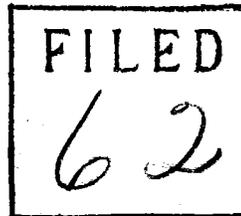


DESCENTS & DISTRIBUTION:

Right of illegitimate children  
to inherit.

March 30, 1945



Honorable Joe H. Miller  
Representative, Carroll County  
Missouri Legislature  
Jefferson City, Missouri

Dear Mr. Miller:

Your letter of March 20, inst., directed to General Taylor requesting an opinion from this Department, whether Sections 314 and 315, R.S. Mo. 1939, are valid and in force in this State, with the letter of Mr. Ralph B. Nevins, Prosecuting Attorney of Hickory County, Missouri, attached, has been received and the matter has been assigned to the writer to write the opinion.

Your letter states:

"Enclosed herewith is a letter from the Prosecuting Attorney of Hickory County asking whether or not the law pertaining to the right of an illegitimate child to inherit is now effective.

"I would appreciate your opinion on this matter as I would like to introduce a bill to change it if is necessary."

Sections 314 and 315, R.S. Mo. 1939, were taken from the Territorial Laws of Missouri, and were enacted in 1822. These Sections will be found as Sections 7 and 8, 1 Territorial Laws, 1804-1822, page 858. The two Sections have been retained, practically without change, and carried on through the many revisions of the statutes of this State, down to and including the Revised Statutes of Missouri, 1919, and there they are numbered Sections 311 and 312.

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The Legislature of this State of 1921, Laws of 1921, pages 117, 118, repealed Sections 311 and 312, R.S. Mo. 1919, and there were enacted in lieu thereof, three new Sections known as 311, 311a and 312.

Section 311a, Laws of 1921, page 118, was declared by the Supreme Court of Missouri in July, 1928, in the case of Southard vs. Short, 8 S.W. (2d) 903, to be unconstitutional.

It is well settled in every jurisdiction that an unconstitutional Act does not repeal a former valid statute.

59 C.J., section 552, pages 939 and 940, states this rule as follows:

"\* \* \* The rule is well settled that an unconstitutional enactment will not repeal a former valid law by mere implication, and the rule is the same where the subsequent unconstitutional act declares the repeal of all acts or parts of acts inconsistent therewith, and it is apparent that the repealing statute is to be substituted for the one repealed, there being nothing that can conflict with a void statute. So where an act expressly repealing another act and providing a substitute therefor is found to be invalid, the repealing clause must also be held to be invalid, \* \* \* "

The Supreme Court of Missouri has held in numerous cases that an original statute remained in force when a statute repealing or amending it was held unconstitutional.

The case of State vs. Hartman, et al., 299 Mo. 410, was before the Supreme Court on this precise question. In that case the Court said: (l.c. 422).

"\* \* \* If the amendment is unconstitutional, then the old law stands. In other words if the unconstitutional amendment fails, then the law before the amendment stands. An unconstitutional amendment is no amendment, and the old law is left unaffected. (cases cited.)"

The Supreme Court had for decision a like question in the case of State vs. Clark, 275 Mo. 95. That case also involved the invalidity of an amendment to a statute. The Court held the amendment unconstitutional. In so holding, l.c. 102, the Court said:

"\* \* \* For it is fairly well-settled that if an existing statute be amended and re-enacted, and be by the amendment rendered unconstitutional, the original statute upon the judicial declaration of invalidity comes automatically into force again. \* \* \*"

The evident intention of the Legislature, Laws of 1921, pages 117 and 118, as expressed in the repealing Section thereof, was to repeal Sections 311 and 312, R.S. Mo. 1919, and to enact new sections in lieu thereof to be numbered and designated as Sections 311, 311a and 312, having as the object and main purpose of the repeal, the establishment, by the terms of Section 311a, of the paternity of children born out of wedlock. This, we think, is a reasonable conclusion when the three sections are read together, and especially so when it is observed that the proviso in Section 311, page 118, Laws of 1921, states that that section shall not apply except when the paternity of the child has been established by an action at law begun during the lifetime of the alleged father of such child. The proviso of said Section 311 is as follows:

"\* \* \* Provided, however, that the provisions of this section shall not apply except in cases where the paternity of such child or children shall have been established by an action at law begun during the lifetime of the alleged father of such child."

The proviso requires compliance with the provisions of Section 311a as being first necessary in order to give life and effect to Section 311. An illegitimate child already had the right to inherit from its mother by the terms of Section 311, R.S. Mo. 1919. Nothing would be added to its

inheritable status by the re-enactment of Section 311, unless it was intended, as the proviso states, to give applicability and effect to this Section if and when a child had first had its paternity established, as is provided for in Section 311a.

The repealing Section of the Act of 1921 had as its main object, the substitution of the terms of Sections 311, 311a and 312, for Sections 311 and 312, R.S. Mo. 1919. So that here, since Section 311a, which contained the main purpose and object of the repeal, has been held invalid, the repealing Section, Section One (1) of the Act of 1921, repealing Sections 311 and 312, R.S. Mo. 1919, is also invalid and must fall with Section 311a. Sections 311 and 312, R.S. Mo. 1919, continued to be in full force and effect, and were properly later carried into the revisions of 1929 and 1939, as Sections 314 and 315, respectively, and now so appear in the Revised Statutes of Missouri, 1939.

