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THE LEGAL POSITION OF THE CHILD OF UNMARRIED PARENTS.[1]

In this and the succeeding article we propose to discuss certain matters affecting the legal position of the child whose parents have not been married to each other.

It will be borne in mind that from the earliest times the position of such a child among the English and Germanic peoples has been one of ignominy, not only in the community but at law. It is only in recent times that an illegitimate child has been referred to by any less harsh term than "bastard"; and moreover the term is still used. Due chiefly to the efforts of social workers, however, the ignominy formerly associated with a child born out of wedlock has been considerably lessened; and this is evidenced by the phraseology used in modern legislation, "illegitimate child" taking the place of "bastard," and recently the phrase "child whose parents have not been legally married to each other" being adopted. Whatever may be the derivation of the term "bastard,"[2] there is no doubt that it has always conveyed a reproach, not only to the parents (and especially the mother) but to the child itself. In Spain, Italy and France and among the northern nations, however, the feeling of ignominy did not prevail to anything like the same extent as in others.

Under Roman Law the position of the illegitimate differed according to whether the period were ante-Christian or Christian. Girard[3]

[1] In preparing this and the succeeding article the following authorities, amongst others, have been consulted:—The Institutes of Justinian, Sandars, 11th impr.; The Laws of the Earliest English Kings, Attenborough; Vols. 1 & 2, History of English Law, Pollock & Maitland; Dicey's Conflict of Laws, 4th ed.; Droit Romain, Girard, 6th ed.; Vol. 2, Bacon's Abridgment, Am. ed., 1876; Hargrave & Butler's Notes to Coke upon Littleton, 1st Am. ed., 1853.

[2] See for example, H. & B.'s Note 176, Co. Litt. 243b; note to 2 Bac. Abr., p. 76.

[3] Droit Romain, 6th ed.

says that in the former, the law did not recognize the natural relationship, either for the purpose of conferring rights upon the child or for avoiding forfeitures. With one exception, natural relationship was regarded as not existing. After the commencement of the Christian era, legitimation became possible, whereby a man could bring his natural children within his potestas.[4] To be legitimate it was necessary that a child be *in potestate patris*. Justinian, after providing as to who might lawfully marry[4a] states, that if persons unite themselves in contravention of the rules so laid down they are not man and wife, and there is no marriage. Children born of such a union are not within the potestas of the father, but are "in the position of children conceived in prostitution;" and they are, therefore, called "*spurii*."[5]

Dealing with the provisions of Inst. Lib. 1, Tit. X, 13, Sandars (p. 39) specifies the means by which legitimation might be effected: (a) oblation to the *curia*—of necessity open only to rich parents; (b) subsequent marriage of the parents; and (c) rescript of the emperor. If the legitimation were by oblation, the child was taken into the potestas of his father, and was capable of inheriting as though legitimate; but if it were by subsequent marriage or rescript, then, in addition to the foregoing, he became the civil relation not only of the father but of all the father's relations.[6] Constantine was the first to establish that the children might become legitimate by the subsequent marriage of their parents. He decreed, however, that "at the moment of conception the parents should have been capable of a legal marriage," that a marriage contract should be entered into, and that the children should consent to the legitimation. If a marriage were impossible on account of the mother having died or disappeared or married another after the birth of the illegitimate, and if there were no legitimate child, Justinian allowed the natural children, by means of an imperial rescript, to be put in the position they would have held if the marriage had taken place.

The legitimate and illegitimate children of the early kings, sovereign princes, and the higher nobility of France appear to have been treated on an equal footing, while the illegitimate children of all other persons were considered as villeins. At the end of the tenth century, however, with the accession of the Capets, illegitimate progeny of royalty were excluded from the throne, and regal rank was denied to them. As respects the illegitimate offspring of the princes

[4] Girard, pp. 186-190.
[4a] Inst. Lib. 1, Tit. x, 1-11.
[5] See Sandars, Just. Inst., p. 38.
[6] Girard, pp. 190-1.

