

1951

In the Matter of the Estate of Mignon Denhalter Lewis : Brief of Respondent

Utah Supreme Court

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Recommended Citation

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IN THE SUPREME COURT
of the
STATE OF UTAH

**IN THE MATTER OF THE ESTATE
OF MIGNON DENHALTER LEWIS**

**Case No.
7724**

FILED

OCT 15 1951

RESPONDENT'S BRIEF, Supreme Court, Utah

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IN THE MATTER OF THE ESTATE
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} Case No. 7724

RESPONDENT'S BRIEF

PRELIMINARY STATEMENT

A careful examination of the Statement of Case contained in Appellant's Brief reveals that while the Statement of Facts contained therein is accurate there are some essential details which were not stated. Such essential facts as were not stated it will be necessary to recite in respondent's argument and therefore they will not be stated in a Statement of Facts.

All italics are ours. Parties will be referred to as appellants and respondent throughout this brief.

SUMMARY OF ARGUMENT

POINT I.

THE TESTIMONY OF WILLIAM JOHN CLARK AND MARY FRANCES JOHNSTON LOVELESS, WITNESSES, WAS COMPETENT EVIDENCE.

POINT II.

THERE IS SUBSTANTIAL EVIDENCE SUPPORTING THE TRIAL COURT'S FINDING THAT WILLIAM H. ENGLISH IS THE GRANDSON OF HENRY CHARLES DENHALTER.

POINT III.

WILLIAM H. ENGLISH AS MATTER OF LAW IS ENTITLED TO PARTICIPATE IN THE DISTRIBUTION OF THE ESTATE OF MIGNON DENHALTER LEWIS, AS HER GRANDNEPHEW.

ARGUMENT

POINT I.

THE TESTIMONY OF WILLIAM JOHN CLARK AND MARY FRANCES JOHNSTON LOVELESS, WITNESSES, WAS COMPETENT EVIDENCE.

The testimony of William John Clark concerning statements that were made to him by his wife was competent evidence and properly received by the trial court. The declarant of the statements was Mr. Clark's wife, Daisy Lenore Clark. Mrs. Clark died in 1910 (R. 16, 18). Mrs. Clark's statements to her husband concerned the birth of a child born in her home and which was adopted by close friends of her family, the John Henry Johnstons.

Mrs. Clark was present at the birth of the child (R. 20). She was also the party who made the arrangements through Doctor Root for Julia Rosa to come to her home for the birth of the child. Mr. Clark was present in the home at that time and while he did not see the mother until after the child was born he was conscious of the fact that the child was born in his home. It was logical that the birth of the child would be discussed between himself and his wife.

The circumstances recited make all of the evidence Mr. Clark gave entirely competent. All of the declarations to which Mr. Clark testified were made prior to any controversy and under circumstances which would indicate that the statements were trustworthy. There was no reason for any bias or prejudice and the persons discussing the matter had no interest or motive to deceive and had every opportunity of acquiring accurate knowledge and knowing the true facts.

Hearsay evidence under the circumstances has historically been found to be competent.

The hearsay exception of declarations about family history or pedigree has been universally recognized in all common law jurisdictions. *Wigmore on Evidence*, 3rd Edition, Volume 5, Sections 1480 through 1503, pages 291 to 326, discusses clearly and forcefully the cases and rules of law governing this exception to the hearsay rule. His discussion points out that the basis for receiving hearsay evidence is necessity. Very often declarants and persons who have first-hand knowledge of the occurrences are dead or unavailable. There are many sub-

stantial safeguards for trustworthiness. People who talk over family affairs when there is no reason for bias or passion usually attempt to tell the truth and their statements in such discussions are trustworthy. They are made prior to the time that any controversy arose and by persons who had no interest or motive to deceive. Statements must also come from persons who appear to have a fair knowledge or fair opportunity to acquire knowledge on the subject about which they make their declarations. Mrs. Clark's declarations were made concerning her own personal observations.

In some jurisdictions only declarations of relatives are properly receivable. This requirement has been abandoned by enlightened jurisdictions when necessity required it. Section 1487, page 304, of Wigmore states that the declarant is qualified whenever he is found to be "likely to know the facts," "having an opportunity to know the facts," or holding a relation, rendering it very probable that he would learn them truly and when such circumstances exist it is not necessary that the declarant be a relative.

