion reached by the California Supreme Court was the result of the interpretation of subsections 3 and 5 of the California act and not only subsection 3 thereof as the appellant would have the Court believe. The court said that subsections 3 and 5 of its act must be read together. Subsection 3 of the California act and subsection 4 of our act are substantially the same, whereas subsection 5 of the California act and subsection 6 of our act are materially different.

The California Court said because children or grandchildren of a deceased brother and sister inherited as next of kin, where there is no surviving brother or sister under subsection 5, that subsection 3 did not apply. In contrast to this, however, our act provides that "children or grandchildren of any deceased brother or sister" are expressly excluded from inheriting as next of kin under subsection 6, and they can only inherit under subsection 4, which provides for inheritance by representation. Thus, if we follow the reasoning of the California decisions these cases support the respondent's position.

In addition to the foregoing decisions, the appellant also cites the California case of Johns v. Scobie, 86 P. 2d. 820, 121 A.L.R. 414, as holding that nephews and nieces inherit per capita. However, such was not its holding,

although it contained a fugitive remark to that effect. This was a case involving the question of the validity of the delivery of a deed; the Court finding that there was no legal delivery then considered the question of whether the grantee had acquired title by adverse possession. In this respect it further found that inasmuch as the grantor died intestate leaving surviving him only nephews and nieces, of whom the grantee was one, that the grantee occupied the property as a tenant in common with the other nephews and nieces and that there was nothing in the record to establish the elements of a hostile or an adverse claim.

The question of what interest the heirs take as between themselves was not involved; it was not probative to the decision, and the fugitive remarks regarding a per capita basis of inheritance were purely dicta.

Furthermore, the Supreme Court of California has laid down a rule that under its present law of succession, nephews and nieces, where the sole heirs, inherit by representation or per stirpes. Such is the holding in the case of *Van Tiger vs. The Superior Court in and for Los Angeles County*, 60 P. 2d. 851. The California Court had before it for consideration sections 225 and 226, California Probate Code, and they read as follows:

“225. No surviving spouse or issue. If decedent leaves neither issue nor spouse, the estate goes to his parents in equal shares, or if either is dead, to the survivors, or if both are dead, in equal shares to his brothers and sisters, and to the descendents of the deceased brothers and sisters by right of representation.

226. If 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.”

In this case the decedent left surviving him only nephews and nieces. The administratrix filed her petition praying that the estate be distributed per capita. It was uncontested. The Court, however, entered its order distributing the estate per stirpes. The Administratrix sought to have the order changed effecting the distribution on a per capita basis, which she claimed was the original order of the court, and that the entry of the order on a per stirpes basis was an error of the Clerk. At page 853, the Court said:

“It will be observed that the respondent does not claim that the facts of the case are otherwise than as set out in the decree nor that the decree does not distribute the estate exactly as the law directs. The decree speaks the truth as to the facts in the case. The decree correctly found the facts with regard to the relationship of the parties to be as above set forth and no other distribution would have been proper under the facts of the case and the law applicable thereto. The rights of the respondent were not impaired by the decree as entered. Indeed it is nowhere claimed in the answer of respondent that her rights were impaired by the decree. Thus the only alleged mistake (so-called) is merely that the clerk correctly entered the decree in compliance with the law and the admitted facts. There was no mistake.

* * * It seems to be the respondent's contention that if she could get the judgment "corrected" so as to distribute the estate per capita instead of per stirpes, then the judgment would contain a judicial error and could not now be corrected. She says: "If, in its order of January 10, 1934 (the date of the hearing), the Court did err in ordering a per capita instead of a per stirpes, distribution, that error, if error there was, was a judicial error, and not a mere mistake of the clerk. Such error, therefore, if error there was, could not be corrected after the clerk had entered the decree of distribution" * * *.

FURTHER ANSWER

The case of the Appeal of Hall et. al. 102 A 977, Maine, a decision cited by appellant, likewise does not support his position. This decision was based on a statute substantially the same as existed in the State of California at the time of the Nigro and In Re Ross Estate decisions and the the Court reached its decisions along the same lines of reasoning as did the California Court in the Nigro and In Re Ross cases.

The mere setting forth of the statutory provisions construed by the Maine Court and again repeating the provisions of subsection 6 of our act, will demonstrate that this case also supports the respondent's position. Subsection 6 of the Maine statute said:

"If no issue, father, mother, brother or sister, it descends to his next of kin in equal shares * * *"

Subsection 6 of our Act says:

“If the decedent leaves no 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 * * *”.

Appellant, in further support of his proposition, quoted from 26 C.J.S., page 1029 (page 27, appellant's brief.) However, for some reason unknown to the respondent, he omitted after the word “permitted,” “See Infra section 23.” Section 23 deals fully with representation and taking per capita, and therein it recognizes that:

“Under the statutes of a few states, it being held in such states that nephews and nieces, although they alone are the heirs or next of kin, take the real and personal property per stirpes.” 26 C.J.S. 1030, Section 23 supra.

Appellant recognizes under the statutes of some states, that nephews and nieces, where the only survivors, would inherit on a per capita basis. However as repeatedly pointed out, whether they inherit per capita or per stirpes depends upon the particular statute of each state.

The Ohio case of *Kinkaid v. Cronin*, 22 N.E. 2d. 576, although cited by appellant in support of his proposition, does not sustain it because of the particular wording of the Ohio statute. This case merely held that in interpreting section 10503-7. General Code, that its provisions applied to collateral as well as lineal descendants.