and the nobility, these were correspondingly dealt with; and in 1600 it was ordained that even the rank of "gentleman" was to be denied to them unless they obtained letters of nobility. The illegitimate children of persons of lower rank, however, were (from the sixteenth century onwards) no longer treated as villeins but as freemen, and except with regard to receiving and transmitting succession they were regarded as on an equal footing with their fellow-subjects, and continued to remain so.[7]

The Anglo-Saxon laws—that is to say, such of them as are available—make little mention of the subject of illegitimacy. The Laws of the Kentish King, Wihtred, published about 695,[8] provide that irregular marriages are to be regularized on pain of excommunication, banishment, or fine. In the reign of Ine, King of Wessex, it is decreed, under laws promulgated between 688 and 694,[9] that whoever begets an illegitimate child and disowns it will not have the wergild at its death, but his lord and the king will have it. The only bearing on the subject in these old laws appears to be that in Alfred's, promulgated between 892-893,[10] whereby it appears that if a nun is abducted from a nunnery and bears a child by her abductor, the child will inherit nothing of the father's property; and if the child be slain the share of the wergild due to the mother's kindred will be paid to the king; but the father's kindred, nevertheless, will be paid the share due to them. From this it would appear that the strict doctrine that an illegitimate child is *nullius filus* did not obtain until after the Norman Conquest, and that the natural relationship of the parents and the child was recognized by the laws of the country. It may also be remarked, that the ignominy later suffered by those born out of wedlock does not appear rife until the populace ceases to have any vivid recollection of William of Normandy and his birth.

With these prefatory remarks, we will now consider the position of an illegitimate child under the common law and in equity.

A. Common Law and Equity.

Coke's definition of a bastard as a child "born out of lawful marriage"[11] has survived to the present day. There are no *classes* of illegitimates (Ib.); but in passing, we might mention a curious instance relating to the position of an illegitimate whose parents were

[7] See H. & B.'s note 176, Co. Litt. 244a.
[8] See Attenborough, Laws of the Earliest English Kings, pp. 3, 25.
[9] See Attenborough, pp. 34, 45.
[10] See Attenborough, pp. 35, 69.
[11] 2 Co. Litt. 244a.

serfs. In the early days, after the Norman conquest, such a child seems to have had an advantage over a legitimate. For, a legitimate child whose parents were serfs was a serf; whilst, in the thirteenth century the rule that an illegitimate is regarded as having no father is resorted to by the courts to support the deduction that, the condition of the father being the decisive fact and the illegitimate not having any father, the illegitimate, whether actually born of bond or free, must be free.[12]

1. Polygamous Marriages.

In its ordinary legal acceptance the term "child" signifies a legitimate child; and if an illegitimate child is intended to be referred to, there must be clear evidence of that intention.[13] It is not certain what is the position of a child born of a union which, though recognized by the law of the domicil of the parties as legal, yet by English law would be regarded as polygamous. To be held valid by our courts the parties to a marriage must have the capacity to marry each other according to the law of their respective domicils at the time of their entering into the contract, and the marriage must be celebrated in due form.[14] The definition of "marriage" laid down by Lord Penzance in the Mormon case, *Hyde* v. *Hyde*,[15] seems still to hold, namely, "the voluntary union for life of one man and one woman to the exclusion of all others."[16] Marriages recognized by English law are those which are understood and acknowledged as such in Christendom and, of course, are not within the prohibited degrees. The matter is by no means settled; and Lord Penzance, in the closing words of his judgment in *Hyde* v. *Hyde* (*supra*), at p. 138, says:

> This court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of the polygamous unions, nor upon the rights or obligations in relation to third persons which people living under the sanction of such unions may have created for themselves. All that is intended to be here decided is, that as between each other they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England.[17]

It would seem, however, that where the law of a country permits polygamy, neither the first nor a subsequent polygamous ceremony, even though it take place in the country so permitting polygamy,

[12] 1 P. & M. 423; 2 P. & M. 397.
[13] *Hill* v. *Crook* (1873), L.R. 6 H.L. 265, at p. 276.
[14] Dicey, Conflict of Laws, pp. 686, *et seq.*
[15] (1866), L.R. 1 P. & D. 130, at p. 133.
[16] See also the interjection of the Judge Ordinary, at p. 132.
[17] See further, Dicey, pp. 289-290.