In *J. A. Turner v. W. M. Person*, 175 N.C. 219, 95 S.E. 362, hearsay evidence was received concerning a doctor's statement to the father of a child concerning the fact that the child had been born alive. The North Carolina court cites and quotes Wigmore's rules, approving them.

In *Hoyt v. Lightbody*, 98 Minn. 198, 116 Am. St. Rep. 366, 108 N.W. 843, a husband of a half-sister of the de-

ceased wife was allowed to testify and the Supreme Court of Minnesota concluded as follows:

“The evidence of a witness whose knowledge with reference to the subject was derived from an intimate acquaintance with the family is admissible to prove such facts of family history as marriage, kinship, name, and death. (Citing cases).”

In *Alston v. Alston*, 114 Iowa 29, 86 N.W. 55, declarations of a man and his wife who were friends of the parents and in whose home the child resided were received and held admissible even though the declarants were in no way related to either of the persons whose family history was an issue.

Frey v. Thomas, 207 Iowa 1229, 224 N.W. 597, following *Alston v. Alston*, allowed a foster mother's declaration to be testified about and again Wigmore's treatise on evidence was cited with approval. See also for similar holdings *Budlong v. Budlong*, 48 R. I. 144, 166 Atl. 308; *Jackson v. Cooley*, 8 John 130 (N.Y.); *In Re Hamm's Estate*, 186 Okla. 610, 99 P. 2d 895.

Professor Wigmore after reviewing many authorities which have had occasion to pass on the family pedigree exception to the hearsay rule concluded as follows (Vol. 5, p. 305):

“It is not necessary to maintain that the statements of *any friend* are always admissible; but it is desirable to disavow any limitation which would exclude the statements of one whose intimacy with the family could leave no doubt as to

his sufficient knowledge, equally with the family members, of the facts of the family history.”

This exception to the hearsay rule was covered by the *A. L. I., Model Code of Evidence*, Rule 524, Subsection 2 (a) (i), which reads as follows:

“(2) Evidence of a hearsay statement of a matter concerning the birth, marriage, divorce, death, legitimacy, race-ancestry, relationship by blood or marriage or other similar fact of the family history of a person other than the declarant

(a) is admissible if the judge

(i) finds that the declarant was related to the other by blood or marriage or finds that the declarant was otherwise so intimately associated with the other’s family as to be likely to have accurate information concerning the matter declared, and made the statement as upon information received from the other or from a person related by blood or marriage to the other, or as upon repute in the other’s family, and

(ii) finds that the declarant is unavailable as a witness; and

(b) may be admitted by the judge in the exercise of his discretion if he finds the facts specified in clause (a) (i) of this Paragraph even if all declarants are available.”

Mrs. Clark, the declarant in the present case, was intimately associated with the Johnstons, Julia Rosa and her mother. She was actually present at the birth of the child to Julia Rosa. What she was declaring concerned an event she *witnessed*. She told her husband that a boy

child was born to Julia Rose. No one could have possessed more opportunity to observe and accurately know the facts declared. She had no motive to deceive nor bias or prejudice and it is inconceivable that at that early date there could have been a thought of any controversy concerning the event which she observed and related to her husband. Clark's testimony came well within the exception to the hearsay rule.

Rule 43 of the *Utah Rules of Civil Procedure* requires that the rule which favors the reception of evidence rather than any rule which would exclude it be followed by the courts of this state. Respondent submits that this Court should adopt the *A. L. I., Model Code of Evidence*, Rule 524, Subsection 2, as the law of this State, it being the rule which favors the reception rather than exclusion of evidence.

Mr. Clark knew of the child being born in his own home from observations that he had made around the home. He knew that Julia Rosa was the daughter of his housekeeper and that she came to the home with Henry Charles Denhalter and demanded the return of her child. Mr. Clark was very well acquainted with Henry Charles Denhalter for Mr. Denhalter delivered soft drinks to the saloon in which Mr. Clark worked as a bartender (R. 22). He also testified from his own knowledge concerning the child that grew up in the Johnston family and was in that family immediately after the episode of the birth of a child in his home. There was only one child ever born in his home so there can be no problem of confusion as

to the child. Most of Clark's testimony was based on his own observations rather than hearsay.

