DOMESTIC RELATIONS

Domestic Relations — Legitimation of Illegitimates

Sec. 10503-15 of the Ohio General Code, known as the Legitimation Statute, reads: "When by a woman a man has one or more children, and afterward intermarries with her, such issue, if acknowledged by him as his child or children, will be legitimate." This act was given an extensive interpretation in a recent "neglected child" proceeding[1] brought by the state to have custody of a child placed with an aunt. The child involved therein was born at such period of gestation that it was uncertain whether it might have been the offspring of its mother's divorced husband or some other man. Two years subsequent to her divorce, intervener married the mother, took the child into his home, and acknowledged it as his own. In applying the above statute, the court said: "Whatever male may have been the source of Mary Lou, it is clear that Hayes has assumed the responsibility for her, and according to the statute, is the father of the child and the child is legitimate."[2]

It may be claimed that such interpretation exceeds the limits set by the syllabus of the Ohio Supreme Court in *Eichorn* v. *Zedaker*.[3] The court therein stated that in order to establish legitimation of an illegitimate child it is necessary to prove that the man who subsequently marries the mother and acknowledges the child as his, is, in fact, the father of such child.[4]

Though not involved in the principal case, the question of a child's legitimacy is most frequently raised in suits brought to determine its right to property and thus the collateral problem of protecting the rights of heirs born within wedlock, as well as the wife's rights, becomes material. At common law, children born out of lawful wedlock could not be rendered legitimate by any subsequent act of their parents.[5] But the power of the Legislature to legitimate or to provide for the legitimation of bastards has long been recognized both in England and in this country.[6]

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[1] Ohio G. C. sec. 1639-1 *et seq.*

[2] *State* v. *Hayes*, 62 Ohio App. 289, 23 N.E. (2d) 956, 28 Ohio L. Abs. 154, 16 Ohio Op. 10 (1939).

[3] 109 Ohio St. 609, 144 N.E. 259 (1924).

[4] But that the syllabus is only dictum and not the law of the case is evident from the statement in the body of the opinion at p. 620: "We are not called upon to determine whether a clear unequivocal acknowledgment would establish the status of legitimacy in the face of clear evidence of nonaccess."

[5] *Ross* v. *Ross*, 129 Mass. 243, 37 Am. Rep. 34 (1880); *Ives* v. *McNicoll*, 59 Ohio St. 402, 53 N.E. 60, 43 L.R.A. 778, 69 Am. St. Rep. 780 (1898); *Allison* v. *Bryan*, 21 Okla. 557, 97 Pac. 282, 18 L.R.A. (N.S.) 931, 17 Ann. Cas. 468 (1908).

[6] *Miller* v. *Pennington*, 218 Ill. 220, 75 N.E. 919, 1 L.R.A. (N.S.) 773 (1905); *Miller* v. *Miller*, 91 N.Y. 315, 43 Am. Rep. 669 (1883); *McGunnigle* v. *McKee*, 77 Pa. 81, 18 Am. Rep. 428 (1874).

Different views are entertained as to whether legitimating statutes should be strictly construed as being in derogation of the common law,[7] or literally interpreted on account of their remedial character.[8] However, it was said in *Re Jessup*[9] that even a liberal construction does not authorize any enlargement or restriction of plain provisions of laws as written. It therefore could be contended that since our statute says "a man" having issue with a woman he subsequently marries, the intent of the statute is to legitimate the child only if this husband was the actual procreator of the child. As hereinafter shown, a strong argument on the basis of social policy can be made for the interpretation of the statute found in the instant case.

The view stated in the syllabus of the *Eichorn* case[10] is taken by decisions of other states with similar statutes. The Wisconsin Supreme Court in *Re Dexheimer's Estate* held that it must be the child's "natural father" who intermarried with its mother to give effect to the statute. Virginia's Supreme Court laid down the rule that the evidence must clearly establish that the mother was married to the child's "putative father" in order to legitimate the bastard.[12] The Kentucky and Missouri courts[13] have held that mere recognition of a child by the mother's husband is not sufficient to render him in fact the father. On the other hand, the Indiana Supreme Court, under a like statute, has consistently taken the view that the blood relation of father and child is not necessary.[14]

The high degree of proof required to establish parentage by most states in itself lends support to the contention that it can be no other than the actual father of the bastard who can cause its legitimation by his subsequent marriage to its mother.[15] The syllabus of the *Eichorn* case requires proof of acknowledgment by "clear and unequivocal" evidence, it being inferable that establishment of such acknowledgment is the statutory substitute for proof of actual parentage.[16]

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[7] *In re Wallace*, 197 N.C. 334, 148 S.E. 456, 64 A.L.R. 1121 (1929); *Taylor* v. *Taylor*, 162 Tenn. 482, 40 S.W. (2d) 393 (1931).