will be regarded by English law as a marriage;[18] so that, as in such a case there can be no marriage in the sense in which our law regards that contract, the issue of any and all of the unions will be regarded as illegitimate in English law. Further, there seems to be no doubt whatever that if A, married to B, obtains a purported divorce, through a court whose jurisdiction to grant such divorce English courts would not acknowledge, and A (during the lifetime of B) subsequently "marries" C, children born of the union between A and C will be regarded as illegitimate by English law, and courts administering that law will treat the marriage between A and B as still subsisting.

2. Legitimation Per Subsequens Matrimonium.

There is a rebuttable presumption that a child born of a married woman or born not more than nine months after the dissolution of the marriage by death is legitimate.[19] The presumption of legitimacy obtains also although the parties to the marriage at the time of the birth may be living apart voluntarily.[20] *Quære,* whether there be any such presumption in the case of a child born after the making of a decree.[21] There is no such presumption in case of a woman living apart from her husband under a decree of judicial separation,[22] or any analogous order.[23] English law and the law of the Germanic peoples required that a child in order to be legitimate must be born *after* the marriage of its parents. This concession was made, however—it did not matter *how long* after. If the child was born subsequently to the marriage, no matter how soon after, *prima facie* the child would be legitimate; and this still obtains. Indeed, in the seventeenth and eighteenth centuries and the early part of the nineteenth the presumption was regarded almost as irrebuttable.

General bastardy was within the cognizance of the Ecclesiastical Courts; and that very virile Pope, Alexander III (1159-1181), under whom sat the famous Third Lateran Council in the West in 1179, by a mandate to the Bishop of Exeter[23a] definitely declared the law of the Church to be that a child born out of wedlock would be deemed legitimate by the marriage of the parents. Children so legitimated were often referred to as "mantle children," because of

[18] See 6 Hals., p. 253.
[19] 2 Hals., p. 427.
[20] Re Parishes of St. George and St. Margaret (1706), 1 Salk. 123.
[21] See 2 Hals., p. 427 (n) K.
[22] Re Parishes of St. Geo. and St. Margaret, *supra.*
[23] *Hetherington* v. *Hetherington* (1887), 12 P.D. 112, at p. 114.
[23a] Referred to in 1 P. & M. p. 127.

the continental practice of placing the children under the cloak which was spread over their parents during the marriage ceremony.[24]

Questions affecting inheritance to land were determined by the king's court. An ordinance, made in 1234 by Henry III. and certain lords spiritual and temporal, directed that if in an action in the king's court it was alleged that a man had been born before the marriage of his parents, the plea must be sent to the ecclesiastical tribunal to enquire whether or not the man whose birth was in question had been born before marriage.[25] But the ecclesiastical court was forbidden to return a general answer, "legitimate" or "illegitimate," and must give a direct answer to the question whether the man was born before the marriage of his parents or not. Now, by the law of the Church and by the laws of the countries whose legal systems were based on Roman Law, a man born out of wedlock but whose parents had been subsequently married to each other was legitimate; but this was never accepted as part of the English common law, which in that respect remained unchanged until 1927.[26] Consequently, we have this disturbing situation—that a man might be regarded as legitimate by the Church but illegitimate by the common law. The Church, therefore, braved citation before the Council and refused to answer the writ. Subsequently to the ordinance of 1234, however, the practice was adopted of deciding the matter *per pais*—in the king's court.[27]

(*a*) Statute of Merton.