Mary Frances Johnston Loveless, the adopted sister of William Henry Johnston, knew many things from her own observations. She saw the baby in the arms of its natural mother being dressed and made ready for the reception by her mother. She saw the same baby afterwards in her own home. She recalls the return of the mother with Henry Charles Denhalter, describing the episode that Mr. Clark testified about (R. 49). She testified about the demands made by Julia Rosa and Henry Charles Denhalter after their marriage when they came to attempt to regain the child that Julia Rosa had given away prior to her marriage. The only evidence presented by Mrs. Loveless to which appellant takes exception was the statement concerning the writing which Mrs. Loveless saw in her mother's chest. The statements of Mrs. Loveless concerning the birth of the child, its date of birth, and the parentage of the child would have been statements from a relative of William Henry Johnston, i.e. his foster mother. The information which she gave in the writings, while hearsay, would come within the common law rule allowing hearsay statements from relatives. Through Mrs. Loveless, William Henry Johnston is traced from the time he was in the arms of his mother to his manhood and back into the Denhalter family.

Even though some incompetent hearsay evidence was received by the trial court, this Court will assume that the trial court, having full knowledge of the law and being the finder of the fact, would ignore any such in-

competent or inadmissible evidence in making its finding of fact.

In a decision of the Supreme Court written by counsel for appellants, who was then Chief Justice of this Court, the rule was set down in the following language, *Christensen v. Johnson*, 90 Utah 127, 61 P. 2d 597, 600:

“* * * When a cause is tried before a court, as was this cause, an appellate court is not prone to reverse the judgment because evidence was improperly admitted. In such case the presumption is indulged that the trial court disregarded the evidence which was improperly received in reaching its conclusions. *Victoria Copper Mining Co. v. Haws*, 7 Utah 515, 27 P. 695; *Spratt v. Paulson*, 49 Utah 9, 161 P. 1120; *Utah State Building & Loan Ass’n v. Perkins*, 53 Utah 474, 173 P. 950; *Matson v. Matson*, 56 Utah 394, 190 P. 943; *Peek v. Bailey*, 57 Utah 546, 196 P. 206. Independent of the evidence which defendant claims was improperly received, there was competent and substantial evidence offered and received in support of the findings made by the trial court. This being an action at law, we are bound by such findings.”

See also *Corey v. Roberts*, 82 Utah 445, 25 P. 2d 940; *Quermbeck v. Hanson*, 94 Utah 127, 75 P. 2d 1027; *Federal Land Bank of Berkeley v. Salt Lake Valley Sand & Gravel Co.*, 96 Utah 359, 85 P. 2d 791. It would therefore appear that the only basic propositions meriting

consideration by this Court is whether or not there was substantial evidence from which the trial court could have found the issues in favor of plaintiff.

POINT II.

THERE IS SUBSTANTIAL EVIDENCE SUPPORTING THE TRIAL COURT'S FINDING THAT WILLIAM H. ENGLISH IS THE GRANDSON OF HENRY CHARLES DENHALTER.

There is no conflict in any of the evidence presented. The testimony of William Clark that there was a child born in his home and that the child went into the Johnston home, which testimony is corroborated in all of its details by the testimony of Mrs. Loveless, is uncontradicted by any evidence. The further testimony that the baby which went into the Johnston home, was born to Julia Rosa, and that thereafter Julia Rosa and Henry Charles Denhalter came and demanded the return of the child, stating that it was their child, was also entirely uncontradicted by any evidence.

It is undisputed that the child taken into the Johnston home from the Clark home grew up to be William Henry Johnston, father of respondent. Some attempt is made in appellant's brief to cast doubt on the weight of Clark's testimony because he did not see William Henry Johnston for a period of approximately eighteen years. But his evidence that this baby who he saw in the Johnston home over a period of approximately five years was the same person he saw in 1927 is positively corroborated and substantiated by Mrs. Loveless, the adopted

sister of William Henry Johnston and knew him through all his life.