“* * * The estate shall pass to such persons of equal degree of consanguinity of such intestate in equal parts, however remote from the intestate such equal and common degree of consanguinity may be.”

The Ohio Court in the case of *Snodgrass v. Bedell*, 16 N.E. 2d. 646, a decision cited in the foregoing case, said:

“That the language makes its provisions apply to collateral heirs as well as lineal heirs. It is not limited to those lineal descendants in a direct line, but includes those of a more remote degree of consanguinity to the intestate. In fact, it says that the per capita or equal division shall apply “however remote” the relationship may be from the intestate.”

Appellant’s concern with the law of escheat can be disposed of in a few words. In his hypothetical case, the property would all vest in the surviving heirs — the heirs of the surviving brothers. There would be no escheat to the state. This is so elementary that it is unnecessary to refer to the authorities in support of it.

The appellant has referred to the report of the Code Commissioners, and although under the rules as laid down by the Editors of *American Jurisprudence and Corpus Juris*, cited by him, it is not applicable hereto, as reference is not to be made to such report where the language of the statute is clear and unambiguous;

“The rule does not prevail where the language used in the statute is clear and unambiguous.” 50 Am. Jur., page 469, section 454.

The report, nevertheless, supports the fact that the legislature not only changed the law by its amendments of 1933, but it intended to do so.

The Amendments corrected the evils of the statute as it existed prior thereto, namely, by them it provided that grandchildren of a deceased brother or sister would inherit as collateral heirs without the survival of the grandparents, and that all collateral heirs would inherit by representation whether of equal degree or not.

In this connection, the appellant writes a great deal about justice and injustice. He says that it is injustice to invoke, as the statute provides, the law of representation in the case of collateral heirs where of equal degree. In this respect, our legislature unquestionably believed that the right of representation should be applied in the case of collateral heirs, for it clearly and unambiguously so provided, and in this respect, it is not alone, for California, New Jersey and Tennessee have so provided, and we do not know how many other legislatures have done so, for we have attempted to marshall only the statutes of the states regarding the question of succession, where there has been a judicial interpretation.

The appellant's citations of authorities on the question of statutory construction again sustains the Trial Court's construction of our law of succession as amended in the Revised Code of 133, for they all lay down the rule that where the revised law in clear and unambiguous terms made a change in the prior law, such change must be given effect. The Editors of American Jurisprudence and Corpus Juris says:

“* * *In any event, where an intention to change the meaning of a statute incorporated in a revision or code is clear, the presumption that no change was

intended must yield to the fact, and the intention to make the change will be given effect. Moreover, it is a general rule that in the construction of compilations, revisions or codes, when a provision is plain and unambiguous the court cannot refer to the original statute for the purpose of ascertaining its meaning. In such case, a doubt or ambiguity in the meaning of the revised statute may not be raised by reference to the former statutes of which it is a revision." 50 Am. Jur. page 466, section 447.

"Revisions and Codes. (1) In General. Courts should not unsettle the force of every change made in a plainly worded revision by inquiring into the authority of the revisers to make such change. So where the meaning of the language of a revision or code is plain and unambiguous, it must be construed without resort to the original statutes which have been brought into it; but wherever necessary to construe doubtful language in the revision, the original acts may be consulted to determine the meaning intended, since it is presumed that no substantial change was intended. In other words, reference may be had to antecedent legislation only to solve a doubt, not to create one. * * *" 59 C.J.~~9~~ page 1098, section 468.

The Supreme Court of Minnesota in the case of *In Re Swenson's Estate*, 160 N. W. 253, *supra*, wherein, as was previously pointed out, the Court was dealing with the history of the law of succession similar to that involved in this case, at page 255, the Court said:

“Appellant invokes the rule that the Revised Laws of 1905 are presumed to have continued the pre-existing law unchanged unless an intention to change it clearly appears. This rule is well settled; but it is equally well settled that where the Revised Laws, in clear and unambiguous terms, made a change in the prior law, such change must be given effect. *State v. Stroschein*, 99 Minn. 248, 109 N. W. 235; *State v. Minneapolis Milk Co.* 124 Minn. 34, 144 N. W. 417, 51 L. R. A. (N.S.) 244; *Williams v. Reid*, 130 Minn. 256, 153 N. W. 324, 593.

In the present case the law as revised is clear and unambiguous, and manifests a plain intent to change the prior law. There is no rule of construction which will 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.”

There is no dispute that the legislature provided that in all instances where the lineal descendants of a decedent are in equal degree they inherit equally, (Subsections 1, 2, 7, and 8, 101-4-5, U.C.A. 1943). However, the legislature, just as, expressly declared, that the collateral heirs

of a decedent to and including "children and grandchildren of any deceased brother or sister," where equal, inherit by representation, (subsections 3 and 4, 101-4-5, U.C.A. 1943.) Had the legislature intended that collateral heirs to and including "children and grandchildren of intestate's brother and sister" should inherit equally where of equal degree, it would have so declared, as it did in the case of lineal descendants. To the contrary, however, it provided that they should inherit by representation.

The legislature was explicit in its language regarding both lineal and collateral descendants. It treated lineal descendants as a class and collateral descendants as another class. In one instance, lineal descendants, where equal, they inherit equally. In the second instance, collateral heirs, where equal, they nevertheless inherit by representation. This is the law as declared by the legislature.

Respectfully submitted,

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