It would seem that at the Assembly at Merton in 1236 the clergy attempted to get the common law in conformity with the church law —and failed. Chapter 9 of the Statute of Merton[28] deals with the subject of bastardy; and its language as it appears in the statute book differs considerably from that which appears in Bracton and in the Note Book. In Volume 1 of the latter, Maitland deals with these differences in detail;[29] and in passing we should like to make a momentary reference to that interesting work, "Bracton's Note Book." This was the result of the discovery of a MS. in the British Museum by Paul Vinogradoff in 1884, and the "Note Book" was compiled in 1887 by the late F. W. Maitland, one of the most famous of our legal historians and teachers of law. The work is of more

[24] 2 P. & M., pp. 397-8.
[25] See 1 Bracton's Note Book, p. 107.
[26] See 16 & 17 Geo. 5, c. 60.
[27] 1 Br. Note Book, pp. 107-8.
[28] 20 Hen. 3.
[29] See pp. 114, *et seq;* also Vol. 3, pp. 134-5.

than academic interest, and for the purpose of relating the Note Book to Bracton, Maitland proceeds much along the lines mooted by Vinogradoff. One of the principal parallelisms is that which relates to the chapter we are now dealing with.[30]

Chapter 9 of the Statute of Merton reads as follows:

> To the King's Writ of Bastardy, Whether one being born before Matrimony may inherit in like manner as he that is born after matrimony, all the Bishops answered, That they would not, nor could not, answer to it; because it was directly against the common Order of the Church. And all the Bishops instanted the Lords, that they would consent, that all such as were born afore Matrimony should be legitimate, as well as they that be born after Matrimony, as to the Succession of Inheritance, forsomuch as the Church accepteth such for legitimate. And all the Earls and Barons with one voice answered, that they would not change the Laws of the Realm, which hitherto had been used and approved.

It will be noticed that the Chapter itself does not enact anything, but merely records the contentions and plea of the clergy on the one hand and an expression of the determination of the barons on the other. Maitland[31] thinks that this may be treated as "an outburst of nationality and conservatism"; and it may very well have been such, having regard to the fact that at this period the feeling of the English against foreign and clerical interference and influence was most pronounced.

(*b*) Eigne and Puisne.

By the English common law, as we have seen, it is essential to heirship that the heir be born in lawful wedlock.[32] But it will be realized that an illegitimate's incapacity to succeed to realty is restricted to an intestacy. He cannot succeed as heir

> or transmit heritable blood to his own legitimate children so as to enable them to claim through him.[33]

There is, however, an exception to the general rule; and in this regard we must pause for a moment to note two terms, now rarely met with but common in the older cases and text-books and used in respect to succession to land—(1) "bastard eigne," "eigne" being a corruption of the French word "aîné," the eldest or first-born, and (2) "mulier puisne," probably derived from the term "filius mulieratus," used by the medieval lawyers in respect to a legitimate son.[34] If, after the birth of an illegitimate son, the putative father married the

[30] See Note Book, Vol. I, pp. 104-115.
[31] 1 P. & M., p. 189.
[32] *Birtwhistle* v. *Vardill* (1839), 7 Cl. & F. 895.
[33] 2 Hals., p. 437.
[34] See 2 P. & M., p. 382 (n).

mother, and after the marriage there was born to them a second son, the first son was called the "bastard eigne" and the second "mulier puisne." Now, under the common law the first-born son (whom we will call "the eigne") was incapable of inheriting, despite the subsequent marriage of his parents; but if upon the death of the father the eigne entered and the second son (whom we will call "the puisne") during the whole of the lifetime of the eigne left him undisturbed, the puisne could not upon the death of the eigne enter against the latter's issue. There must, however, be a descent to the eigne's issue; and if, after the death of the eigne leaving no living descendent, the puisne entered, and a son of the eigne was born posthumously and after the puisne entered, the latter could exclude the posthumous son. The descent to the heir of the eigne took place immediately after the latter's death and without any entry by such heir, who could consequently debar the puisne from entering; and the infancy of the puisne during the eigne's possession did not avail the puisne.[35] The position thus held by the eigne's heir is really the result of a concession to the unwillingness to illegitimate the dead, as the rule was formulated that no decree of illegitimacy would issue to illegitimate the ancestor after one descent. The civil law regarded the ancestor as legitimate, and the common law regarded the matter in the light of a personal defect which could not after the death of the man be raised against his ancestors.[36]

(*c*) Effect of Foreign Domicil.