In addition to the evidence presented by the testimony of Mr. Clark and Mrs. Loveless we have the record of the marriage between Henry Charles Denhalter and Julia Rosa. We know from the testimony of Mrs. Gleason that Henry Charles Denhalter and Julia Rosa kept company prior to their marriage and were seen together on numerous occasions (R. 65, 66). The court could well have found from the fact that Julia Rosa and Henry Charles Denhalter married very soon after the birth of Julia's child and immediately made demand for the return of the child born to Julia, that Henry Charles Denhalter was the father of the child born to Julia. Respondent submits that this conduct of the two young people alone would justify a finding that Henry Charles Denhalter was the father of Julia's child. But, as has been pointed out, respondent's case rests on a much firmer basis. We have all of the testimony from Mr. Clark, Mrs. Loveless and Mrs. Gleason, which points unerringly to the one logical conclusion: that William Henry Johnston was the son of Julia Rosa and Henry Charles Denhalter.

In addition to the evidence surrounding the birth of William Henry Johnston, when he grew to manhood the evidence shows without contradiction that his father, Henry Charles Denhalter, and Julia Rosa Hummel recognized their child. That Henry Charles Denhalter received William Henry Johnston into his home as his long

lost son, paid his living expenses, and took care of his wife and infant child for a period of approximately five years (R. 31). Even the deceased Mignon Denhalter Lewis stated that respondent, William H. English, resembled the Denhalter boys, particularly Bob Denhalter (R. 38).

There was no dispute concerning these facts. All parties admit that Julia Rosa Hummel came from California, stayed at the Denhalter home while William Henry Johnston was there and that the purpose of her coming to the Denhalter home was to visit with her long lost son.

The conduct of Julia Rosa Hummel and Henry Charles Denhalter at the time William Henry Johnston returned to Salt Lake City and their treatment of him and his wife could only be explained by the fact that a child of their marriage had been born and they believed he had now returned. This conduct, when considered with the testimony of Mr. Clark and Mrs. Loveless, proves beyond any possible dispute that there was a son born to Julia Rosa as a result of her relationship with Henry Charles Denhalter and William Henry Johnston was that son.

POINT III.

WILLIAM H. ENGLISH AS MATTER OF LAW IS ENTITLED TO PARTICIPATE IN THE DISTRIBUTION OF THE ESTATE OF MIGNON DENHALTER LEWIS, AS HER GRANDNEPHEW.

Under Points Four and Five of Appellants' Brief

they argue that the respondent, because of the circumstances surrounding his birth, should not be allowed to share in the estate of Mignon Denhalter Lewis, his great-aunt.

From appellants' argument it appears that they have two basic propositions, one that under the circumstances William Henry Johnston did not become legitimized for all purposes and therefore William H. English, his son, cannot inherit through his father's natural father, and second, that he cannot inherit from collateral lines.

There are three sections of our Utah Code which cover in one way or another the question of legitimizing children born out of wedlock. *Section 14-2-14, Utah Code Annotated 1943*, reads as follows:

"If the mother of any such child and the father shall at any time after its birth intermarry, the child shall in all respects be deemed to be legitimate, and the bond for its support shall thereupon become void."

Section 14-4-12, Utah Code Annotated 1943, further showing legislative intent reads as follows:

"The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such, and such child is thereupon deemed for all purposes legitimate from the time of its birth. The

foregoing provisions of this chapter do not apply to such an adoption."

Title 101, Utah Code Annotated 1943, covering Wills and Succession also has a particular section covering the inheritance by illegitimate children. Said section is 101-4-10 and reads as follows:

"Every illegitimate child is an heir of the person who acknowledges himself to be the father of such child, and in all cases is an heir of his mother; and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock. The issue of all marriages null in law, or dissolved by divorce, are legitimate."

Utah court interpretations of the sections quoted have not been very extensive. This is perhaps due to the fact that there is one decision of our Supreme Court which sets the matter down in such language that there can be no misunderstanding of the meaning and intent of the legislative enactment. Chief Justice Frick in *Rohwer v. District Court of First Judicial District*, 41 Utah 279, 125 P. 671, in a very well-reasoned decision interpreting Section 2850 of the Compiled Laws of 1907, passed upon the meaning of the following language contained in said section "and to have and enjoy all rights and privileges to the same extent and in the same manner as though born in lawful wedlock." It will be noted that in the quoted sections of our present day statutes we have language which in its context is practically the

same as the language which Chief Justice Frick is interpreting in the *Rohwer* case. The question was before the court as to whether or not a child who had been illegitimate could take through representation from collateral heirs. The court in its opinion states as follows at page 675:

“The question for us to solve therefore is: What was the intention of the Legislature in adopting section 2850? It is seriously contended that all the Legislature intended to and did accomplish was to permit the children who were born before January 4, 1896, as the issue of plural marriages, to inherit from both parents. That is, while such children were legitimated, they, nevertheless, were not legitimated for all purposes, but such legitimation was limited to the right of inheriting from both parents; a right not existing at common law. But that is not what the statute says. The language there used is that such children are ‘hereby legitimated; and such issue are entitled to inherit from both parents, *and to have and enjoy all rights and privileges to the same extent and in the same manner as though born in lawful wedlock.*’ If the construction contended for be applied, namely, that no further rights than to inherit from both parents were conferred, then the words given in italics are practically meaningless. The suggestion that they are intended to confer either family or social rights or privileges is entirely untenable, because such rights or privileges are already covered by the term ‘legitimate.’ Moreover, in view of what has already been said, and which was well known to the Legislature, such children were

not in need of having their social or family rights protected; but they were sorely in need of being given the legal rights which were enjoyed by their half-brothers and half-sisters. These latter rights and privileges, therefore, were intended to be and were given by the section in question. And, so as to leave no lingering doubt in the mind of any one what the rights and privileges were, the Legislature defined them by making them the same as those that are enjoyed by those who were born in lawful wedlock. Language could not have been selected which was better calculated to define what rights and privileges were given. The legal rights and privileges given were to be the exact equivalent of those enjoyed by all legitimate children."

* * * *

"* * * if we held, in the case at bar, that in adopting section 2850 it was not intended to confer all the rights and privileges enjoyed by legitimate children upon those mentioned in that section, including the right of transmitting property. Neither the language nor spirit of that section authorizes the conclusion that any part of the stigma which by the common law is cast upon bastards shall continue to be visited upon those who are provided for therein.

"The record in this case also discloses that said Joseph T. Anderson was publicly acknowledged by Nephi Anderson as his own child, was received into and cared for in Mr. Anderson's family, and treated as his own. In view of this, we think that under the provisions of section 10, which we have hereinbefore set forth in full, said Joseph T. Anderson must be '*deemed for all purposes legitimate* from the time of his birth.' The

language there used is that such a child is legitimated for *all*, and not only for *some*, purposes. 'All purposes' mean that the child may transmit property as well as inherit it. Courts have no right to place limitations on plain and unambiguous language, unless under peculiar circumstances limitations are required for the purpose of preserving or making effective other provisions upon the same subject."

From the language quoted it is obvious that the Utah Supreme Court was putting into effect in its full blown form all of the salutary purposes that the legitimization statutes were enacted to accomplish.

At common law it was the harsh rule that an illegitimate child was without parent and without relative of any kind. This rule was never the law under the civil code. The civil code with respect to illegitimacy was more humane and accomplished a fairer treatment of the innocent child whose only sin was that of his father and mother.

Respondent has examined a large number of decisions and in no case decided by the United States courts has he had been able to find any decision which does not take the same view as the Utah decision quoted and does not select as being a liberal and humane doctrine the civil law view of illegitimate children.

In *10 C.J.S., Section 14, page 71*, the general rule of law is set down by the editors. They state categorically that usually legitimation changes the status and capacity of the illegitimate child to the status of a child

born in lawful wedlock, and interpreting the words "lawful wedlock," which words appear in Section 101-4-10, Utah Code Annotated 1943, the editors state that, in other words, the civil and social status of such child becomes that of a lawful child of the natural father; that as such lawful child of a natural father the child has all the rights of a lawful child born in lawful wedlock. Among the rights thus conferred is the right to take or inherit from and claim as heir of the deceased father and as the *representative* of his parents and to transmit property to others than the heirs of his body. The only time when there is any dissent from this general law is when there is a specific unequivocal statement in the statute which will defeat the illegitimate child's right to inherit after he has been made legitimate.