[8] *James* v. *James*, 253 S.W. 1112 (1923); *In re Sheffer's Will*, 249 N.Y.S. 102, 139 Misc. 519 (1931).

[9] 81 Cal. 408, 21 Pac. 976, 6 L.R.A. 594 (1889).

[10] *Supra*, note 3.

[11] 197 Wis. 145, 221 N.W. 737 (1928).

[12] *Harper* v. *Harper*, 159 Va. 210, 165 S.E. 490 (1932).

[13] *Stein* v. *Stein*, 32 Ky. L. 664, 106 S.W. 860 (1908); *Helm* v. *Goin*, 227 Ky. 773, 14 S.W. (2d) 183 (1929); *Mooney* v. *Mooney*, 244 Mo. 372, 148 S.W. 846 (1912).

[14] *Selby* v. *Brenton*, 75 Ind. App. 248, 130 N.E. 448 (1921); *Tieben* v. *Hapner*, 62 Ind. App. 650, 111 N.E. 644, rehearing denied 62 Ind. App. 650, 113 N.E. 310 (1916).

[15] *McKellar* v. *Harkins*, 183 Iowa 1030, 166 N.W. 1061 (1918); *Brooks* v. *Fellows*, 106 Kan. 102, 186 Pac. 985 (1920).

[16] A defendant in proceedings to establish him as father of a child is now aided by the statutory authorization of blood-grouping tests which are admissible as evidenc of non-paternity. Ohio G. C. sec. 12122-1, 12122-2. Cf. note on p —, present issue of O.S.L.J.

The conclusion reached by the court in the principal case, that legitimation is effected by the marriage of anyone to the mother of an illegitimate child, plus acknowledgment, is undoubtedly a desirable solution of a grave social problem. Such a result, under our statute, should be confined to proceedings in which the state is contesting legitimacy "as it ill becomes the state to attempt to establish illegitimacy." It is only the father and immediate family whose rights are affected by the creation of this status. The father incurring the duties and obligations of support, custody, and care of the child, and the other family members being deprived proportionately of their measure of inheritance, it seems proper that they be the only ones who should have the right to dispute the legitimacy.

It is probable that substantially the same effect as that sought by the Legitimation Statute may be obtained, if so desired by one not the actual father, by legally adopting the wife's illegitimate offspring.[17]

J. J. F.

EVIDENCE

Evidence — Use of Blood-grouping Tests in Disputed Paternity Cases

The use of blood-grouping tests as evidence in bastardy cases has been frequently discussed, and is of great practical importance. For a general discussion of the value of these tests, see Hyman and Snyder, *The Use of the Blood Tests for Disputed Paternity in the Courts of Ohio*, 2 O.S.L.J. 203, and for the extent to which they have been received, see comments in 1 O.S.L.J. 47, O.S.L.J. 226, and 15 Notre Dame Lawy. 153. Recent developments on the question of their probative value seem worthy of note.

Tests which definitely excluded the defendant as the father were admitted in the case of *State* v. *Wright*,[1] but the jury found the defendant guilty nevertheless. The Court of Common Pleas of Franklin County sustained a motion for a new trial on the ground that the verdict was opposed to the weight of the evidence. In approving the ruling,[2] the Court of Appeals for the Second District discussed the use of these tests in an opinion recognizing their value as evidence. The Court was favorably impressed by the possibility of relieving the innocent defendant which a test of this sort presents.

[17] Ohio G.C. sec. 10512-9, 10512-13, 10512-14.

[1] 59 Ohio App. 191, 17 N.E. (2d) 428 (1938).

[2] *Id.* The Supreme Court subsequently reversed on another ground. No consideration was given the evidence question. *State* v. *Wright*, 135 Ohio St. 187, 20 N.E. (2d) 229 (1939.)