Although legitimation per subsequens matrimonium was no part of the common law of England, it was nevertheless part of the law of other countries; and the comity of nations required that the legitimacy of children born out of wedlock of parents domiciled out of England and legitimated by the subsequent marriage of the parents according to the law of the foreign domicil be recognized.

Legitimacy or illegitimacy is a question of status, and is determined by domicil. Dicey (p. 903) thus states the rule at common law, which was a matter of controversy for many years:

> Our courts hold that under the common law the question of a child's legitimacy is to be determined by the law of the father's domicil at the time of the child's birth, taken together with the law of the father's domicil at the time of the subsequent marriage of the child's parents, and, when a person is legitimated under these two laws, fully admit of his legitimacy.

[35] Co. Litt. 244 a, b, 245 a, b.; 2 Bac. Abr. sub tit. Bastardy; 2 Bl. Com. 248.

[36] Co. Litt. 245; 2 Bac. Abr. tit. Bastardy; 2 P. & M. 382.

It must be borne in mind, however, that the rule in *Birtwhistle* v. *Vardill* (*supra*) still holds at common law, namely, that a person born out of wedlock and legitimated per subsequens matrimonium cannot be heir to realty in countries which are subject to the English common law.[37] But although he cannot inherit real estate, he may nevertheless succeed to personal estate,[38] and will be entitled as a legitimate to share in a devise to, or a settlement of land in favour of, "children" of a deceased parent.[39]

While the law of the country of the domicil of the father at the time of the legitimation must allow legitimation by subsequent marriage, it would seem that the country need not be the one in which the father was domiciled at the time of the child's birth.[40] Note, too, that *domicil* and not mere residence is the determining factor;[41] and that it is the father's domicil and not the mother's which determines the matter; and this, despite the fact that an illegitimate derives its domicil of origin from its mother. In this regard the domicil of the mother and the place of the birth of the child and of the celebration of the marriage are all immaterial.[42] The effect as to legitimacy of the marriage of the parents of a child born out of wedlock is dealt with fully by Dicey, Conflict of Laws, pp. 532, *et seq.*

(*d*) General Remarks.

In the absence of express statutory declaration, it is doubtful whether the child who is legitimated by the subsequent marriage of its parents is to be deemed legitimate from its birth or from the time of the marriage of its parents.

The Roman pre-requisite of legitimation by subsequent marriage was, as we have seen, that at the time of the birth of the child the parents should be legally competent to marry each other; and this has been observed by those systems of law which recognize such legitimation. The effect of a statute recognizing legitimation by subsequent marriage may be such, however, that the strictness of this rule may be modified.[43]

It would seem that if a child be born out of wedlock and the child die, and after its death its parents marry each other, the child will be treated as having been legitimate; and further that legitimacy

[37] See Dicey, p. 904.
[38] *In re Goodman's Trusts* (1881), 17 Ch. Div. 266.
[39] *In re Grey's Trusts* (1892), 3 Ch. 88.
[40] 2 Hals., p. 436.
[41] *Munro* v. *Munro* (1840), 7 Cl. & F. 842; *In re Wright's Trusts* (1856), 2 K. & J. 595.
[42] Dicey, pp. 536, *et seq.*
[43] See notes on *Collins* v. *A.-G.* (1931), 171 L.T. Jo. 522.

per subsequens matrimonium will not be affected by either the parents or child waiving or refusing to accept the status.[44]

The domicil of an illegitimate minor, whilst the minor lives with its mother, is the same as and changes with the domicil of the mother.[45]

Except for such artificial purposes as are contemplated by certain Dominion legislation (e.g., immigration), a person is not domiciled in the Dominion of Canada, but in one of its provinces, each of which in this respect is regarded as a separate country.[46]

In this article we have dealt with certain phases of the position of an illegitimate child under the common law and in equity. In our next article we shall consider the subject of Guardianship and the important statutory alterations (both English and Canadian) which have been made in respect to the matters under discussion.

(To be continued.)

FREDERICK READ.

Manitoba Law School.

[44] See 2 Bac. Abr. tit. Bastardy.
[45] Dicey, p. 115.
[46] Dicey, pp. 61, 128.