Two other courts have had occasion to pass specifically on the right of a legitimated child to take by representation from collateral relatives of the father. The California Supreme and Appellate Courts in the case of *Wolf v. Gall*, 32 Cal. App. 286, 163 P. 346, 348 (Appellate Court decision), 32 Cal. App. 286, 163 P. 350 (Supreme Court decision), decided that legitimated children could inherit from their grandmother by right of representation of their deceased father. The court went to great lengths and spelled out with great detail the reasoning behind its decision. The following indicates without possible doubt the humane and liberal purposes accomplished by the decision:

"At common law a child born out of wedlock was said to be *filius nullius*, and to have no heritable blood. These expressions are of course figurative, and meant no more than that certain legal disabilities were attached to his status, one of which was his lack of capacity to inherit from his father or his parents' kindred. There can be no doubt that the Legislature could remove those disabilities. The right of inheritance of legitimate and illegitimate children alike is a creature of law, and can be changed by the Legislature at any time and to any extent. When the law provides means for making legitimate a child born out of wedlock, it changes the status of that child, and in the absence of special provision to the contrary, he thenceforth comes within the provisions of the laws relating to legitimate children. Thereafter a child so legitimated is included in the designation 'child' or 'children' when those words refer to a child or children legitimately born; and he is no longer included in the designation 'illegitimate child' when that term is used in a statute, unless it is obvious that such words are intended by the Legislature to include one who, though now legitimate, was formerly illegitimate. We think these propositions are self-evident. Of what avail is it to have legitimated a child if he still labors under the disabilities of his former condition? If he has not acquired the rights by law given to, and become subject to the duties imposed upon, his new condition, there has been no change at all, for it is obvious that the fact that he was born out of wedlock has not been changed and never can be. If any stigma attaches to that condition it still remains, and all that the law can do—and all it seeks to do—is to remove the disabilities attached to the condition."

* * * *

“That the words ‘children’ and ‘lawful issue’ when found in statutes of succession are not to be confined to their strict common-law signification was decided by our Supreme Court in the Estate of Wardell, 57 Cal. 484, 491, where it is said:

“‘If courts were now to restrict the word to its common-law meaning, all children born of an unlawful marriage, all children by adoption or acknowledgment of their father, and all children whose parents intermarried subsequent to their birth, would be excluded from rights of inheritance or succession. But by statute, the offspring of marriages null in law (section 84, Civ. Code), children born out of wedlock whose parents subsequently intermarried (section 215, Id.), and children by acknowledgment or adoption of their father (sections 224, 227, 228, and 230, Id.), are all legitimate. These, although incapacitated at common law from succeeding to any rights of their father, are regarded for all purposes as legitimate from the time of their birth. * * * Hence the term ‘children,’ as used in section 1307 of the law of succession, must relate to status, not to origin—to the capacity to inherit, not to the legality of the relations which may have existed between those of whom they may have been begotten. The word has, therefore, a statutory and not a common-law meaning; and its meaning includes all children upon whom has been conferred by Law the capacity of inheritance.’

* * * *

“It results from what we have said that the respondents, having been legitimated by the subsequent marriage of their parents, come within the terms of section 1386 of the Civil Code, and that within the meaning of that section they are ‘lawful issue’ and take by representation.”

The statutes interpreted by the California court are different in their wording from the ones now before this Court, but respondent submits that the Utah Code is plainer in its meaning and more succinctly states the legislative intent that a legitimated child is to be placed on the same footing and have the same status and capacity as a child whose lawful status has never been in question.

The Supreme Court of Kansas in *Smith v. Smith*, 105 Kan. 294, 182 P. 538, 540, having before it the Kansas legitimation statute, decided that a child who had been legitimated could take by representation from a grandfather and other collateral kindred. Their holding and the facts on which they acted are set forth in the following language:

“Having determined that the plaintiff may inherit from his putative father, there remains the question whether he is entitled to inherit through the father from his grandfather or other collateral kindred. The solution of the question must be found in the statute. Under the common law an illegitimate child was deemed to be outside the line of inheritance. To overcome and remedy this injustice the Legislature has specifically conferred the right of inheritance upon illegitimate children and to effectuate the purpose the statute should be given a liberal interpretation. In sections 3844 and 3845, Gen. St. 1915, it is provided that—

“ ‘Illegitimate children inherit from the mother, and the mother from the children.’ Section 3844.

“‘They shall also inherit from the father whenever they have been recognized by him as his children; but such recognition must have been general and notorious, or else in writing.’ Section 3845.