The Supreme Court of Missouri has held in many cases that where the purpose of repeal is to repeal an old law and substitute a new law for it, the repealing section being dependent upon that purpose of substitution, necessarily is invalid when the main purpose of the Act is held invalid. It is so held in the case of State vs. Joyce, 307 Mo. Rep. 49, l.c. 57, where the Supreme Court said:

"\* \* \* Suppose that all three had been embodied in a single act and that subsequently the provisions creating a municipal justices-of-the-peace court had been declared unconstitutional, then under well settled rules of construction the clause repealing the law which was to be replaced by such provisions would be held to be dependent and inoperative. 'When the evident purpose of the repeal is to displace the old law and substitute the new in its stead, the repealing section or clause, being dependent upon that purpose of substitution, necessarily falls when falls the main purpose of the act.' (State v. Thomas, 138 Mo. 95, 100.) We have heretofore applied the same principle to a repealing statute dependent upon another statute which was rejected by referendum. (State ex rel. v. Dallmeyer, 245 S.W. 1066.)"

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"To recapitulate, the only statute having for any part of its purpose the repealing of the Kaw Township provisions of Section 2688, Revised Statutes 1919, was rejected by referendum, but in any event the act now relied on as operating as such a repeal fails in that respect, because the act upon which it is dependent never became effective. It follows that judgment should go for defendant confirming his title to the office in question."

Our Supreme Court on this same point in the case of State vs. Mills, 231 Mo. Rep. 493, l.c. 499, quoting Cyc., and adhering to this rule of construction, said:

"\* \* \* So where an act expressly repealing another act and providing a substitute therefor is found to be invalid, the repealing clause must also be held to be invalid, unless it shall appear that the Legislature would have passed the repealing clause even if it had not provided a substitute for the act repealed." \* \* \*

The case of State vs. Thomas, 138 Mo. Rep. 95, fully discusses the principles here being considered, and in holding that the original statute remained unaffected and unrepealed by an unconstitutional act undertaking to repeal the same, l.c. 99, 100, the Court said:

"Now, did the act of 1895 repeal that of 1891? Though there seems to be some conflict, or apparent conflict, in the authorities as to whether a repealing clause in an unconstitutional law repeals the original law, yet it is believed that the great weight of authority, and the better reasoning announce the negative of that position.

"As already stated, we have decided that the act of 1895 is unconstitutional and void. This being the case, we have to determine the force and effect of that repealing clause or section when considered in reference to the prior section of that act.

"On all hands it is agreed that when a law has been adjudged unconstitutional,

it is no law at all. Rights which rest, or contracts which depend, upon it, are void; it constitutes no protection to one who has acted under it; and affords no punishment to one who has refused obedience to its mandates before the decision was made. Cooley's Const. Lim. (6 Ed.), 222.

"Like the house built upon the sand, when the rains, and the floods, and the winds of judicial criticism descend, and come and blow and beat upon it, it falls, and it is as if it had never been. In short, such act being a nullity, there is nothing upon which the repealing clause can operate, because there is no law in existence which can be inconsistent or in conflict with an act void by reason of its unconstitutionality.

"The case then stands in legal contemplation, as if the repealing section were the only one enacted by the legislature, in which event but one opinion could be entertained as to the non-effectiveness of such a repealing section as that which now confronts us in the act of 1895. In other words, when, as here, the evident purpose of the repeal is to displace the old law and substitute the new in its stead, the repealing section or clause, being dependent on that purpose of substitution, necessarily falls when falls the main purpose of the act.

"Authorities very numerous abundantly sustain this position. (cases cited).

"Under these reasons and authorities it must be held that the act of 1891 remains unaffected and unrepealed by anything contained in the later act. \* \* \* "

The Supreme Court of Missouri in the case of Copeland vs. The City of St. Joseph, 126 Mo. Rep. 417, l.c. 431, on this point again said:

"Where the repealing clause of an unconstitutional law is made applicable

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only to laws inconsistent with its operative provisions, then the former law is not repealed. \* \* \* "

The Act of 1931, Laws of 1931, page 130, mentioned in the accompanying letter of Mr. Nevis, attempting to repeal Sections 311, 311a and 312 of the Act of 1921, supra, has nothing to do with the case. In so far as Section 311a and the repealing clause of the Act of 1921 are concerned they were rendered invalid by our Supreme Court long before the Act of 1931, and there was nothing for the Act of 1931 to repeal. No necessity existed for the repeal of Section 1 of the Act of 1921 by the Act of 1931. It was already inoperative and void because the Section of the Act of 1921 carrying the main purpose of the Act had been rendered invalid by the Supreme Court and under other above quoted decisions of the Supreme Court, Section 1 as the repealing Section of the Act of 1921, went down with Section 311a. Sections 311 and 312, R.S. Mo. 1919, were never repealed. They were still in force as the law on that subject after the Supreme Court held Section 311a, Laws of 1921, unconstitutional, and the repealing Section of that Act likewise being invalid, they were properly carried into the Revisions of 1929 and 1939, and are now in full force and effect as the law of Missouri on the subject.

#### CONCLUSION.

It is, therefore, the opinion of this Department that Sections 311 and 312, R.S. Mo. 1919, were not repealed by the Act of 1921; that those two sections, now Sections 314 and 315, R.S. Mo. 1939, are in full force and effect as the statutory laws of Missouri on the subject; that under Section 314, R.S. Mo. 1939, illegitimate children are capable of inheriting and transmitting inheritance on the part of their mother, and such mother may inherit from her illegitimate child or children in like manner as if they had been lawfully begotten of her, and that under Section 315, R.S. Mo. 1939, illegitimate children may be legitimated by their father marrying their mother and recognizing the children to be his, and that such children would thereby have full legal inheritable rights.

Respectfully submitted,

GEORGE W. CROWLEY  
Assistant Attorney-General

APPROVED:

J. E. TAYLOR  
Attorney-General

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