“In section 3846 it is provided:

“‘Under such circumstances, if the recognition of relationship has been mutual the father may inherit from his illegitimate children.’ Section 3846.

* * * *

“It is contended that as the right depends upon the statute, and as section 3845 expressly provides that an illegitimate shall inherit from his father, it evidences a legislative intention not to put such child in the line of inheritance the same as children born in wedlock, but to limit the right to inherit from the father alone. The other sections indicate a purpose to take away the disqualification resulting from illegitimacy and to clothe the illegitimate with heirship and place him in the line of succession with other children of an intestate. It is provided that the illegitimate shall inherit from his mother, and in similar language gives him the right to inherit from his father. Then follows the provision that the mother shall inherit from the illegitimate child and, where there is the required recognition, the father also shall inherit from such child. Then, as showing that the relationship when duly established by recognition is not limited to the father and child, it is provided that in the matter of inheritance the mother and her heirs shall take preference over the father and his heirs.

“The Legislature contemplated a relationship of succession not only with the father but also

with the heirs of the father. We have no doubt from the language used that the Legislature intended to give an illegitimate the status of a general heir in the matter of the descent and distribution of the property of an intestate, and that the plaintiff is entitled to inherit from his father's father.

“The judgment will therefore be reversed and the cause remanded, with directions to make partition of the property involved in accordance with the opinion herein.”

Respondent submits that no more or better authorities could possibly be found for the proposition that he, under Utah law, is entitled to take as the representative of his father all of the property which would have descended to his father from his great-aunt, Mignon Denhalter Lewis.

In the brief of counsel for appellants there are statements that the general law is against the position which respondent maintains. All of the authorities which claimant has been able to discover are to the contrary. A very good general discussion of the general law, its growth and the salutary and humane propositions which have been accomplished by legitimization statutes is found in *Lund's Estate*, 26 Cal. 2d 472, 159 P. 2d 643, 162 A.L.R. 606. In its decision the Supreme Court of California points out the harsh rules that grew up in the common law and which were abandoned by nearly every American jurisdiction. The decision points out that what American courts and legislatures now have is the civil view of legitimization. Under the civil law the in-

nocent child was not punished for the sins of his father and mother but was given the same consideration that the children born in wedlock were given. The court points out that under all the state laws the fathers of illegitimate children are required to support those children, and this Court knows that under our Utah law such a burden has been placed upon the father. The decision further points out that as a social force the requirement that a father of a child born out of wedlock be required to assume responsibility for it has a deterring effect on the prospective parents of such children, and a penalty, if any penalty is to be assessed, is placed on the father of the child born out of wedlock and not upon the innocent child who can in no way be held responsible. The Lund Estate decision cites *Pfeifer v. Wright*, 41 F. 2d 464, a case which sets forth the civil and common law distinctions and the humane course that American courts and legislatures have pursued.

There is one decision in the books which reaches a contrary result from that reached by the overwhelming majority of American jurisdictions. That case is *In Re Cross*, 197 N. C. 334, 148 S. E. 456, 64 A.L.R. 1121. The result arrived at by the North Carolina court is based on an erroneous conception of a rule of construction which has grown up in some of our American jurisdictions. That conception is that statutes in derogation of the *common law* must be strictly construed. The proper rule of construction is really stated that statutes in derogation of the *common right* must be strictly construed. See *Harvard Law Review*, 21-383. The North Carolina

court does not in any way discuss its result or show what purpose its harsh decision can accomplish.

The annotation following the Cross decision, as reported by A.L.R., points out that the Cross result is contrary to the great majority of the decisions of courts dealing with the right of inheritance by legitimated children from collateral heirs. In the annotation it cites the case of *Jackson v. Moore*, (1849) 8 Dana (Ky.) 170, and quotes the following from said case:

“Thus, in *Jackson v. Moore* (1849) 8 Dana (Ky.) 170, an antenuptial child who was legitimated by the parents’ marriage and father’s recognition was held entitled, as his ‘descendant’ and representative, to a distributive share in personal property left by an intestate and childless uncle, the father’s brother, the father having predeceased the uncle—reliance being placed upon a statute of 1796, which provided: ‘Where a man, having by a woman one or more children, shall afterward intermarry with such woman, such child or children, if recognized by him, shall be thereby legitimated. The issue, also, in marriage deemed null in law, shall nevertheless, be legitimate.’ The court stated that the evident object of that statute was to make such children ‘in all respects as legitimate as they would have been had they been the issue of lawful wedlock;’ that the subsequent marriage and recognition ipso facto legitimated the child; that ‘there is no other limitation or qualification in either the letter or the policy’ of the statute; and that, since the child necessarily became the father’s legitimate child in some sense and for some purpose, ‘she is as

necessarily such a child in every sense and for every purpose of filial legitimacy.’”

The annotation further sets forth a number of authorities which show beyond any possible doubt that the North Carolina court in *Re Cross* reached a harsh, erroneous and unnecessary result.

Appellants cite as authority for their proposition 24 *A.L.R.* 553. There are a great number of cases collected in the annotation. Some of the cases are concerned with children who have never become legitimate under any statute or by virtue of any action and, of course, in many states the illegitimate child who has not been made legitimate is still harshly dealt with, but where there are statutes which make illegitimate children legitimate through acknowledgment or by the marriage of their parents the annotation at page 586 states categorically as follows:

“By statute, in most jurisdictions, an illegitimate child which has been acknowledged or recognized by its father may become his heir,
* * *”

By “heir” respondent submits the annotator meant that the legitimated child is given the capacity to inherit by representation from collateral heirs of his father.

Respondent submits that the cases cited and the annotations show without possible dispute that under our Utah statutes the language (101-4-10) “and inherits his or her estate, in whole or in part, as the case may be,

in the same manner as if he had been born in lawful wedlock," can only mean that the child takes by representation from the collateral heirs of his father. In addition to the language of 101-1-10, the language of 14-4-12 which states that the child made legitimate by the father's acknowledgment is "thereupon deemed for all purposes legitimate from the time of its birth," shows conclusively that there is not to be left any semblance of penalty for promiscuity on such child. All rights of a legitimate child are conferred upon him. Respondent further respectfully submits that this court should, in properly and lawfully construing the statutes and achieving a humane liberal result in this case, hold that respondent takes the share of his father in the estate of Mignon Denhalter Lewis.

At page 43 of appellants' brief they argue that William H. English should not be allowed to share in the estate of Mignon Denhalter Lewis for the reason that William Henry Johnston had been adopted into the Johnston family and therefore entered a new line of inheritance and was prohibited by law from inheriting from his natural parents. The same argument was made before this Court in *Benner v. Garrick*, 109 Utah 172, 176, 166 P. 2d 257. In the *Benner* case a child had been adopted by his grandmother. It was held by this Court that such adopted child was not only entitled to inherit through his blood lines as a grandchild but that he also took the share that he would have as a child of the adoptive parent which, in effect, gave to the adopted child a

double inheritance. This Court setting forth its reasons at page 176 said:

“* * * Had the legislature desired a different result it could have enacted a law forbidding dual inheritance. Furthermore, when a person adopts a child an act of favoritism is shown thereby; it becomes another child in the family of the adopting parent and inherits as such. Had a person not a relative been adopted by decedent, the other heirs would not have had one person less in their own family entitled to take by representation and they would therefore have gotten no more than they will now. Had the decedent desired otherwise she could have made a will to that effect. See *In re Bartram's Estate*, 109 Kan. 87, 198 P. 192; *Wagner v. Varner*, 50 Iowa 532; and *In re Wilson's Estate*, 95 Colo. 159, 33 P. 2d 969, which hold that an adopted grandchild can take its inheritance in the dual capacity of child of its adopting parent and also by representation as the natural child of its deceased parent in the absence of a statute forbidding it.”

Respondent submits that the just, humane, and generally accepted principles of law require that this Court affirm the judgment of the trial court and hold that he takes his rightful share of his great-aunt's estate.

CONCLUSION

Respondent respectfully submits that the Findings of Fact and Conclusions of Law of the trial court that William H. English, son of William Henry Johnston,

was the grandnephew of Mignon Denhalter Lewis and took by representation the share of William Henry Johnston in the estate of Mignon Denhalter Lewis is supported by substantial evidence and is in accordance with the law of the State of Utah and the Decree adjudging that William H. English take by representation the share of his father, William Henry Johnston, should be affirmed.

Respectfully submitted,

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Received copies of Respondent's Brief
this day of October, A. D. 1951.

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